A Tribute to Morris I. Leibman

National Security Law: Second Annual Review of the Field

by Pamela M. Jimenez

Introduction

On Thursday and Friday, October 29-30, 1992, the ABA Standing Committee on Law and National Security and the Center for National Security Law of the University of Virginia School of Law co-sponsored the Second Annual Conference Reviewing the Field of National Security Law. The conference turned out a record crowd of more than 250 participants to listen to some of the nation’s foremost experts on various aspects of national security law. Held at the International Club in Washington D.C., the conference was dedicated to the memory of Morris I. Leibman, a winner of the prestigious Presidential Medal of Freedom and twelve-term Chairman of the Standing Committee (1962-67, 1975-82), for the contributions he made to the study and understanding of national security law. Mr. Leibman passed away on April 21, 1992. His memory was honored at a special dinner on October 29, with tributes by Supreme Court Justice Antonin Scalia, Ambassador Max Kampelman, Ambassador Samuel Lewis, and Dr. Frank R. Barnett.

The field of national security law has been developing as a separate discipline over the past two decades or so. It is a synergy between the international law of conflict management and a newer national law relating to national security issues, such as laws regulating the intelligence process, export controls, the interface between national security and the First Amendment, several issues involving the Fourth Amendment, and even some laws designed to protect the environment.

The first law school course on national security law was taught at the University of Virginia in the mid-1970s. At the forefront of the field’s development have been the ABA Standing Committee on Law and National Security—founded in 1982, largely through the efforts of ABA President and Supreme Court Justice Lewis Powell—and the twelve-year-old Center for National Security Law at Virginia. Today, courses related to national security law are taught at more than 75 law and graduate schools nationwide; and three law school casebooks on the subject have now been published.

The growth of academic programs teaching national security law has been reflected by a major increase in the number of government positions for lawyers trained in this field. In the wake of the Iran-Contra Affair a Legal Adviser was added to the staff of the National Security Council, and the legal staffs in the State Department, Defense Department, Central Intelligence Agency, and other governmental entities involved in the national security process have expanded considerably as this field has grown.

One of the most important recent developments in national security law has been the creation of the field of operational law within the legal departments of the military services. Receiving perhaps its first major test during Operation Desert Storm in the Persian Gulf—which incorporated more than 700 military lawyers—operational law has been recognized as a great success and has been incorporated systematically within the war-fighting chain of command. Thanks in part to the expansion of the field of national security law, when U.S. military forces are deployed in the 1990s—be it to counter foreign aggression or to assist in humanitarian relief—they are accompanied on the ground by highly trained legal experts to advise commanders on a real-time basis.

While we believe that all of the panels addressed issues of considerable importance, we were especially pleased with Friday afternoon’s special panel on
"Democracy and Deterrence: Toward a New Central Paradigm in International Law and Relations." This panel examined fundamentally new ways of thinking about international law and relations, focusing critically on the importance of governmental structures, particularly the risks posed by totalitarianism to human rights and peace, and on the need to deter effectively non-democratic regimes bent on aggression. This approach is suggested by important empirical evidence concerning the relationship between governmental structures, particularly where there is an unchecked concentration of power, and avoidance of democide (massive killings by government of its citizens), major war, chronic economic malaise and severe environmental degradation. These are, collectively, among the most important objectives of U.S. foreign policy.

Among the evidence discussed by this panel were the conclusions of Professor Rudy Rummel, of the Haiku Institute of Peace Research at the University of Hawaii, that totalitarian regimes in this century may have slaughtered as many as four times the number of people who have been killed in battle during all of the major wars of this century. If the suggested correlation between totalitarianism and the loss of human life is valid, then a more central focus on "democracy building" or "rule of law engagement" and effective deterrence against radical totalitarian regimes takes on a far greater importance than some have appreciated. Also of great importance, this new paradigm points to a synergy between aggressive non-democratic regimes and deterrence failure as a major cause of war in this century. While this one two-day conference was not intended to provide the last word on these important issues, it has in our view produced important new insights and will hopefully provoke additional scholarship and policy analysis in the months and years to come. We view it as a great success.

We are deeply indebted to Pamela M. Jimenez, a member of the Advisory Committee to the Standing Committee, for her extraordinary efforts in providing the summaries of the panels which follow. Readers who wish further information about a particular presentation are invited to approach the participants directly or to contact the Standing Committee's Staff Director, Ms. Holly Stewart McMahon, at (202) 466-8463.

All views expressed in this introduction and in the summaries which follow are individual and should not be attributed to the American Bar Association, the Standing Committee on Law and National Security, the Center for National Security Law, the University of Virginia, or any other organization or entity with which participants may be affiliated.

John S. Shenefield
Chairman
ABA Standing Committee
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John Norton Moore
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Opening Remarks

Standing Committee Chairman John H. Shenefield opened the conference with a warm tribute to Morris Leibman, recognizing him as an historic figure in the recently established field of national security law. Chairman Shenefield then turned to Professor John Norton Moore, a four-term Chairman of the Standing Committee (1982-86), who presently serves as Director of the co-sponsoring Center for National Security Law at the University of Virginia School of Law.

Professor Moore framed the issues to be presented at the conference and introduced what proved to be one of its predominant themes—the emergence of democracy and deterrence as critical national security issues. He characterized this development as a
departure from the traditional focus on balance of power and as reflecting a movement toward a "new paradigm" in international relations. Professor Moore defined the paradigm as a combination of classic international law issues—including the use of force, the role of international organizations, the law of war, war crimes, individual responsibility, arms control, terrorism, and third party dispute settlement—coupled with a dramatic expansion in the use of law to address national security matters on the domestic level.

