



Conference Brief

INTERNATIONAL LAW DEPARTMENT
Center for Naval Warfare Studies
United States Naval War College

Hosted by:

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The University of Texas School of Law, the International Institute of Humanitarian Law (San Remo, Italy), and the Lieber Society on the Law of Armed Conflict (American Society of International Law)

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International Law and the Changing Character of War

Compiled by

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From June 22 - 24, 2010 the Naval War College hosted 100 renowned international scholars and practitioners, military and civilian, and students representing government and academic institutions to participate in a conference examining a number of legal issues pertaining to international law and 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 examination of key legal issues.

Key Insights:

1. A clash between international humanitarian law and human rights law is being increasingly exploited, as illustrated by the conflict over Gaza, by those waging “lawfare,” creating uncertainty as to the law applicable to armed conflict, with the result that lawful use of armed force is being unduly constrained without necessarily affording greater protection to non-combatants.
2. A vigorous debate has arisen as to whether the standards for determining direct participation in hostilities are being clouded and possibly eroded by such efforts as the 2009 ICRC Interpretative Guidance, through introduction of unworkable and unsustainable criteria.
3. Cyber attacks in limited circumstances may constitute use of force within the meaning of the UN Charter, entitling states to respond lawfully in self-defense. Decentralized computer networks and ease of masking identities complicates assigning responsibility, highlighting a need for greater consensus on an appropriate standard of state responsibility and its correlative standard of proof.
4. U.S. detention operations have catalyzed widespread litigation and divided the courts as to who may lawfully be detained and for how long, making the issue ripe for legislative action.
5. Use of remotely piloted vehicles by the U.S. to attack non-state actors has generated substantial but ill-founded controversy over the legality of employing such weapons systems in other states on the basis of self-defense.



OPENING ADDRESS:

Mr. Nicholas Rostow

Former General Counsel and Senior Policy Adviser to the U.S. Permanent Representative to the United Nations; former Legal Adviser to the National Security Council; former Staff Director, Senate Select Committee on Intelligence; and 2001 Charles H. Stockton Professor of International Law, Naval War College

The opening address was delivered by Nicholas Rostow, a former Legal Advisor to the National Security Council and 2001 Stockton Professor. Focusing on what some refer to as targeted killings and others call extrajudicial executions, Rostow critically examined the interplay between the law of armed conflict (or international humanitarian law) and the burgeoning body of human rights law. 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 character of war.

After first highlighting the agenda and identifying issues dividing the international community, Rostow critiqued the report, released earlier in the month, from United Nations special rapporteur Philip Alston. In the report, Alston challenged 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 questioned the credibility of that justification and noted that, even if such action could be justified, targeting of individuals still requires compliance with the law of war and human rights law.

Rostow argued that Alston failed to examine individual actions or apply the correct law, furnishing no explanation as to whether his analysis is predicated upon international humanitarian law or human rights law, and failed to articulate what he meant by human rights law. Rostow also questioned Alston's views that direct participation in hostilities, as defined in Common Article 3 and Additional Protocol I, should be narrowly construed, applying only to persons observed to be actively engaged in hostilities. Rostow urged a broader interpretation, tempering his view with the caveat that "the United States has no interest in catching people in counter-terrorism nets that have nothing to do with terrorism."

Rostow rejected Alston's views that the decision to employ force in self-defense should hinge on the availability of "smart" weapons, and that CIA officers who operate drones are unlawful combatants because they do not wear uniforms.

In closing, Rostow exhorted the conference to seek greater clarity and certainty.



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. Chaired by Captain Stacy Pedrozo, JAGC, USN 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, 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, specifically 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 longer when these sites, which typically

received 1000 visits a day, were flooded with 2000 visits per second. Estonia accused the Kremlin of direct involvement but failed to furnish proof, and no clear picture has ever been produced 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. 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 UN Security Council. In Schmitt's view, states have a right to defend themselves before an attack with a response authorized at the last opportunity to prevent an attack. The right includes



the right to respond kinetically in self-defense 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 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 has an obligation to be first given the opportunity to deal with the non-state actors. The development of an accountability framework requires: (1) establishing a legal standard for state response; and (2) 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 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 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 obligations and 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 which, in the cyber arena, the seriousness of which might justify an armed response. The objective of the attack also raises issues. For example, the cyber attack on the Georgian Ministry of Defense 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:
Naval Station Officers’ Club**

