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National Military Manuals on the Law of Armed Conflict

Nobuo Hayashi (editor)



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PREFACE BY THE SERIES CO-EDITOR

The Forum for International Criminal and Humanitarian Law seeks to contribute not only by its seminars and other academic activities, but also through its Publication Series. With this second volume in the Series, editor Nobuo Hayashi exemplifies the aspiration of the Series to provide quality publications on new or otherwise important topics in international criminal and humanitarian law, by using an open, Internet-based publication platform accessible to all, including those in less resourceful countries. While preserving the free nature of the publications, we are taking several steps to augment the quality control regime of the Series. It now has a Board of Editors and an Advisory Board. We are also introducing a more elaborate system of peer review. Feedback is welcome as we continue on this road.

The topic and content of this second volume flow from a Forum seminar entitled "National Military Manuals on the Law of Armed Conflict" held in Oslo on 10 December 2007. Nobuo Hayashi was the intellectual architect of the seminar, working closely with Mads Harlem, international humanitarian law expert at the Norwegian Red Cross, among others.

The seminar offered an opportunity to discuss a topic that has been somewhat novel in the discourse of the Nordic law of armed conflict community. At the time the seminar took place, Nordic countries had not adopted such manuals. Some of their decision-makers and key lawyers have doubted the practical utility of manuals in their country, while others may have had concerns about the appropriate reach of self-regulation within the Nordic military establishments. Should military lawyers be entrusted with the task of expounding applicable international legal obligations, or should that task be the prerogative of lawyers in ministries of foreign affairs and justice? Add to these considerations the limited exposure of Nordic armed forces to armed conflict for purposes other than UN peace-keeping, which has led to few serious violations of international humanitarian law by Nordic soldiers. Needless to say, this fact has no bearing on the merit of military manuals. Rather, the limited number of publicised scandals may have delayed a thorough consideration of whether the time has come to develop such manuals also in the Nordic space. It should therefore be welcomed that, following the seminar, Norway has taken initial steps to have a Norwegian manual prepared.

The seminar reminded us that some other countries consider military manuals an indispensable component of the overall normative framework of their armed forces. Included in this list are states with the most widespread and costly international military presence, and extensive participation in armed conflicts. The approach of these countries reflects in part the long-recognised imperative that states inform members of their armed forces of the applicable normative constraints on their use of force in armed conflict, with a view to ensuring that

these constraints are understood and respected in practice. Admirable efforts and expertise have been invested in developing these manuals. A few of these countries also give their military manuals quite a prominent profile in their contemporary military self-representation, sometimes with reference to how long such manuals have been in existence. Indeed, the early foundations of international humanitarian law were in part built on national manuals.

The seminar brought together experts from these and other countries. As this publication shows, the discussions were wide-ranging and incisive. The group of speakers and participants may well be a suitable platform for further inquiry and analysis of some questions raised. First, what exactly is the state of our knowledge on the effect of military manuals? Do we have knowledge that draws on comparative data on effects, from different countries and more than one branch of armed services?

Secondly, does it make sense for a manual to address both government lawyers and lower-level officers and soldiers at the same time? Can manuals be developed so that they would speak effectively to the latter two groups above and beyond operational manuals and soldier's "LOAC cards" which may exist?

Thirdly, how are military manuals to be made as user-friendly as possible, especially if the target group includes lower-level officers and soldiers? Should military manuals be developed on electronic or online platforms, with several layers of presentation of the information in addition to the traditional textual narrative, so that the learning circumstances of different target groups are better accommodated? Should expertise from disciplines such as pedagogy, psychology and legal informatics be engaged alongside legal and military expertise and experience to strengthen the ability of manuals to reach the target groups and by that meet the objectives of the manuals?

Improving tools to enhance respect for international humanitarian law is intrinsic to the foreign policy goal of strengthening international law and order – it would seem to go to the heart of the matter. Given the remarkable material and human resources consumed by armed forces around the world, the amounts that would be required to increase further our understanding of these issues are insignificant. They will be useful investments in ensuring that states respect international legal obligations which they themselves have made or at least accepted.

Morten Bergsmo

PREFACE BY THE EDITOR

On Monday the 10th of December 2007, Oslo played host to an international seminar on national military manuals on the law of armed conflict. This publication records the papers presented, statements made and views exchanged on that occasion. Hopefully, those considering preparing new manuals will find the content of the following pages useful.

The seminar took place as an event in the series of the Forum for International Criminal Justice and Conflict (now renamed the Forum for International Criminal and Humanitarian Law). It was co-organised by the Norwegian Centre for Human Rights, University of Oslo; the Norwegian Red Cross; the Danish Red Cross; the Finnish Red Cross; the Swedish Red Cross; the Norwegian Defence Command and Staff College; the Norwegian Institute of Defence Studies; and the International Peace Research Institute, Oslo (PRIO).

Approximately one hundred people from well over a dozen countries in Europe, North America and the Middle East participated. They included scholars and students; military lawyers, judge advocates and operational personnel; police instructors; Red Cross advisers; politicians; editors; prosecutors; and legal advisors from foreign, defence and justice ministries. They explored various aspects of military manuals including their preparation and maintenance. The seminar also featured discussions on the idea of a Nordic regional manual.

Special acknowledgements are due to speakers and moderators for their contributions at the seminar and for their feedback on earlier drafts of this volume; rapporteurs for their diligent note-taking and for preparing the minutes of seminar discussions; those who have helped some of the speakers and moderators with their manuscripts; the Norwegian Red Cross, and particularly Mads Harlem and his colleagues, for providing logistical support, offering Henri Dunant Hall as the seminar venue and aiding the rapporteurs with audio-recording equipment; Linda Hafstad, a Forum intern, for her administrative assistance; and PRIO Information Director Agnete Schjønsby for designing, formatting and printing this publication.

Last but not least, on behalf of all seminar co-organisers, I wish to thank the Norwegian, Danish, Finnish and Swedish Red Cross societies for their financial support.

Nobuo Hayashi

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INTRODUCTION

Nobuo Hayashi*

1. Background to the Seminar

The idea of a seminar on national military manuals on the law of armed conflict (LOAC) first took shape in late July 2007. Mads Harlem of the Norwegian Red Cross brought up the subject of military manuals and took the initial step by preparing a concept paper. Then Harlem, PRIO's Morten Bergsmo and I met to discuss the paper. I offered to develop it further at this meeting. By early August, we had agreed upon and finalised a complete draft seminar programme.

It was felt from the outset that our familiarity with national LOAC manuals was somewhat limited. It seemed reasonable to assume that they would endeavour to provide clear operational guidance to armed forces personnel and enhance LOAC compliance among them. Other than that, however, relatively little about the precise nature of these documents appeared to be well understood beyond their respective authors and users. Would they function as textbooks for training, references for practitioners, and/or expressions of official positions adopted by the states that issued them? Could they constitute formal regulations binding on their addressees? These general questions remained unanswered in our minds notwithstanding the existence of several readily accessible manuals such as those issued in Canada, Germany, the United Kingdom and the United States.

It was also felt that producing a credible LOAC manual would be an intense undertaking in resources, expertise, time and labour. First, it would need a dedicated group – or, quite possibly, a succession of dedicated groups – of writers and editors, plus an extensive network of researchers, advisers and consultants. Second, it would require advanced competencies in the law of armed conflict and public international law, as well as a wealth of operational clout, experience and insight. Third, it would be a project stemming over years if not decades. Fourth, it would involve a lengthy, laborious and, at times, highly tedious process of harmonising multi-author enterprises into a coherent whole.

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These prospects would imply that only a well-informed decision at some suitably elevated echelon of government, followed by unwavering long-term political and military support, would produce a manual worth its name. Here, a problem would present itself. It would be a daunting task to impress the utility of a LOAC manual upon those accustomed to responding flexibly and creatively to unforeseen events. They would be anxious about "tying" their hands to the position stated in a pre-existing publication. After all, why should they write a manual when they have been doing just fine for so many years without it?

This led us to a series of questions. What exactly is a national military LOAC manual? What separates a state that issues a manual from a state that does not? In what way do these states differ from each other in their assessment of a manual's benefits *vis-à-vis* its costs?

We knew that none of the Nordic states currently has a fully fledged national manual. Doubtless, they must have considered the matter at different points in time and decided not to pursue it further. Just as clearly, however, recent years have witnessed rapid and significant changes in warfare as well as the law applicable to it. These changes have "reopened" numerous issues such as conflict classification and made it all the more important for states to update their official positions on them. Meanwhile, Nordic states have found themselves in new operational environments – *e.g.*, peace support operations in Kosovo, combat action in Afghanistan – where competent legal guidance is urgently needed. It would appear that discussions among Nordic states on these legal and operational matters would go hand in hand with discussions on the desirability or otherwise of military manuals. At a minimum, the mere thought of articulating positions in writing would focus minds.

2. Aim and Structure of the Seminar

In view of the foregoing, we decided that the seminar would explore four themes. They are: (i) what might be termed the "fundamentals" of national military LOAC manuals; (ii) the experiences of states which already maintain such manuals; (iii) the scope and content of a good manual; and (iv) the need or otherwise of a new manual for a state hitherto without one. Our emphasis would be on matters of real and practical import with a view to assisting those tasked with drafting a manual.

First, the seminar would consider the nature and function of national military manuals. This theme would be divided into two sub-themes, one for the issuing state itself and the other for international law. To begin with, what is a manual? What does it do? Could the expres-

sion "military LOAC manual" possibly refer to more than one type of documents?¹ What is the status of a given manual within the broader legal, institutional and normative framework – particularly in relation to other rule-setting documents – that governs the armed forces of the state that issues it? Those preparing a manual would need to agree on its purpose, status, scope and content, and to calibrate their work accordingly.

Insofar as a national manual contains statements about the law of armed conflict in some shape or form, what is its standing relative to international custom? Can a manual be evidence of state practice and/or *opinio juris*, or neither?² It may well be that, regardless of their formal domestic status, all official LOAC instructions issued by a state constitute *indicia* of that state's practice.³ It is equally possible, however, that different documents do – or should, in any event – have different probative values depending on their respective degrees of authority within the issuing state's regulatory hierarchy. Manual drafters would do well to reflect on the potential weight of their writing in the formation and ascertainment of customary law and, accordingly, the far-reaching legal consequences it might entail for their governments.

Second, the seminar would hear the experience of states which already publish manuals. Here, too, there would be two thematic strands. One strand would look into the experiences of three specific manuals – namely, those issued in Canada, Germany and the United Kingdom. How, and for what purpose, did these states come to issue their manuals? Whom do they identify as the target audience? How, if at all, did they approach questions of status both within their respective military legal orders and under international law? Were these questions problematic for them? Have they encountered substantive, administrative and/or other difficulties during the drafting process? Would they have any advice to give if a state were to consider issuing a manual for the first time? We felt that, in view of their size, self-

¹ See, e.g., Charles Garraway, "The use and abuse of military manuals", in 7 *Yearbook of International Humanitarian Law* (2004), pp. 425-40. Garraway identifies at least three distinct types of documents, namely: international manuals, national manuals and what he calls "internal manuals". According to Garraway (*ibid.*, p. 439),

[a national manual] does not seek to clarify the law as an international manual would seek to do, nor does it seek to be tactical guide for implementation. Instead, it seeks to expound a particular position on the law, which it will then be for others to translate into operational and tactical guidance.

² See, e.g., Frits Kalshoven, "The Respective Roles of Custom and Principle in the International Law of Armed Conflict: The Second Friedrich Martens Memorial Lecture", in 2 *Acta Societatis Martensis* (2006), p. 59. Kalshoven calls military manuals "a form of practice not by a long way as solid as battlefield conduct, but not completely negligible either".

³ See, e.g., Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, 2005, Vol. II, part 2, pp. 4196-207. *The ICRC Customary Law Study* uses the expression "military manuals" in an inclusive fashion. Also, see Michael Bothe, "Customary international humanitarian law: some reflections on the ICRC study", in 8 *Yearbook of International Humanitarian Law* (2005), pp. 156-7, esp. 156:

What are military manuals? Generally, they are part of the internal legal rules of the armed forces of states prescribing a particular behaviour in particular situations of armed conflict. They take the form of general orders, instructions or the like.

Of these general orders, instructions and so on, Bothe goes on to state, in footnote 48:

In addition to these formally binding instruments, there are training manuals or similar teaching and dissemination manuals which have also been used in the [ICRC] Study ... Although their formal status is lower, they do indeed also constitute an element of state practice. No state will teach its troops rights and obligations which are different from the respective official view of the state's military organs in relation to these rights and obligations.

perception, international profile and legal tradition, Nordic states might find aspects of the British, Canadian and German manual-drafting experiences relevant and helpful.

The other strand would focus on the role of national manuals in today's multinational peace operations. What role, if any, have they played in such operations? Would standard national LOAC manuals be usefully adapted for those deployed on peacekeeping, peace enforcement and law enforcement operations abroad? Or would an international approach to military manuals perhaps be more appropriate for them? Questions such as these would be clearly material to Nordic states given their traditional prominence in this area.

Third, the seminar would examine the scope and content of a good national manual. Should it be comprehensive in its coverage of various LOAC areas, *e.g.* the law of neutrality, or should the manual limit itself to areas that are of immediate interest to its issuer? How should it deal with controversial and evolving matters including, for instance, conflict classification, status of individuals and belligerent occupation? To what extent, if at all, should a LOAC manual incorporate other related fields of international law such as international human rights law and international criminal law?

Fourth, the seminar would consider whether a state really needs a national military LOAC manual to begin with. Is a manual really necessary for a state that does not have one yet? What, if any, is its added value? What are the pros and cons of a state having or not having a manual for its armed forces? Are there any conditions for a manual to be legitimate, feasible and/or useful and, if so, what are these conditions? Might there be a "Nordic" manual, given the potential for sharing expenses as well as the combined availability of expertise and close ties in the region?

The seminar would envisage four sessions, each dedicated to one of its four themes. We would highlight the occasion's Nordic focus by drawing its session moderators from Denmark, Finland, Norway and Sweden. We would also ensure that a variety of backgrounds, experiences, interests and viewpoints are represented on seminar panels. Here, we were moderately successful. Alongside our British, Canadian, German and Nordic panellists sat those presenting Swiss, Red Cross and independent perspectives. Despite our efforts, however, we did not succeed in securing the participation of speakers from Iceland or from the United States.

Europe's December climate took its tolls on our programme. Two confirmed speakers, Gro Nystuen and Wolff Heintschel von Heinegg, fell ill shortly before the seminar and were unable to attend as a result. Nystuen had been scheduled to open the seminar and to sit on a discussion panel. Von Heinegg was to discuss the German experience with military manuals.

We had received his draft paper well ahead of the seminar. This volume contains its final version.

3. Views Expressed at the Seminar

3.1 Fundamentals of military manuals

Charles Garraway distinguished national manuals from international manuals as well as official LOAC instructions issued at lower levels of government. A national manual does not form law *per se*. It does, however, provide evidence of state practice and *opinio juris* in relation to the state that issues it. A national manual reflects the positions, including those on contentious matters, adopted by its issuer.

According to Garraway, a state's domestic legal framework for its armed forces should be such that the parameters for military decisions cascade down consistently from a national manual at the top all the way down to "soldier's LOAC cards" on the ground. This framework resembles the top-down, pyramid structure that characterises operational instructions. Despite this similarity, however, a national manual should restrict itself to the law of armed conflict lest the document grow too voluminous.

Garraway noted two major setbacks to publishing manuals. First, the constantly changing nature of armed conflict threatens to make the law, as well as the positions adopted by a state in its military manual, quickly obsolete. Second, the growing use of manuals – not just national manuals properly so called but also, and more problematically, lower-level publications – by organisations and courts as evidence of state practice has prompted states to classify their manuals or caveat them with disclaimers.

Garraway argued that, ultimately, a national LOAC manual is necessary because it is part of what a state owes to members of its armed forces. Soldiers must make life-and-death decisions swiftly and based on imperfect information, and they must do so in conformity with the law. Since their government asks this of them and threatens to punish them if they fail, they are entitled to know the standard by which they will be judged.

Hans-Peter Gasser advanced the thesis that appointing legal advisers to armed forces and issuing military manuals are two sides of the same coin. The policy considerations underlying these measures are identical. They also have the same goal to accomplish, namely to disseminate international humanitarian law (IHL) and ensure its respect among military personnel.

Gasser based his discussions primarily on Articles 80, 82 and 83 of 1977 Additional Protocol I.⁴ Article 80 obligates contracting states to take all necessary measures with a view to ensuring observance of the law. From this general obligation emanate two further duties, one on the provision of legal advisers to the military (Article 82) and the other on dissemination (Article 83). Publishing national manuals is a component of dissemination.

In Gasser's view, legal advice should encompass both customary international humanitarian law and the law applicable in non-international armed conflicts. In peacetime, legal advisers would engage in instruction and operational planning; in wartime, their work would acquire a more preventive tenor. They should be available at least to senior and other key commanders. Legal advisers with requisite IHL expertise may be recruited from active-duty military personnel and/or from members of the military judiciary and the civilian legal profession.

Gasser conceded that there is no express treaty obligation to issue military manuals. Nevertheless, practical IHL tools have become "simply indispensable". Military manuals and legal advisers need and complement each other in accomplishing their common goals. Manuals reaffirm their issuers' commitment to ensuring respect for the law, assisting armed forces personnel with decision-making and providing material for training. Manuals also help clarify legal issues, contribute to the development of custom and serve as models for states without their own.

David Turns examined the significance of military manuals in relation to customary international law. Contrary to popular belief, there are divergences of opinion on this matter. Commentators disagree amongst themselves. Manual drafters seem reluctant to let their writings be treated as evidence of custom; national and international judges appear much more prepared to treat them as such.

To Turns, military manuals would be relevant primarily as an element of *opinio juris*. Admittedly, however, this does not exclude the possibility that manuals may, or may also, constitute an element of state practice – particularly as verbal acts of the states that issue them. Manuals would constitute restatements of what their issuers regard as existing law and how they interpret it in certain situations. Manuals would not, in and of themselves, create new law.

Turns enumerated five contexts within which a manual's significance *vis-à-vis* custom might be considered. First, a manual's significance depends on the calibre of its authors, its official status and formal attribution to ministerial authorities, its intended audience, and the man-

⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), printed in Adam Roberts and Richard Guelff (eds.), *Documents on the Law of War*, 3rd

ner and extent of its circulation. Second, the document would be more significant if it were described as authoritative guidance rather than an *aide-mémoire* or a set of recommendations. Third, parts of a manual may restate the law as it is understood by the issuing state and, consequently, indicate that state's *opinio juris*. Other parts, typically those embracing new positions, may amount to policy declarations where the existence of *opinio juris* cannot be readily assumed. Fourth, whereas a manual may only be concerned with the state that produces it, other states can copy some of the positions taken in it and eventually turn them into custom. Fifth, for the purposes of the customary law of armed conflict, what a state actually does in wartime would be more important than what that state says in peacetime.

Turns concluded that a manual is essentially "politico-legal guidance" issued by a state to its armed forces describing its understanding and interpretation of existing law.

The ensuing discussion probed three major issue-areas, namely the nature of a military LOAC manual, its domestic status and its significance relative to custom.

Several participants stated that manuals are, first and foremost, practical tools for operational guidance and training. One participant added that manuals would also assist allies in understanding one another's positions. These views were widely shared by those who spoke later in the seminar as well.

It is over *what else* a manual might do that the differences of opinion among participants became quite apparent. On the one hand were those for whom a manual should remain a strictly operational instrument. For them, it merely restates, rather than constitutes, law. If manual writers advocate a position based on policy, then this basis should be clearly stated. It would follow that a manual is not binding on its addressees *per se*. Nor is it necessarily indicative of state practice and/or *opinio juris*. As regards custom, states' actual behaviour – including, in particular, their reaction to the practice of other states – carries more weight than the content of their military manuals. Courts should therefore exercise caution against relying too easily on military manuals when determining the existence and/or content of a customary rule.

Some participants, on the other hand, argued that there is nothing mandatorily restrictive about what a manual should or should not do. They noted that each state would be free to assign whatever legal status it deems fit to its military manual; in some states such as Switzerland, military manuals are binding law. Also, in their view, military manuals would clearly represent evidence of state practice. Even if parts of a manual amounted to policy statements rather than legal interpretations, these parts might turn into *lex ferenda* with the support of other states and eventually into *lex lata*. In other words, it would be perfectly

edition, Oxford University Press, 2000, p. 422 *et seq.*

appropriate for manuals to be used not only statically as restatements of existing law but also dynamically as an instrument of law's innovation and progressive development.

3.2 Experiences with military manuals

A.P.V. Rogers traced the British experience with LOAC manuals to 1914 when a chapter on the law of land warfare was inserted into the official *Manual of Military Law*. The chapter was subsequently revised in 1936 and followed by the publication of the *Manual of the Law of Armed Conflict on Land* in 1958.⁵ The latter document accounted for the experience of World War II and the provisions of the 1949 Geneva Conventions.⁶ The adoption of the 1977 Additional Protocols⁷ generated impetus for a new, joint service manual.

Rogers noted that the work on the 2004 *UK Manual*⁸ started in 1978 and culminated in a complete draft in 1986. The different approaches NATO allies had taken to the ratification of the Additional Protocols undermined their hopes of making common interpretive statements on controversial issues and using common language in their respective manuals. The United Kingdom's 1986 draft underwent multiple revisions, including those made in the aftermath of the 1991 Gulf War. The United Kingdom ratified the Additional Protocols in 1998. The latest draft, which had taken Kosovo and Afghanistan into consideration, was tested during the 2003 Iraq War and published in 2004.

According to Rogers, there was initial dissent as to how the *UK Manual* should be drafted. In the end, a decision was made to combine academic and military approaches. The manual incorporated the 1994 *San Remo Manual*⁹ in lieu of earlier draft chapters on naval warfare. There is no independent chapter on neutrality; nor does the manual refer to human rights law beyond occasional references to some of its rules.

Rogers highlighted the increasing need for a manual at a time when treaty provisions are not always clear and may be subject to interpretive statements. Should a state decide to issue a manual, it would do well to resolve some matters in advance. They include the document's intended status; its readership; whether it should function as a legal textbook or an operational handbook and, as a corollary, what layout it should adopt; its authors and methodolo-

⁵ *The Law of War on Land, being Part III of the Manual of Military Law*, Her Majesty's Stationery Office, 1958.

⁶ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949; Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949; Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949. These conventions are printed in Roberts and Guelff, *op. cit.*, p. 197 *et seq.*

⁷ Additional Protocol I; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). The latter protocol is printed in *ibid.*, p. 483 *et seq.*

⁸ UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, 2004.

⁹ Louise Doswald-Beck (ed.), *San Remo Manual on International Applicable to Armed Conflicts at Sea*, Cambridge University Press, 1995.

gies; its scope and content; the manner in which it should handle treaty language; and whether it should be issued in electronic or paper format, in bound or loose-leaf versions, and so on.

William J. Fenrick described Canada as a country marked by its essentially non-military self-perception, lack of enthusiasm for defence expenditures and emphasis on interoperability. As such, Nordic states may find Canada's experience with LOAC manuals of interest.

Fenrick recalled that, until the mid-1970s, Canadian soldiers had undergone limited LOAC training. By 1980, however, Canada had produced its first draft manual. This draft manual was the first of its kind to encompass land, naval and aerial warfare and also to account for the 1977 Additional Protocols. A second complete and usable draft was ready in 1984. It was written on the assumption that Canada would ratify the protocols, which it did in 1990. Neither officially approved nor made available in French, this document remained a draft but it came to be used widely inside and outside Canada. In 2001, Canada adopted a *Joint Doctrine Manual*.¹⁰

Fenrick noted that the *Joint Doctrine Manual* is formally issued under the authority of the Chief of Defence Staff. It has not been approved by other government departments. The manual is a practical, working level publication designed primarily for commanders, staff officers and LOAC instructors. It follows that the manual is not a detailed textbook. Nor is it meant to be exhaustive in its coverage. For example, matters such as those relating to *jus ad bellum* are not addressed in the manual. The manual itself possesses no binding force.

Fenrick observed that Canada had also made use of foreign manuals and sent its military lawyers abroad for LOAC training. Nevertheless, despite the increasing availability of national publications such as the *UK Manual*, each state should in principle do its own LOAC thinking. The fact that modern military operations may not lend themselves to clear legal categories does not diminish the need for the adoption of LOAC manuals or legal policies at the national level.

Fenrick also offered his personal reflections on manual writing. In addition to some of the points raised by Rogers, Fenrick stressed that legal research tools and LOAC manuals do not replace each other; that LOAC manuals should restrict themselves to the law of armed conflict; that such manuals should cover all aspects of the law of armed conflict including, in particular, the conduct of hostilities; and that manuals will not in and of themselves ensure LOAC compliance.

[In his paper, Wolff Heintschel von Heinegg discusses the 1992 *German Handbook*.¹¹ Preparing this document involved extensive international consultations from an early stage. The handbook not only compiles treaties ratified by Germany but also restates conventional and customary rules of international law binding on it and its soldiers. The handbook is a *Zentrale Dienstvorschrift* – a formally binding regulation under German law. It is also a policy statement and, as such, under constant review.

[According to von Heinegg, the *German Handbook* closely follows the 1977 Additional Protocols and other international treaties to which Germany is a party. This approach creates two difficulties. First, German is not an authentic language of these instruments. The handbook must therefore rely on the official German translation of their provisions, resulting in textual discrepancies. Second, the handbook merely repeats some provisions without specifying how they are understood by Germany.

[Von Heinegg observes that the *German Handbook* does not distinguish between international and non-international armed conflicts. It remains to be seen whether this position in fact reflects the law as it stands or a policy adopted by Germany. The handbook's coverage of the law of neutrality and naval warfare requires updating. Sections on other military operations such as peacekeeping and peace enforcement should be added.

[Von Heinegg concludes that, all in all, the *German Handbook* has been a success. It articulates Germany's LOAC positions from which both its officials and allies benefit. Nevertheless, the handbook's limited scope and the considerable passage of time since its publication in 1992 are problematic. Producing a manual enables a state to clarify its views and contribute to the law's progressive development. Manuals should remain national in character, however. Creating a regional manual would prove difficult even among states with strong ties and similar treaty obligations.]

Dieter Fleck regarded military manuals as important tools with which states endeavour to ensure respect for international humanitarian law. Their efforts have come under strain in recent years with the emergence of asymmetrical warfare and increasing recourse to new types of peace operations. These operations encompass not only traditional peacekeeping and peace enforcement but also peacemaking and post-conflict peace building.

Fleck argued that the extent to which international humanitarian law provides peacekeepers with relevant and conclusive guidance should not be overstated. In truth, modern peace

¹⁰ Office of the Judge Advocate General, *Joint Doctrine Manual Law of Armed Conflict at the Operational and Tactical Levels*, B-GJ-005-104/FP-021. This manual can be downloaded from http://www.forces.gc.ca/jag/training/publications/law_of_armed_conflict/loac_2004_e.pdf.

¹¹ ZDv 15/2 *Humanitäres Völkerrecht in bewaffneten Konflikten* – Handbuch – 1992.

operations entail a multitude of activities to which important IHL rules and principles, as well as elements of public international law and national law, apply.

In Fleck's view, peacekeepers are more genuinely concerned with law enforcement than with the conduct of hostilities. For instance, they are bound by strict "capture rather than kill" and *habeas corpus* rules. It is true that IHL provisions prohibit certain measures during hostilities which would not necessarily be unlawful during police action (*e.g.* tear gas). Elsewhere, however, international humanitarian law – *lex specialis* relative to international human rights law during armed conflicts – is more liberal on the conduct of hostilities. International human rights law, for its part, contains more detailed provisions for some aspects of peace operations. This is so despite numerous important commonalities between the two bodies of law, such as the fundamental principles of distinction, proportionality and humanity.

Fleck advocated international co-operation in devising convincing solutions to uncertainties between the law enforcement and conduct of hostilities paradigms. Existing instruments such as the 1999 UN Secretary-General's Bulletin¹² and the 1994 UN Safety Convention¹³ have failed to bring clarity to these uncertainties. On the one hand, the bulletin is limited to conduct of hostilities situations, leaving areas of doubt which require resolution by reference to public international law and the national law of the state contributing peacekeeping personnel. On the other hand, it is unclear whether the UN Safety Convention applies to armed conflict. Manuals on the law of military operations should be developed through international efforts.

The discussion focused on the kind of solutions manuals should offer and on the utility of existing manuals for the purposes of producing a new one. Comments were also made on rules regarding detention and use of force during peace operations.

It was suggested that military LOAC manuals should provide practical, rather than theoretical, solutions. For example, soldiers operating in situations of *de facto* occupation would need rules of practical value, not necessarily those of formal applicability. Manuals should translate old rules into up-to-date solutions.

Questions arose as to whether a manual might be produced on the basis of those already issued elsewhere. The responses given were generally affirmative. Caution was urged on several grounds, however. One ground involves copyrights issues. Another ground for caution emanates from the fact that national manuals often contain views specific to their issu-

¹² Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, UN doc. ST/SGB/1999/13, printed in Roberts and Guelff, *op. cit.*, p. 725 *et seq.*

¹³ Convention on the Safety of United Nations and Associated Personnel, printed in *ibid.*, p. 627 *et seq.*

ers. Those consulting existing national manuals should carefully separate statements of law from statements of policy.

One participant observed that the rules regarding detention and use of force in peace operations were unclear. Nordic states might profitably work together towards a coherent legal policy on these matters.

3.3 Scope and content of military manuals

Roberta Arnold discussed the manner in which the *Swiss Military Manual*¹⁴ envisages penal sanctions in response to LOAC breaches committed by its addressees. Training Swiss military personnel on the law of armed conflict must account for the diverse backgrounds and levels of education they have. The need to ensure familiarity with LOAC rules, including the consequences of their breaches, is particularly acute among those deployed in the field who tend to harbour scepticism towards the law's relevance.

Arnold stated that Switzerland has two federal statutes specifically providing for the punishment of major international crimes. In principle, the Swiss Criminal Code is enforced by civilian courts, whereas the Swiss Military Criminal Code is enforced by military courts. Importantly, the latter code criminalises every breach of IHL rules, including those rules that are customary.

