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The Gulf War: A Practitioner's View

W. Hays Parks*

"The laws are silent amidst the clash of arms," or so Cicero is alleged to have said. Indeed, the term "law of war" has all the appearances of being one of the great oxymorons of all time. Were one to follow the actions of Iraqi leader Saddam Hussein and his military forces during their invasion and occupation of Kuwait, the words of Cicero would seem to ring true. Yet at the same time Colonel Raymond C. Ruppert (U.S.A.), the legal adviser to General H. Norman Schwarzkopf, commander of United States forces for the liberation of Kuwait, has stated that "Desert Storm was the most legalistic war we've ever fought."¹

Operations Desert Shield and Desert Storm — reflecting the periods in which the United States and its Coalition partners planned, prepared for, and executed the liberation of Kuwait — constitute the greatest deployment of lawyers per capita to a theater of operations, and the greatest use of the law (including the law of war) by a nation and its military forces in the history of warfare. Speaking in a positive tone, Chairman of the Joint Chiefs of Staff General Colin L. Powell (U.S.A.) acknowledged that "Lawyers proved invaluable in the decision-making process" during Operations Desert Shield and Desert Storm.²

This article will not describe the details of Desert Shield and Desert Storm. Those have been described in detail in official and private accounts.³ Neither will this article attempt a recitation or analysis of all of the legal issues that arose in the course of Desert Shield and Desert Storm. These have been described in the official Department of Defense report to the Congress on the conduct of the

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1. Steven Keeva, *Lawyers in the War Room*, ABA J. 52, 77 (1991).

2. *Id.* On the role of lawyers, see also Tom Watson, *Law of War on the Rise*, Legal Times XIII, Jan. 21, 1991, at 1.

3. The official account is U.S. Department of Defense, *Conduct of the Gulf War* (Washington, April 1992). Two unofficial accounts are N. FRIEDMAN, *DESERT VICTORY* (1991), and U.S. NEWS AND WORLD REPORT, *TRIUMPH WITHOUT VICTORY* (1992).

1990-1991 Gulf War.⁴ Rather, this article will respond to a question frequently asked of the author and other uniformed and civilian attorneys who practice in an area of the law today known as operational law: "What is it you do?"

I. Operational Law — How it Began

Operational law is an area of the law born from the U.S. experience in the Vietnam War. It is an area that encompasses U.S. domestic law, such as laws and directives relating to security assistance, foreign military sales, intelligence oversight, contracts for goods and services overseas, foreign claims, and authority to negotiate agreements on behalf of the United States. In addition, operational law entails various facets of public international law, such as base rights agreements, status of forces agreements, and questions of sovereignty. However, its heart lies with the heart of military operations — the application of force on the modern battlefield and the protection of noncombatants. Thus, operational law is the area of the law is the area commonly referred to as the law of war.

The law of war is that part of international law that regulates the conduct of armed hostilities; it is sometimes termed the law of armed conflict.⁵ The law of war encompasses the aspects of international law related to issues of when a nation legally may resort to force, known as *jus ad bellum*, and the law related to the conduct of hostilities, known as *jus in bello*. The former traditionally lies within the purview of governments and the national leadership, while the latter predominantly, but not exclusively, is within the domain of the military.

The military role in implementing the law of war is affected by the constitutional authority of the President as the commander-in-chief of U.S. military forces.⁶ It must be remembered that in a democracy such as the United States, the military is an instrument for execution of the foreign policy of the United States. The military acts on behalf of the people of the United States and their duly-elected or appointed representatives; it is not an organization that

4. Appendix O of the Department of Defense's Conduct of the Gulf War addresses the following law of war issues: hostages; treatment of civilians in occupied territory; targeting, collateral damage and civilian casualties; enemy prisoner of war program; treatment of prisoners of war; repatriation of prisoners of war; uses of ruses and perfidy; war crimes; environmental terrorism; conduct of neutral nations; and the concept of "surrender" in the conduct of combat operations.

Appendix L provides greater detail regarding the treatment of prisoners of war. Other legal issues are discussed in the context of the overall narrative of that report.

5. U.S. DEP'T. OF DEFENSE, Joint Publication 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 206 (1989) [hereinafter Joint Publication 1-02]. The Department of Defense, Army and Marine Corps use the traditional term law of war. The Navy and Air Force use law of armed conflict.

6. U.S. CONST., art. II, § 2.

may act unilaterally.

Military lawyers (military judge advocates and civilian attorneys) long have played a role within the U.S. armed forces. Prior to the Vietnam War, however, that role was limited to traditional areas of government-oriented law, such as military justice, contracting, claims, administrative law (the interpretation and application of domestic statutory law and/or departmental and service regulations), and legal assistance. The international law field generally was limited to status of forces agreements, foreign claims, and the law of war. Law of war work in turn was generally limited to training in the law related to the handling of enemy prisoners of war and protection of other war victims protected by the four Geneva Conventions of August 12, 1949.

Although an express legal obligation set forth in each of the 1949 Geneva Conventions requires law of war training regarding the obligations imposed by those conventions,⁷ the last area tended to suffer in its implementation. In May 1968 the Chief of Staff of the Army wrote to the Commander, Military Assistance Command, Vietnam (MACV), and noted his displeasure regarding recurring reports of mistreatment of enemy prisoners of war by U.S. forces. In response, the deputy commander, MACV, suggested that one reason was that judge advocate-taught law of war instruction "has tended to be abstract and academic, rather than concrete and practical."⁸ Failure to provide effective law of war training for U.S. military forces was a key factor in the My Lai massacre.⁹

The My Lai massacre was a watershed event in the Vietnam War, U.S. military history, and the subsequent development of the field of operational law, but it was not the only crucial event. The Vietnam War was a complex conventional and counterinsurgency war of small-unit operations fought under a microscope of critical public attention. The war was subject to a number of political constraints that frustrated the pursuit of the international legal rights of the United States. On an immediate basis, this led military commanders to turn to the assistance of their lawyers in responding to some of the problems they faced. For example, people attired in ci-

7. For example, Article 127 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. 3365, 75 U.N.T.S. 135 states that:

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and in particular, to include the study thereof in their programs of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.

Id.

8. G. LEWY, *AMERICA IN VIETNAM* 30-33, 230, 239, 367 (1978).

9. See LIEUTENANT GENERAL W. R. PEERS, *THE MY LAI INQUIRY* (1979). See also W. H. Parks, *Crimes in Hostilities*, *Marine Corps Gazette*, Aug. 1976, at 16-22, and Sept. 1976, at 33-39.

vilian clothing might have been captured or detained by U.S. forces because they had been engaged in a suspicious or even hostile activity at the time of their capture or detention; were these individuals to be treated as guerrillas, innocent civilians, or "unprivileged belligerents?"¹⁰ Furthermore, if they were guerrillas, were they entitled to prisoner of war status or protection? Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War states that:

. . . . Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, . . . [are entitled to be a prisoner of war], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.¹¹

Judge advocates were called upon to prepare a regulation to establish the tribunals contemplated by Article 5. Working with other members of the commander's personnel, judge advocates proceeded to staff and conduct these tribunals. This was but one of several ways in which the role of the military judge advocate expanded into the warfighting business of his client in the course of the Vietnam War.¹² It reflected the growing complexity of warfighting, and the degree to which a military commander's decisions were affected by politico-legal considerations. Conducting tribunals to determine the combatant status of captured enemy personnel was one of many ways in which military lawyers found their role expanding during the Vietnam War.¹³

Then in the aftermath of the Vietnam War, the Department of Defense promulgated new directives based upon lessons learned from that conflict. Department of Defense Directive 5100.69 addressed the problem of transferring enemy prisoners of war to another government that was unable or unwilling to live up to its Geneva Convention obligations.¹⁴ As a result of the My Lai massacre and subse-

10. Baxter, *So-called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 1952 BRIT. Y.B. INT'L L. XXVII 323-345.

11. Geneva Convention Relative to the Treatment of Prisoners of War, art. 5.

12. For fuller discussion, see Green, *The Concept of 'War' and the Concept of 'Combatants' in Modern Conflicts*, in REVUE DE DROIT PENAL MILITAIRE ET DE DROIT DE LA GUERRE 276 (1971).

13. An excellent account of the role of military lawyers from one of the four U.S. military services is G. D. SOLIS, *MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE* (1989). Regrettably the Marine Corps is the only service to fully record the activities of its lawyers in that conflict. The historical role of military lawyers in armed conflict(s) is reviewed in Parks, *The Law of War Adviser*, REVUE DE DROIT PENAL MILITAIRE ET DE DROIT DE LA GUERRE XVIII,4 359-417, and The JAG J. 31, 1 (1980).

