

XIX

Concluding Observations: The Influence of the Conflict in Iraq on International Law

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The conference from which these articles derive was an exceptionally successful and multilayered one in which a rich lode of legal insights and lessons learned (based, in many instances, on firsthand experience in the field) was truly struck. I cannot do justice to all the contributions to the conference and to this volume; I will simply focus on ten points that look particularly apposite to me.

A. "Lawfare" versus Warfare

The first point relates to the dichotomy between the laws of warfare and the war of "lawfare." The term "lawfare"—apparently coined, and certainly popularized, by Major General Dunlap—is not just a clever play of words. We live at a time when the shrewd use of law as a weapon in the marketplace of public relations may often counterbalance the successful employment of weapons in the battlefield. In the debate, General Dunlap has suggested that it may be a good idea to educate the civilian population, which is potentially subject to aerial bombardment, to reconcile itself to the inevitability of some collateral damage being engendered by almost any attack. My own submission is that before you undertake the massive (and perhaps impossible) task of teaching the enemy population to accept death as a fact of life, it

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may be more productive to educate the general public on our side of the aisle—and especially the media and the non-governmental organizations (NGOs)—to face up to the ineluctable consequences of war.

Speaking of the media, it cannot be ignored that they report armed conflicts with little understanding of the legal niceties, and this has a serious impact on the perceptions of the public at large. The very availability of precision-guided munitions (PGMs) at this moment in history—a subject matter that I shall return to *infra* C—has made commentators jump to the hasty conclusion that every attack can be surgical, that every payload may acquire the target “on the nose” and that no collateral damage should be viewed as immaculate anymore. As a matter of fact, in April of this year, a major West Coast newspaper deemed fit to state that “[y]ou can kill all the combatants you want. What you are not allowed to do is cause collateral damage—civilian casualties.”¹ Astonishingly, the authority cited for this implausible assertion is supposed to be no other than yours truly! I hope that I do not have to persuade those present here that, in fact, I have always argued otherwise, i.e., that there is no way to avert altogether collateral damage to civilians. But the real issue is not the misleading authority: it is the misleading statement.

What is to be done about such misrepresentations of the law of armed conflict (LOAC)? In my opinion, there are three practical steps that should be taken:

- In the daily briefings provided to the media during hostilities, it is indispensable to incorporate some legal interpretation. In other words, it is not enough to describe what happened, or even to include real-time visual (camera or video) coverage of Air Force missions and similar highlights of the military operations. It is absolutely necessary to offer the media a legal appraisal of the events or, in other words, a bit of “lawfare” adjoined to reports of warfare. Surely, the US Air Force—employing, as it does, some 1,300 lawyers—can allocate the personnel required to fill what is currently a dangerous vacuum in the media briefings.

- As pointed out by Professor Heintschel von Heinegg, the armed forces cannot afford the interminable delays occurring prior to the publication of the final conclusions of “in-house” armed forces fact-finding reviews of lethal incidents in which something has gone wrong. The high command must understand that, in the context of “lawfare,” such investigations must be drastically condensed in time: they may even deserve priority over some military operations. The critical exigencies of “lawfare” demand putting an end to the present state of affairs in which charges of wrongdoing are immediately splashed all over the front pages of the world press—without any authoritative response—whereas results of the in-house inquiries, once released (frequently, many weeks

later), are buried at the bottom of a back page. By then, irrespective of the outcome, the public is convinced that the charges have been vindicated.

- New procedures must be found for fact-finding reviews of this nature. I do not believe that human rights NGOs should take over the investigations. On the other hand, when all is said and done, the incontrovertible reality is that the public has become (rightly or wrongly) skeptical about the credibility of in-house probes. The time has come to consider the possibility of leavening the fact-finding process with the addition of some impartial observers to the board of inquiry.

