

## **Kosovo, Afghanistan, Iraq: Is there a role for law in modern warfare?**

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**Speaker:** Professor Christopher Greenwood QC  
**Chair:** Professor Sarah Worthington

### **Professor Worthington**

Hello, I would like to welcome you to tonight's lecture, Kosovo, Afghanistan, Iraq: Is there a role for law in modern conflict? Quite a controversial topic isn't it? It's a lecture to be given by Professor Christopher Greenwood, one of my good friends and colleagues in the Law Department. He is currently convenor of the Law Department and he is chair of the International Humanitarian Law Project. This is a new project that was started at the end of last year in the Law Department and it has been set up to promote and facilitate the study of international humanitarian law and to engage the interests and enhance the dialogue between scholarly community, governments, organisations, institutions and the general public around the area of humanitarian issues. I'm particularly pleased, partly because I'm in the Law Department and the Deputy Director for Research and External Relations, to be presenting and chairing this first lecture of the International Humanitarian Law Project because I think these sorts of research projects set up within the law department or within other departments at the LSE are a critical way for LSE academics to engage with the wider public and influence the agenda in important social science issues. International humanitarian law is critical to some of the major problems that we are facing internationally and I think lawyers have an enormously important role to play in helping solve some of these issues that we seem to be beset by. It gives me great pleasure to introduce Chris Greenwood and invite him to come and present this lecture. The way we propose to do it is have Chris speak for about 40 minutes and then have questions at the end. So hold your fire until then.

### **Professor Greenwood**

Well, thank you very much, Sarah. I'm delighted to be asked to give the first of the International Humanitarian Law Project's series of lectures, although in fact slightly artificial as I am one of the members of the project that I should be giving the first one. It's largely because the guest speaker we had originally invited is not going to be able to come until next term but nevertheless this is one way at least of starting and not hanging around for the guest to be able to come here and I would particularly like to take this opportunity of thanking those who are responsible for organising and sponsoring this evening's lecture, particularly Mike Myer of the British Red Cross whose organisation has very kindly provided the funding which enabled us to get this project off the ground and Louise Arimatsu and Heather Harrison Dinniss who put in all the work of organising this lecture, something which takes a great more doing than you might imagine, particularly if you have me as the lecturer. Heather has been particularly effective at sending the emails that begin, Chris, you need to do this now. I don't quite know why she feels that's necessary, well perhaps I do.

Now the project, as Sarah has explained, is designed to promote and facilitate the study of the law which applies in time of armed conflict. Strictly humanitarian law of course is only that part of the law that deals not with whether it's lawful to go to war, but rather with how wars are fought, how hostilities are conducted, how prisoners are treated. But I am going to take my remit this evening a little bit more broadly and look at the law that applies to the three conflicts I've chosen, of Kosovo, Afghanistan and Iraq.

Now, it will come as no surprise to you, given what the Humanitarian Law Project is all about, that my answer to the question 'Is there a role for law in modern conflicts?', is going to be a very enthusiastic yes. We do however run the risk, particularly those of us who work in a field like humanitarian law, of taking for granted the fact that there is a role for the law that we are interested in and I think it is sometimes useful to stand back a little bit and field test that assumption. To have a look and see whether in the light of what has happened, whether in the light of our experience in a series of selected conflicts, it's really true to say that there is a role for international law in this area and for that reason I have picked these three conflicts as a good basis on which to test the role which law plays and perhaps offer a tentative assessment of how effective or ineffective it is in seeking to fill that role.

Now I realise that the choice of conflicts is highly selective. It's inevitable I'm afraid, given the time constraints of a single lecture that one has to select at some point - that's not always appreciated by everyone. Many years ago at the time of the Gulf conflict of 1991, I had a letter published in the Independent about the legality of that conflict. It was a letter that ran to I think, 150 words, so a little bit longer than the Lords Prayer and great deal less eloquent. I got an outraged postcard from a correspondent saying how very disappointed they were that I hadn't commented on India's invasion of Goa. Well the Indian intervention in Goa in 1963 is not perhaps at the forefront of everyone's mind in 1991 let alone today but those of you who feel that I should have dealt with Goa please forgive me. More seriously, of course I could have picked conflicts that had less of a western central, Anglo-centric focus. The number of lives lost in the fighting in the Congo, the genocide in Rwanda or what is happening at the moment in Sudan have been considerably greater than those in the three conflicts I've picked, but the reason for picking those three conflicts is two-fold. First of all, that all three are ones in which this country's forces have been involved and indeed are still involved and I think it makes it particularly pertinent that we in this country should take a long hard look at the legality of what we're involved in doing. Secondly, these are conflicts in which the governments which embarked upon them have made a great point of the fact that they are acting in accordance with the law and indeed acting in order to further the objectives of international law and while it would be facile to suggest that these conflicts are in anyway typical, it is I think legitimate to come to this conclusion. If there isn't a role for law in these three conflicts given the states that have been involved in them we can be fairly confident that the law is going to be pretty ineffective everywhere else in addition.

So that's my basis for choosing these three. I think they are useful case studies but though they have certain things in common, it is I would suggest to you, fundamentally flawed to see them as part and parcel, either of a titanic struggle of good against evil or demonising them as somehow all part and parcel of a sinister conspiracy. They have certain common factors but they were separate conflicts with different parties, different objectives and different legal justifications. So while we look at all three of them we shouldn't run them together.

