



Meeting Summary

The US and the Laws of War

Summary of the International Law Discussion Group meeting held at Chatham House on Monday, 21 February 2011

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INTRODUCTION

The event was organised to discuss the US approaches to the Laws of War in the context of the forthcoming publication of the new US Law of War Manual.

The participants included representatives of government, embassies, NGOs, media, academics and practising lawyers.

HAYS PARKS

I am pleased to have this opportunity to speak to you about the forthcoming Department of Defense Law of War Manual. Knowing those present, you have heard about it, but wonder if it really exists or is likely to see the light of day in your lifetime.

A brief history of law of war manuals has bearing on the approach taken in the new manual. The 1863 General Orders No. 100, drafted by Professor Francis Lieber and signed by President Abraham Lincoln, is generally accepted as the starting point for law of war manuals. It became a primary source for development of the law of war over the next four decades. Many Lieber Code provisions are referenced in the forthcoming manual to illustrate the lineage of the law. Some are identified as inconsistent with the contemporary law of war to ensure individuals venturing into this field for the first time do not make the mistake of embracing the Lieber Code in its entirety.

Official British manuals date from 1884. Law of war discussion was an integral part of the British MANUAL OF MILITARY LAW until 2004 when the excellent MANUAL OF THE LAW OF ARMED CONFLICT was published.

Why a law of war manual? Why can't a government exist simply with the texts of treaties it has ratified?

A partial answer is provided in article 1 of the 1899 Hague Convention II with respect to the laws and customs of war on land. It was repeated in article 1 of the 1907 Hague Convention IV. Each obliged a State Party to issue "instructions ... which shall be in conformity with the "regulations ... attached to the present Convention". Use of the term "instructions" manifested a direct connection to Lieber's 1863 "Instructions". The language also suggested something germane to the approach taken in the forthcoming DoD Manual: Article 1 of the 1899 and 1907 Hague Conventions did not obligate governments merely to reprint the treaty texts. It required instructions consistent with treaty obligations,

providing elaboration and explanation rather than merely re-printing treaty provisions. The British and U.S. manuals have taken this approach through their various editions, some better than others, as I will show.

What arguably was the first stand-alone law of war manual, James Moloney Spaight's *WAR RIGHTS ON LAND* (1911), was produced privately. Spaight's many works are valuable for the precedent established in providing historical examples of battlefield State practice.

The first U.S. law of war manual was the War Department's *RULES OF LAND WARFARE*, published in 1914. It consisted of one hundred thirty-nine pages of text, a glossary, a comprehensive and very useful twenty-six-page index, and forty-four pages of treaty texts to which the United States was a party at that time (in English and French). It was republished in 1917, 1940, and 1944 with few changes.

The 1949 Geneva Conventions necessitated preparation of a new law of war manual. British and U.S. law of war experts met in Cambridge in May 1953 to consider as common an approach as possible in their respective law of war manuals.

The current U.S. manual, FM 27-10, was published July 18, 1956, following U.S. ratification of the 1949 Geneva Conventions the previous year. The primary author was Harvard Law Professor and U.S. Army Reserve JAG officer Richard R. Baxter, subsequently a justice on the International Court of Justice. The British manual, Part III of the *MANUAL OF MILITARY LAW*, co-authored by Cambridge University law professor Sir Hersch Lauterpacht, and then-Lieutenant Colonel Gerald Draper of the Directorate of Army Legal Services, was published two years later, following the United Kingdom's ratification of the 1949 Geneva Conventions.

Before proceeding to distinctions between the two manuals that influenced the way in which we decided to proceed in the new manual, I would be remiss were I not to mention other U.S. manuals. In May 1941 the U.S. Navy's *TENTATIVE INSTRUCTIONS FOR THE NAVY OF THE UNITED STATES GOVERNING MARITIME AND AERIAL WARFARE* was published but never officially adopted, in all likelihood because its language was not consistent with the Navy's pre-war plans to conduct unrestricted submarine warfare against Japan were a

Pacific War to occur, as happened six months later.¹ In place of the draft 1941 manual, the U.S. Naval War College produced what today is entitled the COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS. As its title indicates, it is a manual of broader scope but with less depth or detail in discussion of individual topics. The DoD Law of War Manual will not replace the COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS. However, any discussion of the law of war in future editions of the COMMANDER'S HANDBOOK or any other subordinate official publication must be consistent with the DoD Law of War Manual.

In 1976, prior to the conclusion of the diplomatic conference preparing the 1977 Protocols I and II Additional to the 1949 Geneva Conventions completed its work, the U.S. Air Force published Air Force Pamphlet 110-31, INTERNATIONAL LAW – THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, prematurely embracing the 1977 Protocols in their entirety.² It was withdrawn in 1995.

Protocols I and II were adopted by the diplomatic conference on June 10, 1977. The United States signed them on December 12, 1977, the day they were opened for signature. Authority to sign the Protocols was subject to interagency agreement that a comprehensive military, legal, and policy review would be undertaken prior to any Executive Branch decision as to ratification. The review was delayed as individuals responsible for it became involved in negotiation of what became the 1980 Convention on Certain Conventional Weapons. The individuals charged with conducting the review also participated in meetings within NATO to develop common statements of understanding. The review proceeded on the Reagan Administration assumption (carried over from the previous Administration) that the United States would ratify Protocols I and II subject to reservations or statements of understanding identified and agreed to in the inter-agency review.