B. The Nature of the Armed Conflict

Diverse views were voiced at the conference as regards the nature of the armed conflict in Iraq. As far as I am concerned, from a US standpoint this has been—and still is—an international armed conflict. The United States (and its allies) went to war against the Baathist Iraq of Saddam Hussein (as to the sequence of events in the Gulf War, see *infra* J). This was an inter-State war when it started, and it remains an inter-State war until it is finished. It is true that Saddam's government has been overthrown and a new Iraqi government has been installed in Baghdad. The US (and allied) forces have been acting in full cooperation with that new government, which has been recognized by the Security Council and by the international community at large. The United States–Iraq Agreement on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, signed in 2008, only attests to that continued cooperation. Yet, remnants of the Saddamist forces (minus Saddam himself)—strengthened by jihadist foreigners—are still fighting in Iraq, and they have yet to be rooted out. As long as US troops persist in waging combat operations against them, the hostilities constitute an international armed conflict. The belligerent occupation of parts of Iraq by US troops formally ended in 2004 (see *infra* G), but the war has gone on. I was glad to glean from various presentations at the conference that, in practice, the US military authorities in Iraq continue to apply the law of international armed conflict. This is as it should be. The war in Iraq is not over until it is over.

This is the US outlook on Iraq. Evidently, the position is different insofar as internal Iraqi affairs are concerned. Side by side with the international armed conflict still raging between the US (and allied) forces and the remaining Saddamists, Iraq is plagued by a non-international armed conflict, in which the Baghdad government is equally trying to eliminate the last vestiges of the *ancien régime*. That is a non-international armed conflict: since the fighting is protracted temporally and widespread spatially, it is impossible to consider the ongoing violence as merely a “below the threshold” internal disturbance.

If I interpret correctly the presentation by Professor Turns, I think that he agrees that we encounter in Iraq two parallel armed conflicts: one international and the other non-international. There is nothing exceptional about the phenomenon of the simultaneous prosecution of an international and a non-international armed conflict within the borders of the same country.² This possibility was expressly acknowledged by the International Court of Justice in its *Nicaragua* judgment of 1986.³ Iraq is just a paradigmatic recent example of two-pronged armed conflicts, which are waged concurrently.

Legally speaking, the parallel armed conflicts must be analyzed discretely. In many respects, the contemporary rules of LOAC in both international and non-international armed conflicts have virtually blended.⁴ However, there is a crucial divergence with respect to a number of pivotal subjects, primarily where post-capture treatment of personnel is concerned: the privileged status of prisoners of war is strictly confined to international armed conflicts.⁵ The issue came to the fore in the personal case of Saddam Hussein. When captured, the United States treated him—rightly—as a prisoner of war. Of course, Saddam could have been prosecuted by an American military tribunal for war crimes (i.e., grave breaches of LOAC). But the United States chose not to proceed with the case. Instead, Saddam was handed over to the Iraqi government, and—once subject to Iraqi jurisdiction—he no longer benefited from the advantages of prisoner of war status. The end of the story is well known.

C. Precision-Guided Munitions

The wide availability and accuracy of precision-guided munitions (PGMs)—especially in air warfare (and particularly when employed in combination with unmanned aerial vehicles (UAVs))—was extolled by many participants in this conference. There is no doubt about the radically increased capability to conduct surgical attacks that minimize collateral damage. Yet, several caveats have been corroborated by the proceedings.

The first point to bear in mind is that accuracy in delivering a weapon to a target is contingent not only on the availability of PGMs but also—perhaps, preeminently—on a good reading of the target area and meticulous preplanning. The trouble is that there are numerous instances in which air attacks (especially, albeit not exclusively, when launched in close support of ground troops) are not linked to any in-depth preplanning. Absent the element of advance preparation, the accuracy of a precision-guided munition cannot by itself be a sufficient guarantee of avoiding mistaken identity of targets.

