



LIEBER NOTES

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

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A Time of Change

By Chris Griggs

The theme of the 104th Annual Meeting of our parent society, the American Society of International Law is **International Law in a Time of Change**. It is certainly an apt title for a conference meeting at this time in the history of mankind. No doubt there will be material to inspire, to challenge, to inform us all as we each strive in our own areas to adapt to, or influence, the changes which are happening all around us. So much for change at the macro level. I want to devote a few column inches in this issue to some change which is about to occur at the micro level for the edifice of international law, and perhaps even for the ASIL, but at the macro level for our society - the Lieber Society on the Law of Armed Conflict. I am speaking of the fact that some of the pillars of our community must retire from the Executive Committee at the Annual Meeting under the rules of the Society, as they have served in that capacity for six years.

Jordan Paust is the Mike and Teresa Baker Law Center Professor of International Law at the Law Center of the University of Houston. He has consistently challenged us to examine our thinking on a range of topics within the scope of this Society's mandate with his vast scholarship in the *jus ad bellum*, the *jus in bello* and international human rights law, amongst other ar-

reas. Thank you for your service, Jordan.

Kenneth Anderson is another retiring member of the Executive Committee who has been in a position to contribute, and has contributed, significant intellectual "firepower" to our activities. Ken is Professor of Law at Washington College of Law, American University and is also Research Fellow at the Hoover Institution on War, Revolution and Peace, Stanford University. He has served as our Treasurer - a very significant role in any not-for-profit organization. Again, we thank you Ken and look forward to continuing to enjoy your company at future Lieber Society and ASIL events.

Finally, it is my sad duty to note that Dennis Mandsager will be relinquishing his role as our Chair. Dennis has been the "captain" on the bridge of this particular ship for a very long time. It has been Dennis who has ably managed our relationship with Tillar House (the ASIL headquarters in Washington, D.C.) and who has galvanized the Executive Committee - when needed - in his characteristically firm but pleasant manner, to achieve what we needed to achieve. I have been tempted to use the Latin expression *sine qua non* when thinking about Dennis' contribution to this Society. But of course, that cannot be so. We as a Society must ensure that we can in fact continue to operate ef-

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Lieber Society Executive Committee

Dennis Mandsager (Chair)
Eric Myles (Vice Chair)
Dick Jackson (Secretary)
Kenneth Anderson (Treasurer)
Sherrod Lewis Bumgardner
David Crane
Chris Griggs
Rob McLaughlin
Michael Newton
James Orr
Jordan Paust
Gary Solis



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fectively without Dennis' hand on the tiller (or Tillar, if you prefer). This will be a challenge for the new committee; of that I have no doubt.

So, if only to celebrate the contribution that these gentlemen have made to the health and well-being of our Society, I would urge you all to attend the Annual

Meeting and particularly our interest group meeting (date and time to be advised). Some of you may wish to step up and take forward the legacy of Dennis and his contemporaries as members of the Executive Committee. However, there are a raft of other reasons to attend, many of which are mentioned in this issue of *Lieber Notes*. By my reckon-

ing, the program of the Annual Meeting (<http://www.asil.org/am10/program-track.cfm>) contains at least eight sessions of direct relevance to the work of this Society. More than enough to warrant a flight from London to Washington on my part. I will see you there!

Chair's Update

By Dennis Mandsager

This edition of our newsletter includes information concerning recent and future Lieber Society activities. If you have suggestions for additional events, please contact our Activities Committee Chair, Eric Myles at e.myles@sympatico.ca. Thanks to Dick Jackson for organizing the Air and Missile Warfare Manual event on 4 February in Washington, DC. I also hope to see you at this year's ASIL Annual Meeting. The Lieber Society will host a panel on *Current Developments in*

the Law of Armed Conflict, as well as our annual business meeting. The day and time for these sessions will be announced soon by the ASIL.

Three three-year positions on our Executive Committee will open up in March, as well as the Chair position. We will have an election in early March. If you are interested in joining the Executive Committee, please contact me by 21 February by email at dennis.mandsager@usnwc.edu. Tillar House will conduct the election by email. If you would like to include

an introductory note concerning your background or ideas for Lieber Society activities, please email that document to me as well. Please limit the document to a single page. I will share all of this background material with our membership prior to the election. According to our by-laws, the Chair position must be filled from either existing or newly elected Executive Committee members.

