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Legal Lessons Learned from Operation Enduring Freedom

*Michael Noone**

"They don't get it," the president said. "How many times do you have to tell them it's going to be a different type of war? And they don't believe it. They're looking for the conventional approach. That's not what they're going to see here."¹

1. Introduction

In October 2002 the Director of Legal Services in the New Zealand Defence Forces concluded an article on the law of armed conflict by saying: "Lawyers suffer from the same disability as strategists – they are always planning for the last war, not the next one."² Presumably he intended his remarks, with regard to Enduring Freedom strategists, facetiously. The generals fought the war they planned for, which was neither a confrontation at the Fulda Gap nor another Battle of Medinah Ridge. However his remarks are salient if applied to military lawyers who, in their planning, must attempt to reconcile a growing gap between contemporary military tactics and a body of battlefield law which is largely unchanged in the past half century and which was designed for entirely different circumstances. If, as has been said, the Great War was fought with twentieth century weapons and nineteenth century values, I suggest that Enduring Freedom may reflect a similar disjunction between military practice and legal theory. That is my thesis and I will attempt to justify it by comparing what has already been published (or spoken of) regarding tactical lessons learned

* Professor of Law, The Catholic University of America. The writer expresses his thanks to Amy Svitak of Defense News and to various participants in Operation Enduring Freedom with whom I discussed this project, none of whom were given the opportunity to review my conclusions.

1 Wednesday October 31, 2001 White House meeting, reported in B. Woodward, *Bush at War*, extracted in *Washington Post*, Home Edition, November 18, 2002, p. A7 ("In Washington.").

2 Col. K. Riordan, "Asymmetric Warfare – Combating Transnational Terrorist Campaigns: The Emerging Legal Situation", (October 2002) *New Zealand Armed Forces Law Review* 6 at 12.

from Enduring Freedom with a provocative article, *Bellum Americanum: The U.S. View of Twenty-First Century War and its Possible Implications for the Law of Armed Conflict*,³ written 5 years ago by a serving officer, then Lt. Col. Michael N. Schmitt, a USAF judge advocate. Risking charges of chauvinism, I selected his article for several reasons: Enduring Freedom was the first new war of the twenty-first century; although waged by coalition forces, some of whom had legal advisors in the field, the application of *jus in bello* was largely governed by US interpretations of law of war doctrines; and, in the near future, robust peacekeeping tactics and concurrent legal rules will be shaped by the Afghan experience and the “stressors” it presented for the law of armed conflict.

Schmitt uses the term “stressors”⁴ to identify characteristics which he thought might affect the law’s development. He identified 10. My paper will focus on 8 which have particular relevance to the law of war in Afghanistan. I will not discuss his first stressor, novel behaviour e.g. computer hacking, which may constitute the justification for armed attack, because it relates more directly to *jus ad bellum*, and is outside the scope of my paper. Nor will I comment on his views regarding the potentially changed environment for treaty regimes, since the most interesting developments have been at what the Canadian forces describe as the “operational and tactical level.”⁵ At that level, the stressors Schmitt identified are: the role of non-State actors; the increasingly vague line between international and national conflicts; the application, in 21st century war, of traditional humanitarian principles of discrimination, proportionality, military necessity, and humanity; and finally, the implications of both enhanced dissemination of tactical information and what Schmitt saw as “the ability to direct lethal force ... increasingly pushed down the chain of command.”⁶ I will consider each in turn, not to offer a cure, but to suggest where the traditional laws of armed conflict have proved wanting, and why military lawyers may be tempted to plan for wars which took place a generation ago.

2. The Role of Non-State Actors and the Line between International and National Conflicts

It is useful to recall that the *Martens Clause*, adopted by the delegates at the 1899 Hague Conference, was intended to regulate the behaviour of the High Contracting Parties, and that their inhabitants and belligerents were to be protected by the Conven-

3 (Summer 1998) 19 *Michigan Journal of International Law*, 1005-1051 (hereinafter *Bellum Americanum*).

