

Introduction

On March 20, 2003, after a year of very dramatic public discourse concerning the appropriate response to Iraq's continuing violation of its international obligations under numerous UN Security Council resolutions, the United States, together with the United Kingdom and a coalition of "willing" partners, including Australia, Denmark and Poland, launched Operation Iraqi Freedom (OIF). OIF commenced the military operations intended to eliminate Saddam Hussein's regime and the specter of his use of weapons of mass destruction. From OIF's inception, and continuing through the next six years of military operations spanning invasion, occupation and restoration of Iraqi sovereignty, the meaning, application and viability of the law of armed conflict were repeatedly tested.

Following its tradition of the in-depth study and teaching on the manner in which the law impacts military operations, the Naval War College hosted a conference entitled "The War in Iraq: A Legal Analysis." The conference was envisioned as a companion colloquium to the Experts Workshop hosted by the Naval War College the previous June entitled "The War in Afghanistan: A Legal Analysis." By the time of the June 2009 conference, events in Iraq had sufficiently progressed to begin developing an objective assessment of what had transpired. The conference brought together distinguished international law scholars and practitioners to examine international and operational law issues that arose throughout the various phases of the Iraq conflict.

Judge Raid Juhi al-Saedi, the former chief investigative judge for the Iraqi High Tribunal, opened the conference by sharing his experiences with the trial of Saddam Hussein, as well as the current status of the Iraqi judiciary. The speakers presented their material over the next two and a half days in five thematic panels. On the first day, attendees were privileged to attend a luncheon address delivered by Major General Michael Oates, US Army, on the "commander's perspective" of military operations in Iraq. Professor Yoram Dinstein provided conference-concluding remarks in which he reflected on the influence the conflict in Iraq would have on the future development of the international law of armed conflict. The presenters remained in Newport for an additional day after the general conference to attend an experts' working group to clarify the overall conference themes and focus in on their respective scholarly contributions.

This edition of the International Law Studies ("Blue Book") series encapsulates the incredibly thoughtful insights and lessons learned that each presenter brought

to the conference, including many gained from personal experience while serving in the conflict zone. The product of their scholarship and roundtable discussions is found within this volume.

The conference was organized by Major Michael D. Carsten, US Marine Corps, of the International Law Department (ILD) with the invaluable assistance of Mrs. Jayne Van Petten and other ILD faculty and staff. The conference was made possible through the support of the Naval War College Foundation, the Center for National Security Law, University of Virginia School of Law and the *Israel Yearbook on Human Rights*. Without the dedicated efforts and support of these individuals and organizations, the conference would not have been the exceptional success that it was.

I would like to thank Professor Raul (Pete) A. Pedrozo and Commander Sandra K. Selman, US Coast Guard, for serving as the editor and managing editor, respectively, for this volume and to thank Professor Ralph Thomas, Captain, US Navy (Ret.), for his meticulous work during the editing process along with the staff of the College's Desktop Publishing department, particularly Susan Meyer, Ken DeRouin, Albert Fassbender and Shannon Cole. I also extend thanks to Captain Charles "Chuck" Passaglia, JAGC, US Navy, and Captain Rymn Parsons, JAGC, US Navy, the former and current Commanding Officer of Navy Reserve, Naval War College (Law), the reserve unit that directly supports the International Law Department. Their willingness to assist with the project and make personnel available to facilitate timely publication of the "Blue Book" was essential. I am grateful to all of the reserve officers who participated in making this volume happen, but specifically appreciate the exceptional work of Commander Todd Richards, JAGC, US Navy, for his comprehensive and painstaking work on the index. This publication is the culmination of the tireless effort of each of the previously named individuals, as well as numerous others, and is a tribute to their devotion to the Naval War College and the International Law Series.

Special thanks go to Rear Admiral James P. "Phil" Wisecup, the President of the Naval War College, and Professor Robert "Barney" Rubel, Dean of the Center for Naval Warfare Studies, for their leadership and support in the planning and conduct of the conference, and publication of this 86th volume of the "Blue Book" series.

The International Law Studies series is published by the Naval War College and distributed worldwide to US and international military organizations, academic institutions and libraries. A catalogue of all previous "Blue Books" appears after the table of contents. Volumes 59–86 of the International Law Studies series are available electronically at <http://www.usnwc.edu/ild>. This "Blue Book" continues the Naval War College's long tradition of compiling the highest quality of scholarly

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inquiry into the most contemporary and challenging legal issues arising from the entire hierarchy of military operations.

