

Introduction

During the last several years we have witnessed impacts on, and changes in, modern warfare, to include cyber operations in Estonia and Georgia, civilianization of the battlefield in Iraq and Afghanistan, use of unmanned systems in Yemen and Pakistan, a lawless enemy invoking "lawfare"—particularly as it relates to civilian deaths and injuries incurred during lawful attacks on enemy targets—to undermine military operations and an enhanced level of public and judicial scrutiny of military actions. Legal practitioners, both military and civilian, and legal academics have worked to identify how international law governs these changing aspects of warfare and to determine if there are any shortfalls requiring changes to the existing legal framework. The legal debate on these matters has been both vexing and fruitful: but a number of unanswered questions remain, making these topics ripe for discourse.

Following its tradition of the in-depth study and teaching of the manner in which the law impacts military operations, the Naval War College hosted a 2010 conference entitled "International Law and the Changing Character of War." The conference brought together distinguished international law scholars and practitioners to examine the challenge to international law posed by the changing character of war.

Dr. Nicholas Rostow, a former Legal Adviser to the National Security Council, opened the conference by setting the stage for the discussions to follow using as his scene setter the "Study on Targeted Killings" report authored by Professor Philip Alston for the UN Human Rights Council. Although Dr. Rostow, like many others, does not agree entirely with Alston's conclusions on the applicability of human rights law in armed conflict, and on the lack of transparency and accountability, he noted that this report, like many others, raises questions that pose a challenge to international law. Over the next two and a half days in five thematic panels the speakers presented their analyses of some of those challenges.

As a conference highlight, the attendees were privileged to attend a luncheon address delivered by Professor Robert "Bobby" Chesney, the Charles J. Francis Professor in Law at University of Texas School of Law, who provided an overview of the emerging federal habeas corpus case law involving detainees held at Guantanamo Bay. He highlighted the differing detention standards used by the executive branch and the federal courts' diverging assessments of the applicability of the law of armed conflict in these cases.

In closing the conference Professor Yoram Dinstein reflected that changes in modern warfare have put legal scholars and practitioners representing nations that abide by the law of armed conflict unnecessarily on the defensive in the face of “modern barbarians” who conduct hostilities in an utterly unlawful fashion. He urged those scholars and practitioners to no longer remain silent, but to go on the legal offensive against those who resort to methods that violate the most basic principles of the law of armed conflict. Professor Dinstein also encouraged resistance to those human rights activists who have erroneously and perilously asserted that during armed conflict human rights law should supplant the law of armed conflict, warning that should they prevail it would be impossible to effectively engage in hostilities.

This edition of the International Law Studies (“Blue Book”) series encapsulates the incredibly thoughtful insights and lessons learned that each presenter brought to the conference, including many gained from personal experience while serving in a variety of conflict zones. The product of their scholarship and roundtable discussions are found within this volume.

The conference was organized by Major Michael D. Carsten, US Marine Corps, of the International Law Department (ILD), with the invaluable assistance of Ms. Jayne Van Petten and other ILD faculty and staff. The conference was made possible through the support of the Naval War College Foundation, the International Institute of Humanitarian Law, the University of Texas School of Law and the *Israel Yearbook on Human Rights*. Without the dedicated efforts and support of these individuals and organizations, the conference would not have been the exceptional success that it was.

I would like to thank Professor Raul A. “Pete” Pedrozo and Colonel Daria P. Wollschlaeger, US Army, for serving as co-editors for this volume, Captain Ralph Thomas, JAGC, US Navy (Ret.), for his meticulous work during the editing process, and the staff of the College’s Desktop Publishing Division, particularly Susan Meyer, Albert Fassbender and Shannon Cole. I also extend thanks to Captain Rymn Parsons, JAGC, US Navy, the Commanding Officer of Navy Reserve, Naval War College (Law), the reserve unit that directly supports the International Law Department. The unit’s willingness to assist with the project and make personnel available to facilitate timely publication of this “Blue Book” was essential. I am grateful to all of the reserve officers, but specifically appreciate the exceptional work of Commander James W. Caley, JAGC, US Navy, for his comprehensive and painstaking work on the index. This publication is the culmination of the tireless effort of each of the previously named individuals, as well as numerous others, and is a tribute to their devotion to the Naval War College and the International Law Studies series.

