



The Law of Occupation and Post-Armed-Conflict Governance: CONSIDERATIONS FOR FUTURE CONFLICTS

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Judge advocates provide commanders and their staffs legal advice on the application of occupation law in specific instances in military operations. This article provides an overview of some fundamental principles of occupation law to help commanders and their staffs appreciate, understand, and better prepare for future operations. It is not intended, in any way, to be a substitute for the legal advice provided by their servicing judge advocates. The statements, opinions, and views expressed herein are those of the author only and do not represent the views of the United States Military Academy, the Department of the Army, or the Department of Defense.

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BEFORE THE ONSET of Operation Iraqi Freedom, occupation law occupied a rarely discussed, long neglected, and seldom trained place on the spectrum of support to military operations. Not since the end of World War II had the U.S. military undertaken the immense responsibility of governing/administering an occupied territory for a prolonged period. Lack of familiarity with the concept and the responsibilities that go along with it led to great initial problems with the occupation. These problems were exacerbated when the government prohibited U.S. personnel from using the term “occupation” to describe the status quo (instead, occupation was referred to as “the O word”).¹

On 19 March 2003, the United States, the United Kingdom, and a few other members of the “coalition of the willing” began Operation Iraqi Freedom by invading Iraq.² Combat actions commenced with a massive wave of “shock and awe.” Coalition forces launched cruise missile attacks and F-117 strikes intended to decapitate the Iraqi regime and break the will of the Iraqis to fight for Saddam Hussein and the Ba’ath Party.³

Early on the morning of 20 March, coalition ground forces entered Iraq in large numbers, thundering toward Baghdad, the southern oil fields, and other strategic locations.⁴ More units quickly followed. Seared into our collective memory are media accounts from reporters embedded with U.S. ground forces as they drove through near-blinding sandstorms, pressing their way to Baghdad.⁵

By early April, Army and Marine Corps units closed on the Iraqi capital. The attack into and sweep through Baghdad were punctuated by periods of intense fighting. By 9 April, all coherent resistance in Baghdad had collapsed.⁶ On 1 May, President George W. Bush landed in a Navy combat aircraft on the USS *Abraham Lincoln* off the coast of southern California.

PHOTO: The Marines of Regimental Combat Team 5 move north from Kuwait to Iraq, 22 March 2003. (U.S. Marine Corps photo by Sergeant Kevin R. Reed)

With a large “Mission Accomplished” banner in the background, Bush announced the end of major combat operations in Iraq. The United States and its allies had prevailed in taking down the regime.⁷

In the immediate aftermath of the invasion, Bush appointed a retired U.S. Army general, Jay Garner, as director of the Office for Reconstruction and Humanitarian Assistance for Iraq. Bush soon replaced Garner with L. Paul Bremer III, and named Bremer his special envoy to Iraq. In that capacity, Bremer served as administrator of the Coalition Provisional Authority (CPA). The CPA was supposed to run Iraq until a sovereign Iraqi government could be reestablished.⁸

Coalition leaders avoided the label “occupation” to describe Iraq’s post-conflict governance. Instead, they portrayed the coalition-force action as a “liberation.”⁹ Notwithstanding the political, legal, and cultural baggage associated with an occupation, there was no question that once coalition forces ousted Saddam Hussein’s Ba’athist regime and exerted authority over Iraq, the law of occupation applied.¹⁰

One of the by-products of Operation Iraqi Freedom and its aftermath was reinvigoration and reconsideration of the law of occupation, a long-standing subset of the Law of Armed Conflict. All Soldiers involved in an invasion and control of enemy territory need to understand the law of occupation. Because it is inextricably linked to the planning and execution of military operations, the law is vital to success. This article aims to increase that understanding.

The Law of Occupation: Background, Legal Framework¹¹

Armed conflicts are regulated by a body of international law known alternatively as the Law of War, the Law of Armed Conflict, or international humanitarian law.¹² At its core, the Law of Armed Conflict is primarily concerned with humanitarian aims. That is, it exists to mitigate the evils of armed conflicts.¹³ Although the basic principles and customary practices embodied in the Law of Armed Conflict evolved to their present states over millennia based on the conduct and beliefs of state parties,¹⁴ it has only been a little over a century since these norms were first memorialized into international agreements among states.¹⁵

The principles that constitute the law of occupation are a discrete subset of the Law of Armed

Conflict.¹⁶ More specifically, the law of occupation is embodied in selected provisions of the Annexed Regulations to Hague Convention IV of 1907,¹⁷ the Fourth Geneva Convention of 1949,¹⁸ and customary international law. The U.S. Army’s authoritative guidance on the law of occupation is contained in Field Manual (FM) 27-10, *The Law of Land Warfare*.¹⁹