Cheers, Dennis



INTERNATIONAL INSTITUTE
OF HUMANITARIAN LAW

The Sanremo ROE Handbook was published by the International Institute of Humanitarian Law in November. The Handbook launch, chaired by Brigadier General Erwin Dahinden, was hosted in Geneva by the Geneva Centre for Security Policy (GCSP).

In addition to our Chair, the launch speakers included Professor Steven Haines from GCSP, Mr François Sénéchaud of the ICRC and Colonel Darren Stewart from the IIHL. The Handbook is currently

being translated into Spanish, Mandarin Chinese, French and Arabic. Other translations are possible. Its printing has been funded by the ICRC. Copies of the Handbook are available in .pdf format on both the IIHL and Naval War

College International Law Department web sites. Questions regarding the Handbook should be addressed to dennis.mandsager@usnwc.edu.



The Air and Missile Warfare Manual: *Lex Lata* or *Lex Ferenda*?

By Dick Jackson

The Lieber Society sponsored a seminar at Tillar House on 4 February. It was well-attended, with over 50 ASIL members and guests, many of whom received Continuing Education Credit.

Claude Bruderlein, the Director of the Humanitarian Policy and Conflict Research (HPCR) Center at Harvard University, presented the Air and Missile Warfare Manual, the result of over five years' work of a group of government and academic experts, sponsored by the "Alabama Process" of the ICRC, the Swiss government, and States Parties to the Geneva Conventions. The Alabama Process examines critical issues in the law of war and proposes a restatement of the existing law and a commentary on those "rules." The HPCR hosted the experts, solicited papers on various topics, distilled them into the proposed rules, which the experts endorsed by consensus. The commentary, also prepared by distilling the expert comments and papers, will be released on 5 March in Brussels.

Professor Bruderlein explained the methodology for preparing the manual and illustrated several of the rules, which had been distributed to the audience. He gave several examples of the definitions and targeting rules, as well as an explanation of the direct participation in hostilities rule, derived from the Additional Protocols and the ICRC *Interpretive Guidance*. He also described the difficulty of getting consensus with representatives of States that had not signed the protocols, but had developed extensive practice in the area. Professor Bruderlein also described the regional consultation with various experts and specially effected States, who were provided copies of the draft rules and commentary and provided the opportunity to provide input to the final drafts.

Ken Anderson, our Treasurer and a Professor at the American University Law School (*see page 1*), responded to the proposed rules by questioning the methodology and several of the rules. He expressed a serious concern about the proliferation of manuals that may be viewed by courts in the United States and abroad as evidence of customary international law. Professor Anderson noted that the United States has not ratified Additional Protocol I to the Geneva Conventions because portions of the protocol blur the distinction between combatants and civilians, an error repeated by the ICRC's



Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law; and courts have already begun citing "rules" developed by the ICRC in its publication *Customary International Humanitarian Law* and the *Interpretive Guidance*, which often represent the law as the authors would wish it to be, or *lex ferenda*.

Rear Admiral (Rtd) Jane Dalton, the former Stockton Chair at the Naval War College and Legal Counsel to the Chairman of the Joint Chiefs of Staff was a participant in the Air and Missile Warfare Manual's development. She commented on the draft commentary, which she had

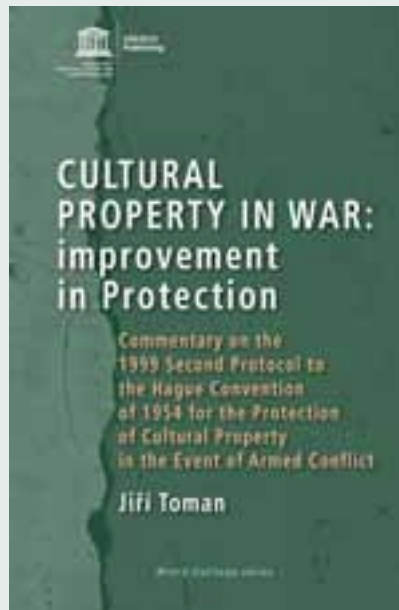
been provided with in December, during the last round of expert reviews. She repeated some of Professor Anderson's criticism and provided examples of areas of the draft commentary that only represented one view of the issue, or copied verbatim from ICRC products, without acknowledging that there were several prominent dissenting views among the experts on those subjects. Admiral Dalton also criticized the use of language in the commentary that was contrary to the black letter rules and indicated a "prohibition," or essentially inserted mandatory language into the rule, despite the consensus of the experts that the rules would use "may" or "should" language. She echoed Professor Anderson's fear that the commentary would be used as evidence of the law, despite introductory language in the manual to the contrary.