Lastly, before I embark on what I want to say, I ought to issue a personal disclaimer. As some of you will know, I have been involved professionally, both in advisory work but also in appearing in court in cases in connection with a number of these conflicts, I want to make it clear at the outset so I don't have to say it each time we come to anything that I have been involved in, that anything I say today I do in my personal capacity and I'm not of course going to be able to answer any questions about any professional involvement that I might have had.

Now the role of international law in warfare, the laws of war, international humanitarian law which is its softer, gentler, more welcoming title, have come in for a great deal of criticism over the last few years from widely differing schools of thought and I think we can identify three different critics. We have first of all the idealist. The idealist is unhappy with the whole idea of a law on warfare. It serves he says to make it more acceptable to public opinion and thereby to legitimise the illegitimate. Quite a mouthful that one. Better on this analysis to recognise that war is terrible, that it's wholly antithetical to law and to do everything in our power to prevent it rather than trying to tame it by bringing it in some way within a legal framework. You find that analysis very pointedly stated by Tolstoy in his great novel War and Peace, and no less eloquently, although perhaps a little more abstractly in some of Philip Allott's more recent writings.

The second critic would have nothing to do with the first at all. I doubt they even speak to each other. The second critic is the realist. Now realists come in a number of different shapes and sizes, many of them are just straightforward cynics. States are never going to abide by the law, certainly not when their vital interests are at stake, certainly not when the fighting's started, so why pretend otherwise, but some of them go a great deal further than just that rather cynical perspective. Not only will states in practice ignore the law, but so they should. A view very popular with some of the neocon writers in the United States at the moment is that the vital interests of the state, or rather of one particular state, should necessarily override any considerations of law. It's actually right and proper on this analysis that international law has no role to play in armed conflict.

The third critic we could perhaps call the outraged. The outraged observer feels passionately that law does matter, that it should have a role in conflict, but his view is that the governments of the west have turned their backs on it, that in practice today it doesn't play any part, even though he wishes that it would. That's the view taken by many writers from a liberal tradition, particularly in this country and the rest of Western Europe. My colleague Philippe Sands would I think in many ways fall into that category.

Now all three of those critiques are extremely eloquent ones, but in my view they're profoundly mistaken and they are mistaken at more than one level. They are mistaken first of all at the empirical level. If you look at what actually happens in practice, it becomes clear that the states *do* take notice of the law. That doesn't mean to say that all states comply with all rules of all the laws relating to the use of force at all times. Nobody but a fool would take that position, but it does mean that to assume that the law is ignored all of the time is fallacious. Law is observed far more often than the outraged fear or the realist's wish. Secondly the perspective of the idealist in particular is mistaken in my view in suggesting somehow that war would be less likely to happen if we didn't have any of the laws that we currently have. There's absolutely no empirical evidence for that whatsoever. There's no indication that states, peoples, would be less willing to embark upon the use of force if there were no rules of humanitarian law, if there were no United Nations charter and indeed the contrary can I think be fairly confidently asserted. If you look at those conflicts such as the civil war in Rwanda, or the fighting which has taken place recently in the Congo, where law has effectively been thrown out of the window, that has not made those conflicts any less intense or made them endure for any shorter period of time. There's no indication that the short sharp shock, which some of the realist critics of international humanitarian law have argued for, there's no evidence that a short sharp shock in fact does make war less likely or less protracted.

There's also to my mind a very strong element in much of the idealist writing, of the same sort of school of thought that gives us the argument that sex education and contraception are to be opposed because they encourage vice and low sexual morals. Sad truth is that vice tends to thrive pretty well whether there are sex education classes in schools or condom machines in university lavatories. It doesn't really make any difference and likewise war is going to happen whether there are rules of international humanitarian law or not. The reality I would suggest is that international society has yet to find an effective means for preventing war altogether and that it's most unlikely to do so in the foreseeable future. It would involve societal changes, which there's no sign that international society is willing to accommodate and the recent growth of international terrorism probably makes this even less likely because we have moved away in a fairly short period of time from a world in which you could identify a very small group of actors as being the likely participants in armed conflict to a world with a far larger, far more diverse group of potential 'belligerents', although I put that word very much in inverted commas.

So my conclusion would be that we not only need law in respect of warfare, we have it and we have to work within in it. So now let us test that response against what we know about the three conflicts that I mentioned. If we look first of all at the conflict in Kosovo which began in 1999. Arguably this was the conflict out of the three I have identified for which there was the broadest degree of international support. None of the 19 NATO countries that embarked upon that conflict seems to have had a substantial opposition lobby. Moreover, if you look at the support which it attracted in the United Nations, it was considerable and diverse. When the Russian Federation put to the Security Council, somewhat ill advisedly you might think, a resolution condemning the use of force by NATO as an illegal act of aggression under international law, it was defeated by 12 votes to the 3 in the Security Council and while several of those 12 were members of NATO, the majority of them of course were not.

So the degree of support internationally for the Kosovo conflict was really quite substantial and yet arguably, it is the conflict out of the three for which it is most difficult to find the legal justification. There was no case there for self defence. Nobody suggested otherwise. There was no authorisation from the Security Council for the military action which took place. That's not to say that there was nothing from the Security Council at all. There was a series of resolutions in 1998 to 99 of considerable importance because they were conclusive and authoritative determination that there was a humanitarian emergency in Kosovo and who was responsible for that. They were also critical in identifying in what had to be done to remove that humanitarian conflict, but they didn't authorise military action. Now to many commentators that shows that the action which took place was unlawful, that the law had been violated. To other commentators the conflict may have been unlawful but it was nevertheless legitimate. It was morally and politically right even if illegal, the view taken very eloquently by Marti Koskenniemi, who's coming here to lecture next month but in my view neither of those analyses is satisfactory. The reality is much more subtle.

