The Laws of War in the 1990-91 Gulf Conflict

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After a war, there is a need to examine the role of the laws of war. This body of law, sometimes known as international humanitarian law, is intended to guide the conduct of belligerents and occupying powers. In the conflicts of this century its effectiveness has been mixed. An examination must consider not only the performance of belligerents to see how it conformed with legal norms, but also the extent to which legal norms are, or are not, relevant to the ever-changing circumstances, techniques, and moral conceptions of warfare.

The 1990–91 Gulf conflict—that is, the August 1990 Iraqi occupation of Kuwait, and the war of January–February 1991 which brought it to an end—gave rise to a wide range of laws-of-war issues and much subsequent analysis. There was extensive public reference at the time to various well-established international norms about particular aspects of the conduct of occupations and armed conflicts, not least in the matter of seizure and treatment of hostages, treatment of prisoners of war, attacks on civilians, use of chemical weapons, and wanton destruction, including damage to the environment. Further, this war raised some general questions: Can the laws of war Adam Roberts, FBA, is Montague Burton Professor of International Relations at Oxford University, and a Fellow of Balliol College. His main academic interests center around limitations on the use of force. His books include Nations in Arms: The Theory and Practice of Territorial Defence, 2nd ed. (London and New York: Macmillan for International Institute for Strategic Studies, 1986); and, as editor with Benedict Kingsbury, United Nations, Divided World: The UN’s Roles in International Relations 2nd ed. (Oxford and New York: Oxford University Press, 1993).

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contribute significantly to the maintenance of restraints in war? Are they of particular importance in a coalition action with United Nations authorization? What can be done about the punishment of violations?

All laws-of-war aspects of the 1990–91 Gulf conflict were affected by the inequality of both the military and the legal positions of the two sides. On the one hand, there was a very powerful 28-country military coalition which professed some adherence to international law in general, and also to the laws of war. On the other hand, there was a single state, Iraq, heavily armed but much weaker than the coalition, which showed distinctly limited interest in the laws of war.

After the end of the war, the salience of legal considerations, including those associated with the laws of war, was well recognized by some of those involved in decision-making, especially in the United States. Shortly after the war, General Colin Powell, Chairman of the U.S. Joint Chiefs of Staff, said: “Decisions were impacted by legal considerations at every level. Lawyers proved invaluable in the decision-making process.” Hays Parks, Special Assistant for Law of War Matters in the Office of the Judge Advocate General of the Army, said: “I have heard General Schwarzkopf, General Powell and just about any other general officer who I run into say that they consider the lawyer to be absolutely indispensable to military operations.”

On the other hand, some early assessments of the war by strategic writers paid little direct attention to laws-of-war issues. This may be a reflection of the way in which strategic and legal approaches to the use of force have followed separate paths in the nuclear age, to their mutual disadvantage. Yet the laws of war can be relevant to strategy. In particular, they may indicate some possibilities of maintaining limits within war, an issue of growing importance in an age where capacities to do terrible harm, and to do so at very long range, are in the hands of many countries, in the developing as well as developed world. In addition, aspects of the laws of war are often

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2. Both quotations from Steven Keeva, “Lawyers in the War Room,” ABA Journal, Vol. 77 (December 1991), pp. 52, 59. The author suggests (p. 59): “In the wake of the Persian Gulf War, there is little doubt that the role of lawyers in military operations has changed irrevocably.” See also the passage on “Role of Legal Advisers” in Final Report to Congress, pp. O-3 and O-4.

perceived as important by those actually doing the fighting. Finally, their application may assist in making some uses of force seem justifiable to both domestic and international opinion.

The focus here is on the *jus in bello* aspects of the Gulf conflict—that is, on the laws relating to the conduct of belligerents during armed conflicts and occupations. It is not on the *jus ad bellum* aspects, that is, on the justification for resort to armed conflict in the first place, the war aims, or the ethics of encouraging Iraqis to rebel against their ruler. The two subjects are largely separate, at least in theory, if not always in practice. The cardinal rule to note here is that the laws of war are fully applicable by all parties to a conflict irrespective of the legality or illegality of the original resort to force. *Jus ad bellum* does, however, overlap with *jus in bello* in matters such as proportionality, neutrality, and the economic rights of occupying powers. In addition, public perceptions about the legitimacy of the conduct of a belligerent do inevitably affect judgments about the legitimacy of the cause of that belligerent. There were several instances in the Gulf conflict in which views about *jus in bello* matters had a considerable impact on *jus ad bellum*. In the early months of the crisis, Iraqi treatment of hostages and others seemed to buttress the views of those who favored a tough response, while towards the end of the hostilities, some coalition military actions led to revulsion, strengthening demands for an early termination of what by then seemed to be a one-sided war.

**Background: The Laws of War**

The laws of war have developed over the centuries in response to a wide variety of practical problems and moral concerns. Like general international law, of which they have formed an important part since the seventeenth-century origins of the modern system of states, the laws of war consist of a disparate body of principles, treaties, customary rules, and practices.4

From August 2, 1990—the day Iraq invaded Kuwait—many laws-of-war agreements were formally applicable to the Iraqi occupation and to the sub-

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sequent war. Table 1 show which of the principal states involved in, or directly affected by, the conflict were formal parties to the relevant accords at the time. It is obviously not a complete list: numerous other states, from Australia to Sierra Leone, sent naval, air, or ground forces to the Gulf as part of the coalition effort, or else provided facilities or assistance of other kinds.\textsuperscript{5}

International law affects a country's armed forces in a variety of ways apart from formal treaty commitments. Some customary rules of international law, even if not codified in treaties, may be no less important as a guide to action. For example, customary principles relating to proportionality of military actions and discrimination in targeting may not be incorporated very explicitly into treaties, but in fact they form the foundations on which such treaties rest. With military technology and practices subject to rapid changes, such underlying customary principles may have more enduring relevance than some detailed treaty provisions. In addition, the ethos of an army, and indeed of a society as a whole, is often of more influence than formal treaty provisions: a country's military and political culture and its experience of war and of foreign domination shape attitudes to matters addressed in the laws of war.

The central area of concern of the laws of war is the protection of victims of war, including the wounded and sick, shipwrecked, prisoners of war, and civilians. These matters are covered mainly in the 1949 Geneva Conventions, which emerged from a diplomatic conference at Geneva as part of the international response to terrible events in the Second World War. Virtually all states have formally agreed to be bound by the 1949 Conventions. However, the laws of war as a whole also serve many other distinct purposes. The wide range of problems explicitly addressed includes:

- Protection of people in the power of the adversary, such as prisoners of war (POWs); alien civilians in the territory of a belligerent; and civilians in territory occupied by a belligerent power;
- Definition of legitimate combatants, to ensure, for example, that non-combatants do not become targets, and that captured combatants are treated humanely;

\textsuperscript{5} For a table listing 42 countries providing contributions to the coalition, and itemizing the types of activity in which they participated, see the British defense White Paper, \textit{Statement on the Defence Estimates, 1991}, Vol. 1 (London: HMSO, July 1991), p. 9. The table shows that armed forces from 28 of the 42 countries took part in military activities in the region, while the others limited their assistance to deploying medical units, providing practical or financial assistance, and taking part in defensive operations in the NATO area.
Table 1. Main Laws-of-War Treaties: Participation of 14 States Involved in the Gulf Crisis of 1990–91.

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p = “Party,” that is, through signature followed by ratification, or through accession  
s = “Signatory,” that is, country had signed but not yet ratified, and thus is not a formal  
party to the treaty  

The Table shows the position as regards participation of the fourteen listed states as of the  
time of the conflict. The last three treaties listed were not formally in force in relation to  
that conflict, but had some bearing on it, partly through the customary law status of some  
of their provisions.  

The full texts of all treaties mentioned in this table, along with introductory notes about  
each agreement and depositary information including lists of states parties and details of  
reservations, are in Schindler and Toman, The Laws of Armed Conflicts; and also in  
Roberts and Guelff, Documents on the Laws of War.  

NOTES  
1 1907 Hague Convention IV and Annexed Regulations on Land Warfare. Although only a  
few of the states listed were formally parties to this accord or (like Italy and Turkey) to  
the very similar one of 1899, the Hague Regulations are accepted as part of international  
customary law, binding on all states. They govern the conduct of occupation forces as  
well as armed combat. Other 1907 Hague conventions in force, and which could be viewed  
as applicable in this conflict because of their customary law status, included those on  
neutrality in land war (V); automatic submarine contact mines (VIII); and bombardment  
by naval forces (IX).  
2 1925 Geneva Protocol on Gas and Bacteriological Warfare prohibits the use in war of gas,  
chemical and bacteriological weapons.
3 1948 Genocide Convention prohibits genocide, which is defined in Article II as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."

4 1949 Geneva Conventions on Protection of Victims of War. These four treaties govern, respectively, Wounded and Sick (I); Wounded, Sick and Shipwrecked at Sea (II); Prisoners of War (III); Civilians (especially in occupied territory, and under internment) (IV).

5 1954 Hague Cultural Property Convention and Protocol. This was formally applicable in the conflict, even though some of the fourteen states listed were not formally bound by it. Iraq and Kuwait were both parties, and the agreement was therefore applicable to Iraq’s occupation of Kuwait. Saudi Arabia was a party only to the Convention, not to the Protocol (which deals with export of cultural property from occupied territory). The three non-parties observe the Convention’s main provisions in practice, and in any case the Convention’s Article 18(3) says: “If one of the Powers in conflict is not a Party to the present Convention, the Powers which are Parties thereto shall nevertheless remain bound by it in their mutual relations. They shall furthermore be bound by the Convention, in relation to the said Power, if the latter has declared that it accepts the provisions thereof and so long as it applies them.”

6 1977 Convention on Environmental Modification Techniques (the ENMOD Convention). Depositary information on ENMOD Convention is from The United Nations Disarmament Yearbook, Vol. 15 (New York: UN Department of Disarmament Affairs, 1991), pp. 460–467, covering material received up to December 31, 1990. Although of very limited applicability in this war because many belligerents were not parties to it, it is possible that states parties were still obliged to implement ENMOD’s provisions.


Although they were not formally in force in this war, both the ENMOD Convention and Geneva Protocol I were potentially relevant to the Gulf conflict. First, some of their provisions are accepted as an expression of customary international law, and to that extent are binding on all states. Second, many states could in practice, as a matter of policy as much as of formal legal obligation, choose to observe the norms outlined in these agreements; and the language used in these accords appears to have provided a basis for some pronouncements, especially in certain U.S. statements, about the actions pursued in the Gulf.

