

## **National Security Law in Practice: The Department of Defense Law of War Manual**

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Good morning. Thank you for this opportunity to speak with you about the forthcoming Department of Defense Law of War Manual.

The history of military law of war manuals is relevant to the path selected for the new manual. At the First Hague Peace Conference, governments adopted Article 1 of the 1899 Hague Convention with Respect to the Laws and Customs of War on Land, obligating governments to issue “instructions” to their armed forces. This requirement was reaffirmed at the 1907 Hague Peace Conference.

The term “instruction” is contained in U.S. Army General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, prepared by Dr. Francis Lieber in 1863 during the U.S. Civil War. The Lieber Code laid the foundation for the treaty obligation for law of war manuals prepared by governments.

The United States implemented the Hague obligation with the War Department’s *Rules of Land Warfare*, published in 1914. I brought along a copy of that manual. It is pocket-sized with small print. It contains one hundred thirty-nine pages of text, a glossary, a comprehensive and very useful twenty-six-page index, and forty-four pages of appendices containing treaties to which the United States was a party at that time (in English and French). It was updated and republished in 1917, 1940, and 1944.

The 1949 Geneva Conventions for the Protection of War Victims necessitated preparation of a new law of war manual. Steps were initiated towards U.S. ratification of the conventions and preparation of a new manual. U.S. Army JAG and British military

and civilian law of war experts met at Cambridge University in May 1953 to discuss their respective manual efforts.

The U.S. manual, Field Manual 27-10, *The Law of Land Warfare*, was published in 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 Major Richard R. Baxter, subsequently a justice on the International Court of Justice. The British manual, 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 British ratification of the conventions.

There have been 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 1976, prior to conclusion of the diplomatic conference that was preparing the 1977 Protocols I and II Additional to the 1949 Geneva Conventions (hereinafter "Protocol I" or "Protocol II"), the U.S. Air Force published Air Force Pamphlet 110-31, *International Law – The Conduct of Armed Conflict and Air Operations*, prematurely incorporating the not-yet-finalized 1977 Protocols. It was withdrawn in 1995. In place of the naval warfare manual, the U.S. Naval War College produced the *Law of Naval Warfare*, now entitled *Commander's Handbook on the Law of Naval Operations*. As its title indicates, it is a manual of broader scope.

The 1977 Protocols I and II were adopted by a diplomatic conference on June 10, 1977. They were opened for signature and signed by the United States on December 12, 1977. DoD consent to U.S. signature was subject to an assurance that a comprehensive military, policy, and legal review of the Protocols would be allowed prior to an Executive

Branch decision as to ratification. The review was delayed three years as the individuals responsible for it were involved in the negotiation of what became the 1980 Convention on Certain Conventional Weapons. The same individuals participated in NATO meetings to develop common statements of understanding. As was the case with U.S. signature, the review proceeded on an assumption by the Reagan Administration (carried over from the Carter Administration) that the United States would ratify, subject to reservations or statements of understanding identified by the review.

Subsequently a policy decision against ratification of Additional Protocol I was made prior to completion of the military, policy, and legal review. President Reagan announced this decision on January 28, 1987.

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 the character of a new law of war manual and specific legal issues, such as defining the concept of *proportionality*. These meetings led to a strong working relationship between the military lawyers representing their respective governments. An Australian colleague irreverently named our informal association “the Empire Club”, eventually consenting to U.S. membership notwithstanding its early departure from the British Empire but only so long as U.S. representatives paid a disproportionate share of the bar tab.

Preparation of a new U.S. law of war manual followed two steps. The first was a 1996 agreement by the Judge Advocates General of the Army, Navy, and Air Force, and the Staff Judge Advocate to the Commandant of the Marine Corps, that there would be a joint manual rather than single-service manuals. This decision was taken for a variety of

reasons, not the least of which was emphasis on joint operations resulting from the 1986 Goldwater-Nichols Act. The military services and the DoD General Counsel agreed that it was time to speak with a single, authoritative voice to ensure consistency in legal interpretation.

