



# LIEBER NOTES

## A Final Note From The Chair : Dick Jackson

**M**y first experience with the Lieber Society was a local forum in Hawaii in 2000, organized by Chuck Keever, who has kept the interest group going in Hawaii for many years. Chuck would invite local government attorneys and academics to meet with the transient military attorneys who live on the island of Oahu. It was great opportunity to get practitioners, academics, and interested government officials to talk about the law of armed conflict (LOAC) (also known as international humanitarian law, or IHL), get to know each other better, and understand each other's point of view. Under the subsequent leadership of Dennis Mandsager, the Lieber Society continued this tradition by supporting a public dialogue about LOAC in various public and academic fora.

During the last three years as your chair, I have tried to maintain that vision of the Lieber Society. The Society provides an important venue for bringing together practitioners and other interested international lawyers, including representatives of non-governmental organizations, inter-governmental organizations, the American Red Cross, government officials, academics, and the International Committee of the Red Cross to discuss the law of armed conflict and encourage public debate about its application in these challenging times.

To that end, we have increased the number of writing prizes sponsored by the organization to include a second Lieber Prize and a new Student Writing prize (which we co-sponsor with American University(AU)). The Lieber Society is

particularly indebted to AU's Hadar Harris for the opportunity to participate in the student writing competition, and you all are invited to the AU-sponsored forum to present the winner and discuss cutting-edge LOAC/IHL issues on the eve of the ASIL conference. We are also indebted to Iain Scobbie and Mike Schmitt, who have provided countless hours of support to the Lieber Prize contest, scoured the academic world for writings on LOAC/IHL topics, and read countless papers over the years; Eric Jensen, who has led the Richard Baxter Military Prize efforts, including coordination of the judges and final selection of the prize winner; and the many Lieber members have served as judges for the various writing prizes. Our efforts to encourage and support these serious academic endeavors have paid off, helping to raise the profile and level of discourse on LOAC/IHL in the last three years. I encourage the society members to continue to volunteer their time for these efforts.

We have made great strides in sponsoring academic and civil society discussions, from Boston to Berkeley. I am particularly excited about the prospect of an upcoming collaboration with Columbia University to sponsor a commemoration of Francis Lieber's "Code" for the 150<sup>th</sup> anniversary of its promulgation. We also have co-sponsored several invitation-only roundtables with the Center for Civilians in Conflict on specific topics, such as the need for ex gratia compensation of victims in armed conflict and the importance of considering civilian/humanitarian concerns in

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## When Is It Permissible to Target Child Soldiers?

by Frédéric Mégret

At a recent symposium on the Legal and Ethical Limits of Technological Warfare, organized by Professor Amos Guiora of S.J. Quinney College of Law and attended by many Lieber Society members, a question arose as to whether it ever would be permissible to launch a drone strike that targeted a child. The question was asked generally and with no particular legal frame of reference in mind but I want to address it as if the law of armed conflict were the relevant framework. For the sake of convenience, I will therefore assume a situation where: (i) there is an unmistakable international armed conflict; (ii) the child soldiers are members of the enemy armed forces, wearing recognizable uniforms; (iii) their under-age status is at least in some cases knowable and known by the attacker.

To the best of my knowledge, the question of whether it might be lawful to target child soldiers is one that has been little explored despite the otherwise vast literature on child soldiers. Yet it seems difficult to think that the fundamental illegality of recruiting child soldiers would not have some implications for the law of armed conflict.

One answer that emerged from the conference attendees was that it would be legal to target child soldiers, but immoral to do so, unless one were in an actual combat situation or acting in self-defense. I am a little chagrined by this posited dichotomy of morality and law, but I want to prod the intuition a little further, because it allows us to think through some of the complexities of the status of the child soldier and the evolving nature of the laws of war.

Perhaps the most obvious starting point is that under the laws of war, the assumption is that members of the enemy armed forces who are not hors-de-combat can be targeted wherever they are located. Nor is there any indication that, from a humanitarian point of view, the attacker should care much about the conditions in which members of the opposite armed forces came to serve. They may have been coerced, or forcefully conscripted in violation of international law, but that does not change the fact that they are combatants and legitimate targets.