4 *Ibid.* p. 1053.

5 Office of the Judge Advocate General, *The Law of Armed Conflict at the Operational and Tactical Level*, B-GG-005-27/AF-020 (October 20, 1999).

6 *Bellum Americanum*, note 3 *supra* at 1087.

tion and by "... the principles of the law of nations, as they result from the usage established between civilized nations, from the laws of humanity, and dictates of the public conscience."⁷ Thus, Marshall Galieni's contemporaneous application of the laws of war during his pacification of France's Madagascar colony was thought at the time to be remarkable⁸ because his opponents did not share the drafters' common Eurocentric vision of usage, laws and public conscience. The friction between different norms of acceptable battlefield behaviour was apparent in Enduring Freedom. The Operation also cast doubt on the categories established by Common Articles 2 and 3 of the Geneva Conventions of 1949 (distinguishing between domestic and international conflicts) and Additional Protocol I of 1977 (recognizing national liberation struggles as international conflicts) which fail to capture the realities of conflict in a non-conforming failed or failing state. In Afghanistan, Taliban and opposition forces had been engaged in tribal warfare for years: warfare which neither party claimed qualified as a national liberation struggle nor did they claim that it fell under the Geneva Conventions' provisions as an internal armed conflict. Richard Kidd, who provided relief to refugees along the Afghan-Tajiki border in 1993 and returned to Afghanistan in 1998-99 when he served as Planning and Operations Manager for the UN Office for Coordination of Humanitarian Assistance reported that neither side complied with *Martens* principles as they conducted their operations.⁹

Operation Enduring Freedom also posed a fundamental question regarding command responsibility. When long standing tribal warfare escalates to a form of conventional warfare, are the former belligerents to be held to the same norms as the subsequent intervenors, conventional forces who are bound by *Martens* principles? While publicists and politicians can demand compliance from conventional forces, it is unrealistic to expect that the behaviour of warriors¹⁰ on either side will change. Do the conventional forces thus become vicariously responsible for the misbehaviour of their native allies? That issue was raised during Enduring Freedom when Newsweek magazine reported the deaths of Taliban prisoners held by the Northern

7 Preamble, Hague Convention IV.

8 G.G. Wilson, "Insurgency and International Maritime Law", (January 1907), 1 *American Journal of International Law* 47 at 51-52.

9 Conversation with the author; see also R. Kidd, "How Afghan Men Fight", at <http://www.csmonitor.com/cgi-bin/getasciarchive?script/2001/10/01/pllssl.txt> (October 1, 2001); T. Gusinov, "Soviet 'deja vu' Offers U.S. Aid in Afghanistan", *Washington Times*, November 3, 2001 at A6 ("Most [Taliban] field commanders have never heard of international treaties on the treatment of POWs."). Former Soviet Major Gusinov served nine years in Afghanistan.

10 Distinguished from soldiers in H.H. Turney-High's *Primitive War: Its Practice and Concepts* (Columbia; University of South Carolina Press, 2nd. edn. 1971), (using tactics and behaviour as the basis for the distinction).

Alliance.¹¹ Robert Cryer, who wrote the first, and at the time I write, still the most thoughtful legal analysis of the war, concluded that the Coalition forces did not bear responsibility for the actions of the Northern Alliance/United Front, in part because the native allies did not always comply with Coalition requests.¹² His test offers a starting point, but must be refined. Otherwise, if tribal allies are obedient to tactical orders, their “civilized” superiors will be presumed to be legally responsible for any savagery. In January 2002, for example, US Special Forces trained local Afghan soldiers to retake Mirwais Hospital in Kandahar, where seven al Qaeda fighters had barricaded themselves. The Afghan attack failed and the Americans took the hospital.¹³ Had the Afghan surrogates succeeded but unnecessarily killed their captive opponents, would the Americans, who exercised operational control over the attack, be legally responsible? The topic is not addressed in the US Army’s “Operational Law Handbook,”¹⁴ nor in its Canadian counterpart¹⁵ although the *Tadic* appeal addressed the control issue at length.¹⁶ The commander of a robust peacekeeping operation who exercises a degree of tactical control – but no disciplinary authority – over indigenous tribal groups supporting the peacekeepers may ask for guidance on command responsibility. The law of armed conflict, based on Nineteenth Century European assumptions of hierarchical authority and responsibility, offers no obvious answer.