In the final analysis, accuracy in attack is predicated on good intelligence (this is where reconnaissance by UAVs may be a vital component in the equation). The key to a successful attack may lie less in the availability of PGMs and more in the collation and evaluation of reliable data. If an attack is launched on the basis of outdated or otherwise flawed information, the PGM may strike the target “on the nose,” and nevertheless the results can be devastating to civilians. For a vivid illustration, suffice it to remind ourselves of the unfortunate episode of the Baghdad bunker in 1991, in which hundreds of Iraqi civilians lost their lives by mistake since they had sought shelter from air raids in the wrong place.⁶

It must be added that the post-event gauging of the legality of any attack must be predicated not on hindsight but on foresight. In other words, what really counts is not what we clearly see after the event, but what is glimpsed through the “fog of war” by the commander in real time. Decisions on the battlefield are often warped by an honest but mistaken belief in the existence of a constellation of facts which is not borne out by reality. It is therefore useful to recall that Article 32(1) of the 1998 Rome Statute of the ICC (International Criminal Court) recognizes mistake of fact as an admissible defense, thereby excluding criminal responsibility for war crimes.⁷

D. Proportionality

The principle of proportionality is the key to the effective protection of civilians and civilian objects from collateral damage in attack. The trouble is that, while everybody pays lip service to the principle in the abstract, its specific dimensions are not always understood by the media, by NGOs or by the general public. Obviously, proportionality is a relative term: it presupposes a comparison between A and B. What are these A and B in the context of LOAC? It is frequently suggested by the media that the proper comparison to be drawn is between the number of human losses sustained—and the amount of property destroyed—by both sides. Nothing is farther from the legal truth. The proportionality that really counts for the purposes of weighing collateral damage is (A) the expectation of excessive incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, compared to (B) the anticipation of the concrete and direct military advantage to be gained (see Article 51(5)(b) of Additional Protocol I of 1977).⁸

It is necessary to stress several points. The first is that proportionality has nothing to do with injury to combatants or damage to military objectives. LOAC does not require any proportionality between combatants’ losses on the two warring sides: the losses inflicted on enemy combatants and damage to military objectives may be immeasurably greater than the counterpart casualties and destruction suffered at the enemy’s hand. Indeed, nothing precludes a belligerent party capable of

doing so from pursuing a “zero casualties policy” where its own combatants are concerned, while inflicting horrific losses on the enemy’s armed forces. Proportionality is strictly limited to collateral damage to civilians and civilian objects.

Even where collateral damage to civilians and civilian objects is concerned, proportionality is by no means determined by purely crunching numbers of casualties and destruction on both sides. The quintessence of proportionality is that the expectation of collateral damage to civilians and civilian objects must not be “excessive.” Some NGOs appear to confuse “excessive” with “any.” The ICRC (International Committee of the Red Cross) commentary on Additional Protocol I seems to mix up the term “excessive” with “extensive.”⁹ Both are misreadings of the text.¹⁰ Even “extensive” civilian casualties may be acceptable, if they are not “excessive” in light of the concrete and direct military advantage anticipated. The bombardment of a vital military objective (like a naval shipyard or an industrial plant producing military aircraft) where there are hundreds or even thousands of civilian employees need not be aborted merely because of the palpable hazards to those civilians.¹¹

The whole assessment of what injury or damage is excessive in the circumstances entails a mental process of pondering dissimilar considerations lacking a common denominator—namely, civilian losses and military advantage—and is not an exact science.¹² In the words of the Elements of Crime of the Rome Statute of the ICC, this is a “value judgement.”¹³

From the text of Article 51(5)(b) of Additional Protocol I one can clearly deduce that the appraisal of proportionality is not about results: it is about the initial expectation (of injury to civilians or damage to civilian objects) and anticipation (of the military advantage). In other words, what counts is what is foreseeable before the event.

The concrete and direct military advantage must be perceived in a contextual fashion. According to Article 8(2)(b)(iv) of the Rome Statute, what counts is the “overall” military advantage anticipated.¹⁴ By introducing the term “overall,” the Statute clearly permits looking at the larger operational picture, as distinct from focusing on the particular point under attack. The attacker may argue, e.g., that an air raid of no perceptible military advantage in itself is justified by misleading the enemy to shift its strategic gaze to the wrong sector of the front (the extensive air raids in the Pas-de-Calais on the eve of the Allied landings in Normandy on D-Day in World War II are an emblematic illustration).¹⁵

Preplanning, albeit of major significance, is not conclusive: the scene of a military encounter frequently changes rapidly. In training, it is required to underscore the importance of situational awareness to the risks of excessive collateral damage.