Domestic issues of national security law include questions concerning war powers, treaty powers, treaty interpretation, the flow of information between branches of government and to the public, control of intelligence and counterintelligence operations, defense organization, export controls, and even some problems in environmental law. These issues, and their implications on U.S. national security policy, were discussed at length during the course of the conference.

I. A Roundtable Discussion on Teaching National Security Law: Materials and Approaches

Dr. Anthony Clark Arend, Professor of Government at Georgetown University, introduced the topic of teaching national security law in the classroom with a discussion of two related courses taught at Georgetown, one in international law and the other on the constitutional law governing U.S. foreign relations. He discussed subject matter and methodology, and made several conclusions about the nature of this evolving area of study. Based upon his observations that national security law courses are extremely popular among undergraduate students and that the case method is an appropriate vehicle for teaching undergraduate students, he recommended that national security law be a mandatory part of the curriculum for Ph.D. candidates in international relations. Professor Arend concluded his remarks by urging the Standing Committee to promote this recommendation.

U.S. Army Colonel William G. Eckhardt, Director of National Security Legal Issues at the U.S. Army War College, prefaced his comments with a tribute to the contributions of Elihu Root to U.S. national security policy. Noting that Root founded the Army War College in 1903, not to promote war but to preserve peace, Col. Eckhardt endorsed Root's belief that the best way to preserve peace is to study war and its prevention, and to develop responsible systems of command and control, responsible systems for re-

porting, responsible rules of engagement, and responsible mechanisms for upholding the rule of law. To that end, Col. Eckhardt's approach to teaching national security law is multi-disciplinary, with a strong emphasis on the rule of law as embodied in the just-war tradition, basic international law, the law of war, and a deep understanding of Clausewitzian politics—specifically, the need to harmonize military power and political objectives. To teach these concepts, Col. Eckhardt used three case studies, the My Lai incident, the 1983 terrorist bombing of the U.S. Marine compound in Beirut, and the Iran-Contra affair. While these studies have been useful historically, Col. Eckhardt emphasized the need for fresh thinking in several areas, such as the appropriate role of a military officer in a democracy; the legal requirements for the period between the ending of war and the restoration of real peace; the issues of peacekeeping, peacemaking and peace-controlling; and the practical workings of international organizations such as the United Nations.

Professor Peter Raven-Hansen, of the National Law Center at George Washington University, commented on the growth of national security law courses in U.S. law schools and the development of domestic national security law. Using the Iran-Contra prosecution as a point of departure, Professor Raven-Hansen presented a "mini-course" on the many aspects of national security law raised by that prosecution. Drawing on those issues, and the role of lawyers in analyzing them, Professor Raven-Hansen observed that because our system requires legal justification for decisions affecting national security, law should play an even greater role in national security decision making. Ultimately, he concluded, such a development would make national security decisions more legitimate.

II. Survey of New Developments in National Security Law

The Honorable Frederick P. Hitz, the first presidentially-appointed, Senate-confirmed Inspector General (IG) of the Central Intelligence Agency, discussed the implementation of a statutory IG at the CIA. He explained that the creation of a statutory IG was the product of congressional concern that the Agency's administrative IG had insufficient strength, independence, and tenacity to accomplish the important tasks entrusted to the position. The statutory IG now has auditing, inspection, and investigatory responsibilities and must file a semi-annual report to the Director of Central Intelligence, who is required
to forward that report to Congress within thirty days. In situations involving a flagrant abuse of the rules, the IG is required to report immediately to the Director, who in turn is required to report the incident to Congress within seven days. In two instances, the statutory IG is required to report directly to Congress: (1) when anyone in a position of responsibility seeks to interfere with the discharge of the statutory IG’s duties and responsibilities; and (2) if the statutory IG’s investigation leads to the office of the Director of Central Intelligence. One dilemma faced by the statutory IG at the Agency is that he is required to serve two masters—the executive branch and the legislative branch. According to Mr. Hitz, this dilemma continues to exist, and indeed, is inherent in the position.

Michael J. Matheson, Deputy Legal Adviser to the Department of State, discussed how national security law has been affected by such major foreign policy crises of the past couple of years as the Gulf War and the dissolution of the Soviet Union and Yugoslavia. Mr. Matheson observed that, as a result of the Gulf War, the Security Council has greatly increased its relevance and importance in international attempts to maintain and restore peace—a role envisioned for the Council in the U.N. Charter. Another important aspect of the Gulf crisis was the joint authorization by the executive and legislative branches for U.S. military forces to enforce Security Council decisions. Mr. Matheson characterized the joint authorization as a model for future crises of a similar nature. He also commented on the dissolution of the Soviet Union and Yugoslavia, problems arising as a result of the succession of new entities to the treaty obligations of the former states, national security concerns relating to arms control, and the need to renegotiate arms control treaties with the new entities on a case-by-case basis.

L. Britt Snider, General Counsel to the Senate Intelligence Committee, discussed the Intelligence Authorization Act for fiscal year 1993, and specifically, Title 7 of the act, which deals with the reorganization of the intelligence community. Mr. Snider characterized the legislation, signed by President Bush on October 24, 1992, as a fairly radical change in the legal foundation for U.S. intelligence activities. Indeed, the act defines the intelligence community in legal terms for the first time and formalizes the role of the Director of Central Intelligence (DCI) as a member of the National Security Council. In addition, it sets forth the DCI’s three distinct roles as advisor to the president, head of the U.S. intelligence community, and head of the CIA. It also addresses the responsibilities of the Secretary of Defense for the National Foreign Intelligence Program. Although many of these issues are mentioned in existing executive orders, the act is more specific, because it was the result of negotiations between the Congress and the State Department, Defense Department, CIA, and FBI.