¹ See Parks, "Making Law of War Treaties: Lessons from Submarine Warfare Regulation", U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 75 (2000), pp. 339-386.

² The U.S. Army prepared and adopted a change to FM 27-10 on July 15, 1976, relating to U.S. ratification of the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare of June 17, 1925, and certain provisions combining treaty texts from the 1907 Hague Convention and the 1977 Additional Protocol I.

In 1983, two years into the Reagan Administration, a relatively low level political appointee unilaterally formulated a policy decision against ratification of Additional Protocol I notwithstanding the ongoing interagency military, legal, and policy review. President Reagan announced this decision on January 28, 1987, in forwarding Protocol II to the Senate for its advice and consent to ratification.

In the 1980s and 1990s U.S. representatives participated in informal meetings with their counterparts from Australia, Canada, New Zealand, and the United Kingdom to discuss various issues, including the character of a new law of war manual. These meetings were an outgrowth of friendships acquired and developed in the course of the negotiations of the 1970s. They resulted in a strong working relationship amongst the military lawyers representing their respective governments. An Australian colleague irreverently named the informal association “the Empire Club”, eventually consenting to U.S. membership provided the U.S. member paid a disproportionate share of the bar tab to compensate for early departure from its colonial status.

Two steps preceded preparation of a new U.S. law of war manual. The first was a 1996 agreement by the senior legal leadership of the Army, Air Force, Navy, and Marine Corps that there would be a joint Department of Defense manual rather than single-service manuals. This decision was taken for a variety of reasons, not the least of which was increased emphasis on joint operations. The senior military legal leadership and the DoD General Counsel agreed that it was time to speak with a single, authoritative voice to ensure consistency in legal interpretations of the law of war. The necessity for a single authoritative document was confirmed with ICRC publication of its CUSTOMARY INTERNATIONAL HUMANITARIAN LAW in 2005. The U.S. letter prepared by the Department of Defense Law of War Working Group, signed by DoD General Counsel William J. Haynes III and State Department Legal Adviser John Bellinger, likely is known within this audience, as well as the excellent Chatham House volume³ edited by Elizabeth Wilmshurst and Susan Breau.

Among its comments, the Haynes-Bellinger letter was critical of the ICRC’s careless use of any and all materials to bolster its arguments without weighing their authoritativeness. One example is the U.S. Air Force manual withdrawn ten years earlier. Another was a

³ PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2007).

publication prepared by a faculty member at The Judge Advocate General's School that had not been reviewed or approved by The Judge Advocate General of the Army or the DoD Law of War Working Group.

In his essay in the Chatham House volume, Professor Iain Scobbie offered other examples, but questioned the validity of this criticism, suggesting that "it is difficult to see how States may disavow, without further ado, statements and official documents emanating from its functionaries, however lowly, providing they are acting in an official capacity at the time".⁴

My first response is that Professor Scobbie gives government bureaucracies more credit for organizational efficiency than actually exists. The second is that Professor Scobbie's question, while a fair one, reflects a common misunderstanding of publishing within a government agency. I'll provide an example to make this point.

In 1992, Germany published its latest law of war manual, written by Dieter Fleck, a long-serving civilian lawyer with the Bundeswehr.⁵ In discussing the law relating to military small arms ammunition, paragraph 407 contains the following:

- It is prohibited to use bullets which expand or flatten easily in the human body....
It is also prohibited to use projectiles of a nature --
- to burst or deform while penetrating the human body; [or]
 - to tumble early in the human body; or
 - to cause shock waves leading to extensive tissue damage or even a lethal shock.

This German manual text was the cornerstone for the ICRC's conclusions in Rule 77 of its CUSTOMARY INTERNATIONAL HUMANITARIAN LAW study, wherein it asserted that the 1899 Hague Declaration on expanding bullets was customary law in international and non-international armed conflicts while offering no supporting evidence of State practice or acknowledging that only thirty-one States are parties to the 1899 Hague Declaration, or that by its terms it applies only in an international armed conflict between parties to the Declaration. The number of States Parties contrasts markedly with the 114 States Parties

⁴ "The approach to customary international law in the Study", 15, at 38-40.

to the far more recent and comprehensive 1980 Convention on Certain Conventional Weapons.

In 2009, addressing the annual German Red Cross legal conference, I informed Dr. Fleck and other members of the audience that were one to accept the language he wrote as the law, then the senior *Bundeswehr* leadership (including, perhaps, Dr. Fleck), arguably could be charged with a violation of the law of war inasmuch as the German version of the NATO standard 7.62 bullet “flattened and deformed easily” when penetrating the human body. The German projectile has a jacket thickness of .55 mm in contrast with bullet jacket thickness dimensions of .65 to .80 mm for the same ammunition used by other NATO governments. The thinner jacket of the German bullet results in projectile deformation and fragmentation of the very kind the German manual declares illegal. The German projectile’s terminal ballistics characteristics were described publicly in 1989, with photographic evidence,⁶ three years prior to the 1992 manual’s publication. The German bullet preceded the German law of war manual by thirty-eight years and continues in use by the *Bundeswehr*, almost two decades after publication of the German manual.