14. Department of Defense Directive 5100.69 (December 27, 1972), Subject: DoD Program for Prisoners of War and Other Detainees. Article 12 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War provides in part that "Prisoners of war may only be transferred by the Detaining Power to a Power which is a Party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee

quent investigations of it, in 1974 the Department of Defense (DoD) issued its first overall law of war directive. DoD Directive 5100.77 has set forth specific duties and responsibilities for law of war training for military personnel and the reporting of suspected violations of the law of war committed by or against U.S. personnel.¹⁵

Critics of the Vietnam War frequently couched their criticism as allegations that weapons employed by U.S. military forces, such as the M-16 rifle, cluster munitions, and napalm, were illegal. Therefore, DoD Instruction 5500.15 established a requirement that any new weapon or munition being considered for development or acquisition by the United States must undergo a legal review to ensure its consistency with the law of war obligations of the United States.¹⁶ Each of these directives required the implementation of directives and programs by each of the military services.

Law of war instruction increased at all levels during the 1970s, both within military units and the service staff and war colleges. Lawyers serving as law of war instructors in that period found themselves confronted with hostile clients. Lawyers and the law of war were blamed for restrictions placed upon the use of military force during the Vietnam War. In order to respond to these accusations it was necessary that lawyer-instructors, many of them veterans of Vietnam service in the combat arms branches, ascertain the nature of those restrictions and their basis. In each and every case, it was determined that the restrictions in question were the result of policy restrictions that were promulgated by either President Lyndon B. Johnson or Secretary of Defense Robert S. McNamara,¹⁷ or were restrictions that the combat commander-client had imposed on himself because he thought a particular course of action might violate the law of war, when in fact it did not.

To clarify this misunderstanding and to improve the working relationship with the client, two steps were undertaken. In the first step, in the late 1970s, the term "law affecting military operations" was coined to indicate that there were a myriad of facets of the law

Power to apply the Convention." *Id.*

15. The current edition is Department of Defense Directive 5100.77 (July 10, 1979), Subject: DoD Law of War Program.

16. Department of Defense Instruction 5500.15 (October 16, 1974), Subject: Review of Legality of Weapons Under International Law. Despite claims to the contrary during the course of the Vietnam War, each of the weapons in question were found to be in compliance with the law of war at the 1978-1980 United Nations-sponsored Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, held in Geneva. For an account of the consideration of one of the weapons in question, see W.H. Parks, *The Protocol on Incendiary Weapons*, INT'L REV. OF THE RED CROSS 279, 535 (1990).

17. For an analysis of those political restrictions from the standpoint of the law of war, see the W. H. Parks, *Rolling Thunder and the Law of War*, AIR U. REV. XXXIII, 2 (1982), [hereinafter *Rolling Thunder*], and *Linebacker and the Law of War*, AIR U. REV. XXXIV, 2 (1983).

that affected both the deployment and employment of U.S. military forces; emphasis was placed on the use of the law as a planning tool that set forth the legal rights of the client (such as the right of self defense) as well as his responsibilities. The phrase subsequently was reduced to "operational law." This not only reflected the client's emphasis on the operational aspect of his business, but also temporarily minimized use of the term "law of war" because of its pejorative connotation in the immediate aftermath of Vietnam. As previously indicated, however, the law of war remained and continues to remain the foundation for the operational law program.

The second step taken was to get the client and his lawyer to come together to discuss issues of mutual interest — even if the client was unaware of their mutual interest. The idea was to make the client aware of the many politico-legal facets of the lawyer's work, in peace and war, while educating the lawyer on the work of the client. Those two objectives were used to create this climate.

The first forum came on December 12, 1977, with the U.S. signature of the 1977 Protocols Additional to the Geneva Conventions of August 12, 1949.¹⁸ Representatives of the U.S. military services and the Joint Chiefs of Staff were involved in the development of the guidance for the U.S. delegation that attended the Diplomatic Conference that drafted the two protocols. However, actual negotiation was left in the hands of international lawyers, not all of whom were entirely conversant with either the law of war or their client's business. Meanwhile, the Joint Chiefs of Staff assent to the U.S. signature was contingent upon a full political-military review of those law of war treaties before taking any decision as to U.S. ratification.

The U.S. review of the 1977 Protocols in all likelihood was the most comprehensive review conducted by any nation. For military, political, and humanitarian reasons a decision was ultimately rendered stating that the United States would not become a party to Protocol I, but would accept Protocol II.¹⁹ In the process of reaching that decision, however, there was ample interaction between the lawyer and client — the military commander(s) who ultimately would live or die by the rules set forth in Protocols I and II. The work of the military lawyer in this respect was no different from that of a civilian attorney advising a civilian client, in the following manner: telling the client the proposed new law, as well as the pros and cons

18. D. SCHINDLER & J. TOMAN, *THE LAWS OF ARMED CONFLICTS*, 621, 689 (3rd ed. 1988) (Protocol I and Protocol II).

19. Message of the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, concluded at Geneva on June 10, 1977, 100th Cong., 1st Sess., (1987). Regrettably, the U.S. Senate has taken no action on Protocol II to date.

behind it; asking whether it was acceptable and if it was not, why not; and finally, inquiring about whether it could be fixed, or must it be reviewed in its entirety? This interaction between lawyer and client in review of Protocols I and II caused the client to come to appreciate the important role of lawyers with respect to the law of war and warfighting.²⁰

The second forum was the Military Operations and Law Symposium, the first of which took place at The Judge Advocate General's School, U.S. Army, in 1982. The symposium assembles military lawyers and principal operational planners from the various Washington headquarters and every major U.S. command. Once assembled, these people review military operations undertaken during the preceding year, as well as anticipated operations, or review other current areas of interest in the context of the legal issues that were faced in the past, or it is anticipated will be faced in the future. Discussion can be conducted at levels up to Top Secret. The Military Operations and Law Symposium was an instant success, and has been held annually since 1982.

Now that the client and lawyer were talking, the lawyer was invited into discussions of operational matters. Lawyers at every level found that commanders and their staffs labored under a number of misperceptions as to what they legally could or could not do. Frequently legitimate military options were discarded because of concerns that particular courses of action might be illegal. As lawyers corrected these misperceptions, their stature grew with the client. Lawyers began to find their role on the increase.

But some military lawyers found that their role stopped at the door to the operations center — the very place where a commander made the most critical decisions. This was not because the lawyer necessarily was unwelcome, but because the lawyer lacked the necessary security clearance for entry. This problem was addressed in 1979 by a directive issued by the Joint Chiefs of Staff that stated that "Legal advisers should be immediately available to provide advice concerning law of war compliance during joint and combined operations"²¹ In order to be "immediately available," the legal adviser had to have the proper security clearance.

High-level security clearances are not easily procured; there is a restriction on the number that may be issued, and each command is allotted a set portion of that number. In order for a lawyer to obtain

20. A detailed discussion of the U.S. military review process is contained in the W. H. Parks, *Air War and the Law of War*, AIR FORCE L. REV. 32,1, 89-218 (1990) [hereinafter *Air War*].

21. The current Joint Chiefs of Staff memorandum is MJCS 0124-88 (Aug. 4, 1988), Subject: Implementation of the DoD Law of War Program.

the security clearance to perform the job, it necessitated that the commander take a clearance away from one of his non-lawyers. Accomplishing this within each command was the task of individual staff judge advocates, and depended upon their selling the role to the commander. Fortunately, the 1980s saw the emergence of the activist lawyer within the military services. Individual commanders became convinced that this was merely another way in which the lawyer could provide the commander with a package of total legal services.

Because one lawyer could not work twenty-four hours a day on a continuous basis, the staff judge advocates' task was to convince the commander not only that they required an upgraded security clearance, but that they needed such clearances for several lawyers on their staff. This was accomplished within each command—testimony to the rapport the activist military lawyer developed with his client during the 1980s. This was true in each of the military services. The lawyer and his client each found that the more the lawyer provided legal services for the client, the more the client tended to turn to his lawyer for further legal services.