Introduction

Special thanks go to Rear Admiral James P. “Phil” Wisecup, the President of the Naval War College, and Professor Robert “Barney” Rubel, Dean of the Center for Naval Warfare Studies, for their leadership and support in the planning and conduct of the conference, and in the publication of this eighty-seventh volume of the “Blue Book” series. This “Blue Book” continues the Naval War College’s long tradition of compiling the highest quality of scholarly inquiry into the most contemporary and challenging legal issues arising from the entire hierarchy of military operations.

The International Law Studies series is published by the Naval War College and distributed worldwide to US and international military organizations, academic institutions and libraries. A catalogue of all previous “Blue Books” appears after the table of contents. Volumes 59–87 of the International Law Studies series are available electronically at <http://www.usnwc.edu/ild>.

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Preface

From June 22 to 24, 2010 the Naval War College hosted over one hundred and eighty renowned international scholars and practitioners, military and civilian, and students representing government and academic institutions to participate in a conference examining a number of international law issues arising from the changing character of war. The conference featured opening, luncheon and closing addresses, as well as five panel discussions addressing specific legal issues that relate to the changing character of war. Panelist comments were summarized by a commentator, followed by questions from attendees. These discussions resulted in detailed examinations of key issues.

The following conference summary was prepared by Commander James Caley, JAGC, US Navy, a member of the Navy Reserve unit that supports the Naval War College's International Law Department. The summary recapitulates the highlights of each of the conference speakers' presentations. As co-editors, we are deeply indebted to Commander Caley for his attention to detail and assistance in facilitating the publication of this "Blue Book." We would also be remiss if we did not thank Captain Ralph Thomas, JAGC, US Navy (Ret.), for his outstanding support and dedication in editing the submissions for this volume of the International Law Studies series. We also extend our sincere appreciation to Susan Meyer of the Naval War College's Desktop Publishing Division for expertly preparing the page proofs. Additionally, we would like to thank Albert Fassbender and Shannon Cole for their excellent work in proofreading the conference papers. The quality of this volume is a reflection of their professionalism and outstanding expertise.

Opening Address

Dr. Nicholas Rostow, a former Legal Adviser to the National Security Council, delivered the opening address. Focusing on what some refer to as targeted killings and others call extrajudicial executions, Dr. Rostow critically examined the interplay between the law of armed conflict (or international humanitarian law) and the burgeoning body of human rights law. Dr. Rostow's remarks suggested that the interjection of human rights law into armed conflict has created dangerous and divisive ambiguity in, and uncertainty as to, what law should apply and how, the effect of which will be to worsen, not ameliorate, the nature of war.

After first highlighting the agenda and identifying issues dividing the international community, Dr. Rostow critiqued the report, released in May 2010, entitled “Study of Targeted Killings” prepared by United Nations Special Rapporteur Philip Alston. In the report, Alston challenges the legality of targeted killings through the use of drones in Afghanistan and Pakistan. Critical of nations such as the United States, Russia and Israel that authorize drone attacks based on self-defense, Alston questions the credibility of that justification and notes that, even if such action could be justified, targeting of individuals still requires compliance with the law of armed conflict and human rights law.

Dr. Rostow argued that Alston fails to examine individual actions or apply the correct law, furnishes no explanation as to whether his analysis was predicated upon international humanitarian law or human rights law, and fails to articulate what he means by human rights law. Dr. Rostow also questioned Alston’s views that direct participation in hostilities, as defined in Common Article 3 of the 1949 Geneva Conventions and Additional Protocol I, should be narrowly construed, applying only to persons observed to be actively engaged in hostilities. Dr. Rostow urged a broader interpretation, tempering his view with the caveat that “the United States has no interest in catching people in counterterrorism nets that have nothing to do with terrorism.”