From a historical perspective, World War II marked the most significant benchmark in the development of occupation law. The Axis powers patently failed to adhere to their fundamental obligations as occupying powers in accordance with the Hague Regulations and customary international law then in effect. It has been argued that atrocities committed by the Axis powers in occupied territories during World War II contributed significantly to their defeat.²⁰ The Axis powers, however, were not alone in violating basic norms of occupation law during World War II. The Soviets also violated occupation law.²¹ The consequences of that behavior led to unprecedented civilian suffering in occupied territories. In 1949, the international community responded with the Fourth Geneva Convention, which amplified and strengthened the basic protections of occupation law.²² Put another way, the provisions of the convention related to occupation law reflect the bitter experiences of civilian populations in occupied territories during World War II.²³

Now, commanders and their staffs must know when they have embarked on an occupation subject to international law. The law is triggered when a successful invader establishes firm control over enemy territory.²⁴ Framed in a slightly different manner, there are two elements that are necessary to establish an occupation under international law. First, there must be an invasion, resisted or unresisted, in which the invader has rendered the invaded government incapable of publicly exercising its authority over the territory or part of the territory.²⁵ Second, the invader has substituted its own authority for that of the former government of the invaded country.²⁶ During an occupation, whether total or partial, the entirety of the Geneva Conventions applies to the warring parties.²⁷

By way of illustration, in 2003 the United States and the United Kingdom acknowledged, albeit indirectly, their obligations in Iraq under the law of occupation. In a joint letter to the UN Security

Council dated 8 May 2003, the two lead members of the coalition of the willing announced that—

The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq. . . . In order to meet these objectives and obligations in the post-conflict in Iraq, the United States, the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance, to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.²⁸

As the Hague Regulations make clear, an occupation extends only to the portion of the territory in which the occupying power has established authority and can exercise that authority and control.²⁹ Accordingly, if an army occupies only a portion of a country it

invades, occupation law applies only to that portion.

The commencement of an occupation is a matter of fact.³⁰ The reality on the ground determines legal status. It does not matter what the occupying or occupied power labels its action (e.g., liberation, offensive, incursion, or something else). Moreover, there is no strict legal requirement to proclaim an occupation underway.³¹ It is prudent, however, to make the occupation known to the inhabitants of the affected territory because of the rights and obligations that flow between the occupying and occupied powers.³² The United States routinely proclaims the commencement of an occupation. For example, during Operation Iraqi Freedom, the CPA³³ issued the following proclamation:

1) The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable



The “O” Word? Soldiers of the 3d Infantry Division conduct a security patrol through the streets of Fallujah, Iraq, 20 June 2003.

U.S. Army, SPC Derek Gaines

reconstruction and development.

2) The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator.³⁴

Likewise, during World War II, General Dwight Eisenhower issued Proclamation Number 1, whereby he announced the Allied occupation of Germany.³⁵

For U.S. Army planners, the transition from Phase III to Phase IV of an operation will likely be the point at which an occupation begins, thus triggering duties and obligations under occupation law. It is possible, perhaps even likely, that hostilities will continue in some areas of an invaded territory and not others. As such, forces may undertake their obligations as an occupying power in some areas while still engaging in combat in others. This happened in World War II with the invasion of Germany.³⁶ Planners should therefore consider not only how they are going to reorient forces from an invasion to an occupation, but when that is likely going to occur. Prior consideration is important to facilitate the transition at a critical time in the operation.

Of utmost importance to understanding occupation law is the underlying concept that an occupation does not transfer sovereignty to the occupying power. Stated differently: “The foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through the actual or threatened use of force.”³⁷ Thus, an occupation is only a temporary trusteeship with certain attributes of sovereignty suspended or limited.³⁸ Arguably, the CPA’s focus on restoring full sovereignty to the Iraqi people as early as possible illustrates this point.³⁹

A corollary to the inalienability of sovereignty is that it is unlawful under international law for an occupying power to annex the territory of the country it is occupying.⁴⁰ One example of an attempted unlawful annexation occurred when Saddam Hussein invaded Kuwait and announced the merger of the two countries.⁴¹ The UN Security Council quickly condemned the action as illegal and declared it null and void.⁴² An occupying nation only has the right to exercise some of the powers incident to sovereignty.⁴³

Under international law, an occupation terminates upon reestablishment of sovereignty in the occupied part of a country.⁴⁴ The Geneva Conventions anticipate that an occupation shall not last more than one year after the general close of military operations.⁴⁵

Authority and Obligations of an Occupier

The authority of an occupying power is firmly rooted in international law. Hague Regulations IV, article 43, states that—

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

This provision highlights a couple of vital points that commanders and their staffs should know about occupation law. First, an occupying power bears responsibility for restoring and maintaining public order and safety in the occupied territory. The breakdown of law and order, the shameful looting of stores, hospitals, and cultural facilities, and the revenge killings and general lawlessness⁴⁶ in sections of Iraq at the commencement of the coalition’s occupation demonstrate how difficult it can be to meet this obligation.⁴⁷ From a military planner’s perspective, two key considerations to ensure public order and safety are force size and capabilities. It is crucial for an occupying power to have sufficient, properly trained forces on the ground in a timely manner to secure the occupied territory.

