



# Conference Brief

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

Hosted by  
*The United States Naval War College,  
The International Institute of Humanitarian Law (San Remo, Italy), and  
The Lieber Society on the Law of Armed Conflict (American Society of International Law)*

with generous support from  
*The Naval War College Foundation and the Israel Yearbook on Human Rights*

## **Non-International Armed Conflict (NIAC) in the 21<sup>st</sup> Century**

compiled by  
Commander Christian P. Fleming, JAGC, U.S. Navy

From June 21 - 23, 2011, the U.S. Naval War College hosted distinguished international scholars and practitioners, both military and civilian, representing government and academic institutions to participate in a conference examining the evolving law in Non-international Armed Conflict (NIAC) in the 21<sup>st</sup> Century. Panelists discussed their views on how the law will develop as the world continues to struggle with the evolving threats to national and international security posed by failed and failing states, insurgencies, and transnational criminal and terrorist organizations. The conference featured opening, luncheon, and closing addresses as well as six panel discussions. Conference video for all events other than the luncheon address is available at:

<https://www.usnwc.edu/Events/International-Law-Conference-2011.aspx>

### **Key Insights:**

1. There are gaps in the law of NIAC. Nongovernmental international organizations have attempted to fill this gap and add clarity to NIAC law. States must be more involved with the process of shaping NIAC law.
2. Determining whether hostilities are a law enforcement operation or a NIAC can be difficult. The threshold question is the intensity of the violence. This is an important determination because different law will apply and different rules of engagement will be drafted depending on how the situation is characterized.
3. There are parallels between NIAC and IAC, and the trend has been convergence. However, differences exist, and it is debatable whether the two will converge completely.
4. Status matters. The different actors involved in a NIAC have different protections and different privileges. It must be determined whether one is a civilian, a civilian directly participating in hostilities, a member of a dissident armed force, a member of an organized armed group, an ordinary criminal, or a member of a state's armed forces.
5. The U.S. view that it is engaged in a transnational NIAC against al Qaeda, as enunciated in the Supreme Court of the United States' decision in *Hamdan v. Rumsfeld*, is controversial. Many scholars view the armed conflict by the U.S. against al Qaeda as not being a NIAC because it does not occur within the borders of a single state.



**OPENING ADDRESS:**

**Professor Ken Watkin**

**Charles H. Stockton Professor of International Law, Naval War College; Former Judge Advocate General for the Canadian Forces**

Professor Ken Watkin delivered the opening address. After introductory remarks, Professor Watkin began his discussion of law in NIAC by quoting Colonel Caldwell, who in 1906 defined a form of NIAC known as “small wars” as being “campaigns under taken to suppress rebellion and guerilla warfare in all parts of the world where organized armies are struggling against opponents who will not meet them in the open field.” The 1940 Small Wars Manual of the U.S. Marine Corps indicated that “small wars represent the normal and frequent operations of the Marine Corps.”

There has been limited success in articulating the law of NIAC as states themselves have been hostile to clarifying the law. The concern is that non-state actors will be given legitimacy. Given the lack of consensus of what law applies to small war, a dialogue has been left open as to how and to what degree human rights law governs the use of force; the treatment of detainees; and the accountability process in NIACs. Gaps remain and the law governing NIAC needs to be clarified for a number of reasons.

First, NIACs have been and will remain the dominant form of warfare. NIACs will not disappear, and pure international wars are becoming rare. International armed conflicts (IAC) can change to NIACs

overnight. This occurred in Afghanistan. Did troops on the ground notice the change? Did the legal advice change? As a result for most practitioners the key question to be asked is whether there is an armed conflict, rather than whether it is IAC or NIAC. Ironically, the Lieber Code, from the American Civil War, a NIAC, was a starting point for codifying rules in an armed conflict. Unfortunately the law applied in NIACs has become muddier since then.

Secondly, the lack of clarity regarding the law of NIAC can have a profound and sometimes negative effect not only on the victims of conflict, but also states in terms of whether their actions are viewed as being legitimate. For example, in post 9/11 detainee operations, the dialogue would have been much different if there had been greater clarity in the law. An application of the policy of treating captured personnel to POW standards, without providing that status, or as security detainees under Geneva Convention IV, could have been a practical, defensible and ultimately helpful approach; however, even today, an internationally agreed framework governing detainees in NIAC is lacking.

Thirdly, there is a belief that the law applicable to NIAC has no real relevance to conflicts between states. However, there can be significant cross-pollination of legal issues, such as when dealing with an insurgency during belligerent occupation.