**Professor Robert M Chesney
Charles I. Francis Professor in Law,
The University of Texas School of
Law**

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 U.S. 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. 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 U.S. detention operations in Guantanamo Bay, but not Iraq or Afghanistan, Professor Chesney suggested that the volume of *habeas corpus* litigation by Guantanamo detainees is explained by the fact that these detainees are confined outside the reach of the UN or other international body, and

therefore in every practical sense are 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 (“AUMF”), Pub. L. 107-40, 115 Stat. 224 (2001) is evolving. The current standard authorizes detention of persons who were part of or substantially supported Taliban or al-Qa’ida forces or associated forces engaged in hostilities against the United States or coalition partners. The definition is informed by law of war principles, and yet the DC Circuit Court of Appeals recently 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:
Civilization of War-Fighting
and the Concept of “Direct
Participation in Hostilities”**

Day one ended with Panel II. Moderated by Professor Charles Garraway, Associate Fellow of the Royal Institute of International Affairs (Chatham House), the



panel 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 highly controversial 2009 Interpretive Guidance (IG) on DPH and the extent to which it 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," and thereby lose protections against direct attack otherwise provided to civilians under law..

Professor Garraway opened the panel by flagging the 2009 ICRC Interpretive Guidance 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, 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 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. 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 (CIL)) 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 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 its Interpretive Guidance 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, however, notes 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. In the view of Professor Garraway and other distinguished attendees, the Interpretive Guidance also purports to limit the level of force employed against the enemy to that necessary to achieve the objective and, in this way, places a greater burden on the attacking party. Yet, no such limitation exists in international humanitarian law.

Finally, Dr. Melzer remarked that the purpose of the Interpretive Guidance is to encapsulate the ICRC's interpretation of the current state of international law, providing key legal concepts that can be used by legal advisors to guide military commanders and to develop rules of engagement. Melzer also clarified that targeting should be based on combat function of the target. Persons who function as, are trained, and have capability to participate in hostilities, are lawful targets. It is the ICRC's view that the question 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, the person who only intermittently participates in hostilities, without allegiance to any particular organized armed group, can only be lawfully targeted when they are directly

participating in hostilities. The intervening periods must be governed by law enforcement principles.

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

Day two began with Panel III. This panel, headed by Villanova law professor John Murphy, was comprised of Naval War College professor Pete Pedrozo, Hina Shamsi of New York University Law School, 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, a Senior Advisor to the Project on Extra-Judicial Executions at New York University School of Law and a contributor to a recent United Nations special report on targeted killings (the Alston report), criticized recent UAV operations on multiple grounds, including, for example, 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 intelligence and targeting that minimize civilian casualties.



In contrast, Ms. Shamsi, a contributor to the Alston report, criticized drone 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 their 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 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, Professor Pedrozo observed that CIA operations fully comport with the law of war. He asserted that drone operations taking place in Pakistan against Taliban and al-Qa'ida forces do not violate Pakistani sovereignty.

Professor Anderson summarized the general view of the international legal community on drones thus: they may be used in armed conflict or in law

enforcement operations, subject to geographic limitations, and are governed by human rights law where 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 to address combatants, wherever they may be, when the United States chooses to exercise its lawful right of self-defense.

Colonel Stewart commented that UAVs are like any other weapon platform. Like every weapon platform, UAVs 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 with such context, can the UAV targeting be truly determined to be lawful or unlawful. 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 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 David Graham of the U.S. Army's Legal Center and School,



included Duke University School of Law professor Charles Dunlap, Ashley Deeks of Columbia Law School, Tel Aviv University professor Pnina Sharvit Baruh, 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 by Justice Richard Goldstone (“the 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, e.g. the trend by insurgents to embed themselves even more closely and deeply within civilian populations. Professor Sharvit Baruh 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 asymmetrical urban fighting with non-state actors, highlighting the September 2009 Report of the United Nations Fact Finding Mission on the Gaza Conflict by Justice Richard Goldstone (“the Goldstone Report”). The Goldstone Report discussed the legality of Israeli operations against Hamas in Gaza, and found thirty instances in which Israel purportedly violated the law of armed conflict, including reckless use of white phosphorous and flechette 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 Baruh discussed the exhaustive approach Israel takes to comply with the law of armed conflict prior to target approval, to include intelligence vetting, legal review for both pre-planned and immediate targets, and extensive warnings to civilian populations. She views Article 57 (Precautions in Attack) of Geneva Additional Protocol I as being customary international law, and she 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 Gulf War, the United States contracted with multiple satellite companies in an effort to deny Iraq the opportunity to purchase satellite imagery of Coalition Forces, obviating the need for military action in this regard. Insurgents are adept lawfare operators. 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. Yet when an official of the United States announces a policy or rule that the U.S. will not engage the Taliban if such engagement would risk the life of civilians, the Taliban will start to embed with civilians.