3. The Application of Traditional Humanitarian Principles

Although Robert Cooper, a senior advisor to Prime Minister Blair, recently suggested (in his personal capacity) that postmodern states revert to the laws of the jungle when dealing with less advanced states¹⁷ postmodern armies will continue to train their soldiers and enforce traditional premodern humanitarian principles. Operation Endur-

11 B. Dehghanpisheh, J. Barry and R. Gutman, “The Death Convoy of Afghanistan”, *Newsweek*, August 26, 2002, 22-30 (The headline: “Witness reports and the probing of a mass grave point to war crimes. Does the United States have any responsibility for the atrocities of its allies?”).

12 “The Fine Art of Friendship; *Jus in Bello* in Afghanistan”, (hereinafter “Cryer”), (2002), 7 *Journal of Conflict and Security Law* 37 at 47.

13 P. Maas, “A Bulletproof Mind”, *The New York Times Magazine*, November 10, 2002, 52-57.

14 JA 422, The Judge Advocate General’s School, 2001.

15 *Law of Armed Conflict*, note 5 *supra*.

16 *Prosecutor v. Tadic*, Judgement IT-94-1-A, 15 July 1999.

17 “The challenge to the postmodern world is to get used to the idea of double standards. Among ourselves, we operate on the basis of laws and open cooperative security. But when dealing with more old-fashioned kinds of states outside the postmodern continent of Europe, we need to revert to the rougher methods of an earlier era – force, pre-emptive attack, deception, whatever is necessary to deal with those who still live in the nineteenth century world of every state for itself. Among ourselves, we keep the law, but when we are operating in the jungle, we must also use the laws of the jungle.” *Guardian Unlimited Observer/Special reports/The new liberal imperialism*, Sunday April 2, 2002.

ing Freedom raises questions about the application of those principles in the Twenty-first Century.

3.1. *Protecting Civilians: The Principles of Discrimination and Proportionality*

In *Bellum Americanum* Schmitt, an Air Force officer, observes:

“Discrimination is a general principle of the law of armed conflict that requires an attacker to distinguish between civilians and civilian objects on the one hand and military objectives (combatants or objects) on the other and to use weapons capable of discrimination between them. Paradoxically, despite vast improvements in weapons system accuracy and battlespace transparency, complying with the principle may become increasingly difficult. The problem is that the lines between lawful targets and protected objects will blur due to the growing dependency on civilians and civilian activities during military operations.”¹⁸

Schmitt’s comments reflect traditional humanitarian concerns in the law of war canon regarding the use of lethal force – typically by bombardment – applied from a distance. But what of close-quarters battle? The US military refers to it as “C.Q.B.,” assumes that it will take place in an environment where civilians are present and attempts to train its soldiers to distinguish between military and civilian targets. Operation Enduring Freedom offered a limited opportunity to practice those skills, which call for split second discrimination between licit and illicit targets if noncombatants can not be removed from the battle zone.¹⁹ The US Army and Marine Corps train for urban warfare and to distinguish between combatants and noncombatants in C.Q.B.²⁰ In early 2003, a German-Dutch military contingent is expected to take over the International Security Assistance Force in Afghanistan. If the contingent is called on to engage in C.Q.B. and have not been rigorously trained in it – as have their national paramilitary police counterparts – are their superiors not legally responsible for otherwise avoidable civilian deaths? Traditional criteria – proportionality and military necessity – intended to minimize risks to civilians from bombardment assume the opportunity for planning and reflection.