According to Arnold, the *Swiss Military Manual* endeavours to offer Swiss officers and non-commissioned officers practical guidance on the legal framework governing their activities. The manual was published in 2005 following an army reform and Switzerland's ratification of the Rome Statute of the International Criminal Court.¹⁵ It was felt necessary to account for the new types of operations – maintaining domestic order and security, peacekeeping, and so on – in which Swiss soldiers find themselves with an increasing frequency.

The manual declares that Swiss military personnel are not to act in a legal vacuum, Arnold said. The manual is not an operational handbook. Rather, it is a regulation and, as such, binding on its addressees. Conduct in breach of the manual gives rise to criminal liability. Specifically, the manual reiterates the principle of individual criminal responsibility and command responsibility, and emphasises that the law admits neither ignorance of law nor superior orders as defences. The manual also recalls the relevant provisions of the Swiss Military Criminal Code and Switzerland's international law obligations to prosecute LOAC breaches.

¹⁴ Rechtliche Grundlagen für das Verhalten im Einsatz, Reglement 51.007/IV.

¹⁵ This statute can be downloaded from http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf.

W.H. Boothby discussed how military manuals might incorporate controversial legal matters. Examples include the status of various persons such as the so-called "unlawful enemy combatants" and private security contractors, the notion of direct participation in hostilities, the definition of military objectives, targeting, weapons regulation and human rights.

In Boothby's view, the dynamic nature of the law of armed conflict would mean that the state issuing a manual should ensure its periodic review and timely amendments. A state may legitimately depart from the positions taken in its manual if it can be shown that they no longer adequately reflect the law in force or as it is interpreted by that state. Nevertheless, addressing controversial matters in a manual still requires considerable care since it may be cited against its issuer at an inopportune moment.

Boothby maintained that a manual should deal with difficult matters as long as they fall within its intended scope. Manuals are a conduit through which law is distilled to inform training and guide battlefield behaviour. It follows that manuals should address unlikely as well as likely events by covering the law of armed conflict comprehensively. In particular, manuals should set out in clear terms the positions of their issuers on controversial matters.

Boothby conceded that it may be difficult to state the law on controversial topics in a manner that is conducive to practical implementation. However, a failure to do so would increase the danger that the law is ignored or unmatched by the actual behaviour. Not addressing issues simply because they are controversial would leave the armed forces uninformed and adversely affect their LOAC training. Quite on the contrary, addressing difficult issues may serve as a catalyst for the adoption of specific positions on them. Manual drafters should remain vigilant against stating *lex ferenda* as if it were *lex lata*.

Louise Doswald-Beck argued that military manuals should incorporate international human rights law. They should do so because that law applies at all times. Unlike the law of armed conflict, international human rights law depends neither on the existence of an armed conflict nor on its classification. Moreover, international human rights law complements and clarifies international humanitarian law where the latter lacks specificity.

Doswald-Beck then offered clarifications regarding the application of international human rights law. First, according to the majority view, that law applies to states only. It does not address itself to non-state entities, *e.g.*, rebel forces and paramilitary groups, as such. This limitation may be partially rectified by the due diligence obligations of states – *i.e.*, a duty not only to respect human rights but also to ensure their respect. Second, the law's extraterritorial application is subject to jurisdiction such as effective control and belligerent occupation. Third, problematically, multinational peace operations leave open the possibility that

human rights abuses may be attributable to an intergovernmental organisation rather than to a state.

According to Doswald-Beck, manuals should at least state that all human rights remain relevant during armed conflicts. Manuals should also incorporate specific human rights. Some non-derogable human rights are particularly pertinent for military personnel, such as the prohibitions against arbitrary deprivation of life, torture and other inhumane and degrading treatment or punishment, enforced disappearances and slavery.

To these, Doswald-Beck added other important human rights, *e.g.*, access to legal counsel and independent bodies for *habeas corpus* remedies. A state's due diligence obligations also encompass an obligation to investigate alleged human rights abuses.

François S  n  chaud offered the perspective of the International Committee of the Red Cross (ICRC) on the historical significance and usefulness of military manuals.

S  n  chaud suggested that, since the 19th century, international humanitarian law has recognised the importance of military manuals as a means of its dissemination and compliance. Pursuant to a resolution adopted at the 1977 Diplomatic Conference,¹⁶ the ICRC developed numerous dissemination tools including *de Mulinen's Handbook*.¹⁷ The ICRC also contributed to the 1994 *San Remo Manual* and published its own *Model Manual* in 1999.¹⁸

S  n  chaud agreed that rules and principles of international humanitarian law are often formulated with a high degree of generality. Military manuals would help their users interpret and clarify these rules and principles. It is therefore imperative that manuals set aside abstract notions in favour of realistic and practical solutions.

In S  n  chaud's view, a manual must fulfil several conditions in order to be accepted and used effectively by its users. First, it must be capable of providing relevant legal interpretation and guidance. This requires that the law be presented accurately yet simply. The manual must also be written in a manner, vocabulary and logic that are familiar to its users. Second, manuals must be produced for the right motive and with a genuine commitment. Third, a manual must enjoy a sense of ownership by those to whom it addresses itself.

¹⁶ Resolution 21 (IV): Dissemination of knowledge of international humanitarian law applicable in armed conflicts, Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, printed in Dietrich Schindler and Jiri Toman (eds.), *The Law of Armed Conflicts*, 3rd revised and completed edition, Martinus Nijhoff Publishers/Henry Dunant Institute, 1988, pp. 728-9.

¹⁷ Fr  d  ric de Mulinen, *Handbook on the Law of War for Armed Forces*, International Committee of the Red Cross, 1987.

¹⁸ Anthony P.V. Rogers and Paul Malherbe, *Fight It Right: Model Manual on the Law of Armed Conflict for Armed Forces*, International Committee of the Red Cross, 1999.

The discussion revealed differences of opinion on the feasibility of incorporating international human rights law into military manuals. One view held that, although the law is clearly important, the scope of its application varies from state to state and from situation to situation. This variability makes it difficult for human rights rules to be stated clearly and practically in a manual.

Others maintained that the law's variability would become less pronounced if one were to focus on a specific country. It should not be too problematic for a single-country manual to articulate those human rights obligations by which its issuer is bound. Nor does the fact that human rights protection is situation-dependent mean that a manual should not affirm the law's applicability in all circumstances. On the contrary, such a statement would be all the more important should the manual address itself to high-level officials. The relevance of international human rights law cannot be ignored in regions such as Latin America where armed forces are involved more often in law enforcement than in armed conflict.

Questions arose regarding the range of human rights rules applicable to post-conflict peace operations. One aspect of the problem relates to effective control. Whereas situations of actual occupation may be relatively straightforward, ongoing operations tend to blur the notion of control. Another aspect of the problem involves *habeas corpus* rules – would peacekeepers be bound by them? The jurisprudence of various human rights bodies would indicate that they are.

Doubts were also expressed as to whether *de Mulinen's Handbook* would be a suitable substitute for other manuals such as the *UK Manual*. The handbook would be more appropriately described as a compilation of checklists than as a book of legal interpretation. In reply, it was pointed out that *de Mulinen's Handbook* is written from an exclusively international point of view, whereas the *UK Manual* is quintessentially a national document.

3.4 A Nordic military manual?

Göran Melander presented several arguments in favour of a common Nordic military manual. Nordic states have broadly similar IHL treaty obligations. They also have similar defence interests, namely their aversion to war and prominence in peacekeeping. A common manual would help participating states reduce their individual resource expenditures. Producing a common manual would induce countries such as Sweden to take measures with a view to improving their IHL implementation. Joint projects of this nature would entail negotiations among Nordic states and bring their relationship closer still.

Melander also listed several arguments against a common Nordic manual. Nordic states have different security interests. Some are NATO members, while the others are not; this

might prove troublesome for a common manual. National pride might also hinder joint efforts. Nordic states differ from each other, albeit slightly, in relation to the scope of their IHL treaty obligations.

Melander added that a way should be found to translate existing national manuals for the benefit of Nordic states. He also stressed that writing manuals does not necessarily mean successfully implementing international humanitarian law. There is a danger that the former might divert one's attention from the latter. In particular, states ought to prosecute war crimes suspects found within their respective jurisdictions.

During the discussion, several participants expressed their view that Nordic states should develop national if not regional manuals.

Participants agreed that Nordic states need to establish guidelines for their field operations. This need is particularly acute in places such as Darfur where the establishment of a Nordic battle group and other forms of long-term collaboration are foreseen. This could very well provide impetus for a common manual. Such a manual might embody the region's progressive, innovative spirit.

It was felt that a regional manual would be unrealistic if Nordic states were too divergent from one another in their national LOAC positions. Mapping the various points of convergence and divergence among Nordic states first may be a worthwhile endeavour. Even the preparation of a national manual would benefit from international involvement.

It was suggested that harmonising Nordic positions on issues such as peacekeeping operations would not be wasteful. States also need to decide, for example, whether or not to apply the law of armed conflict in its entirety to non-international armed conflicts.

Some participants voiced their ambivalence *vis-à-vis* the significance of international criminal law to military manuals. International humanitarian law is essentially a preventive discipline. It exists so that casualties are avoided or minimised in the first place, *not* so that its breaches engage criminal liability. Besides, enforcing IHL breaches through criminal sanction would be effective only if they were the exception rather than the rule. Where international humanitarian law breaks down, criminal law will not solve the matter by itself. The lack of IHL enforcement may call for a wider debate, but it is perhaps not directly relevant *as such* to a military manual.

Participants also considered national caveats often attached to rules of engagements (ROEs) used in multinational operations. Would manuals really help reduce such caveats and other operational obstacles? One participant observed that manuals may be more suitable for is-

sues other than those involving use of force in self-defence. This is an area of primary concern to ROEs where some countries may have more stringent national rules than others. The problem of caveats has been compounded by the ambiguous political mandates on which numerous multinational peacekeeping operations are set up in the first place. Another participant noted that caveats typically involve issues such as defending property to which both domestic and international law may apply; situations would be relatively clearer for armed conflicts proper. At any rate, manuals should insist on strict adherence to *habeas corpus* rules in peace operations.

In his closing remarks, Arne Willy Dahl observed that it would be challenging for a Nordic LOAC manual to harmonise national treaty interpretations without sacrificing clarity. The seminar organisers might put together a proposal for consideration – and, if deemed suitable, further action – by the defence ministries in the region.

4. Where the Seminar Leaves Us

It would be fair to say that the seminar broadly accomplished the four thematic objectives it had set out for itself. First, it has generated a considerable amount of food for thought on the nature and functions of national LOAC manuals. We heard experts place national manuals both within the respective regulatory frameworks of their issuers and in relation to customary international law. Second, participants acquainted themselves with the genesis of major national manuals and reflections of those intimately involved in their production. The seminar traced the thinking that had gone into the development and design of the British, Canadian and German manuals, as well as the prospects and limitations of adapting them for the purposes of creating new national manuals elsewhere. Third, the scope and content of a good manual became the subject of lively debate. Seminar discussions highlighted the growing need for practical legal guidance in peace operations. It also became apparent that the interplay between the law of armed conflict, on the one hand, and international human rights and criminal law, on the other, is highly complex. Fourth, the seminar has made it clear that writing a manual would be an integral part of a state's effort to disseminate and secure compliance with the law of armed conflict among its military personnel.

4.1 What is a manual?

There is, perhaps, no *uniquely authoritative* definition of a national LOAC manual. The seminar has identified several features – *e.g.*, aims and user groups – that are common to national manuals. At the same time, these manuals exhibit sharp differences in crucial aspects such as their legal effects.

Domestically, a "national LOAC manual" often enjoys a superior position *vis-à-vis* other LOAC documents. It usually targets officers and civilian officials of comparable standing. As a result, its content tends to be more sophisticated and detailed than that of a lower-level publication, *e.g.*, a "soldier's LOAC card". Manuals are operational documents and, accordingly, must be of practical relevance to their users. The prevailing practice of several major manual-producing states such as Canada, Germany, Switzerland, the United Kingdom and the United States seems fairly consistent in this regard.

It appears however that each state remains at liberty to decide what a manual is and what it does. In particular, it is for each state to decide whether its manual should or should not enjoy binding authority. The American, British and Canadian manuals are not *per se* binding. In contrast, the German and Swiss manuals are both issued as "regulations" within their respective domestic systems and, as such, binding on their addressees. As Turns observed, this may primarily be a matter of states having different legal traditions.

It is arguable that a binding manual would be weightier than a non-binding manual as an *indicium* of the *opinio juris* and/or verbal act of the state that issues it. This would be particularly so if the manual's binding authority emanated not just from its formal domestic status but also from its content being presented as articulations of the LOAC rules by which the state considers itself bound.

A manual's domestic status may also affect the legal consequences to which conduct consistent or inconsistent with its instructions gives rise. Let us suppose that a binding manual says "you may do X" (*e.g.* "you may shoot") in a given situation, whereas the new customary rule says "you must do Y, not X" (*e.g.* "you must arrest, not shoot") in the same situation. Let us also suppose that doing X constitutes a new customary war crime. What are the legal consequences of the manual's addressee doing X? *Ex hypothesis*, by doing X, the addressee has acted in compliance with domestic law. Internationally, his or her conduct is criminal but, depending on the circumstances, it may be excusable on account of mistake of law.¹⁹ Meanwhile, the state that issues the manual may incur international responsibility in respect of X provided that the act is attributable to it.²⁰

Frequent updates and amendments would diminish the dangers of normative clashes such as these. As von Heinegg noted, however, Germany has already spent one and a half decade reviewing its 1992 handbook. According to Arnold, the *Swiss Military Manual* was issued in response to *major* changes in the international and national legal environment surrounding

¹⁹ See, *e.g.*, Article 32(2), Rome Statute, for crimes falling within the subject-matter jurisdiction of the International Criminal Court.

²⁰ It is well established that a state's domestic provisions are irrelevant for the existence of an internationally wrongful act or for the various obligations arising from it. See, *e.g.*, Articles 3 and 32, Draft Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UN doc. A/RES/56/83 as corrected by A/56/49(Vol. I)/Corr.4.

Switzerland's armed forces. In this era of rapid development in warfare and the law applicable to it, the already difficult job of aligning the content of a binding manual to that of customary law will become even harder.

Non-binding manuals would allow their issuers to be more flexible. Here, Boothby's observation – *i.e.*, that a state may legitimately depart from the positions taken in its manual if it can be shown that they no longer adequately reflect the law in force or as it is interpreted by that state – is instructive. Clearly, this possibility must be what the United Kingdom had in mind when it inserted the following disclaimer to the *UK Manual*:

The Manual is intended as a description of the law as at 1 July 2004. However, it does not commit Her Majesty's Government to any particular interpretation of the law. Every effort has been made to ensure the accuracy of the Manual at this date but it must be read in the light of subsequent developments in the law.²¹

While admittedly undesirable, discrepancies between non-binding manuals and customary rules would not of themselves amount to formal normative conflicts of the sort involving binding manuals. Compliance with a non-binding manual may not mean compliance with domestic or international law. Nor, conversely, does conduct inconsistent with a non-binding manual necessarily constitute conduct in breach of the law in force.

Where the content of a non-binding manual and that of customary law are at odds with each other, there is a risk that the manual's addressee may be left effectively uninstructed as to what the lawful course of action is. This risk makes it imperative that even non-binding manuals remain under constant review.

4.2 Are manuals necessary?

The seminar heard numerous arguments defending the *raison d'être* of military manuals from different angles. In Rogers's view, for example, manuals are needed to decipher the increasingly convoluted treaty language and intricate interpretative statements. Similarly, Sénéchaud observed that IHL rules are often phrased in a manner that is too general to be of practical use and that manuals help bring clarity to their content. According to Gasser, military legal advisers need and deserve manuals in order to perform their functions more effectively. Garraway maintained that soldiers are entitled to know the standard of behaviour to which their government will hold them.

It remains debatable however whether every state with military forces ought to maintain a LOAC manual. Clearly, states are duty-bound to disseminate international humanitarian law

²¹ *UK Manual, op. cit.*, p. x.

and ensure its respect among their military personnel. Manuals may very well be among those measures conducive to the fulfilment of these obligations. But it in no way follows that states without manuals are failing in their efforts. A manual's feasibility – as opposed to its desirability – would be predicated on certain economy of scale on the part of the state concerned and, accordingly, not amenable to generalisations. Nor, important and useful though it is, should a manual be seen as *the* embodiment of effective LOAC implementation. As noted by Fenrick, Melander and other panellists, writing a manual is not an end in itself. It can only be part of a state's broader responsibilities.

Nevertheless, the seminar does seem to have undermined one argument against a manual. Some might fear that a manual would deprive them of the "wriggle room" they might need when responding flexibly and creatively to unexpected events. In fact, quite the contrary is the case. The seminar has made it clear that the absence of a manual would often mean the absence of a clear and considered instruction on potentially crucial matters. This would leave military legal advisers professionally ill-equipped and operators dangerously untrained. Such a state of affairs would be neither fair to them nor wise as a matter of national policy. Articulating and disseminating positions in advance would help lawyers and soldiers in the field react responsibly to evolving circumstances.

4.3 How should a manual be produced?

It was noted earlier that no uniquely authoritative definition of a national LOAC manual may exist. This becomes much less relevant once a well-informed decision has been made to produce one. At issue here is not whether a document with a particular set of characteristics should or should not be called a "manual". It is rather whether, whatever its title, the document enjoys a common understanding among its authors and users as to what it is and what it does.

What must a document purporting to establish legal parameters for military decisions do if it were to be accepted, understood and followed as such? The findings of the seminar are quite clear on this question: the document must engage its addressees in a manner to which the latter can relate. This means, first of all, that the document must engender a sense of inclusion and ownership amongst its users. It is crucial to obtain the approval, support and input of appropriate authorities. Furthermore, the drafters must have a clear idea about the types of activities on which the users need practical legal guidance, and match the document's content to the nature, scope and degree of detail required of that guidance. To this end, the drafting team must include members with operational credibility, experience and insight.

The authors must also agree on their organisation, methodology and coverage. The *UK Manual* exemplifies a formal, long-term and elaborate project with a large number of editors, authors and contributors. Canada's *Joint Doctrine Manual* embodies a somewhat more informal undertaking characterised by a small drafting team. Germany represents a systematic effort involving extensive international and ministerial consultations. The *German Handbook* is also significant from a linguistic point of view. Unlike its British and Canadian counterparts, the handbook was written in a language into which treaty provisions, as well as much of international input, had to be translated.

It is imperative that the drafters proceed on the basis of a common methodology. Their treatment of sources and authorities must be consistent throughout. The drafters should clearly indicate those instructions in their manual which go beyond *lex lata* and advocate *lex ferenda* or policy. For the same reason, caution is advisable when consulting national manuals of other states.

The drafters need to resolve questions of coverage as well. Should their manual limit itself to international humanitarian law, or should it also incorporate international human rights and criminal law? Should it deal not only with situations of armed conflict but also with other military operations? Some seminar participants were strongly of the view that LOAC manuals should focus on being what they are, *i.e.*, manuals *on the law of armed conflict*. These manuals would not easily lend themselves to covering other situations and/or bodies of law. Other participants favoured a more inclusive approach to manual writing. International human rights law remains applicable in armed conflicts. Peacekeepers need instructions on human rights standards in order to do their job properly.²²

These differences do not merely concern a manual's scope. They mirror genuine ambiguities concerning the rules applicable to various activities performed by peacekeepers. It is important that troop-contributing states adopt specific positions and issue clear instructions in one way or another.

4.4 What now for Nordic states?

The seminar has generated several findings relevant to Nordic states. There is growing demand for common Nordic guidelines on rules regarding peace operations. Articulating positions on these and other matters would not only benefit each Nordic state but also its allies.

²² In fairness, the very angle from which the seminar was initially conceived may have complicated the matter. We took manuals *on the law of armed conflict* as our point of departure. It is only then that we asked ourselves whether such manuals should also cover other related areas of international law. Our discussion might have taken a different course had we formulated the question thus: "If armed forces were to be provided with a manual on the legal rules applicable to their military operations, what law(s) should it include?"

Accordingly, each Nordic state would have good reason to consider producing a manual of some description.

Encouragingly, Norway appears to be envisaging a national manual project. Early signals indicate that this manual may be written in English. Similar initiatives also seem to be taking shape in several other Nordic countries. Might these developments eventually lead to a regional manual? The desirability and feasibility of such a manual would depend, *inter alia*, on its scope and the degree of convergence among Nordic states in their legal positions. It is quite possible that they hold similar views on discrete issues and common manuals of a limited scope can be written on these issues. Such possibilities alone will be insufficient for a common manual *on the law of armed conflict*, however: the overall differences between Nordic states may prove ultimately unbridgeable. At this point, we do not know exactly where, and to what extent, their positions converge or diverge. What we need is a comparative LOAC study in the region.

5. Checklist

The following checklist has been put together in the hope that it may assist those considering producing a new manual. Given its generic scope and content, the list will need to be modified according to individual circumstances. For the sake of completeness, the list addresses certain matters several times from different angles and under different headings.

5.1 Preliminary matters

- * Does your state really need a LOAC manual? Why? Why now?
 - What arguments, if any, have so far been advanced for a manual? What additional arguments may be raised in its favour?
 - What arguments, if any, have so far been advanced against a manual? What additional arguments may be raised in opposition to it?
 - What concrete improvements do you expect the manual to bring to the current level of your state's LOAC dissemination and compliance? Are these improvements such that a manual will be warranted?
 - Does the idea of a manual receive well-informed and firm support of relevant military and/or political authorities? Are they prepared to give it the time, resources and facilities necessary?

- * What purposes and functions will the manual serve?
 - In what way(s) will the manual be used? Will it be used as a reference book for lawyers, an operational handbook for commanders, a training textbook for instructors, an official statement for public/international audiences, and/or any other tool?
 - Who are the manual's intended users? Personnel of what seniority and responsibilities do you have in mind? Would they encompass those in the army, navy, marine, and/or air force? Would civilian personnel inside and/or outside the military establishment, such as legal counsel, judges, prosecutors, advisers, diplomats and members of security forces, also be included in the group of intended users?
 - Who else – *e.g.*, academics, foreign and international judicial bodies, inter- and non-governmental organisations – do you expect may make use of the manual?

- * What status will the manual have within the hierarchy of your state's military regulations?
 - Will the manual have binding authority upon its addressees? What consequence, if any, is conduct consistent or inconsistent with its instructions to have under domestic law?
 - Is the manual to be regarded as an authoritative statement of the law by which your state considers itself bound, or is it to be accompanied by a disclaimer? Will the manual be public or classified?
 - Which political and/or military authorities, if any, will formally approve and issue the manual?
 - Will there be any other LOAC instructions, *e.g.*, pamphlets, *aide-mémoires*, recommendations and pocket cards? What purposes, functions and audiences will they each have? In what hierarchical relationship will they be *vis-à-vis* each other and *vis-à-vis* the manual? Will there be procedures to ensure harmony and consistency between the content of these instructions?

- What exactly will the manual's position be in relation to operational instructions such as, for example, ROEs issued at various levels of command and in various operational settings?

- * Where within the broader regime of LOAC implementation will the manual fall?
 - What kind of training programmes will there be for the users? How often, and to what extent, will different user groups be trained on the manual?

 - In addition to issuing and disseminating the manual, what specific measures will be taken to ensure that military personnel are familiar and in compliance with LOAC rules?

5.2 Matters concerning preparation and execution

- * Who will be involved in drafting the manual?
 - Will military lawyers be in charge of the process? Will different armed services be represented? Will those with operational credibility, experience and insight be included?

 - Will civilians and academic lawyers be involved in the drafting process? If so, in what way and to what extent will they be involved?

 - Will members of the various user groups without legal background be involved in the drafting process? If so, in what way and to what extent will they be involved?

 - How will the drafting team be organised? How large or small, and formal or informal, will it be? Who will be responsible for directing and/or administering the project? Who will assume editorial responsibilities?

 - Will government ministries and entities outside the defence establishment be consulted? If so, at what stage in the drafting process and to what extent will they be consulted?

- Will international experts be consulted? If so, at what stage in the drafting process and to what extent will they be consulted? On what criteria will international experts be selected (*e.g.*, expertise, alliance or institutional affiliation, legal tradition)?

- * What areas of law will the manual cover?
 - Will the manual be a joint service or single service publication?

 - Will the manual cover only those areas that are of immediate concern to your state? If so, what are these areas? What will you do, if any, with those areas that are *not* of such concern? Or will it cover all standard LOAC areas?

 - Will the manual specifically cover emerging areas such as peace operations and counter-insurgency warfare?

 - Will the manual cover related areas of international law such as international human rights law, international criminal law and the law on use of force (*jus ad bellum*)?

- * What methodology will the drafters adopt?
 - Is your state likely to sign and/or ratify a relevant treaty in the near future? Is it possible that your state may enter reservations and/or attach interpretive declarations? How will these prospects affect the manual's content?

 - In what way will applicable treaty provisions be incorporated into the manual? Will they need to be translated from an authentic language into another language? Will the provisions be reproduced verbatim? Or will they be paraphrased? Will the manual explain how your state understands these provisions?

 - To what extent, and in what way, will foreign national manuals be consulted? Will there be a clear and consistent drafting and editorial policy on their treatment?

- How will the manual approach controversial areas such as the status of certain individuals and areas undergoing rapid development such as weapons regulation and conflict classification?
 - Will those positions embodying *lex ferenda* be clearly indicated? How, if at all, will the manual discuss uncertainties and/or opposing views without adversely affecting its clarity and succinctness?
 - Will those positions embodying policy be clearly indicated? Will the manual provide reasons for a particular policy position taken in it?
 - To what extent, if at all, will the manual include relevant provisions of domestic law?
 - In what way, and to what extent, will the manual use examples as a means of illustrating a particular point? Will the manual use hypothetical and/or historical examples? To what extent will the manual use foreign examples?
- * What format will the manual take?
- Will the manual be structured according to the standard legal headings? Or will it be structured according to headings based on operational situations?
 - Will the manual be bound? Or will it be kept in loose-leaf format?
 - Will the manual be available in paper versions only? Or will it be available only electronically? Or will it be available in both?
 - Will the manual have an annex containing some of the relevant treaty provisions and/or domestic statutes and regulations?
 - Will some user groups need additional material, such as annotated supplements and document collections?
- * How will you test the manual's pertinence and user-friendliness?
- Will there be a period in which the users can test the manual?

- Will there be a period in which the drafters and editors can collect user feedback and revise the manual accordingly?

5.3 Matters concerning maintenance

- * Will there be a mechanism in place to monitor, collect and analyse legal lessons learned from actual military operations in which your state, its allies, its adversaries and/or third parties take part?

- * Will there be a mechanism in place to monitor, collect and analyse relevant legal developments, such as national and international judicial rulings, enactments, declarations and statements, treaties and academic literature?

- * How will the manual be reviewed, updated and revised?
 - How often will the manual's supplements, updates, amendments, and other modifications be issued?

 - How, and how effectively, will the supplements, updates, amendments and other modifications to the manual be prepared, approved and communicated to its users? Will regular and/or *ad hoc* training be given on them?

PROCEEDINGS OF THE SEMINAR

WELCOME

Trygve G. Nordby*

Dear friends and colleagues,

On behalf of the Forum for International Criminal Justice and Conflict¹ and all the organisers of this seminar, I am pleased to welcome you to our Henry Dunant Hall today.

It is appropriate that we are meeting in this auditorium to discuss how we can improve compliance with international humanitarian law in armed conflict. Henri Dunant had a vision. He believed that, even in times of war, humankind is capable of reducing suffering. Through his initiative, he helped move the law one huge step forward and was rightfully awarded the first Nobel Peace Prize in 1901. From these roots, international humanitarian law has evolved over the course of one and a half centuries. This law is all about protecting persons who do not participate directly in hostilities. The 1949 Geneva Conventions have been accepted by all states. They apply not only to states but also to individuals. International humanitarian law represents a universal public good in today's world of globalisation and interdependence. Every day, the dignity of thousands of people is preserved thanks to the principles and letters of the law.

The Geneva Conventions and their Additional Protocols can be interpreted in different ways. Military manuals are meant to help clarify the content of their provisions for the benefit of armed forces.

The Norwegian Red Cross has not yet decided whether military manuals are the right way to move forward. We are always ready, however, to discuss tools that can provide clear operational guidance to soldiers in the field. During this seminar, we will together look into the roles and functions of military manuals. I especially encourage you to listen to the different experiences of states which have already introduced such manuals. I also hope that we can exchange views as to whether such manuals are necessary and, if so, what they should contain. I leave it up to you to elaborate on these and other relevant issues.

Dear friends and colleagues, I welcome you to Henri Dunant Hall, and I wish you a rich and fruitful discussion.

* Trygve G. Nordby is Secretary General of the Norwegian Red Cross.

¹ Editor's note: In August 2008, the Forum changed its name to the Forum for International Criminal and Humanitarian Law.

SESSION I

FUNDAMENTALS OF MILITARY MANUALS

OPENING REMARKS

Arne Willy Dahl*

My exposure to the law of armed conflict (LOAC) happened very gradually. I started receiving basic officer's training in the Norwegian Army around 1970. In those days, we had access to copies of the four 1949 Geneva Conventions¹ as well as army regulations on how to treat prisoners of war, how to wear Red Cross armbands, and so on. A book or two on the law of armed conflict also existed, but these were not known to me then. Later, in the 1980s, Norway ratified the two 1977 Additional Protocols.² I was teaching cadets the international law of war at the time. Through the course of my work, I came to identify complicated relationships between the Geneva Conventions and their Additional Protocols. Some rules were new, some amended existing ones, and some extended their scope of application to new groups or situations. This entangled web of provisions was thrown to armed forces and they were told to apply them. In those days, as a teacher at the Army Academy, I had the assistance of a book written in 1980 that explained the Additional Protocols but did not provide official positions on how they should be understood or implemented in practice.

It gradually dawned on me that major states would not ratify the protocols. This was a fact that we would have to take into account during combined operations, a fact that complicated matters. New treaties also came into existence, including, in particular, those on the prohibition of certain weapons and protection of cultural property. The International Committee of the Red Cross (ICRC) launched its customary law study and delivered its findings in 2005.³ International human rights law is gaining in importance, especially with regard to peace operations. How should ordinary officers handle all this? It is difficult enough for lawyers. What does it boil down to? To shoot or not to shoot, that is the question.