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: 1. lawfulness of detention; 2. lawfulness of treatment during detention; 3. lawfulness of a transfer of custody from



one state to another; and 4. lawfulness of particular intelligence activities. The differing decisions of the United States 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 its United States. As a result of such litigation risk, European military operations may be curtailed or limited operation to avoid the gray area of the law. In addition, a change in policy brought about by litigation, can over time have a chilling effect on coalition partners willingness to work together and share information. Potential steps to reduce the risk of litigation include, states complying with COIN principles in an effort to win the hearts and minds of the affected population and the need to establish independent non-judicial mechanisms that are designed to oversee the decisions of the executive branch.

Captain Stephens offered a theoretical discussion on lawfare. He argued that lawfare is neither good nor bad. Laws by their nature are indeterminate 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 counterinsurgency doctrine in asymmetrical conflicts and emphasizing the rule of law in counterinsurgency operations as a tool of war.

PANEL V:

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

The last panel, ending day three, was Panel V, which considered the unprecedented levels of public and judicial scrutiny now being given to the use of armed force. Panel head Rob McLaughlin, a Royal Australian Navy captain, and panel members Professor Dr. 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, U.S. Navy, a member of the Naval War College faculty, examined instances of internal and external scrutiny, such as that now occurring as a result of Israeli actions to enforce its naval blockade on Gaza. Concern was expressed for the potentiality that military commanders will be dissuaded 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 nongovernmental organizations, 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 Dr. 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 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 is not helpful in addressing asymmetrical conflict. Perhaps new law needs to be forged. With respect to investigations, nations must move quickly to and supply accurate information. Enforcement in the asymmetrical context is difficult. Perhaps the International Criminal Court may be of some use, though its value may be overestimated.

Commander Murdoch reviewed three cases to demonstrate how recent court decisions and related public scrutiny has negatively influenced British operational commanders. In each case, there has been some form of military justice, civil proceeding, parliamentary review and/or public inquiry taking 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, pre-empt a judicial challenge.

Dr. Schöndorf offered the perspective that Hamas has engaged in lawfare by routinely accusing Israel of war crimes. The purpose of these 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 this risk. In addition, once an allegation is made a democratic state will take such 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 time and money but by the time the results of such investigations are completed the public interest is no longer concerned with the incident.

Commander Kraska analyzed 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 U.S. Supreme Court interpretation of international law involving the Northern blockade of the South in the American Civil War.



CLOSING ADDRESS:

Professor Yoram Dinstein
Professor Emeritus, Tel Aviv
University

Professor Emeritus Yoram Dinstein of Tel Aviv University, and the 1999 and 2002 Stockton Professor, delivered the closing address. His remarks focused on the fact that scholars and practitioners of the law of armed conflict have become too defensive and apologetic in the face of both (i) “lawfare” used effectively by our adversaries; and (ii) increased pressure brought to bear by over-zealous human rights activists and nongovernmental organizations (NGOs) who desire a “regime change” from the law of armed conflict to human rights law. His basic theme was that we have no reason to be defensive; in fact, we need to change the focus of the discussion and the tone of our response.

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, i.e., that a civilized nation’s war-fighting 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 a collateral damage in the course of hostilities. We 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 nongovernmental organizations (NGO’s) and others assert - wrongly and dangerously - that human rights law supplants the law of armed conflict. The human rights NGO’s 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. However, the crux of the matter 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 we are to prevail, we need to change the tone and tenor of the debate, making sure that our response to spurious criticisms is widely heard and understood.



CHAIRMAN'S COMMENTS

We sincerely appreciate the support provided for this year's conference by the Naval War College Foundation, the University of Texas School of Law, the International Institute of Humanitarian Law (San Remo, Italy), the Lieber Society on the Law of Armed Conflict (American Society of International Law), and the Israel Yearbook on Human Rights. Congratulations on a highly successful conference to our Conference Committee, under the leadership of Professor Derek Jinks, Stockton Professor 2009-1010, and Major Mike Carsten, USMC.

Conference speakers are preparing articles that will provide an expanded treatment of the issues discussed. These papers will be published in volume 87 of the Naval War College's "International Law Studies" (Blue Book) series. We anticipate volume 87 to be ready for distribution at the 2011 conference.

Please send constructive criticism of this year's event and recommendations for next year's conference, scheduled for June 21 - 23, 2011, to dennis.mandsager@usnwc.edu.

All the best,

Dennis L. Mandsager
Professor of Law