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Preface

From June 23 to 25, 2009 the Naval War College hosted over one hundred renowned international scholars and practitioners, military and civilian, and students representing government and academic institutions at a conference that examined a number of legal issues pertaining to the war in Iraq. The conference featured opening, luncheon and closing addresses, as well as five panel discussions addressing specific legal issues encountered during the conflict. Panelist comments were summarized by a commentator, followed by questions from attendees. These discussions resulted in a detailed analysis of the key issues.

The following conference summary was prepared by Commander Eric Hunt, JAGC, US Navy, a member of NR Naval War College (Law), the reserve unit that supports the International Law Department. The summary expertly recaps the highlights of each of the conference speakers' presentations. As editor, I am deeply indebted to Commander Hunt for his attention to detail and assistance in facilitating the publication of this "Blue Book." I would also be remiss if I did not thank Captain Ralph Thomas, JAGC, US Navy (Ret.), Commander Sandra Selman, US Coast Guard, and Major Michael Carsten, US Marine Corps, for their outstanding support and dedication in preparing this work.

I also extend my sincere appreciation to Susan Meyer and Ken DeRouin of the Naval War College's Desktop Publishing office, who were responsible for expertly preparing the page proofs. Additionally, I would like to thank Albert Fassbender and Shannon Cole for their excellent work in proofreading the conference papers. The quality of this volume is a reflection of their professionalism and outstanding expertise.

Tribute to Professor Howard S. Levie

With the passing of former Charles H. Stockton Professor of International Law Howard S. Levie on April 19, 2009, this year's conference was dedicated to his memory. Professor Jack Grunawalt, the current Stockton professor, opened the conference with a tribute to Professor Levie.

Soldier and scholar, Professor Levie leaves a legacy of scholarly excellence in the development and study of the law of war. One of the nation's foremost legal experts on the law of war and the key draftsman of the Korean War Armistice Agreement,

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Professor Levie authored ten books (several of them multi-volume works) and over eighty articles. He was internationally recognized as an authority on matters ranging from the treatment of prisoners of war to the legality of conventional and nuclear/chemical/biological weapons; from war crimes and terrorism to the protection of the victims of armed conflict. Among the books he authored are *Prisoners of War in International Armed Conflict*, *The Code of International Armed Conflict*, and *Terrorism in War: The Law of War Crimes*. He also served as the editor of six volumes of the series *Terrorism: Documents of International and Local Control*. The last volume was published in 1997 when he was 88.

In 1998, the U.S. Naval War College in Newport, Rhode Island published *Levie on the Law of War* to honor Professor Levie and to recognize the enormous impact of his writings on the law applicable during armed conflict. In the book's Foreword, it was observed:

Once in a great while, someone comes along who makes a significant and lasting contribution to his or her chosen profession, a contribution that comes to define the paradigm of that calling. With respect to the development and articulation of the law of war, Professor Howard Levie is just such an individual.

A veteran of World War II and the Korean Conflict, Professor Levie served in New Guinea and the Philippines, in post-war Japan, and in Korea. He provided legal reviews of Japanese war crime trials for General Douglas MacArthur. He was assigned to the Staff of the United Nations Command Armistice Delegation when he drafted the Korean Armistice Agreement. A member of the US Army Judge Advocate General's Corps, Professor Levie was the first Chief of the Army JAG Corps' International Affairs Division at the Pentagon. Other assignments included postings in Italy, France, Fort Leavenworth, Kansas and the Presidio of San Francisco. He retired in 1963 in the rank of Colonel.

In September of 1963 he joined the faculty of Saint Louis University School of Law. While there, Professor Levie authored over 20 articles on a broad spectrum of law of war topics. It was also during this tenure that he spent a sabbatical year at the Naval War College as the Charles H. Stockton Professor of International Law. He retired from Saint Louis University in 1977 having attained Professor Emeritus of Law status, and returned to Rhode Island where he resumed his association with the Naval War College as a lecturer on the 1949 Geneva Conventions and the laws of war. In October 1994, his enormous contribution to the College was formally recognized with the establishment of the Howard S. Levie Military Chair of Operational Law.

On the occasion of his 100th birthday, Professor Levie was awarded the prestigious Morris I. Leibman Award by the American Bar Association's Standing Committee on National Security Law. The award citation noted that his career as a soldier and a

scholar spanned more than six decades and was marked by distinction throughout. It concluded, “The impact of [his] enormous body of work on the thinking of domestic and international policy makers, military commanders and scholars cannot be overstated.”

Howard S. Levie was born on December 19, 1907 in Wolverine, Michigan and grew up in Baltimore and New York City. He earned Bachelor of Arts and Juris Doctor degrees from Cornell University and a Master of Laws degree from George Washington University. He also studied at the Sorbonne in Paris and the Academy of International Law at The Hague.