One certainly cannot treat the law here as being irrelevant. What you actually had was a clash of two fundamental and extremely important legal principles. The principle of respect for the sovereignty of states and independence of states on the one hand, and the principles that require promotion and respect for human rights on the other and it was that clash and there's been a tension between those two principles in my view since 1945. There's always been this problem in international law that on the one hand it seeks to preserve the independence of each state to do as it pleases within its territory while on the other hand limiting what it can

do within its territory. That tension has been present for decades but it's particularly evident in the Kosovo conflict.

Now to my mind, at the end of the century which gave us such contributions as the Holocaust, it would be extraordinary if contemporary international law said that it was always necessarily unlawful to use force to prevent a humanitarian catastrophe from taking place. That doesn't of course in itself satisfy the standards in respect of Kosovo. One still has to ask whether the scenario that was existing in Kosovo at the time was sufficient to justify humanitarian action. In my view it was. In a society where a quarter of the population were refugees or displaced before the fighting started and many more within days of the fighting beginning, to see a humanitarian catastrophe is not too difficult, but the critical point here is that one cannot possibly dismiss the role of law as irrelevant. One might end up concluding, as Koskenniemi does, that law can't answer these questions and therefore one has to go outside the law to look for some wider, moral or political legitimacy, but in my view that would be a dreadful mistake. To say as a one off that law and morality have parted company is one thing, but to institutionalise that partition by saying we can never accommodate the notion of humanitarian action within the law but yet we must recognise that it will be legitimate on some occasions, is frankly a confession of complete failure by international lawyers. Of course there is the scope for abuse in a right of humanitarian intervention but as a lawyer I am paid to tell the difference between a good case and a bad one and so are many others of you here in this audience or others who will in due course be paid to tell the difference between good arguments and bad arguments - and if one looks at the risk of abuse, where is that risk greater? In the action that was taken in Kosovo or the complete inaction in Rwanda only 5 years earlier? I for one, feel a great deal more ashamed of what we didn't do in Rwanda than anything we did do in Kosovo.

But there are three other points about Kosovo that I'd like to stress. The first is that when the aerial bombing ends in mid-June 1999, you move into a completely different legal area, because from that moment onwards there is a clear Security Council mandate for what takes place. Resolution 1244 authorises the deployment of ground troops into Kosovo and their continuing presence to this day and that's typical of all of the three conflicts that we're looking at. One can't generalise about them. You have to look instead at the different phases and here there is a clear break with the adoption of Resolution 1244, although I for one would not go down the road that Professor Wedgwood of the United States has gone down of arguing that Resolution 1244 is a retrospective validation by the Security Council of everything that had happened beforehand. I'm afraid that partly because I'm a practitioner as well as an academic, I have always heartily disliked retrospective validations. Having stood up in the international court and defended the legality of what was happening in Kosovo in May 1999, I find it professionally rather unattractive to have to stand up later and say well you can forget what I said then because it all changed retrospectively a few weeks later and I suspect that China, Russia, and a number of other governments that voted for Resolution 1244 would agree with me. Incidentally, those of you who enjoy seeing the speed with which academics can change their position on a subject might like to enjoy the speed with which so many members of the French international legal community changed their enthusiasm for retrospective validation by the Security Council in the 4 years that lapsed between Resolution 1244 in Kosovo and Resolution 1483 in Iraq.

The second point is about humanitarian law pure and simple. What issues of humanitarian law did this conflict give rise to? Well the one that was perhaps most contentious was the selection of targets and the targeting policy that was followed, and in particular two questions

arise here. The first is the fact that NATO confined itself to aerial bombardment, difficult actually to see how it could have done anything else as it had no ground forces in the area, but secondly that it confined itself to aerial bombardment at generally rather high altitudes, 15,000ft and above. Now in my opinion it's a mistake to assume as a matter of course that that shows a callousness about civilian life on the ground. A good case can be made, and was certainly made to me by a pilot, for saying that flying at 15,000ft beyond the reach of anti-aircraft fire you tend to be rather more careful about dropping your munitions than you would be flying at 5000ft when you are taking evasive action all the time in a plane that moves at 500 miles an hour and when a missile can catch you in a matter of seconds. But it does highlight one of the most important and difficult debates of our time, which is especially important for a democracy like this. How do we as a democratic society, where we have to justify to parents, to voters, why we are taking risks with the lives of our servicemen, how do we reconcile the need to protect those servicemen with the need to minimise civilian casualties in the areas that are under attack?

Now I can't comment on the specific decisions that were taken in the Kosovo conflict. What I can say from my experience there, is that if the story could be told of the lengths to which the British government certainly went in ascertaining that each target that was attacked with British involvement was a target which met the legal criteria in humanitarian law and the method of attack met the criteria in humanitarian law, it would I think be a story that would surprise many of you in this room. The notion that there was no respect there for legality in terms of target selection and methods of attack is quite simply nonsensical if you see the lengths to which they went.