Conversely, it is hard to escape the sense that there is something wrong about the deliberate killing of children

when international criminal law has been telling us insistently for a decade that the mere fact of recruiting children for war is an international crime of no small proportion. Imagine, for example, that a commander were to order the bombing of a training camp populated by child soldiers, thereby causing the deaths of hundreds of children (soberingly, this is precisely what the Sri Lankan Air Force was accused of having done in 2006). It would be fair to say that this might give rise to an awkward normative moment, even if the camp were deemed a lawful target. Moreover, I struggle to consider that this would only be a moral problem, and that the law of armed conflict should have nothing more creative to offer than a shrug.

In some ways, this dilemma is reminiscent of the complexities that arise as a result of an enemy surrounding or shielding itself with civilians. But the case of the child soldier is even more complicated. In the civilians-as-shields scenario the figures of the civilians and combatants can theoretically and practically be distinguished, whereas in the child soldier they are notoriously fused: both victim and perpetrator, combatant and non-combatant, angel and demon. In other words, in the shield scenario the attacker might still do his best and hope to end up hitting more combatants than non-combatants; in the child soldier scenario, the combatants *are* the shield.

So what is one to do? In the civilians-as-shields scenario, international humanitarian law ascribes blame on the attacked party (it commits a war crime), but does not entirely absolve the attacking party that goes ahead with an attack and causes extensive civilian deaths. One expects better of the attacking party than essentially swooping to the level of the attacked. This is in line with an increasingly influential non-reciprocal understanding of the laws of war, where each side remains at least theoretically bound to the highest humanitarian standards, notwithstanding the other side's descent into infamy.

We think child soldier recruiting is ignominious because it is a terrible way to spend a childhood -- exposing children to injury, pain, trauma, and death. It would be somewhat curious if the party that deliberately and most directly shares in (even though it is not the pri-

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## When Is It Permissible to Target Child Soldiers? —continued from page 2

mary cause of) the infliction of injury, trauma, or death were to have its humanitarian credentials entirely untarnished.

It may be helpful to think creatively about a unique status for children. Specifically, it could be helpful to treat child soldiers as either non-combatants of the armed forces (akin to medical or religious military personnel, notwithstanding the fact that they may potentially engage in hostilities), or as non-combatants *tout court* (notwithstanding the fact that they are actually members of the armed forces who would normally be targetable as such), *subject to the exception that they may be treated as combatants if and only to the extent that they participate in hostilities*, in the sense that that expression is understood in relation to civilians.

This is an intermediary position fashioned from the normative clay that is the basis international humanitarian law. It is not one that is sustained by any body of prac-

tice, let alone *opinio juris*. Nonetheless, I see it as striking a fair middle ground between the repulsive idea of knowingly targeting children who should never have been on the battlefield in the first place, and the evident risk to one's troops of treating what are actual combatants with, as it were, "kids' gloves." It gives child soldiers an extra chance, although no guarantee that if they actually participate in hostilities that they will escape unscathed; it reinforces the idea that it is the duty of all responsible parties to an armed conflict to protect childhood within the bounds of military necessity, narrowly understood.

Thinking through these sorts of issues is a good example of an area where law and morality ought to be able to find a common ground.

*Frédéric Mégret is an Associate Professor in the law faculty at McGill University, and the Canada Research Chair in Human Rights and Legal Pluralism at the Centre for Human Rights and Legal Pluralism.*

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planning any potential military involvement in Syria [see summary of the most recent roundtable in the Activities section]. Our Lieber-sponsored discussions at Tillar House, the home of ASIL in Washington, DC, have touched on such topical issues as the "Air and Space Warfare Manual," and "Detention in the War on Terror." Perhaps one of the most successful results of Lieber Society collaboration with Tillar House is its members' participation in a series of roundtables, co-sponsored by the Open Society Institute, focused on the challenges of current counterterrorism activities of the US government. Many Lieber Society members, from a broad spectrum of society, contributed to in-depth discussions of these important and timely issues. Although conducted under modified Chatham House Rules, pursuant to which the contributions and conclusions of the discussants have not been attributed or published, these dialogues have substantially contributed to the discourse on the legal rationale and public policy limitations on counterterrorism efforts.