Professor Bruderlein closed with a defense of the manual and its methodology. He noted that most of the input provided by Admiral Dalton during the process had been inserted into the commentary and he claimed that the rules represent *lex lata*, a reflection of the law as it currently exists. He then fielded several questions from the audience about the methodology and the rules. The questions reflected a concern of several audience members that the manual would be interpreted to the detriment of U.S. practice and personnel in future conflicts or court cases. A lively debate continued into the late afternoon over *hors d'oeuvres* and drinks.

1999 Second Protocol to the 1954 Hague Convention

Jan Hladík at UNESCO in Paris has been kind enough to pass on details of the latest developments regarding the 1999 *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*.

The third Meeting of the Parties to the Second Protocol, at UNESCO Headquarters from 23 to 24 November 2009, endorsed the *Guidelines for the Implementation of the Second Protocol* and adopted the *Guidelines Concerning the Use of the Fund for the Protection of Cultural Property in the Event of Armed Conflict*. By these means, the system of enhanced protection and international assistance under the protocol have been brought into operation. Copies of these docu-



ments have been posted to the webpages of the Lieber Society, which you can access by going to www.asil.org and selecting My Membership/Interest Groups/Lieber Society.

In December 2009, UNESCO published the article-by-article commentary on the Second Protocol by Professor Jiri Toman of Santa Clara University Law School. Further information on this book is available via the UNESCO website at http://portal.unesco.org/culture/en/ev.php-URL_ID=40276&URL_DO=DO_TOPIC&URL_SECTION=201.html. Jan says that the book is a must for all scholars in the field of cultural heritage protection law as well as the law of armed conflict.

Member news

Professor Mike Schmitt is leaving his post as Dean of the Marshall Center in Germany to assume the Chair of Public International Law at Durham University in the United Kingdom. He may still be reached at schmitt@aya.yale.edu. Mike will continue his role as General Editor of the *Yearbook of International Humanitarian Law*, which welcomes submissions from members of the Lieber Society. Authors may submit their manuscripts to Mike at the e-mail address previously mentioned.

Professor Francis Boyle of the University of Illinois College of Law has filed a complaint under the *Rome Statute of the International Criminal Court* with the ICC Prosecutor against George W. Bush, Richard Cheney, Donald Rumsfeld, George Tenet, Condoleezza Rice, and Alberto Gonzales. Professor Boyle says that the complaint is in respect of "their criminal policy and practice of 'extraordinary rendition' perpetrated upon about 100 human beings", which he equates with enforced disappearance

of persons and their consequent torture.

Although the United States is not a party to the Rome Statute, Professor Boyle al-



leges that the senior members of the Bush administration previously mentioned are responsible for the commission of international crimes specified in the Statute

within the territory of a number of States which are parties to that treaty. He says that the ICC therefore has jurisdiction to prosecute them under article 12(2)(a) of the Statute. Professor Boyle is seeking to have the Prosecutor initiate an investigation *proprio motu* based on his complaint, under article 15(1) of the Statute.

Any member who would like to demonstrate support for Professor Boyle's initiative may do so by contacting the ICC Prosecutor by letter, fax, or email as indicated below:

The Honorable Luis Moreno-Ocampo
Office of the Prosecutor
International Criminal Court
Post Office Box 19519
2500 CM, The Hague
The Netherlands

Fax No.: 31-70-515-8555

Email: OTP.InformationDesk@icc-cpi.int

International Law and the Changing Character of War

The U.S. Naval War College, in conjunction with the Lieber Society and the International Institute of Humanitarian Law, is sponsoring an international conference under the title *International Law and the Changing Character of War*.

The conference will take place from 22 to 24 June 2010 at the McCarty Little Hall Auditorium at the Naval War College in Newport, Rhode Island.

The purpose of the conference is to examine the challenge to international law posed by the changing character of war. The objectives of the conference are

to catalogue the extent to which existing international law governs these changing aspects of warfare and to assess whether these developments warrant revision of existing international law.

Towards this goal, the conference sponsors have invited renowned international scholars and practitioners, military and civilian, and students representing government and academic institutions. There will be five panel discussions and various speakers.