The Honorable Paul Schott Stevens, former Legal Adviser to the National Security Council, addressed the need to consider U.S. national security interests from a new perspective. He observed that the competition between liberal democracy and communism, capitalism and state socialism, between the Western Alliance and the Eastern Bloc, between the United States and the Soviet Union have been decided unambiguously in our favor. In sorting out the implications of that victory, he identified an opportunity to establish a broader relevance and purpose for law in international relations. For example, in Central and Eastern Europe, including the former Soviet Union, there are opportunities for developing the rule of law, democracy, and popular government. In Yugoslavia, law and the will of the international community may prevent the escalation of conflict into neighboring states. Mr. Stevens indicated that while the U.N. Security Council has begun to play a more significant role in such disputes, it is incumbent upon the United States to take whatever steps are required to support the Council’s mission, particularly with respect to the investigation of war crimes contrary to the 1949 Geneva Conventions. Mr. Stevens concluded that the United States should take the lead in espousing a stronger role for law and a broadened application of the fundamental law of nations in the post-Cold War period.

Victoria Toensing, former Deputy Assistant Attorney General with the Criminal Division of the Department of Justice, discussed the Supreme Court’s 1992 decision in United States v. Alvarez-Machain and its implications for national security policy. Alvarez involved the constitutional right of the U.S. Government to try a Mexican national wanted in the United States in connection with the murder of U.S. Drug Enforcement Administration (DEA) Agent Ricky Camarena. Noting that considerable confusion has arisen over the actual holding of Alvarez, Ms. Toensing summarized the holding as follows: in spite of an extradition treaty, U.S. courts may try a foreign national who has been kidnapped on foreign territory by agents employed by U.S. government officials. The effect of that holding is that the extradition treaty is not the exclusive means for bringing a fugitive to the United States for trial. Speaking more generally, Ms. Toensing suggested that, in her view, the situation involved in the Alvarez case, i.e., the arrest or abduction of a foreign national for trial in the United States, is within the power of the executive under the Constitution. That comment sparked extensive debate among the
panelists and members of the audience. One important policy concern, raised by Col. Eckhardt and echoed by Mr. Stevens, was the danger such activities posed to those who wear the uniform and act on behalf of the United States abroad. Mr. Matheson concurred, stating that such abductions are very serious and should only be considered in the most extreme circumstances. In his opinion, the Alvarez decision does not reflect a change in U.S. policy.

**Keynote Address: Arms Control**

During the first luncheon session, the Honorable Ronald F. Lehman, II, Director of the U.S. Arms Control and Disarmament Agency (ACDA), gave the address on recent developments in arms control. One of these developments, symbolic of some of the changes that have taken place in the international security structure, is the view that the U.N. Security Council should be more active in dealing with the problem of the proliferation of weapons of mass destruction. Ambassador Lehman observed that arms control has been in transition, away from the preoccupation with the East-West military balance and more toward the problems of proliferation, regional security, and local conflicts. As a result, the post-Cold War arms agenda is centered upon proliferation issues, export controls, the destruction and monitoring of weapons systems, and global defense conversion. Some progress has been made. Approximately 150 nations are now parties to the Nuclear Nonproliferation Treaty (NPT). The chemical-weapons convention has been concluded, and 138 states have committed to be signatories. To deal with the proliferation problem successfully, however, Ambassador Lehman suggested that it is necessary to go beyond technical means and address the fundamental cause of the problem, i.e., regional security concerns that drive nations to develop nuclear and chemical weapons. In addition, it is imperative to enforce international norms condemning the proliferation of weapons of mass destruction and to devise effective sanctions for the violation of those norms.

**III. Operational Law: Systematically Incorporating National Security Law in Operational Military Decisions**

Lt. Col. H. Wayne Elliott, Chief of the International Law Division and Director of the Center for Law and Military Operations at the Army's Judge Advocate General's (JAG) School, discussed how operational law has been systematized into current military operations. Colonel Elliott defined operational law as all of the legal rules, regulations and Department of Defense (DOD) directives and policies that must be taken into account when the army deploys for peacetime or wartime operations. During Operation Desert Storm, for example, JAG officers played an important role in advising operational commanders. Indeed, a 1991 ABA Journal article, entitled "Lawyers in the War Room," characterized the Gulf conflict as the "most legalistic" war ever fought. The Joint Chiefs have mandated that legal advisors be immediately available to provide law-of-war advice during joint and combined operations. This advice includes not only general principles of law but also the legal authority for employing force under international law. All deployment plans are now reviewed by lawyers before they are exercised, and all weapon systems are also reviewed before they are purchased.

One of the most significant developments is that JAG officers are now involved in writing the rules of engagement. In short, operational lawyers not only assist in the development of military action plans but also protect the command from politically motivated accusations. In the tactical operation center, the lawyer is part of the command and provides advice on issues such as diplomatic immunity, the rights of neutrals and neutral states, acquisition of property, treatment of prisoners of war, investigation of war crimes, legality of weapons and the legality of an attack on a given target. According to Colonel Elliott, this new role for lawyers as part of the command symbolizes the army's commitment to the rule of law.

Lt. Col. Patrick Finnegan, Legal Advisor to the Army’s Joint Special Operations Command at Fort Bragg, expanded on Colonel Elliott’s presentation of the role of army lawyers in operational law with a discussion of the practical importance of operational law. A full-time operational lawyer is now included in the corps planning cell and the corps assault command post, the small group of thirty to forty people who are the first to be deployed in any crisis. While that development was initially viewed with skepticism, any doubts were put to rest when the 18th Airborne Corps was deployed in Operation Hawkeye. Recounting his experience in that operation, Colonel Finnegan explained that the breakdown of law and order in the U.S. Virgin Islands caused by Hurricane Hugo created myriad issues requiring the assistance of lawyers. At the outset, lawyers were required to draft the rules of engagement and revise those rules as the situation changed. As the 18th Airborne’s mission changed from handling civil disturbance to providing disaster relief, lawyers were required to develop interagency coordination between the 18th Airborne, the St. Croix police, the FBI and Federal Emergency Management Authority officials.