Finally, the unwillingness of states to clarify what law applies to NIAC has



negatively impacted on their ability to influence how that law is being shaped. Gaps, both real and perceived, are being filled by restatements and manuals of international organizations instead of by states. One example is the International Committee of the Red Cross's (ICRC) 2009 Interpretive Guidance on Direct Participation in Hostilities (DPH), which deals with an issue that states appear to have been either unwilling or unable to address. This Guidance is representative of a trend suggesting that states should be held to a higher standard than their non-state opponents. Adding new inequity to the existing law is not likely to aid in reaching consensus among such significant stakeholders in international law such as states.

At the same time, states cannot complain about new manuals if they do not get fully engaged in the processes being used to clarify the law. Civilians must be protected and the question is the degree to which states want to influence that process.

### **PANEL I: Types of NIACs and Applicable Law**

Panel I, moderated by Commander James Kraska, JAGC, USN, of the Naval War College, consisted of David Graham of the U.S. Army's Legal Center and School, Professor Geoffrey Corn of South Texas College of Law, Professor Charles Garraway of the Royal Institute of International Affairs (Chatham House), and Mr. Karl Chang of the U.S.

Department of Defense Office of General Counsel.

Mr. Graham established the framework for the discussion by posing these questions: How do we recognize a NIAC? Are there different types of NIAC? How does the U.S. decide whether a NIAC exists or not? Mr. Graham commented that the law of armed conflict (LOAC) provides no definition of NIAC, nor does Common Article 3 of the Geneva Conventions of 1949. It is not clear what level of violence and how protracted that violence needs to be for there to be a NIAC. States have been reluctant to recognize NIACs within their own borders for fear of legitimizing belligerent groups. Additional Protocol I to the 1949 Geneva Conventions (AP I) does not aid in defining NIAC, and Additional Protocol II (AP II) narrows the number of NIACs to which it would apply. The U.S. practice would appear to be that of making no official determination as to whether a NIAC exists, but, instead, to state that all U.S. personnel involved in a conflict will comply with the LOAC, regardless of how such a conflict might be characterized. While perhaps self-serving, this is a practical approach with a proven track record.

Professor Corn focused on the issue of willful blindness in conflict determination, and why this is a dangerous approach. When states invoke powers under LOAC, namely to kill and detain, then states should be estopped from neglecting to provide protections under Common Article 3. Said differently, if a state is going to use the tools of war, then it must be bound by the rules of war. When a state enters an armed conflict, it cannot



label it as a NIAC or IAC to game the system. Turning to the U.S. conflict against al Qaeda, Professor Corn believes the Bush administration attempted to use a gap in the law to justify an exception to Common Article 3. The U.S. tried to use the inherent right of self-defense to justify the use of force but pretended to not have to address *jus in bello* considerations. There was willful blindness to suggest that when invoking self-defense, the question of the legal framework governing the conflict did not have to be addressed.

Professor Garraway was asked to speak from the European standpoint, and addressed the border between law enforcement and NIAC. Prior to 1949, there was either war or peace. In 1949, everything changed, and the spectrum of violence over the last fifty to sixty years has been like a rainbow, with difficulty in determining where the colors merge. The main issue for many years was the line between NIAC and IAC, but the underlying problem is determining the line between law enforcement and NIAC. Human rights law and LOAC are reasonably compatible in so far as “prohibitions” are concerned. The problem comes with the “permissions” inherent in “Hague law” on the conduct of hostilities. The challenge is, if human rights law and LOAC are not to collide, there needs to be compromises where they differ, such as in targeting. We need to know what law applies in which circumstances. The answer might lie in the intensity of the violence. Where the intensity is similar to IAC, LOAC has priority; where the level is less, human rights law has priority.

Mr. Chang observed that people are troubled by a dearth of law pertaining to NIAC. He argued that attempts to fill this perceived void by drawing from human rights law or from law relating to IAC were unpersuasive and often an exercise in applying law to situations for which it was not intended. Instead, Mr. Chang proposed that the law of neutrality, which governs the relations between belligerents and neutrals, gave principled limits on transnational NIACs. In IAC, we know who we are fighting and where we want to fight. But, in transnational NIAC, the fighting often takes place in neutral or non-belligerent States against citizens of such States. The framework of neutrality law is needed to determine when persons have forfeited their neutral immunity and acquired enemy status. Similarly, neutrality law is needed to determine where the State may use force--when other States are unable or unwilling to address threats emanating from their territory.

