



LIEBER NOTES

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

Vol. 4 Issue 2 - Spring/Summer 2010

104th Annual Meeting

By Chris Griggs

I have finally had a moment to sit down and take stock of the 104th Annual Meeting of the ASIL, which was held in Washington, DC from 24 to 27 March. It was the first time for me as I mentioned in the last issue - if any of you have not yet attended an Annual Meeting, I hope that the following pages will persuade you that it is worth taking the time away from your busy practice, teaching or study commitments to attend.

I have been fortunate to spend time in a number of centers of international law over the past few months. Here in Cambridge, England we are fortunate to hear from a range of eminent speakers and debate issues of international law covering the gamut from trade and investment to oceans, environment, human rights and of course armed conflict. I have also had the honour of spending some brief time at the International Court of Justice, the International Criminal Court and the Special Court for Sierra Leone at The Hague. What these expe-

riences have brought home to me as a practitioner of international law as it affects the armed forces is that we all have a tendency to become stovepiped if we do not occasionally look up from our desks to see what other international lawyers are doing in other fields, with a view to drawing on their experiences and benefiting from synergies between discrete areas. Increasingly I find that, if one area of international law does not provide the answers to a

question, another area may well do so. This is particularly acute for legal advisors to armed forces in the modern era - and I suspect also for academics working in the same field. Not only do we need to be expert in the traditional areas of *jus ad bellum* and *jus in bello*, we

also need to know at least something (probably rather a lot) about international criminal law, the law of the sea, air and space law, international human rights law, the law of state responsibility, international environmental law... and the list goes on. The ASIL Annual Meeting represents an unparalleled opportunity to "cross-pollinate" in inter-



In This Issue:

- 2 Obama-Clinton doctrine
- 3 Chair's Report
- 4 Law of War Training Resources
- 4 Jus ad bellum: Afghanistan and Pakistan
- 5 War and Law in Cyberspace
- 6 Current Developments in LOAC
- 8 The Goldstone Report
- 10 Videoconference: LOAC Challenges in Afghanistan

Lieber Notes is the quarterly newsletter of the Lieber Society. 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

Dick Jackson (Chair/Interim Treasurer)
Eric Myles (Vice Chair)
Rob McLaughlin (Secretary)
Laurie Blank
Sherrrod Lewis Bumgardner
David Crane
Ashley Deeks
Chris Griggs
Eric Jensen
Michael Newton
James Orr
Gary Solis

national law, in the company of some of the greatest minds in the field. In this spirit, a number of members of your new Executive Committee attended the business meeting of the International Criminal Law interest group in Washington, DC - there is much to be gained from developing such relationships with related specialties.

While we were disappointed that the organizing committee did not pick up any of the panels which the Lieber Society had sponsored, as I predicted in the last issue there was much of interest to the members of this interest group in Washington, DC in March.

In this issue I will give you my reflections on the various activities of direct

relevance to the Lieber Society's core focus. If any members disagree with my recollections or with the messages that were being transmitted in Washington, I encourage you to send me a response! It will be printed in the next issue. This issue will also report on other activities that the Lieber Society and its members have been engaged in over the past few months - we have been busy!

Obama-Clinton doctrine

A critical determinant of the manner in which the United States approaches questions of the law of armed conflict and use of force law is the approach taken by key players in the Administration to the relevance and impact of international law on the conduct of international relations. It is therefore apposite to begin this survey of the various contributions in areas relevant to the Lieber Society made at the Annual Meeting by considering the keynote address delivered on Friday, March 26 by **Harold Koh**, the Legal Adviser at the US Department of State.

Mr Koh framed his address by describing a new Obama-Clinton doctrine in the foreign policy of the United States. He said that the doctrine was founded on four themes:

- Principled engagement
- The application of "smart power" by placing diplomacy at the vanguard of US foreign policy
- Strategic multilateralism; and
- Living our values by respecting the Rule of Law.

In respect of the last theme, Mr Koh said that this meant "following universal, not double standards".

Mr Koh then gave a survey of how this doctrine affects US foreign policy in some specific areas. The following are of direct relevance to the focus of the Lieber Society:

- President Obama has announced that "a new era of engagement has



begun" between the United States and the UN Human Rights Council. Mr Koh noted that his department is preparing what he intends to be a model report for the Universal Periodic Review, to be presented in November. It will be interesting to see what the implications of this are, given the controversy surrounding the Goldstone report into Israel's 2008-2009 conflict with Hamas in Gaza, which was commissioned by that Council (noted at page 8 of this issue).

- The United States is looking at ways it can assist the International Criminal Court to fulfill its mandate, consistent with US law. Mr Koh stated that the Administration was looking to meet with the Prosecutor to find ways to assist with existing investigations. Having said that, Mr Koh

suggested that it would be ill-advised to burden the ICC with jurisdiction over the highly politicized crime of aggression. He opined that the ICC is not sufficiently strong or mature for such a step at present and that taking such a step could undermine it.