Suitable books may be of help. I have myself written one that I hope fits into this category. But a scholarly exposition does not assist decision-makers very well. Take, for example, a

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¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949; Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949. These conventions are printed in Adam Roberts and Richard Guelff (eds.), *Documents on the Law of War*, 3rd edition, Oxford University Press, 2000, p. 197 *et seq.*

² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). These protocols are printed in *ibid.*, p. 422 *et seq.*

matter that has been discussed in the Norwegian media in the last couple of weeks – medical personnel manning machine guns. Is that lawful? Is that wise? What should we make of it? The Geneva Conventions stipulate that medical personnel do not lose protection by carrying light personal weapons, or by using them in self-defence or in defence of their patients. But should this provision be read *a contrario* with regard to other weapons? This could be disputed. A legal adviser would say that, lawful or not, it would be unwise to man heavy weapons with medical personnel. But it takes a military decision to give an order prohibiting such practice. I think what we need is a document which not only provides scholarly advice but also practical guidance for officers and soldiers on how to implement this law effectively.

What is a military manual? We shall discuss this today. Let me just offer a tentative definition. A military manual may be seen as a user-friendly provider of explanations, decisions on interpretation, and orders on relevant aspects of implementation. Should it, or could it, be international? Who will be the owner of such a manual? Will it be the manual of armed forces, or will it be the manual of the Red Cross? Who will make it? I cannot answer these questions. I hope we will be closer to an answer at the end of the day today. In this first session, we are going to discuss the fundamentals of military manuals.

Our first speaker is Charles Garraway, Associate Fellow at Chatham House and Visiting Professor at King's College London. He is one of the co-authors of the *San Remo Manual on the Law of Non-International Armed Conflict*.⁴ Please, Charles, the floor is yours.

³ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, 2005.

⁴ International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict*, Martinus Nijhoff Publishers, 2006; Michael Schmitt, Charles Garraway and Yoram Dinstein, "The Manual on the Law of Non-International Armed Conflict", 36 *Israel Yearbook on Human Rights* 2006, Special Supplement, p. i *et seq.*

**MILITARY MANUALS, OPERATIONAL LAW AND THE REGULATORY FRAMEWORK OF THE
ARMED FORCES**

Charles Garraway*

Why bother with a manual? After all, surely it is more trouble than it is worth. People quote them back at you and cite them in legal proceedings. Is it not better to retain flexibility by publishing nothing?

This somewhat defeatist attitude can be found in some circles. It is like the politician who goes through his career saying nothing so that nobody can disagree with him! To the soldier on the ground – and sailor, airman and marine – , the luxury of sitting on a fence is not given. They have to make decisions, often life and death decisions, with little time to reflect and imperfect information. They do not have international law degrees – many do not have much education at all. And yet, it is on them that the burden often falls. In modern warfare, tactical actions can have strategic consequences. The results of Abu Ghraib will be with us for generations to come. The question is how one develops a clear set of instructions that reach from the strategic to the tactical. Where do manuals come in?

First, it is necessary to define our terms. The word "manual" is used in different contexts. There is the "international manual". This type of manual attempts to bring together international law and often move it forward outside the treaty process. Examples include the *Oxford Manual* of 9 September 1880.¹ In the words of the preface:

The Institute [of International Law], too, does not propose an international treaty, which might perhaps be premature or at least very difficult to obtain; but, being bound by its by-laws to work, among other things, for the observation of the laws of war, it believes it is fulfilling a duty in offering to the governments a *Manual* suitable as the basis for national legislation in each State, and in accord with both the progress of juridical science and the needs of civilized armies.

Rash and extreme rules will not, furthermore, be found therein. The Institute has not sought innovations in drawing up the *Manual*; it has contented itself with stating clearly

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¹ *The Laws of War on Land*, Manual published by the Institute of International Law (1880), printed in Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflicts*, 3rd revised and completed edition, Martinus Nijhoff Publishers/Henry Dunant Institute, 1988, p. 36 *et seq.*

and codifying the accepted ideas of our age so far as this has appeared allowable and practicable.²

A more modern example of this process is to be found in the 1994 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*.³ However, these manuals, important though they are in the development of international law, are not what we are dealing with here. Our subject is national manuals and they fall into two categories. At the highest level, national manuals provide evidence of state practice and *opinio juris* in relation to the states by whom they are issued. Whilst such manuals will of course look at contentious areas, their aim is not to reach a consensus but to reflect the position adopted by the state concerned. They do not form law, as of themselves, but will inevitably be cited as an example of "international custom, as evidence of a general practice accepted as law".⁴ On the lower level, manuals may still be issued but the requirement here is different. Indeed, in the words of Article 1 of Hague Convention IV 1907, they should contain "instructions".⁵ At the very lowest level, those instructions need to be reduced still further. In the United Kingdom, the soldier, when deploying on operations, is issued with a small "LOAC card" which contains the key "dos and don'ts". It is drafted in simple language and designed for easy reference. This is separate from rules of engagement (ROEs), containing the operational and political instructions. These too are often reduced to a card.

It is important to realise that "[m]anuals are not an end in themselves. They are an instrument for achieving an end".⁶ Within the national environment, there needs to be a cascade of information. Furthermore, it needs to be "joined up". On the operational side, rules of engagement are approved usually at high levels of government; they then cascade down the chain of command until they reach the soldier again in the form of simple "dos and don'ts". Commanders at each level may make their own adjustments, but they can only act within the confines of the strategic instructions that have come down from government. If the government has decided that a particular weapons system cannot be used for political reasons, the commander further down cannot authorise its use – even if in law it might be legal to use it.

If that is true for operational requirements, it is also true for legal requirements. It is no good starting from the bottom and working up. If service personnel are expected to act within the

² *Ibid*, p. 36. Emphasis in original.

³ Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, 1995.

⁴ Article 38(1)(b), Statute of the International Court of Justice, printed in Ian Brownlie (ed.), *Basic Documents in International Law*, 5th edition, Oxford University Press, 2002, p. 319.

⁵ Article 1, Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, printed in Schindler and Toman, *op. cit.*, p. 71.

⁶ Michael Reisman and William Lietzau, "Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict", 64 *International Law Studies* 1, p. 12.

law – and at risk of prosecution in both domestic and international courts if they do not – , then they are at least entitled to know the standards by which they will be judged.

I can give an example of what I mean. The *Operational Law Handbook* issued by the International and Operational Law Department of the Judge Advocate General's Legal Center & School, US Army,⁷ is described in its preface as "a 'how to' guide for Judge Advocates practicing operational law".⁸ Although this handbook covers a wide field of "operational law" including fiscal and administrative law, it also covers "the law of war". For many years, there has been much debate on the official position of the US Government in relation to Additional Protocol I 1977, a treaty that the United States signed but has not ratified. When recommending to the Senate that the United States should not ratify the Additional Protocol, President Reagan stated that, whilst it had "certain meritorious elements", it was "fundamentally and irreconcilably flawed".⁹ The problem has always been to assess which parts are accepted by the United States as customary law, and thus binding, and which are not. For many years, academics and operators have relied upon an article published by Michael Matheson, then Deputy Legal Adviser at the Department of State, as the authority for the US position on particular articles.¹⁰ This was reflected in the text of the 2005 *Operational Law Handbook*.¹¹ However, the authors were forced to publish an "Errata Sheet" which stated:

This information was taken from an article written by Michael Matheson in 1986. It takes an overly broad view of the US position and as a result may cause some confusion as to US policy.¹²

That is fine as a statement, but it does not help the judge advocate in the field in that it made no attempt to replace the Matheson view with anything at all. The confusion therefore remained – and indeed was probably greater. Judge advocates in the field had to make up their own mind as to the effect of Additional Protocol I with no guidance whatsoever.

To be fair, the United States is aware of this and is currently working on its own national manual, which will provide the top level analysis that is needed. In the meantime, however, there is a yawning gap – not helped by comments used by Bush Administration officials,¹³

⁷ International and Operational Law Department, *Operational Law Handbook*, The Judge Advocate General's Legal Center & School. The 2007 version can be downloaded from <http://www.fas.org/irp/doddir/army/law2007.pdf>.

⁸ *Ibid.*, p. ii.

⁹ Letter of Transmittal, 29 January 1987, printed in 81 *American Journal of International Law* 1987, p. 911.

¹⁰ Michael J. Matheson, "The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions", 2 *American University Journal of International Law and Policy* 1987, p. 419.

¹¹ *Operational Law Handbook* 2005, pp. 15-16.

¹² This errata sheet can be downloaded from [https://www.jagcnet.army.mil/jagcnetintranet/databases/operational+law/clamo.nsf/\(JAGCNetDocID\)/](https://www.jagcnet.army.mil/jagcnetintranet/databases/operational+law/clamo.nsf/(JAGCNetDocID)/).

¹³ See, e.g., Alberto R. Gonzales, "Memorandum for the President: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban", printed in Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib*, Cambridge University Press, 2005, p. 118 *et seq.*

such as "quaint",¹⁴ to describe the Geneva Conventions. If you remove the foundations, the house will inevitably be insecure!

There are downsides to publishing manuals, however. Conflict is like a chameleon; it is forever changing. To that extent, the United States is right. International humanitarian law has a habit of changing in response to the last conflict and is not so good at anticipating the next. After all, the Geneva Conventions themselves were developed in response to the events of 1939-1945 and some of the provisions may indeed be outdated in respect of modern conflicts. Prisoner of war records may no longer be sent by first class post to Geneva; they are transmitted at the flick of a switch by computer! Governments are understandably afraid that if they nail their colours to the mast, they will find that the age of sail has passed and the colours are now on the wrong ship! This is not helped by the growing use of manuals by organisations and courts as evidence of state practice. They are, of course, but care needs to be taken as to how they are so used. A national manual such as the 2004 *UK Manual*¹⁵ may indeed carry some authoritative weight. It has been approved by government departments at the highest levels. A document prepared lower down the chain of command may have less authority, however, and, indeed, it may take into account factors other than law. Thus – with apologies to the editors of the *ICRC Customary Law Study*¹⁶ – , it was unwise to use *A Soldier's Guide to the Law of Armed Conflict (Army Code 71130)*¹⁷ as an authority and to cite it as a manual. Despite its title, this small booklet of some forty pages is designed for senior non-commissioned officers and junior officers. It is updated every year and contains a "pot-tered" version of the law of armed conflict with references to the appropriate conventions and so on. As a former author, I like to think it is a good document but it does not give an authoritative version of the law as interpreted by the United Kingdom.

This tendency to cite any official document has caused problems and the difficulties are illustrated by some of the caveats that are now to be found in such publications. One solution suggested by officials is to classify all publications of this nature so that they cannot be cited. Many already contain statements similar to that found in the Royal Australian Navy Publication, *Australian Maritime Doctrine*:

All Defence information, whether classified or not, is protected from unauthorised disclosure under the *Crimes Act 1914*. Defence information may only be released in accordance with the *Defence Protective Security Manual (SECMAN 4)* and/or Defence Instruc-

¹⁴ *Ibid.*, p. 119.

¹⁵ UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, 2004.

¹⁶ There are numerous references in the footnotes to "military manuals".

¹⁷ This is published by the Directorate General of Development and Doctrine (Army) of the United Kingdom.

tion (General) OPS 13-4 – *Release of Classified Defence Information to Other Countries*, as appropriate.¹⁸

Even the 2004 *UK Manual*, in its loose leaf version issued within the Services,¹⁹ states:

The information in this manual is Crown copyright and the intellectual property rights for this publication belong exclusively to the Ministry of Defence (MOD). No material or information contained in this publication should be reproduced, stored in a retrieval system or transmitted in any form outside MOD establishments except as authorised by both the sponsor and the MOD where appropriate. This information is released by the United Kingdom Government to a recipient Government for defence purposes only. It may be disclosed only within the Defence Department of a recipient Government, except as otherwise authorised by the MOD. This information may be subject to privately owned rights.

This seems particularly strange when the hardback version is on public sale through Oxford University Press and obviously contains only the standard copyright caveats! The contents are identical and it was intended that amendments to the loose leaf version would be available on the MOD website.

In fact, this sort of information should be freely available, but it illustrates the paranoia that sometimes affects government officials. The old 1958 *Manual on the Law of War on Land*²⁰ was used all over the world!

Another solution is to caveat the publication so that there can be "plausible deniability" if the authorities wish to change their position! An example can again be found in the 2004 *UK Manual*. It states in its foreword, written jointly by the Chief of the Defence Staff and the Permanent Under Secretary, Ministry of Defence, that

[i]n this fast moving world, some issues cannot of necessity be stated in absolute terms. What follows is, however, a clear articulation of the UK's approach to the Law of Armed Conflict ... The publication of this Manual should be seen as another step in stating publicly the UK's interpretation of what the Law of Armed Conflict requires.²¹

To ensure that the point is made further, the preface states:

¹⁸ Royal Australian Navy, *Australian Maritime Doctrine*, RAN Doctrine 1 (2000), p. ii. Emphasis in original. As this publication is now available on the internet at <http://www.navy.gov.au/spc/amd/html/chapt1.htm>, the provision seems even more esoteric.

¹⁹ JSP 383, *The Joint Service Manual of the Law of Armed Conflict*, 2004 edition.

²⁰ *The Law of War on Land, being Part III of the Manual of Military Law*, Her Majesty's Stationery Office, 1958.

²¹ *UK Manual*, *op. cit.*, p. v.

[The Manual] does not commit Her Majesty's Government to any particular interpretation of the law. Every effort has been made to ensure the accuracy of the Manual at this date [1 July 2004] but it must be read in the light of subsequent developments in the law.²²

So, what deductions can be made from all this? First, a national military manual is an essential part of the legal framework for the operation of the armed forces. It lays down the parameters within which the commanders can make their operational plans. A national manual is only part of that framework, however. The legal foundations which it lays need to be incorporated into operational manuals and operational training so that the law becomes not an overlay on operational matters but an underlay, underpinning everything that the armed forces do from the strategic to the tactical level.

Second, the manual should not try to do too much. The *US Navy Commander's Handbook on the Law of Naval Operations*,²³ as its name implies, goes far further than an international humanitarian law manual. It has to do so because that is the nature of naval operations. Navies operate on the high seas and so are subject to international law almost wherever they are. That is not so with the land component. When the United States was planning its new joint law of war manual, some wanted it to be an "operational law" manual along naval lines. One participant at the meeting is alleged to have commented: "An operational law manual would not be a book; it would be a bookshelf of books". A national manual on international humanitarian law should limit itself to just that and not try to go further into other operational areas. Otherwise, it would soon expand beyond any imagination.

Third – and most important – , the manual should be the top of a pyramid of publications, cascading down so that even the soldier on the ground with his "LOAC card" has a basic knowledge of the "dos and don'ts". That cascade must be consistent so that there is no contradiction between the card and the manual – or anything in between.

So, I answer my own question: why bother with a manual? That is because we owe it to our soldiers, sailors and airmen. We ask them to comply with the law – and threaten them with sanction if they do not. They are at least entitled to know the law with which we are asking them to comply.

²² *Ibid*, p. x.

²³ Department of the Navy, Office of the Chief of Naval Operations and Headquarters, U.S. Marine Corps, Department of Homeland Security and U.S. Coast Guard, *The Commander's Handbook on the Law of Naval Operations*, NWP1-14M. The latest July 2007 version can be downloaded from [www.nwc.navy.mil/cnws/ild/documents/1-14M_\(Jul_2007\)_\(NWP\).pdf](http://www.nwc.navy.mil/cnws/ild/documents/1-14M_(Jul_2007)_(NWP).pdf).

MILITARY MANUALS, LEGAL ADVISERS AND THE FIRST ADDITIONAL PROTOCOL OF 1977

Hans-Peter Gasser*

On 8 June 1977, the two Additional Protocols to the 1949 Geneva Conventions were adopted by consensus at a Diplomatic Conference specifically convened for that purpose.¹ This historic decision initiated a huge step forward in the protection of the civilian population through law against the horrors of warfare and against terror in the course of armed conflict. Additional Protocol I introduced considerable substance to several chapters of international humanitarian law (IHL) applicable in international armed conflict, while Additional Protocol II strengthened the legal protection of victims in non-international armed conflict. The record acceptance of these international rules governing armed conflict is evidence that their renewal was the right step in the right direction. As of today, Additional Protocol I binds 167 states and Additional Protocol II binds 163 states. There are 195 states parties to the 1949 Geneva Conventions.

The main contribution of Additional Protocol I lies in the reaffirmation and development of the substantive rules relative to the protection of the civilian population against direct and indirect effects of military operations. But it has also added new concepts for strengthening the obligation of parties to an armed conflict to respect their commitments. Some of them demand action in times of peace. The provisions on legal advisers and military manuals are part of that category.

The starting point is Article 80 of Additional Protocol I, entitled "Measures for execution", which reads as follows:

1. The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol.
2. The High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution.

A pure reminder, an expression of the obvious, it seems.

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¹ Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva, 1974-1977.

Additional Protocol I elaborates on this point and mentions, among other things, two specific measures to be taken by the parties. First –

Article 82
Legal advisers in armed forces

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

This is the legal basis for establishing the function of legal advisers to armed forces. Second –

Article 83
Dissemination

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.
2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

Drafting military manuals is part of this comprehensive commitment to disseminate the content of international humanitarian law.

Appointing legal advisers to armed forces and drafting military manuals are two sides of the same coin when considering the obligation to take all measures necessary to ensure respect for international humanitarian law among armed forces personnel. A military manual without qualified personnel to understand and explain it is an empty gesture; legal advisers to armed forces without an instrument to promote and disseminate their message may not be able to achieve very much. Thus, the policy considerations behind the drafting of a military manual and the appointment of legal advisers to armed forces are identical. They have the same mission to accomplish.

In what follows, we shall briefly examine these two institutions and look at some questions that are in need of further analysis.

1. Legal Advisers to Armed Forces

Additional Protocol I is the first IHL treaty that mentions the institution of legal advisers to armed forces.

During the process of drafting Article 82, both its initial German proposal discussed at the expert level and the follow-up ICRC draft submitted to the Diplomatic Conference were considerably watered down. Nevertheless – and this is the main point – , Article 82 as it stands now obligates states parties to "ensure that legal advisers are available". This is a mandatory provision. In view of the fact that it is now normal for armed forces to have legal advisers in their ranks, it can be argued that the obligation to appoint such experts is now part of customary law.²

Military legal advisers are experts in the increasingly complex field of international humanitarian law. Their knowledge is indispensable for decision-making for the same reason that expert knowledge is indispensable in so many other domains.

According to Article 82, legal advisers to armed forces have two basic tasks:

- To give advice, upon request (consultation) or at their own initiative, on questions relating to international humanitarian law; and
- To prepare and take part in the instruction of members of armed forces in international humanitarian law.

It should be made immediately clear that a legal adviser has no commanding, supervisory or controlling function. His role is advisory in character, *i.e.*, to assist those in charge who must make decisions with a view to ensuring that they take IHL commitments into account. The final responsibility lies with the commander in charge of the operation, a responsibility which, incidentally, he can never avoid.

Although Article 82 only mentions the 1949 Geneva Conventions and Additional Protocol I as sources of international humanitarian law, it is obvious that customary international law and general principles of law are part of the law which a legal adviser must include in his reflections. Indeed, written law and customary international law are closely intertwined in several domains, as the International Court of Justice (ICJ) has clearly shown in its *Nuclear Weapons*

² ICRC Customary Law Study, *op. cit.*, Vol. 1, Rule 141, pp. 500-1.

*Advisory Opinion*³ and *Palestinian Wall Advisory Opinion*.⁴ The same may also be said of other sources which directly or indirectly affect military operations, such as the 1954 Hague Cultural Property Convention⁵ and the 1997 Ottawa Convention on anti-personnel mines.⁶ To take into account only part of existing law is incompatible with a professional approach to international law.

The law on non-international armed conflict has nothing to say on the necessity of making legal advisers available to armed forces. Nevertheless, as legal advice in armed forces must be guaranteed in situations of international armed conflict, it would also be available and operational where the same forces were engaged in hostile actions on the territory of their own country. It is a simple and practice-oriented consideration which leads to the conclusion that legal advisers would automatically be available on the governmental side in non-international armed conflict. There is no comparable rule for armed opposition groups, although, of course, they have to respect international humanitarian law.

* * * * *

The following presentation of the role of legal adviser echoes the excellent commentary on Article 82 written by Jean de Preux.⁷

1.1 Role in peacetime

The legal adviser is essentially called upon to cooperate in the instruction of international law applicable in case of armed conflict:

- In military academies;
- For members of the headquarters or the staff to which he is attached; and
- For officers and troops in the unit to which he belongs.

Instruction encompasses participation in exercises and war games, including their evaluation.

³ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226 *et seq.*

⁴ *Ibid.*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136 *et seq.*

⁵ Convention for the Protection of Cultural Property in the Event of Armed Conflict, printed in Roberts and Guelff, *op. cit.*, p. 373 *et seq.*

⁶ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, printed in *ibid.*, p. 648 *et seq.*

Second, legal advice is necessary in the preparation of operational plans for a possible war-time engagement.

1.2 Role in time of armed conflict

The role of legal advisers is a preventive one. Their concern is to ensure the application of, and respect for, international humanitarian law during military operations. In particular, legal advisers are to give their advice in the following contexts:

- During the preparation of a military operation or in the course of an ongoing operation, upon consultation or at their own initiative;
- On particular issues, such as the legality of a weapon or its use; and
- On the commander's duty under Article 87 of Additional Protocol I to prevent and suppress breaches of the law by subordinates.

1.3 Position in the military hierarchy

Article 82 speaks of "the appropriate level" and therefore leaves the organisation of legal advice to each state. A legal adviser should be posted at the following levels:

- Commander-in-chief and his headquarters staff;
- Unit commanders, at least down to the level of division or independent brigade, land, sea and air forces; and
- Area commanders, including those in occupied territories, and commanders of military bases.

Of course, the ministry of defence needs its own (civilian or military) lawyers and experts in international humanitarian law, incorporated into its legal services.

1.4 Size

In view of the role of legal advisers in instruction and operation, the legal staff should consist of several officers, at least at a higher level.

⁷ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross/Martinus Nijhoff Publishers, 1987, paras. 3355-67.

1.5 Qualification and selection

Should a legal adviser in armed forces be a soldier or a civilian? Both cases exist, and there are advantages and disadvantages to them:

- If legal advisers are selected from military personnel on active duty, they must be assigned exclusively to their job as legal advisers. The main advantage of this option is that the person would be knowledgeable about and have an understanding of the military environment, and therefore be acceptable to military personnel;
- If legal advisers are selected from the military judiciary, they may benefit from the authority flowing from their position. They must be familiar with the laws of armed conflict, however. Also, they must not be overloaded with tasks of an administrative, disciplinary or penal nature;
- If legal advisers in armed forces are chosen among civilian lawyers, only IHL experts are qualified for such a function. Their lack of knowledge of military matters may create a problem of acceptability.

Appointing legal advisers to armed forces is an essential element of guaranteeing respect for international humanitarian law by any state party to the Geneva Conventions and their Additional Protocols.

2. Military Manuals

Military manuals are instruments which facilitate respect for international humanitarian law. They are indispensable for governments and armed forces in guaranteeing their commitments to ensure respect for international humanitarian law in armed conflict, including the Geneva Conventions, their Additional Protocols and relevant international customary law.

The purpose of military manuals coincides with the tasks of legal advisers to armed forces. As noted earlier, the policy considerations behind the drafting of a military manual and the appointment of legal advisers to armed forces are identical. They have the same mission to accomplish. What has been said of legal advisers can therefore be true *mutatis mutandis* of military manuals. These arguments underscore the need for such a manual as an instrument to ensure respect for IHL commitments.

According to existing law, however, states parties to the Geneva Conventions and the Additional Protocols are not specifically obligated to have a military manual at the disposal of their armed forces. Yet, experience clearly shows that a practice-oriented tool for the complex field of modern international humanitarian law has become, quite simply, indispensa-

ble. It is irresponsible to believe that referring to the text of international treaties alone guarantees their respect. Not even a well-trained military legal adviser can successfully perform his professional obligations without an adequate tool.

The *UK Manual* has this to say on its purpose, accompanied by the signatures of the Chief of the Defence Staff and the Permanent Under-Secretary, Ministry of Defence:

The publication of this Manual should be seen as another step in stating publicly the UK's interpretation of what the Law of Armed Conflict requires. This Manual will form the basis for training UK military personnel in this body of law and will be used widely to inform practical decision making.⁸

This high-level statement aptly recalls the three main purposes of a military manual, namely:

- To reaffirm the commitment of the highest authorities of a state for respecting international humanitarian law in general, *i.e.*, of all sources including treaty law, customary law and general principles, as well as accepted state practice in this field which may go beyond positive law;
- To advise members of armed forces and civilian personnel, who are involved in a decision-making process on issues relating to international humanitarian law, be it during the preparation of military operations or in the course of such operations. Manuals should provide necessary information on the content of that law; and
- To provide the information necessary for training expert personnel and other members of armed forces who need to be familiar with relevant aspects of international humanitarian law, such as commanders of places of detention or of military police and investigation units.

Military manuals also play important roles, *e.g.*:

- Putting forward propositions which express state practice going beyond legally binding commitments. As such, they may contribute to the formation of international customary law;
- Serving as an example or a model for other states and their armed forces which have not yet adopted such a text; and
- Contributing to the clarification of legal issues, such as the employment of so-called private security companies.

⁸ *UK Manual, op. cit.*, p. v.

3. Final Remarks

The forthcoming presentations by colleagues knowledgeable about the practical side of employing legal advisers and writing military manuals will no doubt enrich the picture. I would only like to underline once more the decisive role which military legal advisers and military manuals play in ensuring respect for international humanitarian law, not only during an armed conflict but also in peacetime.

MILITARY MANUALS AND THE CUSTOMARY LAW OF ARMED CONFLICT

David Turns*

1. Introduction

The purpose of this presentation is to consider some aspects of military manuals in relation to customary international law as a whole. It is necessary to begin with the following questions: what exactly is a military manual and what is a military manual trying to do?

2. Are Military Manuals Evidence of Customary Law?

It has become something of a cliché to say that military manuals represent state practice, or that they represent *opinio juris*, and that therefore, effectively, they are, in and of themselves, customary international law. In fact, their position as sources of international law is quite unclear. An examination of a cross-section of statements made on this question by publicists, together with commentaries of various kinds (including remarks made in the texts of military manuals themselves), indicate that there are some dramatic divergences of opinion.

Professor Ian Brownlie, in one of the most widely used and quoted international law textbooks, not just in the United Kingdom but around the world, expressly lists military manuals as *evidence* of customary international law.¹ On the other hand, Lord Wright, Chairman of the UN War Crimes Commission at the end of the Second World War which investigated atrocities committed by Nazi Germany and its allies in Europe and the Far East, wrote equally categorically: "Manuals do not constitute international law".²

When one considers statements contained in military manuals themselves, or in other official statements produced by governments, a similar contradiction is apparent. In the *US Army Field Manual*, for example, the first paragraphs read as follows:

The purpose of this manual is to provide authoritative guidance to military personnel ...
This Manual is an official publication of the United States Army. *However*, those provi-

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¹ Ian Brownlie, *Principles of Public International Law*, 5th edition, Clarendon Press, 1998, p. 5.

² Lord Wright of Durley, "Foreword", United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. VIII, His Majesty's Stationery Office, 1949, p. x.

sions of the Manual which are neither [US domestic] statutes nor the text of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the laws of war. *However*, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice.³

Thus, in the US manual, there is a statement of what the manual is doing, followed quickly by a qualification, followed by a further "however" qualifying the qualification. That document is of course somewhat venerable, being half a century old. A more recent official expression of US attitudes to the legal significance of military manuals, however, may be found in the letter which was sent by the Legal Counsel of the US Department of State as a preliminary response to the *ICRC Customary Law Study*.⁴ In that letter, the following statement is made:

Although manuals may provide important indications of State behaviour and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations.⁵

In sum, the view being expressed there is that we should at the very least be extremely cautious about how we approach military manuals as a source, or as an expression of a source, of customary international law.

What about courts? Military manuals have of course been discussed, or have at least been referred to, in a number of judicial decisions. For present purposes, again, an examination of just two will suffice: one from an international tribunal, the other from a domestic court. In its seminal *Tadić Jurisdiction Decision*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) specifically referred to the difficulties of ascertaining the customary law of armed conflict, and expressly said that military manuals are a useful tool in identifying military operational practice, and therefore, state practice.⁶ The judges of an international tribunal, therefore, were quite enthusiastic about using military manuals as a source of international law for them to apply, and they clearly said so in as many words.

The Supreme Court of Israel, in its recent and already much-discussed decision on the legality of targeted killings of Palestinian militants by the Israel Defence Forces (IDF), specifically cited military manuals from the United Kingdom, France, the Netherlands, Australia, Italy, Canada, Germany and New Zealand, plus the Air Force Manual of the United States, as evi-

³ *Department of the Army Field Manual FM27-10: The Law of War on Land*, Department of the Army, July 1956, p. 3. Emphasis added.

⁴ John B. Bellinger III and William J. Haynes II, *U.S. Initial Response to ICRC Study on Customary International Law*, U.S. Department of State, 3 November 2006. This response is accessible at <http://www.state.gov/s/l/rls/82630.htm>.

⁵ *Ibid.*

dence for the customary nature of the prohibition of attacking civilians unless they are taking a direct part in hostilities.⁷ A domestic court – and one that is the highest court in a country that is at the very forefront of actual state practice in terms of the law of armed conflict – has given a clear endorsement of military manuals, not just as being useful in general terms, which is what the ICTY said in *Tadić*, but actually in support of a very specific proposition of law. It is therefore clear that the position is varied, to say the least, between different authorities as to the status of military manuals as expressions of customary international law.

3. A Few General Words on Customary International Law

In relation to customary international law generally, it is necessary to comment on a few selected aspects of customary international law that are, in the opinion of the present author, particularly significant in the specific context of military manuals. First, there are the differences between the two main components of custom, namely state practice and *opinio juris*. State practice, of course, is what states actually *do*. *Opinio juris* is what states *say* they do, or what states say they believe about the nature of a legal rule. Both elements of custom have been declared by the ICJ to be significant⁸ but, in relation to military manuals, *opinio juris* is probably a more important expression of custom than state practice.

Secondly, there is a distinction between different types of acts that can constitute customary law, in particular the difference between verbal acts and physical acts. It used to be thought, classically, that state practice consisted of the physical acts of a state; what a state actually *does* in a particular situation. In the *Anglo-Norwegian Fisheries Case*, however, the ICJ specifically referred to the possibility of using *verbal* acts as evidence of state practice.⁹ Where is a military manual to be situated within that spectrum of acts that constitutes state practice? It seems to be fairly clear that military manuals would constitute a verbal act. A military manual is not what the state is actually doing on the battlefield, it is what the state says that it will do on the battlefield, or suggests that it might do, depending on the circumstances that rule at the time.

