

LIEBER CODE

Periodic Newsletter of the Lieber Society on the Law of Armed Conflict Interest Group of the
American Society of International Law

Vol. 5 Issue 5 - Spring 2021

Letter from your Chair

By Andrea Joy Harrison

Dear members,

I hope everyone is enjoying the spring as much as I have been. The blossoms in DC have been particularly uplifting after such a long and dark winter. I hope that your loved ones continue to stay safe and well during this time.

We are gearing up for a busy summer here at ASIL. The Lieber Society is currently working on putting together a number of events, including a speed mentoring/early career event, a panel on COVID and non-state armed groups, and additional networking opportunities.

We are also looking more closely at how we can make the Lieber Society an accessible and inclusive group, and we hope to convene some small-group sessions to explore how we can ensure that diverse backgrounds and voices feel welcome. If anyone has a particular interest in being part of this diversity and inclusion workstream, do not hesitate to reach out to myself or one of the other Executive Committee members.

This newsletter highlights many of our members' contributions to the field of LOAC/IHL, including some excellent original content, so I hope you enjoy reading this edition as much as I did.

Best wishes for the summer ahead,
Andrea Harrison

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Any views expressed in this newsletter are those of the authors in their private capacities and do not purport to represent the official view of the Society or any government or organisation.

Lieber Society Executive Committee

Andrea Harrison (Chair)
Michael Meier (Vice-Chair)
Brittany Laman-Paredes
Jim Schoettler
Rachel VanLandingham
Ronald Alcala
Loren Voss
Tracey Begley
Aaron Fellmeth
Shiri Krebs
Jessica Peake
Andrew Boyle



Newsletter Editor

Claudia Bennett

Election of New Officers

Please join me in congratulating our new officers!

Ronald Alcalá

Ronald Alcalá is a Lieutenant Colonel in the United States Army and an Assistant Professor and an Academy Professor of Law in the Department of Law at the United States Military Academy, West Point, N.Y. He is also Managing Editor of the Lieber Institute for Law and Land Warfare's Articles of War blog and served as volume editor of "The Impact of Emerging Technologies on the Law of Armed Conflict," published by Oxford University Press in 2019.

Before joining the faculty, LTC Alcalá served as a Judge Advocate in a number of legal positions advising commanders on criminal law, international law, and administrative law issues.

He most recently served as an attorney in the Office of the Judge Advocate General at Headquarters, Department of the Army. His other past assignments include Deputy Staff Judge Advocate, Special Operations Command Europe; Chief, Rule of Law, Multinational Division Center, Baghdad, Iraq; and Trial Counsel, Task Force Spartan and 3rd Brigade Combat Team, 10th Mountain Division, Jalalabad, Afghanistan.

LTC Alcalá earned a B.A. in History and Classics from Williams College and a J.D. from the George Washington University Law School. He also holds a Master of Arts in Law and Diplomacy (MALD) from the Fletcher School of Law and Diplomacy, Tufts University, and an LL.M. in Military Law from the Judge Advocate General's School in Charlottesville, VA.



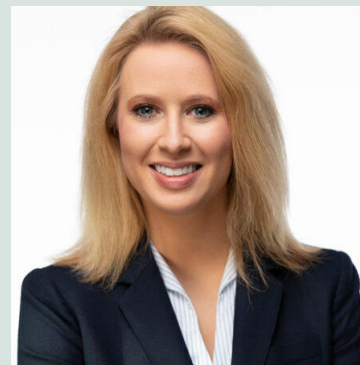
Loren Voss

Loren Voss is a Senior Advisor at the Department of Defense where she leads efforts to integrate civilian harm mitigation into security assistance and security cooperation with allies and partners. She oversees efforts to operationalize the law of armed conflict/international humanitarian law and international human rights law, as well as provide best practices to partner security forces through training and advising.

Loren previously served as an Air Force officer, in which she helped develop and update U.S. war plans and created identification metrics for friendly forces for the first U.S. airstrikes in Libya (2011).

Loren also clerked for the Vice President of the Israeli Supreme Court, focusing on comparative law interpretations in the areas of national security, IHL, and IHRL. As a Harvard Frederick Sheldon Traveling Fellow, she distilled lessons learned and best practices the United States could apply to military decisions and policy in the next decade.

Loren holds a J.D. from Harvard Law School (cum laude), an M.A. in Global Affairs from the Jackson Institute at Yale University, and a B.A. in International Relations and Psychology from the University of Pennsylvania.



Writing Prizes

Lieber Prize for Book

Giovanni Mantilla, *Lawmaking Under Pressure: International Humanitarian Law and Internal Armed Conflict* (Cornell University Press, 2020).