Dr. Rostow rejected Alston’s views that the decision to employ force in self-defense should hinge on the availability of “smart” weapons, and that Central Intelligence Agency (CIA) officers who operate drones are unlawful combatants because they do not wear uniforms. In closing, Dr. Rostow exhorted the attendees to seek greater clarity and certainty in the challenging issues to be addressed during the conference.

***Panel I: The Changing Character of the Battlefield:
The Use of Force in Cyberspace***

Panel I tackled the complex legal issues underlying this potent and growing form of warfare. Moderated by Captain Stacy Pedrozo, JAGC, US Navy, of the Naval Justice School faculty, the panel, consisting of Columbia Law School professor Matthew Waxman, Durham University Law School professor Michael Schmitt and Professor Derek Jinks, current Stockton Chairholder at the Naval War College, used recent large-scale cyber attacks in the countries of Estonia and Georgia to illustrate how cyber warfare may be conducted and how difficult it is to combat, especially with regard to the issues of identification and attribution. Other significant issues explored included when does a cyber attack constitute use of force, what avenues of response (kinetic v. non-kinetic) may exist and what is the responsibility of

States for attacks launched by non-State actors from within those States. Professor Jinks raised additional questions as to the appropriate burden of proof for State responsibility, noting that three competing standards (clear and convincing, beyond a reasonable doubt and fully conclusive) have been advanced.

Captain Pedrozo opened the panel with a summary of the April 2007 cyber attacks in Estonia, which resulted in defacement of, and denial of service from, websites belonging to the Estonian Parliament, banks, ministries, schools, newspapers and broadcasters. Several websites were forced to shut down for a few hours or in some instances even longer when these sites, which typically received one thousand visits a day, were flooded with two thousand visits per second. Estonia accused Russia of direct involvement but failed to furnish proof, and no clear picture has ever been produced as to whether this was ever a State-sponsored event. Estonia charged only one person, an ethnic Russian Estonian, who was eventually convicted of attacking the website of the Estonian Reform Party. He was fined approximately \$1,640. Russian authorities refused to help with the investigation.

Professor Waxman commented that cyber attacks are both legally and factually difficult to characterize. Legally speaking, Article 2(4) of the United Nations Charter prohibits any State from using force against another, which, in the view of many, means use of kinetic force and, hence, would not prohibit cyber attacks. In the view of others, coercion alone—either by economic pressure or other mode—is enough to constitute a use of force. The problem is distinguishing lawful from unlawful coercion. Factually, cyber attacks are difficult to identify and attribute, making it hard to assign culpability. This is not a new problem for Article 2(4) analysis as there is much UN case history from the proxy conflicts of the Cold War.

Professor Schmitt observed that there is authority for the proposition that unless there is an armed attack, a State cannot respond in self-defense within the meaning of Article 51 of the UN Charter without authority from the Security Council. In Professor Schmitt's view, however, States have a right to defend themselves before an attack with a response authorized at the last opportunity to prevent an attack. The self-defense right includes the right to respond kinetically to cyber attacks so long as the response is proportional. With respect to non-State actors (e.g., insurgent groups), a proper response to a cyber attack may be to first demand that the host State take action against the non-State actors and, if unproductive, attack only if the right of the host State to defend its sovereignty is weaker than the right of the attacking State to self-defense.

A more difficult issue may be ascertaining the relevant standard of proof for proving cyber attack liability. Clear and compelling evidence is the proposed standard, but may be impossible to reach given current levels of technology, which cannot overcome identity masking. Professor Jinks pointed out that identifying the

cyber perpetrator is essential to any response in self-defense and that identification is very difficult. Perpetrators operate in decentralized networks and can easily mask their identities. Though Article 51 of the UN Charter requires proof of State action in order to respond, there is widespread precedent of States responding to violent attacks from non-State actors under justification of self-defense, to include the *Caroline* case.