Dr. Fleck acknowledged he did not know the German bullet deformed and fragmented when he wrote the manual. Last month I learned that *Bundeswehr* officials have been aware of the terminal ballistics of its 7.62mm projectile since 1954, but decided against alteration of the bullet design in order to maintain internal ballistics reliability in German machineguns.

Other portions of the manual text are at odds with basic ballistics and State practice. The manual’s statement that it is illegal to employ bullets that “‘tumble’ early in the human body” is historically and physically incorrect. The use of jacketed Spitzer-tip military rifle bullets originated with the French 8mm Lebel cartridge in 1898, successfully extending the effective range of military rifles. Germany adopted the Spitzer rifle bullet – Spitzer representing the German “spitz”, or pointed -- in 1905. The United States adopted it in 1906 and Great Britain in 1910, preceded or followed by adoption of similar projectiles by military forces of other governments. They remain in use to this day. NATO standard bullets in 5.56 and 7.62 calibers are Spitzer bullets. Because of their pointed tip and in-

⁵ HUMANITARIAN LAW IN ARMED CONFLICTS – MANUAL, DSK vv207320067 (August 1992).

⁶ Martin S. Fackler, “Wounding Patterns in Military Rifle Bullets”, *International Defense Review* 1/1989 (1989), 59 at 63,64.

flight instability, Spitzer bullets may yaw upon striking soft tissue, resulting in deformation and fragmentation at close range. However, the centre of gravity in the projectile does not lend itself to “tumbling”, that is, and as the authoritative OXFORD ENGLISH DICTIONARY defines the word, turning end-over-end.

A small-calibre working group composed of medical and firearms experts, and lawyers, met throughout the 1978-1980 meetings that formulated the Convention on Certain Conventional Weapons. Working group meetings were announced and open to any and all delegations. Neither Dr. Fleck nor any other West German delegate attended any of the working group meetings. The participating experts discussed at length small calibre projectile action in the body, referred to as “terminal ballistics”. The experts recognized that any high-velocity rifle bullet may, at very close range, create a temporary cavity that may cause (in the German manual’s words) “extensive damage or lethal shock” if the bullet path is in close proximity to vital organs, such as the liver or the heart. The temporary cavity of the sort condemned in the German manual is a potential effect of close-range wounds by all military bullets employed in machineguns and rifles for more than a century, but seldom results in “extensive damage or lethal shock” from what the manual refers to as a “shock wave”. Neither the expert working group nor the conference at large arrived at conclusions supportive of the language contained in paragraph 407 of the German manual. Nor did subsequent meetings of experts hosted by Switzerland from 1998 to 2003, each attended by ICRC representatives, or delegations to the 1996, 2001, or 2006 CCW Review Conferences. Actions taken at the June 2010 ICC Review Conference in Kampala serve all the more to highlight the error in the German manual and the ICRC reliance on it in Rule 77 of its CUSTOMARY LAW study.

I offered this example to make a point. First, determining State practice by relying on language from manuals only carries identifiable risks. Manual language written in a vacuum, without adequate research and coordination within a government should not be presumed to represent a government’s official position simply because it was written by an individual acting in his or her official capacity. In the case at hand, the official position of the German government is the exact opposite of the views set forth in paragraph 407 of the German manual.

Returning to the main course of my presentation, the second step in commencing work on a new manual was a 1996 meeting hosted by The Judge Advocate General of the Army with law of war experts from the four U.S. military services and their “Empire Club”

counterparts. A key issue dealt with the character of the manual. While one participant held strong views that the manual should be an operational law rather than a law of war manual, British Army Colonel Charles Garraway carried the day when he stated, "A law of war manual is a single volume. An operational law manual would require an entire bookshelf." The decision was taken to proceed with a law of war manual.

Much has been said about the fourteen years it has taken to produce the DoD Law of War Manual. It would be more accurate to describe the process as one that has taken place over a period of fourteen years. On the average, at best fifteen per cent of the period between 1996 and 2010 was devoted to the manual. Participants had their "day jobs", that is, their regular duties, to perform in addition to working on the manual. The operational tempo, including military operations in Somalia, Haiti, and the Balkans, and the two full-scale wars of the past decade, demanded much attention.

The 1914 U.S. manual contained explanations of the law with historical precedents. In preparing the 1956 manual, Professor Baxter was constrained in that he had to incorporate the 429 articles of the four 1949 Geneva Conventions into a new manual on relatively short order. Only one volume of the four ICRC COMMENTARIES edited by Jean S. Pictet had been published. Professor Baxter inserted convention provisions verbatim, without explanation. All historical examples were deleted.

