



# Conference Brief

INTERNATIONAL LAW DEPARTMENT  
Center for Naval Warfare Studies  
United States Naval War College

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## The War in Iraq: A Legal Analysis

Dedicated to the memory of Professor Howard S. Levie  
– soldier, scholar, patriot and dear friend.

Compiled by

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From 23 – 25 June, 2009 the Naval War College hosted 100 renowned international scholars and practitioners, military and civilian, and students representing government and academic institutions to participate in a conference examining a number of legal issues pertaining to the war in Iraq. The conference featured opening, luncheon and closing addresses as well as five panel discussions addressing specific legal issues encountered during the conflict. Panelist comments were summarized by a commentator followed by questions from attendees. These discussions resulted in a detailed examination of key legal issues.

### Key Insights:

- There has been a rise in the use of armed conflict in an offensive manner, giving rise to “lawfare”. This must be addressed through strong and proactive communications.
- Detainee operations absorb an inordinate amount of resources and are fraught with difficult legal issues which can serve as fodder for the enemy’s information operation efforts.
- It is often difficult to achieve positive results during reconstruction given the lack of coordination among the various agencies. This coupled with certain failures to recognize a common goal slow down the reconstruction process.
- The extraterritorial application of human rights law may sound like a positive concept but can create confusion for the front line troops and may serve to over legalize the battle space to the disadvantage of protected persons.



CONFERENCE DEDICATION TO  
THE MEMORY OF HOWARD S.  
LEVIE:

**Professor Jack Grunawalt**  
**Charles H. Stockton Professor of**  
**International Law**  
**U.S. Naval War College**

With the April 19, 2009 passing of former Stockton Professor Howard S. Levie, the conference was dedicated to his memory. Professor Jack Grunawalt opened the conference with a tribute to Professor Levie.

Soldier and scholar, Professor Howard S. Levie leaves a legacy of scholarly excellence in the development and study of the law of war. One of the nation's foremost legal experts on the law of war and the key draftsman of the Korean War Armistice Agreement, Professor Levie authored 10 books (several of them multi-volume works) and over 80 articles. He was internationally recognized as an authority on matters ranging from the treatment of prisoners of war to the legality of conventional and nuclear/chemical/biological weapons; from war crimes and terrorism to the protection of the victims of armed conflict. Among the books he authored are *Prisoners of War in International Armed Conflict*, *The Code of International Armed Conflict*, and *Terrorism in War: The Law of War Crimes*. He also served as the editor of six volumes of *Terrorism: Documents of International and Local Control*. The last volume was published in 1997 when he was 88.

In 1998, the U.S. Naval War College in Newport, Rhode Island published *Levie on the Law of War* to honor Professor Levie and to recognize the enormous impact of

his writings on the law applicable during armed conflict. In the book's Forward, it was observed:

Once in a great while, someone comes along who makes a significant and lasting contribution to his or her chosen profession, a contribution that comes to define the paradigm of that calling. With respect to the development and articulation of the law of war, Professor Howard Levie is just such an individual.

A veteran of World War II and the Korean Conflict, Professor Levie served in New Guinea and the Philippines, in post-war Japan, and in Korea. He provided legal reviews of Japanese war crime trials for General Douglas MacArthur. He was assigned to the Staff of the United Nations Command Armistice Delegation when he drafted the Korean Armistice Agreement. A member of the US Army Judge Advocate General's Corps, Professor Levie was the first Chief of the Army JAG Corps' International Affairs Division at the Pentagon. Other assignments included postings in Italy, France, Fort Leavenworth, Kansas and the Presidio of San Francisco. He retired in 1963 in the rank of Colonel.

In September of 1963 he joined the faculty of Saint Louis University School of Law. While there, Professor Levie authored over 20 articles on a broad spectrum of law of war topics. It was also during this tenure that he spent a sabbatical year at the Naval War College as the Charles H. Stockton Professor of International Law. He retired from Saint Louis University in 1977 having attained



Professor Emeritus of Law status, and returned to Rhode Island where he resumed his association with the Naval War College as a lecturer on the 1949 Geneva Conventions and the laws of war. In October 1994, his enormous contribution to the College was formally recognized with the establishment of the Howard S. Levie Military Chair of Operational Law.

On the occasion of his 100th birthday, Professor Levie was awarded the prestigious Morris I. Leibman Award by the American Bar Association's Standing Committee on National Security Law. The award citation noted that his career as a soldier and a scholar spanned more than six decades and was marked by distinction throughout. It concluded, "The impact of [his] enormous body of work on the thinking of domestic and international policy makers, military commanders and scholars cannot be overstated."