If States have a right to respond to non-State actors in the territory of another State, they still must meet a high standard of proof and perhaps the host State must first given the opportunity to deal with the non-State actors. According to Professor Jinks the development of an accountability framework requires (i) establishing a legal standard for State response and (ii) agreement on the appropriate standard of proof. At this juncture, a State may respond if it is able to prove the host State exercises “control,” as is the case when a State employs contractors. An alternative basis may exist under Article 51 if the State acknowledges and adopts the action of the non-State actor, is unable to assist in neutralizing the threat or harbors the responsible group. The most appropriate standard of proof may be clear and convincing evidence, though the International Criminal Tribunal for the former Yugoslavia uses the standard of “beyond a reasonable doubt” and the International Court of Justice employs a standard of fully conclusive evidence. Given the varying existing standards of proof and the difficulty of meeting any one of them in a cyber context, there may be a need to relax both the standard of State responsibility and the standard of proof. To relax the standard of proof is to invite significant collateral costs. The solution is to forge an international consensus on State obligations and the consequences of breaches.

The cyber attacks in Estonia involved civilian targets. Can cyber attacks be directed at civilians? To be sure, violent attacks are prohibited but non-violent cyber attacks do not necessarily run afoul of international humanitarian law. Perhaps the issue should turn on the consequences of the attack, the seriousness of which, in the cyber arena, might justify an armed response. The objective of the attack also raises issues. For example, the cyber attack on the Georgian Ministry of Defence was directed at a military target. The indirect effects on commerce of an attack on a military target may also be deemed to be direct, if they are foreseeable. Finally, those conducting the cyber attack are often civilian contractors. The “direct participation in hostilities” standard should therefore apply.

Luncheon Address

University of Texas School of Law professor Robert Chesney delivered a thought-provoking luncheon address that recounted the results of the thirty-three habeas

corpus proceedings in US federal courts involving detainees held at Guantanamo Bay. Professor Chesney explored the differing detention standards utilized by the Bush and Obama administrations, the 2001 statute authorizing military force against terrorists and the statutes pertaining to military commissions. Professor Chesney also noted the widely diverging conclusions reached by trial and appellate judges regarding the applicability of the law of armed conflict to these cases.

Beginning with the general observation that over the last several years great interest has been taken in US detention operations in Guantanamo Bay but not Iraq or Afghanistan, Professor Chesney suggested that the volume of habeas litigation by Guantanamo detainees is explained by the fact that these detainees are confined outside the reach of the United Nations or other international body, therefore in every practical sense held within the constant jurisdiction of the United States alone.

Of the thirty-three decisions by Article III courts addressing the merits of Guantanamo detainee petitions for habeas corpus, nineteen granted relief, resulting in the release of eleven detainees. Fourteen detainees have lost on the merits, with two of these cases affirmed on appeal. The definition of who may be detained pursuant to the Authorization for Use of Military Force for acts related to international terrorism is still evolving. The current standard authorizes detention of persons who were members of—or substantially supported—Taliban or al-Qaida or associated forces engaged in hostilities against the United States or coalition partners. The definition is informed by law of war principles, yet the DC Circuit Court of Appeals opined that the law of war is irrelevant to this formulation, deciding that domestic law, grounded in the Military Commissions Act, furnishes the relevant statutory background. In Professor Chesney's view, the varied judicial opinions make this area ripe for further legislative action.

Panel II: The Changing Character of the Participants in War: Civilianization of Warfighting and the Concept of "Direct Participation in Hostilities"

Panel II, which was moderated by Professor Charles Garraway, Associate Fellow of the Royal Institute of International Affairs (Chatham House) in the United Kingdom, wrestled with contentious issues surrounding the concept of direct participation in hostilities (DPH). Panel members Ryan Goodman, a New York University law professor; Brigadier General Blaise Cathcart, Judge Advocate General of the Canadian Forces; Françoise Hampson, an Essex University law professor; and Dr. Nils Melzer, legal advisor to the International Committee of the Red Cross (ICRC), examined the ICRC's controversial 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (IG) and the extent to which the IG does or does

not reflect international law. Among the salient issues considered were the contrasting and confusing status- and behavior-based approaches in international humanitarian law and human rights law to determining when civilians are “directly participating in hostilities,” thereby losing protections against direct attack otherwise provided to civilians under law.

