Introduction

On October 7, 2001 the United States commenced Operation Enduring Freedom, striking terrorist training camps and infrastructure in Afghanistan to dismantle the threat posed by Al Qaeda and its supporters. Over the ensuing seven years, the United States, NATO allies and coalition partners saw the evolution of the Afghan conflict reveal not only an entirely new paradigm of warfare, but a test of the very structure and ability of international law to regulate armed conflicts in the new millennium.

Since its founding in 1884, the US Naval War College has pioneered the study and teaching of the law impacting military operations. For three days in June 2008 the College convened a unique colloquium of experts to take another leap forward in the development and understanding of international law. The workshop, “The War in Afghanistan—A Legal Analysis,” drew together fifty of the world’s most distinguished academics and elite practitioners of international law to provide a comprehensive debate and explication of the conflict. Panelists and participants engaged in thorough discussions germane to both the Afghan war and future military operations involving the legal basis for the conflict, the law governing the conduct of hostilities and the emerging legal framework to transition from hostilities to a stable peace.

This edition of the Naval War College’s internationally acclaimed International Law Studies (“Blue Book”) series captures the insights and lessons shared by the workshop participants. Employing the Naval War College’s Decision Support Center resources, panelists were able to access participant notes from their presentations, augmenting and strengthening their own written work. The fruits of these discussions are contained in the eminent scholarship found in this volume.

The workshop was organized by Major Michael D. Carsten, US Marine Corps, of the International Law Department, assisted by Ms. Heidi Eldridge and Mrs. Jayne Van Petten. The workshop was made possible through the support of the Naval War College Foundation and the Israel Yearbook on Human Rights. Without the dedicated efforts and support of these individuals and organizations, the workshop would not have taken place.

I give thanks to Marshall Center Dean Michael N. Schmitt, the 2008–09 Stockton Professor of International Law, for serving as the editor of this volume, and to Jack Grunewalt and Captain Ralph Thomas, JAGC, US Navy (Ret.), who undertook the lion’s share of the editing process with the assistance of Captain

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
Robert Huard, JAGC, US Navy Reserve (Ret.), and the staff of the College’s Desktop Publishing Department. I also extend thanks to Captain Charles T. Passaglia, JAGC, US Navy Reserve, Commanding Officer, NR Naval War College (Law)—the reserve unit assigned to the International Law Department. His willingness to assist, often at a moment’s notice, made this publication possible. Although I am grateful to all the officers of the reserve unit, a special note of thanks goes to Commander Eric M. Hurt, JAGC, US Navy Reserve, for his work in preparing the index. This publication is a testament to their tireless efforts and devotion to the Naval War College and to the International Law Studies series.

Special thanks go to Rear Admirals Jacob Shuford and Philip Wisecup, past and current Presidents of the Naval War College, and Professor Barney Rubel, Dean of the Center for Naval Warfare Studies, for their leadership and support in the planning and conduct of the workshop, and the publication of this volume.

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. This year we have added a catalog of all previous “Blue Books” right after the table of contents to facilitate research. Volumes 59–85 of the International Law Studies series are available electronically at http://www.usnwc.edu/cnws/ild/ild.aspx. This “Blue Book,” like its predecessors, exhibits the Naval War College’s long-standing dedication to the scholarly discourse and understanding of legal issues at the strategic, operational and tactical levels.

Finally, and most importantly, we once again thank our friend and mentor Professor Howard Levi, to whom this volume is dedicated, for his many enduring contributions to the Naval War College.

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Preface

It has become fashionable in law of armed conflict (LOAC) circles to claim that whatever “war” one is considering, it is a new form of conflict, one that challenges existing LOAC norms, uncovers lacunae in the law or reveals where extant norms have fallen into desuetude. Hybrid warfare, three-block war, postmodern war, asymmetrical war, the global war on terrorism—all have their proponents and detractors, the latter claiming, often accurately, that the packaging of the conflict as this or that form of warfare is nothing more than old wine in new bottles. The discovery of new forms of warfare has become a cottage industry, one that is equally fascinating . . . and distracting.