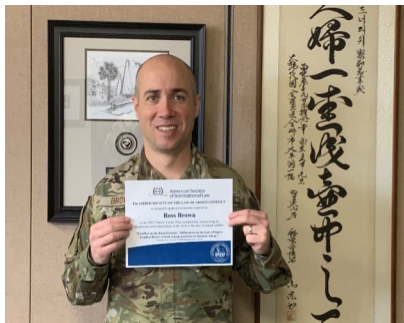
Lieber Prize for Article

Kathryn Hampton, *Born in the Twilight Zone: Birth Registration in Insurgent Areas*, Int'l Review of the Red Cross.



Honorable Mention for Lieber Prize

Ross Brown, *Conflict on the Final Frontier: Deficiencies in the Law of Space Conflict Below Armed Attack, and How to Remedy Them*, Georgetown Journal of International Law



Baxter Prize

This paper by LCDR Dennis Harbin (U.S. Navy), "Targeting Submarine Cables during Armed Conflict: Solutions for Closing a Legal Gap in All-Domain Warfare," significantly enhances the understanding and implementation of the law of war by addressing a unique and important national security issue.

This paper explores a *lex ferenda* that places submarine communication cables under special protection in the event of armed conflict. Moreover, this paper focuses on the targeting of submarine cables *jus in bello* and concedes that the intentional destruction of a submarine cable during peacetime, especially by an armed force of State, constitutes a belligerent act that would justify, *jus ad bellum*, the use of force in self-defense under the Charter of the United Nations.

This paper provides background on the development and use of submarine cables and their importance within today's global economy, provides a brief overview of the international legal regime that protects submarine cables in peacetime, examines the current threat to submarine cables, and evaluates the *lex lata* of targeting of submarine cables in naval warfare. This paper introduces the precedent of targeting them during naval operations and presents the issue of targeting submarine cables in the cyber warfare context. Finally, this paper lists recommendations on how to ensure the protection of submarine cables.



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2021 Clara Barton International Humanitarian Law Competition Recap

During the second and third weekends of March, the American Red Cross, the International Committee of the Red Cross and the Clara Barton Corporation hosted the 7th Annual Clara Barton International Humanitarian Law Competition (CBC). The CBC is open to students currently pursuing a Juris Doctor (J.D.), Bachelor of Laws (LL.B), or Master of Laws (LL.M.) degrees at law schools, as well as military academy students from across North, Central, and South America. Teams are composed of three individuals representing a single institution, and participants are eligible to compete in only one edition of the CBC. This year due to the Covid-19 pandemic, the CBC was held virtually over Zoom.

Over eighty law students and military academy cadets from the United States, Argentina, Brazil and Peru participated in CBC. They represented eighteen teams from fifteen institutions; American University Washington College of Law, University of Baltimore School of Law, Universidad de Buenos Aires, University of California, Los Angeles School of Law, Universidade Federal do Rio Grande do Sul, Georgetown University Law Center, George Mason, Antonin Scalia Law School, Loyola University Chicago School of Law, The Ohio State University Moritz College of Law, Pontificia Universidad Católica del Perú, Santa Clara University School of Law, South Texas College of Law Houston, United States Air Force Academy, United States Military Academy, and United States Naval Academy.

Unlike traditional moot court competitions, the CBC is a simulation-based, experiential legal competition designed to expose rising professionals to the practice of International Humanitarian Law (IHL) and to real world challenges facing IHL practitioners during armed conflict. Participants at the CBC explore the application of the law through fictional, but realistic case studies of armed conflict which continue to evolve throughout the competition. The competition evaluates participants' knowledge of IHL as well as other areas of public international law, and also tests their ability to present, advocate for, and defend legal positions to a diverse range of stakeholders in different simulated environments.

All eighteen teams participated on the first weekend of the competition for rounds one through four. The second weekend, rounds five and six, were the semi-finals and finals as well as the awards ceremony. American University Washington College of Law, Universidad de Buenos Aires, Loyola University Chicago School of Law

and United States Military Academy Team 2 made it into the semifinals. After a long deliberation, Universidad de Buenos Aires and Loyola University Chicago made it into the finals where the Universidad de Buenos Aires were victorious. Afterwards, we celebrated all the amazing participants and awarded the University of Baltimore the best application as well as Maria Protic from Loyola University Chicago School of Law as best advocate.

The organizers would like to thank all our volunteers and judges who made the competition a success. It would not have been possible without them and we appreciate the time, hard work and support they gave us before and during the competition.