Professor Levie was married to the late Blanche Krim Levie, an artist and WAC during WWII. Together in their 90s, they worked on writing an autobiography[,] *Memories of an Ordinary Couple*. Professor Levie died on April 19, 2009 at his home in Portsmouth, Rhode Island. He was 101.

Opening Address

Judge Raid Juhi al-Saedi, formerly the Chief Investigative Judge of the Iraqi High Tribunal, provided the keynote address on the restoration of the rule of law in Iraq. Judge Juhi outlined the history of modern Iraq and explored how the rule of law had eroded into virtual non-existence during the Saddam Hussein era. He stated that, since 2003, Iraq has been on the road to restoring the rule of law. One step in this long and difficult process was the fair trial received by Saddam Hussein, where he enjoyed the right to confront witnesses. Judge Juhi indicated, however, that, while the restoration of the rule of law in Iraq is progressing, there are still many challenges ahead that will require the assistance of the international community.

Panel I: Legal Bases for Military Operations in Iraq

Panel I explored the “legal bases for military operations in Iraq.” The panel opened with Andru Wall laying out the legal bases of the United States for using force against Iraq in 2003. These were, for the most part, grounded in UN Security Council resolutions dating back to 1991’s first Gulf War, including finding Iraq in grave breach of the ceasefire agreement. With these resolutions in hand, the United States viewed itself as legally justified in resuming military action against Iraq. Ms. Alexandra Perina argued that regardless of the bases for invading Iraq, once in Iraq the United States took on the role of occupier with all of the attendant responsibilities, responsibilities made more difficult by a rising insurgency. Professor David Turns sought to address the nature of the conflict in Iraq in terms of

whether it should, at any particular time, be classified as an international armed conflict or non-international armed conflict. He observed that “armed conflict” is not defined in international law, making it difficult to properly categorize the conflict in Iraq. This categorization is vital in determining what laws apply to situations such as detainee treatment. Finally, the issue of a new category of conflict, “transnational armed conflict,” was touched upon as a possible way to describe conflicts with non-State actors. The attendees posed a number of questions, dealing mainly with the rationale for the invasion of Iraq and the issue of anticipatory self-defense.

Luncheon Address

Major General Michael Oates, US Army, Commanding General of the 10th Mountain Division, gave the luncheon address, the “Commander’s Perspective in Iraq.” His remarks and opinions were based on his personal experiences in Iraq during various periods of the conflict. General Oates indicated that the major lesson learned during the initial phase of the war can be summed up by the age-old military maxim: “you fight like you train.” The US military forces were tremendously successful during the opening phase of the war because they fought like they trained. What was not known then is that the forces were not well trained, well resourced or well prepared for the post-combat phase.

In turning to counterinsurgency (COIN) operations, General Oates observed that it is important to look at the situation that gave rise to the insurgency in the first place. He observed that the insurgency was split along religious, cultural and ethnic lines. In addition to their desire for power and control, most of these groups shared an intense hatred of the coalition forces, which they saw as occupiers. How to defeat the insurgency in Iraq was something of a “chicken and egg” dilemma: do you concentrate on solving the problems of the Iraqi people, most notably things like “essential services first,” or do you focus on killing and capturing the bad guys, and, once things are secure, concentrate on improving the daily lives of the Iraqi people?

He indicated that the United States and the other coalition forces traveled along the “essential services first” school of thought for the first few years, but eventually it was determined that the successes were not widespread or sustainable. Too often raw numbers were relied on, instead of an analysis of what those numbers really meant. What was learned over time was that counterinsurgency is about people, not about data. As a military force, the United States became much more successful against the insurgency when, under the leadership of General Petraeus and others who had taken a hard look at counterinsurgency, it was realized that this fight was about people. He observed that people and relationships are the center of gravity in

a COIN fight. Under General Petraeus and General Odierno, the United States transitioned to the alternate view of improving daily lives and began to secure the population.

General Oates concluded his remarks with a discussion of stability operations. He indicated the development of Iraqi security forces was the key to stability. By letting the Iraqi forces take the lead, the Iraqi people began to see them as a force that could be trusted.

Rule of law was one of the major lines of effort. Two things combined to jump-start rule of law efforts during the last year. The first was the improved security situation. The second was the implementation of the US-Iraq security agreement. One of the major keys to stability in any country is having a legal system the citizens can trust and depend on. Without a system for the peaceful resolution of disputes, order breaks down and people take the law into their own hands. He observed that the work in the rule of law arena had been a significant force in promoting stability, especially in central and southern Iraq.