The third point in relation to custom as a source of international law that is of particular significance to a discussion about military manuals is the difference between formal sources of the law and material sources of the law. By "formal source of the law", what is meant is "source of the legal authority". An example may be a treaty. If a treaty codifies a rule that

⁶ International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, para. 99.

⁷ Supreme Court of Israel sitting as the High Court of Justice, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, HCJ 769/2, *Judgement*, 13 December 2006, para. 30.

⁸ See, e.g., International Court of Justice, *North Sea Continental Shelf, Judgement*, I.C.J. Reports 1969, p. 3, para. 77.

already existed in customary law and a state signs and ratifies the treaty, then that treaty becomes the formal source of the rule in question for that particular state. By "material source of the law", is meant "where the rule is restated". It is submitted that the word "re-stated" is a particularly useful word in the context of military manuals, because a military manual is in most instances a restatement of what a state believes is international law, or how a state believes the law can be interpreted in certain situations.

The point here is that the rules already exist. Restatements or material sources do not in themselves create new law; they are a statement of that which already exists. It may be deduced from this that military manuals are very rarely, if ever, going to create new law – not least because each manual is the unilateral expression of one state's opinion.¹⁰ Rather, they will be intended as a restatement or an interpretation of a law that the state believes is already in existence (otherwise it would probably not be in the manual).

4. Five Considerations Regarding Military Manuals and Customary International Law

It is submitted that there are at least five different levels on which one can consider military manuals in relation to customary international law generally. There is no hierarchy intended in the presentation of the order of these levels.

4.1 Formal significance

The first level is the formal significance of a military manual. It is necessary to refer back here, again, briefly to a point made before, namely, the question of who the manual is produced by and what it is envisaged as doing. What is its status intended to be? Is it an official publication of a government? Does it contain the words "Ministry of Defence" or similar in its title? In the United Kingdom, the *UK Manual* as published is indeed produced under the imprimatur of the Ministry of Defence. This assists in reaching the conclusion that it is a fairly authoritative statement of what the United Kingdom believes to be the law, notwithstanding the disclaimer contained at the beginning of that manual.¹¹ It was drafted at a rather high level by some of the United Kingdom's leading academics and practitioners in the field, and therefore it can be viewed as being authoritative. If, on the other hand, a document is produced at a relatively low level and is mainly for internal circulation as some kind of a training document or unofficial guidelines for conduct, then even if it contains the words

⁹ *Ibid.*, *Fisheries case, Judgement of December 18th, 1951: I.C.J. Reports 1951*, p. 116, pp. 132-9.

¹⁰ Although it is possible for the acts of just one state to give rise to a customary rule of international law, it will be necessary for a substantively identical form of the rule in question to be subsequently adopted by other states: one state acting in isolation and without consistency and generality of practice on the part of other states cannot create customary international law. See below.

"military manual" in the title, it is submitted that it will be much harder to establish an authoritative status for such a document.

In this connection, apart from the criticism that has already been mentioned in relation to the use of the UK "manual" in the *ICRC Customary Law Study*, it is also well known that Yoram Dinstein has expressed some fairly sharp criticisms in relation to the quotation of sources from Israel that were described as an IDF manual. Dinstein insisted that the document in question was absolutely no such thing, and that it did not in any way represent the official views of the State of Israel.¹² So, it is very important to be careful of who produced the document and what the intention behind the document is. If it is attributed formally, on any level, to a government or to a ministry of defence, then there is a high probability that it can be accepted as having some kind of an official status and represents that state's view as to the relevant rules of the law.

Within the same bracket, one should also consider to whom the manual is addressed and how it is circulated. Is the manual published, as is the case with the *UK Manual*? Is it made available through distribution in the country generally and indeed internationally, or is it only intended as an internal document? It is important to remember that, if the document in question is produced by a state organ, for example in this case by a ministry of defence, and it is circulated internationally under the name of the ministry of defence, then as a matter of general international law, that is classically viewed as a verbal act of the state, and therefore something for which the state could eventually bear legal responsibility under the doctrine of state responsibility in general international law. That is a matter of considerable importance.

4.2 Practical significance

The second level is what the practical significance of the document is. What is the document actually trying to do, what is it setting out to do in practice? For example, the *US Army Field Manual* is described as authoritative field guidance. Again, the phrase "authoritative guidance" might suggest that a high level of state involvement was in evidence. Or is the document just an *aide-mémoire*, a set of guidelines or loose recommendations? What is it trying to tell the recipients? Is it trying to tell them "you must do X, Y and Z" (X, Y and Z being specifically identified legal rules applied to particular scenarios), or is it merely a much more general guide to principles?

¹¹ *UK Manual*, *op. cit.*, p. x.

¹² Yoram Dinstein, "The ICRC Customary Humanitarian Law Study", 36 *Israel Yearbook on Human Rights* 2006, pp. 6-7.

4.3 Substantive significance

The third level is: what is the substantive significance of the document? In normative terms, the issue is this: more or less everything to be found in a military manual that is stating the law is going to be derivative. Manuals do not develop new law in and of themselves. Instead, their substantive content will be derived from obligations that the state already considers to exist. For example, a very great deal of what is contained in the *UK Manual* is based on the treaty obligations of the United Kingdom. This is true of military manuals generally: they tend to be based on treaty obligations. As the law of armed conflict is to a very large extent regulated by international treaties, it is quite normal that military manuals simply restate the rules that are derived from those treaties. If a manual says that it is forbidden to use chemical weapons in armed conflict, for instance, this is normally going to be because the state is a party to the 1993 Chemical Weapons Convention,¹³ and not necessarily because the state believes that there is a customary law prohibition on the use of chemical weapons.¹⁴ That is certainly the case in the *UK Manual*.¹⁵ Very often, when military manuals are saying something that looks as if it might possibly be new, that will be based on considerations of policy rather than on considerations of strict, legal interpretation. So, if a military manual says, for example, that the rule of proportionality is applicable in non-international armed conflicts as well as in international armed conflicts, the chances are that that is going to be a policy statement by the drafters of the manual as to how they will interpret and apply the rule of proportionality in practice, rather than necessarily a statement of binding legal obligation. It is not the case that the United Kingdom, for instance, considers that the rule of proportionality is formally applicable in non-international armed conflicts as a matter of binding legal obligation. But the position is expressed in the *UK Manual* that the rule of proportionality will be applied in any non-international armed conflicts in which the UK armed forces are engaged. That looks like a policy declaration, not a legal declaration. So we can conclude from this that there are elements in manuals that are clearly derived from considerations and factors other than strict legal obligations: *opinio juris* is not always present.

4.4 The impact of the manual

The fourth element to consider is what the impact of the manual is going to be; what effect it will have in practice. Here, the point is that a military manual will only be concerned with

¹³ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.

¹⁴ This is so although the *ICRC Customary Law Study* expresses the view that there is a customary norm of international law outlawing the use of chemical weapons in international and non-international armed conflicts. See *ICRC Customary Law Study*, *op. cit.*, Vol. I, Rule 74, pp. 259-63. For criticism, see David Turns, "Weapons in the ICRC Study on International Humanitarian Law", 11 *Journal of Conflict and Security Law* 2006, pp. 201-37; W. Hays Parks, "The ICRC Customary Law Study: A Preliminary Assessment", 99 *American Society of International Law Proceedings* 2005, pp. 208-10.

¹⁵ *UK Manual*, *op.cit.*, §6.8, pp. 107-9.

the state that produces it. It will not be intended for all other states to use, it will be just for that particular country to use – although, of course, in the context of a military alliance, there is nothing to stop states from sharing the "best practice", as contained in their military manuals, with their allies. On the other hand, it is instructive to remember that in the context of armed conflict law, it is by no means impossible that a document produced by just one country could then be copied by other countries, go around the world, and find itself being quoted, eventually, as customary law. A classic example is the Lieber Code,¹⁶ produced in 1863. Although it was not a military manual as such but General Orders of the US Army (its full title being the rather vague-sounding "Instructions for the Government of the Armies of the United States in the Field"), it had functions analogous to manuals in an age before armies or war ministries generally produced such documents. It was never directed at any other state or states, but was intended purely for use by Union forces during the American Civil War. In short order, a copy of it fell into the hands of the Confederate Army, and the Confederate War Department understandably thought it a very good idea and decided to adopt a very similar code for use by its own forces. Before long, the Lieber Code was being copied by other countries around the world and war ministries in all the major military powers were adopting the view that the Lieber Code was (re)stating customary international law – which was precisely Francis Lieber's intention when he drafted the code in the first place.

On a more general level of international law as a whole, it should also be remembered that the act of a single state may of course generate customary international law. What is then necessary is that the act be subsequently copied and imitated elsewhere. So, in this context, if a statement in a military manual were to put forward a novel proposition of law, it would only be of real use in the context of custom if it was then adopted and copied in (an)other state(s). The classic case in this regard is *The Scotia*, a decision of the Supreme Court of the United States.¹⁷ Although the case has nothing to do with armed conflict at all, it stands for a general proposition of international law. *The Scotia* was a case concerning a collision on the high seas between a British ship and an American ship. The collision had occurred at night, and the reason for the collision was that the American ship was not displaying recognised navigational lights. The court decided that the navigational lights that were being displayed by the British were the result of a unilateral act by the United Kingdom, in that they derived from a set of regulations that had been promulgated by the British Admiralty in 1853. These regulations were never intended by the Admiralty to apply to any other country. They were intended purely for the use of the Royal Navy and British merchant ships. They were not directed at navies or the merchant shipping of other countries. However, they were copied around the world. At the time of the decision in *The Scotia* in 1871, the US Supreme Court said that although the regulations had originated as a unilateral act by Great Britain, they

¹⁶ *Instructions for the Government of Armies of the United States in the Field*, prepared by Francis Lieber, LL.D., originally issued as General Orders No. 100, Adjutant General's Office (1863), printed in Schindler and Toman, *op. cit.*, p. 4 *et seq.*

had since been adopted and copied everywhere else among all the leading maritime nations – including, indeed, the United States. The court took the view therefore that the single act in question had in fact generated customary international law.

One example of how this might happen in relation to the law of armed conflict is as follows. It is the current position of the Australian Government that the law of belligerent occupation, as expressed in Geneva Convention IV,¹⁸ is the law to be used as regards taking into custody and handling detainees wherever troops are deployed outside Australia, including in peace support operations. That is the official doctrine used by the Australians at present.¹⁹ As far as is known, no other military power in the world currently accepts that proposition. But if that proposition were to find its way into the practice of other states, and if other states were to consider that the rules in Geneva Convention IV can or should be used as legal principles governing the taking and keeping of detainees in any situation where armed forces are present in the territory of another state without the consent of that other state, then this could be evidence of the generation of a new rule of customary international law.

4.5 Component significance

The final element is the component significance of a military manual. Here, we return to a point made at the beginning of this paper. Is a military manual to be viewed as actual state practice, or is it to be viewed more as being in the nature of *opinio juris*? The question here is in relation to the law of armed conflict: what exactly is the state practice? Hays Parks has written, "Government-authorized actions in war speak louder than peace time government statements".²⁰ Military manuals are drafted in some cases over a fairly extended period of time, with the benefit of a peacetime approach in which they can be reflected upon, there can be discussions, things can be considered and reconsidered and analysed in great detail and at considerable length. But in wartime, when armed conflict is actually taking place, and when the law is actually being applied on the ground, things tend to happen very quickly and decisions often have to be made very rapidly. Which is the more important consideration in the formulation of the law of armed conflict? Is it what a state says that it will or might do, or is it what the state actually does when a conflict is taking place and the state is involved in the conflict? For example: it was always the position of Iraq in modern times that the use of poison gas is prohibited in any kind of armed conflict. In 1988, the world witnessed the extensive and well publicised use of poison gas by Iraqi troops against Kurds in the north of

¹⁷ Supreme Court of the United States, *The Scotia*, 81 U.S. 14 Wall. 170 170 (1871).

¹⁸ Articles 17-34, 47-8, Geneva Convention IV.

¹⁹ See Commonwealth, "Australia: Government for the Meeting of Contracting Parties to the Fourth Geneva Convention, Geneva, 27-29 October 1998", 2 *Yearbook of International Humanitarian Law* 1999, p. 451.

This means the Convention applies not only in international armed conflicts but also wherever foreign forces find themselves in control of the territory of another State where there is no consent from a State government apparatus for them to be there.

²⁰ Parks, *op. cit.*, p. 210.

Iraq, most notably at Halabja in the course of the infamous Operation Anfal. Clearly, the state was saying one thing: Iraq was making quite categorical statements repeatedly at public conferences where it asserted that poison gas could never be used, and then it used the weapon itself in the late 1980s, both internally against the Kurds and also internationally in the conflict that Iraq was having with Iran between 1980 and 1988. In such circumstances, which is more important legally: what the state says or what it does?

The present author tends to agree with Parks' position, to the effect that it is more important to see what a state does in an actual armed conflict, than what a state says in the abstract conditions of peacetime that it *would* do in a hypothetical armed conflict in which it might be engaged. That, of course, is not the only way of appraising the position. It would equally be quite possible to say that the situation should be viewed more in terms of "do as we say, not as we do". In other words, what the state says is more important than what the state does, because when the state does something that is a violation of a previously stated rule, it is presented as the exception that proves the rule rather than as a new rule in itself.²¹

5. Concluding Remarks

The basic question is, as has been stated before, what exactly is a military manual and what exactly is it supposed to do? It is submitted by the present author that military manuals are, in essence, politico-legal guidance to the military as to how a state understands and interprets a rule that already exists. They do not in themselves create new law. They generally restate or interpret, very often as a matter of policy rather than strict legal obligation, the rules that the state believes already exist. Usually, those obligations are derived from treaties rather than from customary law. To the extent that any principle that is included in a manual is widely copied, and widely reproduced in other states' manuals, and the practice becomes extensive and uniform in the classic formulation,²² then it would be possible to say that manuals have played a part in the generation of a customary rule. But it is submitted that the matter does have to be approached with great caution; it is the view of the present author that military manuals at the most could be used as evidence of *opinio juris*. If a manual is to be drafted either for Norway or for the Nordic countries collectively, it would be a matter of considerable importance to determine what kind of official status is going to be given to the manual, and of course, what formulation the manual is going to make of rules that are already in existence and that are accepted by Norway or by the Nordic countries collectively.

²¹ See International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgement, I.C.J. Reports 1986, p. 14, para. 186.

²² See, e.g., *ibid.*, *Colombia-Peruvian asylum case*, Judgement of November 20th, 1950: I.C.J. Reports 1950, p. 266, pp. 276-7; *ibid.*, *North Sea Continental Shelf*, *op.cit.*, p. 3, para. 74.

MINUTES OF THE DISCUSSION

Reported by Charles Côte-Lépine*

Louise Doswald-Beck¹ explained the labelling of official sources in the *ICRC Customary Law Study*. The study uses the word "manual" to describe the various sources on which it relies in proving or disproving the existence of a rule of international customary law. In the study, the word "manual" is used simply for reasons of space; the actual names of all the sources can be found in the annex. The study looked at as many sources of state practice from around the globe as possible, rather than affirming the existence of a rule of customary law having examined only a few states.

Doswald-Beck also commented on the effect of instructions contained in military manuals. Can we say that such instructions represent state policies? Manual drafters would do well to be careful and declare immediately whether specific instructions included in their manuals reflect official positions. Otherwise, it would be deeply unfair to second-guess the intention of the state concerned.

In Doswald-Beck's view, once a rule has been established or identified as customary law, a state cannot decide not to apply it on the basis that it believes that it is a matter of policy rather than customary law. In other words, in relation to the application of customary law, a state cannot be a *subsequent* objector. The only way in which a state will not be bound by a rule of customary law is through its persistent objection. As a *persistent* objector, a state ought to object to the application of a rule of international customary law at the very beginning of its formation and be absolutely consistent thereafter.

Doswald-Beck believed that it is not necessarily what is stated in a military manual that contributes to the creation of a rule of customary law. Rather, it is the actual practice of the state on a specific issue that matters. The reaction of other states *vis-à-vis* one state's practice is equally important. For example, when Iraq used chemical weapons on the Kurdish population, it is the strong objection of the international community that strengthened the existence of the customary prohibition on the use of such weapons in warfare.

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¹ Louise Doswald-Beck is Professor of the Graduate Institute of International and Development Studies, Geneva.

As a former ICTY prosecutor, Bill Fenrick² expressed his disinclination to use customary law. While it might be easy for a judge to *confirm* the existence of a rule of customary law, it is difficult for a prosecutor to *prove* its existence. Those ICTY prosecutors who seek to establish the existence of a rule of customary law tend to look at the practice of the states with which the judges would be familiar.

Arne Willy Dahl asked participants what kind of document the drafting process should produce.

Roberta Arnold³ observed that the outcome would depend on the status that the state wants to give its manual. Despite David Turns' statement that manuals do not constitute law, the Swiss manual does constitute law in Switzerland. A breach of this manual is a criminal offence under Swiss law. If a state wants to attach more importance to its military manual, it can do so by restating criminal provisions or by creating legal rules that would engage responsibility for its breaches.

Ove Bring⁴ noted that the discussion so far had mostly focused on international law. In his view, military manuals are important as a form of state practice. According to Turns, while Brownlie believed that manuals are evidence of international customary law, Lord Wright concluded that they do not "constitute international law". Bring argued that manuals represent state practice but not necessarily international law and that there are no different views on this issue. Lord Wright and Brownlie dealt with different matters and their views can easily be reconciled. On the one hand, Brownlie considered that manuals represent *evidence* of state practice; he did not say whether they always represent *international customary law*. On the other hand, Wright concluded that manuals do not represent *international customary law* as such; he did not refer to the issue of *evidence of state practice*. Wright did not deny that the norms contained in manuals *could* express applicable international law.

As for a common military manual for Nordic countries, Bring stated that military manuals had so far been considered in a very *static* manner. Military manuals are often taken only to express what already exists and what is already considered as international customary law. But what comes out of a military manual can touch on matters of state policy and evolve into expressions of *lex ferenda*. For example, Nordic countries would have more progressive views on issues such as internal armed conflict. Such views, if included in a common military manual, could in due course be looked upon as policy statements and, as other countries

² Bill Fenrick is on the faculty of Dalhousie University Law School.

³ Roberta Arnold, Ph.D. (Bern, Hons.), LL.M. (Nottingham), is specialist officer (1st Lt.) and candidate examining magistrate, Military Tribunal 8, Swiss Military Justice; independent legal adviser in international criminal law and international humanitarian law.

⁴ Ove Bring is Professor of International Law at the Swedish National Defence College, Stockholm.

begin to copy them, evolve into *lex ferenda*. In time, *lex ferenda* could become *lex lata*. This might be described as a *dynamic* approach to military manuals, an approach suitable for Nordic countries.

Daniel Geron⁵ advised caution in developing rules of international customary laws when such developments are asserted by states that may not have sufficient practice or experience in the field. This is essential for *lex ferenda* and should be borne in mind in the context of a common Nordic manual.

Darren Stewart⁶ observed that an increasing number of states participate in multinational operations and that interoperability has become a major concern. Experience shows that military manuals are extremely important when understanding other countries' legal positions. Here, military manuals have a double purpose. First, as Charles Garraway noted, they are useful in the sense that they provide a solid basis for training. Second, military manuals help allies understand one another's positions.

Stewart believed that the creation of a common Nordic manual would represent a significant challenge. In Afghanistan, for example, legal advisers from Norway, Sweden and Denmark expressed different opinions on detention rules. It would be challenging to maintain discrete national positions.

Tom Staib⁷ noted that many states, including Norway, have given the role of legal adviser in their armed forces to civilians. National military manuals would be important in order to guide them. But creating a common Nordic manual would be a highly complex enterprise.

The following passages thematically summarise the responses offered by the panellists.

Status of a military manual

While acknowledging that the inclusive use of the label "manual" in the *ICRC Customary Law Study* was a matter of space, Garraway nevertheless cautioned that such use might be dangerous. It could be seen as according the same authority to the official manual of a major power and less formal military instructions issued by a smaller state to its troops.

Hans-Peter Gasser agreed that military manuals do not constitute law. He also agreed that military manuals ought to "spell out the law".

⁵ Captain Daniel Geron is a legal adviser in the International Law Department, Israel Defence Forces.

⁶ Lieutenant Colonel Darren Stewart, UK Army, is Chief Legal Adviser, HQ Allied Rapid Response Corps.

Gasser observed that, at the Office of the General Counsel of the US Department of Defence, Hays Parks had been working for the past thirty years on a military manual for the US armed forces. And yet the United States still does not have a military manual today. Why is that? Is it because states believe that by writing down, black and white, what they consider to be their rights and obligations, they will then be bound by them?

Military manuals and penal sanctions

Garraway reiterated his view that a military manual is a tool which lays out the interpretation of the law rather than the law itself. For example, the UK *Queen's Regulations for the Army* are, in fact, not really "regulations"; nor are they written by the Queen. There will generally be no legal consequences if they are breached.

Turns noted that, while acting in breach of a provision of a national military manual might lead to prosecution in some states, it might generate no legal consequences in other states such as the United Kingdom. It might be that this difference emanates from different legal traditions. Civil law jurisdictions might be more inclined than common law jurisdictions to give the manual a formal legal status within their domestic systems.

Military manuals and *lex ferenda*

Garraway expressed his support for the view that a common Nordic manual could be regarded as advancing *lex ferenda*. In fact, a similar approach has already been taken by countries such as the United Kingdom, particularly on issues dealing with naval warfare. Thus, on the question of blockade, the *UK Manual* follows the provisions of the *San Remo Manual* including those which are considered *lex ferenda*.

Gasser maintained that a military manual is there to spell out the law and that it would be inappropriate to give it a wider function. A military manual should not be seen as a tool for a court or tribunal to determine the existence of a rule of customary law. Rather, it should be seen as an operational tool, a tool that guides people in operations who need to perform complex jobs in the field. If a military manual were given the function of helping judges determine the existence or development of a rule of customary law, it could be dangerous for the people in the field and it might lead to the end of such a manual. A military manual should remain a practical text.

Turns stressed that, in principle, it would be fine to create a military manual with a view to developing international customary law. The practice of one state alone would not be suffi-

⁷ Commander Senior Grade Tom Staib, Norwegian Navy, is Faculty Adviser on Military Law, Norwegian Defence Academy.

cient for that purpose, however. As Doswald-Beck noted earlier, the reactions of other states are more important. In the case of a common Nordic manual, the intention of its drafters to include some provisions as *lex ferenda* would be one step towards developing customary law. In order to see these provisions evolve into *lex lata*, however, other states, particularly those involved regularly in armed conflict, would need to react positively to them. Should the reaction of these other states appear to be negative, then the manual would not have served its *lex ferenda* purposes.

Clarity of positions taken in a military manual

Turns agreed that, if a provision in a manual was not spelled out clearly as a policy statement, it would be unfair to second-guess the intentions of its drafters. Should a position be adopted as a matter of policy rather than legal obligation, then the manual should make that distinction as clear as possible. In the end, the responsibility of making such distinctions rests with the drafters.

SESSION II

EXPERIENCES OF MILITARY MANUALS

OPENING REMARKS

Peter Otken*

The subject of this session is "experience". I hope you will agree with me that international humanitarian law is one subject of international law where experience is probably the most important consideration. You can write about humanitarian law, but it does not really exist except when it is practiced. Whether on the battlefield, in classrooms or at military academies, international humanitarian law must be practiced in order for it to exist.

We are fortunate to have with us today some extremely experienced scholars and practitioners in the field of international humanitarian law, and in particular in drafting and editing military manuals.

Our first speaker is General Rogers. General Rogers was involved in the drafting of the *UK Manual*. He has also worked on the other kind of manual to which Charles Garraway introduced us earlier, namely, international manuals including the shorter and very operational 1999 *ICRC Model Manual*.¹ And, to me, the most important book he has written is the award-winning *Law on the Battlefield*.²

General Rogers will be followed by Commander Fenrick. He is perhaps best known to you for his work at the ICTY. He is also a former officer with the Canadian Judge Advocate General (JAG)'s Corps. He will speak about the drafting of the Canadian manual in which he has participated. This is also an important document. As regards official status and availability, the Canadian manual is one of the first made available on-line. Free of charge and accessible from anywhere, it is arguably the most widely published of all military manuals. Thousands of legal advisers and academics interested in this subject must have downloaded this manual.

As you will have noticed, we are one person short. Professor von Heinegg will unfortunately be unable to join us today. Thankfully, however, Dr. Fleck – who will discuss military manuals and the challenge of multinational peace operations – is also a drafter and editor of the German manual that was to be the subject of Professor von Heinegg's presentation. For that reason, Dr. Fleck has very kindly agreed to say an additional few words about the German

* Peter Otken is Judge Advocate, Danish Judge Advocate General's Corps.

¹ Anthony P.V. Rogers and Paul Malherbe, *Fight It Right: Model Manual on the Law of Armed Conflict for Armed Forces*, International Committee of the Red Cross, 1999.

² A.P.V. Rogers, *Law on the Battlefield*, 2nd edition, Juris Publishing, 2004.

manual at the start of his presentation. You will know him, of course, as the editor of the commented edition of the German manual published by Oxford University Press. Until the publication of the *UK Manual*, this was arguably the most comprehensive and easily accessible international reference work on humanitarian law. Dr. Fleck is now editing the second edition of his publication.

THE UNITED KINGDOM MANUAL OF THE LAW OF ARMED CONFLICT

A.P.V. Rogers*

History of the *UK Manual*

The history of the *UK Manual* may be of interest because, in many ways, it is an example of how not to do it!

There seems not to have been an official manual on the law of armed conflict in the United Kingdom before 1914, although commercially published books were available that covered the subject.¹ Official publications included the *Field Service Pocket Book*,² which contained useful information about the composition of a cavalry division, the erection of a tented camp and the digging of latrines. This also included, but without any explanation or commentary, the text of the 1906 Geneva Convention³ and the 1907 Hague Regulations.⁴

The official *Manual of Military Law*, which contained the text of the Army Act 1881 and subordinate legislation with explanatory material, was amended in 1914 to include a new chapter, Chapter XIV, about the law of war on land. This was written by the celebrated international lawyer, Professor Lassa Oppenheim, with the help of Colonel J. E. Edmonds. The chapter was revised in 1936.

Following the experience of the Second World War and the various war crimes trials that took place afterwards as well as the adoption of the Geneva Conventions of 1949, a new work was clearly needed. A whole book devoted to the subject was published in 1958, being Part III of the *Manual of Military Law*, and sub-titled "The Law of War on Land".⁵ It was written by Professor Hersch Lauterpacht and Colonel, later Professor, Gerald Draper.

* Yorke Distinguished Visiting Fellow of the Faculty of Law and Senior Fellow of the Lauterpacht Centre for International Law, University of Cambridge; formerly Director of Army Legal Services; author of the prize-winning book, *Law on the Battlefield*, 2nd edition, Manchester University Press, 2004; general editor of the UK Ministry of Defence, *Manual of the Law of Armed Conflict*, Oxford University Press, 2004. This article represents the personal views of the author, not those of the United Kingdom government nor of the Ministry of Defence.

¹ For example, T. Barclay, *The Law and Usage of War*, Constable, 1914.

² General Staff, War Office, *Field Service Pocket Book*, His Majesty's Stationery Office, 1914.

³ Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, printed in Schindler and Toman, *op. cit.*, p. 302 *et seq.*

⁴ Regulations Respecting the Laws and Customs of War on Land, annexed to Convention (IV) Respecting the Laws and Customs of War on Land, printed in Roberts and Guelff, *op. cit.*, p. 73 *et seq.*

⁵ Editor's note: elsewhere in the present proceedings, this publication is referred to as the 1958 *Manual on the Law of War on Land*.

The adoption of the Additional Protocols of 1977 necessitated a new manual and it was decided that, for the first time, this would be produced for all three Services, namely the Royal Navy, the British Army and the Royal Air Force (RAF). It should be noted that, up to this point, each Service legal branch was responsible for writing a legal manual for its own Service. In the Army, this was known as *The Manual of Military Law* and, by now, consisting of four volumes,⁶ published on behalf of the Army Department by Her Majesty's Stationery Office.

The new law of armed conflict manual was eventually published in 2004 by Oxford University Press entitled *The Manual of the Law of Armed Conflict*. Professor Christopher Greenwood acted as the academic consultant and there were many contributors. In the end, it was decided to maintain the combined academic and military approach that had been adopted in the earlier works.

Work on the new manual started in 1978 under the auspices of the Service legal services. Some twenty one chapters were envisaged. The Director of Army Legal Services would be responsible for fourteen land and general chapters, and the Director of Legal Services (RAF) and the Chief Naval Judge Advocate respectively for the remaining air and naval chapters. An Army lawyer with the rank of colonel was appointed the editor and, under his direction, the many land warfare chapters were drafted in the period 1979-82. Separate authors or author teams were appointed to deal with the naval and air force chapters. By the time of military operations in the South Atlantic in 1982, much of the manual had been written in first draft.

From the outset, there was dissension as to the type of manual required. Some liked a rather informal style that did not follow treaty wording too closely; others preferred a more scholarly approach, paying close attention to treaty language. Some saw it as a handbook for military personnel; others as a legal textbook. Personally, I saw no need to depart from the text of the 1958 manual unless it was necessary to do so, for example, because the law had changed,⁷ there was new law⁸ or there was some other need to update that text.

When work began, it was hoped that NATO states would move towards ratification of the Additional Protocols together, make common statements of interpretation and, as far as possible, and certainly on key or controversial issues, adopt common language in their respective manuals. These good intentions were undermined, however, by the differing

⁶ Part I of the manual contained mainly the legal rules on the conduct of courts-martial and the enforcement of military discipline; Part II covered other legal topics such as enlistment and terms of service, the reserve forces, and military aid to the civil authorities; Part III covered the law of war on land. The 4th volume, entitled the "Civilian Supplement to Part I", dealt with the legal rules by which military law could be applied to civilians accompanying the Army.

⁷ For example, because of the impact of Part II of Additional Protocol I on the wounded, sick and shipwrecked.