If you would like to volunteer or learn more, visit <https://www.clarabartoncompetition.org/> or email the Competition Committee at clarabartonihlcompetition@gmail.com

Upcoming Events

ICRC and Geneva Academy Essay Competition

The ICRC and the Geneva Academy are launching a global undergraduate student essay competition on Avoiding Civilian Harm during Military Cyber Operations. The competition has been announced on our website and on social media including LinkedIn, Twitter and Facebook. The competition accompanies the forthcoming ICRC report from last year's expert meeting on the same theme, which will be published in June 2021. The results of the competition will be announced at the launch of the report. We will also run a blog series on this theme right after the launch, with contributions from leading military, cyber security, and policy experts.

Conference on Partnered Operations and International Law

POSTPONED: The ESIL Interest Group on Peace and Security, the ASIL Lieber Society on the Law of Armed Conflict, the Department of Legal and Economic Studies – Law School – of Sapienza University of Rome and the National Research Council of Italy (CNR) are organising a joint international conference on partnered operations and international law. Due to the COVID crisis, the organizers have decided to postpone the conference once again, until September 24th, 2021.

Rear Admiral Horace B. Robertson Prize in International Law

The Judge Advocate General of the Navy has announced the establishment of the Rear Admiral Horace B. Robertson Prize in International Law. [For more information click here](#)

Youth in IHL Action

By Larissa Hatch

Young people have so many passions and causes they believe in. One that many share is serving others on a global scale, supporting those they may never meet by raising awareness of the injustices they face.

Within the International Humanitarian Law Youth Action Campaign program at the American Red Cross, young Advocate volunteers become leaders and educators to their peers and their own communities about these global issues to help stimulate more awareness and conversations, leading to action and change for the better. They volunteer to educate the American public on IHL by exploring topics with their communities through peer-to-peer education campaigns. Youth teams participate in an IHL training, during which they learn how to build their own educational campaigns and conduct in-person and social media outreach to promote awareness around IHL. Through this program, they can grow in skills of project management and collaboration, gain confidence in their public-speaking and become leaders in this important global discourse.

This past December, the International Humanitarian Law (IHL) team held our inaugural essay competition. In alignment with this year's theme of our Youth Action Campaign (YAC), Education in Armed Conflict, we opened this opportunity to a broad audience both internal and external to the American Red Cross. We received nearly 90 submissions, of which over 50% of them were written by Red Cross volunteers.

In order to involve more Red Cross volunteers, we selected our judges from our Red Cross IHL Instructors, as they are experts in the field. It was an excellent opportunity to allow them to lead this initiative, reading over multiple essays per judge using a fair evaluation process on criteria of critical thinking, analysis, argument supported by evidence, clarity, and relevance to the theme.

Our winners for both the high school and undergraduate categories are both leaders in their Red Cross Clubs and/or Youth Action Campaigns, and many of our semi-finalists were also Red Cross volunteers. One of our IHL student interns designed this [digital magazine](#) to publish our student winners' essays to recognize our winners. It was a great opportunity to allow our young people to tell the story of this beloved mission through their creativity and desire to make an impact.

We are delighted to share this digital magazine to acknowledge the great work of the IHL programs and the power of the next generation of humanitarian changemakers. To learn more about this and other initiatives for our young advocates, email the us at IHLYouth@redcross.org.

Education in War

Volume 1

April 2021

American Red Cross

Essay Competition



Publications

Brian L. Cox recently published "Recklessness, Intent and War Crimes: Refining the Legal Standard and Clarifying the Role of International Criminal Tribunals as a Source of Customary International Law" in the Georgetown Journal International Law, Volume 52, Issue 1 (Fall 2020) The article is available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3703858

Nicholas Rostow published "The International Criminal Court Revisited" in Justice No. 65, Fall 2020. The article is available at: <https://www.ijl.org/justicem/no65/4/>

Lessons for Legal Advisors From the Brereton Report

By Matthew Montazzoli

The news has been full of revelations and repercussions stemming from the 2020 report of the Australian Defence Force (ADF) Inspector General into allegations of violations of the law of armed conflict (LOAC) in Afghanistan, known as the Brereton Report. The report details a litany of alleged war crimes and other unlawful behavior, including the maltreatment and murder of prisoners, attacks against persons hors de combat due to wounds, planting of weapons and evidence to make unlawful engagements appear acceptable, and endemic false reporting and indiscipline within Australian special operations forces. The report offers a powerful case study for military leaders, international humanitarian law practitioners, and scholars, but a surprising amount of the report deals squarely with the culpability and performance of legal advisors. In reading the report, practitioners should note the inquiry was expressly appointed to investigate the possibility of “a systemic failure, including of commanders and legal officers at multiple levels” to prevent, investigate, or respond to alleged war crimes.¹ The report contains a wealth of information relevant to scholars and practitioners of the law of armed conflict.