Lawyers also drafted the rules of engagement for
the 18th Airborne’s deployment in Panama. The 82nd Airborne went even further and devised a wallet-sized card that was distributed to the troops, a practice that was subsequently followed in both Desert Shield and Desert Storm. In addition to drafting the rules of engagement in Panama, lawyers advised on investigations of potential war crimes and incidents involving “friendly fire.” In the aftermath of Panama, it proved important to have had lawyers involved from the beginning to ensure that a record was made of inquiries. Those records were used in later months to respond to congressional and media inquiries. Colonel Finnegan concluded with the observation that these conflicts demonstrate the increasingly important role of operational law and lawyers in providing legal assistance to commanders.

Professor Richard J. Grunawalt, Director of the Oceans Law and Policy Department for the Center of Naval Warfare at the United States Naval War College and former Stockton Professor of International Law gave a “deck plate” perspective on how the Navy incorporates the concept of national security operational law in its military decisionmaking process. More specifically, he discussed the ways the lawyer assists and supports the operational commander in the pursuit of his military mission within the framework of domestic and international rules of law. Professor Grunawalt also emphasized the importance of education, the methodology of teaching, the development of doctrine, and the writing of publications at the Naval War College, including the Commanders' Handbook on the Law of Naval Operations and various military manuals. He expressed the view that perhaps the truest test of a nation state’s adherence to the rule of law lies not so much in what it says or even the treaties it subscribes to, but in what it does. In Professor Grunawalt’s view, perhaps the most reliable indication of what a nation does or intends to do is the type of guidance it provides to its operational commanders, not only in its educational institutions but also in its manuals. In this sense, Professor Grunawalt submits that the Navy has done a great deal to advance the rule of law in the operational decision process.

Colonel Raymond C. Ruppert, Chief of the International and Operational Law Division of the Office of the Army’s Judge Advocate General, observed that as national security law becomes systematically incorporated into operational military decisions, the methodology underlying national security law has changed and expanded. He expressed the view that Desert Shield and Desert Storm represent the ultimate field test of our systematizing national security law in military decisions, and, concomitantly, into military doctrine. The integration of national security law into operational military decisionmaking is reflected in the field manual governing the mutual obligations of commanders and lawyers used in Operations Desert Shield and Desert Storm. The reciprocal duties set forth in that manual require consultation between commanders and legal advisors throughout the planning and execution phases of all military operations. Looking to the future, Colonel Ruppert suggested that operational law, because it is part of our doctrine, will continue to be used as a vehicle to promote fundamental democratic values throughout the world. This, he suggested, is a new mission for the future.

IV. Operational Law in the Gulf Conflict (Desert Shield and Desert Storm)

Colonel Fred K. Green, former Legal and Legislative Counsel to the Department of Defense, opened the panel with a discussion of specific operational law issues that arose during Desert Shield and Desert Storm. The first mission was to get troops on the ground in Saudi Arabia in order to defend the territorial integrity and sovereignty of that State. Accordingly, the first operational law issue that arose was the need to arrange for the presence of U.S. forces in southwest Asia. Following negotiations between U.S. and Saudi diplomats, an agreement was concluded that governed the presence of U.S. forces, the removal of those forces, and command and control. The U.S. mission in Saudi Arabia, however, became much more complex than simply protecting Saudi Arabia. Ultimately the mission included ejecting Iraqi forces from Kuwait and restoring the Kuwaiti government to power. As a result, the mission statement for the operation that launched Desert Storm was changed to reflect the situation as it evolved, in a manner consistent not only with domestic legal authority, but also with provisions of the U.N. Security Council resolutions.

Myron H. Nordquist, Deputy General Counsel for the Department of the Air Force, elaborated on Colonel Green’s remarks, noting that the U.S. and coalition forces dealt with the Kuwaiti conflict within the legal parameters of Security Council resolutions as well as customary international law. Mr. Nordquist supported his conclusion with details of the pertinent provisions of the U.N. charter authorizing the use of force and defensive collective security measures, and the specific resolutions that condemned the invasion of Kuwait, imposed economic sanctions, permitted the inspection and verification of cargoes and destinations, and ultimately authorized the use of “all necessary means” to enforce the Security Council resolutions and “restore peace and security in the area.” Based on summary records of the Security
Council debates, Mr. Nordquist explained that "all necessary means" clearly included the use of armed force.

Colonel Ray Ruppert elaborated on the operational law aspects of Desert Shield and Desert Storm discussed during the previous panel. Specific legal issues addressed by lawyers in the Gulf conflict included the implementation of U.N. Security Council resolutions, drafting rules of engagement, the treatment of enemy prisoners of war in accordance with the requirements of the Geneva Conventions, and the role of the U.S. military as an occupying power under the Geneva Conventions. In short, lawyers were involved in every phase of the operation in a way that was consistent with U.S. military doctrine.

Captain Thomas Connelly, of the Navy's Judge Advocate Generals Corp and Deputy Legal Counsel in the Office of the Chairman of the Joint Chiefs of Staff, discussed coalition activities prior to Desert Storm and Desert Shield that established the contours of the operation. For example, in September 1990, the United States hosted a naval conference in Bahrain for the approximately twenty countries expected to participate in the implementation of the U.N. resolutions. Although the resolutions had not yet been adopted, the preliminary conference was deemed necessary to ensure that all parties had a mutual understanding of action to be taken and to ensure that all parties had consistent interpretations of the requirements of international law. Specific issues that arose included the response to Iraqi flights over international waters in the Persian Gulf, the neutrality of Iran, and the reaction to mine-layers in the territorial sea of an occupied country to ensure compliance with the rule of law. From the outset, this coordination was significant because the commanders understood that the actions they took would be the standards by which the rules would be examined, developed, and critiqued. As a result, the postwar analysis indicated that the coalition, individually and in the aggregate, complied with applicable law.