¹⁸ *Bellum Americanum*, note 3 *supra* at 1075. (footnotes omitted).

¹⁹ “Any means of clearing an area of noncombatants prior to fighting is more desirable than having to account for and protect noncombatants during the battle.” Col. J.D. Celeski, “Joint Urban Operations: Special Forces in Urban Campaign Planning”, (Fall 2001) 14 *Special Warfare* 2 at 5, referring to Russian experience in the battle of Grozny.

²⁰ See, for example, “Bracing for ‘Primordial Combat’”, *The Washington Post*, October 31, 2002 (Home Edition) A1, A19; Department of the Navy “Military Operations in Urban Terrain”, MCWP3-35 (Quantico, Va.: Marine Corps Combat Development Command, 4-98).

Neither may be available in urban close quarter battle where one study concludes that lightly trained troops may sustain a thirty percent casualty rate.²¹

The Law of Armed Conflict still relies on traditional distinctions between the utilization of deadly force by law enforcement authorities in a civilian environment and its use by belligerents in what 1997 Protocol I refers to the "contact zone". In "The Paradox of Riskless Warfare", a paper originally delivered at the US Army War College's Annual Strategy Conference in April 2002,²² Professor Paul Kahn used the war in Afghanistan as an example to support his claim that without the reciprocal imposition of risk, warfare becomes policing, which requires different rules of engagement and different institutions to regulate the application of force. He does not indicate what those institutions might be. One of them might be the Laws of Armed Conflict, to be replaced by international humanitarian laws regulating law enforcement activities. If that were the case, Riot Control Agents would be a particularly useful method to protect civilians in the context of an urban close quarter battle, as would soft-nosed bullets, used by US and Canadian police and intended to protect bystanders from ricochets or from being harmed by a bullet which penetrated and passed through its intended target.

Operation Enduring Freedom also exemplified the legal problem posed by demands for compliance with the law of armed conflict when opponents fail to honor Geneva Convention requirements that they distinguish themselves from the civilian populace. The tone of a US Marine Corps' report submitted by its Operations Law Office (JAO) captures their sense of frustration:

"JAO aided our front line forces by coordinating efforts on the OEF [Operation Enduring Freedom] rules of engagement (ROE). The ROE, which provide guidance on the use of force for mission accomplishment and self-defense, were complicated in OEF by the presence of unconventional fighting forces who failed to wear uniforms or other fixed distinctive insignia, as required by the Geneva Conventions and customary international law. When conducting operations in a society of similarly dressed people where weapons were widespread and carried openly by both civilians and combatants alike, legal review of the ROE became critical."²³

In Enduring Freedom troops were once again confronted with the question: when do civilian women become combatants and how can they be distinguished from the populace? "During Operation Mountain Sweep ... in late August [2002], paratroopers ... caught seven Afghan women hiding rocket-propelled grenade launchers under

21 "Primordial Combat", note 20 *supra* at A19, quoting an official at the US Marine Corps Warfighting Laboratory.

22 Reprinted in (No. 3, Summer 2002), 22 *Philosophy & Public Policy Quarterly* 2-8.

23 "U.S. Marine Corps", Report to the American Bar Association Annual Meeting, August 8-13, 2002, Washington D.C.

their burqas. US forces confiscated the weapons but let the women go because they are viewed as nothing more than the tools of male enemy forces." Subsequently, in September's Operation Champion Strike, female military police discovered an Afghan woman with an AK47 tied to the inside of one of her legs and a 30-round magazine concealed near her breast.²⁴ Apparently she also was released to smuggle weapons again, probably because coalition authorities did not want to become responsible for women prisoners. I have argued elsewhere²⁵ that those who draft ROEs intended to implement the law of armed conflict are reluctant to acknowledge the important role that women may serve as unarmed auxiliaries to belligerents. Operation Enduring Freedom confirms that the problem persists.