### **PANEL II: Legal Status of Actors in NIAC**

Commander Andrew Norris, USCG, of the Naval War College, moderated this panel, consisting of Durham University Professor (and Chairman of the War College’s International Law Department effective 1 October 2011) Michael Schmitt, Creighton University School of Law Professor Sean Watts, and Stephen Pomper of the U.S. Department of State. The panel delved into the legal status of actors in NIAC, focusing on the categorization of those fighting for and against the State. Mr.



Pomper commented on various U.S. legal policy positions regarding NIAC.

Professor Schmitt discussed the law pertaining to opposition forces in NIAC, noting that treaty law directly on point is sparse. A threshold issue is determining whether the persons are actually members of the opposition or merely individual criminals or members of criminal gangs taking advantage of the instability that exists during conflict. The latter cannot be parties to the conflict unless they are acting in support of rebel forces, and operations conducted against them are governed by domestic and human rights law. Professor Schmitt cautioned, however, that there is a possible change in the wind for well-organized armed criminal gangs competing with the State for control and authority over territory when the state must resort to the military in response. As to opposition forces in a NIAC, the easiest case is that of dissident armed forces, which are clearly targetable at all times. Other groups must display some level of structure and coordination and engage in “armed” actions (or support thereof) against the State before attaining the status of an “organized armed group” that is a party to the conflict and therefore subject to targeting as such. Individuals who act against the State without membership in an organized armed group may qualify as “direct participants in hostilities” depending on the nature of their activities. When they qualify, they become targetable for such time as they participate in the conflict. Professor Schmitt argued that if they engage in recurring acts of hostility, their targetability extends throughout the period of the acts.

Professor Watts addressed the status of government forces in NIAC, and clarified that “status” was being discussed in the classic sense as combatant status, i.e., one’s exposure to hostilities and one’s authority to engage in hostilities. Initially, Professor Watts observed that states have not turned to international law to define the status of government forces in NIAC. There is not customary international law in this area, and very little by way of treatment in scholarly journals. States have not seen a need for international law to speak to the issue of government forces in NIAC because they are committed to domestic law in this area, and have generally been reluctant to commit NIAC issues to international law. Additionally, there is a lack of consensus among states as to the law in NIAC. However, NIAC law is changing. It is possible to imagine a future, where some States and perhaps tribunals, recognize rules regulating participation of government forces in NIAC. Although NIAC rules are often developed by analogy from rules of IAC, the more likely source for such a rule would be some derivation of the existing NIAC rule of distinction. Professor Watts suggested, however, that such a rule would be ineffective at addressing the traditional concerns of distinction. The real concern with government forces’ participation in NIAC is their conduct rather than their legal status. Ultimately this exercise requires a choice between conceiving of combatant status as a gateway to protections and obligations and conceiving of status in purely political terms. This forces *jus in bello* to theorize more than usual.



Mr. Pomper noted that the rules governing actors in NIAC are less developed than in IAC. Often we draw from rules that apply in IAC and translate them into the NIAC context, but this exercise can be difficult. There are identity and status issues at the center of this exercise. Parallels exist between NIAC and IAC, but it is difficult to categorize the actors in NIAC the same way we do in IAC. How we define this has important implications for life and liberty, and has great operational significance for war fighters. There appears to be growing consensus among the United States and likeminded countries that are two primary ways an individual becomes liable to attack in a NIAC: first, if he is a member of an organized armed group; second, if he is a civilian who directly participates in hostilities (DPH) whether or not a member of an organized armed group. An individual who is a member of an organized armed group can be attacked at any time. By contrast, a civilian who DPH loses protection only for the duration of the DPH. There also appears to be growing support for the concept that to determine whether there is DPH, the nature of the harm, causation, and a nexus to the hostilities must be considered.

### **PANEL III: Means and Methods in NIAC**

The final panel of the day was moderated by Lieutenant Colonel George Cadwalader, Jr., USMC, of the Naval War College. This panel, which discussed means and methods in NIAC, consisted of Air Commodore Bill Boothby of the Royal Air Force, Professor Dr. Wolff Heintschel

von Heinegg of Europa-Universität Viadrina, and Dick Jackson of the U.S. Army Office of the Judge Advocate General International Law Department.