Sir Adam Roberts, author of a number of articles and other works on the law of war, has observed, "Lawyers tend to cling to the safe anchor of treaties". It is my personal observation that providing a treaty text without explanation, clarification, elaboration, or evidence of State practice (other than similar manuals), has resulted in lawyers, military and civilian, incorrectly viewing law of war treaties as the sole source for the law. This flaw may have resulted from the approach taken by, or perhaps more accurately, forced upon Professor Baxter in FM 27-10.

In contrast, with two experienced authors and the luxury of time, the 1958 British manual adopted the Spaight and 1914 U.S. manual approach, discussing, explaining, and clarifying law of war treaty provisions, incorporating footnotes with examples of State practice. On occasion it followed the earlier U.S. manual to a fault. In writing portions of the new U.S. manual for which I had responsibility I found text from the 1914 U.S. manual literally lifted and inserted into the 1958 British manual with an error that existed in the original 1914 U.S. manual.

Spaight's writings, the 1914 U.S. manual, and the 1958 British Manual became the models for the new DoD Manual. The possibility for such an approach was denied by Presiding Judge Cassese in the ICTY case of *Prosecutor v. Tadic*.⁷

This is one point of view. Sir Adam Roberts argues to the contrary:

There is little tradition of disciplined and reasoned assessment of how the laws of war have operated in practice. Lawyers, academics, and diplomats have often been better at interpreting the precise legal meaning of existing accords, or at devising new law, than they have been at assessing the performance of existing accords or generalizing about the circumstances in which they can or cannot work. In short, the study of the law of war needs to be integrated with the study of history; if not, it is inadequate.⁸

This repeats the philosophy expressed and demonstrated by Spaight⁹ as well as that of the authors of the 1914 U.S. manual, Professors Lauterpacht and Draper in the 1958 British Manual, Professors Howard S. Levie,¹⁰ Leslie C. Green,¹¹ Geoffrey Best,¹² and Sir

⁷ "When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial statement."

⁸ Sir Adam Roberts, "Land Warfare: From Hague to Nuremberg", *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* (Sir Michael Howard, George J. Andreopoulos, and Mark Shulman, 1994), p. 117.

⁹ *WAR RIGHTS ON LAND* (1911), pp. 5, 11-12, 17-18.

¹⁰ For example, *PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT*, U.S. Naval War College International Law Studies 59 (1984).

¹¹ For example, *ESSAYS ON THE MODERN LAW OF WAR* (1999).

Michael Howard,¹³ among others.¹⁴ Contrary to what Judge Cassese asserted in Tadic, battlefield practice can be found. But it requires more scholarship than some are prepared to undertake.

Similarly, while concern has been expressed about departures from views previously expressed by a State, a study of history for manual purposes is intended not to contradict but to illustrate and reinforce treaty law or government views to the extent governments have offered such views. As I will illustrate in a moment, it also may identify areas in which treaty law has met with insurmountable challenges. As I have shown in my published articles,¹⁵ historical examples play a critical part in developing a fuller and more accurate picture of the law of war. Let me make it clear: violations of the law of war should not be used to suggest that the law of war or an individual provision or rule is wrong. The murder of civilians in the Vietnamese village of My Lai by U.S. soldiers on March 16, 1968 and detainee abuse by U.S. soldiers at Abu Ghraib in Iraq in 2003 reflect failures by individuals to follow the law of war. The manual acknowledges each as a leadership failure rather than suggesting either was a failure of the law of war.

◆ To illustrate the importance of history in understanding the law of war, while Article 23(b) of the Annex to the 1907 Hague Convention IV prohibits killing or wounding enemy combatants through treachery, specificity was lacking until Article 37 of Additional Protocol I prohibited killing, injuring, or capturing an adversary by resort to perfidy, definition of that term, and providing examples thereof, including “feigning of incapacitation by wounds or sickness”. What acts of “feigning or an incapacitation by wounds or sickness” resulting in killing or wounding enemy combatants constitute perfidy? History provided examples in which a soldier feigned death as enemy forces advanced through his former position. Following the passing of the enemy forces, the soldier

¹² HUMANITY IN WARFARE (1980) and WAR & LAW (1994).

¹³ In addition to the volume cited in footnote 5, see RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICTS (1979).

¹⁴ Spaight's pioneer work with regard to the law and air warfare is paralleled by that of Professor M. W. Royse in his 1928 AERIAL BOMBARDMENT AND THE INTERNATIONAL REGULATION OF WARFARE, for example.

¹⁵ See, e.g., “Special Forces' Wear of Non-Standard Uniforms”, CHICAGO JOURNAL OF INTERNATIONAL LAW 4,2 (Fall 2003) 495-560.

escaped and evaded back to friendly lines to recover and fight another day.¹⁶ The gap in time suggested a requirement for a clear nexus between the soldier's feigning death and acts of violence against enemy combatants to constitute perfidy. Reading the plain text of the relevant treaties was insufficient.

◆ Similarly, confusion exists as to the purpose for a white flag. This confusion may have resulted in the death of a British officer in the 1982 Falklands War. Treaty provisions offer limited assistance, merely prohibiting the improper use of a white flag.¹⁷ In addition to review of earlier manuals, research of battlefield practice permitted clarification and detail for a fuller explanation in the manual.