- President Obama has expressed the conviction that "living our values does not make us weaker, it makes us stronger". Mr Koh spoke of the "law of 9/11" and indicated the Obama-Clinton doctrine entails a commitment to conduct all military operations in accordance with international and US law. He specifically mentioned the current operations against Al Qaeda, stating that all individuals who are part of such armed groups are belligerents who may be lawfully targeted in the view of the Administration. Turning to the question of UAV strikes against such individuals in Pakistan, Mr Koh argued that this was a justifiable exercise of America's inherent right of self-defense against armed attacks by Al Qaeda and other such groups present in Pakistan. [Ed: This raises an interesting question of *jus ad bellum* which was discussed again at the joint Lieber Society/US Naval War College/University of Cambridge videoconference on the law of armed conflict in Afghanistan, held on May 6 - see page 10.]

Chair's Report

By **Dick Jackson**

It is an honor and a privilege to be elected the Chair of the Lieber Society Interest Group of the American Society of International Law. Ever since I became a member of the Society, ten years ago in Hawaii, I have been impressed with the dedication of the members to the law of war (or international humanitarian law), its development, dissemination, and instruction. Particularly in this time of conflict and change, the Society's mission is ever more important and visible.

New Executive Committee members

We have elected a great new slate of Executive Committee members, with rich and varied experience in the field. **Jamie Orr** (who was re-elected, after filling a vacancy last year) has experience as both a military legal advisor and a professor of international relations; his extensive work with NATO should benefit the Lieber Society.

Eric Jensen, who retired from the US Army JAG Corps last year, has taken a Visiting Professor position at Fordham Law School. He has assumed the mantle of leadership for our military writing prize over the last year, resulting in even broader dissemination of the Call for Papers and more submissions from all over the world. [Incidentally, we are eternally grateful to **Chuck Kever** for the work he did to set up this program for success. We wish he and Bev well, as they embark on other writing projects.]

Laurie Blank, who has worked as a practitioner in the area, is now a professor of international law at Emory University. She is constantly looking for ways for her students in the international law clinic to work in the law of war and she has enriched the literature with several pieces over the last year.

And last, but not least, our other new EC member is **Ashley Deeks**, who worked on law of war issues in the U.S. State Department Political Military Legal staff for several years, before becoming the Chief of the Division last year. Ashley, too, is moving into academia this summer, taking a Research Professor position at Columbia University Law School. As you can see,



when added to the varied experiences and talents of our other current EC members, we have a dynamic set of officers.

The road ahead

So where do I see us going in the next couple of years? Of course, that depends on you, and the interest you show in the Lieber Society and its mission. This calendar year has already seen a large increase in Society activities, with presentations at Tillar House, co-sponsorship of several conferences, and a fruitful video teleconference between the Pentagon, Washington University, the Naval War College, and Cambridge University. Vice-Chair Eric Myles and his Activities Committee have come up with a number of other ideas for discussion and dissemination of IHL. And I expect, with the deep bench of law professors on the EC, that we will have many

opportunities to teach and discuss the law of war over the next couple of years.

Other than increased discourse about the law of war, I hope to see us increase the dialogue between practitioners and the academics in this field. Our work with the Naval War College over the years has been a great forum for this type of dialogue (and we are co-sponsoring the up-coming conference in June); I hope to see us open other venues, too. And I hope we increase our membership, particularly with students, military officers and members of other ASIL Interest Groups. [It is a simple thing to check a block on the website and join another interest group, and there are many groups with similar interests (like the international criminal law group)]. We are one of the largest interest groups in ASIL and one of the most active; let's keep it up. There is no better time to be a proponent of IHL and the law of war.

Book event

As was mentioned in the Winter 2010 issue of *Lieber Notes*, Executive Committee member **Gary Solis** has recently had his new book *The Law of Armed Conflict: International Humanitarian Law in War* published by Cambridge University Press. The book, only recently made available on Amazon, is the first of its kind in casebook form. It should be invaluable to practitioners, as a reference, and students and professors, at the undergraduate and graduate (law school) level.

On 5 May, Tillar House, the Lieber Society, and the International Committee of the Red Cross sponsored an event to mark the book's launch.

Professor Solis began the event by explaining the genesis of the book – his development of a curriculum for the students at West Point. He explained some of the interesting sources of case law, from obscure

Continued on page 4

Law of War Training: Resources for Military and Civilian Leaders

Laurie Blank and **Gregory Noone** are currently updating their 2008 manual, *Law of War Training: Resources for Military and Civilian Leaders*. The second edition is a joint project of Emory Law School's International Humanitarian Law Clinic (Laurie Blank is the Director of the IHL Clinic) and the United States Institute of Peace. It will be available in 2011.

A resource manual on training for militaries in the law of armed conflict, *Law of War Training* examines different programs and models for law of war training for militaries, including national training, governmental bilateral assistance training, and participation in international programs. *Law of War Training* includes three main sections: an analysis of the different options for pursuing military training in the law of armed conflict, a

directory of programs and models for law of war training, and web links with information about the law of war in general and law of war training. Countries around the world can reference the manual in initiating law of war training and to help ensure that their military forces are trained in accordance with international obligations.

Additional information about the manual is available at <http://www.law.emory.edu/centers-clinics/international-humanitarian-law-clinic/law-of-war-training.html>. The website includes an online secure survey for countries to submit information about their law of war training programs. Any assistance in circulating this website with the link to the survey and the request for information to appropriate persons would be greatly appreciated.

Afghanistan, Pakistan and Modern Challenges to Use of Force Law

This panel at the Annual Meeting, moderated by **Mary Ellen O'Connell** of the University of Notre Dame Law School, explored the deep and persistent challenges facing NATO and US forces operating in Afghanistan and Pakistan, generating insights into the capacity of international humanitarian law to limit suffering in counterinsurgency warfare and the extent to which forces are, in fact, meeting their obligations under the law.

