

FOREWORD

The International Law Studies “Blue Book” series was initiated by the Naval War College in 1901 to publish essays, treatises and articles that contribute to the broader understanding of international law. In *Levie on the Law of War*, the series republishes selected essays of Howard S. Levie.

Professor Levie has contributed to the articulation and development of the law of war for over half a century; initially as a judge advocate in the United States Army, next as a Professor at Saint Louis University School of Law, and then as a widely published and highly respected Professor *Emeritus*. In 1971 Professor Levie began a long relationship with the Naval War College, when he occupied the Charles H. Stockton Chair of International Law. In authoring two volumes of the “Blue Book” series, *Prisoners of War in International Armed Conflict* and *Documents on Prisoners of War*, he revitalized the series and restored it to the forefront of scholarly works involving international law. Thus, it is fitting that we again turn to Professor Levie for this, the seventieth volume of the series.

The editors’ selection of articles from Professor Levie’s voluminous works illustrate the breadth and depth of his scholarship, and evidence the profound impact he has had on the law applicable to armed conflict. We are pleased to be able to remind those who have long read Professor Levie, and acquaint those who are new to his writings, of the continued vitality of his work. While the opinions expressed in these writings are those of Professor Levie, and are not necessarily those of the United States Navy nor the Naval War College, one cannot quarrel with Professor Levie’s commitment, as one of my predecessors, Vice Admiral James B. Stockdale noted in the Foreword to *Prisoners of War*, “to those principles of humanitarianism necessary to regulate an imperfect world.”

On behalf of the Secretary of the Navy, the Chief of Naval Operations and the Commandant of the Marine Corps, I extend to the editors our thanks in bringing together these outstanding examples of Professor Levie’s work. To Professor Levie, I extend my gratitude for his many contributions to the Naval War College. His legacy at the College will be an enduring one.

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Rear Admiral, U.S. Navy
President, Naval War College



Professor Howard S. Levie

ACKNOWLEDGMENTS

We extend our appreciation to the following publishers who, in order to honor Professor Levie, kindly granted permission to reprint materials originally appearing in their books and journals. Please note that any errors or omissions which have occurred in the reprint of these articles are the responsibility of the editors, not of the original publishers.

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The Virginia Journal of International Law Association for permission to reprint *The Status of Belligerent Personnel 'Splashed' and Rescued by a Neutral in the Persian Gulf Area*.

INTRODUCTION

It is a rare privilege in life to ascend to the top of one's chosen profession. Yet to do so, and then, upon reaching mandatory retirement age, successfully embark on a path that takes you to the pinnacle of still another is an extraordinary accomplishment. Professor Howard Levie is just such an individual. Rising to the rank of Colonel in the United States Army, he compiled an impressive military record while serving in an array of high-level legal positions, including Chief of International Law for the United States Army, and Staff Judge Advocate of the Southern European Task Force, European Command, and Sixth Army. Colonel Levie also had the rare opportunity to shape history, most notably through his participation in the Korean War Armistice talks.

Following retirement from the Army, now "Professor" Levie went on to establish himself in academia as one of the masters of international law, particularly the law of armed conflict. A second retirement as Professor *Emeritus* from Saint Louis University only served to accelerate that process. He is as prolific today at 90 as he ever was; more importantly, his work continues to impact the direction the law of armed conflict takes—and is likely to take in the future. Indeed, as will become apparent, his own views continue to evolve even as this selection of his works is published.

The defining characteristic of Professor Levie's work is this very duality; he is neither simply an academic in uniform, nor merely a soldier in academic robes. Too often, academics, including some who have served in the military, are divorced from the reality of the combat operations that law shapes. Their work is thought provoking, but of little real utility to the warfighter or policy maker. The view from the ivory tower is simply too distant. By the same token, as some military officers enter the halls of academia, their output tends to the anecdotal, rather than incisive. While there is merit in the "sea story" as the subject of scholarly contemplation, it cannot replace the critical thinking that characterizes true scholarship. These individuals aptly describe the fog of war, but do little to clear it away.

Professor Levie, by contrast, is as much the academic as soldier—and vice versa. Thus, he brings a synergism to his writings that sets them apart from so much else in the field. They are as relevant and useful at the Pentagon or Naval War College as they are at Oxford or Yale. Therein lies their uniqueness . . . and beauty. Perhaps it is fitting, then, that his selected works be edited by both a military officer *and* an academic.