◆ Conditional protection for medical aircraft originated in Article 18 of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Controversy arose on July 1, 1940, when Royal Air Force fighter aircraft forced down Luftwaffe Heinkel 59 floatplanes operating over the English Channel. The Heinkel aircraft were painted all white with Red Cross markings. The actions taken by the RAF Fighters were supported by an official British declaration on July 29, 1940. The history of these events reinforced rather than contradicted the intent of the treaty provisions of that time. Official government statements were consistent with treaty law. Had they existed at that time, neither amendments to medical aircraft provisions in the 1949 Geneva Conventions¹⁸ nor the process set forth in Articles 24 through 30 of the 1977 Protocol I would have required changes in the conclusions of the British leadership in 1940. Reading treaty text only has resulted in the incorrect conclusion by many that with more than eight decades of treaty language, communications between belligerents to facilitate the operation of medical aircraft is routine or, worse, "customary international law". To the contrary, history reveals that the procedures set forth in the 1929, 1949, and

¹⁶ For example, on November 17, 1943, Captain John Olivey, commanding a mixed force of Long Range Desert Group (Rhodesian) S1, Royal Artillery, and Italian crews manning three six-inch naval guns near a fort at Mount Clidi on the Mediterranean island of Leros, were attacked by superior German forces. His position overrun, he feigned death and was passed by. He withdrew under cover of darkness, making his way to his command's rendezvous point the following day. Further combat action would not have constituted perfidy as it was separated in time and distance from the action in which he feigned death in order to avoid capture. Julian Thompson, *THE IMPERIAL WAR MUSEUM BOOK OF WAR BEHIND ENEMY LINES* (1998), 270.

¹⁷ Article 23(f), Annex to 1907 Hague IV.

¹⁸ Article 36, GWS; Article 39, GWS (Sea).

1977 treaty provisions to facilitate safe operation of medical aircraft have never been attempted, much less executed, principally for reasons related to operational security and electronic warfare. (I distinguish the “red cross box” agreed to by British and Argentine forces in the 1982 Falklands War.)

◆ Following the unsuccessful Canadian/British commando raid at Dieppe on August 19, 1942, handcuffed but unharmed German soldiers were found abandoned by the retreating raiding forces. On September 3, 1942, Germany retaliated by shackling Commonwealth soldiers captured at Dieppe. A subsequent incident during a British Small Scale Raiding Force raid on Sark in the Channel Islands resulted in further German retaliation against Commonwealth prisoners of war in German POW camps. This act led to British counter-retaliation against German prisoners of war as far removed from the point of capture as Canada.¹⁹ Research of the history of these events and the 1949 Geneva Diplomatic Conference was necessary to identify a distinction between the lawfulness of securing prisoners of war at the time of capture and the illegal practice of shackling compliant prisoners of war in POW camps.

◆ Finally, the history of State practice is of value in cases where no treaty provision exists. British transfer of prisoners of war to Bermuda and Ceylon during the Boer War and the U.S. and British practice of transferring Axis prisoners of war to North America during World War II provided precedents for manual language regarding the legality of removal of prisoners of war from an active theater of operations to safer locations so long as Geneva prisoner of war obligations otherwise are met.

The decision to follow in the footsteps of our distinguished predecessors required time to carry out a review of earlier manuals and research of history. Reflecting on the shortfalls of the 1956 manual, the adage that “the best is the enemy of the good” had to be balanced against the gunfighter saying “Speed is good, but accuracy is better”.

While the rationale for a new manual keyed on the development of Additional Protocols I and II, the list of treaties negotiated and/or ratified by the United States subsequent to publication of the 1956 manual was substantially longer:

¹⁹ Commonwealth forces shackling of prisoners of war in POW camps ended on December 12, 1942. The German practice did not end until November 21, 1943, following the mass surrender of more than a quarter million Axis soldiers in North Africa in May 1943.

- ◆ 1925 Geneva Protocol for the Prohibition in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.^{*20}
- ◆ The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, and its protocol.
- ◆ The 1972 Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons*.
- ◆ The 1976 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Methods*.
- ◆ The 1977 Protocols I and II additional to the 1949 Geneva Conventions.
- ◆ The 1980 Convention on Certain Conventional Weapons* and its protocols I (non-detectable fragments)*, II (landmines, booby traps, and other devices)*, and III (incendiary weapons)*.
- ◆ The 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*.
- ◆ The 1995 Protocol IV (Blinding Laser Weapons)* to the 1980 Convention on Certain Conventional Weapons.
- ◆ The 1996 Amended Protocol II to the 1980 Convention on Certain Conventional Weapons*.
- ◆ The 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.
- ◆ The 1998 Rome Statute of the International Criminal Court.
- ◆ The 1999 Second Protocol to the 1954 Hague Convention.
- ◆ The 2005 Additional Protocol III to the 1949 Geneva Conventions*.
- ◆ The 2006 Protocol V (Explosive Remnants of War) to the 1980 Convention on Certain Conventional Weapons*.