The work load at all levels of command expanded several times over as a result, as did the demand for lawyers at lower levels of command that might deploy independently. For example, lawyers with the 82nd Airborne Division routinely deploy with individual brigades, and did so during the 1983 Grenada rescue operation and the 1989 Operation Just Cause into Panama, meanwhile a Marine judge advocate is a part of the staff with each Marine Expeditionary Unit (*i.e.* a task-organized, reinforced Marine battalion, its supporting arms and aviation components, and combat service support units) that deploys as the Marine Corps portion of an Amphibious Ready Group for peacetime training and contingency operations such as noncombatant evacuations or disaster relief.²²

Such judge advocate deployment would have been unthinkable twenty years ago. Today most military commanders would consider it equally unthinkable to deploy without a judge advocate as part of the staff. The world of peacetime and wartime military operations has become far more complex, and military lawyers have proved their value to previously skeptical clients. In some cases this has ne-

22. A Navy-Marine Corps amphibious ready group routinely is deployed in the Mediterranean and the Western Pacific. One example of its work is the nonpermissive noncombatant evacuation from Mogadishu, Somalia, January 5-6, 1991, of 281 U.S. and foreign civilians (representing thirty nations) just days before the commencement of Operation Desert Storm. Its details are discussed in A. B. Siegel, *An American Entebbe*, U.S. NAVAL INSTITUTE PROC. 118.5, 96-100 (1992), AND CAPTAIN R. A. DOSS, USMC, *Rescue from Mogadishu*, U.S. NAVAL INSTITUTE PROC. 5, 103-105, 118 (1992). The legal and political issues involved in a noncombatant evacuation operation are discussed in W. H. Parks, *Evacuation by Military Force*, MARINE CORPS GAZETTE 62, 9, Sept. 1978, at 24-33.

cessitated that the lawyer establish special credentials to follow the client, such as undergoing airborne or air assault training, but the list of volunteer judge advocates willing to take on these high-profile, high-risk assignments is much longer than the number of positions available for them. To appreciate the role of the lawyer that emerged in the years prior to Desert Storm, one particular aspect of the military lawyer's work should be highlighted. Rules of engagement are directives issued by competent military authority which delineate the circumstances and limitations under which United States military forces will initiate and/or continue combat engagement with other forces encountered.²³ Rules of engagement generally were regarded to be within the purview of military commanders and their staff.

In 1978, following an initiative of the Chief of Naval Operations, the Joint Chiefs of Staff undertook to consolidate rules of engagement for maritime forces into a single document. In the process, military lawyers in the Pentagon were called upon to assist in their drafting.²⁴ The reason was two-fold: first, rules of engagement are based upon the right of self defense expressed in Article 51 of the Charter of the United Nations; and second, the drafting skills and critical eye of lawyers were recognized by the staffs of the Office of the Joint Chiefs of Staff and the services. Moreover, lawyers in the International Law Division of the Office of the Judge Advocate General of the Navy had long played a role in offering legal advice to the Navy staff on matters relating to the deployment of U.S. maritime forces; their role in preparation of this consolidated set of rules of engagement was inevitable.

A 1979 Joint Chiefs of Staff consolidated a set of worldwide, "peacetime"²⁵ rules of engagement for maritime forces, and has been followed by similar, updated and amended documents in 1983 and 1988, as well as has implemented directives by all subordinate levels of command worldwide. Subsequent directives have been expanded to cover air, land, and maritime operations. Lawyers at each level of command were called upon to assist in taking a national document and developing rules of engagement tailored to a particular unit, its mission, its capabilities, and the environment in which the unit may operate. This is no easy task. The rules of engagement for an armored or infantry unit in a conventional war facing an Iraqi

23. Joint Publication 1-02, *supra* note 5, at 317. Lawyers have done the only writing on the topic. See J. A. Roach, *Rules of Engagement*, Naval War C. Rev. XXXVI, 1, 46 (1983), and the W. H. Parks, *Righting the Rules of Engagement*, U.S. NAVAL INST. PROC. 5, 83, 115 (1989) [hereinafter *Righting*].

24. See *Righting*, *supra* note 23, for a complete history of this evolution.

25. The current edition of which is The Joint Chiefs of Staff SM-846-88, *Peacetime Rules of Engagement* (Oct. 28, 1988).

military force in a desert environment devoid of civilians are substantially different from those for an infantry unit tasked with protecting the Kurdish minority in northern Iraq. Furthermore, a military police or infantry unit called upon to maintain law and order in Panama during Operation Just Cause or, for that matter, in the streets of Los Angeles or some other U.S. city faces substantially different problems. Expansion of U.S. military missions into areas such as antiterrorism,²⁶ counterterrorism,²⁷ and counterdrug operations necessitated rules of engagement unique to each and every mission. Again, military lawyers have been called upon to assist in the preparation of these rules of engagement, both at the national level where overall guidance is provided, and at the "cutting edge" — the unit(s) responsible for execution of the mission.

All this work placed additional demands upon the military lawyer. As previously indicated, traditionally the scope of the military lawyer's work has rested with military justice and a limited number of other subjects. These additional military missions necessitated that the lawyer become aware of the law that might affect these additional missions. Courses had to be offered by the Army's Judge Advocate General's School, the Naval Justice School, and the Air Force Judge Advocate General's School to prepare judge advocates for these new roles. Equally important, however, the judge advocate assigned to a military unit with a special mission had to become intimately familiar with the unit, its mission, and the unit's capabilities for accomplishing that mission. In this respect military lawyers have taken a lesson from their civilian counterparts. A civilian attorney representing a bank must have a sound background not only in commercial law, but also must possess some understanding of banking practices.²⁸ The difference between civilian and military practice is that if a client in the former setting becomes dissatisfied with an

26. Antiterrorism is defined by Joint Publication 1-02, *supra* note 5, at 31, as "Defensive measures used to reduce the vulnerability of individuals and property to terrorism." As the primary responsibility for protection of U.S. nationals overseas lies with the host nation, and any U.S. efforts must not infringe on the sovereign rights of the host nation, these matters often require negotiation and or close work with host nation authorities.

27. Joint Publication 1-02, *supra* note 5, at 94, defines counterterrorism as "Offensive measures taken to prevent, deter, and respond to terrorism." This could include deployment of U.S. military counterterrorist units for an overseas hostage rescue mission, such as the April 1980 attempt to rescue the U.S. hostages held by Iran in the United States Embassy, or like direct action missions.

28. A classic example of this comes from the United Kingdom. In 1910 a young lawyer by the name of Philip Lloyd-Greame took up practice in Lincoln's Inn with Sir Thomas Ratcliffe-Ellis who, in addition to his legal practice, was a leading figure in the British coal-mining industry and principal organizer of the Mining Association of Great Britain. In order to gain knowledge of the specialized field of mining law, Ratcliffe-Ellis worked in a coal mine for six months. Lloyd-Greame, who changed his name to Cunliffe-Lister in 1924, emerged from the coal mine to become a leading public servant prior to and following World War II. J. A. CROSS, LORD SWINTON 14 (1982).

attorney, that person may simply find another whom he feels will do a better job. In the latter, the client simply stops talking to the lawyer — a result that can lead to dire consequences in a “business” that deals with people’s lives and national security.

The result of the effort of the past two decades is that U.S. military forces that were to be called upon to execute Operations Desert Shield and Desert Storm had developed a solid working relationship between the military lawyer and his or her client. This was the environment in which U.S. military forces would operate.

II. Operation Desert Shield

Operation Desert Shield began in response to Iraq’s August 2, 1990, invasion of Kuwait. Within hours U.S. aircraft carrier battle groups were in the area of operations; within days elements of the 82nd Airborne Division and the First Marine Expeditionary Force were on the ground in Saudi Arabia, preparing to resist any effort by Saddam Hussein to invade Saudi Arabia. They were supported by U.S. Air Force and Marine Corps fighter aircraft flowing into the theater.

In military parlance, this was a “come-as-you-are”, “no-notice” war. There is an important lesson here: military attorney relations with commanders and their staffs, and law of war training for personnel, can not be put in abeyance until the outbreak of hostilities. Each must be an on-going effort, in peace as well as in war, if they are to be effective. The effort put forth by military attorneys in the preceding decade had paid dividends by having an effective working relationship in place when war broke out, and a military with far better training in the law of war than at any time in U.S. history.

The mission of U.S. forces during Operation Desert Shield was stated as follows: U.S. Central Command forces will deploy to the area of operations and take actions in concert with host nation forces, friendly regional forces, and other allies to defend against an Iraqi attack on Saudi Arabia. Be prepared to conduct other operations as directed.

At this point in time, action was taking place on several levels. On the international level, the Department of State was working within the structure of the United Nations to condemn Iraq’s invasion of Kuwait and to call for withdrawal of Iraqi forces from Kuwait. United Nations Security Council Resolution 660 (August 2, 1990), called the invasion a “breach of peace” and demanded immediate, unconditional withdrawal of Iraqi forces from Kuwait; eleven additional Security Council resolutions were to follow over the next four months. Simultaneously diplomatic initiatives were being undertaken by the United States and other nations (such as the United

Kingdom) to mobilize international opposition to the Iraqi invasion. Each of these initiatives was couched in terms of Iraq's violation of the Charter of the United Nations; Department of State lawyers worked closely with their client(s) to frame each initiative in terms that were legally correct. In most cases (time permitting), drafts of various papers were shared with military and civilian lawyers in the Pentagon as a part of the inter-agency coordination process.

On a separate international level, U.S. and coalition forces began to flow into the theater of operations. Because much of the initial manpower and supplies arrived by airlift, a question was raised regarding overflight of other nations en route from the point of departure, generally the continental United States, to the theater of operations. Recognizing the international legal right of sovereignty that each nation enjoys for its landmass, its territorial sea, and the airspace above them, it was necessary to ascertain which nations would permit U.S. overflight for Desert Storm operations; this was an example of the use of the law as a planning tool, since overflight and refueling rights would affect plans for the deployment of the forces to the theater of operations.