8 1981 UN Convention on Specific Conventional Weapons. This was also not formally in force in the Gulf conflict. Some provisions, especially regarding the laying of mines, may be regarded as expressions of customary law. Depositary information from UN Disarmament Yearbook, Vol. 15, pp. 460–467, covering material received by December 31, 1990.
Prohibitions and restrictions on certain weapons (e.g., gas, chemical and bacteriological) and methods of war. These include limitations on using certain weapons in a way which risks causing random damage (for example, the scattering of mines, without means of deactivating them);

• Rules for contacts between belligerents (e.g., negotiation of truces, exchange of prisoners);

• Protection of property, including cultural property; of aspects of the natural and man-made environment; of the customs and institutions, as well as the inhabitants and property, of occupied territory;

• Rules for relations between belligerent and neutral states; and the rights and duties of neutrals;

• Protection of humanitarian activities and institutions of various kinds.

All these types of problem did in fact crop up in the 1990-91 Gulf conflict, and are discussed below as follows: first, specific aspects of the Gulf conflict that could affect whether and how the laws of war might operate are described, followed by a review of the public declarations of various international bodies and states that demonstrate the extent, and limitations, on their awareness of and reliance on the laws of war. Next is a review of laws-of-war issues that arose during the conduct of the Iraqi occupation of Kuwait and during the war itself, including neutrality; the treatment of foreign nationals and prisoners; the conduct of air and land operations including use of mines, gas, and chemical weapons; effects on the environment; and issues relating to casualties and those relating to proportionality of response. Laws-of-war issues of the postwar period are then examined, including the military administration of the occupation of Iraq; war crimes; reparations; and the termination of the war. I conclude with a discussion of how Iraq, the coalition, and the UN observed the laws of war; a note on the effect of sanctions, of the 1977 Geneva Protocol I, and of peacetime international agreements; and the lessons of the Gulf War for the development of new treaties.

Special Features of the Conflict

A number of special features of the Gulf conflict affected the operation of the laws of war. First, Iraq had recently been involved in a long war with Iran. In the Iran-Iraq War 1980–88, despite the ferocity of the fighting, there was some very limited evidence of awareness of laws-of-war considerations, for example in some aspects of the treatment of POWs. However, from the
international community's failure to react to the original attack on Iran in 1980, from its failure to do anything much about Iraq's use of gas, and from its actively continuing trade even in weapons, Saddam Hussein may well have learned the lesson that he could ignore international institutions and law, including the laws of war, with impunity.

Second, Iraq's invasion of Kuwait on August 2, 1990, coupled with its purported annexation of Kuwait a few days later, constituted especially flagrant violations of international law. This was the only case, in the UN era, of attempted annexation of an entire state that was a recognized member of the international community. Furthermore, from the very beginning of the occupation of Kuwait the Iraqi authorities showed no sign of willingness to conduct their occupation in accord with the rules governing military occupations.

Third, there was a general problem of the extent to which Iraq had accepted international legal norms, including the laws of war. In treaty terms, Iraq was bound by such agreements as the 1907 Hague Regulations, the 1925 Geneva Protocol, and the 1949 Geneva Conventions. Iraq had repeatedly voted for resolutions at the UN General Assembly urging Israel to abide by international legal agreements applicable to occupied territories. In this conflict, although there was no systematic Iraqi pronouncement on the applicability of the laws of war, some Iraqi statements did implicitly accept the existence of international standards by which the actions of belligerents could be judged. However, Iraqi statements also implied that the circumstances of the struggle were so special, and its importance so great, that normal standards were of doubtful relevance. Further, in this conflict there was every indication that, in Iraq, the laws of war had not been "internalized," and were not an important part of the training and ethos of the Iraqi armed forces. It is possible that certain traditional tribal, Arab, or Islamic ideas (all of which overlap with provisions of the laws of war in at least some matters, but not in all) had more emotional force and legitimacy in the eyes of some Iraqis than did international legal rules.\(^6\)

Fourth, the occupation took place against the background of the Israeli occupation of the West Bank, Gaza, and the Golan Heights—an occupation which was twenty-three years old in the summer of 1990. Rightly or wrongly,

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many Arabs saw the Israeli occupation as proof of the inefficacy of international legal and institutional restraints. This may have contributed to Iraq’s and the PLO’s disregard of international legal restraints in the conflict over Kuwait.

Fifth, the response to the Iraqi occupation throughout took the form of a coalition action—whether in implementing economic sanctions, or in going to war. Coalition actions often require special attention to the harmonization of practices between allies, for example in the treatment of neutrals and of prisoners. Further, in order to keep the coalition together, and to maintain support for the action within the participating countries, it was important that any action not be seen as mindless or unlimited violence. Hence the special significance of limitations on purposes (the liberation of Kuwait, but not the conquest of Iraq), and also on methods.

Sixth, this was not just any coalition of states, but one that operated with the authorization of the UN Security Council. In the past, questions have sometimes been raised as to whether forces acting under the authority, or at least with the authorization, of the UN are necessarily bound by the laws of war to the same extent as purely national armed forces acting in a national cause. The question has arisen because the UN, as such, is not a formal party to laws-of-war treaties; because the UN as such does not have all the facilities of states for implementation of agreements; and because there might be issues or occasions on which forces acting in the name of the UN were considered to have superior rights vis-à-vis other belligerents. The great majority of answers to this question have been to the effect that forces acting under the UN are bound by the laws of war. In this conflict the question was never raised: the need to observe the laws of war was apparently assumed. Indeed, it appears that the UN framework, with its general emphasis on legality and its appeal to universal principles and interests, acted as a special incentive to the coalition forces to operate in a restrained fashion. As British Air Vice-Marshal Tony Mason has put it:

In a strategy to achieve political objectives endorsed by the Security Council of the United Nations, upholding the principles of an international rule of law, an indiscriminate bombing policy against Iraq was out of the question.

and even accidental civilian casualties would give Saddam valuable propaganda. From the outset, it was acknowledged that some civilian casualties were inevitable, but that their reduction to the lowest possible level was to be a cardinal factor in allied targeting.8

Main Public Statements on Laws of War Issues

In the seven-month period between the invasion of Kuwait and the end of the war for its liberation, various bodies—the UN, the International Committee of the Red Cross (ICRC), and some national governments—made statements on matters relating to the application of the laws of war to this conflict. These statements covered a wide range of issues: they reacted to problems which had already arisen, and also anticipated many which were to arise in the war.

Despite certain limitations indicated below, these statements indicated that key participants were broadly cognizant of the provisions of international law, and perceived them as having a part to play in the management of this crisis. On central issues there was in fact no real scope for doubt or ambiguity. It was clear in law, and reasonably well publicized, that the Iraqi forces occupying Kuwait were bound to observe the provisions on international law applicable to military occupations, most notably those of the 1949 Geneva Conventions. It was no less clear that any armed conflict between the coalition powers and Iraq would be an international armed conflict, subject to the wide range of rules applicable in such conflicts. Iraq plainly did not subscribe to or observe these conclusions, but it does not appear to have offered any serious and detailed alternative position.

THE UN SECURITY COUNCIL

Laws-of-war issues were mentioned several times, but in an unsystematic way, in the twelve UN Security Council resolutions passed in 1990 in response to Iraq’s occupation of Kuwait. In the first month after the invasion, while resolutions were passed on various issues, there was no formal statement from the Security Council about the legal provisions requiring the occupying power to ensure the safety of the inhabitants of Kuwait. The first explicit reference to a laws-of-war agreement was in the sixth such resolution,

Security Council Resolution 666 of September 13, 1990. This mentioned the 1949 Geneva Convention IV, but did so solely in connection with pleas for the safety of third state nationals. Security Council Resolution 667 of September 16, 1990, which dealt with violence against diplomatic missions, again omitted to state in so many words that Iraq’s occupation was subject to the laws of war.

The first clear statement about the applicability of the Geneva Conventions to the occupation of Kuwait came in Security Council Resolution 670 of September 25, 1990, which was basically about sanctions on air transport to Iraq, but which had tacked on to the end a statement that the Council “reaffirms that the Fourth Geneva Convention applies to Kuwait and that as a High Contracting Party to the Convention Iraq is bound to comply fully with all its terms and in particular is liable under the Convention in respect of the grave breaches committed by it, as are individuals who commit or order the commission of grave breaches.”

Security Council Resolution 674 of October 29, 1990, was the most detailed on humanitarian law issues. After repeating the above-quoted passage from Resolution 670, it demanded that Iraq desist from taking third-state nationals hostage, from mistreatment of inhabitants and third-state nationals in Kuwait, and from any other actions in violation of, inter alia, Geneva Convention IV. It then indicated that certain violations might be punished: it invited “states to collate substantiated information in their possession or submitted to them on the grave breaches by Iraq . . . and to make this information available to the Security Council”; and it reminded Iraq that it was liable for any loss, damage or injury arising in regard to Kuwait and third states, referring also to the question of financial compensation.

The famous resolution authorizing the use of force—Security Council Resolution 678 of November 29, 1990—said nothing about laws-of-war limits. In the key passage, the Security Council “authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements . . . the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.”

That was the last of the Security Council resolutions on the matter until after the end of the hostilities between the coalition powers and Iraq. Together they did not constitute a very complete statement of the law in respect of the impending armed conflict. Why was the Security Council relatively restrained in this matter? There are at least four possible reasons. First, the
laws of war are fully applicable anyway: there is no formal need for the UN or indeed national governments to reiterate their general applicability or particular provisions, nor is there a general practice of this kind. Second, it was hard enough to get agreement in the Security Council on such key issues as the imposition of sanctions and authorization of force, without adding issues which might prove complex and divisive. Third, there has sometimes been a lack of attention to, or professionalism in, the laws of war in international diplomacy in general, and in the UN in particular. Fourth, it appears that within the Security Council there was an impression, questionable but not necessarily questioned at the time, that to state that the Geneva Conventions were fully applicable would be to imply that all the powers opposing the occupation of Kuwait were in some sense belligerents, and that this might provide Saddam Hussein with an additional justification for expelling diplomats from Kuwait.9

In theory, the UN Military Staff Committee might have had a role in advising on laws-of-war aspects of the Gulf conflict. Established in 1946, this committee consists of the Chiefs of Staff of the five Permanent Members of the Security Council or their representatives, and has for most of its life had a vestigial existence. Under the UN Charter its function is “to advise and assist the Security Council on all questions relating to the Security Council’s military requirements for the maintenance of international peace and security, [and] the employment and command of forces placed at its disposal.”10

It was as obvious in August 1990 as it is today that the Military Staff Committee would not be an appropriate body to run day-to-day military operations in the Gulf, and in the event it did not have a significant role in matters relating to the laws of war either. There appears to have been no serious attempt to address the question of what kind of role the Military Staff Committee could have if it was not actually running the military activities of the coalition. There might have been scope for some limited but still important functions, including specifying and publicizing key laws-of-war rules that were to be applied in this conflict. States adopted the course of

9. Interview with senior UN official working with the Security Council at the relevant time.
continuing to handle these and many other matters on a mainly national basis.