The first day will commence with an open-

ing address by Professor Derek Jinks, Charles H. Stockton Professor of International Law. Two panel discussions will follow, one on *Cyberspace and the Jus ad Bellum* and the other, on *Civilianization of War-Fighting and the Concept of "Direct Participation in Hostilities."*

The second day will be devoted to two panel discussions: *Unmanned Systems /*



Unmanned Vehicles and a panel discussion dedicated to *Lawfare and Asymmetrical Conflicts*.

The final day will commence with a panel discussion concerning *The Changing Character of Legal Scrutiny*.

The panelists, commentators and speakers will produce articles intended to expand upon the topics presented. These pieces will be published in the next volume of the United States War College's *International Law Studies* series.

This event will be conducted on a "for attribution" basis.

On-line registration will open on 15 March 2010. On or after that date, please access the registration form on-line at: http://www.usnwc.edu/ild/2010ild_conference. If you have trouble doing so, contact the International Law Department at the U.S. Naval War College, at (401) 841 4632 or email michael.carsten@usnwc.edu.

This conference is generously supported by funding from the Naval War College Foundation and the *Israel Yearbook on Human Rights*.

Workshop Prior to the Conference

On Monday 21 June the International Law Department will convene the second workshop on "Professional Military Education: Teaching Law at War and Staff Colleges." Law faculty from war and staff colleges around the world are invited to participate. Please send agenda ideas to Professor Dennis Mandsager at dennis.mandsager@usnwc.edu. To register for the workshop call (401) 841 4632. or email michael.carsten@usnwc.edu.

Activities Committee Report

By Eric Myles

The Lieber Society will be co-sponsoring two additional events scheduled to take place in 2010. First, the Society will continue its co-sponsorship of the annual conference of the United States Naval War College (see above). Furthermore,

the Society will co-sponsor the annual conference of the Armed Forces Law Association of New Zealand (AFLANZ), to be held in Melbourne, Australia during the summer.

Proposals for other events that promote exploration of the law of armed conflict

(or related fields) are more than gladly received. Such proposals should be addressed to Eric Myles, Vice-Chair of the Executive Committee and Chair of the Activities Committee. Eric's e-mail address is: e.myles@sympatico.ca

Differing Visions of the Future of Warfare

Report from *Mind the Gap: International Human Rights Law and the Law of Armed Conflict*, a symposium held on 25 January by the Catholic University of America's Military and National Security Law Students Association and ASIL, in cooperation with the ABA's Standing Committee on Law and National Security:

"Would a vintage tank on display at a local museum be a legitimate target for attack if warfare broke out? Of course not, but if the Army provided a docent in uniform to explain the history of the tank to tour groups, that person could be considered an enemy soldier according to today's interpretation of the rules of warfare.

"This is exactly why they need to be reexamined, according to Harvard law professor Gabriella Blum, former head of the counter-terrorism desk in the international law department of the Israeli Defense Forces. Blum was one of two prominent legal scholars invited to [this] Washington, DC forum to debate the legal uncertainties posed by the applicability of human rights standards to situations where the law of war is applied.

"The symposium tackled head on a thorny legal question: To what extent are human rights standards applicable in armed conflicts? For example, does human rights law preclude combatants in war from killing each other's soldiers, regardless of their role, function, or degree

of threat?

"Speaking first, Blum made her case that one of the fundamental creeds of warfare—that all soldiers are potential military targets for an opposing force—is a relic that needs to be abandoned. "It's obvious that not all soldiers are dangerous," said Blum, observing that soldiers in retreat do not pose the same threat as those on attack. She argued that the



blurring of the traditional distinct line between civilian and combatant, as evidenced by the rise of military contractors such as Blackwater, should prompt a reformulation of the basic principles of war. In deciding who to engage in an armed conflict Blum said the paradigm should not be civilian vs. soldier, but rather threatening vs. non-threatening.

"South Texas College of Law professor Geoffrey Corn, former professor of international and national security law at the Army JAG School, took a very differ-

ent view. Blum's proposed rules of engagement made little sense, he argued, because they failed to take into account that soldiers in combat act in group volition; they are agents of the opposing state and do not make individual moral decisions. For that reason, they must be presumed dangerous at all times and therefore legitimate targets of the use of deadly force as a first resort, not as a last. "If we're really interested in humanity, the best ways to [honor] that is to bring the enemy to submission as quickly and efficiently as possible," said Corn. "I don't think the changing nature of warfare requires a change in paradigm."