Howard S. Levie was born on December 19, 1907 in Wolverine, Michigan and grew up in Baltimore and New York City. He earned Bachelor of Arts and Juris Doctor degrees from Cornell University and a Master of Laws degree from George Washington University. He also studied at the Sorbonne in Paris and the Academy of International Law at The Hague.

Professor Levie was married to the late Blanche Krim Levie, an artist and WAC during WWII. Together in their 90s, they worked on writing an autobiography *Memories of an Ordinary Couple*. Professor Levie died on April 19, 2009 at his home in Portsmouth, Rhode Island. He was 101.

## **OPENING ADDRESS:**

**Judge Raid Juhi Al-Saedi**  
**Chief Investigative Judge, Iraqi High Tribunal**  
**Clarke Middle East Fellow, Cornell University Law School**

Judge Raid Juhi Al-Saedi, Chief Investigative Judge of the Iraqi High Tribunal followed with his presentation on the restoration of the rule of law to Iraq. Judge Al-Saedi outlined the history of modern Iraq and explored how the rule of law was eroded into non-existence through the reign of Saddam Hussein. He argued that Iraq, since 2003 has been on the road to restoring the rule of law. One step in this long and difficult process was the fair trial received by Saddam Hussein where he enjoyed the right to confront witnesses. While the restoration of the rule of law in Iraq is progressing, there are still many challenges ahead which must be met with the help of the international community.

## **PANEL I:**

### **Legal Bases for Military Operations in Iraq**

Panel I explored the "Legal Bases for Military Operations in Iraq". The panel opened with Lieutenant Commander Andru Wall, JAGC, US Navy laying out the United States legal bases for using force against Iraq in 2003. These bases were for the most part grounded in the United Nations Security Council Resolutions dating back to the First Gulf War, including finding Iraq in breach of the cease fire agreement. With these resolutions in hand, the United States viewed itself as being legally justified in



resuming military action against Iraq. Ms. Alexandra Perina argued that regardless of the bases for invading Iraq, once in Iraq the United States took on the role of occupier with all of the attendant responsibilities. These responsibilities were made more difficult by a rising insurgency. Doctor David Turns sought to address the nature of the conflict in Iraq, whether classified as an International Armed Conflict or Non-International Armed Conflict. Doctor Turns observed that "armed conflict" is not defined in international law, making it difficult to properly categorize the conflict in Iraq. This categorization is vital in determining what laws apply to situations such as detainee treatment. Finally, the issue of a new category of conflict, "Transnational Armed Conflict" was touched upon as a possible way to describe conflicts with non-state actors. The attendees posed a number of questions, dealing mainly with the rationale for the invasion of Iraq and the issue of anticipatory self defense.

### **LUNCHEON ADDRESS: Naval Station Officers' Club**

### **Major General Michael Oates, US Army Commanding General, 10<sup>th</sup> Mountain Division (Light) and Fort Drum, NY**

A hosted luncheon for attendees featured Major General Michael Oates, US Army, Commanding General of the 10th Mountain Division who delivered an address titled "The War in Iraq: A Commander's Perspective".

Major General Oates opened with the observation that a person's knowledge of events really depends on three things:

when they were there; where they operated and their job. Accordingly, his remarks and opinions are based on his own experiences during selected snapshots in time.

The major lesson learned during the initial phase of the war can be summed up by the age old military maxim: you fight like you train. Prior to the invasion of Iraq no military in the world trained itself and its leaders for combat better than the US military. Our military was tremendously successful during the opening phase of the war. That success was because we fought like we trained. What we did not know then is that as good as combat training as we were not well trained, well resourced or well prepared for the post-combat phase.

In turning to counterinsurgency (COIN) operations, General Oates observed that it is important to look at the situation that gave rise to the insurgency in the first place. The initial invasion of Iraq was quick and successful militarily. However, we now faced the challenge of being in control of a country twice the size of Idaho; a country with six international borders and a population of over twenty-two million people from different religious, ethnic, cultural and tribal backgrounds.

Like most things in Iraq, the insurgency was split along religious, cultural and ethnic lines. They ranged from the Shiite groups like *Jaish al-Mahdi* (JAM) to the Sunni-led Al Qaeda in Iraq, and everything in between. In addition to their desire for power and control, most of these groups shared an intense hatred of the coalition forces, which they saw as occupiers. In the case of some of these groups, most notably Al Qaeda in Iraq, they were willing to commit horrific acts



of violence and terrorism not only against military forces, but against anyone not aligned with their agenda, including Iraqi civilians.