Colonel Robert L. Bridge, Chief of the Air Force JAG's International Operations Law Division, addressed the problem of "friendly fire," also known as "fratricide." From the outset, the coalition forces were concerned about the high possibility of combatants mistakenly engaged allied forces during the Gulf War. Although preventive measures were taken, virtually insurmountable problems were posed by the vast numbers of ground and aerial forces deployed and the lack of any real reference points in the desert. Consequently, a disproportionate number of friendly forces involved in the Gulf War died at the hands of allies. Since the Gulf War, the U.S. Army has taken the lead in searching for an effective technical means of identifying friendly forces. Indeed, joint training involving U.S. forces from the several services is focusing on fratricide-avoidance techniques. While technical and training prevention will likely produce some improvements, Colonel Bridge cautioned that it would be naive to assume that future conflicts will be free of fratricidal incidents. While several operational issues remain unresolved, it is certain that common law tort principles and criminal negligence principles should not be applied to friendly fire incidents. Those principles would impede the ability of U.S. servicemen to take measures necessary to preserve their own lives, which would be inconsistent with U.S. military policy and inappropriate in military engagements.

Colonel Richard Walls, U.S. Marine Corps, Deputy Director of the Marine Corps JAG Division, discussed the services rendered by the Marine JAG officers in the Gulf War. Those services included not only traditional legal functions, such as trials by court martial, administrative law, and investigations but also operational law issues, including the treatment and use of enemy prisoners of war consistent with the obligations of the Geneva Convention and coordination with the International Committee of the Red Cross (ICRC). As a result, Colonel Walls concluded that the operational law adhered to in the Gulf War has permanently altered the way we conduct warfare.

W. Hays Parks, Chief of the International Law Branch, International and Operational Affairs Division, Office of the Army JAG, addressed the relationship between the ICRC and U.S. government and operational lawyers, coordination with the ICRC on prisoner-of-war issues, and the investigation of Iraqi war crimes. ICRC representatives met with U.S. government officials in December 1990 to discuss law of war conduct in the event hostilities commenced in the Gulf. The U.S. Army is the executive agent within the Department of Defense for the investigation of war crimes committed against U.S. personnel. Two Army Reserve war crimes teams were mobilized in the Gulf War. One team was responsible for collecting and collating information, and the second was sent to the theater of operations. Details of the U.S. investigation of Iraqi war crimes are included in the Department of Defense report on the Gulf War.

V. Special Topic: Humanitarian Intervention and a New World Order

Anthony A. D'Amato, Professor of International Law at Northwestern University School of Law, opened the panel with a discussion of the customary law of humanitarian intervention and the primary and sec-
ondary rules of international law that relate to that topic. Noting that humanitarian intervention is generally considered a secondary rule of international law, Professor D'Amato identified a series of primary rules that delimit humanitarian intervention.

The first rule is that before a State intervenes in the internal affairs of another country it must first pursue a multilateral approach in good faith—for example, working through the United Nations. If that effort is unsuccessful, Professor D'Amato endorsed the use of unilateral action as a permissible alternative.

The second rule is that there must be an objective justification, such as a grave existing or impending human rights violation, to warrant intervention. Third, the cure must be better than the disease, and the goals and missions of intervention must be defined in advance. Finally, there must be adequate plans for withdrawal if the goals of intervention are not being realized. In conclusion, Professor D'Amato noted that in the absence of a fully effective United Nations to police the world, U.S. intervention based upon the foregoing rules may be the next best thing.

Allan Gerson, former Legal Adviser to U.N. Ambassador Jean Kirkpatrick, distinguished between humanitarian intervention and the concept of intervention designed to redress aggression. Commenting on the situation in Yugoslavia, Dr. Gerson argued that Serbia's attacks against Bosnia constitute aggression and, arguably, an impermissible use of force by one State against another under the U.N. Charter. While the situation does not mandate intervention, Dr. Gerson argued that intervention is legally justified. He asserted that it is in the U.S. national interest to intervene on the grounds that such unchecked aggression may spread from the Balkans and destabilize the entire region. In spite of this, Dr. Gerson suggested that what has prevented U.S. action has not been disagreement about the U.S. security interest at stake but rather considerations of political expediency in an election year. In conclusion, Dr. Gerson advocated a nonpartisan acceptance of a new world order based upon the rule of international law.

Dr. Michael Reisman, Wesley N. Hohfeld Professor of Jurisprudence at Yale Law School, discussed the use of humanitarian intervention to protect new democracies. Professor Reisman observed that the past two years have established beyond doubt the lawfulness of humanitarian intervention when the lives of large numbers of the population are in danger and the local government is nonexistent, ineffective, or a threat to basic human rights, as demonstrated by the success of interventions in Iraq and Liberia. Yet, the international community has been reluctant to endorse the doctrine of unilateral humanitarian intervention to enforce its commitment to democracy and the protection of human rights. One significant factor contributing to this is that military governments have manipulated the concepts of sovereignty, domestic jurisdiction, and international affairs to evade international scrutiny and to condemn intervention in the United Nations. Examples include condemnation of the French liberation of the Central African Republic and the U.S. intervention in Panama. This problem is compounded by the fact that U.N. council members tend to view third-world military coups in terms of their own strategic interests. While there may be a consensus at the United Nations on the importance of political democracy, the U.N. has thus far proved unable to make this consensus operational. As a result, Professor Reisman concluded that effective international protection of aspiring democracies will be dependent upon decisive action by the great industrial democracies.