⁸ For example, the new provisions of Additional Protocol I on the conduct of hostilities in Part IV.

speeds at which NATO states moved towards ratification of the protocols.⁹ Nevertheless, representatives of a number of English-speaking nations¹⁰ did exchange correspondence and have meetings periodically over a number of years, to discuss problem areas and drafting issues.

By 1986, we had in the United Kingdom a complete work with index in draft form and awaited a decision about ratification of the Additional Protocols. By now, the United States had publicly declared that it would not ratify the protocols. In 1987, the draft was revised with intention of getting closer to the earlier manual and to the treaty language. One short-coming of the 1958 manual, however, was the tendency of the authors to summarise or paraphrase the treaty language; so, when it seemed necessary or desirable to do so, the revised draft did depart from the 1958 text by including the relevant treaty language as a quotation.

In the period 1994-97, and following the experience of military operations in the Iraq conflict of 1991, the text was revised once again, especially the early chapters; and chapters 5 and 6, on the conduct of hostilities and on weapons, respectively, were completely re-written. At this stage, Professor Greenwood was appointed academic consultant to the project.

Then we awaited a decision on ratification. This took place after the election of the Blair government and, at rather short notice, in 1998. Ratification at last made production of the manual a high priority. The Director-General Joint Doctrine and Concepts took over responsibility for the manual from the Service lawyers and appointed a project officer, an editorial board and a new general editor to bring the work to a final conclusion. Experience of military operations in Kosovo and Afghanistan could be taken into account. A draft of the manual was issued and tested during the Iraq war of 2003. The manual was finally adopted and published in 2004.

Problem areas that faced the editorial team were naval warfare, neutrality and human rights law. In the end, it was decided to adopt the *San Remo Manual* for the naval chapter and this, with some commentary, replaced the earlier draft naval chapters. A chapter on neutrality law was not included, mainly because it would have meant holding back publication while further research was carried out into this area of the law, though there are references to neutrality law drawn from the San Remo text. Similarly, it was considered that to include human rights law would be to go outside the scope of the manual, although, again, there are some cross-references to that body of law.

⁹ For example, Italy ratified the Additional Protocols in 1986, Germany in 1991 and the United Kingdom in 1998, whereas the United States has still to ratify them.

¹⁰ These included Australia, Canada, New Zealand, the United Kingdom and the United States. We were joined at some of the meetings by the late Brigitte Juul of Denmark.

Lessons Learnt

Is there a need for a manual?

It would no longer be possible just to issue the treaty texts as was done before 1914. That might just be feasible with the Geneva Conventions of 1949, perhaps with some explanatory notes, because the language of those treaties is relatively straightforward and each deals with a discrete area of the law. The situation has been complicated by Additional Protocol I, which affects the Geneva Conventions, and other later treaties. Because of the search for consensus, the wording of Additional Protocol I is not always clear and statements on ratification may need to be reflected. Especially in connection with the conduct of hostilities, practical guidance may be needed. All of this points towards the need for a manual. There may also be political reasons for a manual as representing a state's view of the law.

Once a decision has been made to produce a manual, it is worth taking time to consider the aim and how this can best be achieved. We in the United Kingdom tended to think about such things as we went along, although at the back of the mind of some of those involved was the notion of producing an updated and expanded version of the 1958 manual.

If so, what form should the manual take?

We identified requirements for the dissemination of information on the law of armed conflict at about four levels:

1. *Aide-mémoire* cards for soldiers, reflecting the "soldiers' rules". The UK card is numbered JSP 381¹¹;
2. A pamphlet or booklet for junior officers or non-commissioned officers. In the UK Army, this pamphlet is numbered AC 71130;
3. An operational law handbook for unit commanders. In the United Kingdom, such a manual has not, so far as the author is aware, been written¹²;
4. A law of armed conflict manual. In the United Kingdom, the internal version of the manual is numbered JSP 383.

¹¹ This *aide-mémoire* can be downloaded from <http://www.mod.uk/NR/rdonlyres/749088E6-E50A-470E-938D-459A74481E88/o/jsp381.pdf>.

¹² Although such a handbook has not yet been produced, various doctrine publications have been issued on, e.g., handling of prisoners of war, internees and detainees and legal support to joint operations. See, e.g., *Joint Doctrine Publication 1-10: Prisoners of War, Internees and Detainees* (this publication can be downloaded from http://www.mod.uk/NR/rdonlyres/7A5905A5-8E81-40A6-AFB6-949634BAF47F/o/20080424_JDP100Ch1_U_DCDCMAPPs.pdf).

Aim/readership

The *UK Manual* is described as "a reference work for members of the UK armed forces and officials within the MOD and other departments". It is, of course, important to establish the aim before embarking on the project.

Should it be a legal textbook or an operational handbook?

The answer to this question given by senior military officers twenty years ago tended to be on the lines of "gives us the law in language that we can understand; we will then apply it to the operational situation". This was against the background of commanding officers being trained in administering military law to a considerable measure. Following the intervention of the European Court of Human Rights in several cases and the consequent amendments to Service law, such legal involvement by laymen is now on the decrease and there is much more involvement of lawyers in the military judicial processes. Perhaps the trend is now more towards the operational level manual, though that would still have to be built on the foundation of an accepted academic textbook.

Who should write it?

The answer to this question will depend on whether an operational or a legal book is to be produced. A smaller editorial team usually means better cohesion, but they may not be able to cover the whole range of an increasingly complicated subject. The authors need to agree from the outset about the aim of the manual, the methodology to be adopted and how the material is to be presented. The consequences of disagreements between co-authors can range from detrimental to disastrous.

Contents

Should the manual cover only the law of armed conflict or other related areas of law including human rights law? How can this be achieved? These are questions that the editorial team will have to answer at the outset. The way a manual is worded can make a big difference to its readability. For the *UK Manual*, we tried to write in straightforward, standard English, avoiding technical terms and jargon, so that the manual could be understood by those without military or legal training.

Layout

Should the material be presented according to the usual legal headings or according to military situations? The answer will depend on the type of manual to be produced. The latter approach would suit the operational law handbook.

Text

Should treaty texts be regurgitated, paraphrased, summarised or annexed? We decided to summarise or paraphrase the treaty text except where that was clear, in which case it was set out in quotation marks. Personally, I am not keen on paraphrasing because of loss of accuracy, but that is what had been done in 1958 and there seemed no point in changing the 1958 text unless there was a good reason to do so. We also decided against annexing the treaty texts because these could be found in commercial publications.

My preference would be for a text that (a) sets out the legal rule, (b) provides any necessary definitions, explanations and cross-references, (c) provides guidance as to practical implementation, and (d) provides examples, whether historic or fictional. In the case of the *UK Manual*, a decision was made not to use historical examples unless they came from tribunal judgements or were otherwise well documented.

Format

The editorial team will have to consider the form of the manual, for example, a book, bound or loose-leaf; an electronic version, perhaps published on the internet, or stored on compact disc or flash drive. Given weight and space restrictions, operational law handbooks need to be portable and easily accessible. Consideration has to be given to the best way of keeping the material up-to-date by issuing amendments. Sometimes this can be an ongoing process as the lessons of current operations are digested and disseminated. Some of this information may be confidential, so consideration has to be given to security of information. The *UK Manual* is available in two forms: a commercially published manual in book form, available to the general public; and an internal, loose-leaf version that is used by the Ministry of Defence and the armed forces.

Postscript

Of the 1958 *Manual on the Law of War on Land* it was said that it was fine work; only a pity that it was printed on rice paper and tied together with bootlaces! The 2004 edition looks good, published as it is by Oxford University Press, but others will have to be the judge of its content.

REFLECTIONS ON THE CANADIAN EXPERIENCE WITH LAW OF ARMED CONFLICT MANUALS

William J. Fenrick*

The purpose of military manuals on the law of armed conflict is to further national compliance with LOAC/IHL obligations. If a state never engages in armed conflict, it probably has very little need for a LOAC manual. With some justification, Canadians tend to view themselves as an unmilitary people. Given a choice between expenditures on social programmes and expenditures on the armed forces, social programmes win almost every time. As military casualty figures indicate, however, we do tend to show up for World Wars and, occasionally, for lesser conflicts. Two hundred and forty-four Canadian soldiers died in the South African War of 1899-1902, 66,685 died in the First World War, 44,893 died in the Second World War, 516 died in the Korean Conflict, 121 have died on peacekeeping operations and, to date, 74 have died in Afghanistan. We do not go to war by ourselves. We are always part of a coalition of sorts, so interoperability is always important to us. The Canadian experience, with its unmilitary self-perception, lack of enthusiasm for defence expenditures and emphasis on interoperability, may be particularly relevant to those of you from Scandinavian countries, as will our constant exposure to ice and snow. As our current involvement in Afghanistan indicates, probably to the surprise of most Canadians, the Canadian Forces (CF) may continue to be involved in armed conflict even today. This possibility, and the fact that Canada has ratified or acceded to most of the major LOAC treaties, including the Geneva Conventions of 1949 (in 1965) and the Additional Protocols of 1977 (in 1990), impose an obligation on Canada to take appropriate measures so that its armed forces are able to comply with the law of armed conflict.

One of the measures taken by Canada in its endeavour to comply with its LOAC obligations was the adoption of the *Joint Doctrine Manual, Law of Armed Conflict at the Operational and Tactical Levels*, in 2001.¹ This is by no means the only measure taken by Canada to comply with its obligations. There are also training programmes and directives on various relevant matters, such as targeting. Further, Canada has, since the 1990-91 Gulf War, deployed military lawyers abroad on all major operations. At present, for example, there are seven military lawyers deployed in Afghanistan, two in the Congo and one in Darfur.

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This is a very different situation from the one that existed when I joined the then Royal Canadian Navy as an 18 year-old naval cadet in the fall of 1962. Indeed, during the period from 1962 to 1970 when I was a naval cadet and then a very junior naval officer, my only exposure to the law of armed conflict was a viewing of a World War II US Navy film on the treatment of prisoners of war. This focused on the capture of a group of extremely surly U-boat crew members and emphasised that we should capture prisoners and treat them properly for their intelligence value. It finished with a view of an exploding depth charge with appropriate sound effects and emphasised that, if we complied with the law, we would be able to blow the enemy off the face of the earth. At that time, I would have questioned whether the law of armed conflict was anything other than an illusion.

My first exposure to the law of armed conflict as a military lawyer was a very different experience. In the summer of 1974, I was sent off to the US Army Judge Advocate General's School in Charlottesville, Virginia, for a one-week basic course on the law of war. At that time, the Viet Nam War was winding down and the US Army was absorbing the lessons of that conflict, particularly the importance of compliance with the law of armed conflict for maintaining domestic popular support. The course was superbly taught and my life-long interest in the subject was generated. A particularly dynamic teacher on this course was Hays Parks, then a (much younger, as were we all) Marine exchange officer on the staff. In the view of those of us who are LOAC practitioners, Hays subsequently became the leading practitioner in this area of law. It is unfortunate that pressures of work prevented him from taking part in this Forum. I know that the organisers have made every reasonable effort to obtain US participation today and those efforts have not met with success. In my view, post-9/11 problems notwithstanding, the US armed forces have developed a much more detailed compliance programme than the armed forces of any other country.

After I returned from the US Army course, I began looking into what the Canadian situation was concerning LOAC manuals and training. As of 1974, the Canadian Forces appeared to do very little concerning the law of armed conflict. There was a *Canadian Manual on the Geneva Conventions*, essentially an abbreviated plagiarisation of the *ICRC Commentaries on the 1949 Geneva Conventions*; and a short booklet entitled *Unit Guide to the Geneva Conventions*. Most, perhaps all, LOAC training was done by non-lawyers at the unit level or in military schools. The quality of the training was unknown. There was a small directorate concerned with international law in the Office of the Judge Advocate General in Ottawa, but that directorate seemed to focus on status of forces issues. One senior military lawyer, Jack Wolfe, subsequently the Judge Advocate General, was involved almost full-time in negotiating the Additional Protocols. There was no LOAC manual concerning air or maritime opera-

¹ This document can be downloaded from http://www.forces.gc.ca/jag/training/publications/law_of_armed_conflict/loac_2004_e.pdf.

tions. Copies of the United Kingdom's 1958 *Manual on the Law of War on Land* were available in various military law offices, but I doubt they were read by anyone other than Jack Wolfe or me. The Legal Branch focused almost entirely on military justice and domestic law matters.

In 1977, by which time Jack Wolfe had become the JAG, I was fortunate to be transferred to our international law directorate. General Wolfe, who had acquired a substantial profile because of his involvement in the negotiation of the Additional Protocols, moved the Canadian Forces from its torpid state concerning the law of armed conflict by bringing in Leslie Green, a distinguished Canadian law professor and LOAC expert, on a sabbatical year to produce a first draft of a Canadian LOAC manual. At that point, 1979-80, I was the very junior director of international law in JAG (a major with about one year's seniority) and Armand Des Roches, subsequently the Chief Justice of Prince Edward Island, was the director of a newly established directorate of legal training. Leslie's office was collocated with the director of legal training but I worked very closely with him in producing the first draft of the manual. It was clearly Leslie's draft but I had some input, as did then Lieutenant Colonel Des Roches, and I learned an enormous amount working with him. The first draft, which was completed by Leslie in the summer of 1980, was, I believe, the first complete draft manual to attempt to encompass war on land, sea, and in the air and also the first to incorporate the Additional Protocols. Before commencing the project, we endeavoured to obtain copies of manuals from all the countries we could think of. The model used by Professor Green for his draft was the 1958 *Manual on the Law of War on Land* drafted by Sir Hersch Lauterpacht and Gerald Draper although, obviously, the content of the Canadian draft was very different. Leslie subsequently published the first edition of *The Contemporary Law of Armed Conflict* in 1993 and, as he indicated in the preface, that book "grew out of"² and used the same chapter headings as the first draft of the Canadian manual written by him.

After the passage of a year or two, I was assigned as the director of legal training and tasked, among other duties, with producing a second draft of the Canadian manual. That task, which built on Leslie's work, involved some reassessment of the law but also working with line officers to ensure the text was readable by non-lawyers. The second draft of the manual was completed in 1984. From my point of view, at that time we had a complete and usable text. There were, however, a few problems. It had never been approved by anyone but me; it was written in English and an official CF manual must be in both English and French; and it was written assuming that Canada would ratify the Additional Protocols and that was not completed until 1990. The second draft remained just that, a draft, until I retired from the Canadian Forces and moved over to the ICTY in 1994. The draft was, however, widely used within the Canadian Forces and widely distributed outside the Canadian Forces. It, together with

² Leslie C. Green, *The contemporary law of armed conflict*, 3rd edition, Manchester University Press, 2008, p. xviii.

the relevant treaty texts, was used for training purposes, particularly for a one-week Basic LOAC Course run for military lawyers and other officers from 1985 on. It was also used for the provision of advice on targeting and on the drafting of ROEs by lawyers deployed with our naval and air forces in the 1990-91 Gulf Conflict. Generally speaking, Canadian national ROEs are drafted at the National Defence Headquarters level in Ottawa. In the Gulf Conflict, however, Canada was part of a coalition and there was a need for on-site input into coalition ROEs. As the Canadian draft manual was the first one aimed at addressing land, air and sea warfare, other countries also found it helpful. Indeed, I can think of at least one officially adopted national manual which, for a time, looked suspiciously similar to the Canadian draft manual with all references to Canada deleted and the name of another country inserted. We too, on occasion, made use of the manuals and training programs of other countries. As mentioned earlier, we made use of the 1958 *Manual on the Law of War on Land*. We also tended to send our military lawyers on law of war courses run by the US forces and to make use of US materials on occasion. One US publication which was particularly useful was the *US Navy Commander's Handbook* and its related *Annotated Supplement*.³ This manual addresses the law of peacetime naval operations as well as the law of naval warfare. For a period of time, our Maritime Command adopted the *US Navy Commander's Handbook*, together with a Canadian addendum indicating different Canadian approaches to some law of the sea and law of war issues, as an official doctrinal publication. During my time as a military lawyer, we in Canada also benefited enormously from annual discussions in what, over time, became the AUSCANZUKUS⁴ plus Denmark Law of War Manuals Working Group. I would hope that such discussions continue.

My colleagues and successors in the Canadian Forces have further developed Canadian publications, doctrine and training in the law of armed conflict since my retirement. The main publications today are, as indicated earlier, the *Joint Doctrine Manual* which was adopted officially in 2001 and is available in French and English, and the *Collection of Documents on the Law of Armed Conflicts* which contains all of the LOAC treaties and legislation relevant to the Canadian Forces.⁵ The team leader for preparing the *Joint Doctrine Manual* was Major Stéphane Bourgon, subsequently a Defence Counsel at the ICTY, who worked under the direction of then Lieutenant Colonel Kenneth Watkin, who is now the Judge Advocate General. The *Joint Doctrine Manual* updated and replaced the draft manual and all other LOAC publications. In addition, the Canadian Forces have adopted a short *Code of Conduct for CF Personnel* consisting of eleven rules which provide a simple resume of the law of armed conflict.

³ Naval War College, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, 1997, reproduced in A.R. Thomas and James C. Duncan (eds.), *International Law Studies* ("Blue Book" series), vol. 73, Naval War College, 1999. This document can also be downloaded from <http://www.nwc.navy.mil/cnws/ild/documents/Naval%20War%20College%20vol%2073.pdf>.

⁴ Editor's note: "AUSCANZUKUS" stands for Australia, Canada, New Zealand, the United Kingdom and the United States.

⁵ This document can be downloaded from http://www.forces.gc.ca/jag/training/publications/law_of_armed_conflict/collection_of_docs_on_loac_2005_en.pdf.

The *Code of Conduct* is used for training all members of the Canadian Forces. The *Joint Doctrine Manual* is somewhat similar in style to the *US Navy Commander's Handbook* in that it is essentially a summary statement of the law and not a detailed legal textbook. It is my impression that the Canadian Forces would like to develop eventually a higher level and more detailed LOAC manual similar in style to the 1958 *Manual on the Law of War on Land*, the 2004 *UK Manual* and the *Annotated Supplement* to the *US Navy Commander's Handbook*.

As indicated in its preface, the *Joint Doctrine Manual* was prepared by the Office of the JAG, the office of primary interest on LOAC matters, and it is issued under the authority of the Chief of Defence Staff. It is a document available to the public, but its contents were not approved by other government departments. The aim of the manual is

to provide a working level publication on LOAC and a practical guide for the use of commanders, staff officers and LOAC instructors ... The Manual is designed to apply to the tactical/operational levels of doctrine related to the LOAC and to be used as the main source for the preparation of lesson plans required for the training of all members of the CF on the LOAC.⁶

It does not address matters related to the legitimacy of recourse to force (*jus ad bellum*). It does address the law of armed conflict applicable to both international and (in a separate chapter) non-international armed conflicts. It does adopt a Canadian perspective on the relevant treaties and customary law applicable to armed conflicts but, except where explicit Canadian treaty reservations or statements of understanding are concerned, these interpretations are likely to be widely accepted. As a practical matter, the manual does not purport to be exhaustive and it deliberately tends to express the legal issues in the most simple and clear terms. The preface indicates that the manual

amplifies the Code of Conduct which sets out, in accordance with the CF policy on the LOAC, the basic principles and spirit of the LOAC to be applied, as a minimum, by all members of the CF taking part in all Canadian military operations other than Canadian domestic operations. Specifically, this Manual does not apply to domestic law enforcement operations.⁷

Further, although the *Joint Doctrine Manual* contains guidance, it is not itself a legally binding instrument. Separate legislation, such as the National Defence Act, the Criminal Code, and the 2000 Crimes Against Humanity and War Crimes Act, passed by Canada to implement

⁶ *Joint Doctrine Manual*, p. i.

⁷ *Ibid.*

the Rome Statute of the International Criminal Court (ICC),⁸ incorporates the relevant penal provisions and the modes of individual criminal responsibility.

Since the 1970s at least, it has been the view of senior Canadian military and military legal authorities that it was important to devote limited legal resources to developing Canadian expertise in LOAC matters and to developing a Canadian LOAC manual. At the start of the process, it was essential for Canada to develop a manual because there was no manual in existence which addressed the contemporary law of armed conflict applicable to air, sea and land operations. Such manuals do exist elsewhere now, in particular the admirable 2004 *UK Manual*. For this reason, it might be easier to adopt and adapt another state's manual. In my opinion, it is still important for Canada to have its own manual because Canada, as an independent state, has an obligation to do its own thinking on LOAC matters. That being said, the fact that our forces are unlikely ever to fight alone mandates that every effort be taken to harmonise LOAC interpretations with our friends and allies.

Both the draft manuals which I was involved in preparing and the *Joint Doctrine Manual* provide reasonably good summary statements of the customary and treaty-based IHL/LOAC applicable to international armed conflict and of the treaty-based IHL/LOAC applicable to non-international armed conflicts. Unfortunately, reality is often much messier than legal categories. What body of law should be applied when the Canadian Forces are engaged in peacekeeping or peace support operations? What body of law should be applied when the Canadian Forces are engaged outside of Canada in support of a recognised government which is in conflict with dissident armed groups, *e.g.*, in Afghanistan? What about the all too common phenomenon referred to as the Three Block War in which armed forces deployed abroad might be engaged in adjacent areas with reconstruction efforts, law enforcement-type tasks such as riot control, and combat with organised armed groups? Further, in the Canadian context, we have tended in the past to transfer operational control of our forces deployed on peacekeeping operations to UN-appointed commanders. The complexities of real life do not justify abandoning LOAC manuals or declining to draft or adopt them in the first place. It should be noted, however, that several countries, including Canada, have adopted short "Codes of Conduct" or "Soldier's Rules" which contain a set of simple rules which should be applied in any conflict situation other than domestic law enforcement. However, these complexities may also necessitate the adoption of tailored policies at the national level, with the result that the armed forces would need to do more than a strict interpretation on international law would require. Although a technical interpretation of the law may result in the conclusion that the armed forces are engaged in a non-international armed conflict, it may be considered desirable to require those forces to comply with the higher standards of IHL/LOAC for international armed conflicts. Indeed, as many armed

⁸ This statute can be downloaded from http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf.

forces prefer to train to a "One Book" standard and, where IHL/LOAC is concerned, that standard is the law applicable to international armed conflicts, it may not be difficult to require the armed forces to comply as a matter of policy with IHL/LOAC for international armed conflicts on all occasions when they are deployed on out-of-country operations. For example, although one might query precisely which body of law is applicable to the conflict in which the Canadian Forces are engaged in Afghanistan, the Canadian Forces have entered into arrangements whereby they are required to treat all detainees in accordance with the 1949 Geneva Conventions in total, not merely in accordance with their common Article 3.

I would like to conclude this paper with some personal reflections related to LOAC manuals drawn from my experience in assisting in their drafting, in LOAC training, in giving LOAC advice, and in being a "consumer" of such manuals during my time working in the ICTY Office of the Prosecutor.

- The target audience for the manual should be precisely defined in advance and every effort should be made to ensure the target audience is capable of reading the manual. A manual for non-lawyers which is rich in legalese may be intellectually self-indulgent but it does not get the message across. It may be necessary to have more than one manual, each written with differing levels of sophistication, and bulk. In my view, the first target audience should include both non-specialist lawyers and the officer corps. That audience, and more sophisticated audiences, should also be provided with a compilation of the relevant treaty texts. That is the approach taken, to my knowledge, by the British, American, and Canadian forces and I think it is a good idea. The treaties are not a substitute for a manual and *vice versa*.
- Legal research tools, including computerised analytical data bases such as the Case Matrix which has been developed for the ICC, are not substitutes for a manual and *vice versa*.
- One can make an argument that a manual should address any number of legal fields, from *jus ad bellum* to the law of armed conflict to the law of the sea to international criminal law to international human rights law. I think that such manuals should be confined to the law of armed conflict but they should include the law for both international and non-international conflicts and, if such exists, a policy statement concerning whether or not the law for international conflicts should be applied to all conflicts.
- Who should draft the manual is an extremely important issue. I think the manual should be written by persons who have proven LOAC expertise, who can incorporate a practical military perspective, and who can write coherent clear prose (this excludes many lawyers). Writing a manual is not a task for dabblers or amateurs. The approach taken in the United Kingdom and in Canada has been to rely on both military lawyers and academic lawyers.

- Who should approve the manual is also an important issue. If it is to be legally binding in and of itself, governmental approval is probably essential. Most manuals simply provide guidance, hopefully accurate guidance. For such manuals, departmental approval may be sufficient.
- The manual should cover all aspects of the law of armed conflict with a particular stress on issues which are relevant to the soldier in the field and, if necessary, a more superficial approach where less time-sensitive matters are concerned.
- The manual should place a particular stress on issues related to targeting, proportionality, and methods and means of war.
- The manual should be supplemented by a brief set of simple rules – *e.g.*, "Codes of Conduct", "Soldier's Rules" – which provide a condensed version of the key features of the law of armed conflict for individual soldiers.
- A manual, by itself, will not ensure compliance with the law of armed conflict. Every German soldier in the Second World War carried a set of "Soldier's Rules" in his pay book. Before it began to decompose in the 1990s, the Socialist Federal Republic of Yugoslavia had ratified almost every known LOAC and human rights treaty. Its armed forces also had a manual. The various states emerging in the territory of the former Yugoslavia rushed to Geneva to adopt new agreements at the behest of the ICRC. None of these measures generated an impressive compliance record.

THE GERMAN MANUAL

Wolff Heintschel von Heinegg*

Introduction

Germany issued its *Handbook of Humanitarian Law in Armed Conflicts* in 1992.¹ Unlike manuals of other states, this handbook was not a national effort alone. It was the product of a joint effort involving government experts from eighteen states as well as other IHL experts such as those from the ICRC and the International Institute of Humanitarian Law (IIHL).

The original draft had been prepared by members of the Federal Ministry of Defence and by legal experts. It was then sent to the defence ministries of allied countries, the ICRC and the IIHL in San Remo with the request to review it critically and to take part in an international workshop that was convened in Koblenz at the Zentrum Innere Führung.

This approach, of including international experts at an early stage of the drafting of the *German Handbook*, proved to be most beneficial. On the one hand, it helped ensure that neither unnecessary ambiguities nor mistakes found their way into the final product. On the other hand, it made a very thorough discussion between Germany and its allies possible and, thus, contributed to the latter's understanding of the former's positions.

Of course, the eventual manual does not reflect every criticism or every modification proposed by the international experts. The *German Handbook* remains what it is meant to be, namely a statement of international humanitarian law as it is understood by the Federal Republic of Germany. Hence, although the handbook is the product of a joint effort, the Federal Ministry of Defence bears the sole responsibility for its content.

1. Legal Nature

The *German Handbook* has been implemented as a *Zentrale Dienstvorschrift*, i.e., a regulation binding upon all services of the German armed forces. It does not merely compile treaties entered into by the Federal Republic of Germany, but rather paraphrases the obligations

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¹ ZDv 15/2 *Humanitäres Völkerrecht in bewaffneten Konflikten* – handbuch – 1992.

incumbent upon Germany and its armed forces under international treaty and customary law. The handbook is to serve soldiers and civilian personnel of all command levels in courses, military exercises and general training. Moreover, as an instrument legally binding upon all members of the German armed services, it restates and clarifies the obligations of the Federal Republic of Germany under international humanitarian law "binding not only upon its government and its supreme military command but also upon every individual".

In addition to such formal aspects, the handbook is a policy statement. Therefore, other federal ministries, especially the External Office, were considerably involved in the drafting process.

As a policy statement, the handbook is under constant review. Constant review also serves the purposes of keeping the manual up to date with the law's progressive development and of enabling the German armed forces to fulfil new tasks not envisaged in 1992. A new draft is presently under preparation and will probably be implemented in 2008.

2. The *German Handbook's* Approach to International Humanitarian Law

2.1 General aspects

It is, first and foremost, the treaty obligations of states that determine the subject-matters and areas of law to be included in their national IHL manuals. Accordingly, the *German Handbook* closely follows the 1977 Additional Protocols and other international treaties binding upon Germany.

There are, however, some statements in the *German Handbook* that may prove problematic. The handbook is based upon the German translation of Additional Protocol I. It should be noted in this context that German is not an authentic treaty language. For example, according to paragraph 456 of the original German version, attacks are considered indiscriminate "if they may be expected to cause losses or damage to the civilian population which are disproportionate to the concrete and direct military advantage anticipated". The English translation of paragraph 456 is somewhat closer to the wording of Article 51(5)(b) of Additional Protocol I but still not exactly in line with the provision because the word "incidental" has been left out.

Another problem concerns the fact that some provisions of the protocol are merely repeated without specifying Germany's understanding of their content. For example, paragraph 517 states: "Persons taking a direct part in hostilities are not entitled to claim the

rights accorded to civilians by international humanitarian law". In contemporary military operations, a wide variety of conduct may amount to direct participation in hostilities. Merely paraphrasing Article 51(3) of Additional Protocol I and of Article 13(3) of Additional Protocol II does not provide the necessary guidance.

Some parts of international humanitarian law were codified a long time ago; other parts have not been codified at all, or codified only in an incomplete manner. A manual may be neither ambiguous nor fragmentary if it is to serve as clear guidance to the armed forces and legal advisers on their government's position *vis-à-vis* the applicable law. Therefore, the *German Handbook* contains a number of clarifications and elements of progressive development in order to fill in the said gaps. These relate to:

- The law of non-international armed conflicts;
- The law of neutrality; and
- The law applicable to UN peacekeeping operations and to other UN military operations.

2.2 Non-international armed conflicts

The *German Handbook* no longer distinguishes between the rules and principles of international humanitarian law applicable to international armed conflicts and those applicable to non-international armed conflicts. According to paragraph 211,

German soldiers like their allies are required to comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts however such conflicts are characterised.

This very provision of the handbook has led the ICTY to assert a merger of the law of international armed conflicts and the law of non-international armed conflicts.² It remains to be seen whether paragraph 211 is indeed sufficient evidence of the law as it stands or merely a policy statement. It may well be that the new draft of the handbook will again follow the traditional distinction. Be that as it may, the handbook is a clear statement that the incomplete codification of the law of non-international armed conflicts does not absolve German soldiers of their obligation to comply with the rules, principles, and standards that should be observed by all professional soldiers.

² International Criminal Tribunal for the Former Yugoslavia, *Tadić Jurisdiction Decision*, *op. cit.*, para. 118.