How to defeat the insurgency in Iraq was something of a “chicken and egg” dilemma: do we concentrate on solving the problems of the Iraqi people, most notably things like “essential services first”, or do we focus on killing and capturing the bad guys and, once things are secure, concentrate on making the Iraqis daily lives better?

The “essential services first” school of thought argued that if the Iraqi people had electricity, clean water, trash-pick-up and schools for their children, they would be less likely to turn to a violent insurgency to solve their problems. It was a reasonable approach, one that makes sense on its face. We travelled along that line of thought for the first few years of the war, but eventually found that our successes were not widespread or sustainable.

If you look back on the first few years of the war, reports and briefings from that time were filled with statistics: number of patrols conducted; number of caches found and cleared; number of improvised explosive device (IED) or indirect fire attacks. With respect to the “essential services first” approach, this love of numbers fit right in to the template for success. We tracked number of schools built, number of hours of electricity provided, number of Commander’s Emergency Response Program projects initiated and number of dollars spent on those projects. With so many impressive statistics, how could we be losing?

Too often we relied on the raw numbers instead thinking about what those numbers really meant. What we learned over time is that counterinsurgency is

about people, not about data. You have to do the hard work and take things a step further. You have to analyze people, relationships, networks and all kinds of complicated dynamics that take place between people on the ground and, in the case of Iraq you have to understand the culture.

As a military force we became much more successful against the insurgency in Iraq when, under the leadership of General Petraeus and others who had taken a hard look at counterinsurgency, we realized that this fight was about people. People and relationships really are the center of gravity in a COIN fight.

Once we started talking to people, one of the first things we learned was that our “essential services first” approach was probably not the way to go. Under General Petraeus and General Odierno, we transitioned to the alternate view and began to secure the population.

General Oates concluded his remarks with a discussion of stability operations. One of the things we found was that the better we got to know our Iraqi security forces (ISF) counterparts on a human level, the better we were able to teach, coach and mentor them, and the better they became.

The development of the ISF was the key to stability. For their part, the ISF know the people, speak the language and can pick up on a lot of things we cannot. For our part, we bring a wealth of knowledge on how to man, train and equip an army, along with a number of technologically advanced intelligence, surveillance and reconnaissance platforms and other enablers to which the ISF don’t have access. By letting the ISF take the lead, we found the Iraqi people began to see them as a force that could be trusted.



Governance, economics, civil capacity building and rule of law were major lines of effort. Two things combined to jump start rule of law efforts during the last year. The first was the improved security situation that allowed us to focus on tasks and missions outside the security line of operation. The second was the implementation of the US-Iraq security agreement.

The security agreement requires US forces to abide by Iraqi law. The security agreement's requirement that we work through the Iraqi legal system helped us make great strides in the rule of law. Based on the fact that we had to obtain warrants, our units had to develop better relationships with the police, the prosecutors and the judges in their local areas. In doing so, we were able to better identify gaps, seams and shortcomings in their training and in their systems that we were able to address.

One of the major keys to stability in any country is having a legal system the citizens can trust and depend on. Without a system for the peaceful resolution of disputes, order breaks down and people take the law into their own hands. Our efforts in the rule of law arena have been a significant force in promoting stability, especially in central and southern Iraq.

## **PANEL II: Law of Armed Conflict and the War in Iraq**

Panel II focused on the application of the law of armed conflict to the war in Iraq. Major General Charles Dunlap, US Air Force opened the panel presentation with a discussion of the impact of technology and advanced information

systems on the calculus of the war in Iraq. The combination of real time, detailed intelligence from the battlefield and the predominant use of precision guided weapons has resulted in a heightened threshold of error for bombing missions. This heightened threshold is not necessarily consistent with the standards imposed by the law of armed conflict. As the enemy puts forth this idea of 100% accuracy, they are engaged in a sort of "lawfare" which creates an unrealistic expectation for collateral damage. General Dunlap argued that "lawfare" must be countered through effective strategic communications.

Mr. Marc Warren then addressed the always present issue of detainees in Iraq. While the nature of the conflict might have changed over time and was often unclear, the detainees were always treated as if Common Article Three of the Geneva Conventions applied. This treatment was important as the detainee pool contained a mixture of criminals, POWs and insurgents. As the quantity of detainees grew to overwhelming numbers, the detainee policy continued to maintain compliance with the Geneva Conventions and any deviations were isolated and non-sanctioned. Commodore Neil Brown, Royal Navy addressed the application of the laws of armed conflict to the sea campaign in the war in Iraq. This area was limited since the navy of Iraq had been virtually destroyed during the First Gulf War. Establishment and enforcement of various maritime zones during naval operations involved visit and search, stop and inspection and diversion of ships. Commodore Brown discussed the application of rules of engagement by coalition naval forces during combat operations as well as during post-



hostilities maritime zone enforcement activities.