Air Commodore Boothby opened the panel by posing the question whether there is a meaningful distinction between the weapons law that applies during IAC and NIAC. He first examined the similarities. Namely, the fundamental principles of superfluous injury/unnecessary suffering and the prohibition of weapons that are indiscriminate by nature apply equally in both types of conflict. AP II applies to both, as do the Chemical Weapons Convention, the Biological Weapons Convention, and Ottawa Convention, and the Cluster Munitions Convention. However, there is an issue raised by expanding bullets. While treaty law bans the use of expanding bullets in IAC, it is questionable whether this is customary international law. The Kampala Review Conference for the Rome Statute of the International Criminal Court (ICC) adds the offense of employing expanding bullets in NIAC, but only if they are employed to “uselessly aggravate suffering.” Thus, expanding bullets seem to represent a point of distinction between the law applicable to IAC and NIAC. In the former, the offense is not tied to superfluous injury and unnecessary suffering; in the latter, it is. While the general trend has been convergence in the weapons law of these two classes of conflict, achieving complete convergence would require state action and adjustment of some legal interpretations.

Professor Dr. Heintschel von Heinegg focused on naval means of warfare in



NIAC. Until the 1990's there were not too many rules in NIAC related to means and methods. The emerging trend is to expand treaty law to NIAC. But, there is no indication that customary international law has been expanded to apply to NIAC. If there is a merger between the law in IAC and NIAC, then it cannot be a one-way street. The law cannot just speak about protections, but must also address privileges, like targeting. There have been some historical examples of naval components to NIAC, such as during the Spanish Civil War, Sri Lanka, Algeria, and more recently Libya. There are no substantive rules of international law prohibiting naval means and methods in NIAC. Within the respective state's territory, government forces can interfere with international navigation. But, the government forces cannot expand this to international waters. And, if non-state actors interfere with navigation, the state must warn.

Mr. Jackson remarked that the trend has been a collapsing of IAC rules into NIAC, and that this has been driven by the warfighter on the ground who does not know when the situation shifts from an IAC to a NIAC. He then discussed perfidy in NIAC. Perfidy violates the principle of distinction. The most important part of perfidy under NIAC is feigning of civilian status. The Military Commissions Act requires a showing of a violation of LOAC; perfidy may be charged as such a violation.

---

#### **PANEL IV:**

### **Recent and Ongoing NIACs**

Day two began with Panel IV. This panel, moderated by Naval War College Professor Pete Pedrozo, was comprised of Lieutenant General Raymundo Ferrer of the Philippines, Colonel Juan Carlos Gomez of Colombian Air Force, and Dr. Rob McLaughlin of Australia. Its focus was to discuss recent and ongoing NIACs.

Lieutenant General Ferrer opened the panel by presenting background information on his country, the Philippines. He then focused on the two major insurgent groups: the Maoist group and the Moro group. The Maoist group, consisting of the Communist Party of the Philippines/New People's Army, operates nationwide and is the longest-running Maoist insurgency in the world. The Moro group operates primarily in the southern Philippines, and consists of three major groups: the Moro National Liberation Front, the Moro Islamic Liberation Front, and the Abu Sayyaf Group. Lieutenant General Ferrer opined that the NIAC in the Philippines is outside the reach of the global world, and is a cry for human security.

Colonel Gomez discussed NIAC in his country of Colombia, and described how there have been forty-five years of internal conflict. He stated there are three groups of illegal armed actors: the Revolutionary Armed Forces of Columbia (FARC), the National Liberation Army (ELN), and paramilitary forces that have become criminal gangs. Colonel Gomez described



the difficulty in the new operational environment that consists of human rights law on the one side and international humanitarian law on the other, with terrorism and organized crime operating between these two norms. Essentially, human rights law provides the framework in territory controlled by the government, and international humanitarian law applies where the organized armed groups control. The dichotomy is that under human rights law, where there is typical criminal violence, the use of force is in self-defense, and proportionality in criminal law provides the context. Under international humanitarian law, where there is a high level of violence, the concepts of military necessity, military objective, distinction, humanity, and proportionality apply. This impacts rules of engagement (ROE) in these areas, determining self-defense or military necessity ROE.