The UN generally was left in January and February looking rather foolish, as a war was waged in its name about which it knew little or nothing. The lack of control was, in greater or lesser degree, unavoidable. It is difficult to imagine the air or the land campaign having been as effective if it had been run by a UN committee. Indeed, once the matter was put into the hands of the U.S. military and its coalition partners, even the White House (let alone the UN) had relatively limited involvement in day-to-day decisions. UN Secretary-General Pérez de Cuéllar was surely right to say at the outbreak of the hostilities that the UN could not have a negotiating role until Iraq decided to get out of Kuwait. Nonetheless, the UN involvement in sanctioning force without controlling it left a legacy of concern within the organization, and beyond, that will have to be addressed.

A particular problem inhibiting constructive thinking in the UN system about the organization’s role in a war may have derived from the persistent hope that war could somehow be avoided. Many in the UN system are there because they see it as an alternative to war. In this crisis, a preoccupation with avoiding war may have deflected attention from the question of how the laws of war might provide one means of mitigating at least some of the excesses of war if it proved unavoidable.

**ICRC STATEMENTS ON APPLICABILITY OF LAW**

From August 2, 1990, onwards, in extensive direct contacts with the governments concerned, and also in press releases, the International Committee of the Red Cross (ICRC) repeatedly reminded the states involved in the Kuwait crisis of their legal obligations under the laws of war. In particular, the ICRC’s “Memorandum on the Applicability of International Humanitarian Law,” sent to the 164 parties to the Geneva Conventions on December 14, 1990, summarized the obligations of states and armed forces regarding the treatment of non-combatants, the conduct of hostilities, respect for the red cross emblem and medical activities, dissemination of international humanitarian law, and the role of the ICRC. The section on conduct of hostilities read as follows:

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The parties to an armed conflict must . . . observe a number of rules on the conduct of hostilities. These rules are, in particular, laid down in the Hague Conventions of 1899 and 1907, most of which have become part of customary law.

These rules have been reaffirmed, and in some cases supplemented, in 1977 Protocol I additional to the Geneva Conventions. The following general rules are recognized as binding on any party to an armed conflict:

- the parties to a conflict do not have an unlimited right to choose methods and means of injuring the enemy;
- a distinction must be made in all circumstances between combatants and military objectives on the one hand, and civilians and civilian objects on the other. It is forbidden to attack civilian persons or objects or to launch indiscriminate attacks;
- all feasible precautions must be taken to avoid loss of civilian life or damage to civilian objects, and attacks that would cause incidental loss of life or damage which would be excessive in relation to the direct military advantage anticipated are prohibited.

With regard to the use of certain weapons, the following rules are in particular applicable in an armed conflict:

- the use of chemical or bacteriological weapons is prohibited (1925 Geneva Protocol);
- the rules of the law of armed conflict also apply to weapons of mass destruction.

The ICRC invites States which are not party to 1977 Protocol I to respect, in the event of armed conflict, the following articles of the Protocol, which stem from the basic principle of civilian immunity from attack:

- Article 54: protection of objects indispensable to the survival of the civilian population;
- Article 55: protection of the natural environment;
- Article 56: protection of works and installations containing dangerous forces.\(^\text{12}\)

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This and other ICRC statements could be criticized, especially for their emphasis on provisions of 1977 Geneva Protocol I, not technically in force in the conflict: certain other principles and rules (for example the prohibition of wanton destruction in the 1949 Geneva Convention IV) might have been a more widely accepted basis for protection of the environment. Yet overall the ICRC statements performed a useful function in ensuring that all the parties to the conflict were advised in clear terms of the formal applicability and practical need to apply rules by which they were bound.  

NATIONAL DECISION-MAKING AND STATEMENTS

In the five months of run-up to the war, the coalition powers devoted much attention to laws of war and related issues. This was most evident in the UK and United States, two countries which have historically played a major role in the development of the laws of war, and both of which had in recent years placed increased emphasis on the laws of war in the training of their armed forces. In the UK the process began with an unfortunate incident. On August 21, 1990, Prime Minister Margaret Thatcher attacked the ICRC for not taking adequate action to protect foreign nationals in Iraq and Kuwait: a criticism widely viewed as based on a misunderstanding of the ICRC’s role and actions.  

Apart from this incident, in both the UK and United States there were quiet and careful preparations on many practical issues involving the laws of war, including on the rules of engagement and targets, and on receiving and looking after POWs. On January 11, 1991, the U.S. Department of Defense sent a message to all commands giving the text of the mid-December 1990 ICRC memorandum quoted above plus some detailed comments clarifying U.S. interpretations of the memorandum. It criticized as misleading the ICRC’s statement that “the following general rules are recognized as binding”; and it stressed that “the obligation of distinguishing combatants and military objectives from civilians and civilian objects is a shared responsibility of the attacker, defender, and the civilian population as such.” Among its numerous other clarifications was a key statement

reserving a U.S. right of retaliation if Iraq used gas: “The U.S. accepts the prohibition on chemical weapons contained in the 1925 Geneva Gas Protocol as binding upon first use only.”

As regards the complex area of limitations on the use of weapons—an area in which the laws of war, the law of arms control, and many other considerations intersect—the main issues which arose before the outbreak of war were, first, the need to prevent Iraqi use of chemical (or, possibly, biological) weapons; and second, the non-use of nuclear weapons. There was a link between the two issues. The U.S. administration repeatedly emphasized that any Iraqi use of chemical or biological weapons would lead to an “absolutely overwhelming” American response; and it may have been deliberately equivocal about possible U.S. use of nuclear weapons as part of such a response. However, as a practical policy option any U.S. use of nuclear weapons was probably ruled out, not least for fear of antagonizing American as well as Arab and other opinion. On January 8, British Prime Minister John Major, visiting British troops in Saudi Arabia, ruled out a nuclear response to an Iraqi chemical weapons attack: his statements on this, in answer to a reporter from Catalan television, were criticized as assisting Iraqi war planning. One legal constraint on the United States and UK (deriving from the law of arms control, rather than the law of war) may have been that both countries had given “negative security assurances” in 1978 that they would not use nuclear weapons against a non-nuclear-weapon state which is a party to the Nuclear Non-Proliferation Treaty, except in case of attack against them or their allies by such a state in association with a nuclear-weapon state.

In the last days before the war, President Bush tried to impress upon President Saddam Hussein the key importance of certain limits. In a letter which Iraqi Foreign Minister Tariq Aziz refused to accept from Secretary of State James Baker at Geneva on Wednesday January 9, 1991, President Bush wrote: “The United States will not tolerate the use of chemical or biological...”

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weapons, support for any kind of terrorist actions, or the destruction of Kuwait's oil fields and installations. Further, you will be held directly responsible for terrorist actions against any member of the coalition. The American people would demand the strongest possible response. You and your country will pay a terrible price if you order unconscionable acts of this sort." 20

After the start of Desert Storm on the night of January 16–17, 1991, the U.S. and some other coalition governments made statements of a general character placing some emphasis on laws-of-war issues. President Bush's initial address to the nation on the evening of January 16 specified that targets which U.S. forces were attacking were military in character, but contained no other indication of the limits applicable to the belligerents under the laws of war. 21 In general, his speeches before and during the war contained relatively little reference, direct or indirect, to the laws of war. 22

In remarks on January 16–18, Richard Cheney, U.S. Secretary of Defense, and Lt.-General Chuck Horner, Commander of the U.S. Central Command air forces, particularly stressed that the bombing campaign would avoid civilian objects and religious centers. Some of their words on this point echoed the words of 1977 Geneva Protocol I, Article 48, "Basic Rule," which states that, "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

20. Letter dated January 5, 1991, from President Bush to President Hussein, as published in U.S. Department of State Dispatch, Vol. 2, No. 2 (January 14, 1991), p. 25. James Baker said at a press conference at Geneva on January 9, immediately after his long meeting with Tariq Aziz: "He read it very slowly and very carefully, but he would not accept it nor would the Iraqi embassy in Washington accept an Arabic courtesy translation." Ibid., p. 22. In "The Washington Version," Part 3, a program about the Gulf War shown on BBC television on January 18, 1992, James Baker recounted that Tariq Aziz, having spent 12–15 minutes reading the letter, said that he could not accept it: "It is not written in the language heads of state use to communicate with each other." At the end of the 6–7 hour meeting, throughout which the letter had lain on the table, Tariq Aziz again refused an invitation to take it. Later in the same program Lawrence Eagleburger, deputy secretary of state, said of Saddam Hussein: "One message I think he did get is that if he were to resort to chemical weapons he would regret it, and regret it intensely." Eagleburger was speaking in a general way, not referring specifically to the January 9 Geneva meeting.


Curiously, no other laws-of-war agreement contains anything like so clear a formulation of the crucial principle of discrimination between legitimate military objectives and civilian objects. This basic rule was evidently seen by the United States as "a codification of the customary practice of nations, and therefore binding on all." It looks as if we are in an era in which, not only in arms control, but also in laws of war, some unratified treaties get referred to, and perhaps even respected, as much as some which are formally binding.

REPORTING OF LAWS-OF-WAR ISSUES IN THE PRESS
ICRC and coalition government statements on laws-of-war issues did occasionally lead to controversy. In some instances the press misunderstood key issues, or treated them sensationaly. Some at ICRC became exasperated with the performance of the press: "The ICRC press officers dispassionately explained the importance of their neutrality, not once but a hundred times, to unreceptive journalists many of whom knew nothing of international humanitarian law or the Geneva Conventions, and who took a very different approach." In the UK, a careful presentation of issues related to the Geneva Conventions at a Ministry of Defence off-the-record briefing was followed by questions on the consequences of violations, and on the basis of any prosecution for violations in UK law: all this resulted in the tabloid headline: "QUEEN WILL SIGN ORDER FOR SADDAM EXECUTION." Episodes such as this do not encourage officials to repeat such efforts, but are hardly an argument against having clear, on-the-record statements setting out basic facts and positions.

Issues During the Occupation and War
The conduct of the occupation and the war involved a wide variety of laws-of-war issues. Many of these were and remain subjects of intense controversy both as to basic facts, and as to the conclusions which can be drawn from

24. For further evidence of U.S. adherence to provisions of agreements to which the United States is not a formal party see Final Report to Congress, pp. O-3 and O-13.
the facts regarding the question of whether applicable legal norms were observed or violated. What follows is a summary, necessarily provisional, of some of the key issues.