I would be remiss if I didn't thank Sheila Ward and her team at Tillar House that has been dedicated to support-

ing the Interest Groups of the American Society of International Law. Over the last three years they have worked tirelessly to support Lieber Society efforts -- providing a budget, helping us restart this newsletter, ensuring the writing prize winners are rewarded for their efforts, and providing the technology to make it all happen. We couldn't do it without their help, almost all of which takes place behind the scenes.

Finally, you have a great Executive Committee that has contributed in each area of the Lieber Society's activities. They have reviewed writing submissions, recommended modifications to the by-laws, sponsored panels at their academic institutions, contributed to roundtables and other collaborative efforts, and remained engaged in the work of the society. I encourage each of our members to continue to be actively involved in ASIL and the Lieber Society. It has been an honor and a privilege to be the Chair of this group for the last three years. Thanks to you all.

*Dick Jackson*



## Activities Spotlight

### **Military Intervention in Syria: Mitigating Harm To Civilians**

by Jaimie Orr

On January 15, 2013, the Center for Civilians in Conflict (CIVIC) and the American Society of International Law (ASIL) convened a roundtable of policymakers, military planners, protection experts, and legal academics – including several Lieber Society members – to assess the following five military intervention options that have taken place or are being considered in response to the situation in Syria:

1. Training and equipping the armed opposition, with a focus on enabling the rebels to defend themselves and the population;
2. Conducting limited airstrikes to destroy Syrian aircraft on the ground and render the Syrian regime's runways inoperable;
3. Deploying Patriot anti-aircraft missile batteries in Turkey and Jordan, close to the Syrian border, to shoot down Syrian aircraft;
4. Creating a Stand-Off No-Fly Zone or Full No-Fly and No-Drive Zone, much as was done in Libya; and
5. Deploying an international police force in preparation for the assumed state of lawlessness expected to follow the demise of the Assad regime.

The roundtable considered each option through a civilian harm mitigation lens, identifying the challenges and opportunities policymakers and military planners should consider before taking action. The resulting discussion was in-depth and focused, generating a number of concrete recommendations.

ASIL and the Center have drafted an outcome document, detailing the discussion and resulting recommendations. Consistent with ASIL's "Tillar House rules," this document will not be publicly released. It was, however, shared with key policymakers, including individuals within the U.S. government, allied nations, NATO, and U.N. missions and agencies.

***Jaimie (Robert James) Orr is the Dean of the School of the School of Criminal Justice and Social Sciences at Tiffin University and a member of the Lieber Society's Executive Committee.***

## Lieber Member News: Activities, Awards, and Publications

International Criminal Court Prosecutor Fatou Bensouda has appointed **Diane Marie Amann** to serve as her Special Adviser on Children in and affected by Armed Conflict. A Lieber Society member and former ASIL Vice President, Amann holds the Emily and Ernest Woodruff Chair in International Law at the University of Georgia School of Law.

During the April Annual Meeting of ASIL, Amann will receive the 2013 Prominent Woman in International Law Award and deliver the keynote at the Women in International Law Interest Group luncheon on Thursday, April 4 at 1-3 PM. Her talk is titled "International Law and the Future of Peace."

**William Banks**, Syracuse University School of Law Distinguished Professor, has a new book out. *COUNTERINSURGENCY LAW: NEW DIRECTIONS IN ASYMMETRIC WARFARE*, was published last month by Oxford University Press. Chapters include contributions by several Lieber Society members, including **Geoffrey S. Corn, Eric Talbot Jensen, Christopher Jenks**, and **Gregory McNeal**.

**Francis A. Boyle's** new book, *DESTROYING LIBYA AND WORLD ORDER: THE THREE-DECADE U.S. CAMPAIGN TO REVERSE THE QADDAFI REVOLUTION*, just came out in February 2013. The book provides a comprehensive history and critique of U.S. foreign policy toward Libya from 1981 to 2011. Boyle is a Professor at University of Illinois College of Law and former Legal Advisor to the Palestine Liberation Organization and Yasser Arafat on the 1988 Palestinian Declaration of Independence.