Normally members of the North Atlantic Treaty Organization (NATO) restrict landing, refueling, and overflight privileges within their respective nations to NATO missions. Diplomatic initiatives opened those bases, as well as overflight rights over traditionally neutral Switzerland and Austria, to U.S. military and chartered civilian aircraft en route to Southwest Asia. Meanwhile, other nations proved less cooperative. India refused to permit Marine Corps combat aircraft overflight rights from their Western Pacific bases, necessitating a flight route of twice the distance back across the Pacific, the continental United States, the Atlantic, and Europe. Egypt refused basing authority for U.S. aircraft until the United States forgave Egypt's \$6.7 billion dollar foreign military sales debt. State Department and military lawyers worked closely with one another and their respective clients in identifying, addressing, and attempting to resolve basing and overflight problems.

U.S. forces assigned to Desert Shield were under the command of U.S. Central Command, known within military circles as "CENTCOM." Before CENTCOM deployed from its home at MacDill Air Force Base, Florida, its staff judge advocate was in communication with his legal counterparts above and subordinate to his headquarters, as well as the various elements of the CENTCOM staff. This allowed the Staff Judge Advocate to anticipate the legal issues he would face in supporting the command and its mission.

At this point in time it is appropriate to provide some idea of the levels at which legal advice was being provided. Starting at the

very top, a civilian attorney works at the National Security Council. This attorney coordinates national policy issues with senior policy-making clients within the White House and the National Security Council and the legal counterparts at the Department of Defense, State, Justice, Treasury, and the other agencies of the U. S. Government. At the Department of State, the Office of the Legal Adviser addresses legal issues concerning execution of U.S. foreign policy.

For military operations, the Secretary of Defense has his separate General Counsel, as do each of the service secretaries. The Chairman of the Joint Chiefs of Staff has the Legal Counsel. The chiefs of the military services and the service departments are served by a Judge Advocate General, while the Marine Corps has its separate legal office for responding to questions of the Commandant of the Marine Corps that would not normally be addressed by the Judge Advocate General of the Navy.

Below these levels are military judge advocates working with the theater commanders. Judge advocates at the U.S. Atlantic and Pacific commands had to address legal issues (such as the overflight of India question) that would affect movement of forces through its theater of operations or movement of forces and/or material from its command to CENTCOM's area of operations. It should be noted that at every level, coordination of legal positions or issues had to be up and down the chain of command, as well as across command lines. The idea was to support CENTCOM in its execution of its mission, anticipating the legal issues that might arise, rather than wondering whether a particular option was "legal" or "illegal." Again a parallel can be drawn to civilian practice. A lawyer determines a client's needs and proceeds to assist in meeting those needs through the processes set forth in law and/or regulation. So, too, did the operational lawyer support his or her client in the Desert Shield build-up of U.S. and Coalition forces in Southwest Asia.

Below these command and policy levels were the commands responsible for carrying out the plans devised by CENTCOM — the "shooters," aviation elements, communications experts, and logistic specialists. Some had the responsibility for fine tuning the law of war knowledge of the individual soldier; all had to concern themselves with peacetime and wartime rules of engagement for their respective commands, whether an infantry unit or a logistic support base that would be concerned with rear area security in an area populated by civilians. Others had to address fundamental issues regarding support for the deployed soldier and accomplishment of that unit's mission. Lawyers in all commands deploying to Southwest Asia played a major role in preparing the members of their commands for entry into a substantially different culture. They conducted a preventive

law program in which the judge advocates worked closely with other elements of the unit staff. Lawyers at every level continued to provide traditional legal services, such as preparing wills and powers of attorney, for personnel within their command. Similar services were provided for dependents of military personnel by lawyers who remained at home posts, or by Army Reserve judge advocates who lived in the local community.

Legal issues could come up or down the chain of command. To gain a perspective for this, the author usually arrived in his Pentagon office around 5:00 A.M., where he would call his counterpart at CENTCOM headquarters (where it was 1:00 P.M.) by secure telephone to determine the issue(s) that required particular attention. At 7:00 A.M. the author or another member of the office would attend the morning briefing for the Secretary of the Army and the Chief of Staff of the Army in the Army Operations Center (along with The Judge Advocate General of the Army and the General Counsel of the Army, or their designated representatives) where other legal issues might be raised. The balance of the day would be spent coordinating with counterparts in the other services, the Joint Chiefs of Staff, the Office of the General Counsel of the Department of Defense, or the Office of the Legal Adviser, Department of State, on the issues that had arisen in the course of that day. Much of this coordination was accomplished by telephone, but some required face-to-face meetings. The workday generally ran sixteen to eighteen hours, seven days a week, from August 1990 through March 1991. This was true not only for the author's office, but for lawyers working at every level of command.

During the 1983 U.S. rescue operation in Grenada, a desk for a legal representative was established in the Army Operations Center, a practice that has continued to this day. The desk had to be manned twenty-four hours a day, seven days a week, so that questions could be addressed on the short-notice basis in which they usually arose. As the International and Operational Law Division of the Office of The Judge Advocate General is small, it became apparent that that office could not work the long days that had begun and man the desk in the Army Operations Center. Other lawyers in the Office of The Judge Advocate General were (in military parlance) "volunteered" to work shifts at the desk. As all military judge advocates receive law of war training, many of the questions could be addressed by the person on watch. If the question were more complex or esoteric, a response could be placed in abeyance until a member of the International and Operational Law Division arrived in the office, or a member of that office would be contacted and asked to come in to answer the question. (As a general rule, the "tough"

questions invariably were received in Washington around 2:00 A.M.) In addition to the military judge advocates "volunteered" for watch duty, Army Reserve judge advocates with international law experience volunteered (in the true sense of the word) to stand watches or work in the International and Operational Law Division, as did a Nevada National Guard judge advocate.

As the CENTCOM headquarters was moved to Saudi Arabia, a number of legal issues emerged. Two key areas were foreign criminal jurisdiction and host nation support. The former involved efforts to negotiate a status of forces agreement with nations in which U.S. military forces were to be stationed (not all were stationed within Saudi Arabia). The latter involved a series of questions regarding services to be provided by the host nation, such as what services a host nation was likely to provide; 'who and how it would be provided'; and who would pay for it, the "guest" or the host. This involved the most fundamental of services, such as provision for water for personnel and aviation fuel for the hundreds of aircraft arriving daily. There had to be accountability procedures for services provided, payment procedures, and an assignment of contracts. U.S. domestic law came into play in some cases. There are statutory limits on minor military construction,²⁹ and similar limits on acquisition under the NATO Mutual Support Act.³⁰ These and a number of other issues had to be addressed as U.S. and Coalition forces moved into the theater of operations.

Legal issues concerning civilian personnel also arose. In Operations Desert Shield and Desert Storm, the United States employed civilians in the theater of operations both as career civil service employees and indirectly as contractor employees. Civilians worked as part of the military transportation system, at the forward depot level repair and intermediate level maintenance facilities, and as weapons systems technical representatives. Civilians worked alongside their military counterparts aboard U.S. Navy ships, on U.S. Air Force bases, and in virtually every U.S. Army unit. In addition to U.S. civilians fulfilling a number of critical functions, a number of local nationals and third-country civilians were employed by U.S. and foreign contractors.

In addition, a number of civilian personnel programs had to be re-evaluated in light of the experience of Desert Shield and Desert Storm. One of the most significant concerns the status of "civilians" in the law of war. Prior to Desert Shield and Desert Storm, the military services had recognized that the increasing number of civilians

29. 10 U.S.C. §2805 (1982).

30. 10 U.S.C. §2347 (1982). Other issues related to responsibility sharing and host nation support are discussed in Appendix P, Conduct of the Gulf War, *supra* note 3.

employed in combat service support roles meant that the traditional law of war distinction between "combatants" and "civilians" was no longer realistic. The U.S. military review of the 1977 Additional Protocol I acknowledged that the technological advance of military forces during the Twentieth Century had increased the role of civilians in military planning and operations. This raised serious questions concerning the practicality of the distinction between "combatants" and "civilians" as it had been put forward in Article 51(3) of Additional Protocol I.³¹

In the military services of many nations, civilian positions had been substituted for uniformed military personnel, usually for economic reasons. The issue was: If a civilian assumes a work responsibility previously assigned to a uniformed member of the armed services, was the work done by that person now immune from attack? It was the position of lawyers within the military services that a civilian occupying such a position realistically was a "combatant," and therefore subject to attack or capture.