Dr. McLaughlin analyzed Australia's experience in East Timor, which he described as a high-end law enforcement operation, and contrasted it with their experience in Afghanistan, which was a NIAC. It is important whether a conflict is classified as law enforcement, a NIAC, or an IAC, because under a law enforcement scenario, lethal force can be used for self-defense, but in NIAC and IAC, LOAC principles dictate. He opined that Afghanistan was clearly a NIAC since 2005, and that there was little political or strategic risk in classifying it as such – especially given that the 'other' (the Taliban) is seen to have few redeeming features. However, East Timor was, for political and strategic reasons as much as legal reasons, classified as a law

enforcement action – not least because the intervening force was invited in by Indonesia and shared responsibility for security with Indonesia, even though the militias were at the same time being supported from within the Indonesian military forces. The decision on how to characterize a conflict impacts ROE, determining whether there is attack or only self-defense ROE in place with respect to lethal force. While self-defense ROE is the same under both labels, mission accomplishment ROE is where it differs. There is little practical difference between NIAC and law enforcement insofar as detention rules are concerned.

### **LUNCHEON ADDRESS:**

**Naval Station Officers' Club**

**The Honorable Harold H. Koh  
Legal Advisor of the Department of  
State**

The Honorable Harold Koh, Legal Advisor of the Department of State, presented a luncheon address entitled "International Law and Armed Conflict in the Obama Administration." Mr. Koh opined that there was an emerging Obama-Clinton doctrine that espoused principled engagement, diplomacy, strategic multilateralism, and following the rules of domestic and international law.

Mr. Koh stated that the U.S. is deeply committed to applying LOAC to its NIAC against al Qaeda with respect to both targeting and detention. Under domestic law, the authority to detain stemmed from the Authorization for Use of Military Force (AUMF), as informed by the principles of the courts and international law. Common Article 3 and AP II, as well



as the Supreme Court of the United States, all recognize the detention of belligerents to prevent them from returning to the battlefield is lawful. Once detained, all persons in U.S. custody must be treated humanely, and the U.S. will not torture.

Regarding targeting, the U.S. complies with all applicable law. The U.S. is in an armed conflict with al Qaeda, the Taliban, and associated forces, and may use force consistent with the inherent right of self-defense. Congress has authorized force through AUMF. Usama bin Laden was the unquestioned leader of al Qaeda, clearly had an operational role, and continued to pose an imminent threat. The operation against him was conducted adhering to the principles of distinction and proportionality, and was consistent with LOAC and U.S. domestic law.

Turning to Libya, Mr. Koh stated there was a call to international action by the Arab League and NATO, and force was authorized under Chapter VII of the U.N. Charter because the situation threatened international peace and security. The War Powers Act was not triggered because of the shift to an explicit support role by the U.S. forces, because no troops are on the ground and there have been no casualties, and because the actions do not involve sustained fighting or active exchanges of fire. Mr. Koh posed the question as: did the Congress of 1973 that intended to stop future Vietnams intend for there to be many more Rwandas? Are we ready for the slaughter to resume?

Mr. Koh concluded by remarking that the administration has tried to square its emerging national security policies with

the need for interoperability with respect to the ICC, cluster munitions, and landmines.

### **PANEL V: Detention in NIAC**

Day two ended with Panel V, which focused on detention issues in NIAC. The panel was moderated by Lieutenant Colonel Eric Young, JA, USA, of the Naval War College, and consisted of Brigadier General Thomas Ayres, JA, USA, Lieutenant Commander Kovit Talasophon of the Royal Thai Navy, Dr. Knut Dörmann, of the International Committee of the Red Cross (ICRC), and Deputy Assistant Secretary of Defense William Lietzau.

General Ayres addressed the role of detainee operations in NIAC. He noted the legal authority to detain in a NIAC to keep insurgents out of hostilities until the cessation of hostilities. He noted however, that based upon his experiences in Iraq, there are four types of insurgents: 1) those with a criminal purpose, e.g., to steal; 2) those who do not want coalition forces there, so they try to show the coalition cannot keep the civilians safe; 3) those who oppose the Iraqi government as formulated and similarly seek to discredit the government formed; and 4) foreign fighters who may be training for other terrorist activities and pose a threat to the national security interest of the United States or other Coalition nations. The first type of insurgent, one with a criminal purpose, would, in almost all phases of the conflict, be turned over to the government of Iraq to be tried in the domestic criminal



courts. As the conflict and the Iraqi government matured, the coalition forces sought to figure out how to detain only the worse of the worst, because, for operational reasons and due to “insurgent math”, they cannot detain everyone with any basis for detention. The operational realities drove the coalition to evidence-based detention. Additionally, as the UN Security Council Resolution expired, as the Coalition consequently sought to transfer detainees to the Iraqi government, and as the Coalition sought to assist the maturation of the Iraqi government institutions to implement the rule of law, the coalition increasingly modeled compliance with Iraqi law and respected host nation criminal law as the basis to detain insurgents. Brigadier General Ayres asserted that the Coalition’s efforts in modeling adherence to a criminal law paradigm to detain insurgents should not be seen as undercutting the international humanitarian law basis for detaining insurgents in a NIAC.