Professor Garraway opened the panel by describing the 2009 IG as both uncontroversial and highly controversial. International humanitarian law hinges on the principle of the distinction between combatants and non-combatants. Non-combatants are presumed not to be directly participating in hostilities, and therefore are entitled to protection from attack. In the ICRC’s view, Professor Garraway noted, civilians lose this protection if—but only if, and only for so long as—they directly participate in hostilities.

Professor Goodman disagreed with the ICRC interpretation of international law in Section IX, “Restraints on the Use of Force,” noting that the IG failed to identify specific treaty law and State practice in support of its position. Professor Goodman also noted the law of war already contains restrictions applicable to the killing of an otherwise legitimate target, to include combatants who are *hors de combat*; escaping prisoners of war; and actions taken in reprisal. He noted that such restrictions may seemingly support the ICRC’s position on restraints of the use of force, but not to the extent which the IG suggests.

Professor Hampson discussed the ongoing debate regarding the interrelationship between international humanitarian law and human rights law with respect to targeting. Specifically, given the nature of a given conflict, she analyzed the applicable law (Hague and Geneva treaty law and customary international law) and when each might apply. She noted that the ICRC position relies on both human rights law and the application of a law enforcement paradigm, which utilizes a behavior-based approach to distinguish civilians from combatants. Hence, when a civilian behaves like a combatant by engaging in hostilities, he loses the protection from attack that is accorded civilians during that action only. In contrast, international humanitarian law uses primarily a status-based approach for distinguishing civilians from combatants. The ICRC in the IG now accepts that a member of an armed group exercising a continuous combat function creates a category that is status based. Logically, then, for status-based targeting decisions to be lawful, LOAC has to prevail over human rights law. Professor Hampson notes, however, that the problem is a bit more complex depending on the nature of the conflict and, in fact, she argued that in some limited circumstances human rights law may prevail.

Brigadier General Cathcart noted that distinguishing civilians from combatants is intelligence driven, and therefore must be well established for purposes of targeting. Any doubt is resolved in favor of finding civilian status.

Finally, Dr. Melzer remarked that the purpose of the IG is to encapsulate the ICRC's interpretation of the current state of international law, and provide key legal concepts that can be used by legal advisors to guide military commanders and develop rules of engagement. Dr. Melzer also clarified that targeting should be based on the combat function of the target. Persons who function as combatants, and who are trained and have the capability to participate in hostilities, are lawful targets. It is the ICRC's view that the question of whether a person loses the protection of civilian status must be determined at the time of targeting. If a civilian joins an organized armed group, such person falls into a continuous combat function and can be lawfully targeted. On the other hand, persons that only intermittently participate in hostilities, without allegiance to any particular organized armed group, can be lawfully targeted only when they are performing a combat function. The intervening periods must be governed by law enforcement principles.

***Panel III: The Changing Character of Weapon Systems:
Unmanned Systems/Unmanned Vehicles***

Panel III, moderated by Villanova University School of Law professor John Murphy, was comprised of Professor Pete Pedrozo of the Naval War College, Hina Shamsi of New York University School of Law, Colonel Darren Stewart of the San Remo Institute and Professor Ken Anderson of American University's Washington School of Law. Its primary focus was unmanned (or remotely piloted) aerial vehicle (UAV) operations in Afghanistan and Pakistan. Ms. Shamsi, Senior Advisor to the Project on Extrajudicial Executions at New York University School of Law and a contributor to a recent United Nations special report on targeted killings (Alston Report), criticized recent UAV operations on multiple grounds, including lack of transparency and accountability, and the extent to which targeted killing destabilizes existing legal frameworks. Professor Pedrozo outlined the legal basis on which CIA-controlled UAVs are operated in Pakistan, while Professor Anderson discussed whether geographic considerations delimit UAV use.