This raised collateral issues, both in the domestic international spheres. Could a civilian employee be ordered to go enter an area where he or she might be at personal risk? What actions should be taken if a civilian employee decided that he or she no longer wanted to be in the theater of operations? Could that person "quit" in the middle of a war and, if so, what priority did he or she have for transportation out of the theater? If these persons were at risk, what responsibility did the military have for arming them and training them in the safe operation of a personal defense weapon? If civilian employees were captured, would they be entitled to prisoner of war status? What steps could/should the military services take to enhance the likelihood that a captured civilian employee would be treated as a prisoner of war?

These were but a few of the legal questions raised with regard to the approximately 5,000 civilians working in the theater of operations during Desert Shield and Desert Storm.³² In the aftermath of those operations, a new Department of Defense Directive was devel-

31. Article 51(3) of Additional Protocol I provides that "Civilians shall enjoy the protection . . . [from intentional attack] unless and for such time as they take a direct part in hostilities." *Id.*

The U.S. military study determined that there was no agreed definition as to what the term "direct" meant, such as whether it extended only to combatant-type activities carried out by any soldier, or whether it involved hostile acts. Moreover, to allow a civilian to engage in hostile activities (during which time he or she would be subject to attack), then regain immunity by temporarily ceasing such actions (perhaps to stop for a meal, or to rest) would not only make a mockery of the intended purpose of the law of war but might place civilians who truly are not taking part in hostilities at greater risk. For further analysis of this point, see *Air War*, *supra* note 20, at 116-134.

32. The issue of civilian accompanying U.S. forces in Desert Shield/Desert Storm is discussed in Appendix N to the DoD report *Conduct of the Gulf War*, *supra* note 3.

oped to codify the lessons learned from the war.³³ Civilian personnel lawyers in the Office of The Judge Advocate General of the Army, the other services, and the Department of Defense played a major role in development of a policy that recognized the modern nature of the battlefield while placing a traditional law of war concept, distinction between "combatant" and "civilian," into its proper modern context.

Other issues involved long-range planning. For instance, in August 1990 CENTCOM contemplated that if hostilities were to commence, Iraqi soldiers would be taken as prisoners of war. In particular, because of cultural sensitivities, it seemed sensible to arrange for their transfer to the host nation, which was Saudi Arabia. This necessitated a written agreement, which required work by the author's office, the Office of the Secretary of Defense, the Department of State, the United States Ambassador in Riyadh, and the staff judge advocate for CENTCOM. Ultimately an agreement was reached, but only after extensive drafting, coordination, and negotiation.

The CENTCOM mission statement quoted above clearly placed U.S. forces in a self-defense posture, yet left them with the warning that they should be prepared to go into action on short notice, either in self defense against an Iraqi attack or on offensive operations to liberate Kuwait. This necessitated the CENTCOM staff judge advocate coordinating with subordinate commands to ensure their understanding of their rules of engagement. It was necessary to prepare two sets of rules of engagement, one "peacetime" self defense set and the other a set for hostilities. Ground forces at every level had to be thoroughly (and almost daily, due to the changing environment) briefed on these rules, as were aviators and commanders of ships in the various naval task forces.

Operating in accordance with the authority provided by United Nations Security Council Resolution 665 (August 25, 1990), a program for maritime interception was established early in Desert Shield.³⁴ Navy and Marine Corps judge advocates with expertise in the law of the sea and the law of naval warfare regularly provided legal advice while preparing, amending, and adjusting the rules of engagement in an environment that constantly changed. Preparation of these rules of engagement necessitated close coordination with other participating naval forces to avoid different interpretations of the rules in force. Judge advocates were responsible for an assignment that was extremely dynamic.

33. Department of Defense Directive 1404.10 (April 10, 1992), Subject: Emergency-Essential DoD U.S. Citizen Civilian Employees.

34. The maritime interception program is discussed in Chapter IV of Conduct of the Gulf War, *supra* note 3.

Other issues were raised on a short-notice basis that required immediate attention. For example, Article 38 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field requires all medical personnel, medical transports, and medical units to display the Red Cross or the Red Crescent to facilitate their identification.³⁵ Given that Saudi Arabia uses the Red Crescent, would the U.S. and its Western, Christian Coalition members have to display the Red Crescent rather than the Red Cross? According to the language of Article 38, only nations already using the Red Crescent at the time of the drafting of the treaty are authorized to use the Red Crescent in lieu of the Red Cross, although nations that had gained their independence since 1949 and had become party to this treaty have exercised an option as to which distinctive emblem each will use. There is no provision for the United States to use the Red Crescent, and it was not the intention of the U.S. to change from the Red Cross. However, at the request of Saudi Arabia and as an accommodation to the host nation, the U.S. and other Western Christian members of the Coalition displayed a smaller Red Crescent alongside the Red Cross.

Similarly, would the U.S. hospital ships have to display the Red Crescent? Hospital ships are covered by the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.³⁶ Article 43 of that convention provides for the display of the Red Cross only; there is no provision for use or display of the Red Crescent. Had the U.S. received a request from Saudi Arabia or any other nation for either of the two U.S. hospital ships to display the Red Crescent while in that nation's territorial waters, the request would have been considered not from a legal but a policy standpoint. Although not expressly authorized, neither is the display of the Red Crescent prohibited by the treaty in question.)

Early in Desert Shield Iraqi soldiers began defecting or deserting to Coalition forces along the Saudi-Kuwaiti border. Since the United States and its allies were not yet "parties to the conflict" as that term is stated in Article 2 common to the four 1949 Geneva Conventions, a question of applicability of the treaties was raised; that is, were the deserting or defecting Iraqi soldiers entitled to prisoner of war status, and the protections provided by the 1949 Geneva

35. Geneva Convention for the Ameliorative of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, art. 38, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 [hereinafter *Convention on Wounded and Sick*].

36. Geneva Convention for the Ameliorative of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, art. 43, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85 [hereinafter *convention on wounded and sick*].

Convention Relative to the Treatment of Prisoners of War?³⁷ Since the United States and its Coalition partners wished to encourage defection or desertion of Iraqi soldiers, all deserting or defecting Iraqi soldiers would be provided prisoner of war protection, even if not legally entitled to the status as such. They received all the benefits of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War as if that treaty applied in fact.³⁸

Anticipating that U.S. personnel might be captured if hostilities broke out between Iraq and the Coalition, an *ad hoc* Department of Defense Prisoner of War Advisory Committee was established within the Office of the Secretary of Defense. Representatives on this committee included legal advisers from the Office of the General Counsel, Department of Defense; Office of the Legal Adviser, Chairman of the Joint Chiefs of Staff, as well as the author's office. The committee considered questions concerning U.S., Coalition, and enemy prisoners of war, since legally, and the Secretary of the Army is the Executive Agent for enemy prisoners of war.³⁹

In establishing the law of war program, DoD Directive 5100.77 appointed the Secretary of the Army the Executive Agent for the investigation of alleged violations of the law of war committed against U.S. personnel.⁴⁰ In light of reports that Iraqi forces in Kuwait and Iraq had taken U.S. citizens hostage in the opening hours of the Kuwaiti invasion, the author's office began a file of suspected or alleged violations of the law of war by the Government of Iraq. A meeting of lawyers and policy makers from the military services, Office of the Joint Chiefs of Staff, and Departments of Defense, State, and Justice was held in late August 1990 to consider what further steps needed to be taken. It was decided that the Army would continue its investigation. The Secretary of the Army mobilized two reserve judge advocate international law teams to assist CENTCOM headquarters and the author's office in its work. Those teams were joined by two Naval Reserve judge advocates who volunteered for active duty. One team was sent to Southwest Asia, while the second remained to work in the Pentagon.⁴¹

37. *Supra* note 7.

38. Article 2 common to the four 1949 Geneva Conventions states in part that ". . . the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." *Id.* A state of war existed between Kuwait and Iraq prior to January 16, 1992, but not between the U.S., Saudi Arabia, and their Coalition partners and Iraq. Nonetheless, the United States always has taken a liberal interpretation in providing prisoner of war protection, even where formal applicability of the 1949 Geneva Conventions was in doubt. See U.S. Department of the Army, DAJA-IA 1983/7031 (November 4, 1983), Subject: Geneva Conventions Status of Enemy Personnel Captured During URGENT FURY.

39. DoD Directive 5100.69, *supra* note 14, at para. VB.

40. DoD Directive 5100.77, *supra* note 15, at para. E2f.

41. Two U.S. Naval Reserve judge advocates also volunteered for and served on active

On December 10-11, 1990 International Committee of the Red Cross (ICRC) representatives met with Department of Defense officials to discuss war conduct should hostilities occur. The ICRC officials presented the U.S. officials with a memorandum the ICRC maintained constituted the law of war obligations of all potential parties to the conflict. They advised that a copy of the memorandum was being provided to all potential combatant nations, including Iraq. The ICRC officials asked that the paper be transmitted to all military commanders as a statement of national policy.⁴²

This raised questions with regard to the precise role of the ICRC, and as to the correctness of its statement. The latter in turn raised questions regarding the portions of the law of war that would be applicable were hostilities to commence.