Before opening the panel to questions, Professor Doctor Wolff Heintschel von Heinegg observed that misinterpretations as to the requirements imposed by the laws of war need to be quickly countered and information operations must be proactive. A failure to confront these false perceptions will allow the enemy to control the information war and win the battle for public support. Questioners explored the issues of the enemy's use of the law to attempt to negate the advantages of technology. Professor Doctor Heintschel von Heinegg stressed that the canard of 100% accuracy ignores that the law of armed conflict expects that there will be civilian casualties.

### **PANEL III:**

#### **Occupation in Iraq**

Panel III began the second day of the conference by shifting the focus to "Occupation in Iraq". Professor Eyal Benvenisti delved into the issue of when an occupation begins. The Hague Conventions speak in terms of control over territory while the Geneva Conventions address the control of the population. The question of who can exercise control and what is the nature of the ability to control may establish occupation as a matter of law regardless of the formal declarations of the parties. Professor Benvenisti argued that the occupying power has the ability to alter the status quo in the legal area. In fact it would be almost impossible to maintain the status quo given that the original regime has been overthrown. Accordingly, the issue remained as to what

Iraqi laws were the occupiers required to observe and whether the occupiers own national human rights law applied to their actions as the occupying power?

Brigadier General Butch Tate, US Army spoke from the perspective of the military forces as implementers of an occupation. It is imperative that as occupiers the rule of law is observed in all situations. This meant investigating soldiers for all misconduct involving the occupied population. Brigadier General Tate stressed that following the recent turn over to the Iraqis, the focus of the US forces shifted to respecting Iraqi law, but not to the detriment of safety or operational requirements. The panel was questioned concerning the Hague and Geneva Conventions and their application to the occupation of Iraq. The sense was that the Hague Conventions were concerned with preserving the status quo of an occupied territory while the Fourth Geneva Convention was focused on the protection of the occupied population. A question was also raised as to whether the applicable United Nations Security Council Resolutions on Iraq provide more protections than did the traditional law of occupation. The panel responded in the affirmative, noting that Security Council Resolutions include applicability beyond that found in the Fourth Geneva Convention.

### **PANEL IV:**

#### **Stability Operations in Iraq**

Panel IV turned its attention to the issue of "Stability Operations in Iraq" and the dynamic nature of these operations given the changing legal status and environment in Iraq. Although the Iraqi



government requested a continued United States presence in Iraq, this created its own set of problems. Ms. Shelley Young observed that in working out a security agreement between the United States and Iraq, many issues needed to be resolved. Ms. Young noted the final agreement established exclusive United States jurisdiction over US troops and civilians, provided for the withdrawal of US forces and established a termination date for the agreement on December 31, 2011. Colonel Richard Prgent provided the military view of stability operations. In expounding this view, Colonel Prgent stressed the need to appreciate three truths. Security drives everything, nothing in Iraq is simple and the rule of law is Iraqi not American justice. The change in the US status from occupying power to an invited presence created challenges. Foremost among these was the treatment of detainees. Under Iraqi law there is no provision for internment. Detainees must be charged or released. This and the continued re-establishment of the rule of law are but two of the challenges going forward in the conduct of the current stability operations.

Mr. Laurent Colassis outlined the role of the International Committee of the Red Cross (ICRC) in stability operations. With the decrease in violence the activities of the ICRC have increased. Mr. Colassis noted that Iraq is now the third largest mission of the ICRC behind Darfur and Somalia with the chief goal being to focus on detainee operations. Noting the requirement under Iraqi law to either charge or release detainees, Mr. Colassis explained that the release of detainees can be complicated. Where and to whom detainees are released is an issue with legal implications. Ultimately, a balance

must be found between security and possible mistreatment.

The questions for the panel covered a broad gamut of issues including whether the United States military is proficient at nation building. The consensus is that the military is not particularly adept at nation building but that the military possesses capabilities, and often displays a dedication to finishing a job for which other agencies are not effectively resourced. A question was also raised about the status of individuals covered as protected persons and who should receive those protections during an insurgency. Mr. Colassis stated that despite the current situation not satisfying all Additional Protocol II requirements, Iraq is best classified as a non-international armed conflict (NIAC). As a NIAC, detainees are entitled to protection under Common Article 3, customary international law applicable during NIAC, international human rights law and Iraqi domestic law. This response served as the catalyst for a prolonged discussion regarding detainees as well as the ICRC's view of customary international law.