Paul Pillar, from Georgetown University, brought a non-legal perspective as a retired long-serving CIA officer specializing in South West Asia, setting the scene

for the legal discourse. He noted that the policy of the Obama Administration is to pursue counterinsurgency in Afghanistan to shore up the government of President Karzai and assist the Afghan Government to extend its control in most (if not all) of Afghanistan. Protection of the civilian population is also a key policy plank. Professor Pillar observed that "Taliban" is a broad label which is applied to many disparate groups, eg the Haqqani network, which do not operate in a unified way. Unlike the UK, the US is not in favor of building bridges with the Taliban until the war is won.

Continued from page 3

US cases like the "last enemy combatant" in the US Indian Wars, to recent cases from the International Criminal Tribunal for the Former Yugoslavia. Professor Solis then gave a brief overview of the range of topics covered, from the historical antecedents, to the current treaty basis for the law. And he provided a reading from several dramatic portions of the book on torture and unlawful combatants.

Jamie Williamson, the Legal Advisor for the ICRC in Washington, DC, and I provided commentary on the book. We both agreed that Professor Solis' book will be an excellent resource for the practitioner and a dynamic teaching tool for the professor. While pointing out minor disagreements with the author, I was (and am) effusive in my praise of the scholarship and provocative teaching materials made available by Gary's exhaustive research. Jamie noted that he planned to carry the book with him as a reference book, due to its numerous citations and comprehensive coverage of the current issues in IHL.

Undergraduates and law students alike should be intrigued by the coverage of recent controversies, including torture, unlawful combatants, human shields, and competent tribunals.

The ICRC was kind enough to provide refreshments for the event, while Tillar House and ASIL provided the libations. A standing-room-only crowd of Washington locals, students, and ASIL members attended. And Gary even autographed a few books. The Lieber Society and ASIL, in general, wish Gary well with the dissemination of this important new textbook and reference on the law of armed conflict.

Professor Pillar went on to make some candid personal observations about the use of unmanned aerial vehicles ("UAV"), such as Predators, in Pakistan. He observed that they are used extensively in Pakistan,

Continued on page 5

Continued from page 4

because Pakistan does not permit conventional US/NATO military operations on its territory. However, Al-Qaeda is now largely based in Pakistan, as of course are their co-belligerents, the Pakistani Taliban (not to be confused with the Afghan Taliban). Accordingly, Professor Pillar intimated, the use of UAV to target these persons is the only option. He stated that, while the Pakistani Government claims outrage at the UAV strikes, privately they appear to be cooperating.

Hina Shamsi from New York University School of Law posed the questions which spring to the minds of legal academics when confronting the fact of US operations in Pakistan. She asked whether the law of armed conflict applied to such operations, given that Pakistan is a friendly foreign State. She asked what the justification for the UAV strikes was in the *jus ad bellum*. Has the Pakistani Government consented to these operations on its territory? If not, Hina

suggested, it seems likely that the US Government will mount an argument based on a robust interpretation of America's inherent right of self-defense. She fore-



shadowed that these issues would soon be clarified by the State Department Legal Advisor, Harold Koh, in a written justification for America's approach.

Hina Shamsi's remarks regarding the Obama Administration's approach to the

UAV strikes left one wondering whether in fact the Commander-in-Chief was content with the present policy. This issue was addressed by **John Radson**, a former

Assistant General Counsel at the CIA. He opined that the evidence indicates that President Bush gave the CIA written authorization under US law to conduct targeted killings using UAVs. He stated that it appears this approach has been accepted by President Obama. He suggested that the complexities which arise from the *jus ad bellum* in relation to the operations of US forces in a foreign State have a different

aspect when the operations are conducted by the CIA which, like many intelligence agencies worldwide, has long conducted covert operations in foreign countries which are unlawful - certainly as far as the law of the "receiving State" goes.

War and Law in Cyberspace

Considerations of Predator drones and their operators back in the continental United States provides a neat *segue* to another fascinating topic which was canvassed at the Annual Meeting - just how, if at all, does the law of armed conflict deal with the question of war in cyberspace?

As is often the case with discussions of this topic in my experience, it posed more questions than it answered. That is perhaps the nature of the field at present. One such question was with respect to the obligation under customary international law for combatants to bear arms openly, if indeed they are to benefit from that status. How does this apply to operators conducting computer network attacks (CNA)? It was suggested that perhaps the equivalent duty in cyberwarfare was to ensure that

the malicious code contained appropriate metadata indicating that the sender is a combatant.

This panel boasted a number of eminent speakers, including **Eliana Davidson**, the Deputy General Counsel for Intelligence at the US Department of Defense. She discussed the complexities of the *jus ad bellum* in relation to CNA, drawing out the contrast between what might constitute a use of force for the purposes of article 2(4) of the UN Charter and what constitutes an armed attack for the purposes of article 51. I noted the implications of the *Nicaragua* judgment of the International Court of Justice in this area, and asked Eliana whether the US had ever reported to the Security Council any action taken by it in response to a foreign CNA, pursuant to article 51.

She replied that the US could do so, but she did not know whether it had.