Panel II: The Law of Armed Conflict and the War in Iraq

Panel II focused on the application of the law of armed conflict to the war in Iraq. Major General Charles Dunlap, US Air Force, opened the panel presentation with a discussion of the impact of technology and advanced information systems on the calculus of the war in Iraq. The combination of real-time, detailed intelligence from the battlefield and the predominant use of precision-guided weapons has resulted in a heightened threshold of error for bombing missions. This heightened threshold is not necessarily consistent with the standards imposed by the law of armed conflict. As the enemy puts forth the concept that 100 percent accuracy is required, it is engaged in a sort of "lawfare" that creates an unrealistic expectation that little or no collateral damage can result. General Dunlap argued that "lawfare" must be countered through effective strategic communications.

Mr. Marc Warren then returned to the always-present issue of detainees in Iraq. While the nature of the conflict might have changed over time and the determination of which portion of the law was applicable was often unclear, detainees were always treated as though Common Article 3 of the 1949 Geneva Conventions applied. This treatment was important, as the detainee pool contained a mixture of criminals, prisoners of war and insurgents. As the number of detainees grew to overwhelming size, the detainee policy continued to require compliance with the Geneva Conventions; any deviations were isolated and non-sanctioned.

Commodore Neil Brown, Royal Navy, addressed the application of the laws of armed conflict to the sea campaign in the war in Iraq. Spatially, this area was

limited since Iraq's navy had been virtually destroyed during the first Gulf War. Establishment and enforcement of regulations applying to the various maritime zones during naval operations in the region involved visit and search, stop and inspection, and diversion of ships. Commodore Brown discussed the application of rules of engagement by coalition naval forces during combat operations, as well as during post-hostilities maritime zone enforcement activities.

Before opening the panel to questions, Professor Wolff Heintschel von Heinegg observed that misinterpretations of the requirements imposed by the laws of war need to be quickly countered and that countering information operations must be proactive. A failure to confront false perceptions allows the enemy to control the information war and win the battle for public support. Questioners explored the issues of the enemy's use of the law to attempt to negate the advantages of technology. Professor Heintschel von Heinegg stressed that the canard that 100 percent weapon accuracy is required ignores that the law of armed conflict recognizes that there will be civilian casualties.

Panel III: Occupation in Iraq

Panel III began the second day of the conference by shifting focus to the "occupation of Iraq." Professor Eyal Benvenisti delved into the issue of when an occupation begins. The Hague Conventions speak in terms of control over territory, while the Geneva Conventions address control of the population. Whether a State can exercise control, and the nature of its ability to establish control, may establish occupation as a matter of law regardless of the formal declarations of the parties. Professor Benvenisti argued that the occupying power has the ability to alter the occupied State's domestic laws. In fact, it would be almost impossible to maintain the status quo, since the original regime has been overthrown. But the ability to alter the law left unanswered the question of what Iraqi laws the occupiers were required to observe. Another question was whether the occupiers' own national human rights laws applied to their actions as an occupying power.

Brigadier General Clyde Tate, US Army, spoke from the perspective of the military forces as implementers of an occupation. He emphasized that for occupiers it is imperative that the rule of law be observed in all situations. This meant investigating soldiers for all misconduct involving the occupied population. Brigadier General Tate stressed that following the return of governance to Iraqi authorities, the focus of US forces shifted to respecting Iraqi law, but not to the detriment of safety or operational requirements.

The panel was questioned concerning the Hague and Geneva Conventions and their application to the occupation of Iraq. The sense was that the Hague

Conventions were concerned with preserving the status quo of an occupied territory, while the Fourth Geneva Convention was focused on the protection of the occupied population. A question was also raised as to whether the applicable UN Security Council resolutions concerning Iraq provided more protections for Iraqi sovereignty than did the traditional law of occupation.

Panel IV: Stability Operations in Iraq

Panel IV turned its attention to the issue of stability operations in Iraq and the dynamic nature of these operations given the changing legal status and environment in Iraq. Although the Iraqi government requested a continued US presence in Iraq after December 31, 2008, this created its own set of problems. Ms. Shelley Young observed that in negotiating a security agreement to address the post-2008 US presence in Iraq, many issues needed to be resolved. Ms. Young noted the final agreement established exclusive US jurisdiction over US military personnel and civilians, provided for the withdrawal of US forces and established a termination date for the agreement of December 31, 2011.

Colonel Richard Pregel provided the military view on stability operations. He stressed the need to appreciate three truths: security drives everything, nothing in Iraq is simple and the rule of law is Iraqi—not American—justice. The change in the US status from occupying power to an invited presence created challenges. Foremost among these was the treatment of detainees. Under Iraqi law there is no provision for internment; detainees must be charged or released. This and the continued re-establishment of the rule of law are but two of the challenges going forward in the conduct of stability operations.