If an aviator or a platoon commander on the ground finds out that reality does not match the pre-attack briefing, he has to abort the attack.

E. Direct Participation in Hostilities

Civilian protection from attack is vouchsafed, in conformity with Article 51(3) of Additional Protocol I, “unless and for such time as they take a direct part in hostilities.”¹⁶ Direct participation in hostilities has proved to be a matter of critical importance in both Iraq and Afghanistan where the enemy flagrantly disregards the cardinal principle of distinction between combatants and civilians. The need to define activities coming within the ambit of direct participation in hostilities is perhaps the “hottest” topic in LOAC today. It has become even hotter after the ICRC published (in June 2009) an “Interpretive Guidance” on the subject,¹⁷ formulated after thorough consultation with a fairly large group of experts but in disharmony with the views of most of the Western members.

In the Newport conference of 2007 I addressed the specific (and complex) hypothetical scenario of a civilian driving a munitions truck to supply the armed forces.¹⁸ There is a host of new settings of direct participation in hostilities coming to light all the time. This year we heard about civilians who have to move around Iraq for strictly civilian purposes, but—in order to get from one place to another—have no choice other than joining a military convoy for their protection and en route they are handed over weapons to be used against attack, thus becoming gunmen. No doubt, in case of an actual exchange of fire with the enemy, such civilians will be viewed as directly participating in hostilities.

The most controversial issue in the context of direct participation in hostilities is that of the “revolving door” syndrome, i.e., the case of persons who repetitively take up arms against the enemy and then reassume the posture of innocent civilians. The ICRC maintains that civilian immunity from attack is restored each time that the person ends his engagement in a hostile act and that no prediction as to his future conduct is allowed.¹⁹ I and others profoundly disagree. In fact, the proposition is irreconcilable with the universal rejection of the concept of “a soldier by night and peaceful citizen by day,” even by the ICRC commentary on the Additional Protocol.²⁰

I do not want to go at length into the complex details of the “revolving door” problem or other related issues, since I have a proposal to the organizers of the Newport conferences. My proposal is to devote next year’s session to a systematic examination of the whole topic of direct participation in hostilities.

F. Private Military Contractors

This is a subject that has gained priority on the international legal agenda because of Iraq and the large numbers of private military contractors (PMCs) involved there (according to some estimates, the number of PMCs in Iraq equals that of the US troops deployed). Intensive consultations by inter-governmental experts produced in 2008 *The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflicts*.²¹ According to this document, PMCs retain their civilian standing as long as they are not incorporated into the armed forces and do not directly participate in hostilities.²²

PMCs include engineers, technicians, instructors, construction workers, providers of food services and weapon specialists (tasked with training, maintenance and repairs).²³ However, if PMCs are hired by the military to actually operate weapons systems or otherwise take part in the hostilities, they lose their civilian protection.²⁴ Even PMCs who retain their civilian status run a tangible risk of being the victims of collateral damage (for instance, should the enemy attack a military base in which they are employed).²⁵ PMCs are particularly vulnerable to attack if they put on military uniforms while in service.

G. Belligerent Occupation

Many of the presentations at the conference (for instance, those by Brigadier General Tate and Colonel Pregent) were linked to the dilemmas of occupation in Iraq, whether under the guise of a belligerent occupation regime or in the context of a post-occupation regime. The underlying questions are when belligerent occupation begins, what occupation is all about while it lasts and when it ends.

As far as the beginning of belligerent occupation is concerned, Professor Benvenisti rightly pointed out that it is necessary to distinguish between the invasion and occupation stages. But in my opinion it is advisable to note the possibility of a hiatus between the two stages.²⁶ This came to light in Iraq at the time of the looting of the National Museum in Baghdad in April 2003. The Iraqi troops in the area had already been defeated and driven away. The US combat troops advanced through the area in pursuit of the enemy, but—being on a combat mission—had to proceed to other destinations. The rear echelons had not yet established effective control in Baghdad; the result was chaos enabling the Iraqi looters to act freely.²⁷ What is the lesson learned? General Rogers has suggested that MPs should in the future be assigned to accompany combat troops.²⁸ But is this practical? One thing is regrettably clear: you cannot prepare for everything.