The ICRC has long occupied a position of leadership with regard to respect for the Geneva Conventions. However, those treaties address the protection of "war victims" which included: medical personnel, units, and equipment, and combatants *hors de combat* or who have fallen into enemy hands. With the development of the 1977 Additional Protocols and their rules on warfighting, the ICRC has endeavored to assume a role with regard to the actual conduct of hostilities. This is a role for which it neither has been appointed, nor one in which it is regarded as having any expertise. Even its role in implementation of the 1949 Geneva Conventions is subject to the consent of the nations involved.⁴³

The answer to the first question was that rules for warfighting offered by the ICRC were advisory only, and that only if they were correct statements of the law of war. This necessitated a comparison of law of war treaties and nations party to them to the list of potential participants should hostilities arise. Such a list in fact had been begun on August 3, 1990, and maintained throughout Desert Storm as additional nations joined the Coalition to liberate Kuwait.

In addition to the United Nations Charter, with its prohibition against the threat or use of force against the territorial integrity or political independence of an sovereign state, treaties applicable to the Gulf War were: Hague Convention IV and its Annex Respecting the Laws and Customs of War on Land of October 18, 1907;⁴⁴ Hague Convention Respecting the Rights and Duties of Neutral

duty in support of the Army's war crimes investigation. The work of the war crimes teams is discussed at pages 0-22 to 0-25 of DoD's Conduct of the Gulf War, *supra* note 3.

42. International Committee of the Red Cross, Memorandum on the Applicability of International Humanitarian Law in the Gulf Region.

43. For example, Article 9 of the Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 7, states that the activities of the ICRC and similar organizations shall be carried out "subject to the consent of the Parties to the conflict concerned . . ." *Id.*

44. Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of October 18, 1907, 36 Stat. 2277, T.S. 539, 1 Bevans 631.

Powers and Persons in Case of War on Land of October 18, 1907;⁴⁵ Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines of October 18, 1907;⁴⁶ Hague Convention IX Concerning Bombardment of Naval Forces in Time of War of October 18, 1907;⁴⁷ Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of June 17, 1925;⁴⁸ and Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948.⁴⁹ In addition The four Geneva Conventions for the Protection of War Victims of August 12, 1949, were the following:

Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field;⁵⁰ Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;⁵¹ Geneva Convention Relative to the Treatment of Prisoners of War;⁵² and Geneva Convention Relative to the Protection of Civilian Persons in Time of War.⁵³ Finally, there was the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954.⁵⁴

Since Iraq, Kuwait, France, Egypt, Saudi Arabia, and other Coalition members are parties to this treaty, the treaty was binding between Iraq and Kuwait, as well as among Iraq and those Coalition members in the conflict. Canada, the United Kingdom, and the United States are not parties to this treaty. However, the treaty has been fully implemented by U.S. military forces for more than three decades, and Canadian, British, and U.S. military personnel receive training on its provisions. Recognizing that if hostilities were to occur they would take place in the "cradle of civilization," the treaty was followed by all Coalition forces throughout the Gulf War.

Three other law of war treaties were not legally applicable in the Gulf War, but nonetheless bear mention.

First, there was the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention).⁵⁵ While the United States and many

45. Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of October 18, 1907, 36 Stat. 2310, T.S. 540, 1 Bevans 654.

46. Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of October 18, 1907, 36 Stat. 2332, T.S. 541, 1 Bevans 669.

47. Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of October 18, 1907, 36 Stat. 2351, T.S. 542, 1 Bevans 681.

48. Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of October 18, 1907, 26 U.S.T. 571, T.I.A.S. 8061, 94 LNTS 65.

49. 78 U.N.T.S. 277.

50. Convention on Wounded and Sick, *supra* note 34.

51. Convention on Wounded and Sick, *Supra* note 35.

52. *Supra* note 7.

53. 6 U.S.T. 3516, TIAS 3365, 75 UNTS 287.

54. Schindler & Toman, *supra* note 17, at 745-768.

55. ENMOD Convention, 31 U.S.T. 333, T.I.A.S. 9614.

of its Coalition partners were parties to this treaty at the time of the Gulf War, Iraq had signed but not ratified it. Thus, Iraq by its signature was bound not to take actions inconsistent with the convention,⁵⁶ while the ENMOD Convention was not regarded as legally applicable to Iraqi actions during the conflict. The U.S. and its Coalition partners nevertheless remained bound by the treaty.

Second, there was the 1977 Protocol I Additional to the Geneva Conventions of August 12, 1949 (Protocol I).⁵⁷ Iraq and several major Coalition members, including the United States, Great Britain, and France, are not parties to Protocol I; therefore, it was not applicable during the Gulf War.

Third, there was the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons.⁵⁸ Iraq and most of the Coalition members, including the United States, are not parties to this treaty; it had no applicability in the Gulf War. However, U.S. and Coalition actions were consistent with its language. Iraqi actions were consistent with the treaty except as to its provisions on land mines and booby traps.

In reviewing the ICRC memorandum, it was determined that the ICRC had erred in relying heavily on the language of the 1977 Protocol I in the development of its memorandum. The memorandum was reviewed and re-transmitted to all commands with careful annotation as to its correctness, with regard to the law of war obligations of the United States.⁵⁹ Subsequently, it was determined that the United States was the only nation that had transmitted the ICRC document to its military forces.

The five months preceding commencement of Desert Storm had seen the largest deployment of U.S. forces in that space of time in military history. Its accomplishment is all the more impressive in that it began from a standing start. In that period, lawyers at all levels of command had answered literally thousands of questions in the operational law field. The foregoing merely provides a sampling of some of those questions. What is important to appreciate is that U.S. detailed attention to and compliance with the law of war in execution of Operation Desert Storm occurred because of the foundation laid by military lawyers during the preceding two decades.

III. Operation Desert Storm

Operation Desert Storm commenced on January 17, 1991, with

56. Article 18, Vienna Convention on the Law of Treaties (1969).

57. Schindler & Toman, *supra* note 18, pp. 621-688.

58. Schindler & Toman, *supra* note 18, pp. 179-196.

59. U.S. Department of the Army message 111800Z (Jan. 11, 1991), Subject: ICRC Law of War Memorandum.

the air campaign nicknamed Instant Thunder.⁶⁰ It was to continue at a high pace for thirty-eight days, until the ground offensive crossed into Iraq and Kuwait on February 24th. Many of the law of war issues and much of the operational law work that began during Desert Shield required further attention. For example, the surrender of Iraqi soldiers increased as the air bombardment of their positions intensified, and U.S. and Coalition forces began to implement their plans for care for Iraqi prisoners of war in a manner consistent with the Geneva Convention Relative to the Treatment of Prisoners of War. The United States entered into agreements with Great Britain and France that the U.S. would care for all Iraqi prisoners of war captured by those nations. The International Committee of the Red Cross requested permission to visit with Iraqi prisoners of war in Coalition hands, which was granted.⁶¹

The mission of Desert Storm was as follows: [U.S. Central Command] will conduct offensive operations, in concert with Coalition forces to accomplish the following: Neutralize Iraqi national command authority; eject Iraqi armed forces from Kuwait; destroy the Republican Guard; as early as possible, destroy Iraq's ballistic missile nuclear, biological, and chemical warfare capabilities; and assist in the restoration of the legitimate government of Kuwait.

Instant Thunder was planned to accomplish many of these objectives, to support ground forces in their ejection of Iraqi ground forces from Kuwait, and to contribute to the destruction of the Republican Guard. Its meticulous planning and execution resulted in substantial accomplishment of these objectives. The issues that subsequently arose, revealed a side of the law of war that has been seen in past conflicts, and particularly in the Vietnam War: use of the law of war by an enemy in its disinformation campaign.

Saddam Hussein had made a careful study of the Vietnam War, including limitations on U.S. airpower through shielding legitimate military objectives through use of the civilian population and civilian objects, and through a disinformation campaign alleging substantial civilian casualties.⁶² In addition to facing the most highly

60. The air campaign is discussed in detail in Chapter VI of the DoD Report Conduct of the Gulf War, *supra* note 3. The name Instant Thunder was selected in express rejection of the graduated application of force approach taken by Secretary of Defense Robert S. McNamara in the 1965-1968 Rolling Thunder air campaign against North Vietnam. See *Rolling Thunder*, *supra* note 17, and K. P. Werrell, *Air War Victorious: The Gulf War vs. Vietnam*, *PARAMETERS* XXII, 2 41-54 (1992).

61. On the other hand, the DoD report Conduct of the War is critical of the ICRC in that, while it had unlimited access to Iraqi prisoners of war in Coalition hands, ICRC actions on behalf of U.S. and other Coalition prisoners of war in Iraqi hands were virtually nonexistent. See p. 0-19, Conduct of the War, *supra* note 3.