2.3 Neutrality

It is worth emphasising that the *German Handbook* clearly considers the law of neutrality a part of international humanitarian law. The handbook clarifies to some extent the problem of scope of applicability by stating that "the neutrality of a state begins with the outbreak of an armed conflict of considerable size between other states". Whether this correctly reflects the current state practice may very well be doubted. For instance, France continues to claim that the law of neutrality applies only in cases of a declared war, whereas Sweden seems to take the position that it applies only if a state not a party to an international armed conflict officially declares its neutrality. Questions also remain as to what additional value the notion of "international armed conflict of considerable size" brings. This formulation is problematic because it implies that third states are automatically bound by the entirety of the rules laid down in Chapter 11 of the handbook as soon as an international armed conflict reaches a "considerable size". To make the matter worse, this statement does not seem to reflect Germany's position in recent international armed conflicts such as the 2003 Iraq War.

2.4 Other military operations

Ideally, a manual on the law of armed conflict would include rules on "military operations other than war". Today, the majority of armed forces are engaged in multinational operations (including operations within the framework of NATO and/or the EU) that do not amount to international armed conflicts and whose legal basis is either Chapter VII of the UN Charter, Chapter VI of the same charter, or a combination thereof.

In view of the fact that there is no international law tailored to such operations, a military manual should, at a minimum, clearly state when international humanitarian law applies to peacekeeping, peace enforcement and other military operations. According to the 1999 UN Secretary-General's Bulletin,³

the fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.⁴

The *German Handbook* is less clear on this point. Paragraph 208 merely states: "The rules of international humanitarian law shall also be observed in peacekeeping operations and other

³ Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, printed in Roberts and Guelff, *op. cit.*, p. 725 *et seq.*

⁴ *Ibid.*, §1.1.

military operations of the United Nations". In most cases, this generalisation will prove counterproductive for an operation and certainly not assist in finding solutions conducive to its success. For if taken at face value, this passage would mean that it does not matter whether the armed forces are in a situation of armed conflict. The truth of the matter is that the law applicable in non-armed conflict situations differs immensely from the law applicable in armed conflict. Even in armed conflict, UN Security Council resolutions may modify the applicable rules of international humanitarian law (*e.g.*, during the occupation phase of the 2003 Iraq War). There is some evidence today that the detention of persons is to be judged in light of the relevant UN Security Council resolutions alone rather than international humanitarian law or human rights law.

In any event, a modern military manual should be as specific as possible on the law applicable to such operations. Since there is no international treaty on the law applicable to peacekeeping operations and the applicable customary international law is far from clear, it is the affirmative duty of every government to provide its armed forces with the necessary guidance upon which they are so heavily dependent when deployed out of area.

2.5 Law of naval warfare

The *German Handbook* contains a chapter on the law of naval warfare that follows the traditional approach characterising the respective 1907 Hague Conventions⁵ and other codifications of the law of naval warfare prior to World War II. Accordingly, this chapter contains rules on mine warfare, the conversion of merchant vessels into warships, restrictions on the right of booty in naval warfare, prize measures, and submarine warfare. Unlike the *UK Manual*, the *German Handbook* does not take the view that prize measures and other methods of naval warfare are lawful only if they are necessary and proportionate in light of the right of self-defence under Article 51 of the UN Charter.

No chapter on naval warfare would be complete and operable if it did not define its rules in accordance with the law of neutrality and the law of the sea. The handbook contains a section on exclusion zones that is meant to reflect the recent developments in customary international law as restated in the *San Remo Manual*.

Of course, in view of the date of issue fifteen years ago, some provisions in Chapter 10 no longer reflect the contemporary international law of naval warfare. This holds true, *e.g.*, for

⁵ See, *e.g.*, Convention (VI) relating to the status of enemy merchant ships at the outbreak of hostilities; Convention (VII) relating to the conversion of merchant ships into war-ships; Convention (VIII) relative to the laying of automatic submarine contact mines; Convention (IX) concerning bombardment by naval forces in time of war; Convention (XI) relative to certain restrictions with regard to the exercise of the right of capture in naval war; Convention (XII) relative to the creation of an International Prize Court.

exclusion zones and hospital ships. Nor are there any sections on peacekeeping operations, counter-terrorism operations, counter-proliferations operations and maritime interdiction/interception operations. Such operations are dealt with in the *German Navy Commander's Handbook on the Law of Naval Operations*.

3. Experience with the *German Handbook*

The overall experience with the 1992 *German Handbook* is to be regarded as a success story. On the one hand, there was an urgent need for the Federal Republic of Germany in 1992 to state its positions on international humanitarian law. Since then, members of the German armed forces and their legal advisers have been able to rely on the handbook in their exercises and training courses. On the other hand, the handbook has contributed to a better understanding of Germany's position *vis-à-vis* international humanitarian law by its allies. While the allies certainly do not share the German approach in its entirety, they have been able to improve cooperation with the German armed forces in multinational operations.

The *German Handbook* remains very limited in scope, however, insofar as it deals exclusively with international humanitarian law applicable in armed conflicts. Today, most military operations do not amount to armed conflicts. Hopefully, the new version will more accurately reflect the realities of modern operations.

Finally, the considerable time that has passed since the manual's publication in 1992 is problematic. A manual should be as up to date as possible if it is to serve its basic function, *i.e.*, to guide the armed forces of the state that issues it. It should therefore be revised regularly and modified as often as necessary. Probably, the only way of achieving this aim is for the manual to be issued in loose-leaf rather than bound versions.

Concluding Remarks

Some may take the position that a military manual is unnecessary because it is by nature far too general to give guidance to those who seek it in the circumstances of a concrete operation. While this is certainly true when it comes to operational questions that are better dealt with in ROEs, this position would underestimate the intrinsic value of military manuals. Military manuals are a unique opportunity for states to clarify their understanding of international treaty and customary law applicable to military operations. In most cases, referring to treaties alone will be insufficient because they are nothing but political compromises that are inherently ambiguous, especially with regard to rules and principles of high practical im-

portance. Hence, if not merely a repetition of international treaties, a military manual will bring legal clarity and legal security. Such a manual will benefit both the armed forces of the issuing state and those of its allies. Moreover, a military manual is a perfect tool with which to contribute to the progressive development of international humanitarian law. A publicly accessible manual – and a military manual should not be classified for the reasons given here – will be noted by states which may ultimately share the positions taken in it.

There are nevertheless good reasons to maintain a manual's national character even where the ties with other states are rather strong. First, it would be difficult to agree on a common understanding. This holds true even if all participating states are bound by the same treaties. Second, a joint manual of more than two states would create at least a political obstacle to all endeavours aimed at a progressive development of international humanitarian law. Finally, it should be borne in mind that Scandinavian countries are members of different collective security systems – namely, NATO and the EU – and some of them have pursued a political course that is not necessarily shared by their respective neighbours. A joint Scandinavian manual would therefore be rather rudimentary and not necessarily helpful for those who are dependent upon it.

MILITARY MANUALS ON THE LAW OF ARMED CONFLICT AND THE CHALLENGE OF MULTI-NATIONAL PEACE OPERATIONS

Dieter Fleck*

1. As a result of the reaffirmation and further development of international humanitarian law during the recent decades, considerable efforts were made to increase implementation of that law by means of **military manuals**.¹ Military manuals are designed to describe legal and policy rules applicable in armed conflicts. They might not suffice to prove state practice as evidence of customary international law; nevertheless, among the various means available to ensure respect for international humanitarian law, military manuals have an important role to play.

2. Implementation efforts during these decades were **challenged** by armed conflicts characterised by asymmetries between rich and poor parties, states and non-state actors, and technologically advanced forces and those lacking even rudimentary equipment and logistics. Many countries and their populations have witnessed unlimited methods of fighting by the poor as well as excessive acts by the rich even during precision strikes. This development has led to new vulnerabilities of technologically advanced societies. Military manuals have been put to the test in these conflicts.

3. One important additional challenge for many armed forces concerns their involvement in various forms of **peace operations** for which the law of armed conflict was not designed and in which the applicability of its rules is a matter of debate. Many of those gathering experience in peace operations today have not participated in an armed conflict for a long time. Many soldiers would consider training in peace operations much more relevant for their daily work than training in the law of armed conflict.

4. **Peace operations as such have undergone considerable developments** in the practice of states, the United Nations and regional organisations. The term "peace operation" as it is used here comprises all forms of military (peace support and peace enforcement) operations conducted in support of diplomatic efforts to establish and maintain peace. This concept deliberately goes beyond traditional peacekeeping, as it combines elements of peacekeeping

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¹ For a list of military manuals on international humanitarian law, see *ICRC Customary Law Study, op. cit.*, Vol. II, part 2, pp. 4196-207.

with peacemaking and post-conflict peace-building. **A strict distinction between traditional peacekeeping and peace enforcement has often proven impossible.**

5. **The extent to which peacekeepers may enjoy rights and must fulfil obligations under international humanitarian law cannot be defined in general terms.** The very fact that most rules of international humanitarian law have been developed for the conduct of hostilities during an armed conflict should caution attempts at extending the application of these rules hastily to peace operations – operations that are designed to avoid fighting, *i.e.*, to stabilise a situation, rather than to engage in active hostilities.

Nevertheless, important principles and rules of international humanitarian law apply both in armed conflicts and peace operations alike, irrespective of whether peacekeepers are in fact engaged in an armed conflict or not.² These principles and rules may be included in ROEs for peace operations.³

6. **In modern peace operations, a complex legal regime comprising peacetime rules of international law, international law of armed conflict and national law must be respected and effectively implemented.**

7. **The genuine task of peacekeepers is connected more closely to law enforcement than to the conduct of hostilities.** Law enforcement demands that a strict "capture rather than kill" rule be observed, *habeas corpus* respected and each case of death by force formally investigated. None of these principles are normally applicable in the conduct of hostilities. Conversely, there may be situations where police forces may employ means that are prohibited in the conduct of hostilities, such as the feigning of civilian status and use of tear gas or even dum-dum bullets. With the exception of these very special provisions, international humanitarian law is more liberal in its limitations for the conduct of hostilities. It has a *lex specialis* function *vis-à-vis* the corresponding provisions of human rights law during international and non-international armed conflicts.⁴

Armed forces and the police must observe these differences both in training and in field operations.

² Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edition, Oxford University Press, 2008, §§208, 1309.

³ See, *e.g.*, "General Report", *Recueil XVII The Rule of Law in Peace Operations*, International Society for Military Law and the Law of War, 2006, pp. 109-57; "Recommendations", *ibid.*, pp. 416-7.

⁴ See International Court of Justice, *Nuclear Weapons Advisory Opinion*, *op. cit.*, para. 25; *ibid.*, *Palestinian Wall Advisory Opinion*, *op. cit.*, paras. 102-42.

8. Whereas general observance of international humanitarian law in all armed hostilities has long been established as a matter of law⁵ and best practice,⁶ **the UN Secretary-General's Bulletin formally requires that all members of UN forces engaged as combatants in an armed conflict observe "[t]he fundamental principles and rules of international humanitarian law set out in the present bulletin".**⁷ This regulation is clearly limited to the conduct of hostilities. For this purpose, the bulletin gives a summary of the main rules of international humanitarian law. But this should not be understood as implying that UN forces are not subject to the entirety of international humanitarian law.

The bulletin states the obvious for those peacekeepers who are engaged in the conduct of hostilities. Its content is declaratory in nature and relevant not only for forces established by the United Nations but also for those under regional, multinational or national control and operating with the authority of the Security Council (*e.g.* the Gulf conflict of 1990-1991).

9. **It would be erroneous to interpret the UN Secretary-General's Bulletin as advising peacekeepers to act as combatants conducting hostilities, when in fact they must adhere to law enforcement principles.** The bulletin clearly states that it applies to UN forces engaged as combatants in situations of armed conflict and stresses that it applies to them only "to the extent and for the duration of their engagement".⁸ It is in the same context that the bulletin refers to "enforcement actions"⁹ and "peacekeeping operations when the use of force is permitted in self-defence".¹⁰

Given the fact that a policeman acting in self-defence would still be bound to the law enforcement paradigm, and any resort to a "conduct of hostilities" mode might be judged excessive, the text of the bulletin leaves some room for doubts. Such doubts must be resolved through ROEs and standing orders in accordance with applicable rules of international law and the law of the sending state.

The functional immunity of peacekeepers as organs of their sending state,¹¹ their accountability under national and international law, and the responsibility of states for any wrongful conduct of their military and civilian personnel, all remain applicable.¹²

⁵ See, *e.g.*, Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged, resolution adopted by the Institute of International Law (1971), printed in Schindler and Toman, *op. cit.*, pp. 903-5; Conditions of Application of Rules, Other Than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged, resolution adopted by the Institute of International Law (1975), printed in *ibid.*, pp. 907-8.

⁶ See, *e.g.*, *German Handbook*, *op. cit.*, para. 208.

⁷ Secretary-General's Bulletin, *op. cit.*, §1.1.

⁸ *Ibid.*

⁹ *Ibid.* The context of this term is *peace* enforcement, not *law* enforcement.

¹⁰ *Ibid.*

¹¹ See Dieter Fleck, *The Handbook of the Law of Visiting Forces*, Oxford University Press, 2001, pp. 3-6.

10. **The UN Secretary-General's Bulletin also states that it does not affect the protected status of members of peacekeeping operations under the UN Safety Convention**¹³ nor their status as non-combatants "as long as they are entitled to the protection given to civilians under the international law of armed conflict".¹⁴ This provision refers to Article 2(2) of the convention,¹⁵ a very unfortunate provision which, if taken seriously, would have the effect that, as Christopher Greenwood has put it, "the threshold for the application of international humanitarian law is also the ceiling for the application of the Convention".¹⁶

11. **Both the UN Safety Convention and the UN Secretary-General's Bulletin may be criticised for neglecting the obvious differences between law enforcement and the conduct of hostilities.** Members of peace operations and their commanders must now fill this gap, hopefully supported by their sending states and competent UN organs.¹⁷

12. **Peace operations have an inherent role in the protection of human rights and the restoration of justice, whether expressly declared or not.** The relationship between international humanitarian law and human rights law has been shaped as part of a development which started after the Second World War and is expressed in the adoption of major human rights principles in Article 75 of Additional Protocol I. Legally speaking, this relationship may be characterised by mutual complementarity¹⁸ and by the *lex specialis* principle.

However, the *lex specialis* principle should not be misunderstood as being applicable to the general relationship between the two branches of international law as such. It should rather be seen in relation to specific rules in specific circumstances. Whether a sending state's human rights obligations apply extraterritorially depends on the terms of the human rights

¹² See Draft Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UN Doc. A/RES/56/83 as corrected by A/56/49 (Vol. II)/Corr. 4.

¹³ Convention on the Safety of United Nations and Associated Personnel, printed in Roberts and Guelff, *op. cit.*, p. 627 *et seq.*

¹⁴ UN Secretary-General's Bulletin, *op. cit.*, §1.2.

¹⁵ Article 2(2), UN Security Convention, provides:

This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

¹⁶ Greenwood in Fleck, *op.cit.*, § 208, para. 4:

It seems highly unlikely that those who drafted this Convention intended it to cease application as soon as there was any fighting, however low-level, between members of a UN force and members of other organized armed forces as this would reduce the scope of application of the Convention to almost nothing.

¹⁷ See, e.g., *Uniting against terrorism: recommendations for a global counter-terrorism strategy*, Report of the Secretary-General, UN Doc. A/60/825 (this report can be downloaded from <http://www.un.org/unitingagainstterrorism/sg-terrorism-2may06.pdf>); *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, UN Doc. A/59/2005 (this report can be downloaded from <http://www.un.org/largerfreedom/>); High-level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility*, United Nations, 2004 (this report can be downloaded from <http://www.un.org/secureworld/report3.pdf>).

¹⁸ Human Rights Committee, General Comment No. 31, paras. 2, 10, 11. Also, see *ibid.*, General Comments Nos. 15, 18, 28. All General Comments can be accessed at <http://www.unhchr.ch/tbs/doc.nsf>.

treaty in question. In many cases, a decisive factor will be whether the individual comes within the jurisdiction of the state concerned.

The practical relevance of human rights for peace operations cannot be underestimated. It is underlined by the fact that some subject-areas are dealt with more fully in human rights law than in humanitarian law (*e.g.* freedom of opinion, right to recognition as a person before law, right to participate in government, treatment in detention, disappearances, destruction of homes).

13. In peace operations, the significance of human rights obligations may be seen under three different aspects:

- (a) Ideally, there would be an express mandate by the Security Council and/or a regional organisation requesting not only all parties to the conflict but also the peacekeeping force to protect human rights;
- (b) Even where such a commitment has not been expressly stated, peace operations are to respect the law of the receiving state including its international law obligations of which human rights are an important part; and
- (c) Finally, human rights obligations of the sending state apply extraterritorially for acts committed within its jurisdiction.

14. Despite their differences, law enforcement operations in peacetime and the conduct of hostilities in armed conflicts have very much in common. The fundamental principles of distinction, avoidance of unnecessary suffering and humanity are quite similar in both types of operations. The same is true for secondary principles such as proportionality and effectiveness.

Existing differences in the implementation of these principles under the paradigms of law enforcement and the conduct of hostilities are a matter of gradation; they do not affect their full applicability as such.

15. Convincing solutions cannot be achieved at the national level alone. As with any effective peace operation, manuals on the law of military operations should be developed through international cooperation and promulgated as a multinational document or at least after close consultation. The ICRC, as the guardian of international humanitarian law, and other competent international agencies such as the UN Department of Peacekeeping Operations, should be duly involved in this process.

MINUTES OF THE DISCUSSION

Reported by Maria Bergram Aas*

Hans-Peter Gasser stated that the *UK Manual* provides the necessary information in an excellent manner. First, it says what military objectives are. Then, it quotes the treaty text followed by an explanation of the definition. Finally, some examples are given. It is likely that future generations of manual users will not know what a referral to "Dresden" would represent. Other solutions should be found to illustrate different aspects of the law.

As regards the applicability of the law of armed conflict to peace operations, Gasser recalled a conversation with an Australian major on the challenges facing Australian forces in Somalia. They were in a situation of *de facto* occupation and, accordingly, decided to apply Geneva Convention IV. This shows that the issue at hand is not necessarily one of formal applicability but one of practicality. The rules contained in Geneva Convention IV were exactly the rules the Australian forces needed at the time.

In Gasser's view, a military manual should, as the *UK Manual* does, provide practical rather than theoretical solutions.

Tom Staib asked whether, and to what extent, it would be fruitful to produce a Nordic or Norwegian manual based on existing manuals.

To Gasser's observations, Tony Rogers replied that this was in fact how he wanted the *UK Manual* to be structured. As regards Staib's question, Rogers stated that it would be possible to develop a new manual on existing ones, but copyright issues would need to be addressed. That said, existing manuals would be a good starting point. One should in any event look at several manuals for this purpose.

Bill Fenrick followed Gasser and Rogers in endorsing the idea of both using and looking to existing manuals. At one point in time, Canada did so by adopting the *US Navy Commander's Handbook* and attaching a Canadian annex to it. Such an annex was needed to implement the differences between the two countries' points of view on certain law of the sea issues and also to incorporate the *San Remo Manual*. Fenrick agreed with Gasser on the importance of a military manual's practical applicability.

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Dieter Fleck also advocated the need to look at other manuals during the process of drafting one's own. For example, NATO's Multinational Corps Northeast headquartered in Stettin, Poland, consists of German, Polish and Danish forces. They might benefit from having access to national manuals in preparing instructions for their operations.

Fleck responded to the point made by Gasser regarding peace operations and the lack of distinct, traditional rules that are appropriate for them: Bjørn Egge, former president of the Norwegian Red Cross, had served at one point of his career as a captain in the *Opération des Nations Unies au Congo* (ONUC). Lacking military instructions, the young captain simply decided to apply what Egge referred to as "Geneva Conventions *plus*". Admittedly, however, the world has become more complicated today. The rules needed to be translated into practical and up-to-date solutions.

Klaus Ilmonen¹ commented on how best to use the available resources with a view to prioritising the needs for military manuals. Nordic countries have not been involved in armed conflict for the past few years. They also operate with different realities when it comes to the politics of security; some nations are allied nations, others are not. One area in which Nordic countries do face challenges almost every day is peace support operations. Should one approach the task of creating a military manual from the bottom up rather than from the top down? Nordic countries do not have the kind of field expertise that, for example, the United Kingdom has from its experience in Northern Ireland. Nordic countries should perhaps first focus on the legal status of ROEs. It would then be appropriate for them to consider a set of operational guidelines on the laws of targeting in peace support operations, the legal status of intelligence in such operations, and so on. Eventually, one might create a coherent legal policy on peace support operations.

Ilmonen also raised concrete questions regarding the law of armed conflict in peace operations. Let us imagine a peace support operation in an area with no local infrastructure. All the judges have been shot or fled. One finds himself having the custody of a person suspected of a very serious crime, say murder. Under the European Convention on Human Rights,² what is he to do? For how long can he keep the person in question? Let us also imagine crowd control in a hostile environment where people have weapons and hand grenades whereas our soldiers have nothing but their weapons and shields. At what point do our soldiers use force? What kind of force do they use?

Charles Garraway cautioned that states should be very careful about blindly copying the manuals of other states. New Zealand, for example, had copied the Canadian manual but

¹ Klaus Ilmonen, LL.M., jur.lic., is an attorney in private practice.

somehow missed the fact that in the manual there was a reference to "a state with a common border". It should also be noted that law and politics are very closely intertwined here. One must therefore approach the task of drafting a new manual by looking at other nations' manuals very, very carefully. It may very well turn out that an annex is not sufficient.

² Convention for the Protection of Human Rights and Fundamental Freedoms, printed in Malcolm D. Evans (ed.), *Blackstone's International Law Documents*, 8th edition, Oxford University Press, 2007, p. 46 *et seq.*

SESSION III

SCOPE AND CONTENT OF MILITARY MANUALS

OPENING REMARKS

Marja Lehto*

As our first topic this afternoon, we will address the scope and content of military manuals. This title refers to the substantive areas of law a military manual should preferably cover. Generally, a military manual should cover customary law as well as relevant treaty obligations binding on the state, extending also to instructions that reflect its national policy. This already makes it clear that different national manuals may have slightly different contents depending on the applicable law and chosen policy lines. The content itself is also open to different interpretations. Views about the appropriate scope and content of military manuals are bound to evolve according to normative developments and changes in the actual conduct of hostilities, technological developments, *etc.* In this panel, we will approach the topic from four different angles.

The ICRC has played an important role in promoting effective implementation of the laws of war. This role involves, among other things, reminding states of their obligation to make the rules known to their armed forces and supporting them in their efforts to do so. In the early 1990s, the ICRC identified protection of the natural environment as a neglected area of international humanitarian law and advocated the inclusion of questions relating to this area in military manuals. The ICRC submitted a set of guidelines¹ to the UN General Assembly in 1994. The assembly adopted it in a consensus resolution inviting all states to give due consideration to the topic.² This is only one example of the many activities the ICRC undertakes in this area and we are lucky to have the opportunity, in the course of this debate, to hear the ICRC's views on how to improve the substantive content of military manuals.

The relationship between international humanitarian law and human rights law is a topic that has been much debated recently. The extreme view that the two bodies of law would be mutually exclusive in the sense that IHL alone would govern situations of armed conflict is clearly in a minority. The mainstream view, also endorsed by the ICJ in its *Palestinian Wall Advisory Opinion*, favours the concurrent applicability of IHL and human rights law. According to the ICJ, there are three possible situations:

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¹ International Committee of the Red Cross, "Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict", 311 *International Review of the Red Cross* 1996, pp. 230-7.

² UN Doc. A/RES/49/50, para. 11. Also, see *ibid.*, para. 12; UN Doc. A/RES/50/44, para. 11; UN Doc. A/RES/51/157, para. 12; UN Doc. A/RES/52/153, para. 14; UN Doc. A/RES/53/100, para. 17.

some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.³

Subscribing to this view, as most do, however, will not do away with the need to determine the applicability of different rules in each particular situation. Determining how exactly the two branches of law interact with each other therefore requires a case-by-case analysis.

I would also like to quote a passage from the 2004 US *Operational Law Handbook*, a fairly recent instrument. In its Chapter 3 entitled "Human Rights", the handbook states:

Human rights law established by a treaty generally only binds the state in relation to its own residents; human rights law based on customary international law binds all states in all circumstances ... If a specific human right falls within the category of customary international law, it should be considered a "fundamental" human right. As such, it is binding on U.S. forces during all overseas operations.⁴

A further topic in this panel relates to the incorporation of international criminal law into military manuals. Major advances have been made in international criminal law during the past ten years. It is unthinkable that these developments would not be reflected in the instructions to armed forces. To give you an example, Finland does not have a military manual, but the IHL training given to its armed forces by the Finnish Red Cross has already for nearly ten years included a presentation on the International Criminal Court. Finland has ratified the Rome Statute and we are in the process of revising the Penal Code so as to take full account of the definitions of crimes in the Rome Statute and ensure the possibility of national trials under its complementarity principle.

And finally, as far as the changing nature of armed conflicts and new challenges to international military operations are concerned, it seems obvious that military manuals which link the existing international legal framework with its compliance in practice should account for the new situations the troops are facing. Since this is a Nordic event, I would like to refer here to the Copenhagen discussions on the treatment of detainees in international security operations. One question for those who plan to revise their military manuals or begin to draft a new one is how far to go in discussing new and emerging problems.

We have a panel of four distinguished experts with considerable experience and excellence in the areas they will be addressing:

³ International Court of Justice, *Palestinian Wall Advisory Opinion*, *op. cit.*, para. 106.

⁴ *Operational Law Handbook* 2004, p. 42.

- Dr. Roberta Arnold is specialist officer and candidate examining magistrate at Military Tribunal 8, Swiss Military of Justice. She is also an independent legal adviser in international criminal law and international humanitarian law. Her doctoral thesis, *The ICC as a New Instrument to Repress International Terrorism*,⁵ is one of the most interesting new books on the subject of terrorism and IHL in recent years. Dr. Arnold will discuss the incorporation of international criminal law into military manuals.
- Group Captain William Boothby from the UK Royal Air Force Legal Branch has extensive experience on the law of armed conflicts. He has served in the United Kingdom, Germany, Hong Kong, Cyprus, and Croatia. He is a member of the Editorial Board of the *UK Manual* and has attended the negotiations that led to the adoption of the Ottawa Convention on landmines as well as recent negotiations within the Certain Conventional Weapons Convention framework. He will address the realities, developments and controversies regarding the conduct of hostilities.
- Ms. Louise Doswald-Beck is Professor of International Law at the Graduate Institute of International and Development Studies in Geneva and she teaches at the Geneva Academy of International Humanitarian Law and Human Rights. She has made a long career in the ICRC and has also served as the Secretary-General of the International Commission of Jurists. She has published widely on IHL issues and is the co-author of the landmark *ICRC Customary Law Study*. Professor Doswald-Beck's topic is "Incorporating international human rights law into military manuals".
- Mr. Francois S en echaud is Head of Unit for the Relations with Armed and Security Forces in the ICRC. He has both a legal and a military background and has not only written about peace support operations but has also drafted a new field manual for the Swiss Army entitled *Operational Law for Brigade Commanders and Their Staff*. For the ICRC he has served in several countries in Europe, Africa and Latin America. He will approach military manuals from the ICRC's point of view.

I believe we are in for a very interesting session.

⁵ Roberta Arnold, *The ICC as a New Instrument for Repressing Terrorism*, Transnational Publishers, 2004.

MILITARY MANUALS AND CRIMINAL PROVISIONS OF THE LOAC: THE SWISS EXAMPLE

Roberta Arnold*

Introduction

Article 59 of the Swiss Constitution obligates every male Swiss citizen to serve in the Swiss armed forces. The Swiss armed forces are based on conscription and are, consequently, a veritable "melting pot" of people with different cultural, linguistic and social backgrounds.

Everyone is recruited in the same fashion and follows the same path, regardless of whether he/she will become an officer or a non-commissioned officer, or remain a simple soldier. Specific training as a commissioned or non-commissioned officer will be provided after the completion of service in lower ranks.

There may therefore be personnel of equal ranks with very different degrees of education. For example, soldiers may hold academic legal titles, whereas officers may have no academic titles but other military or professional qualifications instead. Accordingly, when providing the most appropriate LOAC training, the structure and components of the Swiss armed forces and the target audience must be carefully considered.

Its complexity notwithstanding, the law of armed conflict should be understood by all members of armed forces regardless of their rank, incorporation, background or education. Added thereto is the fact that the law should be understood primarily by those engaged "in the field" who, moreover, as experience shows, tend to be sceptical about its utility and practicality. It must be admitted that the military often considers LOAC/IHL to be something exotic and (too) theoretical.

It is therefore very important to "translate" core LOAC principles into military language in a way that is suitable and understandable even to the most illiterate soldier. It is also important to make it clear to him/her that LOAC breaches will have very serious consequences both under domestic and international law.

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The *Swiss Military Manual on Behaviour during Deployment* entered into force on 1 July 2005¹ after a revision of pre-existing regulations.² This manual takes the aforementioned issues into consideration.

The *Swiss Military Manual* is a regulation. It was drafted by the Laws of Armed Conflict Section at the Swiss Department of Defence, a cell within the Staff of the Chief of the Armed Forces. The manual's publication follows the reform of the Swiss armed forces (known as the "Army XXI" reform) and the ratification of the Rome Statute by Switzerland. The need was felt to re-define the legal frameworks applicable to various types of operations/engagements undertaken by the Swiss armed forces,³ with a particular focus on the applicability of human rights and LOAC principles.

Since the Army XXI reform, traditional warfare defence has ceased to be the primary task of the Swiss armed forces. They are prevalently engaged in the maintenance of domestic order and security and in peacekeeping.⁴

In peace support operations such as those in Kosovo, the borderline between peacekeeping and peace enforcement may be subtle. It has become very important to provide some guidelines to Swiss military personnel on the applicable legal framework including, in particular, the distinction between human rights and international humanitarian law.

As the depositary of the 1949 Geneva Conventions, Switzerland has a long humanitarian tradition and it has always been aware of the importance to disseminate IHL principles among armed forces.⁵

The fact that the ICRC has its seat in Geneva has certainly influenced the legal doctrine of the Swiss armed forces. It is probably not a coincidence that there are several former ICRC delegates and legal advisers in the Swiss Department of Defence. Consequently, legal advisers of the Swiss armed forces consider that international humanitarian law and human rights are

¹ Rechtliche Grundlagen für das Verhalten im Einsatz, Reglement 51.007/IV.