The other aspect about targeting I just briefly comment on is that Kosovo was an unusual conflict in the sense that the purpose for which force was being used was not to defeat an enemy army, but rather to put pressure on a government to stop a policy of ethnic cleansing. Now if that is your purpose, it raises the question about whether the humanitarian law rules on targeting really serve the purpose for which they are intended. A target is lawful if, but only if, it makes an effective contribution to the enemy's military action. That means that it might have been perfectly lawful to bomb a barracks of 18 year old conscripts but not to attack a target of high prestige value with a link perhaps to the Milosevic family or to the ruling party in Serbia, which could be attacked without any loss of life at all, but which made no effective contribution to military action. Now as the law stands that's unlawful and it's actually very difficult to see how the law could be changed, how it could evolve to make it legitimate, without undermining the key principle of the protection of the civilian which was perhaps the most important principle in contemporary humanitarian law. I merely raise it as one of the difficult areas that was thrown up by the Kosovo conflict and which I think would repay much closer study.

The last point I'd make about Kosovo is that in sharp contrast to the previous two occasions on which British forces had been involved in large scale military operations, in Iraq in 1991 and in the Falkland Islands 10 years earlier, there was a plethora of litigation following from the Kosovo conflict. A case in the International Court of Justice which challenged the legality, not only of the way the war was being fought but of the decision to resort to force at all, decided in the end on jurisdictional grounds. A report by the Prosecutor of the International Criminal Tribunal on whether there were grounds for bringing charges against the NATO personnel, something which caused apoplexy in so much of Jesse Helm's office at any rate, but which decided that there was no ground for bringing charges against anyone and lastly the case of Bankovic in the European Court of Human Rights which decided that

the European Convention on Human Rights was not applicable to the bombardment of targets in Yugoslavia. That last case is cited by many as an indication that there's no role for law in this type of conflict. In my opinion it doesn't mean anything of the kind. It's rather about which law is to be applied, whether it is humanitarian law or human rights law, two cousins whose family relationship has never been an entirely happy one. They are rather like the sort of relatives who meet on Christmas afternoon and bicker constantly because they've had too much to drink at lunchtime.

Let's turn from that to the case of Afghanistan. Here the legal basis for resorting to force was very much clearer. In the aftermath of the atrocities of the 11th September 2001 there was in most people's view an overwhelming case for the use of force based on the right of individual and collective self defence. It wasn't a case of pre-emptive military action in the sense in which that term is used in the United States national security strategy document, a document which actually was only published in 2002 because there had already been the attacks and I think a good case could be made for saying that further attacks from Al Qaeda against American and other targets were imminent. The concept of imminence in the law of self defence is always rather an elastic one and difficult to pin down but I think when one is dealing with terrorist violence it has to be treated rather differently from imminence in the sense of tanks rolling across an international frontier.

Perhaps the only question mark over the legality of resorting to force would revolve around two issues. First of all whether it was legitimate to rely on the right of self defence against non-state actors or is self defence confined to the case where one state attacks another. I must confess I've always thought this was one of the most ridiculous debates in international law today. There is nothing in the charter of the United Nations that says that the right of self defence is confined to defence against states. There is nothing in the practice of states that suggests it, there's nothing in the history of the right of self defence that suggests it. The argument appears to turn on a somewhat contrived interpretation of the French text of Article 51 and yet very surprisingly, not least because the issues didn't arise, it's advisory opinion on the Israeli wall in 2004, the International Court did give birth to a brief statement which suggests that the right of self defence is confined to action against states. In my opinion that's something which needs to be revisited very quickly and very carefully. It doesn't fit with contemporary international law. I think one can apply to it the test of asking if you went out into the street and raised this question with half a dozen intelligent bystanders, the men and women on the Clapham omnibus as we used to say, I think most of them would assume that you were completely crazy to be asking the question at all and if the lay public thinks that of international lawyers I think it's time that we took a long hard look at the assumptions on which we are acting.

A more difficult question is whether if it was lawful to resort to force in self defence it was lawful to use force against Afghanistan and not simply against the Al Qaeda movement. Now as a normal proposition I would say quite emphatically that the answer to that question would be no. The idea that because terrorists have operated from the territory of a state, that state itself becomes a legitimate target for attack is a principle which carried to its logical conclusion would have justified the Royal Air Force in reducing Boston to rubble during the early years of the Northern Irish troubles. I made the mistake of giving this example when I was lecturing in the United States once expecting to be attacked by the audience, but it was in a university in Mississippi and their reaction was yeah, go for it! I'd forgotten just how long is the arm of the American civil war down in the Deep South. But I think Afghanistan is a special case because of the extent of Taliban involvement with Al Qaeda and the fact that the

Security Council, and again you see here the mixture of Security Council involvement and unilateral action, the Security Council had already passed Resolutions which bound the Taliban government to hand over Osama Bin Laden and the leadership and to prevent the use of its territory for military action against the United States.

Now if one turns to the question of international humanitarian law issues in Afghanistan, targeting again is the first important issue but I've said what I wanted to say about that, let me instead focus on two other questions, what law applied in Afghanistan? The United States has taken the position that it's engaged not simply in an armed conflict with Afghanistan which it undoubtedly was in 2001, nobody would contest that, but rather in a broader war on terrorism which entitles it to rely upon the powers of the belligerent in armed conflict anywhere. Now that to my mind raises a number of very serious difficulties indeed. First of all at the political level it seems to me to be a thoroughly unwise decision because it gives a spurious air of legitimacy and a status to Al Qaeda which it simply doesn't deserve. The laws of armed conflict are based on the principle that they apply equally to both parties to the conflict, but there should be no suggestion of any equality of any kind between Al Qaeda and the United States or the United Kingdom or any other government for that matter.