62. See N. Cigar, *Iraq's Strategic Mindset and the Gulf War: Blueprint for Defeat*, *THE J. OF STRATEGIC STUD.* 1, 2, 4, 13-14 (1992), and C. de Caro, *War of the Airwaves*, *THE PROV. J. B-4* (1992).

integrated and densest air defense environment in airpower history, the Coalition air campaign had to be waged with this in mind. Rules of engagement for air forces were prepared to take all reasonable measures to minimize collateral civilian casualties and injury to innocent civilians incidental to the attack of lawful targets. Unlike the air campaigns against North Vietnam, however, lawyers correctly advised their clients at the various levels that U.S. and Coalition air forces need not assume all responsibility for minimization of collateral damage and injury, nor sustain unacceptable losses of friendly forces to further minimize collateral injury or damage. If Saddam Hussein persisted in placing military equipment in densely populated areas, or refused to take normal air defense precautions, such as evacuation of civilians from the vicinity of immovable military objectives, he assumed responsibility for collateral civilian casualties and collateral damage to civilian objects should it occur despite the best efforts of U.S. and Coalition aircrews. This is a classic example of the lawyer advising his client as to his rights. While collateral civilian losses always are regrettable, the law of war is not a suicide pact requiring that a military commander accept unacceptable losses of his forces where his opponent refuses to discharge his law of war obligations.

While lawyers continued in their advisory role with regard to review of the daily target lists, the focus shifted slightly from the commander to his public affairs officer. Public affairs officers at the Department of State, Department of Defense, Joint Chiefs of Staff, and U.S. CENTCOM daily provided live briefings on military operations to a watching world. The words used in their statements were of critical importance, as were the U.S. responses to Iraqi disinformation regarding attacks on targets in populated areas, the attack on the biological weapons facility characterized by Saddam Hussein as a "Baby Milk Factory," and the destruction of the Al Firdus command and control bunker (intentionally mischaracterized by Saddam Hussein as an "air raid shelter")⁶³ in which civilian relatives of the officers employed therein had taken shelter. The wording of public statements was as critical as the most important contract or set of jury instructions a lawyer could draft. The difference lay in the time sensitivity of the preparation, often measured in minutes.

In the midst of the air campaign, two Iraqi MiG-21 Fishbed fighter aircraft were found immediately outside the entrance to the ancient temple of Ur. Legitimate military targets may be attacked

63. A disinformation effort exacerbated by use of the same term by CNN's Peter Arnett in his newscasts, for which he was criticized within his own network. See P. M. SMITH, HOW CNN FOUGHT THE WAR 33-38 (1991). The Al Firdus command and control bunker issue is discussed on pages O-14 and O-15, *Conduct of the Gulf War*, *supra* note 3.

wherever they may be located, even if located outside the most important cultural property.⁶⁴ The CENTCOM staff was aware that the aircraft had been placed there by Saddam Hussein to shield them from destruction or, if attacked, to cause serious damage to Ur that would erode international and U.S. domestic support for Desert Storm, and possibly fragment the Coalition. The gain from destruction of the MiG-21s would have been outweighed by the negative effect of damage to Ur. Recognizing that the MiG-21s had been rendered ineffective by their placement at Ur, the decision was made that they would not be attacked. This was the practical side of implementation of the law of war in the course of the air campaign: as target lists were developed around the clock in a very fluid situation, lawyers had to be available twenty-four hours a day to respond to time-sensitive issues. Once again, the system established in the 1980s of placing a lawyer in the operations center at each level of command paid dividends.

The air campaign resulted in the first Coalition personnel being captured by Iraq. Television viewers in the United States and around the world began to see U.S. and other Coalition aircrew members appearing before television cameras, where they would "confess" to war crimes against Iraq. Their coercion was apparent. Senior U.S. officials turned to their lawyers for advice as to the rights of U.S. and other Coalition prisoners of war in Iraqi hands.

Simultaneously, an increasing number of Iraqi soldiers were deserting or defecting to U.S. forces. The International Committee of the Red Cross protested a photograph published by U.S. media services showing Iraqi prisoners of war in U.S. custody, claiming that any photograph of a prisoner of war was prohibited by the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW). Senior U.S. officials again turned to their lawyers not only to determine the legal obligations of the United States, but to reconcile any U.S. protest of Iraqi treatment and display of U.S. and other Coalition prisoners of war with photographs of Iraqi prisoners of war in U.S. custody.

The language of the GPW is not as clear as claimed by the

64. Article 27 of the Annex to Hague Convention IV of 1907, *supra* note 44, states in part that In sieges and bombardments all necessary steps must be taken to spare, as far as possible, "buildings dedicated to religion . . . historic monuments . . . provided they are not being used at the time for military purposes." *Id.*

Article 4(1) of the 1954 Hague Cultural Property Convention, *supra* note 54, states in part that "The High Contracting Parties undertake to respect cultural property situated within their own territory . . . by refraining from any use of the property and its immediate surroundings . . . for purposes which are likely to expose it to destruction or damage in the event of armed conflict . . ." *Id.*

Article 4(2) states that "The obligations mentioned in paragraph 1 . . . may be waived only in cases where military necessity requires such a waiver." *Id.*

ICRC in its complaint. Article 13 provides in part that prisoners of war must be shielded from both insults and public curiosity. There is no prohibition on photographing prisoners of war, and it was pointed out that the ICRC itself makes extensive use of photographs of prisoners of war in its various publications, press materials, and the ICRC museum at its headquarters in Geneva.

Photographs of prisoners of war, of course, may be used in a way that subjects prisoners of war to the public curiosity prohibited by Article 13. This is particularly true when those photographs are used for propaganda purposes and have been gained by use of torture or intimidation, which are prohibited by Articles 13 and 17, of the GPW. This was the basis for the protest ultimately made by the United States to Iraqi filming of U.S. and other Coalition prisoners of war. In turn, U.S. officials were aware that the capture of enemy personnel is a news event, as is their care in conformity with the GPW. A clear balancing between media interest and protection of the dignity of Iraqi prisoners of war had to be accomplished. U.S. officials also were concerned that families of Iraqi prisoners of war might be at risk if the prisoners of war were identified by Iraqi authorities from photographs taken by the media. Accordingly, guidance was issued by the Assistant Secretary of Defense for Public Affairs that balanced these competing requirements. Lawyers on the staffs of the Secretary of Defense, Joint Chiefs of Staff, at CENTCOM, and in the Office of The Judge Advocate General of the Army coordinated closely with one another and with their respective clients to develop and implement this policy.⁶⁵

While the air campaign was underway, some humanitarian assistance organizations sought to provide humanitarian aid to Iraqi civilians. As relief columns would travel from Jordan to Baghdad, it was necessary for these relief organizations to coordinate their movement with the Coalition, particularly given the intense Coalition hunt underway in western Iraq for Iraqi Scud missiles and their launchers. Lawyers on the CENTCOM staff were involved in the ensuing discussions with these relief organizations, and in reconciliation of issues that arose with regard to their movement within areas of combat operations.

The Iraqi disinformation campaign led to another role for lawyers within the government. Members of the media sought information on the law of war, and lawyers within the Pentagon daily found themselves responding to media inquiries through the various public affairs offices, or talking directly to the press about a range of law of war issues. Similar inquiries came from some human rights groups.

65. Memorandum of the Assistant Secretary of Defense for Public Affairs (February 2, 1991), Subject: Photography of Enemy Prisoners of War.

For example, Human Rights Watch, a human rights organization, expressed an interest in law of war issues arising from the conflict but admitted its ignorance of that area of the law. A senior official of Middle East Watch met with lawyers in the Pentagon in order to gain an understanding of the law of war issues. The lawyer's role not only included service to the client but to the general public as well.⁶⁶

Operation Desert Storm's final phase began early on February 24, 1991, with U.S. and Coalition ground forces breaching the Iraqi defensive lines and racing forward into Kuwait and Iraq. The ground offensive ended after one hundred hours of action. This led to other legal issues. The rules of engagement for combat had to be revised to reflect the ceasefire and its terms; the specific terms of ceasefire which the Coalition expected Iraqi forces would have to observe, to include collateral issues such as prompt repatriation of Coalition prisoners of war, had to be drafted.

The fighting that broke out between the Shi'ite minority and Iraqi military forces in and around the city of Basrah following the cessation of Coalition offensive operations caused a number of Iraqi civilians to flee that area. Many entered the previously-uninhabited desert areas of Iraq held by Coalition forces. This raised a new issue: Was the United States and its Coalition partners an "occupying power" in the terms of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War? If so, what were its obligations to care for these refugees, particularly in light of the fact that the forces had to be prepared to re-engage Iraqi forces if the ceasefire failed, or to withdraw from Iraq on short notice. What assistance could be sought from international relief organizations? Lawyers at a variety of levels — from the lone, young judge advocate with the armored brigade that had penetrated deepest into Iraq, to senior lawyers at CENTCOM, the Pentagon, and the Department of State — worked feverishly to resolve these issues while providing essential food, water, and medical care for these refugees until U.S. forces withdrew from Iraq.