One of the key problems in the area of cyberwarfare, that was highlighted by this panel, was attribution. It is often very difficult to tell whether the entity that appears to be the source of the CNA is in fact the guilty party, or merely a "spoof" for another. As Eliana Davidson pointed out, the level of attribution required when one is "building a stronger wall" is far less than when one is intending to "fire the cannon" [the analogies are mine]. Eliana underscored the importance of this new discipline to the DoD by describing the establishment this year of Cyber Command as a standalone combatant command

Continued on page 6

Continued from page 5

under the command of General Alexander. He will have the objective of developing a unified, coordinated and comprehensive defense of the DoD networks.

Robin Geiss provided the perspective of the International Committee of the Red Cross on the law of armed conflict as it applies to cyberspace. He noted that it has been argued that, in view of the more temporary and less destructive nature of denial of service attacks, this broadens the range of legitimate military objectives. The ICRC refutes this. Having said that, Robin acknowledged that there may be some circumstances where a CNA against a specific military

objective would be permissible where a kinetic attack would not be, for example against a nuclear power plant, where the CNA could shut down the power plant but not release dangerous forces.

The question arose as to whether the law

of armed conflict applies when a CNA is launched from a place where there is no armed conflict taking place. Robin stated that the ICRC's view is that it does not - a domestic law enforcement paradigm would apply in such cases. I asked Robin for the ICRC's view on the use of civil-

ians to conduct CNA and/or UAV strikes, in view of the centrality of the principle of distinction to the law of armed conflict. He stated that such civilians lose their protected status "for such time" as they are so directly participating in hostilities, but did not offer a view on whether permitting civilians to participate in such roles undermines the principle of distinction *per se*.



Lieber Society Panel: Current Developments in LOAC

The Lieber Society is grateful to **Rear Admiral Jane Dalton, JAGC, USN (Retd)** for moderating a stimulating and thought-provoking panel immediately prior to our business meeting on 26 March at the Annual Meeting. We convened at eight bells of the forenoon watch, which suited the Navy/Marine Corps folks perfectly (and it seems everyone else made it too).

We were honored to have **Brigadier General Tom Ayres**, Army Assistant Judge Advocate General - Operational Law, in our midst. He offered some sage counsel about the practical realities associated with the application of the law of armed conflict on a modern battlefield. Many of you will have heard many speakers before talk of the "strategic corporal", but General Ayres' timely comments reminded us that this law must be capable of being applied by troops on the ground, who are not lawyers or academics with time to carry

out research, in the heat of battle. For that reason, it is our duty to make sure that the rules are kept as clear as possible for those who must apply them.

Rebecca Ingber, adviser on LOAC issues in the Department of State, spoke from her experience as an attorney involved in the litigation brought against the US Government in connection with its detention at Guantanamo Bay and elsewhere of persons captured in connection with Operation *Enduring Freedom*. She noted that the "March 13 brief", the Obama Administration's doctrine supporting detention operations at Guantanamo Bay, was based on the 2001 Congressional Authorization for the Use of Military Force ("AUMF"). Detention was authorized based on proven membership of Al Qaeda or the Taliban, or on the basis of hostilities conducted against US or coalition forces by that person's armed group. Rebecca

stated that membership of an armed group can be based on evidence of a formal nature (eg an oath of allegiance), but it is more commonly based on circumstantial evidence. She noted that, while the US Government has lost 75% of the detainee cases brought before US courts, this has been as a result of a failure to satisfy the Court of the petitioner's membership of Al Qaeda or the Taliban, rather than any judicial rejection of the Administration's view of its detention authority. She opined that it is generally accepted that membership of an armed group is sufficient for these purposes; there is no need to prove the actual conduct of hostilities by the detainee. On the other hand, support for such an organization without membership will not suffice. The key issue is whether the individual was operating within the organization's command structure.

Continued on page 7

Continued from page 6

Jane Dalton commented on the process which led to the production of the *Air and Missile Warfare Manual* by the ICRC and the Humanitarian Policy and Conflict Research (“HPCR”) Center at Harvard University, as well as the concerns felt by a number of experts with respect to its final form. This topic is canvassed fairly extensively in the Winter 2010 issue of *Lieber Notes*, for those members who are not familiar with it already.

Eric Jensen gave a wide-ranging presentation on the benefits and pitfalls of LOAC manuals, drawing on his experience as a military manual writer, but focusing principally on recent ICRC products. He began by discussing the ICRC’s three-volume *Customary International Humanitarian Law*. Eric opined that this study is useful as a source of State practice and *opinio juris*. However, he noted the valid criticisms which have been levelled at it, eg that there is not enough State practice cited to support some of the propositions as customary (see, for example, *Contemporary Practice of the United States Relating to International Law*, 101 AJIL 636, 639 (2007)). Despite this, the study is being extensively cited as authoritative on the content of customary IHL.

Next, Eric directed our attention to the ICRC’s *Interpretive Guidance on the Concept of Direct Participation in Hostilities*. The central issue is of course whether

a “fighter by night” who lays down his AK47 and becomes a “farmer by day” is entitled to protected civilian status by day - the so-called “revolving door” phenomenon. The *Interpretive Guidance* states: “The ‘revolving door’ of civilian protection is an integral part, not a malfunction, of IHL.” Eric pointed out that there is strong disagreement with this perspective. For myself, I think it is im-



portant to note that the *Interpretive Guidance* would not include part-time fighters in organized armed groups, such as Al Qaeda, within the category of civilians in the first place. Hence the question of direct participation would not arise. The *Interpretive Guidance* seemingly places such persons (who inevitably fail to meet the qualifying criteria for combatants) in a “middle group” between combatants and civilians, having no belligerent privilege but being legitimate military objectives *per se*. This in itself may be somewhat controversial, in view of the weight of authority (eg *Prosecutor v Delalic*) suggesting there is no such middle group.