² Regl 51.7/II Gesetze und Gebräuche des Krieges (Auszug und Kommentar); Merkblatt 51.7/IV Kriegsvölkerrechtliche Grundsätze für den Kommandanten. In English, "Laws and Customs of War (Excerpt and Commentary)" and "Bulletin on LOAC Principles for Commanders", respectively.

³ "Verhalten im Einsatz".

⁴ Also, see *Swiss Military Manual*, *op. cit.*, p. 1:

Die drei Hauptaufträge der Armee (Friedensförderung, Existenzsicherung, Raumsicherung/Verteidigung) werden jeweils unter verschiedenen rechtlichen Rahmenbedingungen erfüllt. Alle AdA müssen die für ihren jeweiligen Auftrag geltenden Regeln kennen.

⁵ See Articles 47/48/127/144, Geneva Conventions I/II/III/IV. Also, on this issue, see International Committee of the Red Cross, "The Obligation to Disseminate International Humanitarian Law". This document can be downloaded from [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5JYLTB/\\$File/Obligation_to_disseminate.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5JYLTB/$File/Obligation_to_disseminate.pdf).

complementary *vis-à-vis* each other and that no engagement/operation may take place in a legal vacuum where neither the former nor the latter would be applicable.

The idea, therefore, was to provide members of the Swiss armed forces with a simple tool so that they understand the applicable legal framework in different types of engagement and take the most appropriate measures in order to achieve their mission.

Consequently, the *Swiss Military Manual* was released for commissioned and non-commissioned officers and a simpler *Bulletin on the Rules of LOAC* was released in pocket card format for soldiers.

This paper aims to illustrate the structure and contents of the *Swiss Military Manual* with special reference to criminal law principles. Part One will illustrate the relevant international and domestic laws applicable in Switzerland and briefly discuss the issue of jurisdiction over international (war) crimes. In fact, Switzerland has both civilian and military justice – in other words, jurisdiction may be shared in some cases. Parts Two and Three will illustrate the goals of the *Swiss Military Manual*, dealing in detail with its structure and contents. The paper will then draw conclusions.

1. Swiss Legislation on LOAC and Jurisdiction over International Crimes

As noted earlier, Switzerland has a long IHL tradition and it is a party to the most important LOAC conventions including the three Protocols additional to the Geneva Conventions.⁶ Switzerland is a monist country. It follows that international treaties are directly applicable as domestic law in the sense that they do not require implementation and are considered on an equal footing with domestic legislation. In some instances, however, implementation has taken place in order to abide by the principle of legality. For instance, following the ratification of the ICC Statute, a new provision on genocide was introduced in the Swiss Criminal Code.⁷ Further revisions are also underway, in particular a draft catalogue of new war crimes and crimes against humanity. Moreover, reforms will bring about a repartition of competencies between civil and military tribunals to adjudicate war crimes and other international crimes.⁸

⁶ Additional Protocol I; Additional Protocol II; Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III). The latter protocol is printed in 861 *International Review of the Red Cross* 2006, p. 191 *et seq.*

⁷ Article 264, Swiss Criminal Code.

⁸ The Departments of Justice and Police, Defence, and Foreign Affairs are currently working on the draft proposal.

At present, war crimes are solely within the jurisdiction of the military justice.⁹ The general rule is that the Military Criminal Code shall be enforced by military tribunals, whereas the Criminal Code shall be enforced by civilian courts. In exceptional cases, however, the Military Attorney General may decide to delegate a case to ordinary criminal courts.¹⁰ Conversely, military courts may deal with violations of the Federal Laws on Roads and Traffic¹¹ and minor violations of the Federal Laws on the Use of Drugs.¹² Jurisdictional conflicts between ordinary and military tribunals are adjudicated by the Swiss Federal Tribunal.¹³ Pursuant to Article 108 of the Military Criminal Code, its provisions shall apply in all cases of *international* armed conflicts, breaches of neutrality and use of force in response to such breaches.¹⁴ According to paragraph 2 of Article 108, violations of international treaties are also punishable when the latter provide for a *wider* scope of application.¹⁵

Article 109 of the Military Criminal Code specifically addresses breaches of international law applicable in times of armed conflict. The code also contains provisions on abuses of protective signs,¹⁶ hostilities against internationally protected persons and things,¹⁷ violations of duties towards the enemy,¹⁸ breaches of an armistice or peace¹⁹ and offences against parlementaires.²⁰

Article 109 provides for the repression not only of the *most serious* IHL breaches as required by the 1949 Geneva Conventions and their 1977 Additional Protocols but also of *every* IHL violation,²¹ including breaches of customary law.²² Thus, the Military Criminal Code goes

⁹ Article 29(2), Criminal Code.

¹⁰ Article 221, Military Criminal Code; Article 46(2), Criminal Code.

¹¹ Article 218(3), Military Criminal Code. Also, see *Loi fédérale du 19 décembre 1958 sur la circulation routière*, RS 741.01.

¹² Article 218(4), Military Criminal Code. Also, see *Loi fédérale du 3 Octobre sur les stupéfiants et les substances psychotropes*, RS 812.121. Examples include intentional use of small quantities of drugs and preparatory acts to this while in duty. In this latter case, disciplinary sanctions may be enacted by the disciplinary authorities. As a rule, the military justice is not invoked. Severe violations of the law on the use of drugs are subject to civil jurisdiction.

¹³ Article 223, Military Criminal Code. For more details on this issue, see Roberta Arnold, "Military Criminal Procedures and Judicial Guarantees: The Example of Switzerland", 3 *Journal of International Criminal Justice* 2005, pp. 749-77.

¹⁴ See Swiss Military Appeal Tribunal 1A, *Niyonteze Appeal Case*, 26 May 2000, p. 27.

¹⁵ Examples include violations of the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict; Article 3 common to Geneva Conventions I-IV 1949; Additional Protocol II. These violations also apply in non-international conflicts. See Marco Sassòli, "Le génocide rwandais, la justice militaire suisse et le droit international", 2 *Schweizerische Zeitschrift für Internationales und Europäisches Recht* 2002, p. 164.

¹⁶ Article 110, Military Criminal Code.

¹⁷ *Ibid.*, Article 111.

¹⁸ *Ibid.*, Article 112.

¹⁹ *Ibid.*, Article 113.

²⁰ *Ibid.*, Article 114.

²¹ Sassòli, *op. cit.*, p. 162.

²² Swiss Military Appeal Tribunal 1A, *Niyonteze Appeal Case*, *op. cit.*, p. 28.

further than international law.²³ In order to guarantee equitable sanctioning, Article 109(2) states that less severe violations may be punished with disciplinary sanctions.²⁴

It may be argued that Switzerland already has a sufficient legal basis for addressing the law of armed conflict and its criminal provisions and that a manual such as the one we are dealing with is superfluous. It should be recalled however that the law's complexities do not allow those deployed in the field to undertake speedy action while taking the applicable legal framework into consideration. It is for this reason that, in addition to the legislation on war crimes, the *Swiss Military Manual* with a much more soldier-friendly concept and text was adopted.

2. Role of the *Swiss Military Manual*

In order to fulfil the dissemination obligation under Article 6 of Additional Protocol I, the Laws of Armed Conflict Section at the Swiss Defence Department is entrusted with the training of members of the Swiss armed forces – from the simple soldier to the highest ranking officer. The underlying concept is "train the trainers." In other words, LOAC training will primarily be provided for officers who will in turn educate their troops. Nevertheless, dissemination needs to account for the different target audiences and the different degrees of knowledge required.

Soldiers will be led by commanders. This means that the former do not need as detailed knowledge of IHL principles as the latter. Consequently, a *Bulletin on the Rules of LOAC* in the shape of a pocket card was developed for soldiers whereas the more detailed *Swiss Military Manual* was developed for officers and non-commissioned officers.

The *Swiss Military Manual* restates existing law, primarily human rights, international humanitarian law and core criminal provisions. It does so in a more reader-friendly – or, to be more precise here, "soldier"-friendly – manner than ordinary legislation, with a view to facilitating one's awareness of the law in critical situations and to helping him/her adopt the best and lawful option available for the achievement of his/her mission.²⁵

²³ On categories of LOAC violations and their repression, see R. Arnold, "The development of the notion of war crimes in non-international conflicts through the jurisprudence of the UN *ad hoc* tribunals", 3 *Humanitäres Völkerrecht-Informationsschriften* 2002, p. 135.

²⁴ This may apply, *e.g.*, when a prisoner of war did not receive the pay foreseen by Article 60, Geneva Convention III. See Sassöli, *op. cit.*, p. 162.

²⁵ The preamble states (pag. IV):

Das nachfolgende Reglement richtet sich an alle höheren Unteroffiziere und Offiziere der Schweizer Armee.. Es will den Kadern der Armee aufzeigen, in welchem rechtlichen Rahmen sich die Armee bei den verschiedenen Einsatzarten bewegt und welche Rechte und Pflichten sich die Truppe und Kader in den jeweiligen Einsätzen daraus ergeben.

In English (unofficial version):

The manual's status as a regulation means that its breaches constitute crimes punishable under Article 72 of the Military Criminal Code.²⁶ Therefore, unlike in other states, this manual does not simply amount to an operational handbook.

The manual briefly describes the legal principles and offers a schematic overview of the different scenarios with available legal options. This assists those military personnel without legal backgrounds who would not otherwise understand core LOAC principles and their meaning.

Military manuals are not necessarily – or, at least, should not necessarily be – drafted for legal advisers. Legal advisers can rely on textbooks, commentaries and primary legislation and jurisprudence that are already available. In contrast, combatants, in particular officers in charge of combat units, do not have the time and skills to read complex legal texts. What they need is a set of clear concepts on which they can pursue the most viable and legal option to achieve their mission.

3. Structure and Contents

3.1 General structure of the manual

The preamble of the *Swiss Military Manual* briefly summarises its aims and objectives, *i.e.*, to illustrate:

- (a) The importance of the applicable legal framework for the Swiss armed forces;
- (b) Core and non-derogable human rights which shall be applied at all times and under all circumstances;
- (c) Basic legal provisions applicable to troops in various engagements, ranging from providing assistance to the police to establishing peace and security (including peace support operations). Special reference is made to the repartition of competences between civilian and military authorities; and
- (d) The rules applicable in situations of traditional warfare.

The following regulation is targeted at all high-ranking non commissioned and commissioned officers of the Swiss Armed Forces. It aims at illustrating to the military leadership the legal frameworks applicable to the different types of engagement and the rights and duties that follow thereto for the troops and the leadership.

²⁶ Breaches may be punished with up to three months of monetary penalty.

The preamble also refers to the website of the Section of the Laws of Armed Conflict, which is constantly updated.²⁷

The preamble is followed by a list of applicable international conventions, such as the Universal Declaration of Human Rights, the European Convention on Human Rights, the UN Charter, the Geneva Conventions and their Additional Protocols, and the Rome Statute.

As regards the position of the armed forces within the Swiss legal framework, the manual clearly states that they must fulfil their mission in accordance with the applicable national and international laws. Armed forces personnel are never to operate in a "legal vacuum", *i.e.*, there shall be no situation or operation not subject to any legal provision. They are responsible for their own behaviour (principles of individual and command responsibility).

The manual also states that it is an element of command and individual discipline to observe and enforce the legal framework applicable to each specific type of engagement. This is a clear restatement of the obligation set forth under Article 87 of Additional Protocol I according to which commanders shall ensure respect for international law among their subordinates.²⁸ The manual further reiterates the fact that there is no defence of superior orders. Ignorance of law is inadmissible and each member of the armed forces is meant to know the content of this regulation.

Part two of the manual specifically deals with fundamental human rights. It provides a brief definition of human rights and explains that they are universal. A brief bullet-point list specifies these rights, namely the right to life and freedom, the prohibition of torture, the prohibition of slavery and forced labour, the freedom of expression, minimal procedural guarantees and the principle of legality. The manual states that, as representatives of their government, members of the Swiss armed forces must observe fundamental human rights. At the same time, as Swiss citizens, they are also entitled to the same rights even though their enjoyment may be limited under given conditions and circumstances.

²⁷ See <http://www.loac.ch>.

²⁸ Article 87 reads:

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

The manual recalls that, particularly in cases of military occupation, the occupying forces are entrusted with the maintenance of peace and order in the area they occupy and that this implies guaranteeing fundamental human rights.

The manual explains that one's right to life may be limited in cases of lawful acts of war or actions undertaken by military as *ultima ratio* in self-defence or to save life of others. The manual further provides guidelines for engagement in support of police forces. It indicates the meaning of the principle of proportionality, the basic rules applicable in cases of arrest and preventive detention and the use of fire-arms. Reference is then made to the relevant ROEs.

The fourth and final part of the manual focuses on the applicable legal framework in times of armed conflict. It is in this regard that criminal provisions, primarily those prohibiting LOAC breaches, assume a greater role.

3.2 ICL provisions

The *Swiss Military Manual* specifies that the law of armed conflict aims to regulate the behaviour of military personnel during combat operations and that the most important rules are contained in the 1949 Geneva Conventions, their 1977 Additional Protocols and the 1907 Hague Regulations.

Pursuant to its preamble, the manual stresses that there is no defence of superior orders or ignorance of law. Each member of the Swiss armed forces is individually responsible for his/her own behaviour. Commanders may be held liable under the general principle of command responsibility for having failed to prevent the commission of crimes of which they were or should have been aware.²⁹ Moreover, the manual recalls that lawful killing should not be confused with the crime of murder since, in times of armed conflict,

the lawful injuring of the adverse party, namely the killing of adverse (enemy) troops and combatants during combat operations, is neither an international nor a domestic crime.³⁰

This is particularly important for those deployed as peacekeepers in situations which may shift from Chapter VI peacekeeping to Chapter VII peace enforcement to which the law of

²⁹ On this principle, see R. Arnold, "Command Responsibility: A Case Study of Alleged Violations of the Laws of War at Kham Detention Center", 7 *Journal of Conflict and Security Law* 2002, pp. 191-232.

³⁰ *Swiss Military Manual*, *op. cit.*, §153:

Die rechtmässige Schädigung des Gegners, nämlich die Tötung von gegnerischen Truppen und Kombattanten bei Kampfhandlungen, stellt weder ein völkerrechtliches Delikt noch ein Verbrechen nach nationaler Rechtsordnung dar.

armed conflict applies. In the latter context it is not a crime to kill the enemy, whereas in peacetime different criteria apply.

It is further highlighted that compliance with the law of armed conflict is primarily in one's own interest. This is so since IHL rules are based on the principle of reciprocity, *i.e.*, one ought to treat the enemy as one would like to be treated in return.³¹

The manual also reiterates the four core LOAC principles, namely distinction, proportionality, military necessity and limitation.³² It also offers their brief and succinct yet clear-cut explanations in connection with other important concepts such as military objectives, combatants, protected persons and protected objects. It recalls the obligation of each party to an armed conflict to take precautionary measures in case of an attack and provides a one-page table containing different scenarios that may occur during combat operations. Thus, for example, the manual asks whether it is allowed to shoot at a particular objective and gives a brief explanation of the "correct" answer.

Chapter 17 of the manual then refers to the applicable provisions of Swiss legislation on LOAC violations. It recalls in particular that LOAC breaches may be prosecuted either under the Criminal Code or the Military Criminal Code and that these crimes, including genocide, are never subject to prescription. The manual refers to Article 109 of the MCC which stipulates the punishment of LOAC breaches with a maximum of three years imprisonment or a monetary sanction unless more severe provisions are applicable.³³ The manual explains that the Swiss judicial authorities are under an international obligation to open criminal proceedings both against Swiss and foreign citizens suspected of these crimes committed not only in Switzerland but also abroad if the suspects find themselves within Swiss territory and if the crimes in question have a sufficiently close nexus with Switzerland.³⁴ Paragraph 239 of the manual recalls that Switzerland has ratified the Rome Statute, that the ICC is a body of international adjudication with its seat in The Hague and that this court has jurisdiction over genocide, crimes against humanity, war crimes and aggression. The manual highlights the fact that the Rome Statute contains a better definition of the elements of these crimes and that, according to the statute's preamble, all the contracting parties undertake to ensure the prosecution of persons suspected of having committed such crimes. It is further explained that the ICC's jurisdiction is based on the principle of complementarity and that, therefore, the court shall act only if a state is either unwilling or unable to prosecute a crime itself.

³¹ *Ibid.*, §155.

³² *Ibid.*, §158.

³³ On 1 January 2007, Switzerland introduced a new criminal sanction system. See R. Arnold, "The new sanction system in the Swiss Military Criminal Code", in International Society for Military Law and the Law of War, *Newsletter July/August/September 2007*, REF: ISMLLW 2007/3 E 1.

The manual³⁵ then briefly defines the concepts of individual and command responsibility. It explains that each and every person is responsible for his/her own behaviour, be it an act or omission, and that, in particular, there is no defence of superior orders if the order was clearly unlawful and the soldier knew that it was in violation of the law of armed conflict. Moreover, such cases should be reported to superiors.

With regard to command responsibility, the manual clearly states that commanders are under an obligation not only to control their subordinates but also to ensure their knowledge of basic LOAC rules.

Conclusions

The *Swiss Military Manual* should not be considered strictly as an operational handbook but rather as a regulation. It was conceived as a tool for military personnel to recall and identify the legal framework applicable to different types of operations as well as its basic principles and rules. The manual's primary target audience includes soldiers and officers deployed in the field. It is therefore succinct, schematic and written in a reader-friendly manner.

Since the manual is a regulation, its breaches constitute crimes pursuant to Article 72 of the Military Criminal Code in addition to those envisaged elsewhere under the code and under the Criminal Code. This is an additional incentive to observe the principles of the international laws of armed conflict.

Thanks to the manual, all members of the Swiss armed forces, whatever their rank, education and social background, are given an instrument to protect themselves from taking actions which may constitute a violation of the law and, as such, result in criminal sanctions. For those holding the rank of simple soldier, basic LOAC principles are summarised in a pocket card indicating protected signs, persons and objects.

With these new tools which account for the Army XXI reform and Switzerland's ratification of the ICC Statute, members of the Swiss armed forces will be better aware of the need and, more importantly, the feasibility to fulfil their military mission in compliance with the law of armed conflict and the fact that it is neither exotic nor theoretical.

³⁴ *Swiss Military Manual*, *op. cit.*, §238.

³⁵ *Ibid.*, §§242-8.

ADDRESSING THE REALITIES, DEVELOPMENT AND CONTROVERSIES REGARDING THE CONDUCT OF HOSTILITIES

W.H. Boothby*

I speak in this matter in my personal capacity and my comments should not be taken to reflect the views of the UK Government, nor those of the MOD.

International law is a matter for states. They make the treaties and express their interpretation of the obligations in those treaties. It is their practice that forms customary law and one element in that practice is official statements by states, including those in military manuals. There is a sound argument that conduct of armed forces on the battlefield is a more important element in state practice in relation to the formation of custom, but that is a side issue. The important point is because military manuals are a central ingredient in state practice and because a state's declared position on matters of controversy may be cited against that state at some inconvenient future moment when actions or events that the author least expected have actually come to pass, considerable care is required when addressing controversial matters in a military manual. As an example, consider that half a dozen years ago most of us would not have expected that the law of occupation would become a matter of some significance for the UK armed forces, and in the event we were anxious to ensure that the subject was properly addressed when the *UK Manual* was published in 2004.

None of this means that difficult matters should be avoided in a manual's text. Quite the reverse. When preparing a military manual, the text should address unlikely as well as foreseeable events by covering the law of armed conflict comprehensively. So states that do not at the time the manual is prepared expect to become involved in an intervention, or in counter-insurgency operations, in aerial attack or in other offensive military operations should nevertheless ensure that they state the law accurately on such matters because even peacekeepers may need to fight their way out.

An important preliminary question is what the exact scope of the military manual is to be. It may be that some matters of controversy fall outside the intended scope. A manual on the law that is applicable *in bello* will therefore not address, or not address in any detail, *jus ad bellum* issues. If, however, controversial topics fall within the scope of the intended text, they must be addressed because it seems to me that the state must give proper expression to its interpretation of the law in the manual it issues. Simply to avoid dealing with a relevant

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matter because it is difficult will leave the armed forces uninformed and will adversely affect LOAC, and perhaps wider, training.

All statements in the manual, including those about controversial matters, must accurately reflect the nation's position, taking into account other public official statements on the topic that the state may have issued. The very act of preparing a manual may of course be the catalyst for the state to address and finalise a national position on particular international law issues. The process of publication will certainly tend to focus minds in this respect.

Wide consultation with specialist staffs, other subject matter experts and across government is therefore likely to be advisable, *e.g.*, when dealing with cultural property it may be necessary to consult the Ministry of Culture. So what are the issues that are potentially controversial? There are I suppose a number of obvious candidates.

One is the whole question of combatant status, the notion of "unlawful combatants" and related matters. Another topical matter on which national positions may differ is the position of contractors' employees on the battlefield. This feeds into the linked question of direct participation in hostilities and the famous, or is it notorious, "revolving door" problem. A number of the people in this room are involved in a process which seeks to develop a clearer understanding of direct participation, but national views will differ on, for example, the categorisation of particular activities. The definition of "military objective" and other issues in relation to the law of targeting, aspects of weapons law including the expression and interpretation of certain treaty and customary rules, even the very meaning of the term "armed conflict" and the relationship between the law of armed conflict and human rights law are all issues that involve potential controversy and these are all only illustrations.

When dealing with a controversial matter, the purpose of the manual is not to produce a lengthy academic discussion of the competing points of academic view concluding with an extensive assessment of their respective merits. The text should, instead, start by stating the legal rules or provisions that are not controversial. It should then note the particular issue that causes difficulty and should set out in clear terms the national position in relation to those matters of controversy. The assessment of the customary law position on these, and of course other, matters will be an important task for the manual's authors. They will be assisted by the *ICRC Customary Law Study's* rules and commentaries which they should examine carefully along with other evidence of state practice, learned writings and materials before reaching a conclusion as to what, if any, customary law there is on the matter.

The reference in the last paragraph to "setting out in clear terms the national position on matters of controversy" is easy to suggest but may be difficult to achieve. The particular

challenge is to explain the law in terms that are capable of practical implementation by the armed forces for which the manual is written. While the academic community is free to develop its sometimes most complex theories and formulations, the authors must remember that a manual is the conduit through which the law is distilled to inform training and, thereby, to guide and control the decisions of commanders, planners and operators in battle. It follows that if the law itself is unintelligible, contradictory, or incapable of practical application in armed conflict, there is a considerable danger that it will be ignored. Equally, if the articulation of the law is confusing, ambiguous, obscure or wrong, behaviour in battle is less likely to match the legal requirements.

It follows therefore that, when we seek to clarify controversial issues, we must bear in mind that the conclusions that we reach must be capable of practical application on the battlefield. The understandings that we develop in targeting law must be intelligible to planners of attacks, to commanders of attacking forces and to those involved in actually prosecuting attacks. Our interpretations of the notion of direct participation must be understandable to, and readily applicable by, all those whose task it is to decide whether attacking a particular individual is lawful. So we need interpretations that make military sense and that are therefore more likely to be implemented.

I referred earlier to manuals as an ingredient of custom and emphasised the importance of battlefield practice. But as we have seen, the military manual also influences the conduct of states' armed forces. This places the manual at the core of these twin processes which enhance its importance as an authoritative statement of the state's international law position.

It is often at the fault-lines of international law that controversial issues can arise, and they may be the catalyst for rule change. While law is a dynamic thing, the manual must, on the date of its publication, reflect the law applicable to that state on that date. The authors should be careful not to state developing law as if it were already established and accepted. By all means state the direction in which the law appears to be evolving, but the text should make it clear what established law amounts to and may then discuss the apparent direction in which the law is developing. Do not fall into the trap of pretending that *lex ferenda* has become *lex lata*.

If the dynamic nature of the law suggests that the manual itself cannot be a statement of the law "for all time", the manual's text will have to be re-visited from time to time as interpretations of all matters, including matters of controversy, develop. The authors will wish to consider how to bring amendments speedily to the attention of the military community and, for that matter, to the wider readership. This suggests that it is legitimate for a state to act contrary to a statement in the manual in a situation where it can be shown that the law has

developed inconsistently with that statement or where the widely accepted interpretation of an established legal rule has similarly developed in such a way that the manual text no longer accurately reflects the state's interpretation of the law.

Finally, it is worth bearing in mind why we sometimes engage in military operations, namely to bring law and respect for law to places where the law is either unknown, is being rejected or is routinely breached. It can only add to the credibility of the intervening force that it states publicly and in advance the legal rules by which it considers itself to be bound. By setting out publicly our position on controversial matters in such a document, we may also contribute to the development of consistent customary law (or at least establish contrary practice in relation to an inconsistent developing customary "rule"). But most importantly, the manual that addresses all relevant LOAC issues including controversial ones provides the surest foundation for the effective training and guidance of the armed forces.

INCORPORATING INTERNATIONAL HUMAN RIGHTS LAW

Louise Doswald-Beck* and Sandra Krähenmann**

1. Why Incorporate International Human Rights Law?

It is necessary to incorporate human rights law into military manuals because it applies at all times. The very provisions of human rights treaties show that they continue to apply during armed conflict with derogations being possible "in time of public emergency which threatens the life of the nation".¹ Both the ICJ² and human rights treaty bodies³ have insisted that human rights law continues to apply during armed conflict. This approach is confirmed by extensive state practice in the form of UN General Assembly⁴ and Security Council⁵ resolutions. Consequently, as most countries are bound by human rights treaties, many, including those concerned here, can find themselves before a human rights body because human rights treaties provide for the right of individual petitions. Human rights bodies have not hesitated to analyse human rights violations occurring in the context of armed conflicts.⁶

Furthermore, human rights law applies in situations where international humanitarian law does not apply because many military operations do not amount to an armed conflict or in situations where the government concerned does not wish to recognise the existence of an armed conflict.⁷ For the purposes of human rights law, the formal qualification of a given situation as an armed conflict is irrelevant.

Finally, human rights law clarifies and complements international humanitarian law. Some areas, especially as regards non-international armed conflicts and occupations, remain vague

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¹ Article 4, International Covenant on Civil and Political Rights.

² See International Court of Justice, *Nuclear Weapons Advisory Opinion*, *op. cit.*, para. 25; *ibid.*, *Palestinian Wall Advisory Opinion*, *op. cit.*, paras. 102-114; *ibid.*, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Judgement*, 19 December 2005, para. 216.

³ See Human Rights Committee, General Comment No. 29; *ibid.*, General Comment No. 31, para. 11.

⁴ See, *e.g.*, UN Doc. A/RES/46/135, UN Doc. A/RES/52/145, UN Doc. A/RES/62/6.

⁵ See, *e.g.*, UN Doc. S/RES/1034 (1995), UN Doc. S/RES/1565 (2004), UN Doc. S/RES/1738 (2006).

⁶ See, *e.g.*, European Court of Human Rights, *Loizidou v. Turkey*, Merits, *Judgement* of 18 December 1996; *ibid.*, *Ergi v. Turkey*, *Judgement* of 28 July 1998; *ibid.*, *Isayeva v. Russia*, *Judgement* of 24 February 2005; *ibid.*, *Isayeva, Yusupova and Bazayeva v. Russia*, *Judgement* of 24 February 2005; Inter-American Court of Human Rights, *Bámaca Velásquez v. Guatemala*, *Judgement* of 25 November 2000; *ibid.*, *Case of the "Mapiripán Massacre" v. Colombia*, *Judgement* of 15 September 2005; *ibid.*, *Case of the Pueblo Bello Massacre v. Colombia*, *Judgement* of 31 January 2006.

⁷ In the situations relating to south-east Turkey and Chechnya, the states concerned denied that there was an armed conflict.

in the latter, but they are regulated by the former. Similarly, there are some significant gaps in international humanitarian law relating to the treatment of captured persons in non-international armed conflicts, *i.e.*, before trial or without trial. Again, human rights law regulates such situations.

2. Some Clarifications Regarding Human Rights Law

Before addressing the question which human rights should be included in a military manual, some clarifications regarding human rights law in general are required.

One question requiring clarification is who is bound by human rights law. According to the majority view, human rights law, unlike international humanitarian law, binds only states. As we are concerned with national military manuals here, this is not an issue. However, it should be kept in mind that violations of human rights can arise for actions and omissions because under human rights law states have a general obligation "to respect and *to ensure* human rights".⁸ Therefore, states have a due diligence obligation to protect the human rights of individuals against acts of other individuals or entities, including rebel forces and paramilitary groups.⁹ If the governmental authorities knew, or ought to have known, that individuals were in real danger from non-state actors, but did not take any measures, the state violates its human rights obligations. Both the Inter-American Court of Human Rights (IACHR) and the European Court of Human Rights (ECHR) have found that states violated the victims' right to life when they failed to protect them against violence stemming from paramilitary groups.¹⁰

Another frequent question relates to the extra-territorial application of human rights treaties, *i.e.*, whether they bind states with regard to operations abroad. Most human rights treaties contain similar, albeit not identical, provisions limiting their scope of application to individuals subject to the "jurisdiction" of the state concerned.¹¹ Thus, human rights treaties apply wherever states exercise jurisdiction. The term "jurisdiction" has been interpreted to mean effective control of a territory (or part of it) or over a person. The first interpretation is

⁸ Article 2(1), International Covenant on Civil and Political Rights. Emphasis added. Also, see Article 1, European Convention on Human Rights; Article 1(1), American Convention on Human Rights.

⁹ Human Rights Committee, General Comment No. 31, *op. cit.*, para. 8.

¹⁰ Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, Judgement of 29 July 1988, para. 182; *ibid.*, *Mapiripán Massacre Case*, *op. cit.*, para. 123; *ibid.*, *Pueblo Bello Massacre Case*, *op. cit.*, para. 140; European Court of Human Rights, *Kilic v. Turkey*, Judgement of 28 March 2000, para. 77; *ibid.*, *Mahmut Kaya v. Turkey*, Judgement of 28 March 2000, para. 101.