The Brereton Report found that some unit legal advisors lost sight of the fact that “ultimately their client is, and their professional duties are owed to, the Commonwealth, as distinct from the deployed force, its members, or commanding officer.”² Multiple attorneys assigned to ADF special operations units “drank the Kool-Aid” and lost sight of their “duty to serve the interests of the Commonwealth of Australia, even if that conflicted with the interests of [the unit] or its members.”³ Maintaining independence and objectivity can be difficult for military attorneys embedded within combat units. A unit’s legal advisor naturally tends to think of the concrete men and women with

whom they live, fight, and work as their client instead of the actual, but amorphous, institutional client: the service or the state. One unit lawyer lamented to investigators that legal advisors often “did not have a clear understanding of what their roles, responsibilities, and expectations were” before deployment.⁴

The Brereton Report contains allegations that legal officers engaged in “embellishment”⁵ or “legal whitewashing”⁶ of operational reporting. Operators routinely asked legal advisors to review reports before submission to higher headquarters so the attorney could “ensure that precise terminology was being used correctly,” particularly as it regarded the rules of engagement (ROE).⁷ The report identified this sort of proofreading as problematic because by “doing what lawyers conventionally do, putting the witness’s words into terms that legally express what he understood the witness to have said,” several legal advisors altered the information presented to higher headquarters to make an assault force’s actions appear concordant with the ROE.⁸ The report makes it clear the legal advisors’ work was not sinister or inappropriate on its face, but points to the danger of adjusting verbiage. There can be a slippery slope between changing a couple of words for clarity and altering or inventing facts.

Of particular interest to members who work to investigate and mitigate harm to civilians from military operations, the report castigates legal advisors for a failure to ensure complaints of civilian harm were treated and managed impartially. Many legal officers assumed a defensive or adversarial stance towards complaints by civilians or non-governmental organizations (NGOs), dismissing as “absurd” reports of unlawful killings that were later determined to have substance.⁹ Lawyers were just as likely as the opera-

1 COMMONWEALTH OF AUSTRALIA, INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE, REPORT OF INQUIRY UNDER DIVISION 4A OF PART 4 OF THE INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE REGULATION 2016 INTO QUESTIONS OF UNLAWFUL CONDUCT CONCERNING THE SPECIAL OPERATIONS TASK FORCE GROUP IN AFGHANISTAN (Nov. 10, 2020) 50 (emphasis supplied), available at <https://afghanistaninquiry.defence.gov.au/>.

2 *Id.* at 114-115, 364.

3 *Id.* at 449.

4 *Id.* at 449.

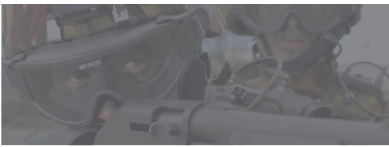
5 *Id.* at 36, 114.

6 *Id.* at 524-525.

7 *Id.* at 295.

8 *Id.* at 449.

9 *Id.* at 450.



tors they supported to dismiss reports as insurgent propaganda or falsehoods motivated by a desire to induce condolence payments.

The failure of oversight mechanisms, lapses of discipline, and cultural problems identified in the Brereton Report are by no means confined to the ADF. There is an ongoing Department of Defense Inspector General inquiry into U.S. Special Operations Command's compliance with the law of war, to say nothing of disputes surrounding the International Criminal Court's investigation of war crimes in Afghanistan. The most remarkable aspect of the report may be the ADF's recognition that moral authority is an element of combat power, and the organization's willingness to respond to indicators of indiscipline with aggressive investigation and "a scathing and unwavering condemnation of ADF conduct, written by the ADF itself."¹⁰

For a detailed analysis of the Brereton's implications for legal advisors, please visit <https://lieber.westpoint.edu/lessons-legal-advisors-brereton-report/>

For full access to the full, redacted Brereton Report visit: <https://afghanistandinquiry.defence.gov.au>

¹⁰ Alexandra Koch, Rohini Kurup, & Tia Sewell, "Understanding the Australian Inquiry Into ADF War Crimes in Afghanistan," *Lawfare Blog*, (Nov. 25, 2020), available at <https://www.lawfareblog.com/understanding-australian-inquiry-adf-war-crimes-afghanistan>.