Professor Murphy opened the panel by lauding unmanned drones as systems capable of precision targeting that minimize civilian casualties. In contrast, Ms. Shamsi, a contributor to the Alston Report, criticized drone (UAV) operations, arguing that they make it easier to kill and thereby facilitate an expansion of executions beyond those that are legally justified under international humanitarian law. She further contended that the operation of drones by the CIA, though not illegal under international humanitarian law, should nevertheless be halted because the CIA is not capable of complying with the law of war and is not sufficiently transparent in its operations to verify compliance. Moreover, she concluded, under human

rights law, targeted killings are illegal because they are not designed to accomplish an objective, but are merely to kill. She observed that while the United States, Russia and Israel have all justified drone attacks on the basis of self-defense, this justification cannot stand where the resulting deaths occur in another State's territory, such as in Pakistan.

Professor Pedrozo noted that special rapporteur Alston did not possess a mandate to investigate or render conclusions with respect to international humanitarian law, and thus his assertions should be understood only insofar as they relate to human rights law. Additionally, he observed that CIA operations fully comport with the law of war. He asserted that drone operations taking place in Pakistan against Taliban and al-Qaida forces do not violate Pakistani sovereignty.

Professor Anderson summarized the general view of the international legal community on drones, saying that they may be used in armed conflict or in law enforcement operations, subject to geographic limitations, and are governed by human rights law in those instances when human rights law is not superseded by international humanitarian law. This is in contrast to the view of the United States that drones may be deployed without geographic limitation against combatants wherever they are located when the United States chooses to exercise its lawful right of self-defense.

Colonel Stewart commented that UAVs are like any other weapon platform; they have significant capabilities and vulnerabilities. As a result, to properly evaluate the use of UAVs they must be viewed in the context of the overall military plan or strategy. Only in such context can the UAV targeting be truly determined to be lawful or unlawful. Colonel Stewart also argued that evolving technologies, such as autonomous weapon systems, while enhancing the ability to neutralize threats, tend to replace human judgment with algorithms, a potentially unwise exchange. The legal community must be the driving force to ensure the lawful application and use of such emerging technologies.

***Panel IV: The Changing Character of Tactics: Lawfare in
Asymmetrical Conflicts***

Panel IV delved into the lawfare phenomenon and its growing impact on how warfare is conducted by the United States, Great Britain and Israel. The panel, moderated by Mr. David Graham of The Army Judge Advocate General's Legal Center and School, included Duke University School of Law professor Charles Dunlap, Ms. Ashley Deeks of Columbia Law School, Tel Aviv University professor Pnina Sharvit Baruch and Captain Dale Stephens of the Royal Australian Navy. Substantial comment was made on the September 2009 Report of the United Nations Fact

Finding Mission on the Gaza Conflict prepared by Justice Richard Goldstone (Goldstone Report), and the manner in which Hamas used the report in an effort to discredit and thereby constrain Israel. Observations were also made on the unintended consequences of recent attempts by military forces to limit civilian casualties in Afghanistan, such as the trend by insurgents to embed themselves even more closely and deeply within civilian populations. Professor Sharvit Baruch detailed the lengths to which Israeli forces now go—far above and beyond the requirements of international law—to avoid civilian casualties.

Mr. Graham opened the panel with a discussion of asymmetric urban fighting with non-State actors, highlighting the Goldstone Report. The report discusses the legality of Israeli operations against Hamas in Gaza and finds thirty instances in which Israel purportedly violated the law of armed conflict, including reckless use of white phosphorus and fléchette munitions. Mr. Graham questioned whether the Goldstone Report portends—or reflects—a fundamental shift in the manner in which principles of the law of armed conflict are applied in asymmetric armed conflict.

Professor Sharvit Baruch discussed the exhaustive approach Israel takes to comply with the law of armed conflict prior to target approval, to include intelligence vetting, legal review of both preplanned and immediate targets, and extensive warnings to civilian populations. She viewed Article 57 (Precautions in Attack) of Additional Protocol I as being customary international law and focused her remarks on Israel's efforts to comply with its dictates.

Professor Dunlap, to whom the term "lawfare" is largely credited, described it as a method of exploiting the law during armed conflict to achieve operational ends. For instance, just prior to the first Gulf War, the United States purchased satellite imagery of coalition forces from multiple commercial companies, thereby denying that intelligence information to Iraq and obviating the need for military action to keep Iraq from obtaining the imagery.