The Honorable Richard Shifter, former Assistant Secretary for Human Rights and Humanitarian Affairs at the Department of State, distinguished between "human rights" and "humanitarian affairs". He observed that if the term "humanitarian intervention" is construed narrowly, it is easier to make a case for intervention. He described Somalia as a case for humanitarian intervention in its purest form. Quoting from Article 1 of the U.N. Charter, Ambassador Shifter noted that one purpose of the United Nations is the achievement "of international cooperation in solving international problems of an economic, social, cultural or humanitarian character." Given the disruption of the production and distribution of food throughout Somalia by bandits and the ensuing danger of mass starvation, Ambassador Shifter suggested that there is a compelling basis for the Security Council to take jurisdiction under Article 39 of the U.N. Charter. Although the United Nations has taken limited measures to intervene in Somalia, those efforts have been inadequate. Ambassador Shifter asserted that if "the new world order" is to be more than an empty phrase, the challenge posed by Somalia must be met. The world community must be willing to make sufficient military forces available to assure that food is delivered to the starving population and must be willing to foot the bill for both the food and the cost of providing the required military protection. In the United States, this means more than a vote in the United Nations. To establish humanitarian intervention, the United States must be prepared to contribute to funding the effort and to provide military and logistical support.
VI. Advising the Government on National Security Law: A Roundtable Discussion

Stewart A. Baker, General Counsel of the National Security Agency, indicated that one of the challenges faced by a lawyer within a security agency is that many of the issues that arise in national security and intelligence agencies do not have a very large legal component. Moreover, where legal issues are involved, there is a high level of expertise among non-lawyers, a fact that further limits the role of the lawyer. Legal questions do arise, however, when the activities of the agencies might be perceived as having an impact on the rights of American citizens or on other areas of activity that are heavily regulated by the courts. These include arms control and proliferation, economic intelligence surveillance, counter-terrorism, counternarcotics and the investigative activities of Congress and special prosecutors. Regarding operational issues, Mr. Baker took the position that lawyers have a very limited role. At the same time, he suggested that as lawyers become more involved in such issues, there will be a need for lawyers to advise people conducting operations. He predicted that will eventually become the most important role lawyers will play at NSA and the other intelligence agencies.

John H. McNeill, Deputy General Counsel for International Affairs and Intelligence in the Department of Defense, discussed the international law and operational law issues that arise in the Department of Defense during both armed conflict and in rendering humanitarian assistance abroad. The DOD also has a role in advising on intelligence matters, arms control negotiations, and ensuring that U.S. weapons development systems comply with our international legal obligations. In addition, the DOD has been involved in negotiating new agreements with Russia, Belarus and Ukraine on demilitarization and denuclearization. More generally, the DOD takes an active part in the evolution of customary rules of international law dealing with the law of the sea. In conclusion, Mr. McNeill stressed the importance of ensuring that legal advice is integrated into the policymaking process and observed that the need for various legal departments of government to work together on national security problems has enabled lawyers to have a much greater impact in the decisionmaking process.

Nicholas Rostow, Legal Advisor to the National Security Council, discussed the two most important roles of the Legal Advisor in terms of the activities conducted by the NSC staff. His most important responsibility is coordinating the activities of the other senior counsel in the national security community. His second function is to provide candid advice to the National Security Advisor and his staff, and through them to the President. Recently, the NSC has been dealing with a variety of difficult questions, including separation of powers issues resulting from congressional requests for national security information; weighing the competing legal values where drugs and terrorism are involved; and issues concerning the use of military force. The NSC is also involved in issues relating to the use of force. Whenever the question of the potential use of force arises, legal counsel from the various government departments convene to discuss it—resulting in a very effective process that avoids forum shopping.

Colonel James P. Terry, a Marine who serves as Legal Counsel to the Chairman of the Joint Chiefs of Staff, took issue with a comment by Stewart Baker suggesting that few legal issues are involved in the conduct of war. In Colonel Terry's view, a great number of operational questions can be answered only with the assistance of lawyers. Even before a military operation begins, legal assistance is required on such problems as export controls, foreign assistance, weapons sales, targeting concerns, pre-positioning, access and overflight rights, and status of forces. These international legal issues directly affect the law of armed conflict. The Joint Chiefs' office also must consider mobilization and emergency authorization needs, special operations concerns, special or covert activities, international logistical and environmental concerns, and arms control and disarmament. Historically, the effectiveness of the United Nations has been limited by the fact that it is dependent upon consensus—a rare commodity during the Cold War. The emergence of a more effective United Nations and the creation of unified and specified commands by the United States have been important developments for national security lawyers. By providing better leadership to the United Nations, Colonel Terry indicated that the United States can help make the United Nations more effective by ensuring that there is professional military advice, planning, and execution available to the secretariat. At the same time, Colonel Terry argued that the United States should provide to the U.N. only those forces from the U.S. military that we are uniquely capable of providing. Finally, he concluded, it is necessary to ensure that U.S. forces committed to any United Nations operation are controlled and commanded within clearly defined parameters.

Edwin D. Williamson, Legal Advisor to the Department of State, discussed national security and foreign policy issues he has been required to address at the State Department during the past year. The most
important single development was certainly the break-up of the Soviet Union and the resulting issues of recognition, successor state obligations, and compliance with international obligations. The situation in the former Yugoslavia raised some similar issues but was more complicated given the context of the break-up. One of the highlights of the year was the State Department's appearance in the International Court of Justice (ICJ) in a case brought by Libya concerning the Pan Am flight 103 disaster. The State Department was also involved in the case of the downing of Iran Air flight 655, as well as a number of government-to-government claims still pending in the Iranian claims tribunal. In addition to these cases, the State Department is actively involved with war powers, separation of powers, and sovereign immunity issues.