Secondly the notion of a war with not a state but some shadowy entity with no territory, no population, no government, no means of compliance or interest in complying with humanitarian law, it seems to me to be a complete distortion of the way in which the law of armed conflict has developed over time. Now that first difference might be a pure difference of theory, a conceptual difference with no practical substance to it because I wouldn't doubt for a moment the legality of the use of force in Afghanistan, but it does I think have a practical significance in relation to the second question I wanted to highlight which is the indefinite detention at Guantanamo Bay of over 500 people, most but not all of whom were taken prisoner in Afghanistan, or at least in connection with the conflict in Afghanistan.

Now much of the criticism of the United States over Guantanamo Bay is in my view misplaced. A state is entitled to detain for the duration of a conflict unlawful enemy combatants. It would be extraordinary if it was entitled to detain as prisoners of war lawful enemy combatants but not entitled to detain people who were taking part in hostilities when they weren't allowed to do so and the notion of an unlawful combatant is not, as often has been suggested, something conveniently invented by the Defence Department in 2002. It is as old as the laws of war. As soon as you have a notion of prisoner of war, you have a notion of unlawful combatant alongside it, but there are I think two really serious drawbacks to what the United States has done.

The first is the approach taken initially, until the Supreme Court overturned it, of the US Executive deciding without reference to any kind of impartial tribunal about whether somebody was a lawful combatant or an unlawful one, a prisoner of war or a detainee without POW status. That to my mind is in clear breach of the provisions of the Geneva Convention on Prisoners of War. Although it is worth noticing that the Geneva Convention presupposes that anyone who goes before an impartial tribunal wants to be a prisoner of war, that that is the optimal result and certainly it is better to be a prisoner of war than to be any other kind of prisoner, as Winston Churchill, who himself had been one, made clear in his memoirs. But that's not really what much of the criticism today of the United States is all about. It's by those who argue that they shouldn't be detained at all, that they weren't combatants, they weren't taking part in the hostilities, it's all a dreadful mistake and humanitarian law does not in my view deal satisfactorily with that. It's one of the areas where the relationship between

humanitarian law and human rights law is in bad need of attention but it is difficult to escape the conclusion that Guantanamo has been both a legal and a political disaster for the United States. The question to my mind is where we go from here, given that we wouldn't wish to start from where we are, what next, and that's something which is going to call for very careful and imaginative analysis, both of the legal and practical levels.

Lastly, a word or two about Iraq in 2003. Now that's by far the most controversial of the three cases. You need to be clear however what the debate is about. As far as the initial resort to force in Iraq is concerned that was not justified by the governments that engaged in it on the basis of the US doctrine of pre-emptive use of force, nor was it justified on the basis of self defence against an imminent armed attack. For all the argument about the Prime Minister's statement of 45 minutes in September 2002, by the time one comes to March 2003 that has disappeared. The argument instead was based on a rather difficult and technical argument that the mandate granted to the coalition states, in the aftermath of Iraq's invasion of Kuwait in 1990 by Resolution 678, have been reaffirmed and renewed by later Resolutions of the Council, 687 and 1441, and was still in force to be relied upon when Britain and the United States and others embarked on the intervention in March 2003. Now that's an argument which I found compelling at the time and I still find it compelling as a proposition of law, but I know there are one or two people who don't agree with me about that! One or two of them might even be here tonight.

It is therefore important I suggest to you, not to allow the debate about the initial resort to force to have an undue impact upon an analysis of the equally serious questions that arise afterwards, two of them in particular. First of all the legality of the subsequent presence of foreign troops in Iraq, now that has nothing whatever to do with whether the initial resort to force was legal or not because a few weeks after George Bush, perhaps a little ill advisedly, made his mission accomplished speech, the Security Council unanimously adopted Resolution 1483 and then in October 2003 Resolution 1511, and those Resolutions provided a mandate for the presence of a multinational force in Iraq. It recognised the Iraqi interim government as having essentially what's left of Iraqi governmental standing and also provided a mandate for the Coalition Provisional Authority which existed alongside the coalition's mandate rather the coalition's powers under international humanitarian law; and then again you have Resolution 1546 in June 2004 which recognises the end of the occupation and provides for recognition of the new Iraqi government which followed upon it.

Now in the light of those later Resolutions, which are unequivocal in their language and received unanimous or near unanimous support in the Security Council, there is in my view no room whatever for the sort of argument of the defendant in a recent court martial who said he wasn't prepared to go to Iraq because if he did he would be taking part in an illegal war. Well if the war was illegal, which I would doubt, it had finished by the time that he was going to be deployed to Iraq and there was an entirely different legal basis for the presence of foreign forces by that stage and it is very important to distinguish between those different phases.

The second point in relation to Iraq, and this is where one comes to the more, the purer perhaps international humanitarian law, is looking at the powers of the occupier during the period of the occupation which would run from the 1st May 2003 to the 28th June 2004. Now that was a most interesting period because it was probably the closest one came to an occupier seeking to reconstruct a society since the end of the Second World War. You would have to go back to the reconstruction of Germany and Japan in the late 1940's, early 50's, to

find anything that is remotely comparable to it. Was it within the scope however of an occupier's powers under humanitarian law and here again to answer that question you've got to look both at the law of belligerent occupation and at the same time that the extent of the powers granted by the various Security Council Resolutions because they went further in what they authorised the CPA to do than the ordinary rules of international humanitarian law would have done.