Such is the case with the war in Afghanistan and its attendant relationship with transnational terrorism, thrust into the global spotlight by the al Qaeda attacks of September 11, 2001 against the United States. Indeed, the conflict does exhibit seemingly new features. Among these, the nexus with transnational counterterrorism is perhaps most prominent. The nexus has perplexed international law practitioners and scholars considering such matters as the juridical character of the conflict, the status of its participants and the existence (or the lack thereof) of belligerent occupation. Other unique normative issues are raised by the complex matrix of forces found in Afghanistan—the Taliban, armed opposition groups such as the Northern Alliance, transnational terrorists, the US-led coalition comprising Operation Enduring Freedom, Pakistani security forces operating in the tribal areas and NATO, participating as the UN-sanctioned International Security Assistance Force (ISAF). Further, the conflict has generated vibrant doctrinal debates over, inter alia, counterinsurgency, counterterrorism and stability operations, which have thus far been somewhat starved for serious analysis by the broader international legal community.

This book attempts to begin painting the normative backdrop to the conflict. To do so, the Naval War College’s International Law Department brought together a select group of international scholars and practitioners who have either particular expertise in the issues it raises or experience in providing legal advice to those responsible for conducting operations. This combination created a particularly fertile environment in which to deconstruct and analyze the events of the past seven years from both a practical and scholarly perspective. The chapters that follow are the product of that sophisticated dialogue.
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Part I sketches the conflict and its legal issues in the broad sense. Professor Sir Adam Roberts explores Afghanistan in the context of international security. In particular, he addresses challenges posed by fitting Western military doctrines, practices, and institutions to Afghan realities. Professor Roberts concludes with a discussion of actual and possible future effects of the war on international security, including that on the United Nations and NATO, and offers a summary of potential responsive policy choices.

Professor Yoram Dinstein addresses terrorism in the context of the conflict. He distinguishes terrorism that is purely internal from that launched from a foreign country and perhaps warranting action in or against that foreign country. Of particular note, he deals with the issue of attacks by non-State actors and the question, seemingly settled in the aftermath of the attacks of 9/11 but thrust into controversy by the International Court of Justice’s Wall Advisory Opinion, of whether they constitute “armed attacks” under Article 51 of the UN Charter. Professor Dinstein focuses on action against terrorists within a foreign country. He deals with action taken with the consent of that State, with action taken against the State itself and with the timely issue of “extraterritorial law enforcement.” Also of particular note is his conclusion that the inter-State war that began on October 7, 2001 continues unabated.

Part I concludes with a contribution by Professor Michael Reisman which considers the relationship between the missions assigned by the political branches of government and international law. He suggests that the feasibility of such missions and the costs to the nation in terms of life and treasure will be affected by the degree of their compliance with the requirements of international law. Thus, Professor Reisman argues, international law is directly relevant to the design of such missions, suggesting that a “less-is-more” approach may be merited when international expectations of lawfulness appear unlikely to support broader missions.

Part II addresses the legal basis for the military operations that have been conducted. Professor John Murphy argues that many of the issues raised with regard to Afghanistan constitute major challenges to international law and international institutions. They will require the United States and other members of the world community to make hard choices that will alter the future of international law. In support of his thesis, he examines the jus ad bellum, jus in bello, governance, the roles of the United Nations and NATO, problems created by the use of the tribal areas in Pakistan as a safe haven by the Taliban and al Qaeda, and the impact of Afghanistan on the current unstable political situation in Pakistan.

An examination of the international legality of US cross-border operations from Afghanistan into Pakistan by Professor Sean Murphy follows. He assesses their consistency with the jus ad bellum norms enshrined in Articles 2(4) and 51 of
the UN Charter, an issue of relevance not only to events in that region, but to analogous operations elsewhere, for instance the Turkish operations in northern Iraq and Colombia’s forays into Ecuador. According to Professor Murphy, self-defense provides a basis for those operations that respond to raids by militants from Pakistan into Afghanistan, so long as the US operations remain necessary and proportionate and the Afghan government consents to the presence of US forces. However, a broader right of self-defense against al Qaeda targets in Pakistan based on the attacks of 9/11 is, for Professor Murphy, far more problematic.