Professor Dunlap observed that insurgents are adept lawfare operators. He cited as an example that the law of armed conflict does not prohibit civilian casualties during combat operations; they are accepted as collateral damages under rules governing necessity, distinction and proportionality. But when a US official announces that the United States will not engage the Taliban if such engagement would risk the life of civilians, the Taliban will start to embed with civilians. If an attack occurs that kills or injures civilians, although the attack was lawful, media reports are often adverse.

Ms. Deeks spoke on various court decisions and how they divide the United States and its European coalition partners. She focused on four broad categories of litigation: lawfulness of detention, lawfulness of treatment during detention,

lawfulness of a transfer of custody from one State to another and lawfulness of particular intelligence activities. The differing decisions of the US and European courts on such cases are causing tensions in the operational environment. The European courts have provided less deference to the decisions of the executive branch in military and international affairs matters as compared to courts in the United States. As a result of such litigation risk, European military operations may be curtailed to avoid gray areas in the law. In addition, a change in policy brought about by litigation can, over time, have a chilling effect on the willingness of coalition partners to work together and share information. She cited potential steps that could reduce the risk of litigation as including ensuring States' compliance with counterinsurgency (COIN) principles in an effort to win the hearts and minds of the affected population and the establishment of independent non-judicial mechanisms designed to oversee the decisions of the executive branch.

Captain Stephens argued that lawfare is neither good nor bad. Laws by their nature are indeterminate, thereby creating gaps that require filling. Lawfare attempts to take advantage of such gaps. To fill such gaps, legal advisors attempt to use legal principles, which are generally moral concepts. These legal principles, if used properly, can effectively be used as a means of counter-lawfare. One such way is to apply the COIN doctrine in asymmetric conflicts and to emphasize the rule of law in COIN operations as a tool of war.

***Panel V: The Changing Character of International Legal Scrutiny:
Rule Set, Investigation and Enforcement in Asymmetrical Conflicts***

Panel V considered the unprecedented levels of public and judicial scrutiny now being given to the use of armed force. Panel moderator Captain Rob McLaughlin, Royal Australian Navy, and panel members Professor Wolff Heintschel von Heinegg of Europa-Universität Viadrina, Commander Andrew Murdoch of the Royal Navy, Dr. Roy Schöndorf of the Israeli Ministry of Justice and Commander James Kraska, JAGC, US Navy, a member of the Naval War College faculty, examined instances of internal and external scrutiny, such as that occurring as a result of Israeli actions to enforce its naval blockade on Gaza. Concern was expressed that this scrutiny has the potential to dissuade military commanders from militarily appropriate and lawful actions due to the costs and burdens of such scrutiny, irrespective of liability.

Captain McLaughlin began by observing that all countries are subject to intense legal scrutiny in the operational environment, with non-governmental organizations (NGOs), among others, well equipped to conduct independent investigations. Key considerations are who is investigating and the body of law

applied in the investigation. Legal scrutiny is especially significant in the asymmetric context.

Professor Heintschel von Heinegg asserted that the law of armed conflict does not recognize asymmetry. This law simply gives privileged status to certain persons. In asymmetric conflicts, one party attempts to compensate for military weaknesses by taking advantage of the weaknesses imposed on the other party by the law of war. Examples are perfidy and use of human shields, though employing human shields would not necessarily prevent an attack under law of war principles. He maintained that the law of armed conflict is flexible, but often not helpful when applied to asymmetric conflict. He opined that perhaps new law needs to be forged. With respect to investigations, nations must move quickly to publicly supply accurate information as to what had occurred. Professor Heintschel von Heinegg observed that enforcement in the asymmetric context is difficult. He indicated that the International Criminal Court could be useful in this regard, although its value may be overestimated by some.

Commander Murdoch reviewed three cases to demonstrate the manner in which recent court decisions and related public scrutiny have negatively influenced British operational commanders. In each case there has been some form of military justice, civil proceeding, parliamentary review and/or public inquiry that took years to complete. This level of scrutiny is very costly in time and resources. It also exposes military and government personnel to personal and reputational risk. To help offset such risk, the military requires a well-resourced operational capability to respond to and, if possible, preempt a judicial challenge.