STATUS OF KUWAIT AND GENERAL CONDUCT OF THE OCCUPATION
From the start of the occupation of August 2, Iraq never conceded that it was an occupying power. On August 8 the Ba'ath Revolutionary Command Council in Baghdad announced a "comprehensive and eternal merger" between Iraq and Kuwait, which it viewed as Iraq's nineteenth province. The UN Security Council was quick to affirm the basic rule of international law prohibiting such annexations: "Annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void."27 There was no doubt that in the view of the international community, formed on the basis of well-established principles of international law, Iraq's purported annexation was rejected, and Iraq remained an occupying power in Kuwait, subject to the relevant international rules.

Many of Iraq's actions during its occupation of Kuwait were in breach of the extensive body of law governing military occupations and the treatment of civilians. The deportations of inhabitants, introduction of Iraqi settlers, torture, murder, looting, and wanton destruction all violated well-recognized rules.28 Overall, Iraq's conduct of this occupation represented its most continuous and extensive violations of the laws of war in this conflict. As one careful examination of this aspect of the conflict concluded: "The civilian population who were obliged to remain in Kuwait during the Iraqi occupation clearly experienced extraordinary brutality at a personal level and harsh exaction upon economic and general levels. The *jus in bello* manifestly failed to protect them from any of this, even though much of what was done was very clearly unlawful."29 Actions in the course of the occupation constituted

28. 1949 Geneva Convention IV, Article 32: "This prohibition applies not only to murder, torture, corporal punishment . . . but also to any other measures of brutality whether applied by civilian or military agents"; Article 33: "Pillage is prohibited"; Article 49(1): "deportations of protected persons from occupied territory to the territory of the Occupying Power . . . are prohibited, regardless of their motive"; Article 49(6): "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." Much of the above is reflected in the list of grave breaches in Article 147.
a major part of the U.S. government's postwar complaints of Iraqi war crimes in this conflict.  

Some of the allegations of Iraqi outrages during the occupation must be treated with caution. Thus it was claimed that incubators were looted and babies left to die, but evidence on this was conflicting. The young woman who gave purportedly eye-witness testimony to a U.S. congressional hearing on this matter turned out to be the daughter of the Kuwaiti ambassador to the United States.

TREATMENT OF FOREIGN NATIONALS
From early in the occupation of Kuwait, Iraq seized people in Kuwait (including U.S. and UK citizens), took them to Iraq, and in many cases used them as hostages and human shields. This was a violation of 1949 Geneva Convention IV. There was strong international opposition to Iraq's conduct in this matter. Following numerous representations, Saddam Hussein announced on December 6, 1990, that there would be a lifting of "all the travel restrictions imposed on foreigners who were previously forbidden to leave the country." Many of the foreign hostages seized in Kuwait were released by Iraq by the end of December 1990.

The treatment of foreign nationals in one of the coalition countries, the UK, was controversial. The British government was the only one in the coalition to engage in widespread detention and attempted deportations of Iraqi nationals. In the seven months between the invasion and the end of Desert Storm, approximately 200 Iraqis, Lebanese, Yemenis, and Palestinians were detained, all under the 1971 Immigration Act. Although the Home


31. The U.S. Report on Iraqi War Crimes, p. 14, states that 120 babies were left to die after being removed from incubators that were taken to Iraq. Evidence casting doubt on some stories regarding the incubators is cited in Françoise Hampson, "Liability for War Crimes," in Rowe, The Gulf War 1990–91 in International and English Law, p. 248.

32. 1949 Geneva Convention IV, Article 34: "The taking of hostages is prohibited"; also Article 49(1).

33. Patrick Cockburn, Colin Hughes, and Sarah Helm, "Hostages 'Home by Christmas',' The Independent (London), December 7, 1990, p. 1. This report indicated that Iraq was detaining some 3,400 foreign nationals, including 580 detained at strategic military and civilian sites: these figures appear to have included foreign nationals who had been in Iraq anyway, as well as those taken to Iraq from Kuwait.
Secretary issued deportation orders against 176 Arab nationals, the number actually deported was at most five.34 After the beginning of hostilities on January 16–17, thirty-five Iraqis resident in Britain were held as prisoners of war. They were, according to the British government, members of the Iraqi armed forces, a claim that some of them denied. Some did have reserve liability, and thus could technically have met the 1949 Geneva Convention III’s definition of POWs as “members of the armed forces of a Party to the conflict” who have “fallen into the power of the enemy.”35 The unusual policy of treating these thirty-five as POWs, when they had not participated in the war at all, reflected the odd circumstance, not envisaged at all in Geneva Convention III, that members of an adversary’s armed forces actually chose to stay in enemy territory after the outbreak of hostilities.36 There were several grounds for criticism of the UK actions: that they were arbitrary and based on out-of-date or wrong information; that there were inadequate procedures for appeal; that some were wrongly classified as POWs; that a few were deported when they should at most have been interned; and that the 1949 Geneva Civilians Convention, with its detailed provisions regarding the internment of enemy nationals, was largely ignored. The approaches adopted, particularly the Home Office’s emphasis on deportations, caused some embarrassment in other government ministries, and were widely criticized.37

ATTACKS FROM THE AIR
Both sides engaged in aerial attacks, though in different ways, on different scales, and with different purposes.

The coalition air campaign, aimed at military targets in Iraq proper and in occupied Kuwait, involved extensive and much publicized use of cruise missiles and laser-guided bombs. It also involved a wide range of other weapons and techniques, including (especially in the last days of the war)

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close air support of ground operations. It led to numerous claims (both at
the time and subsequently) that air attacks might at last be capable of distin-
guishing clearly between military targets on the one hand and civilian objects
on the other; and knocking out an adversary’s war machine clinically. As
General Schwarzkopf explained: “By the last week in January, the skies over
Iraq belonged to the coalition. We were accomplishing exactly what we had
set out to do: cripple Iraq’s military system while leaving its agriculture and
commerce intact and its civilian population largely unharmed.”

The idea that societies can be neatly divided into military personnel and
objects on the one hand, and civilians and civilian objects on the other, is
deeply attractive, and is at the heart of much thinking on the laws of war.
However, it presents problems both in theory and in practice. A variety arose
during the 1991 war. First, wars are usually fought for political purposes,
and take place in a political framework. Civilians are often supporters of the
objects of a particular war, or pay taxes for it, or are viewed by an adversary
as a key group to influence, exploit, or move. Thus, there is often some
pressure to ensure that the costs of war are brought home to them as well
as to the armed forces. Civilians may in addition engage directly in action
harmful to an adversary, for example by working in munitions factories,
driving military supply transport, providing intelligence, and hiding guerril-
las: such acts lead to even stronger pressure to treat civilians as legitimate
targets.

Second, many objects, such as bridges, oil refineries, and power stations,
provide for the needs of both the armed forces and the civilian population.
It is often impossible to damage their military function without at the same
time doing harm to the civilian population.

Third, belligerents may put their military personnel and equipment in a
civilian neighborhood, so as to hide their military preparations or complicate
the work of an attacker. The placing of anti-aircraft guns on top of apartment
blocks (as was done by Iraqi forces in Kuwait), or of military aircraft imme-
diately adjacent to cultural monuments (as was done by Iraq at Ur) are
examples of such practices. They are infringements of the laws of war.

Fourth, in war, especially war from the air, many weapons inevitably miss
their targets, whether because of poor intelligence, inaccuracy in the weapon
itself, panic on the part of an aircrew under fire, or deflection of an incoming

missile by an anti-missile exploding in a “near-miss.” Or intelligence may suggest, wrongly, that a given location has a purely military function, when that function is mixed, or has changed. Fifth, even when weapons hit genuine and properly located military targets, and are reasonably suited to their particular purpose, there may be some unavoidable collateral damage to civilians: for example, motorists who happen to be driving past a military base when it is attacked. Sixth, belligerents may be often tempted to hit civilians or civilian objects deliberately in order to force the adversary to devote great effort to protecting them, thus deflecting the adversary from other aspects of its war effort.

These problems suggest that the development of accurate methods of bombing cannot be expected to transform completely the civilian’s vulnerability in war. However, the fact that there are bound to be severe difficulties in the protection of civilians does not invalidate the effort to keep war as limited to military targets as is possible.

Such problems of separating combatant from civilian help to explain why the 1949 Geneva Convention IV (the Civilians Convention) says little about limitations on combat which might reduce its often catastrophic impact on civilians, addressing instead the simpler issue of civilians who are in the hands of the adversary, such as internees and inhabitants of occupied territory.

Such problems also help to explain why, with regard to particular incidents involving civilian deaths and suffering, there is a need to be careful about assertions that a state has violated existing legal standards. In war, it is often wrong to assume that a given destructive act was deliberately inflicted by the enemy, when it may have owed something to the chaos which inevitably accompanies hostilities. The most serious consequences of war, so far as civilians are concerned, may be ones that are not totally unambiguous violations of the rules. In combat, the legal consideration is whether every reasonable effort has been made to keep civilian damage to a minimum. This is a matter on which it can be unwise in some instances to rush to judgment.

Many actions by the coalition, especially in the bombing campaign, raised questions about their compatibility with the laws of war. Was it militarily necessary and justifiable to bomb aspects of the economic infrastructure of Iraq? Was sufficient care always exercised in choice of targets? Why were some targets bombed at a time of day when it was certain there would be civilians in the area? Were aircrew instructed in strong enough terms that it would be better to return with their bombs than to drop them, if there were any doubt about hitting the designated target?
Two incidents received especially heavy criticism. First, the U.S. bombing of the Amariya bunker in Baghdad on February 13, which caused approximately 300 civilian casualties, appears to have been the tragic outcome of an intelligence error and of Iraq's commingling of civilian and military activities. Second, the bombing of traffic retreating north from Kuwait City at Matla ridge on February 27, and the concern it caused in some of the coalition countries, may have been one factor prompting President Bush's decision to suspend all military offensive action from 8 a.m. (local time) on February 28, rather than pursue some of the much-discussed military alternatives. The repercussions of both these incidents were evidence of the salience, including in the coalition countries, of issues related to the laws of war, and their impact on broader policy questions.

In March 1991, in the immediate aftermath of the war, a controversial report submitted to the UN by Under-Secretary General Martti Ahtisaari, the Finnish head of a special investigative commission, deplored the devastation of Iraq caused by the bombing. The conflict had "wrought near-apocalyptic results upon the economic infrastructure of what had been, until January 1991, a rather highly urbanized and mechanized society. Now, most means of modern life support have been destroyed or rendered tenuous." The report noted the destruction of non-military objectives: for example, seed warehouses, and a plant producing veterinary vaccines; and it said that "all electrically operated installations have ceased to function," causing shortages and contamination of the water supply. The damage to facilities serving Iraqi civilian life was also criticized in a report by Middle East Watch.