The second step was a 1996 meeting hosted at The Judge Advocate General's School in Charlottesville 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 representative 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 a bookshelf." It was decided 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 is more accurate to describe the process as one that took place during a fourteen-year period. At best twenty per cent of the time between 1996 and 2010 was dedicated to the manual. Participants had regular duties to perform in addition to working on the manual. In particular, the operational tempo, including military operations in the Balkans and the two wars of this decade, demanded much attention. Further, the adage "the best is the enemy of the good" had to be balanced against the gunfighter adage that "speed is great, but accuracy is better".

The 1914 U.S. manual contained statements of the law as interpreted by the United States and historical examples of State practice to provide context. In preparing the 1956 manual, Professor Baxter had to incorporate the 429 articles of the four 1949 Geneva Conventions into the new manual in relatively short order. He inserted the

Geneva conventions *verbatim*, without explanation. Historical examples were deleted. In contrast, with two authors and the luxury of more time, the 1958 British manual discussed, explained, and clarified law of war treaty provisions, following the 1914 U.S. manual in incorporating footnotes with State practice examples.

Sir Adam Roberts has observed, “Lawyers tend to cling to the safe anchor of treaties”. Providing a treaty text without explanation, clarification, elaboration, or evidence of State practice, has led lawyers, military and civilian, to incorrectly view law of war treaties as the law in its entirety. This flaw may have resulted from the approach taken in the 1956 FM 27-10. It is a shortfall in the International Committee of the Red Cross’s 2005 *Customary International Humanitarian Law* study, for which it has been criticized. The approach taken in the 1914 U.S. manual and by Professors Lauterpacht and Draper in the 1958 British manual to *explain* the law with State practice examples became our approach in the new DoD Manual. This necessitated substantial research of history.

Other law of war treaty developments began in 1954. Over the next fifty-two years the international community produced an additional nine arms control or law of war treaties and eight protocols of relevance to production of a new manual.<sup>1</sup> The United States has ratified five of the nine treaties and six of the eight protocols.

The extent of treaty development made it apparent that a manual new from bottom to top was necessary. Negotiations and international consideration of specific law of war topics since 1956 necessitated more detailed explanation, not only with respect to new treaties or protocols but based on clarification of the law gained as a result of those international discussions. For example, whereas the 1956 FM 27-10 discussion of the legality of weapons consists of one paragraph stating the treaty prohibition of weapons

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<sup>1</sup> Listed at the end of presentation.

calculated to cause *unnecessary suffering* with a brief, vague definition, the forthcoming manual contains extensive discussion of the principle in two chapters. Discussion of the legality of weapons in the new manual is far more comprehensive. In contrast to FM 27-10's single page, the DoD Manual weapons chapter is ninety-six single-spaced pages. This is a representative contrast between the DoD Manual and its immediate predecessor. Authors of the DoD Manual benefited from almost four decades of international discussions on the legality of weapons.

The new manual contains chapters on new topics. Non-international armed conflict, relatively unknown in 1956, evolved from a single article in the 1949 Geneva Conventions to the 1977 Additional Protocol II. Since the end of World War II, the United States military has fought three conventional armed conflicts for a cumulative time of less than four years. In the same time, they have engaged in counterinsurgency operations in three major armed conflicts lasting a cumulative 23 years. Therefore, non-international armed conflict merited a chapter. Technological developments have played a similar role, resulting in a 17-page chapter on information and cyberspace operations.

Consideration was given as to what should be said of the 1977 Protocol I. The objections expressed by Reagan Administration officials were narrowly focused on parts of four of Protocol I's 102 articles. These provisions would have been rejected had the Reagan Administration sought Senate advice and consent to ratification. Our closest allies have rejected these provisions with carefully-crafted statements deposited upon ratification. The principal provision to which members of the Reagan Administration objected has had no play nor effect – *none* -- since its incorporation into Protocol I in 1974.