Eric also expressed the view that the *Interpretive Guidance* takes a very narrow view of direct participation, which is not supported by State practice: “the act must be specifically designed to directly cause the required threshold of harm”. He suggested that, for example, makers of improvised explosive devices (“IED”) should be considered to be directly participating, although he drew a distinction between such persons and civilian workers in a munitions factory. He grounded that distinction on factors such as sovereignty and State sponsorship. Eric was challenged on this point in questions, on the basis that his thesis would undermine equality of treatment under the law of armed conflict. Eric then questioned the indication in the *Interpretive Guidance* that there is an obligation to use non-lethal measures to deal with a civilian who is directly participating in hostilities, if that would be sufficient to achieve the military objective.

Finally, Eric mentioned a couple of other manuals in passing, including the nascent manual on the law of armed conflict in cyber warfare. He said that, as a matter of general principle, it is important as a first step to identify what the purpose of the manual is. Is it intended to state the *lex lata*? The *lex ferenda*? Or is it intended to be a statement of best practice?

At the end of the formal presentations, a lively debate ensued. To paraphrase the Bard: “And gentlemen in England [or elsewhere]... shall think themselves accursed they were not [there]” (Henry V, Act iv, Scene iii, *mutatis mutandis*).

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 Fall edition later this year - 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.

The Goldstone Report and the Law of War

It may be confidently asserted that few writings in the law of armed conflict have provoked as much controversy in recent times as the *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, presented to the UN Human Rights Council by Justice Richard Goldstone and his team of experts in September 2009.

The 2010 Annual Meeting underscored this controversy by providing a panel which neatly juxtaposed two of the contrary schools of thought on the significance of the Goldstone report. **Omar Dajani**, a former legal adviser to the Palestinian Authority and now an associate professor at Pacific McGeorge School of Law, presented a menu of the important contributions made by the report in his estimation. **Abraham Bell** of the University of San Diego School of Law, a former official in the Israeli Government and an expert on the legal aspects of the Arab-Israeli conflict, provided a counterpoint to Omar's comments by setting out the major criticisms of the report, both from a procedural and a substantive perspective. For those who would like to read more on Professor Bell's critique than I can do justice to here, I would suggest you look out for his "A Critique of the Goldstone Report and its Treatment of International Humanitarian Law," 104 *American Society of International Law Procedure* (forthcoming, 2010).

Omar Dajani began by asserting that the Goldstone report adheres largely to the orthodox view of distinction and proportionality, rejecting the less orthodox views adopted by Israel and, in some cases, the US. For example, the report refuses to accept the treatment of civilian governmental infrastructure as a legitimate military objective simply because it is affiliated with the enemy *de facto* government. The fact that the entity controlling this govern-

ment, ie Hamas, has been declared a terrorist organization by some States does not alter this position. The report did however accept that if a civilian object has a dual military/civilian use or is used to directly participate in hostilities, then it becomes a legitimate military objective.

On the question of distinction, Omar stated that the Goldstone report found that the Israeli Defense Force ("IDF") had reversed the presumption of the protected status of civilians in the instruction it



provided its forces during pre-deployment training. He attributed guidance such as "if in doubt, shoot" and "there are no innocents in urban warfare" to the IDF training.

Turning to proportionality, Omar said that the Goldstone report had avoided threshold cases and focused on those cases where the proportionality gap between the expected military advantage and the incidental civilian casualties expected was huge. He said that, in some of these cases, it was in fact hard to discern any military advantage. Specifically, the report found that the avowed policy of one IDF commander to attack villages from which attacks were launched by Hamas, as a reprisal, was unlawful. Omar indicated that the IDF has since indicated that it does not endorse such reprisals.

Having set out the important contributions of the Goldstone report, Omar Dajani opined that the report has set in motion a series of processes to prevent impunity for the unlawful actions of the individuals involved. He included within this the fact that it has provided material and an impetus for IDF military investigations and also in support of potential proceedings in other States. Omar suggested that the Human Rights Council should now request that the Security Council refers the situation dealt with in the report to the International Criminal Court. He said that his reasons for this view were that:

- There is a high degree of command responsibility for the failure of the IDF to comply with the principles of distinction and proportionality.
- The IDF consistently violated the law of armed conflict during the Gaza conflict.
- Israel has the opportunity to avoid ICC jurisdiction over the situation pursuant to the principle of complementarity, if it deals appropriately with the allegations.

Abraham Bell began by setting out the major criticisms of the Goldstone report, levelled by Israel and others:

- The style and presentation of the report gives an impression of bias against Israel.
- The appointment of Christine Chinkin to the Mission, given her previous critical academic commentary on Israel's action as a matter of *jus ad bellum*, also indicates bias.

Continued on page 9

Continued from page 8

- The witnesses who gave evidence to the Mission were pre-selected and intimidated by Hamas.
- The incidents on which the Goldstone report focused were the most extreme which could be selected. This was done for maximum effect and, again, suggests bias against Israel.
- Analysis of the Goldstone report suggests that the Mission only found witnesses credible if they were Palestinians, or Israelis who corroborated the evidence of Palestinians.