40. For a powerful defense of the bombing on the road north of Kuwait City on February 27, and the minimization of casualties and damage, see Final Report to Congress, pp. O-34 and O-35. Billière, Storm Command, pp. 301, 311 and 329, refers to "evidence of madness and destruction everywhere," but also says "the situation can be fully justified." Schwarzkopf, It Doesn't Take a Hero, pp. 468-469, says that most Iraqis had jumped out of their vehicles and run away, but confirms the action's serious political effects within coalition states.
41. The military options which were not taken, but have been much debated, ranged from continuing the land campaign for another day or so in order to cut off the only escape route for Iraqi forces in southern Iraq, to, more ambitiously, continuing the offensive all the way to Baghdad or beyond. The latter would have risked breaking up the international consensus on the use of force based on UN Security Council resolutions.
42. Letter of the UN Secretary-General to the President of the Security Council, March 20, 1991, and annexed report of the same date (UN doc. S/22366), pp. 5, 6 and 8.
A full-blooded denunciation of U.S. bombing policy was a central part of the series of accusations made by Ramsey Clark and others in connection with an unofficial commission of inquiry and war crimes tribunal, the latter giving its judgment on February 29, 1992. A publication resulting from this process claims: “Experience, reason, and actual counts completed make the 150,000 minimum civilian deaths in Iraq since the beginning of the war until early 1992 a very conservative number. . . . A quarter of a million Iraqis, military and civilian, died from 110,000 air attacks. This was genocidal.”

Some reports described Iraq in the aftermath of the war in less apocalyptic terms.45 The Pentagon, in its reports on the war, stressed the efforts made to achieve discrimination and to reduce civilian casualties, but did not describe damage in great detail, and did not give casualty figures.46

In the present state of the law, a verdict that the bombing policy in general was illegal would be hard to sustain. The evidence is strong that the campaign was more discriminate than most previous bombing campaigns. However, it was less precise in its effects than appeared at the time from the well-orchestrated videos of high-tech weapons hitting legitimate targets with stunning accuracy. Moreover, there is ground for concern about the performance of belligerents in carrying out their obligation not merely to set out to attack only legitimate targets, but also to exercise the maximum possible care in planning and carrying out attacks. The frequent statements of regret about collateral damage, and about intelligence errors, sometimes appeared facile and were received skeptically.

Iraq paid back-handed deference to the laws of war by claiming, in a campaign of disinformation, that coalition forces were deliberately targeting populated areas and civilian objects. In this campaign it appears that the extensive damage which undoubtedly occurred as a result of coalition bomb-

44. Ramsey Clark, The Fire This Time: U.S. War Crimes in the Gulf (New York: Thunder’s Mouth Press, 1992), 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 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, D.C.: Maisonneuve Press, 1992), pp. 24, 34, 49 etc. On Iraqi casualty figures, see also sub-section 11 below, “Casualties.” Clark’s use of the word “genocidal” also appears to lack rigor.
ing was not enough: bomb damage, including of a mosque, was also reportedly faked.\textsuperscript{47}

The Iraqi use of Scud missiles against Saudi Arabia and Israel raises a tangled question concerning weapons design and the laws of war. These ballistic missiles, being inherently inaccurate, can only be used against targets which occupy a very large area, which meant, in this conflict, cities. Thus, quite apart from the fact that they were extensively used against a technically non-belligerent state (Israel), the Scud missiles by their very nature violated fundamental principles of the laws of war. This gives rise to consideration as to whether the manufacture, transfer, possession and deployment of such missiles in general should be subject to special prohibitions. Against this must be set the paradoxical fact that in the event, whether due to their inherent limitations, poor use, luck, or the effects of anti-missile defenses, the Scuds killed relatively few people.\textsuperscript{48} Would the coalition powers have been happier if the Iraqis had been in possession of more accurate and discriminate missiles?

\section*{Conduct of Hostilities on Land}

Apart from extensive use of artillery, mainly by coalition forces, land operations in the war consisted mainly of the battle for Khafji in Saudi Arabia, which Iraqi forces attacked on January 29, and Desert Sabre, the short, highly mobile coalition invasion of Kuwait and southern Iraq on February 24–28. Two major types of question arose. First, in the battle for Khafji there were reports of perfidious indications of surrender as a trick by Iraqi forces. Some of the reported acts probably constituted violations of the laws of war: however, the use of reversed turrets by Iraqi tanks entering Khafji was not necessarily an act of perfidy, as, according to the Pentagon, “a reversed turret is not a recognized indication of surrender \textit{per se}.\textsuperscript{49}” Second, coalition forces, in breaching Iraqi defense lines rapidly and effectively on February 24, bulldozed trenches and in so doing buried some Iraqi soldiers alive. Use of this

\textsuperscript{47} Final Report to Congress, p. O-12.
horrific method was revealed only in September 1991, and was criticized on several grounds, including the causing of unnecessary suffering, and the difficulty of identifying the dead. The Pentagon has defended the action in some detail, on the basis of military necessity, for which the laws of war do make allowance. Its Final Report spells out a range of military considerations that “required that the assault through the forward Iraqi defensive line be conducted with maximum speed and violence.”

TREATMENT OF PRISONERS
In general, the rules governing the treatment of prisoners are easier for belligerents to follow than the rules governing combat, but even here difficulties arose. The main problem, as expected, was getting Iraq to observe the 1949 Geneva Convention III. Iraq refused ICRC delegates access to prisoners throughout the land war. Coalition prisoners in Iraqi hands were treated in a manner inconsistent with the Convention; and many, perhaps even most, were evidently tortured. If Iraq’s purpose in parading captured airmen on television and using them as human shields was to weaken coalition resolve, it failed. At the end of the war, the Iraqi regime belatedly turned to the ICRC to achieve an efficient and humane transfer of prisoners. The ICRC had earned a degree of trust from the Iraqi regime because of its role in repatriation of prisoners from the Iran-Iraq war of 1980–88, a process which had suddenly accelerated during the 1990–91 Gulf conflict, as the Iraqi regime sought to clear away the consequences of its previous major war.

In the February 1991 land war, large numbers of Iraqi prisoners were taken. While estimates at the time ranged as high as 180,000, the actual figure was lower. Between January 18 and May 2, 86,743 Iraqi POWs were captured by the coalition forces. The ICRC received 71,000 Iraqi prisoner-of-war and civilian internee capture cards; and between March 6 and May 9, 1991, over 64,000 Iraqi POWs were repatriated under ICRC auspices.

Some incidents during the war raised the question of what is proper evidence that troops wish to surrender. At least one such case led to a subsequent investigation. On June 12, 1991, the U.S. Navy announced that it would look into allegations that American servicemen attacked Iraqi soldiers on a Kuwaiti oil platform as they tried to surrender on the second day of the war. The board of investigation recognized the complexity of the situation faced by the U.S. commanding officer, and concluded that his actions did not violate the law of armed conflict. On the other hand, his failure to investigate Iraqi white flags further, to discuss his evaluation of them, and to report on them to his superiors represented a serious lapse of judgment.\footnote{The decision to hold an investigation was reported from Washington, \textit{The Times} (London), June 13, 1991. For an outline of the facts, of the results of the investigation, and of general problems of surrender raised in this war see Horace B. Robertson, Jr., "The Obligation to Accept Surrender," \textit{U.S. Naval War College Review} (Spring 1993), p. 103.}

As for repatriation of prisoners after the war, much went smoothly but there were two main problems. First, of the thousands of civilians reportedly taken from Kuwait to Iraq, large numbers remained missing.\footnote{Final Report to Congress, p. O-7, issued in April 1992, said "several thousand remain missing." On Iraqi evasiveness regarding the deported Kuwaiti civilians, see Billière, \textit{Storm Command}, pp. 315–318.} In August 1993, Sheikh Salem as-Sabah, Head of the Kuwait POW and Missing Persons in Iraq Committee, stated that 627 citizens seized in Kuwait were still being held incommunicado in Iraq.\footnote{Erik Ipsen, "Q & A: The Kuwaiti Gulf War Victims Still Held in Iraq," \textit{International Herald Tribune} (Paris), August 23, 1993, p. 2.} Second, over 13,000 Iraqi POWs in coalition hands did not want to return, and in August 1991 were reclassified as refugees: the ICRC insisted on interviewing POWs without witnesses, in order to make sure that they were choosing of their own free will whether or not to be repatriated.\footnote{Final Report to Congress, p. O-20. ICRC, \textit{The Gulf 1990–1991}, pp. 25–26.}

Identification and Burial of the Dead

After the end of the war, there were several reports that Iraqi dead had been buried in mass graves without proper identification of individuals, and of grave sites, as required in 1949 Geneva Convention I, Article 17. ICRC representatives had some contact with the U.S. military authorities on this matter. Even if this was not a major war crime, it does appear that some coalition forces had failed to perform their legal obligations properly. The issue attracted particular attention because of a widespread belief that there...
had been Iraqi military casualties on a scale which coalition governments were anxious to suppress. However, the press interest in this matter in August 1991 was overtaken within a few weeks by the revelations about the use of bulldozers in breaching trenches.60

MINES AND UNEXPLODED ORDNANCE

The use of mines has long been a subject of the laws of war, for obvious reasons. Whether laid on land or at sea, they can be indiscriminate in their effects, injuring civilians and neutrals; they can continue to cause damage even after the war is over; and some may cause injuries with fragments that are not detectable by X-rays. All these issues arose in the 1991 Gulf War. The law relating to mines—part of the law on the methods and means of warfare—is encapsulated in a general customary rule that mines should be laid discriminately, and careful records kept. The 1907 Hague Convention VIII spells this out so far as naval mines are concerned.