Lieutenant Commander Talasophon discussed Thailand’s experience with detention. During the Cold War, Thailand almost had a civil war with its communists. They have also fought many border wars with their neighbors. Currently, in the south, there are hostilities between the government and those with political grievances. However, the Thai government has declared that there is not a NIAC, but rather law enforcement operations. Domestic law has been used instead of international humanitarian law, although the government has complied with the spirit of Common Article 3. Detention is used to secure evidence and

to ensure that the actor does not use further violence.

Dr. Dörmann commented about the legal framework of detention in NIAC. He began with a general observation that the sources of international law pertaining to detention in NIAC consisted of Common Article 3, AP II Articles 4 through 6, and customary international law. Next, he opined that it is now generally accepted that human rights law applies alongside international humanitarian law in situations of armed conflict, and extraterritorially, despite the view of some important dissenters like the U.S. After presenting the rules on treatment in detention, conditions of detention and fair trial rights, he focused on internment (i.e. non-criminal detention). Internment cannot be used solely for interrogation, nor can it be used as punishment for past acts. Internment may be resorted to if there are imperative reasons for security to do so, a standard which includes direct participation in hostilities. Detention should be periodically reviewed to determine whether there is still a security threat. Dr. Dörmann concluded by stating that there were gaps in the law of detention in NIAC, and states should discuss the legal framework.

Commenting on the timeliness of the International Law Department’s Conference, Mr. Lietzau observed that the U.S. has not, in past years, seen a need to focus great attention to the law that applies in NIAC, as it did not anticipate participation in such conflicts. The recent developments in international law brought on by the 9/11 attacks and the enduring conflict in which the United States is



engaged has stressed existing law and has spurred the discussion of how the law applicable in NIAC can and should be developed. The paucity of guidance in IHL for detention in NIACs has caused many to turn to human rights law to fill apparent gaps, but we should be careful not to allow bodies of law not designed for armed conflict to upset international humanitarian law's delicate equipoise balancing military necessity against humanitarian interests.

To assist in understanding and explaining the legal regimes in play with respect to terrorist detention, Mr. Lietzau used a diagram to visually represent the confluence of the two disparate legal regimes associated with detention. The left side of the chart depicted the *lex generalis* of a peacetime society, where criminal procedure serves as the primary mechanism lawfully implementing detention authorities. The right side of the chart identified the *lex specialis* of the law of war.

Mr. Lietzau explained how the Geneva Conventions, written more than a half century ago, were simply not designed for the present conflict. And even if they had been, the past 60 years have witnessed countless refinements to criminal procedure on the human rights side of the chart, but almost no refinements to the law of war side.

Its constituting documents were drafted in the 1940s, before our present conflict was even envisaged. It is natural, then, that jurists would initially look to the far more refined and nuanced criminal procedure to address issues of detention. But the dearth

of applicable guidance does not necessarily militate in favor of shifting to *lex generalis*; the normative gaps are not related to the authority to detain itself.

### **PANEL VI: Enforcement in NIAC**

Panel VI began the final day of the conference, and was moderated by Colonel Darren Stewart, OBE, British Army, of the San Remo Institute. Introducing the topic, Colonel Stewart remarked that NIAC has little substantive black letter law compared to international humanitarian law. However, while the law in NIAC has gaps, it is applied day to day by practitioners on the ground. The question of enforcement brings the law into sharp focus. The panelists, New England Law Professor John Cerone, University of Essex Professor Françoise Hampson, and Johns Hopkins University Professor Ruth Wedgwood, addressed the issue of enforcement, both criminally and civilly, in NIAC.

Professor Cerone discussed enforcement issues in the context of the current situation in Libya. After reviewing the phases of the conflict to date, he discussed the legal regimes that applied to each phase, as well as their inter-operability. It is now widely accepted that international human rights law applies simultaneously with humanitarian law in internal armed conflicts. Even those states that object to simultaneous application in international or transnational armed conflicts do not object to the application of international human rights law in internal armed conflicts. He then focused on international



criminal law and the Security Council referral of the situation in Libya to the International Criminal Court. As Libya is not a party to the ICC Statute, the Court will have to address issues of immunity and *nullem crimen sine lege*. The Court will have to ensure, in particular, that any crimes prosecuted are well-established in customary international law. Twenty years ago it was debatable whether any violations of the law of non-international armed conflict gave rise to individual criminal responsibility in international law. The legal landscape has changed dramatically since that time. Nonetheless, it is clear that not all of the war crimes within the subject matter jurisdiction of the ICC have entered the corpus of customary law.