The legal foundation of the law of belligerent occupation can be traced back to Hague Regulation 43 of 1907, which reads (in its common non-binding English translation):

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.²⁹

The international law of belligerent occupation thus makes it plain that it is incumbent on the occupying power(s) to ensure, as far as possible, security to the population. Indeed, I submit that—if in real estate the three predominant considerations are location, location, location—in belligerent occupation the three preponderant considerations are security, security, security.

I found it almost amusing to hear in this conference that the US occupation authorities were deeply concerned about the revision of the Iraqi copyright law. I can well understand that the existence of an outdated copyright law may become an issue after a prolonged belligerent occupation. After all, the local law cannot be frozen for many years (let alone decades), and over a stretch of time the reasons for law reform become compelling. Yet, when the belligerent occupation lasts in theory from April 2003 through June 2004, how did copyright even come into the minds of the authorities of the occupying power(s)? They should have worried about security, security, security, and then perhaps Iraq would have been a better place to live in today.

As for the end of belligerent occupation, I bow to the binding decision of the Security Council in Resolution 1546 (2004), which—acting under Chapter VII of the Charter of the UN—established that the occupation of Iraq was terminated by the end of June 2004.³⁰ I do so because I strongly believe that, by virtue of the combined effect of Articles 25 and 103 of the Charter,³¹ the Security Council is vested with the power to override all norms of international law (with the possible exception of peremptory norms constituting *jus cogens*),³² including those of LOAC. De jure, the end of belligerent occupation in Iraq in June 2004—as decreed by the Security Council—was therefore unassailable. De facto, however, the end of belligerent occupation of Iraq in 2004 was more notional than real.³³ In realistic terms, the belligerent occupation should have been looked upon as continuing in some parts of Iraq to this day. Only now when US combat troops are finally evacuating the main Iraqi urban areas is the belligerent occupation of certain parts of Iraq perhaps coming to a close. Like war, an occupation is not over until it is over.

The de jure termination of the belligerent occupation in Iraq in June 2004, of course, made it possible for the legislation adopted there to become “transformative”³⁴ without being in breach of international law. But de facto, one may well ask if the effective control of substantial parts of Iraq by US (and allied) troops has been really affected by the Security Council resolution defining the end of belligerent occupation. Who actually has looked after the security and the welfare of the population? The Iraqi government in Baghdad? There is an anecdote told in Iraq about an inhabitant of an area controlled by Romanian troops (no offense to the Romanians intended) coming to a local police station complaining that a Swiss soldier has just stolen from him a precious Romanian-made watch. The sergeant at the desk asked the Iraqi if he was drunk. “Surely,” said the sergeant, “you mean that a Romanian soldier stole from you a precious Swiss-made watch.” “You said that,” answered the Iraqi, “not I.” Well, just as it is pure fiction that there are Swiss soldiers in Iraq, it is pure fiction that between 2004 and 2009 all Iraqis have been under the effective control of the Baghdad government.

H. “Stability Operations”

Captain Stephens quoted a manual on stability operations, telling us that these have become “a core Army mission.” Assuming that stability operations (or, as they were called by some other participants in the conference, “nation-building”) are not merely a euphemism for counterterrorism combat missions, I am worried. Undertaking such a transformative mission transforms not only the occupied country: it is bound to transform also the armed forces of the occupying power(s). Soldiers are supposed to be soldiers, not policemen or experts in political, social and economic affairs. The core mission of an army is to carry out combat missions, in order to defeat the enemy and win the war. This is what officers and other personnel are—and ought to be—trained for.

Stability as such, in any event, is overrated. Saddam’s regime was stable. What is sought is stability under a democratic government based on the rule of law. However, while assistance in the building of a new democratic and stable Iraq is a worthy cause, I think that it should be rendered by those qualified to do so. For every task in life there are qualified professionals. When the need arises, we rely on a doctor, a lawyer or a plumber to do what is required. Even in American football there are separate teams for “defense” and for “offense,” each requiring different skills. By the same token, you cannot expect the same folks in the military to specialize both in combat and in “nation-building.” It is far better for the Army to concentrate on what it does best—combat—and to recruit civilian professionals to do what they do best.