In the course of Desert Shield and Storm, the United States and its British and French partners had captured 69,822 Iraqi prisoners of war and retained personnel.⁶⁷ Their care and processing did not cease with the announcement of a ceasefire, but would continue until they had been repatriated. This work raised a number of questions regarding practical implementation of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW). These issues were addressed by lawyers working at each level of the chain of com-

66. Personal knowledge of the author, who conducted the briefings for the Human Rights Watch official.

67. Appendix L, Conduct of the Gulf War, *supra* note 3.

mand. Issues of interpretation were directed to lawyers in Washington only if they involved major policy issues. Two examples were as follows:

Representatives of the ICRC requested of commanders of enemy prisoner of war camps a daily accounting, by name, of Iraqi prisoners of war held in their facilities. While Articles 122 and 123, GPW, provide for a capturing power to provide such information to the Central Tracing Agency of the ICRC, it was necessary to determine the correct meaning of those provisions.

The United States Army, in coordination with the ICRC prior to the war, had established a new Prisoner of War Information System (PWIS) for expedited processing of enemy prisoners of war and transmittal of the information required by Article 122, GPW, to the National Prisoner of War Information Center in the Army Operations Center in the Pentagon. Because of difficulties in processing vast numbers of prisoners, actual processing facilities, the principal processing took place only once a prisoner of war reached Theater-level camps located far from the front lines. The information collected there in compliance with Article 122, GPW, was sent to the National Prisoner of War Information Center.

Article 123, GPW, requires that such information be transmitted to the Central Tracing Agency "as rapidly as possible." It was determined that inasmuch as the Iraqi prisoners of war were being held by the United States rather than by a particular camp commander, the information requested would be transferred to the Central Tracing Agency from the National Prisoner of War Information Center rather than from individual camps. As it turned out, the PWIS enabled the theater camps to transfer the information to the National Prisoner of War Information Center expeditiously. Once reconciled, the National Prisoner of War Information Center then faxed the information directly to the Central Tracing Agency in Geneva, within days of capture of an enemy soldier, rather than the weeks and months that had been the experience in previous conflicts. The process resulted in an almost perfect accuracy rate that is the highest ever attained by any captor. An ICRC official meeting with CENTCOM officers in Riyadh, Saudi Arabia, in April 1991 declared that U.S. treatment of enemy prisoners of war "was the best compliance with the [GPW] by any nation in any conflict in history."⁶⁸

68. Page L-1, *Conduct of the Gulf War*. In addition to accounting reasons, the U.S. response to the ICRC request was based upon Article 12, GPW, which states that Prisoners of war are in the hands of the enemy Power [i.e., nation], but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Inasmuch as the ultimate responsibility for the Iraqi prisoners of war rested upon the

Also, there was interest of other humanitarian organizations in the law of war. In the course of Desert Storm a request was received from Human Rights Watch to permit its Middle East Watch to visit U.S. prisoner of war camps. Military lawyers were consulted by prisoner of war camp authorities: Did the request have to be honored? While the camp commanders were quite willing to open their camps to necessary and appropriate inspection, their mission was to care for the prisoners of war and retained personnel in their custody rather than to conduct daily tours for each and every organization that felt inclined to appoint itself as a guardian of prisoners of war in U.S. care.

The response, coordinated between the author's office and the Department of State, was clear: Article 9, GPW, authorizes a captor to permit the ICRC "or any other impartial humanitarian organization" to conduct their work, subject to the consent of the Parties to the conflict concerned (in this case, the U.S., Saudi Arabia, and Iraq), while Article 125, GPW, states unequivocally that: "The Detaining Power may limit the number of societies and organizations whose delegates are allowed to carry out their activities in its territory and under its supervision The special position of the [ICRC] in this field shall be recognized and respected at all times."⁶⁹ Inasmuch as the ICRC was carrying out its work within the U.S. prisoner of war camps, there was no obligation to allow representatives of Middle East Watch or any other self-appointed "humanitarian" organization into U.S. prisoner of war camps.⁷⁰

IV. Post-conflict work

Legal issues did not end with the cessation of hostilities. Lawyers supported commands actively involved in the reconstruction of Kuwait, the repatriation of Iraqi prisoners of war, the disposal of captured enemy equipment and supplies, the investigation of Iraqi war crimes, and the recovery and disposition of enemy dead on the battlefield. Because of Saddam Hussein's refusal to fully comply with United Nations Security Council requirements to which he previously agreed, the maritime interception program continues as an enforcement mechanism for the UN embargo.

Other issues also needed to be addressed. For example, first, news stories reported the breaching of the Iraqi line of defense by

United States Government, it was felt that all reports to the Central Tracing Agency of the ICRC performance should come from Washington.

69. GPW, art. 125.

70. Personal knowledge of the author, who handled the request. The decision was influenced as well by the fact that Human Rights Watch/Middle East Watch officials previously had conceded their lack of knowledge of the law of war, and had requested special briefings in order to educate themselves on the subject.

the First Infantry Division, as well as the attack on Iraqi forces on the so-called "highway of death." The reports suggested that each involved some violation of the law of war. Lawyers worked with press officials to clarify the facts in each case, and to explain that neither was a violation of the law of war.⁷¹

Second, in its funding of the Gulf War, Congress mandated that the Department of Defense would provide interim and final reports on the conduct of the Gulf War to it.⁷² The interim report was submitted on July 15, 1991, while the final report was forwarded to Congress on April 9, 1992.⁷³ In addition to a complete section discussing the law of war issues identified by Congress that it wished discussed, lawyers at the Washington and CENTCOM levels were fully involved in the writing and review of the report as a whole.

Third, Iraqi threats or damage to the natural environment brought to armed conflict a new level of potential destruction in war. Following the Gulf War, questions were raised as to whether new laws of war were required to address this problem. The international environmental organization Greenpeace hosted a conference in London in June 1991, to call for a "Fifth Geneva Convention," while the Government of Canada and the Secretary General of the United Nations hosted a conference of experts in Ottawa in July 1991 on the same subject.⁷⁴ The ICRC in turn hosted a like conference of experts in Geneva April 19-27, 1992. The United States specifically declined to send representatives to the Greenpeace meeting, but was represented by international lawyers from the Department of State, the Office of the Joint Chiefs of Staff, and the author's office, thus indicating the continuing role of lawyers.

V. Conclusion

As stated at the outset of this article, it was not the author's

71. The "highway of death" was one of the great misnomers of the war, as it involved few Iraqi casualties. As journalist P.J. O'Rourke described the scene:

The killing field here was littered not so much with corpses as with TVs, VCRs, Seiko watches, cartons of cigarettes, box lots of shampoo and hair conditioner, cameras, videotapes and household appliances. School desks, tea sets, stuffed animals, silverware, an accordiom and a Kuwaiti family's photo album were all being dragged back to Iraq. I saw a pickup truck full of women's ball gowns and another truck stacked with Pampers. A hot-wired camper van sat with two cans of club soda resting in the dish-mounted drink gimbals. The camper bunks were filled with men's boxer shorts, the price tags still on them

. . . . What we had here was the My Lai of consumer goods
P. J. O'Rourke, *Hoo-Ah!*, ROLLING STONE, MAY 2, 1991, at 40, 63. The breaching of the Iraqi defense line and the "highway of death" issue are discussed at O-32 to O-35, Conduct of the Gulf War, *supra* note 3.

72. Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991 (Public Law 102-25).

73. Conduct of the Gulf War, *supra* note 3.

74. Ottawa Conference of Government Experts on Environmental Warfare, July 10-12, 1991.

intention to offer a complete, comprehensive discussion and analysis of all of the legal issues surrounding the 1990-1991 Gulf War for the liberation of Kuwait. Such an article would require a book-length publication.

The law of war before Desert Shield and Desert Storm often was looked upon as an esoteric, academic subject of little practical value. Changes initiated by the armed services of the United States in the post-Vietnam era recognized its importance and the importance of the lawyer in working with his client in this area, not only to assist the client in discharging his legal obligations (while counseling him of his rights), but also in fighting in the politically-charged environment of warfare today.

It is clear that in a media-intense conflict like that experienced in the Gulf War, law of war issues — including allegations of violation of the law of war — will loom large in determining domestic and international public support for the war effort. Fighting war under a microscope will continue to challenge the military commander. The role of the lawyer developed as part of the concept of operational law was intended to provide the battlefield commander with the same quality legal services a civilian client would expect from an attorney or law firm in the private sector. The degree to which law of war issues played in the execution and accomplishment of Desert Shield and Desert Storm proved the wisdom of that decision. The degree to which commanders and senior policymaking officials turned to their lawyers for advice and assistance was testimony to the value of the lawyer to the client.