Second, there is an affirmative obligation to respect and maintain the occupied power’s existing legal framework. This clear-cut rule is tempered by an escape clause—“unless absolutely prevented”⁴⁸—and by a slight modification to the Fourth Geneva Convention that permits suspension or repeal of an occupied country’s penal laws when they constitute a threat to security or an obstacle to application of the convention.⁴⁹ U.S. Army doctrine reinforces these international obligations. More specifically, the governing field manual declares—

In restoring public order and safety, the occupant will continue in force the ordinary civil and

penal (criminal) laws of the occupied territory except as authorized by Article 64 . . . GC and Article 43 HR . . . to alter, suspend, or repeal such laws. . . . These laws will be administered by the local officials as far as practicable. Crimes not of a military nature and not affecting the occupants' security are normally left to the jurisdiction of the local courts.⁵⁰

To suspend or repeal the occupied power's laws, local or national, there has to be a nexus between the offending law and an issue related to the security and safety of the occupying powers' armed forces, the accomplishment of the mission, or compliance with international law.⁵¹ Examples of such offending laws may include the right to bear arms, the right to assemble and protest, freedom of movement, and discrimination based upon some suspect classification.⁵²

In a related point, a long-standing principle of occupation law forbids the abolition or suspension of local, ordinary courts.⁵³ Accordingly, military planners should anticipate using the occupied territory's courts, when feasible.⁵⁴ Such courts should be suspended only if judicial officials abstain from performing their functions, the courts are corrupt and unfairly constituted, or the local courts collapsed during the hostilities.⁵⁵ During World War I, Germany occupied Belgium from 1914 to 1918.⁵⁶ The Germans did not disturb the local court system and left its jurisdiction largely intact.⁵⁷ In Iraq, the CPA

established the Central Criminal Court of Iraq. In a notice published on 18 June 2003, it proclaimed—

The CPA has taken steps to meet the urgent security needs of the people of Iraq and Coalition Forces by creating a Central Criminal Court of Iraq. This court *will apply and operate under Iraqi law*, as amended to ensure fundamental fairness and due process for accused persons, and will be modeled on the current Iraqi court system. The Central Criminal Court will consist of an Investigative Court, a Trial Court and an Appeal Court, with the right of further appeal to the Iraqi Court of Cassation. *The judges and prosecutors will be locally selected Iraqis.* The Court will deal with serious offenses that most directly threaten the security and civil order in Iraq. This interim measure will address the immediate need for a reliable and fair system of justice. The CPA will continue to assist in restoring the capability of the Iraqi court system, as it recovers from years of Iraqi Ba'ath Party abuse and perversion. In tandem with this measure the CPA has modified the Criminal Procedure Code to accord the people of Iraq fundamental due process protections and shield them from human rights violations. The CPA has also introduced provisions ensuring that persons detained by Coalition Forces are treated in accordance with international law and receive prompt justice before Iraqi courts. (Emphasis added.)⁵⁸

Alternatively, an occupying power may use non-political, military, or provost courts, but such courts should be limited to trying violations of occupation provisions or regulations. The World War I Belgium example illustrates this principle as well. German courts tried cases that involved German nationals in matters that did not involve the interests of Belgians.⁵⁹ Additionally, violations of occupation law or crimes against German personnel were tried at tribunals established by the Germans.⁶⁰

Under certain circumstances, an occupying power may issue its own laws and regulations. If it publishes such laws, it must provide notice to the inhabitants of the occupied territory.⁶¹ Laws must be published in writing in the language of the inhabitants of the occupied power,⁶² and the laws must not be applied retroactively.⁶³ Moreover, in accordance with general principles of law, penalties must be proportionate to any offense.⁶⁴



Former President of Iraq Saddam Hussein makes a point during his initial interview by a special tribunal, where he was informed of his alleged crimes and his legal rights, 1 July 2004. In accordance with the law of occupation, Saddam was tried in an Iraqi, not an American, court.