Since publication of the 1956 manual, the United States has ratified six of eleven treaties and six of the eight protocols listed above (marked with an asterisk).²¹

The degree of treaty development necessitated a manual new from bottom up. International consideration of specific law of war topics since 1956 merited detailed explanation, not only with respect to new treaties or protocols but based on clarification of

²⁰ Ratified by the United States on April 10, 1975.

²¹ Notwithstanding their titles I have included the 1977 Additional Protocols I and II as “treaties” rather than “protocols” owing to their content.

the law gained from those international negotiations. For example, the first sentence on the legality of incendiary weapons in the 1956 U.S. manual declares them to be legal. It is followed by the statement that such weapons “should not ... be employed in such a way as to cause unnecessary suffering”, a statement in contradiction of the previous statement and of no value to the judge advocate or his or her commander.

The recorded history of State practice with respect to incendiary weapons is lengthy, dating back to 671 A.D. The medical effects and the relevant law of war principles related to incendiary weapons were discussed exhaustively by military, medical, and legal experts at the 1978 to 1980 diplomatic conference that produced the incendiary weapons protocol to the 1980 Convention on Certain Conventional Weapons. The U.S. delegation played an active role in these negotiations. The new manual relies upon State practice and the negotiating history of Protocol III to provide a six-page explanation with respect to the legality of incendiary weapons and their lawful employment. This offers a representative contrast between the 1956 manual and the forthcoming DoD manual.

A key issue was what was to be done with regard to the 1977 Protocols I and II. Those of us involved in the military, legal, and policy review in the 1980s knew that the objections expressed by Reagan Administration officials and the military review were focused on parts of five of the 102 articles in Protocol I. The objectionable provisions would not have been accepted had the United States ratified Protocol I. Some of our closest allies, including the United Kingdom, have rejected or limited the effect of these articles with carefully crafted reservations or statements of understanding upon ratification while clarifying other provisions with statements developed in our earlier NATO meetings. The most contentious Additional Protocol I provision²² has had no play – *none* -- since its incorporation into the draft by the diplomatic conference thirty-seven years ago notwithstanding continuous acts of violence by one of the armed non-State actors the provision was written to benefit.

In writing the manual, we enjoyed a level of experience that did not exist during the Reagan Administration. Over the past quarter of a century, U.S. forces have engaged in military operations unilaterally and with States Parties to Protocol I as Coalition partners in which Protocol I provisions were applied.

²² Article 1(4).

Some Protocol I provisions have been accepted formally by the United States. For example, the definition of “military objective” in Article 52, paragraph 2, is incorporated into Protocols II and III of the Convention on Certain Conventional Weapons, each ratified by the United States. It was employed by the U.S. military and its Coalition partners in the 1991 and 2003 wars against Iraq, the 1999 NATO Kosovo air campaign, the war in Afghanistan, and in other operations. We looked to history to provide examples of civilian objects that traditionally have become military objectives, such as lines of communication. Again, history offered a clearer picture than treaty text alone. Protocol I provisions have been incorporated into the manual with clarification or explanation consistent with their original intent and with the assistance of scholarly documentation by Diplomatic Conference participants.²³

A frequent question is “for whom is the manual intended”? The manual is intended to be user friendly by anyone at any level. Frequently we thought about the young military legal adviser in the field, alone, asked a question by his or her commander in the middle of the night. We know the manual cannot anticipate every issue. We endeavored to provide as much of an explanation as we could to assist that officer.

Herein lies a fundamental distinction between the 1956 manual and the forthcoming manual. Whereas the 1956 manual provided the plain text of the 1949 Geneva Conventions without explanation, the DoD manual provides explanation with reference to applicable treaty provisions and relevant examples of State practice, that is, practical experiences of soldiers in combat that serve to inform and provide elaboration.

Let me make several points before turning to how we worked.

- ◆ First, a part of the manual effort was directed at clearing up terminology. Media representatives sometimes speak of attacks on “civilian targets”. The manual emphasizes there are “civilian objects” and “military objectives”, but that there is no such thing in the law of war as a “civilian target”. Similarly, while some earlier treaties arguably suggested that civilians were “non-combatants”, contemporary treaties, including Additional Protocol

²³ M. Bothe, Partsch, and W. Solf, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* (1982).

I, use the term “civilians” only to describe civilians.²⁴ Today, the term “non-combatant” refers to military medical personnel and chaplains. Similarly, we have avoided terms such as “terrorist”, “insurgent”, or “guerrilla”. Each describes a tactic, has no law of war meaning as such (only one of which, terrorizing the civilian population, is prohibited by the law of war), and all too frequently has been employed for political reasons. The status of captured individuals is determined by the law of war rather than terms employed by politicians for pejorative purposes. We adopted a term in contemporary use – armed non-State actors – in place of these non-legal terms. It does not pre-judge the status of such individuals if captured.

◆ Second, the manual would have looked differently had it been completed a decade ago. The issue of unprivileged belligerency is based upon eight centuries of State practice and the principle of right authority derived from that practice. It was a part of the draft manual before the September 11, 2001, attack. However, protections to which a captured unprivileged belligerent is entitled were not well developed in the pre-9/11 drafts. The lessons learned over the past decade, some painfully, and advisory assistance received from International Committee of the Red Cross representatives helped us address this vacuum.