Incidents of "friendly fire" fatalities and the mistaken targeting of non-combatant civilians are used as examples of military failures to adequately discriminate in the selection of targets and application of force. An informed discussion of the topic requires that a distinction be made between pre-planned and time-sensitive targets. With regard to preplanned strikes/targets, the US Air Force has developed an elaborate targeting process²⁶ which requires legal review in the selection of targets, of weapons to be used on a particular target, and in assessing potential collateral damage in order to ensure that the principles of discrimination and proportionality are complied with²⁷ and I believe the same procedures were applied successfully by other coalition air forces. Unintended fatalities occurred in the context of time critical targeting and will be discussed in the section devoted to command and control.

Target or objective based planning has been the hallmark of post cold war USAF preplanned targeting doctrine. However, there are indications that the Afghan and Balkan experiences have caused the US Air Force to turn again to "effects based" targeting intended to affect an enemy leadership's willingness to fight. Effects based targeting may involve the use of what one Air Force general described as "nonkinetic weapons,"²⁸ primarily electromagnetic which, if directed at "civilian" leadership (e.g. Saddam Hussein and his supporters) might well affect noncombatants as well and give rise to charges of inhumanity. Effects based targeting is also reflected in a draft US Joint Forces Command study which offered a scenario in which the

24 "Female MPs in 82nd thwart weapons smugglers", *Air Force Times*, September 23, 2002, A28.

25 "Whacking Unarmed Women: Gaps in the Law of Armed Conflict", (Summer 2002), 9 *Duke Journal of Gender Law & Policy* 271-276 (using examples from Northern Ireland and Somalia).

26 Described in AFJPM 10-225, "Targeting, the Joint Targeting Process and Procedures for Targeting Time-Critical Targets", (July 1997).

27 The Judge Advocate General's Department: *United States Air Force, Air Force Operations & the Law*, Chapter 18, Targeting and Weaponing (2002). Certitude can never be achieved during the process of target selection and assessment of collateral damage potential. One legal "targeteer" said to me: "we can't know for certain which buildings are mosques."

28 Brig. Gen. W. Lord, speech at MILCOM 2002, a military technology conference in Anaheim California, October 7-10 2002, summarized in "Brains Complimenting Brawn", *The Air Force Times*, 22 (October 28, 2002).

sources of an autocratic leader's wealth are targeted. One of the sources is a bordello. Although the study's authors caution that "the workers" should be told they are at risk if they stay there²⁹ one wonders if this proposal would meet law of armed conflict targeting criteria.

3.2. *Protecting Belligerents: Other Humanitarian Considerations*

For convenience sake, I will separate my "lessons learned" discussion into 2 sections: those protections which postmodern forces could claim and those which could be claimed by their premodern opponents. Several practices of the coalition forces warrant attention. First, not all coalition combatants were necessarily members of an organized armed force *in stricto sensu*. A ten man CIA team of operatives and "paramilitary officers" landed in northeastern Afghanistan on September 26, 2001 with instructions from the head of the Agency's counter terrorism center to "Go find the al Qaeda and kill them ... Get bin Laden ... I want his head in a box ... to show the president."³⁰ Subsequent CIA teams apparently followed. One newspaper report spoke of an equivalent British team's military operations in Afghanistan. Termed the Increment, a component of MI6, Britain's secret intelligence service, it is composed of former and serving members of the Special Air Service, and its relationship with the armed forces is vague.³¹ As they attempted to blend into the native populace, neither group sought to wear the sort of distinctive sign required by the Geneva Conventions in order to qualify for prisoner of war status. Nor, for the same reason, would military members of the coalition's Combined Joint Special Operations Task Force engaged in clandestine intelligence gathering operations³² qualify.