Commanders should be aware that U.S. Army doctrine explicitly provides that U.S. military and civilian personnel taking part in an occupation are not subject to the local laws or the jurisdiction of local courts.⁶⁵ In Operation Iraqi Freedom, the CPA went a step further, promulgating an order that exempted contractors from Iraqi legal processes for acts performed pursuant to the terms and conditions of their contract or any subcontract.⁶⁶

Besides issues related to the courts and legal system of the occupied territory, there are a number of critical issues associated with the administration of occupied territory.⁶⁷ As mentioned earlier, the Hague Regulations reinforce the point that an occupying power's primary duty is to restore and maintain public order.⁶⁸

Military planners should be acutely aware that in administering an occupied territory, the occupying power may withdraw from individuals the right to change their residences, restrict freedom of movement, forbid visits to certain areas, prohibit emigration and immigration, and require all individuals to carry identification cards.⁶⁹ Obviously, such actions should never be undertaken lightly. Censorship, another permissible act, is potentially contentious, especially when the occupying power is a democratic country whose own citizens enjoy freedom of speech and a free press. An occupier is not required to observe existing laws regarding the press. Field Manual 27-10 anticipates this issue. It provides that an occupying power may establish censorship of the press, radio, theater, motion pictures, and televisions; of correspondence; and of all other means of communications. Specifically, an occupying power may prohibit entirely the publication of newspapers or prescribe regulations for their publication and circulation.⁷⁰

During the occupation of Iraq, the CPA ordered the closure of a newspaper, *Al-Hawza*, run by Muqtada al-Sadr, a militant Shi'ite cleric. Al-Sadr was a harsh critic of the occupation, and the newspaper was shut down for inciting violence by printing fabrications and wild rumors about the coalition.⁷¹

Another very contentious issue involves the practice of religion. An occupying power must permit the freedom of religion in occupied territory.⁷² The Geneva Conventions stipulate that an occupying power shall permit ministers of religion to give spiritual assistance to the members of their religious communities.⁷³

In terms of funding for an occupation, the economy of an occupied territory can only be required to pay for the expenses of the occupation. These costs should not be more than the economy of the country can reasonably be expected to bear.⁷⁴ Needless to say, taxing the population in an occupied territory can be a potential flash point. According to the Hague Regulations—

If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.⁷⁵

An occupying power may also regulate commercial activities essential to the purposes of the occupation.⁷⁶ In post-conflict Iraq, the CPA assisted the Iraqis in developing a market-based economy by modernizing their central bank, developing transparent budgeting and accounting arrangements, drafting labor and intellectual property laws, updating existing commercial codes, and promoting private business through their banking sector.⁷⁷

Rights of the Occupied Population

To set a threshold, the 1949 Geneva Conventions define a category of individuals (i.e., “protected persons”) who receive specific protections during an occupation. Protected persons are, for one, those who find themselves in the hands of a foreign occupying power.⁷⁸ Rights and protections under occupation law are focused on “protected persons” because other individuals can seek redress through normal diplomatic channels. Regarding the status and treatment of protected persons, the Geneva Conventions provide that—

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.



U.S. Air Force, SSGT Shawn Weismiller

Protect the vulnerable: Iraqi children watch as U.S. Army Soldiers from the 3d Infantry Division set up an access control point at a combined medical operation triage site, Hollandia, Iraq.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Without prejudice in the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same considerations by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion, or political opinion.⁷⁹

In addition to these sweeping guarantees, specific guarantees are provided to vulnerable groups and individuals. For example, individual or mass forcible transfers, as well as deportations of protected persons from occupied territory, are prohibited regardless of motive.⁸⁰ An occupying power may, however, undertake total or partial evacuation of a given area if the security of the population or imperative military reasons dictate such actions.⁸¹ Given the experience of World War II with massive relocation of civilian populations by the Nazis, it is not at all surprising that the Fourth Geneva Convention includes such a provision.

Needless to say, children are particularly vulnerable in an occupation. Consequently, occupation law provides specific protections for them under certain circumstances. Occupying powers are obligated to ensure that institutions devoted to the care and education of children work properly.⁸² They also are required to take all necessary steps

to facilitate the identification and registration of parentage.⁸³ Nor shall they hinder preferential treatment for children younger than 15, expectant mothers, and mothers of children under 7 in terms of food, medical care, and protection against war's effects.⁸⁴

Other protections afforded to protected persons during an occupation have to do with food and medical supplies,⁸⁵ hygiene and public health,⁸⁶ spiritual assistance,⁸⁷ and relief services. If the population of an occupied territory needs supplies (e.g., food, clothing, and medical supplies), an occupying power is obligated to coordinate relief schemes through other states or the International Committee of the Red Cross.⁸⁸ Such supplies must be allowed in and protected by the occupying power.⁸⁹ By way of illustration, among other measures to improve the quality of life for the Iraqi people, the CPA attempted to rebuild and repair infrastructure, maintain oil production, ensure food security, improve water and sanitation infrastructure, and improve health care quality and access.⁹⁰