Abraham Bell then criticised some selected substantive aspects of the Goldstone report. First, he criticised the report's finding that Israel's closure of its borders with Gaza was unlawful collec-

tive punishment. He said that the ICRC's *Customary International Humanitarian Law* indicates that such action is in fact lawful. Abraham posited that the position taken by the Goldstone report fails to take proper note of the State's right and duty to take measures to suppress terrorism under UN Security Council resolution 1373 (2001) and the various anti-terrorism treaties. He argued that the international law for the suppression of terrorism justifies Israel's total embargo of Gaza, due to the diversion of aid shipments to Hamas.

Turning to the questions of distinction and proportionality, in direct contradiction of Omar Dajani's thesis, Abraham Bell suggested that the treatment of these issues by the Goldstone report was "quite revolutionary".

Abraham criticised the report's suggestion that the Gaza police force was civilian in nature. In what Abraham described as a

"revolutionary" finding, the Goldstone report said that one should not treat a member of a terrorist entity who is armed as presumptively a combatant. He noted the Israeli view that the Gaza police force was an irregular armed force tasked with conducting combat operations against Israel. He supported this contention with evidence that, during the conflict, a spokesman for the Gaza police spoke of the "need to face the enemy".

Abraham also considered that the Goldstone report had an insufficient evidential basis to make the findings it did that various IDF operations in Gaza violated the principle of proportionality. The presence of many civilian casualties following such operations was not sufficient by itself; there needed to be proof that it was the intent of the IDF to launch a disproportionate attack.

Lieber Prize Announcements

By Dennis Mandsager

The Lieber Prize is awarded annually to individuals 35 years or younger for outstanding scholarship in the field of international law and the use of force. Winners received a \$500 prize and a complimentary annual membership at the 2010 Annual Meeting. This year, the prize for the book category was awarded to Professor James A. Green of the Universi-

ty of Reading School of law, for his book, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing 2009). Professor Robert Sloan of Boston University School of Law won in the articles category for his piece, "The Cost of Conflation: Preserving the Duality of the *Jus ad Bellum* and the *Jus in Bello*", published at *34 Yale Journal of International Law* 47 (2009).

a member of the active or reserve military forces for exceptional writing on the law of war. It is open to authors from any nation who are serving in the military on active duty or in the reserve. This year there were 31 articles submitted from authors in six countries. The judging panel of Professor Jordan Paust, Mr. David Graham, and Dr. Frederik Naert selected the paper "Combatant Status and Computer Network Attack" submitted by Sean Watts as the winner of the 2010 Lieber Society Prize. The papers "A *Jus Post Bellum* for the U.S. Military: Facilitating the International Legal Debate on Post-conflict Reconstruction" and "Rethinking Computer Network Attack" submitted by Laura Beth Wrzesinski and Paul A. Walker were determined by the judges to be worthy of receiving Certificates of Merit. Thanks and appreciation are expressed to all of the authors, to the judges, and to the prize coordinator, Eric Jensen, for their work in making this competition a success.



We are very grateful to our judges, Michael Schmitt of Durham University Law School, Iain Scobbie of the School of Oriental and African Studies (University of London) and Wolff Heintschel von Heinegg of Viadrina Europa University.

Lieber Society Military Prize

The Lieber Society Military Prize is awarded to

The prizes and certificates were awarded by our new Chair, Dick Jackson, at the Annual Meeting.

Challenges for the Law of Armed Conflict in Afghanistan

In a first for the Lieber Society, on May 6 we co-sponsored a transatlantic videoconference on the contemporary challenges for the application of the law of armed conflict in Afghanistan. Our co-sponsors were the US Naval War College and the Lauterpacht Centre for International Law at the University of Cambridge. The Lieber Society is very grateful to its co-sponsors for the financial and technical support they provided to make this event a reality.

The videoconference linked three nodes in the US; the Naval War College, the Pentagon and Fort Lewis, WA, with one node at the University of Cambridge in England. **Commander Chris Griggs** chaired the conference from Cambridge, with the able assistance of coordinators in each of the US nodes. We were fortunate to have two very thought-provoking presentations from **Professor Peter Rowe** of the University of Lancaster School of Law (speaking from Cambridge) and **Professor Derek Jinks**, the Charles H. Stockton Professor at the Naval War College (speaking from Newport, RI).

The event attracted a range of participants, from serving US judge advocates and other government officials to academics and students, including students from the University of Washington Law School who travelled to Fort Lewis for the event at a relatively early hour on the West Coast! In Cambridge, it was pleasing to see a number of students of international relations attend, in addition to the lawyers.

Peter Rowe began the discourse by

raising the question as to whether what is occurring in Afghanistan now is an international armed conflict or a non-international armed conflict. He noted that some commentators argue that it is



neither and that accordingly only international human rights law applies. Peter opined that that is not a realistic perspective. But he did question whether there is an armed conflict underway in respect of all the “anti-Government elements” (“AGE”). He referred to the definition of a non-international armed conflict provided by the ICTY in *Tadić* - “protracted armed violence with organized groups”. The Taliban is an organized armed group, but what of the other AGEs?