Professor Levie's writings appear in a variety of journals, not all of which are readily available. We thought, therefore, that it would be worthwhile to bring together in one volume those which we considered most valuable and thought

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provoking. We also thought it would be fitting recognition on the occasion of his 90th birthday in December 1997.

Of course, any editor who must select 20 or so writings from a body of work that includes 10 books (several of which are multi-volume works) and over 75 articles, and continues to grow, understandably approaches that task with some trepidation. In making our selection, we set two criteria for inclusion. First, we wanted to include articles which remained especially relevant, to produce a book which would be useful to today's, and tomorrow's, scholars and practitioners. To that end, we asked Professor Levie to prepare addenda to five chapters reflecting changes in the law since they were originally published. Second, we hoped to emphasize those topics in the law of war to which Professor Levie devoted his greatest attention, and upon which his international reputation is primarily based. Thus, there is a heavy emphasis on prisoners of war, the first subject to which he turned, and that which has been the focus of much of his work since. There are also a number of articles discussing the legal issues surrounding war crimes, an interest of Professor Levie's in which he has recently invested significant effort. Given his long ties to the Naval War College, it should come as little surprise that we have also elected to include several articles dealing with naval warfare. The articles are presented chronologically, both because several pieces cut across subject-matter boundaries, and to emphasize the impressive temporal scope and developmental vector of his jurisprudence. As an aside, we also endeavored to remain true stylistically to the original articles, with the exception of converting foot notes to end notes. Thus, we only altered the original article when a clear editing error had been made.

The opening piece, *The Nature and Scope of the Armistice Agreement* (1956), aptly meets these criteria for inclusion. Written while Professor Levie was on active duty, it reviews the history and development of the armistice as an instrument governing non-hostile relations between belligerents, concluding that formal peace treaties are being supplanted by armistices as the prevailing method of ending wars. Not unexpectedly, *Nature and Scope* was resorted to time and again by practitioners to help ascertain the status of relations between Iraq and Coalition States following cessation of hostilities in Operation Desert Storm. Indeed, it was referenced as late as 1997 by judge advocates considering the status of aircrew members that might fall into Iraqi hands while enforcing the no-fly zones of Operations Southern and Northern Watch. The scholarly treatment provided the topic in *Nature and Scope* is complemented neatly by *Across the Table at Pan Mun Jom* (1965), an account of Professor Levie's own experiences as a negotiator in the Korean armistice talks.

In *Prisoners of War and the Protecting Power* (1961), Professor Levie turns to a topic for which he has become best known, prisoners of war. Writing in the *American Journal of International Law* nearly four decades ago while still a

military officer, he discusses the historical evolution and functioning of the institution of the Protecting Power, arguing that it deserves to play a central role in safeguarding prisoners from excesses by Detaining Powers. It is a theme to which he will return time and again. For instance, in *Some Major Inadequacies in the Existing Law Relating to the Protection of Individuals During Armed Conflict* (1971), he singles out the non-existence of a means for ensuring the presence of a Protecting Power in each State party to an armed conflict as one of four major *lacunae* in the law. Soon thereafter, in *International Law Aspects of Repatriation of Prisoners of War During Hostilities: A Reply* (1973), an extended comment on an article by Professor Richard Falk on repatriation, Professor Levie rejects the idea of releasing repatriated prisoners of war to “*ad hoc* and self-styled humanitarian organizations,” as occurred on occasion during the Vietnam conflict. Instead, he argues, repatriation is best accomplished by Protecting Powers, or, in their absence, the International Committee of the Red Cross. He returns to the topic once more in the last work included in the book, *Enforcing the Third Geneva Convention on the Humanitarian Treatment of Prisoners of War* (1997). It is there that he labels it a “tragedy” that the sole use of Protecting Powers since the 1949 Convention occurred during the Falklands War.