Iraqi forces reportedly laid well over 500,000 mines in Kuwait, and abandoned quantities of unexploded ordnance; they also laid naval mines of a kind that violated legal norms. As part of the Security Council Resolution 686 of March 2, 1991, which was the initial cease-fire resolution, Iraq had to “provide all information and assistance in identifying Iraqi mines, booby traps and other explosives.” The following day, at the cease-fire talks at Safwan, Iraqi commanders did hand over maps of minefields.61

As to the coalition, as many as one third of its bombs and projectiles reportedly failed to detonate, the soft sand and the use of stockpiled or experimental weapons increasing the failure rate; and many U.S. anti-personnel mines, dropped into the battle area, remained a lethal hazard afterwards.62 Substantial quantities of depleted uranium, which is toxic and mildly radioactive, were left in armor-piercing shells in the desert.63

60. See the two reports on this by Robert Fisk in The Independent (London), August 5, 1991, pp. 1 and 9. Outcome of ICRC representations not known to author.
After the end of hostilities, the difficult task of making minefields safe proved extremely difficult. In less than a year after the war, explosive ordnance reportedly killed or wounded some 1,250 civilians, and claimed the lives of fifty demolition specialists.64

GAS AND CHEMICAL WEAPONS
The moral firebreak against the use of chemical and biological weapons held in the 1991 Gulf War. This may appear surprising in view of Iraq’s stockpiles of such weapons, its record against Iran and its own Kurdish population, and the dire warnings of some commentators that any war would certainly lead to the use of gas. The coalition leaders feared the use of such weapons, and took numerous countermeasures.65

There are several possible explanations for Iraq’s non-use of gas. Deterrence almost certainly played a part: as noted earlier, the coalition powers made numerous statements to the effect that there would be a sharp (possibly even nuclear) response to any Iraqi use of chemical or biological weapons.66 There also appears to have been a threat that in such a case the United States would change its war objectives both geographically and politically, to encompass the occupation of Baghdad and removal of Saddam’s regime.67 There is some evidence that Iraq did not actually introduce chemical artillery and bombs into the Kuwait front. The coalition land war tactics may also have played a part: there were no static coalition lines or trenches such as might have made visible and easy targets. The coalition bombed Iraqi production facilities for weapons of mass destruction, and managed in so doing to avoid some of the feared contamination hazards.68 Some coalition statements, including those distributed to Iraqi soldiers and civilians in leaflets, emphasized

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64. Horwitz, “These Men Dance Through Mine Fields.”
65. For evidence of worries about chemical weapons, see Schwarzkopf, It Doesn’t Take a Hero, pp. 389–390 and 445.
66. One such warning was made as early as August 9, 1990. See Colin Brown, “Britain Warns Saddam Against Gas War,” The Independent (London), August 10, 1990, p. 1. See also the interesting report by Christopher Bellamy, Defense Correspondent, “Allies ’Put Iraqis off Chemical War’,” The Independent November 29, 1991, p. 5, which presents some evidence in support of the proposition: “The Iraqis were deterred from using their chemical weapons during the Gulf war because the allies made it known that they would respond with their own chemical and nuclear weapons, both of which were in the theatre of war. British sources have confirmed.”
the idea that there was personal responsibility of officers for the use of such weapons: this may have impressed on some Iraqi commanders that these weapons were in a separate category, and their use could have consequences for them. (It appears that the coalition’s threat of an exceptionally tough response was essentially confined to the issue of possible Iraqi use of chemical weapons. The same threat was apparently not made in respect of some other threatened or actual Iraqi violations of the laws of war, including in the area of environmental damage.)

The non-use of chemical weapons confirmed the general pattern which has developed since the conclusion of the 1925 Geneva Protocol: not one of the major violations in the intervening years has been against an adversary who was known to have both counter-measures against the use of gas (masks, suits, etc.) and an effective capacity for retaliation. It is also possible that the Protocol has played some part in helping to identify gas and bacteriological weapons as in a special category.

Although this was a successful case of non-use, it is not surprising that after the war the UN Security Council imposed chemical and biological, as well as nuclear, disarmament on Iraq.69

ENVIRONMENTAL DAMAGE

The position regarding environmental damage is in sharp contrast to that on gas and chemicals. The war saw extensive damage to the natural and man-made environment, including through the bombing and mine-laying mentioned earlier. The most highly publicized aspect of environmental damage concerned oil. During the war, huge damage was done by the pumping or spilling of vast quantities of oil from occupied Kuwait into the Gulf; and at the end of the war, even greater damage was done by systematically setting the Kuwaiti oilfields on fire.

The basic problem of inducing Iraqi restraint in the matter of environmental damage was in some ways similar to the problem of preventing Iraqi use of gas and chemical warfare. Both issues involved international legal standards. Both raised the questions of how to actively deter criminal Iraqi action; and of how to ensure that Iraqi commanders were fully aware of their personal responsibility and liability for any violations. Yet as far as the environment

was concerned, the allies apparently did not spell out this obvious point with
the necessary clarity and urgency.

Any action causing massive environmental damage unrelated to any rea-
sonable military purpose is a violation of the laws of war; but this rule is,
for the most part, stated obliquely. The 1907 Hague Convention’s preamble
refers to the need “to diminish the evils of war, as far as military require-
ments permit.” In the annexed Regulations which constitute part of the original
1907 accord and are still binding, Article 23(g) covers at least some forms of
environmental damage when it states that it is especially forbidden “to de-
stroy or seize the enemy’s property, unless such destruction or seizure be
imperatively demanded by the necessities of war”; and Article 55 obliges an
occupant to respect property in occupied territory. In 1949 Geneva Conven-
tion IV, Articles 53 and 147 contain rules prohibiting excessive and wanton
destruction of property. In addition, several well-recognized underlying prin-
ciples of the laws of war show the illegitimacy of massive environmental
destruction. One of these, known as the principle of humanity, was described
as follows in a 1987 U.S. naval manual: “The employment of any kind or
degree of force not required for the purpose of the partial or complete
submission of the enemy with a minimum expenditure of time, life, and
physical resources is prohibited.”

Environmental concerns are only addressed by name and directly in two
agreements, both concluded in 1977. Neither of them was fully applicable in
the 1991 Gulf War, and their specific provisions are problematic so far as the
facts concerning threats to the environment in the 1991 Gulf War are con-
cerned.

The first is the 1977 UN Convention on the Prohibition of Military or Any
Other Hostile Use of Environmental Modification Techniques (ENMOD). This
deals with the use of the forces of the environment as weapons, as distinct
from damage to the environment. Article II prohibits “any technique for
changing—through the deliberate manipulation of natural processes—the
dynamics, composition or structure of the Earth, including its biota, litho-
sphere, hydrosphere, or of outer space.” An authoritative interpretation of
this article lists phenomena that could be caused by the prohibited tech-
niques, ranging from earthquakes and tsunamis (tidal waves) to changes in
weather patterns or in the state of the ozone layer. It is doubtful whether

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Saddam Hussein was engaging in any such technique: there is fairly wide agreement among specialists that, even if Iraq had been a party to ENMOD and this treaty had been fully in force in this conflict, its terms would not have covered the types of action carried out by Iraq.71

The second laws-of-war agreement which refers to the environment is the 1977 Geneva Protocol I. This deals in two articles with the specific question of damage to the natural environment, as distinct from the manipulation of the forces of the environment as weapons. Article 35, which outlines basic rules on methods and means of warfare, states in its third paragraph: “It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.” Article 55 states that “1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. 2. Attacks against the natural environment by way of reprisals are prohibited.”

Problems arise not only because this agreement was not technically in force in this conflict, but also because the United States had earlier expressed some reservations about these particular provisions, and further because it is at least debatable whether the provisions of this agreement actually apply to the environmentally destructive acts of this war. The Pentagon’s interim report to Congress on the war implied that the Protocol’s environmental provisions laid down standards which Iraq had violated. However, its final report said, controversially, that even if Protocol I had been in force, it was doubtful whether Iraq’s actions would have violated its environmental provisions, the question being whether the damage was really “long-term” in the sense of decades.72 Regardless, Iraq’s environmental crimes were violations of older and well-established rules prohibiting wanton destruction.

There was more than adequate warning of possible environmental damage in the event of a war over Kuwait. Iraq consistently threatened to set fire to oilfields. On September 23, 1990, Saddam Hussein announced that if there

71. This is the view of many international lawyers who have looked at the matter. It is also the clear conclusion of the Pentagon’s Interim Report to Congress, p. 12-6; and Final Report to Congress, pp. O-26 and O-27.
72. Interim Report to Congress, pp. 12-5 and 12-6; Final Report to Congress, p. O-27. See also pp. 24 and 25, where these acts were held to be war crimes as they constituted “unnecessary destruction.”
were a war, Iraq would strike at the oilfields of the Middle East. On December 23, in immediate response to tough comments in Cairo by the U.S. Defense Secretary, the Iraqi defense minister said in Baghdad: “Cheney and his aides will see how the land will burn under their feet not only in Iraq but . . . also in Eastern Saudi Arabia, where the Saudi fighters will also feel the land burn.” These statements, like his threats to use hostages as human shields, appear to have further solidified international opinion against Iraq.73

The scope of the potential environmental threat of a war over Kuwait was heavily publicized in the weeks before the war, but mainly by those arguing that war should be avoided altogether. In particular, the warnings at a symposium of scientists on the potential environmental effects of a Gulf war, held in London on January 2, 1991, were somber: that a large proportion of the oil wells had been mined and might be ignited by the Iraqis; that the resulting fires might burn up to three million barrels of crude oil a day; and that oil spilt from damaged wells and pipelines would flow into the Gulf, causing a spill “10 to 100 times the size of the Valdez disaster.”74 (The March 1989 Exxon Valdez disaster had dumped over 250,000 barrels of crude into Prince William Sound, Alaska.)

Such a spill was indeed to happen, apparently as a result of deliberate Iraqi policy. Iraqi forces appear to have caused a large slick by deliberately pumping huge quantities of oil into the Gulf, a process which was eventually brought under control by coalition bombing of the pumping stations on January 27. The true size of the spill was probably between seven and nine million barrels, well into the range predicted by the London meeting of scientists.

The massive destruction of the oilfields of Kuwait at the very end of the war was Saddam Hussein’s final gesture of defiance. Some 600 wells were set on fire, and 175 others left gushing or damaged.75 It is doubtful whether this destruction had any serious military purpose, and in the event it had little or no military value.76 It was wanton destruction, designed only to show that a country losing a war can still hurt its adversaries and neighbors.

75. Kuwait Environment Protection Council, State of the Environment Report: A Case Study of Iraqi Regime Crimes Against the Environment (Kuwait: November 1991), pp. 1, 2-3, and Table in Fig. 2. This states that 6 million barrels of oil per day were being lost.
76. The Pentagon’s Interim Report to Congress, p. 13-2, suggests that the smoke had some modest effect on coalition air operations. The Final Report to Congress, p. O-27, is more dismissive.
The protection and clean-up operation in the Gulf did avert the threat to desalination plants, and recovered some two million barrels of oil. After a very hesitant start, the task of extinguishing the oil well fires was completed on November 6, 1991.