Professor Hampson opined that in the past fifteen years, the focus has been on criminal responsibility, with not enough focus on civil responsibility. The advantages of a civil action is that the claim can be brought against a state without the need to identify the actual perpetrators, there is a lower standard of proof than in criminal cases, and the victims have more control over the claim. Claims can be brought in the domestic courts of the state where the violation occurred, or possibly in the domestic courts of third-party states. There is no international means of bringing a claim against a non-state actor, although possibly arbitration could be used on an *ad hoc* basis. At the international level, the only way to proceed is to bring a claim against a state. Claims could be brought before the International Court of Justice (ICJ) or before other human rights bodies. The most important feature of the human

rights bodies is the right of an individual to file a petition.

Professor Wedgwood offered several suggestions for improving the work of the ad hoc war crimes tribunals. First, indictments should be structured to allow a speedy trial. The Milosevic case might have been tried in separate parts for Bosnia, Croatia and Kosovo, instead of the four-year trial during which both the presiding judge and the defendant passed away. Second, it is unfortunate that the Yugoslav war crimes tribunal declined to share evidence from Serb military archives with the International Court of Justice in the latter's adjudication of the Srebrenica genocide case. International justice should not be segregated by tribunal. Third, it is important that cases be tried concerning victims from all ethnic communities in a civil conflict, so there is no misplaced imputation of bias. The failure of the Rwanda tribunal to try any cases against members of the Rwandan Patriotic Front and the Tutsi armed forces, instead remitting them to local justice authorities controlled by the Kagame government, was an unfortunate event. Fourth, political organs are not well suited as the locus for war crimes investigations. Using the Secretary General's office or the Human Rights Council for such investigations may be problematic, because of limited fact-finding capacity and their daily immersion in politics.

---



**CLOSING ADDRESS:**

**Professor Yoram Dinstein**  
Professor Emeritus, Tel Aviv  
University

Professor Emeritus Dinstein of Tel Aviv University, and the 1999/2000 and 2002/2003 Stockton Professor, delivered the closing address. Professor Dinstein addressed five main areas: the definition of NIAC, thresholds in armed conflicts, *jus in bello*, intervention, and interaction.

Professor Dinstein defined a NIAC as taking place within the borders of a single State, carried out between the central Government of that State and organized armed groups, or (there being no effective Government) between such organized armed groups fighting each other. A NIAC can spill over across the borders and start another NIAC in a second country, as happened in the Great Lake Region of Africa. Still, the idea (endorsed by the Supreme Court of the United States) that a NIAC can be global is oxymoronic.

Next, Professor Dinstein pointed out that there were three thresholds in armed conflicts - two for NIACs, one for IAC – plus a sub-level of sporadic and isolated violence (e.g., riots) that is below the first threshold, thus constituting a law enforcement paradigm. The first threshold of NIACs is established by Common Article 3 of the four Geneva Conventions of 1949. This famous provision (which reflects customary international law) does not spell out what conditions have to be met for the first threshold to be crossed. The Appeals Chamber of the ICTY, in the *Tadić* case (in 1995), added the element of

the violence having to be “protracted”. The second threshold of NIACs is set up by AP/II of 1977, which requires the exercise of control by an organized armed group over a part of the territory, enabling them to carry out sustained and concerted military operations. This requirement makes the distinction between a NIAC and below the threshold violence much clearer: sustained and concerted military operations are the antonym of sporadic and isolated violence. The acid test of control of some territory explains the difference, for instance, between the current internal situations in Libya and Syria. In Libya (not counting the foreign intervention by *fiat* of the Security Council), there is no doubt a NIAC, inasmuch as the insurgents exercise control over vast tracts of land. By contrast, the violence in Syria remains below the threshold - notwithstanding its great intensity and the fact that it is protracted – because no part of the territory is under the control of any insurgent organized armed group. The third threshold means that the armed conflict amounts to an IAC, and this denotes that two or more States are pitted against each other.