As the titles just cited suggest, though the need for Protecting Powers is a pervasive call in Professor Levie’s work, he delved into virtually every facet of the prisoner of war theme. For instance, in *The Employment of Prisoners of War* (1963), he outlines the Geneva Prisoners of War Convention limitations on the use of prisoner labor. In this piece, Professor Levie’s “soldier” persona surfaces in his understanding of the need for balance in treatment of the subject, for while prisoner labor is certainly subject to abuse by a Detaining Power, productively occupying prisoners can actually enhance their morale.

Of the articles reproduced here, *Maltreatment of Prisoners of War in Vietnam* (1968) offers the most wide ranging treatment of prisoner of war prescriptions. In it, Professor Levie takes on the contentious issue of the applicability of the Prisoners of War Convention to the Vietnam War. Was it an international armed conflict thereby requiring compliance by all Parties to the Convention, or was it a non-international armed conflict, in which case only the minimal protections of Common Article Three to the Geneva Conventions of 1949 would apply? What customary law applies to the treatment of those captured? What responsibilities does a belligerent have *vis-à-vis* maltreatment of prisoners by an ally? Professor Levie then surveys allegations of mistreatment by the United States, South Vietnam, North Vietnam, and the Vietcong. The piece retains its relevance, for the applicability of the Convention and the quality of treatment required to be accorded to prisoners were both issues that surfaced during the Gulf War, not only with regard to the treatment of Coalition prisoners held by the Iraqis, but also as to the treatment of Iraqi prisoners of war.

Professor Levie has also devoted much of his effort to writing about war crimes and the appropriate enforcement regime for them. *Criminality in the Law of War* (1986) sets the stage by distinguishing between the treatment accorded prisoners for pre-capture and post-capture offenses. Also setting the stage is *The Rise and Fall of an Internationally Codified Denial of the Defense of Superior Orders* (1991). Superior orders—the claim that the accused committed a war crime because he was so ordered by a superior officer (or Government) and that refusal would have resulted in harsh punishment—is a purported defense that has been presented for as long as war crimes have been prosecuted. Upon review of its historical assertions and the largely unsuccessful efforts to codify a denial of the defense, Professor Levie concludes that “any defense counsel . . . would be professionally derelict if he failed to assert . . . that the rule denying availability of the defense of superior orders has been rejected as a rule of international law.” It is a conclusion that draws into question the official US position, as stated in law of armed conflict manuals such as the Commander’s Handbook on the Law of Naval Operations, that no such defense exists.

Several of Professor Levie’s more recent articles on the subject follow. In *Violations of Human Rights in Time of War as War Crimes* (1995), he emphasizes that the law of war includes much of what is in peacetime labeled “human rights,” and that violations of human rights norms during armed conflict may subject the offender to punishment as a war criminal, as has been done in the case of the former Yugoslavia. Writing the same year, in *Prosecuting War Crimes Before an International Tribunal*, Professor Levie offers a primer on how to conduct a war crimes prosecution. How does one accumulate evidence or determine whom to charge? Which rules of evidence apply? *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future* (1995) serves as the mechanism by which Professor Levie looks at how one war crimes tribunal has been set up to handle such matters. The article is a comprehensive description of the International Tribunal and its procedures; topics range from organizational structure and jurisdiction to rules of procedure and penalties. Having described an actual war crimes tribunal, in *War Crimes in the Persian Gulf* (1996) he conducts a retrospective analysis of war crimes committed by the Iraqis during the Gulf War, and outlines how a tribunal might have handled them had the political decision been taken to establish one. Finally, *Was the Assassination of Abraham Lincoln a War Crime?* (1995) is a fascinating look back in history at the question: “Is the murder of an individual committed in wartime by one or more individuals of the same nationality as the victim a war crime?” Given the contentiousness of events ranging from incidents of involvement in overseas assassination attempts cited by the Church Committee to speculation concerning US intentions regarding Saddam Hussein, the article remains timely despite its use of a case study over 100 years old.