Status of Property and Services

There are some basic principles occupation Soldiers need to understand and appreciate about state and private property in an occupied territory. First, an occupying power is prohibited from destroying real or personal property unless military operations absolutely require it.⁹¹ Regarding state property, an occupying power serves as administrator and conservator of public buildings, real estate, forests, and agricultural estates belonging to the occupied power. Such property must be protected and properly administered.⁹² If the property is of a military nature (e.g., forts, arsenals, dockyards, barracks, etc.), the occupying power may control it until the close of hostilities and may damage or destroy it if required by military necessity.⁹³

As a general rule, it is impermissible to confiscate private property.⁹⁴ The prohibition applies not only to the taking of property, but also to any acts that, by use of threats, intimidation, or pressure, permanently or temporarily deprive an owner of his property.⁹⁵ The law of occupation does, however, permit the *requisitioning* of private property. Occupying powers may seize such property as cables, telephone plants, radio and TV equipment, motor vehicles, railways, plants, port facilities, ships in port, barges, and airfields provided that it gives the

owner a receipt and eventually returns the property or offers fair compensation for it.⁹⁶

An occupying power may requisition commodities and services such as fuel, food, clothing, building materials, machinery tools, and billeting for troops, among other things.⁹⁷ As mentioned previously, requisitions of food and medical supplies are only permissible provided the needs of the civilian population have been taken into account. Additionally, the occupying power must pay fair value for such goods or services.⁹⁸

Although it may be somewhat self-evident, an occupying power may not compel protected persons to serve in its armed forces or otherwise provide services in support of military operations.⁹⁹ Protected persons over the age of 18, however, may be required to do work necessary to assist the occupied population. For example, they may be required to assist with public utility services, the feeding and transporting of protected persons, or the provision of health care assistance to the population.¹⁰⁰ Professionals and public officials such as engineers, physicians, and employees of public utilities who can make significant contributions to the welfare of the population in an occupied territory may be made to work by an occupying power—but again, only on behalf of the population.

Security in an Occupied Territory

Security will likely be of paramount concern for any occupying power. The law of occupation mandates reciprocal obligations for both occupying and occupied powers to aid in establishing a safe, secure environment for all parties to the occupation.¹⁰¹ Occupying powers can demand obedience from the inhabitants of an occupied territory to ensure the security of its forces, the maintenance of law and order, and proper administration of the territory.¹⁰² The population of an occupied territory is to behave in a peaceful manner, take no part in hostilities, and refrain from acts meant to harm the occupying force.¹⁰³ Military authorities in an occupied territory are allowed to perform police functions and protect their own forces. They also have broad latitude in creating a secure environment: among other things, they are permitted to restrict freedom of movement, hold individuals incommunicado for limited periods (under exceptional circumstances), and intern protected persons.¹⁰⁴ There are limits,

though. Occupying powers are not permitted to engage in physical or moral coercion, particularly to obtain information; deportations; collective punishments; and acts of brutality.¹⁰⁵ Moreover, they may only impose the death penalty on protected persons convicted of espionage, serious acts of sabotage against military installations, or intentional offenses that cause the death of one or more persons.¹⁰⁶

Lastly, an occupying power may only pronounce sentence after a regular trial.¹⁰⁷ Accused persons have the right to present evidence, to call witnesses, to be represented by a qualified counsel or advocate of their choice, to have the services of an interpreter, and to appeal.¹⁰⁸

Considerations for the Future

There are several key lessons and considerations for commanders and staffs regarding the application of occupation law. Generally, the lessons can be grouped in terms of planning, training, and following.

Although far from perfect, the occupation of western Germany by the victorious Allies after World War II was one of the most successful military occupations in history. It was a monumental task by any measure, as this description of Germany in May 1945 attests:

Scenes of utter devastation greeted the occupiers. Germany's industry lay in ruins. Housing was in short supply in the bombed-out cities. The specter of famine during the coming winter loomed. Simultaneously, one of the great population upheavals of all time occurred. Over six million displaced persons from all over Europe suddenly were free to make their way back to their homelands. Untold millions of German refugees streamed west seeking sanctuary from advancing Soviets. Allied troops disarmed, scrutinized for possible involvement in war crimes, and then released over five million German military and paramilitary personnel to return to where they enlisted.¹⁰⁹

Planning for the occupation of Germany began in 1943. Such forward thinking was particularly noteworthy because the outcome of the war was anything but certain at that point. Detailed planning for future occupations should include, among other things, the careful consideration of an occupying power's obligations under international law,

because such obligations are inextricably linked to the administration of the occupied territory.

In contrast to Germany in 1945, critics of the Iraq war point to inadequate plans and faulty assumptions as the genesis of many of the overarching problems associated with the occupation. Good planners would certainly have considered the obligations and responsibilities mandated by occupation law, and they would have taken steps to ensure those obligations and responsibilities could be met. Instead, key leaders disregarded the Army chief of staff's advice about the troop level needed to occupy Iraq; military officers and career diplomats were excluded from occupation planning; and a State Department study on the challenges an occupation of Iraq would entail were simply ignored.¹¹⁰ All these mistakes might have been avoided if leaders had taken the legal requirements of occupation into account.