It is remarkable that the coalition powers did not make a more serious effort to spell out in advance to Iraqi officers the criminality of setting fire to oil wells, and the personal responsibility they would bear if they participated in it. None of the millions of leaflets they dropped dealt with this issue. There are several possible explanations for these failures. First, since the environment had been raised as a reason for not resorting to war at all, those expressing concern about it had failed to make specific proposals of a kind which might have helped to limit any war that did occur. Second, the coalition powers, especially of course the United States, were concerned above all with threats to the lives and welfare of their troops, a matter in which gas and chemical weapons loomed large: for whatever reason, environmental considerations did not loom so large in governmental decision-making.

After the war, complaints of wanton destruction, including damage to the environment, featured in many official U.S. and Kuwaiti statements about Iraq’s conduct during the war. However, there is no immediate prospect that the leading Iraqis involved will be tried for these or other offenses. The destruction was one basis for the reparations demanded by the UN Security Council from March 1991 onwards.

NEUTRALITY

Security Council Resolution 678 of November 29, 1990, by not calling on, still less requiring, all UN member states to take part in military action, left conspicuous continued space for neutrality and non-belligerency of various kinds. At the same time, the UN Charter and other Security Council resolutions imposed a range of obligations on all states to take part in sanctions and not to impede the coalition action. The conflict thus involved a challenge to certain traditional ideas of neutrality.

The 1907 Hague Conventions associated neutrality with complete impartiality: thus Convention V, on Neutrality in Land War, said in Article 9 that “every measure of restriction or prohibition taken by a neutral Power” in regard to a wide range of matters “must be impartially applied by it to both belligerents.” In the wars of this century, this rule has often proved impracticable or undesirable, and notions of “qualified neutrality” and “non-belligerency” have emerged, releasing neutral states from certain neutral duties,
but still requiring avoidance of active participation in hostilities. Thus in much modern practice neutrality has been considered compatible with participation in international sanctions and blockades.

The 1991 Gulf War suggested that there are further changes in ideas of neutrality. Some traditionally neutral states, including Switzerland and Austria, went so far as to permit overflights by U.S. military aircraft, while India denied such permission. Iran actually declared its policy as one of neutrality, or non-belligerency, and pursued this policy quite successfully, but “the United States advised Iran that, in light of UNSC Resolution 678, Iran would be obligated to return downed Coalition aircraft and crew, rather than intern them. This illustrates the modified nature of neutrality in these circumstances.”77

Some complex patterns of non-belligerence emerged in this war. Israel’s non-involvement in the war was considered compatible with having U.S. Patriot air-defense missile batteries on its soil; and Turkey, while not directly involved in the war, allowed the United States to bomb northern Iraq from bases on its soil, and received extensive defense assistance from its fellow NATO members. The various defensive measures taken by allies in respect of Israel and Turkey had the clear purpose, in which they succeeded, of reducing the likelihood of the war spreading in a major way to these countries.78

The policy of the Swiss government regarding this conflict had an influence on debates within the ICRC about the ICRC’s status. Both Switzerland and the ICRC (which had always been a quintessentially Swiss body, and remains based in Switzerland) are committed to policies of neutrality, but their policies are not identical. In the wake of UN decisions, Switzerland—autonomously, as it is not a UN member—decided to apply wide-ranging economic and financial sanctions against Iraq. This may have fed Iraqi suspicions about the impartiality of the ICRC’s operations.79 On March 19, 1993, the ICRC and the Swiss government signed an agreement on the ICRC’s legal status, in which the Swiss government recognized the ICRC’s status as that of an international (i.e., rather than Swiss) organization.80

78. For details of NATO’s extensive and little-reported Southern Guard operation, designed in part to deter a possible Iraqi attack on Turkey during the Gulf crisis, see Howe, “NATO and the Gulf Crisis,” esp. pp. 249–258.
CASUALTIES

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. 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 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. In May 1991 the U.S. Defense Intelligence Agency released an internal estimate (with a stated error factor of 50 per cent) of 100,000 Iraqi soldiers killed and 300,000 wounded: these figures were later disavowed by the Pentagon. Ramsey Clark gives an even higher figure for Iraqi military deaths. In early 1993 John Heidenrich, a former military analyst with the DIA, in an estimate based on a methodology clearer than most, suggested that the total Iraqi military death toll may have been as low as 1,500, with about 3,000 wounded.

81. Figures for coalition military dead: General Schwarzkopf gave a total figure of 466 in testimony to the Senate Armed Services Committee on June 12, 1991; The Times (London), June 13, 1991. The same total was given in a report in Time, June 17, 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.


84. Clark, The Fire This Time, pp. 38 and 209, asserts that between 125,000 and 150,000 Iraqi soldiers were killed.

85. 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 careful inference on the basis of known facts, especially regarding the low numbers of wounded among the Iraqi prisoners taken by coalition forces.
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. A further element of explanation could be that many Iraqi troops appear to have left or been withdrawn from the Kuwait Theater of Operations by the time the coalition land offensive began.

The exact numbers of civilian deaths 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 over one thousand. Estimates of Iraqi civilian deaths as a result of the coalition bombing campaign have ranged from Ramsey Clark’s 150,000, cited earlier, to John Heidenrich’s figure of “probably fewer than 1,000.” According to a Greenpeace briefing, the Iraqi government stated that 2,278 civilians had died as a result of the bombing campaign. Calculation of Iraqi civilian deaths is complicated by the difficulty of putting a precise figure to the many deaths which undoubtedly occurred, during and 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 an 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 determination of the coalition, and especially of the Americans, not to take any avoidable risks with their own soldiers’ lives. This led to the decision to launch the ground offensive only 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

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86. 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), September 27, 1992, p. 16.
87. “The Government of Kuwait estimates that 1,082 civilians were murdered during the occupation. Many more were forcibly deported to Iraq.” *Final Report to Congress*, p. O-7.
89. William M. Arkin of Greenpeace International, “Gulf War Effect and Laws of War Briefing,” Geneva, April 28, 1992. In this briefing Mr. Arkin suggested that some targets in Iraq, including elements of the transport system, were attacked at Israel’s request.
casualties were suffered. 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.

**PROPORTIONALITY, AND THE INEQUALITY OF THE CONFLICT**

“Proportionality” in the laws of war encompasses many distinct ideas, some of which are about the scale and costs of the response to the initial *casus belli*; others relate to the conduct of hostilities, including the scale and costs of a belligerent action in relation to its anticipated military value. Proportionality is a complex concept to apply to individual cases, and does not involve any simple mathematical element requiring an equality between the two sides in the terms of combat or in casualties. Indeed, as one analysis of proportionality in relation to this war concluded, “the endless flexibility of the principle is both its strength and its weakness.” It is not obvious that any of the accepted ideas of proportionality was violated in a general way by the coalition action in this war.

However, irrespective of existing legal concepts of proportionality, the one-sided nature of the war as it developed did become an issue. The picture of superior technology being used on the coalition side against exposed human beings on the other side is far too simple. Nonetheless, the disproportion of the military deaths did raise unusual questions, even if they are not narrowly legal ones. How long is it right to go on bombing an adversary’s forces (even if they are illegally occupying and seeking to annex another state without justification) before engaging them in direct combat, which at least gives them a reasonable chance either to fight or to surrender? Against concentrations of Iraqi forces, was it right to use fuel-air explosives which soldiers might not have a chance to survive even if outside their vehicles? Is there not a moral danger lurking in the idea that a war might be almost cost-free in human terms for one side? In some moral judgments on the war, especially those made in third world countries, the disproportion is seen as a ground of criticism of the coalition. Some saw the war as going against the notion

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of chivalry, which still has at least a vestigial existence as an underlying principle of the laws of war.

Above all, this coalition war raises an issue which may recur in some collective military actions in the future: that in conflicts between forces representing the international community and an offending state, there are inevitably built-in inequalities of several kinds: in numbers of countries involved on the two sides; numbers of troops; intelligence; and quality of equipment. Further, action under Security Council auspices can easily come to acquire just-war overtones, even an element of moral superiority; and the states involved in such action may be especially reluctant to suffer casualties in a cause far from home. All of these elements create potential risks for the equal application of the laws of war.

Postwar Issues

It has already become apparent that even after the end of major hostilities on February 29, 1991, many areas of activity on which the laws of war have a bearing continued to receive much attention and to play an important role: for example, return of prisoners, burial of the dead, and mine clearance. In addition, a number of new issues arose, or became more serious.

MILITARY ADMINISTRATION IN OCCUPIED 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; 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 by coalition forces. Under the laws of war, an occupying power is obliged to ensure that there is an effective administration and line of responsibility in an occupied area. 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 popula-

tion and requiring little administration, then attracted people from outside, which necessitating more administration than was at first available.

**THE QUESTION OF TRIALS FOR MAJOR WAR CRIMES**

After the war, the coalition governments suddenly became quiet on the subject of major war crimes, and on the war-crimes responsibility of Saddam Hussein and his colleagues. This contrasts with the emphasis on war crimes in Security Council Resolution 674 of October 29, 1990. After the cessation of hostilities, the Security Council passed some long and very detailed resolutions on the cease-fire, reparations, dismantling of Iraq’s capability for chemical warfare, and so on. One of these, Security Council Resolution 687 of April 3, 1991, is the longest ever passed by the Security Council. Yet nothing was said on the subject of personal responsibility for war crimes.

There were genuine difficulties in pursuing the war crimes issue. First and foremost, Saddam Hussein would have been difficult to arrest even had the coalition military action had more offensive goals. Then, after the end of hostilities, it would have been awkward to call for his arrest as a war criminal at the same time as negotiating cease-fire terms with his government. Further, it would not have been right for outside powers to push this issue hard if local powers did not want this. However, the failure to take any action exposed a serious problem regarding the laws of war, namely, the difficulty of securing enforcement. As a minimum it would have been possible to make a statement to the effect that major war crimes occurred, involving grave breaches of the Geneva Conventions; that there is personal responsibility for these crimes; and that under the Geneva Conventions any state is...

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93. The term “major war crimes” encompasses serious violations of the laws of war, including “grave breaches” of the four Geneva Conventions, as defined at some length in each of them. It also includes certain other categories of crime, including crimes against peace (e.g., launching a war of aggression). It tends to be used with reference to the actions of principal government leaders and senior military officers.

94. In January 1993 the outgoing Director of the CIA, Robert Gates, who was deputy national security adviser at the White House during the 1991 Gulf War, told the Los Angeles Times that in the deliberations about war aims, “there was a general feeling that it would not be difficult for Saddam to flee Baghdad and it would be very difficult for us to try and find him. So you’d end up potentially occupying much of Iraq and then having to deal with the consequences of that.” Reported in The Independent (London), January 9, 1993. On reasons why it was not practical to make the conquest of all Iraq a coalition war aim, see Schwarzkopf, It Doesn’t Take a Hero, pp. 497–498.