While Professor Levie may be best known as one of the world's most eminent prisoners of war and war crimes scholars, his contributions have ranged far more widely. Given his enduring affiliation with the United States Naval War College, it should come as little surprise that he has spent much time considering the law of naval warfare. We have selected three noteworthy pieces on the subject. *Methods and Means of Combat at Sea* (1988) is an excellent survey of the subject generally, serving as a primer on everything from the applicability of Protocol I Additional of 1977 and protection of the environment to exclusion zones and submarine warfare. He deals with the latter subject much more thoroughly in *Submarine Warfare: With Emphasis on the 1936 Protocol* (1993). It is an exhaustive study of the development of the laws of submarine warfare from the American Revolution through both world wars to the present. Finally, in *The Status of Belligerent Personnel 'Splashed' and Rescued by a Neutral in the Persian Gulf Area* (1991) he addresses the status of Iranian or Iraqi personnel who fell into the hands of US forces engaged in escort operations during the Iran-Iraq war. Finding that there was, despite occasional hostile incidents involving US forces, no state of armed conflict between the United States and either Iran or Iraq, Professor Levie concludes that they would not be entitled to prisoner of war status under the Prisoners of War Convention, but that they would be entitled to basic humanitarian protections such as adequate food and water and being free from torture.

We have included several articles dealing with specific weaponry which lies at the heart of current debates in the law of armed conflict community. *Weapons of Warfare* (1975) is an analysis of three types of "weapons" that created great controversy during the Vietnam War—lachrymatories, napalm, and herbicides. Finding the use of all three most likely legal during that conflict, Professor Levie goes on to urge, on practical and humanitarian grounds, against their use in future wars. In light of the Chemical, Conventional Weapons, and Environmental Modification Conventions, and Protocol I Additional to the Geneva Conventions, this piece, written over two decades ago, is particularly prescient.

Two articles on the subject explore both extremes along the continuum of weaponry. *Nuclear, Chemical, and Biological Weapons* (1991) surveys the law applicable to each titled category, with special emphasis on naval warfare. Professor Levie concludes that while there is no *per se* prohibition on the use of nuclear weapons, the use of either biological or chemical weapons is legally proscribed. Ultimately, he notes that "one might almost regret our inability to turn back the clock to the nineteenth century, when nuclear, chemical, and biological weapons . . . were not even a gleam in a scientist's eyes." An addendum to the piece illustrates the extent to which his aspirations are slowly being realized in the Chemical and Biological Weapons Conventions, which outlaw the use

of either genre of weapons, and the 1996 holding of the International Court of Justice in the *Nuclear Weapons Case*, which finds the use of nuclear weapons generally contrary to international law, except in self-defense “in which the very survival of a State would be at stake.” (The Court did not rule on the legality of use even in the latter circumstances.)

At the other end of the continuum of weapons lie conventional weapons. *Prohibitions and Restrictions on the Use of Conventional Weapons* (1994) examines the Conventional Weapons Convention and its three annexed Protocols governing non-detectable fragments, land mines, and incendiaries, respectively. Despite initial US opposition to Protocol III (the US ratified I & II), Professor Levie argues that “it is an extremely humanitarian agreement which contains nothing irreparable of either a political or a military nature that warrants the refusal of the United States and other major military powers to accept it.”

Broader in its coverage of methods and means of warfare is *The Law of War Since 1949* (1995), a sweeping survey of the major post-war instruments governing armed conflict—the Seabed Treaty, Bacteriological Convention, Environmental Modification Convention, Protocol I Additional, Conventional Weapons Convention, and Chemical Weapons Convention. It is a provocative piece in which he restates his support of Protocol III (concerning incendiaries) to the Conventional Weapons Convention, and then bemoans the fact that a convention to prohibit the existence of nuclear weapons is unlikely (even had the International Court found their use fully contrary to international law) due to the reality that a number of actual, or potential, possessors would fail to become Parties, “or would become Parties with the preconceived idea of violating their agreement and thereafter being in a position to hold the non-nuclear world hostage.”

Professor Levie’s willingness to at times swim against the tide of official US positions is perhaps most evident in *The 1977 Protocol I and the United States* (1993). In this article he serially reviews those provisions of the Protocol which the US finds objectionable, setting forth why they are in fact not contrary to US interests, or in the case of those which are, explaining how concerns could be addressed with a very few understandings or reservations at the time of ratification. Given his credibility as an objective and insightful scholar, and his impressive credentials as an accomplished military officer, the article has proven expectedly influential, particularly in military circles.