The coalition's irregular conventional forces operating outside the Convention's protections suffered no legal disability because Taliban's treatment of prisoners had never conformed to Geneva Convention standards. US Navy SEAL Petty Officer 1st Class Neil Roberts, the sole coalition prisoner taken by the Taliban was, if press reports were accurate, fortunate to have been killed by being shot in the head during the March 4, 2002 battle of Roberts Ridge.³³ Milt Bearden, who directed the final years of the CIA's covert war against the Soviets in Afghanistan has described the

29 J9, *Joint Futures Lab, U.S. Joint Forces Command, Joint Operational Warfighting (JOW): Thoughts on the Operational Art of Future Joint Warfighting*, (15 August 2002), (draft) 21.

30 Reported in B. Woodward, *Bush at War*, extracted in *Washington Post*, Home Edition, November 18, 2002, A8 ("In Afghanistan").

31 "MI6 boosts elite military wing to combat terror", *The Sunday Times*, News 1-5, July 21, 2002.

32 "Troops use own sources for raids", *Washington Times*, September 4, 2002, A1 at A13.

33 "Yolo County mourns its slain Navy SEAL", *The San Francisco Chronicle*, Final edition, March 6, 2002, A12.

Taliban practice of cutting the throats of its Russian prisoners.³⁴ When the Afghans committed atrocities against their troops, the Soviets retaliated.³⁵ Had any coalition military prisoners been taken and their execution filmed as was the journalist Daniel Pearl's, military lawyers would have been asked about the availability of reprisal. While academic lawyers may not agree over the continued availability of this remedy, I have argued elsewhere³⁶ that the traditional methods available to an aggrieved state or states could not be applied in an operation similar to Just Cause. Traditional methods permit the use of perfidy but some perfidious acts (improper use of a white flag, pretending to be sick or wounded or to have surrendered) are routinely practiced and expected by tribal opponents. Others (misuse of the opponent's uniform, Red Cross or equivalent emblem, attacks on medical units) could not be used because the opponent does not have the requisite assets to abuse. The US Army's legal standard text unrealistically suggests that an otherwise prohibited weapon could be used in reprisal.³⁷ However, nuclear and biological weapons must be rejected as impractical and inhumane. Chemical and otherwise prohibited conventional weapons must be rejected because they are neither readily available in the logistics pipeline nor are forces trained to use them. Thus, a lesson that should be learned from Just Cause is that consideration must be given to means of reprisal if a robust peacekeeping operation is to take place in an area where captors routinely videotape the murder of their captives.

There were two lessons learned with regard to the legal protections to be accorded the coalition's opponents. The first is well known to peace keepers: leave prisoner taking to local authorities. Operation Enduring Freedom did not permit that luxury and, as one coalition lawyer phrased it, "we seem to be in a situation where we have an admitted international conflict but one in which all the participants on one side fail to qualify as combatants." The problem arises, of course, when the unqualified participants are captured or surrender. An essay on "lessons learned" is not the forum to recapitulate the policy arguments for and against according these detainees prisoner of war status, nor whether the coalition forces, headed by the US, acted properly in deciding that no individualized status determination was necessary. Robert Cryer's article summarizes the legal issues³⁸ from an English perspective and is usefully

34 *The Black Tulip: A Novel of War in Afghanistan* (Random House, 1998 36). R. Kidd, note 9 *supra* reported a video in circulation which showed similar treatment of a captured Soviet helicopter pilot. See also L.C. Green, *The Contemporary Law of Armed Conflict* (Manchester University Press 2d edn. 2000), (reports of Russian soldiers murdered by their Taliban captors), pp. 23 n. 22.

35 S. Alexievich, *Zinky Boys: Soviet Voices from the Afghanistan Wall* (W.W. Norton, US edn. 1992), (describing the atrocities and the response).

36 "Applying Just War *Jus in Bello* Doctrine to Reprisals: An Afghan Hypothetical", (Fall 2001), 51 *Catholic University Law Review* 27-34.