Now what all this suggests to me is that the debate about legality in relation to the conduct and initiation of warfare today is very much a part of the broader, political, moral, philosophical debates, that there is undoubtedly a role for law here. There is also plenty of evidence of a wish and indeed an effort to comply with the law on targeting, for example, or belligerent occupation in particular. How effective the law has been is much more difficult to assess and it's unlikely until many of the documents that are currently classified or at least many of the documents that are currently classified and haven't yet been leaked, are made available and we get the sort of magisterial work that Sir Lawrence Freedman has just published on the Falklands conflict of 1982. It is unlikely we will be able to make a definitive assessment but I would suggest to you that there is more than enough material to make the outraged critic reconsider his position provided that it is he is open minded enough to do so.

There is no doubt that there is plenty of material for the International Humanitarian Law Project to work on and we very much look forward to working on it.

[APPLAUSE]

### **Professor Worthington**

Thank you very much, Chris. You said that you felt rather strange for you to be chair of the International Humanitarian Law Project and giving the first lecture, it seems to me not an abuse of chair's privilege but an illustration of the standard of debate that can be expected to come out of this project, an exceptional standard and a hard act for other people to follow. Now we'll see how you deal with questions. Next test! I thought we would take questions in groups.

### **Question 1**

My name is Mr Alami, I'm a final year law student here - my question is how do you propose to hold governments accountable for the types of weapons they use in the conduct of their warfare? For instance cluster bombs in civilian areas or what came in the news a few months ago about the use of white phosphorous.

### **Question 2**

Anthony Dworkins with the Crime Support Project – you said that with reference to Afghanistan that there clearly was a right to detain enemy fighters lawful or unlawful until the end of hostilities - my question is, when you talk about the end of hostilities, do you mean the end of an international armed conflict or the end of fighting altogether and has that point been reached yet?

### **Question 3**

I'm <NAME> and I would like to identify myself as someone who originates from the only capital in Europe, in the world, which has been bombed by both NATO and the Nazis. There is the view of those who have experienced foreign aggression and occupation and make comparisons and by the way Mr Hitler in his international community back in 1941 may well

differ a great deal from the international community that American presidents lead in terms of NATO but in one sense I would suggest they are absolutely the same and in my equal right and they are the only thing that needs to be addressed here and it has not been addressed at all, is that the participants in a war conflict must accept the same laws for themselves as do those who they bomb and aggress against. That means that the US for once accepts the international law, accepts the judgement of the International Court of Justice and accept all those United Nations Resolutions that they always ignore and we know where the US stands. It stands, it says we are above the law, we can do whatever we like, our citizens are not going to be judged and very briefly if I may say there is a misnomer there, mis-categorisation, Afghanistan and Iraq are countries, Kosovo is of course a province of Yugoslavia, the country that was bombed with the equivalent of three Hiroshima bombs and you will know very well, I hear about concerns from 15,000ft, they bomb the Chinese embassy, they also pulverised radio/television Serbia, murdered 16 of its people who worked there and I noticed that hardly anyone pays any attention and you defended, Mr Greenwood, in fact the NATO/British state when the families of those who wanted confrontation on this came to the European Court of Human Rights.

### **Professor Greenwood**

Right, let me try and answer those in turn. First of all, Mr Alami, two points in response to your question. The first is that one needs to be a little careful about jumping to the conclusion that a particular type of weapon, which has been the subject of a lot of press comment, is necessarily unlawful per se. There is nothing unlawful per se about cluster bombs. Now the problem with cluster bombs is two fold. First of all, if you use them in a heavily populated area then you are likely to kill quite a number of civilians but that is true of virtually any weapon. It's the way it's used rather than the weapon itself which is the problem. The machete is simply a 20th century version of a weapon that has been used for killing people since the beginning of time and it killed more people in Rwanda than cluster bombs have killed since cluster bombs have been invented. So look rather carefully at the nature of the weapon and the manner of its use.

The second point is that there is a both a body of substantive law on this, a number of specific treaties dealing with particular weapons although none that deal specifically with either cluster bombs or white phosphorous and also a number of general principles which prohibit indiscriminate weaponry, the indiscriminate use of a weapon or the use of weapons that are calculated to cause unnecessary suffering. Those prohibitions can be enforced for example through the International Criminal Court, for those states who accept its jurisdiction. They can be enforced in the context of Yugoslavia for instance by the International Criminal Tribunal for Yugoslavia.

In response to Anthony Dworkins question, yes, what's the end of hostilities, that's the 64,000 dollar, rather more than 64,000 dollar question in terms of Guantanamo Bay. The answer I would like to give you is once the hostilities in Afghanistan finished that should be an end of the matter but that has long gone. The question therefore is what you do with those detainees now? Repatriate them to Afghanistan would not necessarily be the answer of choice for anyone from the human rights world for example. What I think we have to do is first of all to break with the notion that they can be detained for so long as the war on terrorism continues. That to my mind is a completely spurious argument but secondly to get away from a rather simplistic approach of saying that we must therefore treat them the same way as we would treat prisoners of war at the end of the conflict. The end of the conflict has come, we must repatriate them at once, without any serious thought being given of the consequences of

doing so. Now if I had a blueprint for how to reconcile those two tensions I would give it to you but I'm afraid I don't. I hope that Guantanamo Bay will be closed as soon as possible. How it's closed and what happens to the people in it is something which is going to be extremely difficult to sort out.