Part II concludes with a discussion by Commander Alan Cole of the Royal Navy as to the legal issues surrounding the formation of the ad hoc coalition established to conduct operations in Afghanistan. He distinguishes the coalition created for Operation Enduring Freedom from the NATO-led ISAF. Commander Cole concludes that operating two separate missions at two different tempos in the same country in an attempt to suppress the same enemy is a recipe for a conflict of laws. Nevertheless, he also concludes that the countries that contribute to the missions have accommodated their legal differences in pursuit of mission success.

In Part III, attention turns to jus in bello conduct of hostilities issues. Professor Charles Garraway begins by analyzing the character of the conflict, asking whether the situation in Afghanistan, considered in the wider context of the war on terror, constituted a new paradigm which removed it from the extant law of war or whether it was a mutation of an existing normative structure capable of accommodation within the current legal framework. He discusses the positions of the various US agencies in their attempts to fashion a coherent policy for the United States, pointing out that adoption of the State Department approach might have narrowed discussion to combatancy, thereby avoiding much of the controversy that ensued on the characterization issue.

Professor Geoffrey Corn also tackles the characterization of conflict issue, noting that characterization is an essential first step in determining the norms that govern a conflict. He notes the difficulty of applying the traditional categories of either international or non-international armed conflict. Professor Corn considers and develops a possible third category to address the situation of extraterritorial military operations conducted by States against non-State actors, one he labels “transnational armed conflicts.”

Three pieces addressing traditional law of war issues follow. Professor Gary Solis surveys various LOAC issues encountered during US ground combat in Afghanistan. He focuses on those that recurrently surfaced during the conference—status of the conflict, status of actors, detention, targeted killings, Guantanamo and war crimes prosecution.
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Mr. W. Hays Parks of the Office of the General Counsel at the US Department of Defense takes on the issue of combatants, surely one of the most controversial emanating from the conflict. He analyzes the Taliban’s status as a government and the combatant status of Taliban and al Qaeda fighters, explores the US administration’s legal rationale for denial of prisoner of war status to captured al Qaeda and Taliban personnel, and considers the law of war issue of special operations forces’ wear of indigenous attire. Mr. Parks concludes with an evaluation of the administration’s findings on these issues.

Professor Michael Schmitt’s contribution identifies and analyzes targeting issues during the conflict. He examines practices, with particular emphasis on counterinsurgency doctrine, concluding that the policy restrictions necessary to conduct such operations effectively greatly exceed those required by the law of armed conflict.

Part IV looks at detention operations during the conflict. Professor Matthew Waxman dissects three issues—the minimum baseline treatment standards required as a matter of international law, the adjudicative processes international law requires for determining who may be detained and how foreign military forces operating in a counterinsurgency transition detention operations to effective civilian institutions. He also thoughtfully presents reflective observations regarding the convergence of law and strategy.

Mr. Stephane Ojeda of the International Committee of the Red Cross surveys the law applicable to detention during armed conflict before turning to the specific issue of the detention of Taliban fighters. He distinguishes detention during the period before the establishment of the Afghan transitional government in June 2002 from that occurring thereafter. His analysis is premised on the existence of an international armed conflict before June 2002 and a non-international armed conflict thereafter. Mr. Ojeda concludes by suggesting that international humanitarian law, properly implemented, adequately addresses the various situations present during the conflict vis-à-vis detention.

Professor Ryan Goodman next delves into the rationales suggested for detention during the conflict, focusing on security threats and intelligence value. He begins by affirming the applicability of the law of armed conflict to non-international armed conflicts. Professor Goodman then turns to two central questions: (1) is it lawful to detain civilians who have not directly participated in hostilities and (2) is it lawful to detain individuals for a long or indefinite period for the purpose of gathering intelligence? As to the first, he notes that the law of armed conflict allows such detentions in appropriate circumstances, but cautions that US law may impose additional requirements. Regarding the second, he rejects the premise that
individuals may be detained for long or indefinite periods solely for the purpose of gathering intelligence.