37 FM 27-10, *The Law of Land Warfare* (July 1956, amended 1976). Para. 497 a.

38 Cryer, note 12 *supra*, pp. 68-82.

supplemented by a report³⁹ prepared by the Congressional Research Service of The [US] Library of Congress. The second lesson learned confirmed US experience in Somalia where standard military rounds passed through human targets without stopping them.⁴⁰ It has been suggested that tribesmen's less dense body mass (in both Somalia and Afghanistan, US troops referred to the local warriors as "skinnies") and light weight robes diminished the effectiveness of NATO style bullets designed for a different physiological type wearing a uniform and, possibly, body armor. The Hague ban on expanding bullets(imposed after the British proposed using them in the tribal areas along the North West Frontier of India) is too sacrosanct to be challenged. However, consideration may be given to slowing the velocity and other ballistic characteristics of the standard military round. This would of course generate a controversy with humanitarian organizations concerned with the avoidance of unnecessary suffering.

4. Command and Control

Lt. Col. Schmitt made two predictions regarding this topic: that the obligation to verify targets (a corollary of the duty to distinguish between civilian objects and military objectives) would be enhanced⁴¹ and that the ability to direct lethal force would be pushed down the chain of command to individuals who are not officers thus requiring additional training in the law of armed conflict.⁴² We have seen the first prediction confirmed in the US Air Force's elaborate (and time consuming – the selection process takes 36 to 40 hours before an air tasking order is issued)⁴³ procedures for preplanned targeting. Verification and weapons selection are necessarily curtailed for time sensitive aerial and artillery targeting where either the transient nature of a target or force protection considerations require a rapid response. My focus will be on Air Force targeting practices since US forces in Afghanistan had no artillery support and relied solely on mortars and the aerial delivery of fire support from October 2001 through July 2002. Aerial bombardment (which includes the delivery of a variety of munitions – not just bombs – from various weapons platforms – not just bombers) was also the sole source of allegations that coalition forces were insufficiently sensitive in their target selection and thus caused unnecessary civilian deaths. Of course the same precautions intended to avoid unintended consequences delay response time. In Enduring Freedom, once a request for Close Air Support

39 J. Elsea, "Treatment of 'Battlefield Detainees' in the War on Terrorism", *CRS Report for Congress*, April 11, 2002.

40 M. Bowden, *Black Hawk Down: A Story of Modern War* (Atlantic Monthly Press, 1999), p. 208.

41 *Bellum Americanum*, note 3 *supra* at 1077.

42 *Ibid.* 1087.

43 *Air Force Operations and the Law*, note 27 *supra*, p. 291.

had been forwarded from an AWACS aircraft to the delivery aircraft, it took 26 minutes to compute the desired mean point of impact, and then the aircraft had to be directed through busy airspace to the target. Thus, the 10th Mountain Division commander complained that "It took anywhere from 26 minutes to hours [on occasion] for the precision munitions to hit the target. That's o.k. if you're not being shot at and the target's not fleeting ... we really worked hard to kill fleeting targets the first three or four days [of Operation Anaconda]. Honestly, we weren't that successful."⁴⁴ Mark Bowden, the American journalist who spent some time with the 391st (US) Fighter Squadron described precautions taken to avoid collateral damage and concluded "No bombing campaign – no matter how sophisticated or scrupulous – can completely avoid mistakes."⁴⁵ However, the Pentagon has been slow to consider the implications of Michael Reisman's statement, in slightly different context, that "the media appear to be able to play a preponderant role in international decisions by presentation of graphic images [of human rights violations] and insistence that remedy be provided."⁴⁶ One of the lessons the Pentagon has not learned is how to respond promptly and effectively when there are media reports of careless bombing.