### **PANEL V:**

### **Issues Spanning the War in Iraq**

Panel V looked at “Issues Spanning the War in Iraq”. Captain Brian Bill, JAGC, US Navy addressed the issue of detainees. At the height of operations in Iraq there were 26,000 detainees. Task Force 134 was created to oversee all detainee operations. Detentions under the UNSCRs were driven by whether the detainee posed an imperative threat. Captain Bill noted that the determination of this status



involved giving the detainee a certain level of due process. In fact, the due process afforded detainees was above and beyond that required by Article 78 of the Fourth Geneva Convention. Task Force 134 went so far as to provide women, children and the feeble minded with special representatives to aid them in their detention hearings. Mr. Robert Boorda noted the difficulties that arise when there are multiple agencies involved in the stability and reconstruction efforts. In Iraq there is little coordination or communication between civil and military agencies. This creates a chaotic environment on the ground and hampers the efforts to rebuild. Mr. Boorda explained that Iraqis are often targeted by insurgents for cooperating with the U.S. in its efforts to rebuild the country making local involvement and ownership difficult to obtain. These problems combined with the inability to determine the needs of Iraqi civil society make the restoration of Iraq an ongoing challenge.

Ms. Naz Modirzadeh posed the question as to what human rights law applies following an occupation. While the U.S. does not recognize the extra-territorial application of human rights law, other countries have been moving in that direction. Ms. Modirzadeh argued that while on its face it would appear to benefit civilians by creating new levels of legal protections, it may serve only to confuse the soldier on the ground. Confusion for the front line soldier is not a positive development. As human rights law is applied, a corollary question arises as to which rights should be recognized and applied. Many questions followed this panel with the focus being on what is the impact of the application of human rights law to armed conflicts. While it may not

be an operational proscription, it certainly creates a new layer of "fog of war" in the legal context. This tied into the issue of "lawfare" from the first panel.

**CLOSING ADDRESS:**  
**Naval Station Officers' Club**

**Professor Yoram Dinstein**  
**Professor Emeritus, Tel Aviv**  
**University**

The conference ended with a closing address by Professor Yoram Dinstein assessing the highlights of the conference. The concept of lawfare cannot be ignored and must be dealt with proactively and with a focus on the perceptions of society as to what are the true legal requirements in an armed conflict. Iraq is an international armed conflict. It started as such and has never ceased to have that classification because hostilities have not concluded. Also, international armed conflict is a prerequisite to belligerent occupation of the type that occurred in Iraq. It was acknowledged that you must adapt if you are using high technology to fight an enemy using very low technology. You can be very precise in striking the wrong target and have the enemy defeat you in the war of information. When this happens, the emphasis has been on the principle of distinction of targets as opposed to proportionality. As stated earlier, the law of armed conflict anticipates civilian casualties.

Professor Dinstein noted that in deciding who is a civilian, the concept of direct participation comes to the fore. Someone who is an insurgent during the day cannot come home at night and expect to have the protections accorded a civilian. The concept of direct participation has



interesting applications to private military contractors. Their role must be strictly defined if contractors are to be employed in the conflict. One of the main goals of belligerent occupation is to insure security. Occupation begins when control is exercised, but when does occupation end? Finally, the application of human rights

law in the context of armed conflict may not be a positive development. The law of armed conflict is a well understood body of law that is designed to protect civilians and military members alike. To interject an array of other laws into the arena would not be beneficial for those in harm's way.

### CHAIRMAN'S COMMENTS

We sincerely appreciate the support provided for this year's conference by the Naval War College Foundation, the Center for National Security Law, University of Virginia School of Law and the Israel Yearbook on Human Rights. Congratulations on a highly successful conference to our Conference Committee, under the leadership of Professor Jack Grunawalt and Major Mike Carsten, USMC.

Conference speakers are preparing articles that will provide an expanded treatment of the issues discussed. These papers will be published in volume 86 of the Naval War College's "International Law Studies" (Blue Book) series. We anticipate volume 86 to be ready for distribution before our 2010 summer conference.

Please send any constructive criticism of this year's event and recommendations for next year's conference, scheduled for June 22-24, 2010, to me at [dennis.mandsager@usnwc.edu](mailto:dennis.mandsager@usnwc.edu).

All the best,

Dennis L. Mandsager  
Professor of Law