Professor Dinstein then focused on the *jus in bello* in NIAC. While there is currently a very remarkable trend in treaty law of growing convergence between the *jus in bello* applicable in IACs and in NIAC, there cannot be a full merger of the law in both types of armed conflicts. There are at least three insurmountable obstacles to such merger: (a) the domestic law will always consider insurgents to be traitors, and they cannot therefore be accorded the status of POWs by the central Government



(absent recognition of belligerency); (b) neutrality is not an issue, as there is only one State embroiled in a NIAC; (c) the whole body of law relating to belligerent occupation is irrelevant to NIACs since neither the central Government nor the insurgents can be in belligerent occupation of their own land. There are additional – less compelling – problems relating to the legality of certain means and methods of warfare, e.g., the legality of particular weapons, blockades, etc.

The issue of intervention relates to military assistance requested from, or offered by, a foreign country when a NIAC is going on. International law permits foreign countries to extend military assistance to the central Government against insurgents. If and when the foreign country does so, the armed conflict remains a NIAC – despite the participation of foreign troops in the hostilities – inasmuch as the foreign troops are not battling another State. However, if the foreign troops are deployed against the central Government, the armed conflict automatically crosses the third threshold and becomes an IAC. Moreover, even when the foreign troops arrive at the request of the central Government, consent to their presence can be withdrawn at any time. Once consent is withdrawn by the central Government, the foreign forces must leave. Failure to do so will result in the situation becoming an IAC.

The last issue is interaction. First off, it must be appreciated that an armed conflict can coexist with the law enforcement paradigm. Criminal activities do not cease when an armed conflict (either a NIAC or an IAC) breaks out. Indeed, usually crime

is on the rise in wartime, if only because there are numerous new crimes (such as black market activities or trading with the enemy). Ordinary crimes – even in the course of an armed conflict – are governed not by the *jus in bello* but by the domestic criminal law subject to the precepts of international human rights. Secondly, a NIAC can segue into an IAC: foreign intervention on behalf of insurgents is a prime example. But an IAC can also be the outcome of the implosion of a State torn apart by a NIAC and the continuation of the hostilities between several new sovereign States created on its ruins. Obviously, as far as fighters in the field are concerned, it may not always be easy to detect at what exact point a NIAC has morphed into an IAC (the situation in Bosnia in 1992 showed that lack of clarity in a graphic manner). It is therefore easier to analyze the situation when an interval takes place; for instance, Eritrea first rebelled successfully against Ethiopia in a NIAC, and then – after a space of time – started an IAC against the same country. Thirdly, the reverse is also true: IACs can turn into NIACs. Thus, the IAC between the American-led coalition and the Baathist regime in Iraq has recently come to a successful end, and the fighting that continues in Iraq is today is no more than a NIAC. Fourthly, a NIAC and an IAC can be waged concurrently in the same country. The best illustration is Afghanistan in 2001, where there was a NIAC between the Taliban and the Northern Alliance, and (starting in October of that year) a separate IAC between the United States (supported by its allies) and the Taliban. Fifthly, as shown in the conference (with respect to the Philippines), there may even be several



## 2011 Naval War College International Law Conference Brief

---

unrelated NIACs going on in the same country simultaneously, where different organized armed groups fight the same central Government while having diverse – and perhaps clashing – aims. All this can cause confusion, especially since Governments are often "in denial", reversing the thresholds. That is to say, when Governments are engaged in an

IAC, they tend to claim that the armed conflict is no more than a NIAC. When they are caught in a NIAC, they are inclined to maintain that the violence is sporadic and below the threshold.

Professor Dinstein concluded by recognizing that times are changing, and NIAC law must change with it.

### CHAIRMAN'S COMMENTS

We sincerely appreciate the support provided for this year's conference by the Naval War College Foundation, the International Institute of Humanitarian Law (Sanremo, 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 Coordinator, Lieutenant Colonel George Cadwalader, Jr., and his dedicated team including Ms. Jayne Van Petten, Legalman Chief Harrold Henck, Lieutenant Robert Blackwell, Lieutenant John Rahaghi, Master-at-Arms First Class Cynthia Dix, and Master-at-Arms First Class Wanda West.

Conference speakers are preparing articles that will provide an expanded treatment of the issues discussed. These papers will be published in volume 88 of the Naval War College's "International Law Studies" (Blue Book) series. We anticipate volume 88 to be ready for distribution at the 2012 conference.

Please send constructive criticism of this year's event and recommendations for next year's conference, scheduled for June 26-28, 2012, to [dennis.mandsager@usnwc.edu](mailto:dennis.mandsager@usnwc.edu).

All the best,

Dennis L. Mandsager  
Professor of Law