The final operational practice examined during the conference, stability operations, is addressed in Part V. Mr. David Turns of the UK Defence Academy opens by surveying the place of stability operations within international law, specifically the *jus ad bellum* and the *jus in bello*, and, within the latter, the law applicable in international and non-international armed conflicts. He discusses application of the law of armed conflict to stability operations, including such issues as the status, treatment and targeting of insurgents. Mr. Turns pays particular attention to UK practices and policies.

Brigadier General Kenneth Watkin of the Canadian Forces offers a second coalition perspective, although his contribution is widely applicable to any forces engaged in such operations. He starts by outlining the definition, scope and purpose of stability operations, asking whether such operations are "new" or simply a catch-all category for a variety of missions that have already challenged doctrine writers and lawyers. General Watkin next tackles operations at the lower end of the spectrum of conflict in an effort to ascertain the degree to which international law has adapted to them. He continues by considering stability operations in the context of a coalition environment. General Watkin concludes by reflecting on the American doctrinal approach to "war amongst the people."

Professor Marco Sassòli offers a comprehensive analysis of the international legal framework for stability operations, specifically addressing the issue of when international forces can conduct attacks or detain individuals in these operations. He usefully addresses these matters in the context of both the LOAC and international human rights law, examining which prevails in the event they lead to different results. For Professor Sassòli, the answer to the question is tied to the specific circumstances attendant to a particular situation in which these laws apply.

Finally, the focus on stability operations narrows as Lieutenant Colonel Eric Jensen of the US Army and Ms. Amy Pomeroy describe and discuss US Army rule of law operations. They highlight three lessons learned: (1) the need to integrate rule of law operations into all phases and aspects of military operations; (2) the need to coordinate and synchronize the rule of law efforts of various actors, including the host nation; and (3) the need for rule of law operations to be effects-based.

The book concludes in Part VI by focusing on a topic of particular importance in operations such as those conducted in Afghanistan—human rights law. Professor Hampson begins consideration of the topic by asking whether human rights law is of any relevance to operations in Afghanistan. She analyzes five key issues:
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(1) whether human rights law remains applicable when the law of armed conflict applies, (2) whether human rights law obligations apply extraterritorially, (3) the impact of the territorial State’s human rights obligations for other States assisting it, (4) the effect of a Security Council mandate on legal obligations that would otherwise be applicable, and (5) whether human rights notions offer useful guidance to armed forces, whether or not human rights law is applicable de jure.

The final chapter of the book, by Mr. Stephen Pomper of the US State Department, examines the US government’s approach to human rights obligations during the conflict in Afghanistan, pointing to issues with which the new administration will have to grapple. The Bush administration took the view that the law of war did not provide an adequate framework for addressing those legal issues that arise during a conflict with a non-State group, but argued that legal and policy considerations weighed against filling the lacunae by resort to human rights law. He explores the topic by looking to, inter alia, the argumentation of the Bush administration, including that bearing on International Court of Justice opinions and other case law, as well as Canadian litigation. Mr. Pomper suggests that the Obama administration would be well served by considering this history in fashioning its own approach to the subject.

As the book was being finalized, the international law community was saddened to learn that one of its giants, Professor Howard Levie, had passed away at the age of 101. Professor Levie had a long and distinguished service as a judge advocate in the US Army, including acting as a key drafter of the Korean War Armistice Agreement, before becoming a renowned academic at Saint Louis University. He served as the Charles H. Stockton Professor at the Naval War College in 1971–72 and remained active as a frequent lecturer at the College following his retirement as Professor Emeritus from Saint Louis and his move to Newport, Rhode Island. Over the decades, Professor Levie mentored many young judge advocates and scholars; it was my honor to be among them.

In 1998, the Naval War College 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, Professor Emeritus Richard J. Grimawalt, the current Stockton Professor and former head of the Oceans Law and Policy Department at the Naval War College, 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.
Michael N. Schmitt

This book is dedicated to the memory of Professor Howard S. Levie—soldier, scholar and patriot. We shall all miss him deeply.

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