Like the NSC, the State Department has been besieged with an overwhelming number of congressional requests for documents relating to "Iraq-gate," the alleged "October Surprise," and the POW-MIA hearings, and compliance with these requests has required some coordination among government agencies. Although inter-agency coordination in response to such requests is a long-standing practice, it has been criticized by uninformed members of the media. Mr. Williamson indicated that dealing with poorly informed journalists can be one of the most frustrating aspects of a government lawyer's job.

**KEYNOTE ADDRESS**

The International Court of Justice

During the second luncheon session of the conference, His Excellency Stephen M. Schwebel, a Judge on the International Court of Justice, discussed cases pending before the Court, most of which raised jurisdictional questions and involved maritime boundary disputes. Two of the cases he identified are relevant to U.S. national security law. One involves shooting down the Iranian Airbus by the Vincennes on July 3, 1988. The question of whether or not the court has jurisdiction would be considered first. Also before the Court are twin cases filed by Libya regarding the aerial incident at Lockerbie. Libya has moved to prevent the United States and the United Kingdom from seeking any further resolutions in the Security Council requiring Libya to surrender the persons accused of having blown up Pan Am flight 103. Libya has maintained that under the 1971 Montreal Convention, it is entitled to extradite the individuals accused of those crimes. Given the existence of a supervening U.N. Security Council resolution, the ICJ has declined to issue provisional measures. Nevertheless, the merits of the case remain to be resolved. Generally speaking, Judge Schwebel noted that during this period of relative detente, the ICJ expects to play a greater role in dealing with disputes that arise among States, since States tend to be more willing to adjudicate in periods of good international relations. Judge Schwebel indicated that, in principle, the Court is able to deal with national security issues, issues of aggression, and the ongoing use of force. Practically, however, the court's performance on those issues must be assessed on a case-by-case basis.

**VII. Special Topic:**

**Democracy and Deterrence:**

**Toward a New Central Paradigm in International Law and Relations**

Professor John Norton Moore returned to and expanded upon a theme set in his opening remarks concerning the development of a new central paradigm in international law and relations. Pointing to Professor Rudy Rummel's study of democide, Professor Moore observed that democracies have never had a major war with other democracies and tend to have a better record of protecting and preserving human rights than other forms of government. As a result, the character of a regime has acquired an enormous importance in international relations. A related development is a dedication to the notion of democracy as a central focus in foreign policy. This is a departure from international law focused on third-party dispute settlement and reflects a new paradigm based upon the notion of human rights, the avoidance of genocide and war, the promotion of peace, and efforts to further economic development and environmental protection. According to Professor Moore, these ends should be achieved not through the use of force, but rather through the pursuit of peaceful strategies—such as the Conference on Security and Cooperation in Europe (CSCE) process—to promote democracy in a way that is consistent with rule-of-law engagement.

To avoid war, there must be focused deterrence of potential aggressors. Professor Moore closed with two recommendations to accomplish these goals. First, it is critically important to reinvigorate the prohibition against aggressive attack in the international system. Secondly, to have a deterrent effect, the system must treat aggression differently from the way it treats collective defense. Professor Moore concluded that the new world order requires a new way of thinking, a new paradigm that has as its center the notion of differences in governmental structure and the importance of dealing with those differences in every aspect of U.S. foreign policy.
Also making a return appearance at the conference, Professor Grunwald endorsed Professor Moore's conclusions regarding rule-of-law engagement and agreed that the underlying cause of international armed conflict is the aggressive intentional use of force by nondemocratic totalitarian regimes. He agreed also that democratic states must act to deter such conduct if the rule of law is to prevail on an international level. This "new thinking" requires a distinction between aggressive and defensive response to aggression, although several other considerations must be taken into account as well. For example, territorial integrity is often in conflict with other values in the international legal system, such as humanitarian law and human rights. This tension must be examined before determining whether or not to proceed as a matter of policy. It is also necessary to consider such operational law issues as collateral damage and incidental injury. Simply put, the consequences of actions taken must be weighed carefully. This assessment includes not only the planned mission, but also the rules of engagement and plans to extricate any forces deployed. These factors must be considered if legal advice and guidance on the use of force are to be genuinely meaningful.

Peter R. Huessy, Senior Defense Consultant for the Institute for Foreign Policy Analysis and Consultant on the Strategic Defense Initiative Organization for the Office of the Deputy Chief of Staff, USAF, discussed the politics of Professor Moore's new paradigm. Given the various political interests of different constituencies in government, the question is how to maintain U.S. security interests and a defense establishment in a way that is consistent with the expectations of the American people. Mr. Huessy suggested that the response to this question requires the following: a recognition that while the Cold War is over, it has taken a new form in the war against the forces of tyranny and fundamentalism that have no tolerance for Western values; a realistic assessment of the world's commitment to democracy and free enterprise; an acknowledgment of the dangers posed by the proliferation of weapons of mass destruction; an admission that U.S. foreign policy decisions are designed to protect U.S. national security interests; and, finally, frankly letting the American public know what those national security interests are, why they need protection, and the form that protection will take.

Penn Kemble, Senior Associate at Freedom House, suggested that the link between democratization and the deterrence of war was established with the collapse of the Soviet power at the end of the 1980s. He asserted that while the military strength of the West played an important role in the collapse of the Soviet Union, political, intellectual, and moral forces were equally important. Those forces included the deterioration of the totalitarian system and the spread of democracy beginning with the Solidarity movement in Poland and carrying over into the various human rights movements of other satellite countries. Mr. Kemble concurred with the observations of the other panelists that it would be naive to assume that our dangers are over and ignore our international obligations to concentrate on problems at home. He concluded that there is a need to find a middle ground.