"Friendly-fire" incidents do not necessarily implicate the law of armed conflict so it is not surprising that *Bellum Americanum* did not discuss it. But, in my view, among the lessons not learned from Enduring Freedom, "friendly fire" warrants discussion as an aspect of coalition warfare. In April 2002, two USAF F-16 fighter bombers were returning from a night mission in Afghanistan when they observed "fireworks" near Kandahar. Their AWACS command and control center gave them permission to determine the exact location of why they thought was anti-aircraft fire. They did so and, while trying to pin-point the location, sought permission to return fire. Although the AWACS asked them to "hold fire" until more information was provided, the flight leader's wingman declared that he was responding in self-defense and dropped a 500 pound GBU-12 laser guided bomb on what was discovered to be a Canadian forces live fire exercise. Four soldiers were killed and eight were injured. "Neither Canadian nor [US] Central Command officials would explain where the breakdown in communications started..."⁴⁷ The North Americans' joint investigative board held the pilots at fault. The board report was referred to the pilots' commander who, in September, charged both with criminal offenses. On November 27th Canadian officials acknowledged that transcripts which had not been released with the report established that the troops were shooting tracer bullets in the air about

44 "Officers: Air Force policy left ground troops high and dry", *Army Times*, September 30, 2002, 10.

45 "The Kabul-Ki Dance", (November 2002). *The Atlantic Monthly* 66 at 81.

46 "Unilateral Action and the Transformations of the World Constitutive Process", (2000), 11 EJIL 1, 3, 13.

47 "General to decide if pilots will be prosecuted", *Air Force Times*, July 15, 2002 A10.

the time the planes were nearby.⁴⁸ As summarized, the evidence does not exculpate the pilots, but does suggest that Canadian and US officials were unprepared for public scrutiny of this kind of event. In the foreseeable future the US will supply the aerial artillery needed in any coalition war. Unfortunately there will be occasions in which – to use a British term from World War II – the US will “score an own goal,” either against their own or allied forces. Ministers of Defense, their staff, commanders, lawyers, and public affairs officers engaged in coalition warfare must be better prepared for the next incident of friendly fire.

Finally, it is too early to confirm Schmitt’s prediction that the authority to direct lethal force would be delegated down the chain of command and that additional training in the law of armed conflict would be required. As a consequence of Enduring Freedom, the US Army and Marine Corps are reviewing their fire support doctrines and manning of the career fields authorized to call for fire.⁴⁹ As this is written (December 2002) there are no indications that any of the Enduring Freedom coalition members intend to enhance their law of war training in this regard.

5. Conclusion

First, I must apologize to readers from outside the US for the obvious biases reflected in my report. I am certain that, as has the US, each of the coalition partners has established a “lessons learned” planning cell. My experience collecting sources and materials suggests that the law of armed conflict may not have appeared on the planners’ agendas although it has certainly figured large in media commentary (reporting the concerns of humanitarian groups). I hope that my essay will provoke discussion of the questions which it raises. Anne-Marie Slaughter, 2002 President of the American Society of International Law commented recently on differences in approach to the war on terrorism. Her remarks are as pertinent to the legal lessons which could be derived from Enduring Freedom. “Some have argued that we are breaking new ground and need new rules, or at least a new paradigm for future behaviour. Others have applied the lawyer’s usual response to new situations: rather than throw out the old rules and start fresh, explore how the old rules can be most logically and sensibly extended.”⁵⁰ It is fitting that I close my comments as I opened them with a reference to our New Zealand allies who, according to a newspaper account of Combined Joint Special Operations Task Force, figure among “a collection of some of the world’s most skilled and deadly covert warriors ... The [New Zealanders] win high marks from the Americans for their prowess at navigating

48 “Canadian Troops Fire Preceded U.S. Airstrike”, *Washington Post*, November 28, 2002 A28.

49 As to the Army, see “Officers ... high and dry”, note 44 *supra*.

50 “Notes from the President”, *ASIL Newsletter* 1, 10 (July/September 2002).

Afghanistan's rough terrain.”⁵¹ I call on their military lawyers, and others as well, to extend the old rules logically and sensibly as we navigate the rough legal terrain uncovered by Operation Enduring Freedom.

51 “Troops use own sources”, note 32 *supra* at A13.