Dr. Schöndorf offered the perspective that Hamas has engaged in lawfare by routinely accusing Israel of war crimes. The purpose of the allegations was to damage Israel's reputation and force investigations. These tactics can be very effective for non-State actors because once an allegation is made, the reputation of the accused State is immediately compromised. The non-State actor does not face the same risk. In addition, once an allegation is made a democratic State will take such an allegation seriously and conduct an investigation. In contrast, a non-State actor has no similar interest in conducting its own investigation and there is no public expectation that it do so. As a result, to discredit these allegations, nations are forced to expend enormous amounts of time and resources, but by the time the results of such investigations are completed the public is no longer concerned with the incident.

Commander Kraska addressed the question of whether Israel's naval blockade of Gaza is subject to the law of naval warfare or the law of the sea. While noting disagreement, he argued that the law of naval warfare on blockade is applicable, even if the hostilities do not constitute international armed conflict, because the area is

one of continuous violence. This, he suggested, is consistent with the US Supreme Court interpretation of international law involving the North's blockade of the South in the American Civil War.

Closing Address

Professor Emeritus Yoram Dinstein of Tel Aviv University, the 1999 and 2002 Stockton Professor at the Naval War College, delivered the closing address. His remarks focused on the fact that scholars and military practitioners of the law of armed conflict have become too defensive and apologetic in the face of both (i) lawfare, which is used effectively by the adversaries of civilized nations, and (ii) increased pressure brought to bear by overzealous human rights activists and NGOs who desire a “regime change” from the law of armed conflict to human rights law. His basic theme was that there is no reason to be defensive; in fact, the focus of the discussion and the tone of the response need to be changed.

In Professor Dinstein's view, there are two modern phenomena that have led civilized nations to become excessively apologetic and defensive when waging war. The first is that the “barbarians at the gate”—rogue States and terrorist organizations—are exploiting a lesson from armed conflict in Vietnam, that is, that a civilized nation's warfighting effort can be effectively impeded by eroding public support for pursuing victory. In the war in Afghanistan, public support for confronting the enemy is eroded by highlighting civilian casualties as collateral damage in the course of hostilities. “We” (whom he defined as the scholars and military practitioners of civilized nations) have, in fact, allowed false notions about the unacceptability of civilian casualties, under the law of armed conflict, to take root and unnecessarily hamper our military operations. He stressed that the law of armed conflict takes civilian casualties as collateral damage for granted, and only requires belligerent parties to minimize them.

The second phenomenon is that NGOs and others assert—wrongly and dangerously—that human rights law supplants the law of armed conflict. The human rights NGOs have contributed to a misperception that lawful State action is unlawful. Undeniably, human rights law can fill gaps in the law of armed conflict, where such gaps exist. The crux of the matter, however, is that the law of armed conflict constitutes *lex specialis*. It has been recognized as such by consistent State practice and by judicial opinions.

Professor Dinstein believes that, if civilized nations are to prevail, scholars and military practitioners need to change the tone and tenor of the debate, making sure that the response to spurious criticisms is widely heard and understood.

Conclusion

We hope that the thought-provoking articles published in this “Blue Book” will add to—and help shape—the debate on the multiple complex emerging legal issues presented by the changing character of war. The legal insights offered here to legal practitioners and scholars should assist them as they address these and other issues that may evolve in future conflicts.

This “Blue Book” would not have come to fruition had it not been for the enormously successful conference made possible in large measure by the conference committee under the leadership of Major Mike Carsten, US Marine Corps, working with Mrs. Jayne Van Petten of the International Law Department, and the support provided by the Naval War College Foundation, the University of Texas School of Law, the International Institute of Humanitarian Law, the Lieber Society on the Law of Armed Conflict (American Society of International Law) and the *Israel Yearbook on Human Rights*. We thank these individuals and organizations for their enduring support and generosity.

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