

# Center for Constitutional Rights

A NON-PROFIT LEGAL/EDUCATION ORGANIZATION COMMITTED TO THE CREATIVE USE OF LAW AS A POSITIVE FORCE FOR SOCIAL CHANGE.

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1600 Pennsylvania Avenue N.W.  
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Secretary of Defense  
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Washington D.C. 20301

January 24, 2002

## **Re: CONSEQUENCES OF FUTURE USE OF FORCE AGAINST IRAQ**

Dear Sirs:

We, the undersigned Law Professors and U.S. Non-Governmental Organizations write to you to raise our concerns about possible violations of international humanitarian law (IHL) that may occur in any future use of force against Iraq. This letter does not concede or accept that any future use of force would be lawful under international law. Nor do we accept that all “peaceful means” to resolve the dispute have been exhausted as required under Article 33 of the UN Charter. Indeed, we consider that any future use of force without a new U.N. Security Council Resolution would constitute a crime against peace or aggressive war in violation of the U.N. Charter.

Our primary concern in this letter is with the large number of civilian casualties that may result should U.S. and coalition forces fail to comply with IHL in using force against Iraq, in particular, the fundamental rules of distinction, military necessity and proportionality.<sup>1</sup> Large numbers of civilian casualties were documented during the Gulf War 1991 and there is now published information that there will be a large number of civilian casualties in this war. For example, a recently published confidential United Nations report which predicts that “as many as 500,000 civilians could require treatment to a greater or lesser degree as a result of direct or indirect injuries.” (citing WHO report estimates) as a consequence of any future war.<sup>2</sup> Many of the civilian deaths in the 1991 war could have been avoided had IHL been adhered to in a more

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<sup>1</sup> The most comprehensive statement of the rules governing the conduct of hostilities relative to international armed conflict is Protocol 1 Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1). Protocol 1 was adopted in 1977 and has been ratified by 160 states. Although the United States has not ratified it, key provisions of the Protocol are incorporated in its military manuals and statements have been made by Senior Officials to the effect that the US considers them declaratory of customary international law. Indeed it is widely considered that many of its fundamental provisions are in fact part of customary international law and as such binding vis-à-vis non-part states as such.

<sup>2</sup> Likely Humanitarian Scenarios, United Nations, December 10, 2002.

rigorous fashion than it was by the U.S. and coalition armed forces. Similarly, in any future use of force, compliance with IHL will be a necessary prerequisite to ensuring the least number of civilian deaths.

Overall, IHL is aimed at minimizing, to the maximum extent possible, adverse impacts of armed conflict on civilian lives and infrastructure. It places certain constraints on the conduct of hostilities and prescribes that all feasible precautions must be taken in the choice of means and methods of attack so as to protect civilian life. These protections encompass both the selection of weapons or weapon systems and the manner in which such weapons are used. It prohibits not only direct attacks against civilians and civilian infrastructure, but also the planning and execution of attacks which fail to adequately distinguish between military targets and civilians or civilian objects as well as those attacks, which, although aimed at a legitimate military targets, have a disproportionate impact upon civilians or civilian objects. In accordance with these principles, the following means and methods of attack, all of which, to some extent, were used during recent armed conflicts in which U.S. armed forces have participated, violate IHL:

1. High level, indiscriminate, air-strikes on known centers of civilian population.
2. Carpet bombing.
3. Fuel-air explosives, cluster bombs, multiple rocket launcher systems or nuclear weapons, including B61-11s (tactical nuclear earth-penetrating weapons designed to destroy deep underground targets.)
4. Excessive targeting of electricity supplies causing damage to civilian facilities reliant upon such supplies, for example, water supply and treatment facilities and hospitals.
5. Bombing of works or installations containing “dangerous forces”, namely, dams, dykes and nuclear electrical generating stations.
6. Bombing specifically aimed at terrorizing or undermining the morale of civilians or that is designed to cause civilians to overthrow an existing government.

Our concerns that IHL will be violated during any war with Iraq stem from evidence of the past use of force by the United States and its coalition partners in the Gulf War 1991, Kosovo and most recently in Afghanistan. During these conflicts violations of IHL by all parties were extensively documented. Given these past violations, there is a reasonable basis for assuming that in any future military action against Iraq, these requirements will once again be breached.

Although you are obviously better placed than ourselves to know the exact details of the past use of force in the Gulf War, Kosovo and Afghanistan, the basis of our concerns stem from the following documented incidents. These particular incidents, most of which occurred during the 1991 Gulf War, all violated IHL and some indeed constitute grave breaches of the Geneva Conventions:

### **THE GULF WAR, 1991**

#### **1. Illegitimate means and methods of attack**

Daytime attacks on targets in or near urban areas:

- A mid-afternoon attack on a bridge in Nasiriyya, Southern Iraq, killing 100 people and injuring 80 others.
- A daytime attack on bridges situated near crowded market places in Samawa city killing 100 civilians and injuring many others.
- A 3.30 pm attack on an oil-storage tank, near a gas distribution point where

- civilians were known to have regularly gathered to purchase fuel for domestic purposes killing or injuring some 200 people.
- Use of unguided missiles in urban areas during attacks on four cities Basra, Falluja, Samawa and al-Kut, damaging or destroying some 400 dwelling houses, mainly in poor areas; 19 apartment buildings and several hotels; two hospitals and two medical clinics; two schools and a mosque; restaurants and other commercial buildings as well as market areas.
  - An unannounced attack on the Ameriyya Civilian Air Raid Shelter killing between 200 and 300 civilians when it was known by coalition forces that the facility had been previously used as a civil-defense shelter.
  - The use of at least 320 tons of depleted uranium in air and tank rounds and sniper bullets.