I do not deny that the civilian professionals that I am addressing have to discharge their duties under the overall supervision of the armed forces. Indeed, it is a basic premise of belligerent occupation that the government of an occupied territory must be military, and any civil administration must function as a subdivision of the military government.³⁵ Yet, even a military government is entitled to—and in appropriate cases should—employ civilian professionals with the proper credentials, in order to fulfill specific tasks that in my view do not constitute part of the core mission of any army.

I. Human Rights Law

At the conference, we heard (principally, from Ms. Modirzadeh) about the issue of the relationship between human rights law (HRL) and LOAC. Let me add, however, that it is often forgotten that most human rights are subject to derogation in wartime. As a good illustration, take internment (a topic that we heard about from Captain Bill). Under HRL, in principle, “a policy of preventive internment, that is the arrest and detention of those who are considered dangerous without any intention of bringing them to trial” is inconsistent with the basic human rights instruments.³⁶ Yet, the same European Court of Human Rights—which is the authority for this proposition, underlying its very first judgment, in the *Lawless* case of 1961—also pronounced that the norm is subject to derogation in time of war or other public emergency,³⁷ as per Article 15 of the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR).³⁸ Derogation of most human rights is also possible under Article 4 of the 1966 International Covenant on Civil and Political Rights (ICCPR).³⁹

Unlike HRL, derogation from LOAC rights—although possible in some extreme instances⁴⁰—is limited to specific persons or situations and no others. Certainly, wartime per se does not justify derogation from LOAC: after all, by its very nature LOAC is designed for application in wartime. The upshot is that LOAC may provide a better solution to a given problem than HRL. Thus, where internment under belligerent occupation is concerned, we have Article 78 of Geneva Convention IV of 1949: this provision explicitly permits preventive internment for imperative reasons of security, but this is subject to a procedure including the right of appeal as well as a “periodical review, if possible every six months, by a competent body” (to be set up by the occupying power).⁴¹

It ensues that in wartime, as far as internment goes, LOAC has a humanitarian edge over HRL. It is true that in peacetime, HRL attains a higher level of humanitarianism—let’s even say one hundred—but, if derogated in wartime, the level of protection can drop to zero. LOAC may not aspire as high as HRL, but it never

drops so low: it delivers a constant fifty. I find the half loaf most reassuring in the face of a possibility of getting no loaf at all.

Admittedly, some human rights are non-derogable: freedom from torture is a leading example (see the aforementioned provisions of the ECHR and ICCPR). Yet, most non-derogable human rights coincide with rights established directly by LOAC, independently of HRL. Thus, torture in international armed conflicts is expressly forbidden by all four Geneva Conventions,⁴² as well as Additional Protocol I.⁴³ An ICTY (International Criminal Tribunal for the former Yugoslavia) Trial Chamber held in the *Furundzija* case, in 1998, that the LOAC prohibition of torture constitutes a peremptory norm of customary international law (*jus cogens*).⁴⁴

The International Court of Justice held, in the advisory opinion on *Nuclear Weapons*, that—in the conduct of hostilities—the test of an (unlawful) arbitrary deprivation of life is determined by the *lex specialis* of LOAC.⁴⁵ The *lex specialis* construct of LOAC has been reaffirmed by the Court in its 2004 advisory opinion on the *Wall*.⁴⁶ The full connotations of the *lex specialis* status of LOAC can best be appreciated in the context of the fundamental right to life, addressed by the Court in the *Nuclear Weapons* advisory opinion. In allowing lethal attacks against enemy combatants, LOAC runs counter to the basic tenets of human rights law concerning extrajudicial deprivation of life.⁴⁷ Nevertheless, in the event of an international armed conflict, the LOAC norms—as *lex specialis*—prevail over the *lex generalis* of human rights.