A corollary to this point about planning (and execution) is that it should involve interagency and coalition partners, as well as multinational and private-sector actors. The Department of State has to be an integral part of this process. Other agencies also bring enormous value and expertise to any occupation. They need to be involved in the planning with the Army from the very outset to ensure that we comply with the requirements of occupation law. Moreover, we fight as coalitions and, therefore, one may reasonably assume that we will not occupy a territory alone. A unified effort involving close planning and coordination with all

of the appropriate actors is critical to meeting our obligations.

A second consideration is training. Even though occupations should be interagency efforts, the military does the heavy lifting. Accordingly, members of the armed forces need to train appropriately. Training should occur at all levels of war—strategic, operational, and tactical—before the actual invasion.

The force that invades a country will likely be the force that occupies that country. The transition to occupation may happen concurrent with ongoing combat operations. In World War II, for example, as the Allies invaded Germany from the west, the terminal operation of the war (Overlord) overlapped with the initial occupation operation (Eclipse). Only through proper training can forces successfully reorient from a combat to an occupation role.

The occupation may also happen sequentially; that is, it may immediately follow the invasion and conquest of the enemy, as it did in Iraq in 2003. In either case, the forces of the occupying power must be adequately trained to assume those responsibilities even before the operation begins.

Lastly, our armed forces must abide by the law of occupation. As discussed above, many burdensome, expensive (in terms of personnel and resources), and time-consuming legal obligations and duties flow from being an occupying power. But if we fail to live up to our obligations, or we do so selectively, our actions will erode our legitimacy and standing in the international community. **MR**

NOTES

1. *Forged in the Fire: Legal Lessons Learned during Military Operations, 1994–2006* (Center for Law and Military Operations, the Judge Advocate General's Legal Center & School, United States Army, September 2006), 84. Coalition leaders had another reason to avoid the word *occupation*. In Arabic, the word for "occupation" has a negative connotation because of the Israeli occupation of the West Bank and the Gaza Strip. Philip James Walker, "Iraq and Occupation," in *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, ed. David Wippman and Matthew Evangelista (Transnational Publishers, 2005), 260.
2. Walker, 263.
3. LTC Pamela Stahl et al., *Legal Lessons Learned from Afghanistan and Iraq*, Vol. 1, *Major Combat Operations (11 September 2001–1 May 2003)*, (Charlottesville, Virginia: Center for Law and Military Operations, the Judge Advocate General's Legal Center and School, United States Army, August 1, 2004), 26.
4. *Ibid.*
5. Thomas E. Ricks, *Fiasco: The American Military Adventure into Iraq*, (New York: Penguin, 2006), 124–25.
6. Stahl et al., 27–28.
7. Ricks, 145.
8. Walker, 263.
9. *Ibid.*, 260.
10. *Ibid.*, 262–63.
11. Eyal Benvenisti, *The International Law of Occupation* (Princeton: Princeton University Press, 1993), 3. Sometimes this area of law is referred to as the law of belligerent occupation. Benvenisti notes correctly that is not always entirely accurate. That is, an occupation can occur as a result of a threat of force or an armistice agreement without actual fighting. In his book, Benvenisti cites the example of the armistice agreement that gave the Allies control over the

- Rhineland in 1918.
12. *85th Law of War Deskbook*, International and Operational Law Department, (International and Operational Law Department, The Judge Advocate General's Legal Center and School, United States Army 2006), A-2.
13. Walker, 263.
14. *Army JAG School Deskbook*, A-2.
15. Gerhard von Glahn, *The Occupation of Enemy Territory* (University of Minnesota Press, 1957), 3.
16. Benvenisti, 3.
17. Hague Convention (HR IV) Respecting the Laws and Customs of War on Land and Its Annex (1907) [HR IV]. The post-World War II International Military Tribunal at Nuremberg, Germany, acknowledged that the Hague Regulations reflect customary international law binding on all states. Michael N. Schmitt, "The Law of Belligerent Occupation," Crimes of War Project: The War in Iraq, <<http://www.crimesofwar.org/special/iraq/news-iraq5.html>>, accessed 28 September 2007.
18. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) [GC IV].
19. FM 27-10, *The Law of Land Warfare* (Department of the Army, July 1956).
20. Morris Greespan, *The Modern Law of Land Warfare* (University of California Press, 1959), 209.
21. Benvenisti, 60, 67. In regard to the Soviet Union's violation of occupation law, the Molotov-Ribbentrop Agreement that resulted in the invasion and annexation of Poland in September 1939 was a patent violation.
22. *Ibid.*, 59. It is important to note that the 1949 Geneva Conventions supplement the Hague Regulations, not replace or amend them.
23. Greespan, 211.
24. FM 27-10, para. 356.