◆ Collaterally, while stating unequivocally that a captured unprivileged belligerent is entitled to humane treatment and that “humane treatment” standards include at a minimum those set forth in Article 3 common to the four 1949 Geneva Conventions, the manual otherwise follows past practice in leaving elaboration to other official publications. In the case of humane treatment for unprivileged belligerents, the details are contained in the 2005 U.S. Army Field Manual 2-22.3, INTERROGATION, which adopts not only common article 3 but also Article 17 of the 1949 Geneva Prisoner of War Convention. The field manual identifies authorized interrogation methods as well as those expressly prohibited. FM 2-22.3 was endorsed by Congress in the Detainee Treatment Act of 2006. The 2009 REVIEW OF DEPARTMENT COMPLIANCE WITH PRESIDENT’S EXECUTIVE ORDER ON DETAINEE CONDITIONS OF CONFINEMENT, prepared by a team headed by Vice Admiral Patrick M. Walsh, USN, at the time the Vice Chief of Naval Operations and presently Commander, U.S. Pacific Fleet, was undertaken pursuant to Executive Order

²⁴ The English language text of API art. 37(1)(c) incorrectly offers as an example of perfidy “the feigning of civilian, noncombatant status”. The official French text correctly states “le statut de civil ou de non-combatant”, that is, “the feigning of civilian or non-combatant status”, regarding the two categories as distinctive. Bothe Partsch, and Solf, NEW RULES FOR VICTIMS OF ARMED CONFLICTS (1982), at 206, n. 21.

13492 to conduct “a review of the conditions of detention at Guantánamo to ensure that no individual at Guantánamo is being held there, ‘except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions.’” FM 2-22.3 and the Walsh Report are consistent with the treaty requirements set forth in the forthcoming manual while providing greater detail.

- ◆ In any case the manual would not have supported and does not now support flawed advice offered by Department of Justice officials in the immediate post-9/11 months that law of war treaty obligations of the United States can be “waived” by the President under his Constitutional authority.

- ◆ Fifth, given the politically charged environment that existed following the September 11th attacks, I drew a line in the sand that the manual would be apolitical. This was accomplished.

I’ll now turn to the work effort before closing. The DoD manual is the product of the Department of Defense Law of War Working Group. It consists of representatives of the judge advocates general of the Army, Navy, and Air Force; the Staff Judge Advocate to the Commandant of the Marine Corps; the offices of General Counsels of the three Military Departments; the Legal Counsel to the Chairman, Joint Chiefs; and the General Counsel, Department of Defense – or, as I have characterized them, the “nine law firms of the Department of Defense”. The DoD Law of War Working Group originated with the DoD lawyer members of the U.S. delegation to the 1974-1977 Diplomatic Conference that produced Protocols I and II. It evolved over the years into the composition indicated above. We benefited from the participation of exchange officers from the legal branches of the Royal Air Force and Royal Australian Air Force. They were full partners in our endeavour and contributed more than their fair share. Our colleagues from the Office of the Legal Adviser, Department of State, also participated on an informal, advisory basis, offering invaluable comments and suggestions. Nonetheless they understood the manual would be a Department of Defense document.

Different offices or individuals assumed responsibility for individual chapters. Once drafted, each chapter was circulated to other members, following which the first of many “murder boards” was held for the draft.

In May 2009 the Department of Defense General Counsel hosted an international peer review of seventeen of the nineteen proposed draft chapters (drafts of two had not been completed) at The Judge Advocate General of the Army's Learning Centre and School in Charlottesville. The peer review consisted of senior military legal officers from Australia (Group Captain [now Air Commodore] Paul Cronan, Director General Australian Defence Legal Services), Canada (Brigadier General Ken Watkin, Judge Advocate General, Canadian Forces), New Zealand (Brigadier General Kevin Riordan, Director, New Zealand Army Legal Services), and the United Kingdom (Group Captain [now Air Commodore] William H. Boothby, Deputy Director of Legal Services, Royal Air Force); four U.S. professors with extensive law of war knowledge from top U.S. law schools; and Sir Adam Roberts. Sir Adam's honours include Emeritus Professor of International Relations, Oxford University, Senior Research Fellow at the Centre for International Studies in Oxford University's Department of Politics and International Relations, an Emeritus Fellow of Balliol College, Oxford; and President of the British Academy. Peer review members were asked to "tear the draft chapters apart" and "grant no quarter" in the process.

The meeting exceeded our expectations. Individual authors turned to revisions based upon the peer review comments. The chapters underwent additional law of war working group reviews, undertaken with the assistance of a professional (non-lawyer) editor, Justin Anderson, who earned his doctorate at King's College London; a Canadian, Dr. Stephanie Carvin, a professor at Royal Holloway College and graduate of the London School of Economics; and an American lawyer, Anna Katherine Drake, with her Master's in War Studies from King's College London. Following their works the chapters were sent to me as the editor-in-chief for review, editing for consistency, and cross-referencing before a "nearly almost final" review by the Law of War Working Group. In some cases draft chapters were returned to individual authors for further work.