This does not mean that relations between LOAC and HRL law are characterized by constant friction. In reality, there are only a few examples of collision between them.⁴⁸ Still, there is no denying the incompatible approaches of LOAC and HRL to some central issues, and it must be observed that the discrepancies are not limited to the treatment of combatants. Thus, in the words of Theodor Meron: “Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in hostilities, such as civilian victims of lawful collateral damage.”⁴⁹

J. Jus ad Bellum

Lieutenant Commander Wall addressed the issue of *jus ad bellum* in Iraq. This, as everybody knows, is a controversial topic. I have addressed the subject myself in a previous Newport conference,⁵⁰ and do not wish to repeat my arguments. Let me just say, very succinctly, that—for my part—the key to unlocking the conundrum of Iraq lies in understanding that (a) the Gulf War that started with the invasion of Kuwait in 1990 is still going on, (b) the period between 1991 and 2003 was largely

one of ceasefire (punctuated by sporadic hostilities between Iraq and the coalition led by the United States), (c) Iraq (as authoritatively determined by the Security Council⁵¹) was in material breach of its ceasefire obligations (especially insofar as the destruction of weapons of mass destruction (WMD) was concerned), and (d) the fighting of 2003 and thereafter should be viewed merely as the resumption of general hostilities by the coalition in response to that material breach.⁵²

The fact that no WMD were actually found in Iraq does not affect the legal analysis. Iraq had clearly amassed WMD at earlier times—in material breach of the ceasefire—and all intelligence services worldwide were convinced that it continued to do so. Even those who were opposed to the coalition’s military action in 2003 did not deny that basic fact and merely wished to postpone the clash of arms (some commentators now argue that Saddam himself deliberately misled the world to believe that he possessed WMD for some convoluted reasons that escape me). Well, in wartime, smoke and mirrors can become all too real. In the sphere of the *jus ad bellum*—no less than in that of the *jus in bello*—what ultimately counts is reasonable evaluations of the facts as they appear at the time of action, rather than post-event hindsight knowledge.

K. Conclusion

Although the worst appears to be over in Iraq, the “nation-building” there is still in many respects a work in progress. The United States finds itself still on a learning curve. Winston Churchill famously said that Americans always come to the right decision—after they have tried everything else. In Iraq it seems that everything else has already been tried. Let us hope that Americans will arrive at a right decision soon.

Notes

1. Carol J. Williams, *Legal experts want more from Obama on Guantanamo*, LATIMES.COM, Apr. 21, 2009, <http://articles.latimes.com/2009/apr/21/world/fg-obama-gitmo-law21>.
2. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 14–15 (2004).
3. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 114 (June 27).
4. See *San Remo Manual on the Law of Non-International Armed Conflict* (Michael Schmitt, Charles Garraway & Yoram Dinstein eds., 2006), 36 ISRAEL YEARBOOK ON HUMAN RIGHTS 2006 (Special Supplement).
5. See *id.* at 40–41.
6. See DINSTEIN, *supra* note 2, at 117–18.
7. Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND

OTHER DOCUMENTS 1314, 1329 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) [hereinafter Rome Statute].

8. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 7, at 711, 736 [hereinafter Additional Protocol I].

9. See Claude Pilloud & Jean Pictet, *Article 51 – Protection of the civilian population, in* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 613, 626 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

10. See Christopher Greenwood, *Current Issues in the Law of Armed Conflict: Weapons, Targets and International Criminal Liability*, 1 SINGAPORE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 441, 461–62 (1997).

11. See W. Hayes Parks, *The Protection of Civilians from Air Warfare*, 27 ISRAEL YEARBOOK ON HUMAN RIGHTS 65, 110 (1997).

12. See William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MILITARY LAW REVIEW 91, 102 (1982).

13. See KNUT DÖRMANN, *ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY* 161 n.37 (2003).

14. Rome Statute, *supra* note 7, at 1318.

15. See MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, at 318, 325 (1982).

16. Additional Protocol I, *supra* note 8, at 736.

17. NILS MELZER, *INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW* (2009), *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-872-p991/\\$File/irrc-872-reports-documents.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-872-p991/$File/irrc-872-reports-documents.pdf).