Congratulations to Lieber Society Vice-Chair, **Ashley Deeks**, who started her new position as Associate Professor at University of Virginia School of Law in the fall of 2012.

UCLA School of Law's *Human Rights & International Criminal Law Online Forum*, which provides an online venue for debate of issues facing the ICC, was named one of the world's Top Three Justice Innovations of 2012 by The Hague Institute for the Internationalisation of Law. Lieber Society member **Scott Exner** is the Associate Editor of the Forum, and Lieber Society members are encouraged to contribute to the *Forum*.

In January, **Kate Jastram** organized and hosted a three-day student IHL Workshop, sponsored by the ICRC at Berkeley Law. Participants included over 40 students from over 20 law schools around the country, with faculty from

The Judge Advocate General's Legal Center, and School, U.S. Department of State, ICRC and leading law schools – several of whom are Lieber Society members.

Jastram, who is the Director of Research and Programs at Berkeley's Miller Institute for Global Challenges and the Law, also has a new article out: *The Kids Before Khadr: Haitian Refugee Children on Guantanamo*, 11 SANTA CLARA J INT'L L (forthcoming 2013). In February 2013, she presented a paper titled, "Forced Migration in Non-international Armed Conflict: IHL's Contribution to Protection" at a conference in Oxford, England on enriching refugee protection standards through recourse to international humanitarian law.

**Katherine Huskey**, Director of the Anti-Torture Program at Physician for Human Rights, has been prolific in the past year. Her recent work includes: *A Strategic Imperative: Legal Representation of Unprivileged Enemy Belligerents in Status Determination Proceedings*, 11 SANTA CLARA J INT'L L 195 (2012), and *Accountability for Private Military and Security Contractors in the International Legal Regime*, CRIM. JUSTICE ETHICS, 31:3, 193-212 (2012).

Cornell's Associate Professor of Law, **Jehns David Ohlin**, co-edited a collection of articles in *TARGETED KILLINGS: LAW & MORALITY IN AN ASYMMETRICAL WORLD*, which was published by Oxford University Press in 2012. Contributions include chapters by Lieber Society members **Kenneth Anderson, Craig Martin, Richard V. Meyer, Gregory McNeal**, and Ohlin.

**Don E. Scheid**, professor emeritus at Winona State University in Minnesota, is editing a collection of articles on humanitarian intervention, titled *ARMED HUMANITARIAN INTERVENTION: IDEAS AND RECONSIDERATIONS*, to be published this summer by Cambridge University Press. The collection addresses many of the normative and legal issues involved with humanitarian interventions, with a particular focus on the 2011 NATO intervention in Libya.

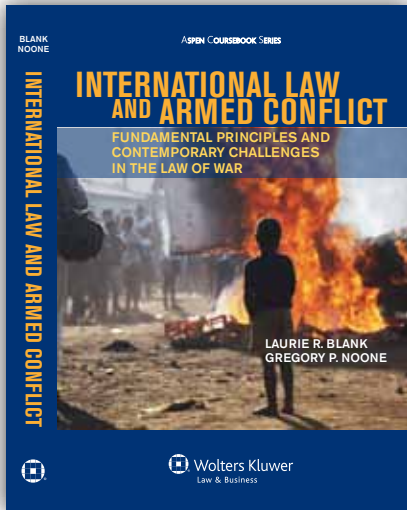
Brigadier-General (Ret'd) **Ken Watkin**, has a new and important piece out: *Use of Force During Occupation: Law Enforcement and Conduct of Hostilities*, 94 INT. REV. OF THE RED CROSS (2012).

British solicitor and Georgetown S.J.D. student, **Diane Webber**, has published the following interesting article: *Preventive Detention in the Law of Armed Conflict: Throwing Away the Key?* 6 J. NAT'L SECURITY L. & POL'Y 167 (2012).