Mr. Laurent Colassis outlined the role of the International Committee of the Red Cross (ICRC) in stability operations. With the decrease in violence, the activities of the ICRC have increased. Mr. Colassis noted that Iraq is now the third-largest mission of the ICRC, behind Darfur and Somalia, with a focus on detainee operations. Despite the requirement to charge or release, releasing detainees is not always simple. Where and to whom detainees are released is an issue with legal implications. Ultimately, a balance must be found between security and possible mistreatment by the State to whom the detainee is released.

The questions for the panel covered a broad gamut of issues, including whether the US military is proficient at nation building and whether nation building should even be a military mission. There was general agreement that military forces are not particularly adept at nation building, but that they possess capabilities and resources to complete non-traditional missions. It was observed that many nation-building tasks should be handled by civilian agencies but these agencies were often not

effectively resourced. A question was also raised about the status of individuals covered as protected persons and who should receive those protections during an insurgency, illustrating again that the issue of detainees was of prime concern—and importance.

Panel V: Issues Spanning the War in Iraq

Panel V looked at “legal issues spanning the war in Iraq.” Captain Brian Bill, JAGC, US Navy, addressed the issue of detainees. At the height of operations in Iraq there were twenty-six thousand detainees in US custody. Task Force 134 was created to oversee all detainee operations. Detentions under the authority of UN Security Council resolutions were driven by a determination as to whether the detainee posed an imperative threat. Captain Bill pointed out that the determination of this status involved giving the detainee a certain level of due process. In fact, the due process afforded detainees was above and beyond that required by Article 78 of the Fourth Geneva Convention. Task Force 134 directives went so far as to provide women, children and those who needed assistance in understanding the proceedings with special representatives to aid them in their detention hearings.

Mr. Robert Boorda noted the difficulties that arise when there are multiple agencies involved in stability and reconstruction efforts. In Iraq there was, and continues to be, little coordination or communication between civil and military agencies. This creates a chaotic environment on the ground and hampers reconstruction efforts. Mr. Boorda explained that Iraqis are often targeted by insurgents for cooperating with US efforts to rebuild the country, making local involvement difficult to obtain. These problems, combined with the inability to determine the needs of Iraqi civil society, make the restoration of Iraq an ongoing challenge.

Ms. Naz Modirzadeh posed the question as to what human rights law applied during an armed conflict, during an occupation and during the post-occupation period while coalition forces remained in Iraq. While the United States does not recognize the extraterritorial application of human rights law, other countries have been moving in that direction. Ms. Modirzadeh argued that, while on its face it would appear to benefit civilians by creating new levels of legal protections, extraterritorial application of human rights law may not bring the positive results that its proponents seek. As human rights laws are applied extraterritorially, a corollary question arises as to which rights should be recognized and applied.

Many questions were addressed to the panel, with a focus on the impact of the application of human rights law to armed conflicts. Comments of both panelists and conference attendees suggested that while it would not “mean the end of the world,” it would certainly create a new layer of “fog of war” in the legal context.

Closing Address

The conference ended with Professor Yoram Dinstein assessing the highlights of the conference. He indicated that the concept of “lawfare” cannot be ignored, that it must be dealt with proactively and with a focus on educating societies on the true legal requirements in an armed conflict. He argued that the conflict in Iraq began as an international armed conflict and, in his opinion, continues to be an international armed conflict because hostilities have not concluded. Additionally, international armed conflict is a prerequisite to belligerent occupation of the type that occurred in Iraq. He stated that military forces must adapt to the circumstances in using high technology to fight an enemy using very low technology. Precision in striking the wrong target can lead to defeat in the war of information.

Professor Dinstein noted that in deciding who is entitled to protection as a civilian, the concept of direct participation in hostilities comes to the fore. An individual who is an insurgent during the day cannot come home at night and expect to have the protections accorded to a civilian. The concept of direct participation has interesting applications to private military contractors. Their role must be strictly defined if contractors are to be employed in the conflict. One of the main goals of belligerent occupation is to ensure security. Occupation begins when control is exercised, but when does occupation end? Finally, the application of human rights law in the context of armed conflict may not be a positive development. The law of armed conflict is a well-understood body of law that is designed to protect civilians and military members alike. To interject an array of other laws into the arena would not be beneficial for those in harm’s way.

Conclusion

In closing, I trust that you will find the articles from the preeminent scholars and practitioners that contributed to this volume to be thought provoking and useful in shaping the debate on the conflict in Iraq for future generations.

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