18. See Yoram Dinstein, *Distinction and Loss of Civilian Protection in International Armed Conflicts, in* INTERNATIONAL LAW AND MILITARY OPERATIONS 183, 191–92 (Michael D. Carsten ed., 2008) (Vol. 84, US Naval War College International Law Studies).

19. INTERPRETIVE GUIDANCE, *supra* note 17, at 70–71.

20. See Jean de Preux, *Article 43 – armed forces, in* COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 9, at 505, 515.

21. DIRECTORATE OF INTERNATIONAL LAW, INTERNATIONAL COMMITTEE OF THE RED CROSS, *MONTREUX DOCUMENT ON PERTINENT INTERNATIONAL LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICTS* (2008), *available at* [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/\\$FILE/ICRC_002_0996.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/$FILE/ICRC_002_0996.pdf). The text is reproduced in 13 JOURNAL OF CONFLICT AND SECURITY LAW 451 (2009).

22. See Part 1, paras. 24–26, of the Montreux Document. *Id.* at 458.

23. See Jeffrey F. Addicott, *Contractors on the “Battlefield”: Providing Adequate Protection, Anti-Terrorism Training, and Personnel Recovery for Civilian Contractors Accompanying the Military in Combat and Contingency Operations*, 28 HOUSTON JOURNAL OF INTERNATIONAL LAW 323, 333–34 (2005–6).

24. See Avril McDonald, *Ghosts in the Machine: Some Legal Issues Concerning US Military Contractors in Iraq, in* INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES, *ESSAYS IN HONOUR OF YORAM DINSTEIN* 357, 382–86 (Michael N. Schmitt & Jelena Pejic eds., 2007).

25. See Lisa L. Turner and Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 AIR FORCE LAW REVIEW 1, 26 (2001).
26. See YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 41–42, 208–9 (2009).
27. See John C. Johnson, *Under New Management: The Obligation to Protect Cultural Property during Military Occupation*, 190/191 MILITARY LAW REVIEW 111, 149–52 (2007).
28. A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 159 (2d ed. 2004).
29. Regulations Respecting the Laws and Customs of War on Land, Annex to Hague Convention, No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 7, at 55, 66, 78.
30. S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004), reprinted in 43 INTERNATIONAL LEGAL MATERIALS 1459, 1460 (2004).
31. U.N. Charter, reprinted in 9 INTERNATIONAL LEGISLATION 327, 339, 361 (Manley O. Hudson ed., 1950).
32. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 322–25 (4th ed. 2005).
33. Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, in INTERNATIONAL LAW AND ARMED CONFLICT, *supra* note 24, at 439, 488.
34. See *id.* at 486–87.
35. See DINSTEIN, *supra* note 26, at 56.
36. A.H. ROBERTSON AND J.G. MERRILLS, *HUMAN RIGHTS IN EUROPE* 66 (3d ed. 1994).
37. *Lawless v. Ireland* (No. 3) (Eur. Ct. H.R.), 3 JUDGMENTS AND DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS 27, 54–62 (1961).
38. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, reprinted in *THE RAOUL WALLENBERG COMPILATION OF HUMAN RIGHTS INSTRUMENTS* 81, 85–86 (Göran Melander & Gudmundur Alfredsson eds., 1997).
39. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, reprinted in *THE RAOUL WALLENBERG COMPILATION*, *supra* note 38, at 43, 44–45.
40. See Convention Relative to the Protection of Civilian Persons in Time of War art. 5, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 7, at 575, 581–82 [hereinafter Geneva Convention IV]; Additional Protocol I, *supra* note 8, art. 54(5) at 738.
41. Geneva Convention IV, *supra* note 40, at 603.
42. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 12 (2nd para.), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 7, at 459, 465; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 12 (2nd para.), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 7, at 485, 491; Convention Relative to the Treatment of Prisoners of War art. 17 (4th para.), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, reprinted in *THE LAWS OF ARMED CONFLICTS*, *supra* note 7, at 507, 518; Geneva Convention IV, *supra* note 40, art. 32 at 590.
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52. For more detail, see DINSTEIN, *supra* note 32, at 294–300.