W. Scott Thompson, Associate Professor of International Politics at the Fletcher School of Law and Diplomacy and Resident Associate of the Carnegie Endowment for International Peace, discussed the importance of deterrence in U.S. efforts to institutionalize and promote aspiring democracies. By deterrence, he was not referring only to the nuclear deterrence that served us well in the Cold War but identified five related propositions; (1) Democracy and the rule of law are insecure today in the Second and Third Worlds. While the United States may reinforce democratic developments with loans, grants, and technical expertise, deterrence is necessary to prevent reversion to totalitarianism, which he deemed inevitable in the Third World. (2) While historically, democracies have not fought one another, fighting may well break out between established democracies and new democracies in the future. To emerge victorious, the United States must engage in military, economic, and political deterrence. (3) The viability of deterrence as a rational model is undermined by the existence of barbaric leaders who do not respond in ways our culture views as "rational." (4) The greatest aid to democracy in all parts of the world will be the resilience and strength of the United States and its commitment to the protection of democratic values. (5) The fifth proposition is that the most effective way to promote democratic values is with continued positive aid from the National Endowment for Democracy (NED), the Agency for International Development (AID), and related agencies. Professor Thompson concluded that to determine how to discriminate among potential deterrent actions, the United States must consider the multiplier effect of the position taken, the importance of the government at risk to us, including its values, its economy, and its military and strategic importance, and, finally, the ease with which deterrence can be made to work.

VIII. Special Topics: The Independent Counsel, Separation of Powers, and National Security Law

Former Assistant Secretary of State Elliott Abrams opened the panel with a discussion of institutional
dangers inherent in the concept of an independent counsel as established by the Ethics in Government Act. The greatest danger is that the independent counsel reports to no one and is not subject to the traditional checks and balances set forth in the Constitution. As a result, the mindset and behavior pattern in the office of an independent counsel is that it is "above the law."

Political prosecutions pose another danger in a setting that is inconsistent with the ordinary features of the criminal justice system. More fundamentally, Mr. Abrams suggested that the office of independent counsel statute increases the role of Congress vis-à-vis the Executive Branch. In his view, that increased power is not needed because other traditional political remedies exist to hold executive officials accountable, including the investigatory powers of Congress, its influence on pending legislation, and its right to impeach any civil officer. To redress this disruption in the balance of power between the various branches of government, Mr. Abrams recommended that the Office of Independent Counsel statute be modified substantially.

Timothy E. Flanigan, the Assistant Attorney General for the Office of Legal Counsel in the Department of Justice, expanded upon Mr. Abrams' criticisms of the independent counsel statute, focusing on its effects on separation of powers and in the sensitive areas of national security and foreign affairs. He emphasized that in addition to the traditional concept of separation of powers by which the branches of government "check" one another to prevent abuses of power, separation of powers also safeguards fundamental principles of accountability. A key reason the Bush Administration opposed reauthorization of the Independent Counsel provision of the Ethics in Government Act was that, by breaking lines of responsibility within the Executive Branch, the autonomous independent counsels were essentially unaccountable and often created problems in national security and foreign affairs.

In at least two major national security foreign affairs incidents involving independent counsels, inexperience with the intricacies of foreign affairs led to conduct that was not only irresponsible but clearly contrary to the norms of international law and accepted diplomatic practice. Mr. Flanigan argued that the Independent Counsel statute is fundamentally unnecessary, given the ability of the Department of Justice and the power of the Attorney General to investigate executive officials, the lack of accountability created by the disruption of principles of internal checks and balances, and the exorbitant and unconstrained costs of the independent counsels. In conclusion, Mr. Flanigan observed that the independent counsel statute stands as an example of why accountability in govern-

ment is critical to the protection of both the individual and the public.

Morton H. Halperin, former Director of the Washington office of the American Civil Liberties Union (ACLU), explained that the organization approaches the question of the role of the special prosecutor with a set of conflicting concerns. On the one hand, the ACLU remains dedicated to the rights of criminal defendants. On the other hand, the ACLU insists that government officials in positions of trust need to be held accountable when they engage in actions that violate U.S. criminal laws. The Justice Department cannot be trusted to prosecute cases against senior officials within the Executive Branch—particularly when those cases involve sensitive intelligence programs, because Justice is part of the intelligence apparatus. Regarding the false testimony statute, he stated that the law is clear on the question of when misleading Congress is a crime. In his view, the simple solution to testimony that affects national security interests is the right to decline to answer. Therefore, government officials who provide false testimony should be prosecuted by an entity that is independent from the administration. At the same time, Mr. Halperin acknowledged that there must be a mechanism that reconciles the tension between the obligation of government officials to obey the law and the administration's pursuit of intelligence objectives.

Jacob A. Stein, who served as an independent counsel in the investigation of former Attorney General Edwin Meese, III, offered a mixed review of the statute. Noting that at times the statute had worked well, and at other times it has not worked well at all, he stated that the fact that the independent counsel's power may have been misused on occasion is not sufficient reason for abandoning it. Recounting his experience in the investigation of Ed Meese, he discussed some of the specific problems he encountered and made general comments regarding the role of an independent counsel. Rather than give the authority to declassify, a grant that might jeopardize the life of U.S. agents, Mr. Stein suggested that independent counsel should evaluate the nature and scope of a given prosecution with an eye to the need to declassify information. In the end, he concluded, the protection of innocence is more important to the community than the punishment of guilt. In Mr. Stein's view, the independent counsel concept should be improved in a way that is consistent with this fundamental democratic value.

For further information about this or other ABA national security conferences, contact Ms. Holly Stewart McMahon at (202) 466-8463.