Lastly, Mr <NAME>, you and I are just going to have to agree to differ I'm afraid. It's nothing to do with might being right, nor with respect, is it anything to do with states not accepting the same legal standards. Let me take the example you particularly gave about the International Court of Justice. Yugoslavia did indeed try and take the United States, the United Kingdom and eight other NATO states to the International Court. In order to do that a country which had never accepted the jurisdiction of the International Court itself, which had vigorously contested on jurisdictional grounds charges of genocide brought against it by the government of Bosnia Herzegovina, deposited an acceptance of the Court's jurisdiction at the end of April 1999 which did not have retrospective effect and which was designed therefore, rather skilfully if I may say so, the lawyers employed by Mr Milosevic did quite a careful job on this, to ensure that they could bring legal proceedings against NATO without any risk of the NATO states bringing any claim against them for what had happened in Kosovo that had caused the conflict. So I think if one is looking at the question of different states not accepting the same standards one might perhaps look rather carefully at the optional clause declaration deposited by Yugoslavia in April 1999.

As for the case about RTS Serbia I did indeed act as counsel for the British government. I've never made any secret of that fact and I alluded to it very briefly at the beginning of my lecture. I argued on behalf of Britain and the other defendants in that action at the European Convention of Human Rights was not applicable to this situation. The European Court of Human Rights by 17 votes to nil accepted that argument. I don't think that there's anything to be ashamed of in that.

#### **Question 4**

I'd like to take issue with the stance that you've taken with regard to the UK, as you say attempt to minimise civilian deaths, and partially with what you said about the cluster bombs. If you are following a policy which is attempting to minimise civilian deaths you do not use depleted uranium shells and you do not use cluster bombs which were well known to have been used, as the Daily Telegraph happened to say, ones which had gone past their expiry date so maximising their chance that they would not explode on use so effectively becoming mines and mines have been adjudged to be an unlawful weapon. So in that sort of regard both their use in such a way to make them perhaps unlawful weapons and not being used to minimise civilian casualties and it was said that they were also used when people were retreating from conflict situations so that the very civilians that they were supposed to be protecting in Kosovo or the Iraqi conflict were the ones who actually suffered and would you also like to comment on when you talk about targeting, as a previous speaker said, is it permissible to target media stations. Is it also ... bridges which don't have a military use?

#### **Question 5**

I just want to talk about what you said about attacking Afghanistan, attacking terrorists particularly. You said there was nothing in international law, in the charter in particular, that said you couldn't attack terrorists if...there's nothing that said the armed attack had to come from a state if you were attacking terrorists but in respect of attacking Afghanistan itself the attack had to come from the state. What I would say is, first of all, in Nicaragua the ICJ said if an attack was to come from irregulars, which I take to mean non-state actors, there would

have to be a degree of imputability to the state because even if you were attacking terrorists, if you're bombing a base it's on the territorial estate, you are then using force against the territorial integrity of that state so doesn't that imply then that even if these attacks come from non-state actors it needs to be imputable to the state for you to then to be able...for you to violate the territorial integrity.

### **Question 6**

Charles Garraway, Associate Fellow, Chatham House – you mentioned that the executive decision in Guantanamo was in your view a clear breach of the third Geneva Convention. Is there not a greater problem with the "global war on terror"? If it is an armed conflict what law applies at all? Is it a Geneva conflict? It doesn't seem to be an international armed conflict within Common Article 2 or a non-international armed conflict within Common Article 3. What law does apply?

### **Question 7**

Toby Fenwick from UCL – my question concerns the trial of Lieutenant Malcolm Kendall-Smith that you referred to obliquely. I think we agree that he violated direct orders for a legal situation. My question is about the judgement itself though. The Judge Advocate is reported to have said that British officers are not expected to question their orders for legality beforehand. I wondered about your views on that.

### **Professor Greenwood**

Depleted uranium is not a weapon you would use as an anti-personnel weapon; depleted uranium is essentially used as an anti-armoured vehicles weapon. Likewise cluster bombs are not a weapon you would normally use against people. It's a weapon you'd normally use against material and the use of both of them is to my mind perfectly lawful against equipment. You've got to use them in a manner which doesn't expose the civilian population to unnecessary risk and of course the risk element with cluster bombs is greater because of the risk that some of the bombs won't explode, although you have that problem anyway with every other type of ordinance. You know ordinary bombs don't explode. You would be surprised how many bombs from the Second World War are still being dug up around the world and which are still very dangerous. So I think it is not a good idea to become too fixated about the cluster bombs element of it.

You asked about attacking troops retreating or people retreating, well of course if they are civilians they are not a lawful target for attack anyway. The only circumstances in which an attack on say, a group of civilians retreating from an armed conflict would not be unlawful, would be if there was a genuine mistake, if those carrying out the attack thought they were attacking a military target and that's a matter really of looking at the question of the information that they had available to them at the time but the fact that it's troops who are retreating, the fact that they're retreating doesn't make any difference at all, the enemy's military are a lawful target under humanitarian law whether they are coming towards you or going away and indeed retreating forces have always been a particular object of attack in conflict.

### **Speaker**

[INAUDIBLE]

### **Professor Greenwood**

Well, carrying a white flag is a rather different matter because that is a suggestion that the people concerned are trying to surrender. Now that's got nothing to do with retreating. If you wish to surrender you shouldn't be retreating, you should be moving towards the people to whom you are trying to surrender. You can't immunise armed men from attack by waving a white flag.

The other point I'd make about bridges which don't have a military use – any bridge can have a military use like any railway line, like any road, almost any building, the question is whether this particular bridge in the circumstances of this time, in this conflict, either is being used by the military or could be used by them. The fact that they are not at the moment using it doesn't mean to say that it doesn't have a potential value that would make it a target. Now I don't quite buy into the theory that a bridge is always a legitimate target which is something that you find in a lot of military handbooks but bridges would be very high on most targeteer's lists and perfectly lawfully so.