25. FM 27-10, para. 355. The U.S. Army's field manual makes the point that, in order for the law of occupation to apply, the organized resistance must have been overcome and the invader must have taken measures to establish its authority. More specifically, it provides:

It is sufficient that the occupying force can, within a reasonable time, send detachments of troops to make its authority felt within the occupied district. It is immaterial whether the authority of the occupant is maintained by fixed garrisons or flying columns, whether by small or large forces, so long as the occupation is effective. The number of troops necessary to maintain effective occupation will depend on various considerations such as the disposition of the inhabitants, the number and density of the population, the nature of the terrain, and similar factors. The mere existence of a fort or defended area within the occupied district provided the fort or defended area is under attack, does not render the occupation of the remainder of the district ineffective. Similarly, the mere existence of local resistance groups does not render the occupation ineffective.

26. *Ibid.*, para. 356.

27. GC IV, art. 2. This provision is referred to as common article 2. The term "common article" simply means that the exact provision is found as article 2 of each of the four Geneva Conventions.

28. *Forged in the Fire*, 85. On 22 May 2003, the UN Security Council adopted UN Security Council Resolution 1483. That resolution recognized the United States and the United Kingdom as occupying powers and admonished all concerned to comply fully with the law of occupation.

29. HR IV, art. 42; FM 27-10, para. 351.

30. FM 27-10, para. 355.

31. *Ibid.*, para. 357.

32. *Ibid.*

33. *Forged in the Fire*, 87. The CPA under Ambassador Bremer was responsible for overseeing and coordinating all executive, legislative, and judicial functions to govern Iraq in the aftermath of the invasion. Such functions included, but were not limited to, humanitarian relief, reconstruction, and other governmental assistance.

34. Coalition Provisional Authority Regulation. No. 1 (16 May 2003), available at <www.cpa-iraq.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority.pdf>, accessed 18 August 2007.

35. General Dwight D. Eisenhower, proclamation, "Proclamation Number 1," *Army JAG School Deskbook*, M-2

36. Kenneth O. McCreedy, "Planning the Peace: Operation Eclipse and the Occupation of Germany," *Journal of Military History* 65, no. 3 (July 2001): 713-39.

37. Benvenisti, 5. In a very thought-provoking article, Adam Roberts, the Montague Burton Professor of International Relations at Oxford University, addresses the question of whether it is legitimate, within the existing framework of international law, for an occupying power, in the name of creating a democratic and peaceful state, to introduce fundamental changes in the constitutional, social, economic, and legal order of the occupied territory.

38. Michael N. Schmitt.

39. *Forged in the Fire*, 87.

40. *Ibid.* It should be noted that it is also prohibited for an occupying power to establish a puppet government, whether at the national or local level, to carry out acts that are otherwise unlawful if performed directly by the occupying power. FM 27-10, para. 366

41. Adam Roberts, "Applying the Laws of War and Human Rights," *American Journal of International Law*, 580 (2006): 583.

42. *Ibid.*, citing Security Council Resolution 662, paragraph 1 (UN Security Council, SC Res. 662 [August 9, 1990], *ILM* 29 [1990]: 1327).

43. FM 27-10, para. 358.

44. *Army JAG School Deskbook*, M-4

45. GC IV, art. 6(2). Additional Protocol (AP) I, art. 3(b) omits the one-year period and simply states that the conventions apply to the termination of the occupation. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts. The United States has not ratified AP I.

46. Matthew Bogdanos, *Thieves of Baghdad* (New York: Bloomsbury Publishing, 2006). Bogdanos' book provides a first-hand account of efforts to recover priceless artifacts from Iraq, the cradle of civilization, that were looted during Operation Iraqi Freedom; Schmitt, "The Law of Belligerent Occupation."

47. Loretta Napoleoni, *Insurgent Iraq — Al Zarqawi and the New Generation* (New York: Seven Stories Press, 2005), 136.

48. Roberts, 587

49. GC IV, art. 64.

50. FM 27-10, para. 370.

51. *Army JAG School Deskbook*, M-5.

52. *Ibid.*

53. Hague Reg. IV, art. 23(h); FM 27-10, para. 372.

54. *Army JAG School Deskbook*, M-5

55. FM 27-10, para. 373.

56. Benvenisti, 32.

57. *Ibid.*, 52.

58. Office of the Administrator of the Coalition Provisional Authority, public notice, "Regarding the Creation of a Central Criminal Court of Iraq and Adjustments to the Criminal Procedure Code" (June 18, 2003), available at <www.cpa-iraq.org/regulations/>, accessed 28 September 2007.

59. Benvenisti, 52.

60. *Ibid.*, 5.