Peter then went on to discuss the problems in discerning the applicable law in a non-international armed conflict such as Afghanistan (on at least one view). For example, Afghanistan is now a Party to Additional Protocol II, but not all the coalition partners in ISAF or Operation *Enduring Freedom* are. What about customary international law? Peter questioned whether some or all of the codified rules which apply to international armed conflicts also apply to non-international armed conflicts as custom. The ICRC’s *Customary International Humanitarian Law* suggests they do. This is accepted by some States, but not others - including those who challenge the methodology of the ICRC’s study.

Peter raised the thorny issue of whether AGEs in Afghanistan are themselves bound by the law of armed conflict. He suggested that the threshold question is whether they are organized armed groups. If they are, he suggested that they are bound not only by the law of armed conflict, but also by other relevant treaties to which Afghanistan is a Party, such as the Ottawa Convention and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

Peter noted the conclusion of the ICRC’s recently published *Interpretive Guidance* that members of organized armed groups with a “continuous combat function” may be targeted at all times (*see page 7 for more on this*). He queried the impact of Afghan law on operations conducted in that country in view of changing SOFAs and other instruments with the host State. Turning to look at the conflict from the perspective of the Afghan Government,

Continued on page 11

Continued from page 10

Peter mused whether that government incurs State responsibility for any breaches of its international human rights obligations on its territory by coalition forces, noting the terminology used in article 2(1) of the International Covenant on Civil and Political Rights. What about the commander of a coalition force - does he incur command responsibility for breaches of the law of armed conflict by foreign troops which are under his operational control, but not his command? Finally, Peter questioned whether AGEs are bound by Afghanistan's human rights obligations. Some commentators suggest they are; Peter is not convinced.

Derek Jinks began his paper by discussing what he called "fundamental regime-level ambiguities" in international law as it applies to the situation in Afghanistan.

First, he posited that the law of armed conflict currently provides an inadequate framework for non-international armed conflicts. Even Additional Protocol II combined with the customary international law discerned in the ICRC study present an incomplete picture, eg in the area of detention operations. The lacuna is even more acute for States which are not Parties to Additional Protocol II and/or do not accept the ICRC's view of customary law. The US is one such State; it is therefore left with common article 3 as its sole source of law in such conflicts. Derek referred to the negotiating history of Additional Protocol II. He said that the States Parties plainly understood that the law of armed conflict would be supplemented by some other law in internal armed conflicts. This "other law" is unspecified.

Derek's second "fundamental ambiguity" related to the *jus ad bellum*. He argued that it fails to specify with precision when a State can use force in self-defense against non-State actors. A number of unresolved issues contribute to the uncertainty. Can non-State actors commit "armed attacks" which trigger the application of article 51 of the UN Charter? The majority of the International Court

of Justice in the *Wall* advisory opinion held that they cannot. Derek suggested that this view is in decline in the wake of 9/11. Next, when is it lawful for a State to act in self-defense against a non-State actor present on the territory of another State which does not consent to that act? Derek began with the relatively uncontroversial point that such action is lawful if the armed attack by the non-State actor is attributable to the host State, as described by the ICJ in *Nicaragua* and reflected in the International Law Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts*. He then went on to argue that, even if the armed attack is not attributable to the host State, that State has a "due diligence" obligation to prevent its territory from being used to cause injury to another State. If it is unwilling or unable to exercise this due diligence, the harmed State may use force by way of "self help". Professor Jinks was challenged on this thesis by the Cambridge node in questions. Asked what his authority was for the proposition put forward, Derek cited *Corfu Channel* and also the *Trail Smelter* arbitration, by way of analogy from international environmental law. I found this a novel theory; it will be interesting to see what others make of it in due course.

Derek's final fundamental ambiguity was the relationship between the law of armed conflict and international human rights law. He noted that one view is that the law of armed conflict is the *lex specialis* and it therefore displaces international human rights law. It was evident from a question asked by the Pentagon node that this view is held by some at least in that august institution. Derek stated that the "displacement theory" has been widely rejected by international authors. He noted the ICJ's view in *Nuclear Weapons* that the law of armed conflict is the *lex specialis* in the sense of determining (at least to some degree) the normative content of international human rights law in a situation of armed conflict - the "interpretive theory". Derek indicated that the difference between the two theories is profound; under the displacement theory, the UN's human rights mechanisms have no place in situations of armed conflict.

If the interpretive theory prevails, they do. Derek noted that there is no judicial authority supporting the displacement theory, in stark contrast to the interpretive theory. He was challenged on this by the Pentagon node, which asked him to respond to its contention that the displacement theory was supported by the decisions of the European Court of Human Rights in *Banković* and *Behrami and Saramati*, and by the House of Lords decision in *Regina (Al Jeddah) v Secretary of State for Defence*. Derek responded that *Banković* is authority for the proposition that the European Convention will not apply extraterritorially unless one of the exceptions to its primarily territorial jurisdiction applies (eg "effective control" of the overseas territory by own forces). *Behrami and Saramati* and *Al Jeddah* are authority for the proposition that breaches of human rights committed by forces operating under a Security Council mandate are attributable to the UN and not their sending State, if the Security Council maintains "overall authority and control" over the mission. Both Derek Jinks and Peter Rowe agreed that these were all cases which in fact support the interpretive theory. At no point was it suggested that international human rights law was "displaced" in these armed conflict contexts. The cases were decided on the basis that human rights law did apply *ratione materiae*, but did not apply in the particular context, either because of a jurisdictional limit or because the acts complained of were not attributable to a Party to the Convention.