At the moment the draft manual is proceeding through an informal interagency review. Once that is accomplished, the manual will be forwarded to the DoD General Counsel, Jeh Johnson, for his review and approval prior to his forwarding it to the Secretary of Defense for his signature.

Thank you again for the privilege and pleasure of meeting with you to provide you this overview of the forthcoming manual.

DISCUSSION

General issues

With regard to Article 75 of the Additional Protocol I, it was asked whether its content is contained in the Manual or whether there will be a separate announcement from the US government to the effect that it represents customary international law. As of now, an agreement is being worked out between the Department of State and the Department of Defense and their decision on this issue is being expected.

Despite the US not being a party to the Additional Protocols I and II, it was nevertheless noted that were the US to ratify the two instruments, no substantive changes would be required in the Manual itself. In some aspects, the Manual does arguably go beyond what is strictly required by international law, e.g. affording broader humanitarian protection to armed non-state actors.

It has been the US policy to apply the rules governing international armed conflicts (IAC) in all armed conflicts, yet the Manual features a separate chapter on non-international armed conflicts (NIAC). Whilst it is true that the US trains its soldiers primarily for IACs, there are some significant differences between the two types of armed conflict. In IACs, we are most often dealing with linear battlefield and the situation of one military force fighting against military forces on the other side. In NIACs, however, the civilians are in fact those whom we are trying to protect. It is sometimes difficult for conventional forces-minded soldiers to understand that foreign civilians do not pose a threat. The Manual makes clear that significant civilian casualties would alienate local people and jeopardize our military efforts. On the other hand, it emphasizes that the underlying basic principles, such as humane treatment, remain the same in all armed conflicts.

With regard to the relationship between international humanitarian law (IHL) and human rights law, the US position is that IHL represents *lex specialis*, as confirmed by both the International Court of Justice and the US Supreme Court. In NIACs, there are areas where human rights law applies alongside IHL. On the other hand, the persons captured in IACs are treated in accordance with the comprehensive IHL regime and there is no need to resort to human rights law. Although where there is a genuine gap in law, we can look to human rights law for assistance.

Targeting

A question was raised whether the Manual addresses the US Navy's Commander's Handbook definition of military objective, including war-sustaining targets; wording not included in the Additional Protocol I definition of a military objective. The Manual continues

to use the war-sustaining terminology but it is arguably more of an intellectual argument between various textual alternatives which does not make a real practical difference. We are looking at the types of legitimate military objectives that affect the enemy's capability to wage war, but not attacks against civilian populations.

The issue of direct participation in hostilities was one of the most difficult parts of the Manual, because it often has to be tailored to a particular conflict scenario. There are different types of insurgency, guerrilla warfare and armed non-state actors, which are constructed along local and cultural lines, such as tribal loyalties in Somalia or Afghanistan. The "farmer by day, fighter at night" label is probably one of the most inaccurate descriptions of a person's relationship to an armed non-state actor. The Manual is therefore limited to a few general statements and guidelines on direct participation in hostilities. That said however, US has one of the most detailed methodologies concerning the selection of targets, but these are classified and cannot be discussed in the Manual.

An instructive example from a real IAC situation was the bombing of the Peenemünde during the WWII. We would not target the individual constructors or engineers, but if the assembly and launch site itself was being bombed, civilians working there were at risk. What may also be considered is a targeting of a particular person such as Wernher von Braun, who was the technological mastermind and a high-value target. These are all factors to take into account in the final decision-making.

With regard to the civilians accompanying armed forces, the Manual does not contain a separate chapter dealing with the issue but it is addressed in several instances in different chapters, such as the one on the means and methods of combat or protection of civilians. The number of civilian contractors on the ground is increasing and they are used to substitute for a state's military forces. It is therefore impossible to expect they would be immune from attacks or to call them non-combatants. This is also an issue where the direct participation in hostilities comes in again. If we take an example of the 1990 operation Desert Shield, there was a supply line from the US into Saudi Arabia to bring the US tanks in. They were transported within both the US and Saudi Arabia by trucks driven by civilians, which would then arguably be legitimate targets.

Modern warfare

Semi-autonomous weapon systems, such as drones, are being used by the US in its military operations, and there are a number of misconceptions about how that is being done. For example, the button is always pushed by a senior military officer, not a civilian. Although the system allows for highest precision targeting, it has to undergo the same legal process as any other weapon.

Similarly, possible future autonomous systems, which can be programmed to make the decision to shoot on their own initiative, would also have to meet the same IHL standards. However, there is a reason to be sceptical about them due to the possibility of misuse, e.g. if the enemy sends something that looks like a suicide vessel, but is in fact full of children, that would have disastrous consequences for the military efforts.

Another very contentious issue, cyber warfare, is also dealt with in a short separate chapter of the Manual. It covers some basic issues including a limited *ad bellum* analysis of whether cyber attack can constitute an armed attack within the meaning of Article 51 of the UN Charter. It is however very difficult in practice to provide a comprehensive unclassified guidance on the issue and the section will not therefore satisfy all curiosity.

Summary by Monika Hlavkova