95. The Pentagon ended its report pointedly: “A strategy should be developed to respond to Iraqi violations of the law of war, to make clear that a price will be paid for such violations, and to deter future violators.” Final Report to Congress, p. O-36.
entitled to prosecute. Such a statement could have been made by the coalition powers, the UN General Assembly, or the Security Council. The United States did eventually, in its war crimes report issued by the UN in March 1993, say all of these things. The need for a clear policy on major war crimes was especially obvious in view of the fact that junior figures—Iraqi officers who happened to have been caught in Kuwait at the time of the cease-fire—were put on trial in Kuwait for lesser offenses.

The failure to hold a major war crimes trial exposed a central problem of the laws of war. Where a state is not willing to prosecute its own government leaders and officers, there is frequently no other practical mechanism for bringing alleged offenders to justice. It is not necessarily responsible to think in terms of some form of supra-national justice being applied, when the mechanisms and even, in some cases, the will may be lacking. The implementation of the laws of war involves a wider range of processes, and is also somewhat more uncertain, than the simple vision of imposing legal standards through trials may suggest.

**REPARATIONS FOR DAMAGE CAUSED BY THE OCCUPATION AND WAR**

When a war ends, especially if it is seen as having resulted from an illegal and aggressive act by one side, or was characterized by widespread looting of property, there is often a demand for reparations, compensation, and the return of stolen goods. Laws of war agreements contain many references to these matters. The UN Security Council, in the second paragraph of its Resolution 686 of March 2, 1991, demanded that Iraq, “accept in principle its liability under international law for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq; . . . [and] immediately begin to return all Kuwaiti property seized by Iraq, to be completed in the shortest possible period.” The wording of this resolution implies that compensation is demanded on account of both *jus ad bellum* and *jus in bello* considerations. The question of whether it is wise to demand heavy reparations from a state which has lost a war is very difficult: the historical precedents are mixed.

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THE WAR'S INCONCLUSIVE END
Although the coalition won a decisive victory, the war ended with Iraq still in conflict with its major adversaries on a wide range of issues: its treatment of its own subjects, its failure to return some people deported from Kuwait, its armaments, its frontier with Kuwait. These continuing problems raised in some minds the question of whether the coalition had got its war aims right. However, they do not appear to have prompted arguments that the coalition should have observed fewer *jus in bello* restraints in its actual conduct of the war.

Lessons

The countries of the international community, and especially the coalition powers, need to consider carefully what lessons might be drawn from their handling of laws of war issues in this conflict. Even if the verdict is that they were for the most part handled well, there remain many areas of concern, and many lessons to be drawn.

IRAQ'S VIOLATIONS
Iraq violated the laws of war in countless ways: looting, taking of hostages, treatment of prisoners, Scud attacks on cities, and unnecessary destruction, including oil crimes. However, the judgment that Iraq derived no advantage from its violations is persuasive. Many Iraqi war crimes involved the coalition in considerable effort, for example in dealing with the Scud threat during the war and in restoring the oilfields after the war, but they never threatened to be militarily decisive.

THE COALITION AND THE LAWS OF WAR
The laws of war were applied much more thoroughly (if still imperfectly) on the coalition side. Indeed, there were some important innovations, including a greater emphasis on accurate targeting of bombing than in previous campaigns; apparently successful information campaigns to persuade Iraqi sol-

diers that they would be safer if they left their military vehicles; and successful pressure on Iraq not to use chemical weapons.

Far from hampering the coalition, as might be anticipated by those who see law as a brake on the use of force, observance of basic rules may have assisted it. Many of the rules make excellent military as well as moral sense, and make surrenders by the adversary’s forces more rather than less likely. When a war involves such unequal forces as this one did, the laws of war may have a special importance in assisting the legitimacy of the coalition side. When coalition conduct seemed to be leading to mindless carnage—as at the Baghdad bunker, or Matla Ridge—this had a serious negative effect on public opinion.

Certain features of this war which may have facilitated observance of the laws of war by the coalition powers will not be present in every future conflict. The coalition countries, having superior military resources at their disposal, were not forced into those desperate situations of cruel and prolonged combat, and desperate struggle for survival, which sometimes lead to violations of the laws of war. The limits of the West’s attachment to humanitarian rules was not tested as sharply as some other wars such as those involving counter-guerrilla operations in which the vital distinction between civilians and combatants can be particularly hard to maintain. It may have been because the coalition casualties were low, and also because the war in many ways resembled a classic inter-state war, that there was no tendency to assert that the Iraqis were illegal combatants, or that forces acting in the name of the UN had any superior rights in matters relating to the laws of war.

THE UNITED NATIONS
The UN should undertake a careful examination of its handling of several issues in this conflict, including those relating to the Military Staff Committee and also the laws of war. There are strong feelings at the UN, especially on the part of Third World countries, that the United States had too much power in this crisis. The deeper problem may be that there were no clear ideas in New York, or in national capitals, as to what kind of role the UN could have had—and no serious attention there to laws of war issues.

SANCTIONS
Economic sanctions, which the UN imposed on Iraq on August 6, 1990, are widely viewed (not least in the UN Charter) as a preferred alternative to the
use of force. However, the case of these sanctions against Iraq raises two key questions: First, can sanctions succeed in getting a government to withdraw from a policy to which it is deeply committed? Second, are sanctions so indiscriminate in their effects that they raise questions regarding their compatibility with the laws of war?

In some respects, sanctions operated in an unusually favorable environment: Iraq had few friends, and was deeply dependent on exports of a key commodity—oil. The sanctions were implemented efficiently, if not perfectly. Sensible provision was made for exceptions on humanitarian grounds. Yet their effect seems to have been in some respects more indiscriminate, perhaps even more inhumane, than that of military action. They raised food prices, and had serious consequences for the people of Iraq. They showed few signs, before or after the war, of achieving the desired changes in Iraqi policy.100

1977 GENEVA PROTOCOL I

This war showed the relevance of many of the provisions of the 1977 Geneva Protocol I.101 In particular, the Protocol contains important rules restricting attacks on civilians and civilian objects (e.g., Articles 48 and 50). On the other hand, the war confirmed certain problems in the Protocol. An example is that its environmental provisions are not as useful as they may seem from a superficial reading. Second, the prohibitions on reprisals in Articles 20 and 51–56 may be too sweeping. In this war the threat of reprisal may have helped deter Iraq from use of chemical weapons. Powers will be reluctant to rule out in advance almost all right of reprisal when they are fighting an adversary with so little regard for legality as Saddam Hussein.102

The powers involved in the war could usefully address or re-address the question of how they should now proceed in respect of 1977 Geneva Protocol I. (The Clinton administration has in fact initiated a new look at the Protocol.) One possible course is ratification by states not yet formally bound by the Protocol. By June 15, 1993, there were 125 states parties. Within an alliance context, ratification needs to be reconsidered anyway since, with Germany's

100. For a critical assessment of the effect of sanctions, see Paul Lewis, “Postwar Iraq is on its Feet Despite Strict UN Embargo,” International Herald Tribune (Zurich), January 25, 1993, p. 1.
ratification in 1991, and Portugal’s in 1992, twelve out of NATO’s sixteen members are parties to the Protocol. Further, on October 25, 1993, the UK announced its decision to ratify 1977 Protocols I and II. (Like other NATO members, the UK will, at ratification, make a number of reservations and declarations of understanding in respect of some of Protocol I’s provisions. There could be problems for the alliance if a majority of members are bound by this agreement but certain key members (France, Turkey, UK, and United States) are not bound. The other possible course is to continue the exercise initiated by the United States in 1987, and work out practical means of implementing the majority of the Protocol’s provisions.

1981 UN CONVENTION ON SPECIFIC CONVENTIONAL WEAPONS
The war also confirmed a lesson of several recent wars, including those in Cambodia and Angola: the urgency of getting observance of at least minimum rules about the use of landmines, so that risks to civilians, and the continuation of damage even after the war is over, can be minimized. This matter is addressed in most detail in Protocol II of the 1981 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. As yet, the number of states parties to the 1981 Weaponry Convention is low: at June 15, 1993, there were only 36 parties. In view of the seriousness of the mines problem, there is a case for re-examining this treaty, and especially its Protocol II, with a view to ratification.

PROPOSALS FOR NEW TREATIES
The Gulf War, like many previous wars, has led to proposals for new international agreements on the laws of war—especially in this case as regards environmental damage in war.103 Others, including the ICRC, preferred a more evolutionary path of working on clarifications of the current legal position, including in a UN framework.104 Although the problem which a proposed convention would address is serious, one may question whether it is really the best way forward. As indicated above, there are already

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provisions in customary and in written law which cover many aspects of the matter. Further, the most serious difficulty, so far as environmental issues were concerned, was not that the law was unclear, but rather that one country was prepared to violate it.

**APPLICABILITY OF PEACETIME INTERNATIONAL AGREEMENTS**

In a number of matters, the events of the war raised the question as to whether, and if so to what extent, existing international peacetime agreements continue to be applicable in a war. It is widely conceded that certain basic aspects of international human rights agreements continue to create obligations in time of war and military occupation. The same may be true, even in relations between belligerents, so far as some other types of agreement are concerned—including for example agreements on protection of aspects of the environment. This is a difficult question, but the great complexity of international cooperation of various types suggests that the old idea of a complete and sharp divide between the law of peace and the law of war may need some modification.

**Conclusion**

Overall, the 1990–91 Gulf conflict showed that the laws of war are an essential, if sometimes neglected, part of the framework of international relations. The case suggests that the laws of war have a particular relevance to coalition actions under UN auspices. It also indicates that observance of *jus in bello* may strengthen public and international governmental perceptions of the merits of a particular side in a conflict, and vice versa. Finally, it confirms that observance of international legal norms may contribute positively to the achievement of war aims and the effective management of military operations.

However, this conflict also confirmed that the laws of war have many limitations. They can easily be misused as a tool of propaganda. Their application is never free from controversy. The circumstances which actually arise in a war are often subtly different from what was envisaged when treaties were concluded. Basic legal concepts are sometimes too simple: for example, neutrality has been shown once again to be more complex in practice (especially in a case where UN sanctions are applied) than in legal theory. The means of redress against major war crimes committed by a state have proved weak or non-existent—so much so that the law may be better
viewed as a set of professional standards than a system of criminal justice. Further, there may be times when the law seems to tolerate extreme or one-sided military actions which may go against the grain of other, still important, ethical standards.

Yet the difficulties that arose in the Gulf conflict suggest that the main problem is not that new law is needed: rather, it is ensuring that the law that exists is adequately understood, widely ratified, sensibly interpreted, and effectively implemented. It remains important to ensure that the law’s purposes, principles, and content are properly incorporated both into military training and into the minds and practices of political leaders, diplomats and international civil servants.