Derek then turned to consider a number of "retail level" issues which complicate the picture in Afghanistan. He noted that there are (at least) three different ways in which States may think about combatant status. Some are Parties to Additional Protocol I, some are not. Some are Parties, but have declared a reservation to article 44 of the Protocol. These three different positions make a real difference to how a coalition partner will view the issue in the context of an international armed conflict. Another problem is that it is often lost sight of that combatant

Continued on page 12

Continued from page 11

status is a concept of international armed conflict, not non-international armed conflict. Finally, Derek raised the question: to whom does the Fourth Geneva Convention apply? This is a critical issue in international armed conflicts such as Operation *Enduring Freedom*, at least in its first phase. The vast majority of the non-Afghan fighters who were captured by coalition forces were citizens of Saudi Arabia, Pakistan or Yemen. These countries all maintain normal diplomatic relations with the United States. Accordingly, their citizens are excluded from the application of the Fourth Geneva Convention by virtue of article 4.

Derek concluded with the observation that ambiguities such as those he had outlined are unhelpful, and increasingly so because we are now witness to:

- Increased international supervision of military operations, eg the Goldstone report;
- Increased domestic supervision of military operations;
- Increasing proliferation of “soft law” instruments, such as the ICRC’s *Customary International Humanitarian Law*;
- The increasingly multilateral nature of military operations; and
- The increasing willingness of adversaries to exploit gaps in the law, the so-called phenomenon of “lawfare”.

In addition to the questions already mentioned in this report of the videoconference, questions were asked by the US Naval War College node about the relationship between the law of armed conflict and domestic criminal law, specifically in

relation to the offense of “murder contrary to the law of war” established by the Military Commissions Act, 2009, 10 U.S.C. §950t(15). Derek Jinks commented that a failure to comply with the law of war does not necessarily make that failure criminal under the law of war; although it may be made criminal under domestic law. He contrasted the killing of combatants by an unprivileged belligerent, which is not a war crime (although it may be a domestic crime), with the committing of perfidy, which is a war crime.

At the instigation of an Afghan law student at the Washington University Law School, the Fort Lewis node asked if the law of armed conflict addresses the provision of remedies to victims of coalition operations, or whether it is left to the domestic law of the sending States. Peter Rowe responded that the law provides limited redress in such cases. They are generally remedied by way of an *ex gratia* payment by the relevant authorities. There is however a role for international human rights institutions in certain circumstances. Derek Jinks agreed with Peter and indicated the *status quo* was no accident.

By way of follow-up, the Cambridge node asked Derek Jinks whether the Alien Tort Claims Act would be of assistance. Derek noted that this US statute does not form part of the law of armed conflict, but it has been used in cases involving armed conflict. In *Sosa v Alvarez-Machain* 542 U.S. 692 (2004), the US Supreme Court held that the ATCA provides a cause of action only for violations of international norms that are as “specific, universal, and obligatory” as were the norms prohibiting violations of safe conducts, infringements of the rights of ambassadors, and piracy in the 18th century. Derek opined that it is unclear which claims related to a violation of the law of armed conflict would pass through that filter. He said that the scope for ATCA litigation was being increasingly

circumscribed by judicial and political constructs, but that such a claim may still be possible.

Finally, the Pentagon node asked whether there are any lessons to be learnt from the Goldstone report and what comments, if any, the panelists could offer on the role of the Prosecutor at the ICC. Peter Rowe said that the first lesson of the Goldstone report was that, if such a report is commissioned by the UN, the subject State should involve itself in the report’s preparation. The second lesson was that States should avoid the necessity for such reports by transparently conducting their own investigations. As for the ICC Prosecutor, Peter expressed the view that the principle of complementarity will shield any State which is serious about upholding the Rule of Law. Derek Jinks indicated that the Goldstone report is a glimpse of the future. He then posed the question as to whether there are adequate accountability checks for these new international institutions which seek to supervise the conduct of military operations. He concluded that there adequate checks in respect of the ICC Prosecutor, in the form of the Pre-Trial Chamber and the need to persuade the State having custody of the alleged offender. He expressed less confidence in respect of the Human Rights Council, but concluded that, in the end, the credibility of that body is a political, rather than a legal, issue.

Overall, the Lieber Society’s first joint videoconference stimulated a wide-ranging and thought-provoking debate on issues of central importance. It enabled a range of stakeholders who do not ordinarily have the opportunity to exchange views to do so. We hope that it will be just the first of many such events - please contact Eric Myles, Chair of our Activities Committee, if you have an idea for such an event.

The War on Terror and the Laws of War: A Military Perspective

Michael Lewis, Eric Jensen, Geoffrey Corn, Victor Hansen, Dick Jackson and James Schoettler are the authors of this new book (September 2009), published by Oxford University Press. The publisher states that, in this book, “six legal scholars with experience as military officers bring practical wisdom to the contentious topic of applying international law to the battlefield. The authors apply their unique expertise to issues that have gained greater urgency during the United States’ wars in Iraq and Afghanistan: including categorizing targets and properly detaining combatants. For more information, and to order a copy, go to: <http://www.us.oup.com/us/catalog/general/subject/Law/PublicInternationalLaw/GeneralPublicInternationalLaw/?view=usa&ci=9780195389210>.