## 2. **Attacks on non-military targets**

Attacks on Food, Agriculture and Water-Treatment Facilities:

- The destruction of four government food warehouses in the city of Diwaniyya.
- An attack on a dairy produce factory 30 kilometers from Basara.
- The destruction of flour-milling facilities and grain-storage warehouses.

Attacks on the Electrical System:

- The destruction of four of Iraq's five Hydro-electric facilities, transforming the country from an energy-dependent society into, a "pre-industrial"<sup>4</sup> one.

Attacks on Civilian Vehicles on the Highway:

- Indiscriminate daytime attacks on civilian vehicles on the highway killing some 60 people.

Attacks on objects dedicated to civilian purposes:

- Indiscriminate attacks on Bedouin tents in Western Iraq leaving 46 dead civilians, including infants and children.

### **KOSOVO, 1995**

- High altitude, indiscriminate bombing operation in the vicinity of Djakovica on April 14, 1999 killing over 70 ethnic Albanian civilians and wounding 100 others.
- Deliberate attack on the Headquarters of Serbian State Radio and Television on April 23, 1999 killing 16 civilians.

### **AFGHANISTAN, 2001**

- Day time cluster bomb attack on the village of Shaker Qala on October 22, 2001, killing 9 civilians and injuring 14.
- Carpet-bombing by B-52s of frontline village near Khanabad on November 18, 2001, killing

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4 See Report to the Secretary General on Humanitarian Needs in Kuwait and Iraq in the Immediate Post-Crisis Environment, Martii Antisaari, United Nations Report No. 5122366, March 20, 1991.

5 See Civilian Deaths in NATO Air Campaign, Human Rights Watch, February, 2000; "Collateral Damage" or Unlawful Killings, Amnesty International, June, 2000. Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan, Human Rights Watch, December 18, 2002; A Dossier on Civilian Victims of United States' Aerial Bombing of Afghanistan: A Comprehensive Accounting, Professor Marc W. Herold, University of New Hampshire, December, 2001.

6 See Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan, Human Rights Watch, December 18, 2002; A Dossier on Civilian Victims of United States' Aerial Bombing of Afghanistan: A Comprehensive Accounting, Professor Marc W. Herold, University of New Hampshire, December, 2001.

150 civilians.

- Mid-day attack on two residential areas in Ni on May 7, 2002 during which cluster bombs were dropped close to market place and hospital killing 14 and injuring 30.
- Attack on a wedding party in July 2002 killing 40 civilians and injuring 60 others.

Arguably, many of the above violations of IHL constitute international crimes for which there is individual responsibility. For over half a century, the U.S. has participated in international efforts to ensure the accountability of those persons responsible for the commission of such crimes, including the establishment of the Nuremberg Tribunal and more recently, the Special Court for Sierra Leone. In spite of its opposition to the ICC, the U.S. has repeatedly and publicly reaffirmed its commitment to international justice and the need to prosecute those persons found responsible for the most serious international crimes, including crimes against humanity and war crimes.<sup>7</sup> Accordingly, we are committed to ensuring the accountability of those persons who may be found responsible for the commission of crimes against humanity and war crimes in this war. To this end, together with non-governmental organizations here in the U.S. and the U.K., we will seek to pursue prosecutions of persons responsible for such crimes with the Prosecutor to ICC, where they are nationals of state party to the statute. For non-party states, like the U.S., we will petition the Security Council to refer the matter to the Prosecutor under the Statute of the ICC<sup>8</sup> and actively pursue all other avenues of bringing them to account.

Crimes against humanity and war crimes are crimes under customary international law for which there is universal jurisdiction. States, including the U.S., have an international obligation to either prosecute individuals within their jurisdiction or to extradite them to a country that will prosecute. In recognition of this obligation in regards to war crimes, Congress enacted the War Crimes Act, under which civilian courts in the U.S. have authority to try either service members or civilians for certain violations of the laws of war, including grave breaches of the Geneva Conventions. If prosecutions are not initiated against U.S. nationals where there is evidence of their involvement in such acts, we commit ourselves to ensuring that such allegations are thoroughly investigated and prosecuted under this Act.

As a first stage in ensuring accountability of persons responsible for these crimes, we understand that a tribunal under the auspices of the Permanent Peoples' Tribunal will be convened in London to examine evidence of violations of IHL, crimes against humanity and war crimes, with a view to referring such evidence to the Prosecutor of the ICC, where appropriate. We wholly support this initiative.

A letter in similar terms will today be delivered to the governments' of the UK and Canada. We request that you liaise with them and representatives of governments of other possible coalition partners to ensure that should force be used against Iraq, such force complies in all respects with the requirements of IHL as detailed in this letter.

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<sup>7</sup> See e.g. Speech by U.S. Ambassador for War Crimes Issues, Washington D.C. (May 6, 2002); U.S. Office of War Crimes Issues Fact Sheet, U.S. Department of State (May 6, 2002); John R. Bolton, Under Secretary for Arms Control and International Security, Remarks to the Federalist Society, Washington D.C. (November 14, 2002).

<sup>8</sup> See Article 13(b). There is also the possibility of the Court exercising jurisdiction over U.S. nationals who have committed such crimes if Iraq, being the state where the crime was committed, should accept the jurisdiction of the Court and refer the matter to the Prosecutor. See Article 12(3) of the Statute of the ICC.

Sincerely,

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