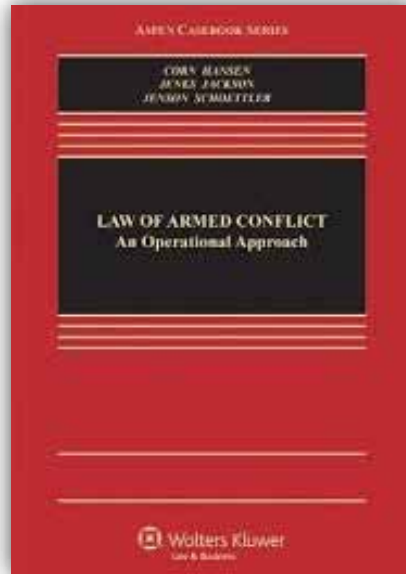
## Two New Law of War Textbooks



**Laurie Blank** and Greg Noone have co-authored a new LOAC book, titled *INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR* (Aspen/Wolters Kluwer), which will be out in early April. Blank is a professor at Emory Law School and the

Director of Emory's International Humanitarian Law Clinic; she is also the Treasurer of the Lieber Society. Noone is a professor at Fairmont State University and Director of the Intelligence and National Security program there as well as a Captain in the U.S. Navy JAGC Reserve. Intended for use in law schools, graduate and undergraduate programs, and military institutions, *INTERNATIONAL LAW AND ARMED CONFLICT* covers the law of armed conflict in a comprehensive and innovative manner, presenting the material in a functional manner: why do we have a law of armed conflict; what is armed conflict and when does it occur; who are the relevant persons in armed conflict; how must states and individuals conduct themselves during armed conflict; and what are the mechanisms for implementation and enforcement of the law. Alongside a variety of primary source materials, the book includes short first-person vignettes written by practitioners with operational experience and expertise in the specific topic (including many Lieber Society members)! The book promises to be a great resource for students, faculty and practitioners alike.

Another excellent new textbook, *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* is coming out this spring, authored **Geoffrey S. Corn**, Victor Hansen, **Christopher Jenks**, **Eric Talbot Jensen**, **James A. Schoettler**, and the outgoing Lieber Society Chair **Dick Jackson**. All five authors are active or retired United States Army officers, with more than 140 years of collective military operational experience among them. THE



*LAW OF ARMED CONFLICT* provides comprehensive coverage of all aspects of the law of armed conflict, with a focus on operational scenarios and an emphasis on the distinction between law and policy in regulation of military operations. Rich with documentation and examples, the text includes excerpts from treaties and treaty commentaries,

domestic and international cases, Department of Defense directives, service field manuals, and regulations implementing legal obligations. Carefully crafted problems, most based on actual operational experience, follow each chapter and place the student in the position of a military legal adviser providing operational legal advice. In this way, students enhance their understanding of the relevance of the law in planning and executing military operations. An ancillary package accompanies the text with solutions to all study problems, model exam questions (multiple choice, short answer, essay,) recommended supplemental sources, suggested video clips to illustrate issues, Power Point slides for each chapter, and a website with links to all primary sources.

### Event

The International Committee for the Red Cross and Georgetown Law's National Security Law Society are hosting a book launch for both textbooks on April 2, 2013, from 11:30-1:30 pm, at Georgetown Law School (Hotung 2000). **Dick Jackson**, Greg Noone, Andrew Carswell, and Gabor Rona will be speaking, and **Eric Talbot Jensen** will moderate.



## Call for Papers

The Historical Origins of International Criminal Law  
Beijing/New Delhi, February 28 - March 1, 2014

Proposals due May 1, 2013  
Information available [here](#).

## Upcoming Conference of Interest

Quality Control in International Fact-Finding Outside Criminal Justice for Core International Crimes  
The 2013 LI Haopei Lecture (by Richard Goldstone) and Seminar.  
May 20, 2013.

The seminar is open to the public and interested persons should register by sending an e-mail message to [bolton@fichl.org](mailto:bolton@fichl.org). Details are available [here](#).

## Mark Your Calendars!

April 24, 2013 is the 150<sup>th</sup> Anniversary  
of the Lieber Code.

*Views contained in this publication are those of the authors in their personal capacity. The American Society of International Law and this Interest Group do not generally take positions on substantive issues, including those addressed in this periodical.*