Now let me turn from that to the question about Nicaragua. You're not doing an exam on this are you? They're two rather different questions if I may say so run together, entirely understandably because the International Court of Justice has made the exactly the same mistake. The issue in the Nicaragua case was whether particular action was imputable to the United States for the purpose of making the US liable in compensation to Nicaragua and the United States won that part of the case. The activities of the contras were not imputable to the United States because the US didn't control them. They weren't an arm of the United States. Now that's quite a controversial ruling and it's been questioned in its principle by the International Criminal Tribunal for Yugoslavia but the International Court was not there saying that unless the use of irregular forces is imputable to a state it can't constitute an armed attack. What it did say, in my view rather unwisely, was that the use of covert force would only amount to an armed attack if it reached a level of intensity, and the language in which it put that particular part of its judgement referred to the use of irregular force by states, but it's wrong in my view to read that as meaning that only if states do it then it's amount to an armed attack. The Court wasn't required to consider the question of the use of force by non-state actors in the Nicaragua case and that particular part of Nicaragua, and bear in mind it is a judgement of 600 pages, in that particular part of the case where they made that short comment about irregulars that you picked up, they weren't dealing with the question of the use of force by non-state actors. The sentence that they used has in my view has been taken out of context and assumed to mean that *only* if there is a degree of state involvement can it amount to an armed attack.

Now where you are quite right is that just because the use of force by a non-state movement qualifies as an armed attack, that's not enough. Establishing that Al Qaeda's attack on the Twin Towers was an armed attack, and I don't have any difficulty with that proposition, that in itself doesn't justify the use of force against Afghanistan, but I also think it would be wrong to say that unless you can show in advance the link with the Taliban you cannot justify military action in Afghanistan. That's also wrong. I remember James Crawford who is one of the most skilful lawyers in the business, and particularly on this subject, saying that the jury was still out on whether the use of force by Al Qaeda was imputable to Afghanistan. That was a remark he made of the American Society of International Law last year. Well if the jury is still out now it's not much of a guide to those who have to take a decision about action.

I think the better analogy would be this one. In a war, a neutral state may not allow its territory to be used for action by either of the two belligerents. If it does so, if it permits it,

either because it doesn't want to do anything about it or it can't do anything about it, then it opens up its territory for counter action by the other belligerent. If its own forces get in the way and try to prevent that, which is undoubtedly going to happen with action against Al Qaeda and Afghanistan, then they become a lawful target of military action as well, but that analysis is really peculiar to the situation in Afghanistan. The extent of Al Qaeda's presence there, the nature of its relationship with the Taliban, is quite different from what you normally find of a relatively small group of terrorists operating in a country where the government of that country is trying, perhaps not very effectively, to do something about it. So I think it would be a mistake to jump from Afghanistan to say that therefore Israel for example, is always entitled to use military force against terrorists anywhere in the world that it happens to find them.

### **Professor Worthington**

Please let me know what mark that answer gets will you!

### **Professor Greenwood**

Colonel Garraway, what law applies to the war on terrorism? The answer is that of course the question can't be answered, which is another indication of why the notion of a war on terrorism just doesn't stand up to analysis as a matter of law. I always thought that when people talked about a war on terrorism they meant it in a purely political, rhetorical sense, just like one talks about a war on drugs or a war on poverty. I mean in that sense it is perfectly understandable particularly after 9/11, but to talk about a war on terrorism as a serious legal proposition doesn't, so far as I can see, stand up at all and it is striking that no other state, even those who have been closely allied with the US and Afghanistan conflict for example, no other state has gone down that road.

Lastly, the Kendall-Smith trial – now the trouble with that is I haven't read what the Judge Advocate said. I read a press report in a newspaper in Tobago which I have to say wasn't, you know...the Tobagan press wasn't covering this trial with quite the close attention that I would have wished, so it would perhaps be rather dangerous for me to comment. There is a proposition under English law as well as international law, that the soldier not only is entitled to disobey a manifestly illegal order, he has a duty to disobey a manifestly illegal order. But that was written in the context of orders such as shoot these prisoners, Sergeant, or bayonet these civilians. It is, I think, rather different when the question is about the legality of the decision to resort to force and if one looks at the analysis of the House of Lords, roughly contemporary with Judge Bayliss's decision in the court martial in the case of the Crown v Milling and Jones, the case about the peace protesters who broke into the US airbase in Britain, I think you can see the same sort of reasoning below the surface there. That there is a difference between an order which is illegal under humanitarian law and giving somebody a right to say well I will pick and choose which conflicts I think are okay and which ones are not. In fact, however, even if you interpreted the law in the manner most favourable to Mr Kendall-Smith, I still don't see how his argument can even get on its feet because there wasn't any illegality to what he was being asked to do and when he was being asked to do it.

### **Professor Worthington**

Before we thank Chris, can I just give you a couple of notices. First of all, as you know, this was the first lecture in the International Humanitarian Law Project lecture series. The second lecture is on Monday 5th June and it is given by Professor Sir Adam Roberts who will be discussing transformative military occupation, applying the laws of war and human rights. I don't think I quite appreciated the issue of the conflict between those two and until early in

your lecture, Chris. Many of you have picked up a flyer already about that lecture, if not you can pick up one on the way out. That flyer also contains the email address for the International Humanitarian Law Project if you want to be kept notified of forthcoming events or projects that are being undertaken. Finally, after we have said thank you, there's a reception upstairs on the 5th floor in the staff dining room to which you are all invited.

Lastly, if that was an example of educating, informing, stimulating debate it was a good exercise. Thank you very much.

[APPLAUSE]