61. *Army JAG School Deskbook*, M-6.

62. GC IV, art. 65.

63. *Army JAG School Deskbook*, M-6; GC IV, art. 67.

64. GC IV, art. 67.

65. FM 27-10, para. 374.

66. Coalition Provisional Authority Regulations No. 17, available at <www.cpa-iraq.org/regulations/>.

67. Department of Defense, *Military Support to Stabilization, Security, Transition, and Reconstruction Operations Joint Operating Concept* Version 2-0 (December 2006), 47. This new joint guidance encapsulates some basic principles of occupation law. It provides, in part, as follows: The highest priority tasks for this civil administration will be the maintenance of law and order, which will be carried out in a manner that seeks to preserve the pre-existing legal order (where applicable), and care of the civilian population to ensure it receives adequate food, water, shelter, and medical treatment. Other key functions for this administration will include reconstituting essential public services and fostering the recovery of the national economy.

68. Hague Reg. IV, art. 43; FM 27-10, para. 363.

69. FM 27-10, para. 375.

70. FM 27-10, para. 377. The manual provides that the occupying power is not required to furnish facilities for postal services, but may take charge of them itself.

71. Hassan Fattah, "Keep freedom of press in Iraq," *USA Today*, 31 March 2004, <<http://www.usatoday.com/news/>>, accessed 25 September 2004.

72. GC IV, art. 64.

73. *Ibid.*, art. 58. Citing GC IV, art. 64, the *Army JAG School Deskbook* highlights a finer point on this issue. It provides, in part, that clergy may not refer to politics or incite resistance.

74. FM 27-10, para. 364.

75. Hague Reg. IV, art. 48.

76. FM 27-10, para. 376. The field manual specifically comments that the commander of the occupying force will usually find it advisable to forbid activities between the occupied territory and territory still in the possession of the enemy.

77. *Forged in the Fire*, 89.

78. GC IV, art. 4. The article further provides: "Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."

79. *Ibid.*, art. 27.

80. GC IV, art. 49.

81. *Ibid.*

82. *Ibid.*, art. 50. More specifically, occupying powers shall arrange for the maintenance and education (if possible, by persons of the same nationalities, religions, and languages) of children orphaned or separated from the parents. *Ibid.*; *Army JAG School Deskbook*, 84.

83. GC IV, art. 50; *Army JAG School Deskbook*, M-11.

84. GC IV, art. 50.

85. *Ibid.*, art. 55, paras. 1 and 3; AP I, art. 14; *Army JAG School Deskbook*, M-12. Occupying powers have a duty to ensure the population has food and medical supplies, particularly if resources of the occupied territory are inadequate.

86. GC IV, art. 56; *Army JAG School Deskbook*, M-12. Occupying powers have a duty to ensure and maintain medical and hospital establishments and services of public health and hygiene in the occupied territory. In emergency situations regarding the care of military wounded and sick, occupying powers may requisition civilian hospitals provided that the occupying power arranges for the care of civilian patients. If, however, the materials and stores of the civilian hospitals are needed for the civilian population, the materials and stores cannot be requisitioned by the occupying power. GC IV, art. 57.

87. GC IV, art. 58. Occupying powers shall allow clergy to provide religious and spiritual assistance to their religious communities.

88. GC IV, art. 59; M-12.

89. GC IV, art. 61; AP I, art. 81; *JAG School Deskbook*, M-12. In recognition of this important obligation, the parties to the conventions are required to make every effort to ensure the transit and transport of relief supplies shall be exempt from charges, taxes, or customs duties.

90. *Forged in the Fire*, 87.

91. GC IV, art. 53.

92. Hague Reg. IV, art. 55; *Army JAG School Deskbook*, M-14.

93. FM 27-10, para. 401; *Army JAG School Deskbook*, M-14.

94. *Ibid.*

95. FM 27-10, para. 401.

96. GC IV, art. 51; FM 27-10, para. 410a.

97. FM 27-10, para. 412b.

98. GC IV, art. 55.

99. GC IV, art. 51; FM 27-10, para. 420.

100. GC IV, art. 51.

101. Department of Defense, *Military Support to Stabilization, Security, Transition, and Reconstruction Operations Joint Operating Concept*, provides excellent insight and guidance on considerations for stability and support operations.

102. *Army JAG School Deskbook*, M-19.

103. FM 27-10, para. 432.

104. GC IV, arts. 27, 42, 43, 49, 64, 66, and 78.

105. GC IV, arts. 31, 32, 33, and 49.

106. GC IV, art. 68.

107. GC IV, art. 72.

108. *Ibid.*

109. McCreedy, 713-39.

110. Lawrence J. Korb, "The Cost of Failing to Plan," Center for American Progress: National Security, <www.americanprogress.org/issues/2004/03/b38979.htm>, accessed 25 September 2007.