1977 Protocol I provisions have been accepted by the United States in other treaties. For example, the definition of "military objective" in Article 52 of Additional Protocol I is contained in two protocols to the Convention on Certain Conventional Weapons. Each has been ratified by the United States. In writing the manual, we enjoyed a level of experience that did not exist during the Reagan Administration in that we engaged in combat operations in the 1991 and 2003 wars against Iraq, the 1999 NATO Kosovo air campaign, the war in Afghanistan, and in other operations with Coalition partners who were States Parties to Protocol I and in which its provisions were applied by

Allied and U.S. military commands. With this background, Protocol I provisions have been incorporated into the manual, with explanation as necessary, when regarded as accurate statements of the law or otherwise consistent with U.S. practice.

A frequent question is “*for whom is the manual intended*”? The manual is intended to be user friendly by anyone, lawyer or non-lawyer, at any level. Frequently we thought about the young JAG in the field, alone, asked a question by his or her commander in the middle of the night. We know that the manual cannot anticipate every issue. We endeavored to provide as much of an explanation as possible to assist a JAG in *understanding* the law of war.

I’ll now turn to the work effort.

The new DoD manual is the product of the Department of Defense Law of War Working Group. The Law of War Working Group originated with the DoD lawyer members of the U.S. delegation to the Diplomatic Conference that produced the 1977 Protocols I and II. Today 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 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 Pentagon”. It has been our good fortune that the Air Force JAG office has included exchange officers from the Royal Air Force and the Royal Australian Air Force. We have benefitted from their participation. Our colleagues from the Office of the Legal Adviser, Department of State, have participated on an informal basis in development of the manual, offering invaluable comments and suggestions. That said, at all times the manual has been regarded as and remains solely a Department of Defense document.

Different offices assumed responsibility for preparing individual chapters. Once drafted, each chapter was circulated to other members, following which a “murder board” was held for the draft. Each chapter underwent multiple drafts and “murder boards” in the process.

In May 2009 the DoD General Counsel hosted an international peer review of draft chapters at The Judge Advocate General of the Army’s Learning Center and School in Charlottesville. The peer review consisted of senior military legal officers from

Australia, Canada, New Zealand, and the United Kingdom; four U.S. law professors from top U.S. law schools with extensive knowledge of the law of war; and Sir Adam Roberts, a distinguished British professor of history with long-time interest in the law of war. A non-lawyer, Dr. Stephanie Carvin, a professor at Royal Holloway College, University of London, served ably as a member of our post-peer review editorial staff and in-house “sanity check”. Peer review members were called upon to “tear the draft chapters apart” and “give no quarter” in the process. The meeting was a great success. Individual authors turned to revision of their respective chapters based upon peer review comments. The chapters underwent another law of war working group review, undertaken with the assistance of a professional, non-lawyer editor, Dr. Justin Anderson. Finally, they were forwarded to me for review, editing for consistency, and cross-referencing.

The draft manual now exceeds 1,100 single-spaced, typewritten pages with more than 3,000 footnotes. Notwithstanding the number of footnotes, it was prepared as a user’s tool rather than as a law review article. All chapters will be in the hands of members of the law of war working group by the end of this month for a final read-through. Its members will have one month to identify any “red flag” points, reconcile them, brief their respective superiors, and obtain their approval. Once that is accomplished, the manual will be forwarded to the DoD General Counsel, Mr. Jeh Johnson, for his review prior to his forwarding it to the Secretary of Defense for approval and release.

Thank you again for the opportunity to speak with you about this.



Arms Control or Law of War Treaties or Protocols since 1954\*

- ◆ The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict\*, and its First 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\*.

*\*Asterisk indicates U.S. ratification. In the main text, the 1977 Additional Protocols I and II have been counted as “treaties” notwithstanding their official titles.*