As should be apparent, Professor Levie has not shied away from forcefully expressing his opinion. That has certainly been the case with regard to Protocol I Additional and the weapons treaties. However, it is not a recently emergent propensity on his part. For instance, in *Major Inadequacies* (1971), cited *supra* regarding Protecting Powers, he argues for a method by which an automatic determination that the law of armed conflict applies to a situation can be made,

cites the need for “a complete and total prohibition of the use in armed conflict of any and all categories of chemical and biological weapons,” and laments the non-existence of a code governing aerial warfare. It was in the same year that he wrote *Civilian Sanctuaries: An Impractical Proposal*. In the article, Professor Levie takes issue with a proposal contained in two reports of the UN Secretary General (prepared at the request of the General Assembly) that civilian sanctuaries be established during armed conflict to ease the difficulty belligerents experience in discriminating civilians and civilian objects from legitimate military objectives. To Professor Levie, the proposal did not comport with reality; States would not be willing to set apart large areas in which any activity contributing to the war effort would be forbidden, nor willing to deprive themselves of the labor necessary for defense industries. In a worst case scenario, the areas could actually become a source of blackmail leverage for a nuclear nation facing total defeat. In its stead, Professor Levie argues for compliance (not new norms), codification of the law of air warfare, and creation of a system of sanctions against States (in addition to individuals) which violate the principle of military necessity.

Finally, *The Falklands Crisis and the Laws of War* (1985) has been included in the collection as a capstone piece—a case study of sorts—that examines many of the principles discussed throughout the book, but in the context of a single conflict. In it, Professor Levie considers maritime exclusion zones, protection of fishing vessels and hospital ships, incendiary weapons, the role of protecting powers, treatment of civilians, prisoners of war, and mercenaries. The result is a classic Levie *tour de force*.

What was perhaps most gratifying in preparing Levie on the Law of War was the extent to which those involved found themselves distracted from the somewhat tedious editing process by the substantive brilliance of the articles. We almost unconsciously found ourselves *reading* when we should have been *editing*. Indeed, a recurring experience for all was rediscovering how relevant and perspicacious pieces that were in some cases decades old remained. It is our hope that others will share in that experience.

When all is said and done, this book would not have been possible without the invaluable assistance of many friends at the Naval War College. Professor Jack Grunawalt, Director of the College’s Oceans Law and Policy Department, provided encouragement throughout the project, enthusiastically agreeing to write the opening chapter about Professor Levie’s distinguished careers. While funding was intermittently problematic, Captains Ralph Thomas and Dan Brennock of the Center for Naval Warfare Studies ensured it never was for *the editors*, thereby giving us the much appreciated luxury of concentrating on the task at hand. Ms. Carole Boiani and Ms. Allison Sylvia of the College’s Publications and Printing Division supervised the preparation of the manuscript,

an oft onerous task that involved scanning less than optimally preserved articles, and then correcting the countless errors that result from this “miracle technology.” They did so with professionalism, speed, and most importantly, a seemingly inexhaustible supply of good spirits. We are indebted to our colleagues in the Oceans Law and Policy Department—Professor Grunawalt, Captain Thomas, Colonel Lou Reyna, Commander Jeff Stieb, and Lieutenant Colonel James Duncan—who willingly read page proofs to identify “typos” that had eluded our own proofreading efforts. Colonel Duncan was especially helpful as overall director of the International Law Studies series (Blue Books) in handling the mechanics of transforming a completed manuscript into a finished book. Of course, we would be horribly remiss if we failed to thank our families for their understanding support throughout.

Of course, we owe our deepest debt of gratitude to Professor Levie. He allowed us full editorial control of the project, never once providing anything but the gentlest of suggestions. In fact, upon reviewing the notional table of contents, he only recommended one addition, *Across the Table at Pan Mun Jom*, emphasizing that the decision on whether to include it was ours, not his. We did, as we should have in the first place, and the book benefited thereby. Indeed, our sole complaint is that as we were putting the collection together, Professor Levie continued to write high quality pieces that deserved to be included, thereby creating a dilemma of where to draw the line in a *corpus* of jurisprudence that grew as we worked. In fact, *Enforcing the Third Geneva Convention* was included at the final hour, forcing us to work with drafts because it was not actually published until our page proofs were in their last revision. Simply put, Professor Levie was an absolute joy to work with.

We wish Professor Levie well as he continues to guide the rest of us to better understanding of the law of war. It was our great honor to serve as editors for this labor of love.

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