"Before a packed room, the two professors did an articulate and thought-provoking job of delineating quite different visions of how conflicts should be fought in the future. The question of the place of human rights in a violent fire zone is currently a hot one and was the subject of lectures at the US Naval War College last

May.

"The initial exchange of views between Corn and Blum was expanded upon by the commentary of Harvey Rishikof, professor of law and national security studies at the National Defense University, National War College in Washington, D.C.; and Jamie A. Williamson, legal delegate, International Committee of the Red Cross, Regional Delegation for United States and Canada."

Tell us your news . . .

Lieber Notes is only as useful and interesting as the contributions from you, the members of the Lieber Society. There will be a Spring edition shortly after the Annual Meeting - I hope that you will support this publication again with contributions of interest to our

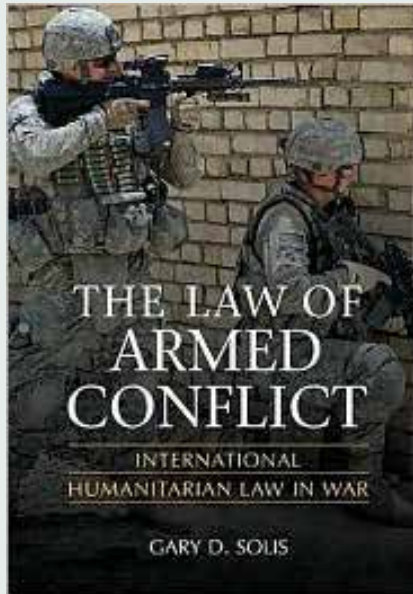
members. Please send me all your news of members, recent or up-coming relevant publications and events, short opinion pieces of matters of interest to the Society . . . whatever you think may be of interest to your fellow members.

Contributions with accompanying images are particularly welcome!

Please send contributions to me, Chris Griggs, at cj.griggs@gmail.com or cjg57@cam.ac.uk.

New Book on the Law of Armed Conflict

Gary Solis, a long-time Lieber Society member, recently had his new textbook published: *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge: Cambridge University Press, 2010). Intended as a basic textbook for law students and others interested in the subject, it includes a lengthy section on Francis Lieber and his 1863 Code. Solis's doctorate is in the law of war. He directed the United States Military Academy's law of war program for six years, until retiring from West Point in 2006. An expert witness in courts-martial and other federal trials, as well as Guantanamo habeas cases, he currently teaches the subject at Georgetown University Law Center and the International Institute of Humanitarian Law. The 682-page



book takes readers from the basics of the law of armed conflict to its more complex issues. He covers conflict status, including the individual status of non-state actors, core LOAC principles, the Additional Protocols, obedience to orders and command responsibility, torture, rules of engagement, targeting, and various treaties of LOAC significance. Many cases and materials are included. With back-cover endorsements from West Point's Dean, as well as John Norton Moore, a former Judge Advocate General of the Navy, the Marine Corps' senior lawyer, and Yoram Dinstein, it might be worth a look whether you're teaching or not.

West Coast Workshop on Teaching International Humanitarian Law

From 9 to 10 April 2010, the University of California, Berkeley Law School and the International Committee of the Red Cross will convene the first *West Coast Teaching International Humanitarian Law (IHL) Workshop* at the University of California, Berkeley. The workshop is targeted at law professors interested in teaching an IHL course for the first time, integrating IHL modules into their current courses and/or rethinking their current teaching of this important subject.

Topics covered will include:

- Defining the scope and content of an IHL class;
- Exploring the intersection between

international human rights law, international humanitarian law, and international criminal law;

- Incorporating IHL modules into the teaching of classes such as public international law, national security law, immigration law; constitutional law; administrative law and more;
- Identifying strategies for developing curricula, responding to current events, and gaining support from school administrations for the teaching of IHL.

The workshop provides an opportunity for law faculty to think creatively about their teaching of IHL and network with

others to support and expand their teaching of the topics.

Speakers include Geoffrey Corn, Marci Hoffman, Kate Jastram, Eric Jensen, Larry Johnson, Paul Kong, Gabor Rona, Trevor Rush, Gary Solis, Beth van Schaack, and Jamie Williamson.

The cost of the two-day seminar is \$250 per person and includes breakfast and lunch for both days as well as all materials.

To register or for more information on the Teaching IHL Workshop, please visit <https://www.regonline.com/teachingihl> or contact teachingihl@berkeley.edu



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