¹¹ See Article 1, European Convention on Human Rights. Article 2(1), International Covenant on Civil and Political Rights, refers to "all individuals within its territory and subject to its jurisdiction". The "and" has been interpreted disjunctively both by the Human Rights Committee (see General Comment No. 31, *op. cit.*, para. 10) and by the International Court of Justice (see *Palestinian Wall Advisory Opinion*, *op. cit.*, para. 109).

illustrated by cases involving military occupations: both the ICJ and human rights bodies have insisted that human rights law applies to military occupations.¹² Situations of less permanent control are covered as well: in a case involving a Turkish military operation in northern Iraq, the ECHR confirmed that temporary control of an area as a result of military operations can qualify as exercise of jurisdiction.¹³ The second possible interpretation illustrates that a state may be held accountable under human rights treaties even in situations falling short of effective control of a territory: if a state exercises control over a person, such as in cases of arrest and detention abroad, the individual concerned falls within the jurisdiction of the state.¹⁴ It remains controversial whether air strikes qualify as exercise of jurisdiction over the victims. In a case arising out of the NATO bombing of a Serbian radio and TV station, the ECHR denied that the bombing amounted to exercise of jurisdiction.¹⁵ On the other hand, the Inter-American Commission on Human Rights confirmed that Cuba exercised its jurisdiction over political dissidents when Cuba shot down their airplane travelling through international airspace.¹⁶

In addition to jurisdiction, one must consider the issue of attribution. This issue is most relevant for peacekeeping or peace enforcement operations where there may be jurisdiction¹⁷ and yet the act may be attributable to an international organisation rather than to a state. Recently, the ECHR declared inadmissible two cases involving alleged human rights violations by peacekeepers in Kosovo because the acts of the peacekeepers were attributable to the UN and not the sending state.¹⁸

At the outset of this paper, it was stated that human rights law continues to apply in armed conflict but allows for derogations in a state of emergency. It is important to avoid the common misperception that human rights, other than those specifically designated as non-

¹² International Court of Justice, *Palestinian Wall Advisory Opinion*, *op. cit.*, paras. 107-13; *ibid.*, *Armed Activities*, *op.cit.*, para. 216; Human Rights Committee, Concluding Observations: Israel, UN Doc. CCPR/CO/78/ISR, 2003, para. 11; European Court of Human Rights, *Loizidou v. Turkey*, Preliminary Objections, Judgement of 23 March 1995, paras. 59-63; *ibid.*, *Cyprus v. Turkey*, Judgement of 10 May 2001, paras. 75-81.

¹³ European Court of Human Rights, *Issa v. Turkey*, Merits, Judgement of 16 November 2004, para. 74. The Turkish military operations lasted six weeks.

¹⁴ See, *e.g.*, Human Rights Committee, *Lopez Burgos v. Uruguay*, Views, 29 July 1981, UN Doc. CCPR/C/13/D/52/1979, paras. 12.1-12.3; European Court of Human Rights (Grand Chamber), *Öcalan v. Turkey*, Judgement of 12 May 2005, para. 91; Inter-American Commission on Human Rights, *Coard et al. v. United States*, Report No. 109/99, 29 September 1999, para. 37.

¹⁵ European Court of Human Rights (Grand Chamber), *Bankovic and others v. Belgium and others*, Admissibility, Judgement of 12 December 2001, paras. 34-81.

¹⁶ Inter-American Commission on Human Rights, *Armado Alejandro Jr. and others v. Cuba ("Brothers to the rescue")*, Report No. 86/99, 29 September 1999.

¹⁷ See, *e.g.*, Human Rights Committee, General Comment No. 31, *op. cit.*, para. 10; *ibid.*, Concluding Observations: Netherlands, 27 August 2001, UN Doc. CCPR/CO/72/NET, para. 8; *ibid.*, Concluding Observations: Belgium, 19 November 1998, UN Doc. CCPR/C/79/Add.90, para. 14.

¹⁸ European Court of Human Rights (Grand Chamber), *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Admissibility, Judgement of 2 May 2007, paras. 144 -52.

derogable,¹⁹ can be eliminated if there is a state of emergency. On the contrary, the so-called derogable rights remain in existence and they can be restricted only if and to the extent to strictly necessary for the particular situation. Treaty bodies interpret this strictly and they have never accepted the elimination of a right.²⁰

3. Which Human Rights Should Be Listed?

At the very least, a military manual will need to mention that all human rights remain relevant in times of armed conflict. It is therefore essential to have a good legal adviser. Furthermore, it would be appropriate to list the most pertinent human rights and stress that they are particularly significant in non-international armed conflicts, occupations (whether officially so-called or not) and operations where there is physical control of a place or over a person. The following section provides a brief overview of the most pertinent human rights to be listed in a military manual.

4. Which Human Rights Are Most Pertinent?

4.1 Prohibition of arbitrary deprivation of life

The right to life is non-derogable in all four major human rights treaties.²¹ The European Convention on Human Rights makes an exception for "deaths resulting from lawful acts of war".²² Although the ECHR has heard a number of cases relating to deaths during hostilities, this exception has never been used so far. Arguably, the term "lawful acts of war" refers to

¹⁹ See the list of non-derogable rights contained in the treaty provisions, namely Article 4(2), International Covenant on Civil and Political Rights (extended by Human Rights Committee, General Comment No. 29, *op. cit.*); Article 15(2), European Convention on Human Rights; Article 27(2), American Convention on Human Rights. The African Charter on Human and Peoples' Rights does not have a derogation clause.

²⁰ See, *e.g.*, Human Rights Committee, General Comment No. 29, *op. cit.*, para. 4. The following cases illustrate the evaluation of derogation measures in the context of administrative detentions: European Court of Human Rights, *Lawless v. Ireland*, Merits, Judgement of 1 July 1961, paras. 31-8; *ibid.*, *Ireland v. United Kingdom*, Judgement of 18 January 1978, paras. 211-21. On derogations from the requirement to be brought promptly before a judge in the context of criminal proceedings, see, *e.g.*, European Court of Human Rights, *Brannigan and McBride v. United Kingdom*, Judgement of 25 May, 1993, paras. 48-66; *ibid.*, *Aksoy v. Turkey*, Judgement of 18 December 1996, paras. 67-87; Inter-American Court of Human Rights, *Castillo Petruzzi et al. v. Peru*, Judgement of 30 May 1999, paras. 104-12. The Inter-American Court of Human Rights has issued two advisory opinions on the non-derogability of the right to *habeas corpus* and the right to a remedy in states of emergency: Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 of 30 January 1987; *ibid.*, *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87 of 6 October 1987. The Inter-American Commission has analysed derogations from the right to liberty and the right to a fair trial in a case dealing with the arrest and trial of alleged terrorists. See Inter-American Commission, *Ascencios Lindo and others v. Peru*, Report No. 49/100, 13 April 2000, paras. 69-137.

²¹ See, *e.g.*, Article 4(2), International Covenant on Civil and Political Rights; Article 27(2), American Convention on Human Rights; Article 15(2), European Convention on Human Rights.

²² Article 15(2), European Convention on Human Rights.

attacks in international armed conflicts that are in conformity with international humanitarian law. This means in practice that operations that are not hostilities in international armed conflicts must be conducted in accordance with the prohibition of arbitrary deprivation of life.

This prohibition has been interpreted by human rights bodies in a series of cases involving the use of force against rebels themselves. The common thread of these decisions is that the use of lethal force would be "more than absolutely necessary"²³ if an arrest can be effected. In the case of *Guerrero v. Colombia*, government forces raided a house because they suspected that a former ambassador was held hostage there by "guerrilleros". No hostage was found in the house. When the rebels returned, the government forces shot each of them at point-blank range although none of them was armed at that time. Since arrest would have been possible in these circumstances, the Human Rights Committee (HRC) concluded that the use of force violated the right to life.²⁴ In addition, even if the actual use of force might be justified, the right to life might be violated due to insufficiencies at the planning stage. In the case of *McCann v. United Kingdom* concerning the killing of three members of the Irish Republican Army (IRA), the ECHR highlighted the distinction between the actual use of force and the planning of an operation.²⁵ There was no violation of the right to life on account of the actions of the police officers who shot the IRA members: they genuinely believed that the IRA members were on the point of detonating a car bomb.²⁶ However, the United Kingdom had violated the right to life of the IRA members because it had not planned the operation so as to minimise the need to use force against them. In particular, they had not arrested them earlier when they had the opportunity to do so.²⁷ Finally, it is worth pointing out that in situations where arrest is not possible, it is not *per se* lawful to use force: human rights bodies have stressed that the use of force against persons who are not dangerous is excessive, hence unlawful, even if this means that the persons cannot be apprehended.²⁸

All these cases relate to the use of force outside the actual hostilities. The ECHR has never dealt with a case concerning the use of force against rebels themselves during hostilities. On the other hand, in cases brought by the relatives of civilian victims of hostilities, the court

²³ *Ibid.*, Article 2(2).

²⁴ Human Rights Committee, *Guerrero v. Colombia*, Views, 31 March 1982, UN Doc. CCPR/C/15/D/45/1979, paras. 13.1-13.3.

²⁵ European Court of Human Rights, *McCann and others v. United Kingdom*, Judgement of 5 September 1995.

²⁶ *Ibid.*, paras. 195-200.

²⁷ *Ibid.*, paras. 202-13.

²⁸ See, e.g., Inter-American Commission, "*Brothers to the Rescue*", *op. cit.*, paras. 37-45; European Court of Human Rights (Grand Chamber), *Nachova and Others v. Bulgaria*, Judgement of 6 July 2005, paras. 93-109. These cases did not arise from events during armed conflicts, but the proportionality principle spelled out in them applies as well in times of armed conflict because human rights law does not distinguish between peace and armed conflict. These cases reflect Principle 9, United Nations Basic Principles on the Use of Force and Firearms by Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

stressed the need to take sufficient precautions to avoid civilian casualties. In cases concerning the use of force against Chechen rebels, the court acknowledged that it was necessary to use potentially lethal force in order to quell an insurrection. It found however that insufficient precaution had been taken during the planning and prosecution of the attacks and consequently there was a violation of the right to life.²⁹

This brief overview shows that, in practice, operations which are not hostilities in an international armed conflict need to be planned in a way that would allow for arrest, if reasonably possible, of persons using or suspected of using force. If force is absolutely necessary, sufficient precautions must be taken to minimise civilian casualties.

4.2 Prohibition of torture and inhuman and degrading treatment or punishment

The prohibition of torture and inhuman and degrading treatment is firmly established in international law. Indeed, general human rights treaties³⁰ and specialised treaties³¹ dealing exclusively with the struggle against torture and other ill-treatment condemn these practices, both on a universal and regional level. In all these treaties, the prohibition is not derogable. Finally, torture and other ill-treatment are prohibited under international humanitarian law as well.³² Human rights law adds to this prohibition because it contains specific obligations and mechanisms to prevent and punish acts of torture.

First of all, specialised human rights treaties seek to prevent torture through the establishment of visiting mechanisms, such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment created by the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Similarly, the Optional Protocol to the UN Convention against Torture (OPCAT) provides for a new international body, the UN Subcommittee on the Prevention of Torture. In addition, states parties to OPCAT are obligated to set up or designate national preventive mechanisms. These bodies conduct visits of places of detention and make recommendations to the states concerned.

²⁹ European Court of Human Rights, *Isayeva v. Russia*, *op. cit.*, paras. 162-201; *ibid.*, *Isayeva, Yusupova and Bazayeva v. Russia*, *op. cit.*, paras. 155-200; *ibid.*, *Ergi v. Turkey*, *op. cit.*, paras. 77-81.

³⁰ See, *e.g.*, Article 7, International Covenant on Civil and Political Rights; Article 3, European Convention on Human Rights; Article 5(2), American Convention on Human Rights; Article 5, African Charter of Human and Peoples' Rights.

³¹ See, *e.g.*, UN Convention against Torture and Other Inhuman or Degrading Treatment or Punishment; Inter-American Convention to Prevent and Punish Torture and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

³² See, *e.g.*, Article 3 common to Geneva Conventions I-IV 1949.

Secondly, the UN Torture Convention provides not only for a general obligation to take preventive measures³³ but also for specific preventive measures such as the proper training of law enforcement officials and military personnel³⁴ and the duty to review interrogation rules.³⁵

Finally, the UN Torture Convention includes procedures for the prosecution of perpetrators of torture³⁶ and for the reparations of victims.³⁷

4.3 Prohibition of enforced disappearances

International human rights bodies have repudiated the practice of enforced disappearances as a violation of multiple human rights, including the right to liberty and security, the right to life and the prohibition of torture and other ill-treatment.³⁸ In addition, enforced disappearances violate the rights of the family of the forcibly disappeared.³⁹

Adopted by the UN General Assembly in December 2006,⁴⁰ the International Convention for the Protection of All Persons from Enforced Disappearance is the first universal treaty which includes a definition of enforced disappearances⁴¹ and prohibits them in all circumstances.⁴² The convention adds extra rules and procedures to combat impunity and to prevent enforced disappearances. With this convention, a binding treaty recognises explicitly and for the first time that relatives of forcibly disappeared persons are victims as well and have a right to reparations. The Committee on Enforced Disappearances, set up by this convention, will monitor its compliance by states parties.

³³ Article 2(1), UN Torture Convention. The Committee Against Torture (CAT) confirmed the convention's extraterritorial applicability to all territories and persons under the effective control of a state. See Committee Against Torture, Conclusions and recommendations: United Kingdom of Great Britain and Northern Ireland, 10 December 2004, UN Doc. CAT/C/CR/33, para. 4(b); *ibid.*, Conclusions and recommendations: United States of America, 26 July 2006, para. 15.

³⁴ Article 10, UN Torture Convention.

³⁵ *Ibid.*, Article 11.

³⁶ *Ibid.*, Articles 4-8.

³⁷ *Ibid.*, Articles 12-14.

³⁸ See, e.g., Inter-American Court of Human Rights, *Velásquez-Rodríguez*, *op. cit.*, paras. 149-58; European Court of Human Rights, *Çiçek v. Turkey*, Judgement of 27 February 2001, paras. 125-69; *ibid.*, *Bazorkina v. Russia*, Judgement of 27 July 2006, paras. 98-149.

³⁹ See, e.g., Inter-American Court of Human Rights, *Bámaca Velásquez v. Guatemala*, *op. cit.*, paras. 159-66; European Court of Human Rights, *Çiçek v. Turkey*, *op. cit.*, paras. 170-4; *ibid.*, *Bazorkina v. Russia*, *op. cit.*, paras. 137-42.

⁴⁰ UN Doc. A/RES/ 61/177.

⁴¹ Article 2, International Convention for the Protection of All Persons from Enforced Disappearance, reads as follows:

For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

⁴² *Ibid.*, Article 1(1).

4.4 Prohibition of slavery, servitude and trafficking

Armed conflicts frequently result in an increase in slavery, in particular sexual slavery, and trafficking in human beings.⁴³ Such practices are repudiated in both human rights law and international criminal law. Under human rights treaties, the prohibition of slavery and servitude is non-derogable.⁴⁴ International criminal law includes enslavement as a crime against humanity.⁴⁵ More specifically, sexual slavery can constitute a crime against humanity⁴⁶ or a war crime in both international⁴⁷ and non-international armed conflicts.⁴⁸ Trafficking in human beings is a transnational offence which is the object of two specialised treaties: the Council of Europe Convention on Action against Trafficking in Human Beings⁴⁹ and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the latter supplements the United Nations Convention against Transnational Organized Crime).⁵⁰ These treaties aim not only at preventing trafficking and prosecuting traffickers but also at protecting the human rights of victims of trafficking. An independent monitoring body, the Group of Experts against trafficking in human beings (GRETA), is set up by the Council of Europe Convention.

4.5 Prohibition of arbitrary deprivation of liberty

The prohibition of arbitrary detention has many facets which cannot all be addressed here. In addition, the rules depend, to some extent, on whether a criminal charge is intended to be brought or not.⁵¹ The bottom line is that the right of *habeas corpus* or equivalent must be available within a short period of time to anyone deprived of his or her liberty.⁵² Although

⁴³ See, e.g., Report of the Special Rapporteur on violence against women, its causes and consequences: Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997-2000), 23 January 2001, UN Doc. E/CN.4/2001/73, para. 53; Report of the High Commissioner for Human Rights: Systematic rape, slavery and slavery-like practices during armed conflict, 17 June 2003, UN Doc. E/CN.4/Sub.2/2003/27.

⁴⁴ See, e.g., Article 8, International Covenant on Civil and Political Rights; Article 6, American Convention on Human Rights; Article 5, African Charter of Human and Peoples' Rights; Article 4, European Convention on Human Rights.

⁴⁵ See Article 7(1)(c), Rome Statute. According to Article 7(2)(c),

'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

⁴⁶ *Ibid.*, Article 7(1)(g).

⁴⁷ *Ibid.*, Article 8(2)(b)(xxii).

⁴⁸ *Ibid.*, Article 8(2)(e)(vi).

⁴⁹ This convention was adopted by the Committee of Ministers on 3 May 2005 and entered into force on 1 February 2008.

⁵⁰ The protocol and the convention were adopted by UN General Assembly (UN Doc. A/RES/55/25). The convention entered into force on 29 September 2003 and the protocol on 25 December 2003.

⁵¹ In particular, the right to be brought promptly before a judge and the right to trial within a reasonable time applies only in the context criminal proceedings. See Article 5(3), European Convention on Human Rights; Article 9(3), International Covenant on Civil and Political Rights.

⁵² For the principle that *habeas corpus* must be available to anyone in detention, see, e.g., Human Rights Committee, General Comment No. 8, *op. cit.*, para. 1; *ibid.*, *Vuolanne v. Finland*, Views, 2 May 1989, UN Doc. CCPR/C/35/D/265/1987, paras. 9.3-9.5; European Court of Human Rights, *Ireland v. United Kingdom*, *op. cit.*, paras. 197-201. For the time frame, see Human Rights Committee, *Torres v. Finland*, Views, 5 April 1990, UN Doc. CCPR/C/38/D/291/1988, para. 7.3; European Court of Human Rights, *De Jong, Baljet and Van den Brink v. the Netherlands*, Judgement of 22 May 1984, paras. 55-9.

not explicitly listed as non-derogable, both the HRC and the IACHR have insisted that the right to *habeas corpus* cannot be derogated from since it is an important safeguard for other non-derogable human rights such as the prohibition of torture and other ill-treatment.⁵³ In situations where local courts are non-existent, unavailable or inappropriate, a tribunal needs to be created, *i.e.*, a body that is independent and can make a binding determination as to whether the deprivation of liberty is lawful and not arbitrary.⁵⁴ Detainees are entitled to have regular access to such a body.⁵⁵ The Inter-American Commission confirmed the application of these obligations in situations of armed conflicts in the case of *Coard et al. v. United States*: during the invasion of Grenada, US forces arrested several individuals for security reasons.⁵⁶ They were kept in detention for periods of nine to twelve days before being turned over to local authorities. Of these days, six to nine were after the end of hostilities. While in US custody, the detainees were without access to a court to contest the lawfulness of their detention.⁵⁷ The Inter-American Commission conceded that their detention was necessary for security reasons but found a violation on the ground that no review procedure was available to the detainees.⁵⁸ Such a review procedure did not require access to Grenadian courts but could have been set up by the United States.⁵⁹

4.6 Access to a lawyer

Detained persons are required to have access to a lawyer within a short space of time. This right is not spelled out in human rights treaties, but has been stressed by human rights bodies as an inevitable corollary to other rights. Most importantly, access to a lawyer is a means of preventing torture and other ill-treatment⁶⁰ as well as enforced disappearances.⁶¹ Furthermore, detainees may need legal assistance in exercising their right to *habeas corpus* effectively.⁶² Within the specific context of criminal proceedings, early access to a lawyer is necessary to safeguard the fair trial rights of the accused.⁶³ Finally, access to a lawyer for

⁵³ Human Rights Committee, General Comment No. 29, *op. cit.*, para. 16; Inter-American Court of Human Rights, *Habeas Corpus Advisory Opinion*, *op. cit.*, paras. 29-43.

⁵⁴ For an analysis of the features to be possessed by the review body, see, *e.g.*, Human Rights Committee, *Vuolanne v. Finland*, *op. cit.*, para. 9.6; European Court of Human Rights, *Chahal v. United Kingdom*, Judgement of 15 November 1996, paras. 124-33, 144.

⁵⁵ See European Court of Human Rights, *Winterwerp v. Netherlands*, Judgement of 24 October 1979, paras. 53-61.

⁵⁶ Some petitioners previously held political positions and others were officers of the Revolutionary Military Council of Grenada. It was not clear whether the petitioners were held as civilians or as prisoners of war. For the purpose of its analysis, the commission treated them as civilians, as claimed by the United States. See Inter-American Commission, *Coard et al. v. United States*, *op. cit.*, paras. 45-50.

⁵⁷ *Ibid.*, para. 57.

⁵⁸ *Ibid.*, para. 60.

⁵⁹ *Ibid.*, para. 58.

⁶⁰ See, *e.g.*, Human Rights Committee, General Comment No. 20, para. 11; Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading, treatment or punishment, 23 December 2003, UN Doc. E/CN.4/2004/56, paras. 27-49.

⁶¹ See Article 17(2)(d), Convention for the Protection of All Persons from Enforced Disappearance.

⁶² See, *e.g.*, Human Rights Committee, *A. v. Australia*, Views, 30 April 1997, UN Doc. CCPR/C/59/D/560/1993, para. 9.6; European Court of Human Rights, *Megyeri v. Germany*, Judgement of 12 May 1992, paras. 21-7.

⁶³ See European Court of Human Rights, *Öcalan v. Turkey*, *op. cit.*, para. 131.

anybody in detention is provided for in soft law instruments such as the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁶⁴ and the European Prison Rules.⁶⁵

4.7 Obligation to investigate

The duty to investigate is not included in human rights treaties themselves, but human rights bodies have stressed this obligation on the basis that states have an obligation to "ensure" human rights.⁶⁶ Thus, a suspicion or allegation of unlawful death (including death occurring during armed clashes), disappearance, torture or other serious violation of human rights, requires that an effective investigation be carried out. Such an investigation may take different forms, but in order to qualify as "effective", certain criteria have to be met. First of all, the body undertaking the inquiry must be independent not only institutionally but also in practice. This requirement is particularly important in cases where violations allegedly occurred at the hand of state agents. Secondly, the authorities must act on their own motion and proceed promptly and expeditiously. In addition, the investigation must be transparent, allowing for public scrutiny of either the investigation and/or its result. While this element may vary, relatives of the victim must be involved in order to protect their rights. And finally, the investigation must be capable of leading to the identification and punishment of those responsible, which is an obligation of means and not of result.⁶⁷

⁶⁴ Principle 17 and 18. The principles are annexed to UN General Assembly Resolution 43/174 (UN Doc. A/RES/43/174).

⁶⁵ Rule 23 of the European Prison Rules which are annexed to Recommendation Rec (2006)2 of the Committee of Ministers to member states on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers Deputies.

⁶⁶ See, e.g., Human Rights Committee, *Laureano Atachahua v. Peru*, Views, 16 April 1996. UN Doc. CCPR/C/56/D/540/1993, para. 8.3; European Court of Human Rights, *Kaya v. Turkey*, Judgement of 19 February 1998, paras. 86-92; Inter-American Court of Human Rights, *Myrna Mack Chang v. Guatemala*, Judgement of 25 November 2003, paras. 152-58.

⁶⁷ See, e.g., European Court of Human Rights, *Isaveva v. Russia*, *op. cit.*, paras. 209-23; *ibid.*, *Isayeva, Yusupova and Bazayeva v. Russia*, *op. cit.*, paras. 201-25; *ibid.*, *Bazorkina v. Russia*, paras. 117-9. In his 2006 report, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions dealt with the issue of accountability in armed conflict and occupation. See Report of the Special Rapporteur on extrajudicial, summary or arbitrary execution, 8 March 2006, UN Doc. E/CN.4/2006/53, paras. 33-43.

MILITARY MANUALS, AN ICRC PERSPECTIVE

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This paper reviews the past experiences with military IHL/LOAC manuals from an ICRC perspective. It discusses the usefulness of these manuals as well as the conditions necessary for their acceptance and effective use.

1. Historical Landmarks on the Necessity of a Manual

The 1863 *Lieber Code* is widely referred to as the first attempt to codify the laws of war. Although the code's instructions corresponded to a great extent to the laws and customs of war existing at that time, it would be an overstatement to say that the Union troops were renowned for respecting them. The opinion expressed by General Sherman that "war is hell" was shared by far too many. Such an attitude and behaviour clearly demonstrated the need for the rules to be taught, trained and enforced throughout the chain of command in order to be respected in the field.

Shortly after the first Geneva Convention was adopted in 1864, the idea of using military manuals to improve respect for international humanitarian law emerged. Gustave Moynier, president of the International Committee for the Relief of Wounded – renamed the International Committee of the Red Cross in 1876 – , set out recommendations for what he then called the convention's "vulgarisation", *i.e.*, making its letter and spirit known by all in a popular form, a term that was replaced later by "dissemination" and complemented nowadays by "integration". Moynier insisted, for instance, that medical units wear Red Cross arm-bands even in peacetime so that combat troops would become used to them and be trained in respecting them.

In the aftermath of the 1871 Franco-Prussian War, concerns arose as to the implementation of the 1864 Geneva Convention. Although it was usually understood that the lack of respect displayed by belligerents in the field was more a result of ignorance than specific intentions, some called the relevance and practicality of the convention into question. The correspondence between Gustave Moynier and Count Mundi of the Austrian Red Cross Society is illustrative of the debate which, to some extent, still echoes more recent ones. Moynier clearly

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expressed his belief in the need to look for ways of gaining understanding and respect other than further codification.

The text negotiated at Brussels in 1874 failed to secure the acceptance of all governments present as a convention binding upon them. The Institute of International Law then developed the Brussels Declaration¹ into the 1880 *Oxford Manual*. The manual was meant to be "suitable as the basis for national legislation in each State".² It endeavoured to support military men by clarifying the rules and, thereby, to shelter them from "painful uncertainty and endless accusations".³ Since "it is not sufficient for sovereigns to simply promulgate new laws", the manual would support the authorities so that they "make these laws known among all people" and "the men called upon to take up arms ... may be thoroughly impregnated with the special rights and duties attached to the execution of such a command".⁴ To this end, the Institute of International Law gave its work "a popular form, attaching thereto statements of the reasons therefor, from which the text of a law may be easily secured when desired".⁵

One century later, in 1977, the Diplomatic Conference adopted the two Additional Protocols to the Geneva Conventions. In its Resolution 21 (IV), the conference, having recalled states' responsibilities, specifically invited the ICRC to

participate actively in the effort to disseminate knowledge of international humanitarian law by, *inter alia*:

- (a) publishing material that will assist in teaching international humanitarian law, and circulating appropriate information for the dissemination of the Geneva Conventions and the Protocols,
- (b) organizing, on its own initiative or when requested by Governments or National Societies, seminars and courses on international humanitarian law, and cooperating for that purpose with States and appropriate institutions.⁶

Consequently, in the following decade, the ICRC developed a number of specific tools. Amongst those tools, Frédéric de Mulinen's *Handbook on the Law of War for Armed Forces*⁷ remains an undisputed cornerstone. This handbook emanated from the author's own ex-

¹ Project of the International Declaration Concerning the Laws and Customs of War (1874), printed in Schindler and Toman, *op. cit.*, p. 27 *et seq.*

² *Oxford Manual*, *op. cit.*, preface.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Resolution 21 (IV): Dissemination of knowledge of international humanitarian law applicable in armed conflicts, Diplomatic Conference, *op. cit.*, para. 4, printed in Schindler and Toman, *op. cit.*, pp. 728-9.

⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, International Committee of the Red Cross, 1987.

perience and conviction that all the rules contained within treaty and customary laws needed to be taught and explained through their interplay rather than individually. It was "conceived and prepared ... in a military manner with recommendations for action and behaviour" so that "the relevant provisions may be understood and applied by armed forces".⁸ Since then, the handbook has served as the basis for other tools such as the ICRC's "Law of War Teaching File" and has been reproduced by countless armed forces as their own. It still serves as the basis of the teaching provided by the International Institute for Humanitarian Law in San Remo.

In accordance with its mandate, the ICRC contributed to the development of the *San Remo Manual* published in 1994. The purpose of this manual was to provide a contemporary restatement of international law applicable to armed conflicts at sea, thus replacing the *Oxford Manual on the Laws of Naval War Governing the Relations between Belligerents* adopted by the Institute of International Law in 1913.

In 1999, on the fiftieth anniversary of the four Geneva Conventions, the ICRC presented its *Model Manual* to all states attending the XXVII International Conference of the Red Cross and Red Crescent. This model manual was meant for adoption as it stood or for adaptation and completion by national authorities. It did not meet with the expected success, however. It was therefore decided to update *De Mulinen's Handbook*, a process that is now underway with the first phase of testing and amendments having just been completed. A final revised version is planned for next year.

Parallel to these efforts, and with the support of the ICRC as well as a number of experts and governments, the Program on Humanitarian Policy and Conflict Research is currently reviewing all norms related to air warfare. By the end of 2008, this process should culminate in the adoption of a manual similar to the *San Remo Manual*.

Finally, to conclude on the ICRC's experience with IHL manuals, the work of its delegates in the field should be also mentioned. Indeed, besides efforts at the international level, the ICRC has assisted numerous armed forces at the national level around the world in adopting IHL manuals or, occasionally, manuals combining both international humanitarian law and human rights law applicable to military operations. In fact, just several weeks ago, the ICRC received its most recent request from armed forces for the provision of consultative support.

⁸ *Ibid.*, p. iv.

2. Usefulness

A military IHL/LOAC manual is certainly a useful step towards making this law better known and more easily understood by those who will have to implement it in the end. As noted earlier, historically, this need has been recognised from the beginning. Arguably, if a need was recognised after the Franco-Prussian War to adopt a national manual which would explain the 1864 Geneva Convention, a clear and succinct ten-article text, then there is little doubt that such a need persists nowadays in view of the number of existing treaties and customary law.

A manual may therefore be understood as a measure to comply with the legal obligation to disseminate international humanitarian law.⁹

Like any other body of law, international humanitarian law is a set of general rules – sometimes too general to serve as a guide for practical behaviour in combat. It is therefore necessary to interpret the law, analyse its operational implications and identify consequences at all levels, in order to guide the military clearly on how to respect it. For instance, the principle of proportionality as expressed in Articles 51 and 57 of Additional Protocol I consists of a balance between "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof", on the one hand, and "the concrete and direct military advantage anticipated", on the other. Purportedly, the principle is very general in order to allow for its adaptation to any situation. To complete both estimates and implement the principle in practice, however, the military must establish clear responsibilities amongst relevant positions within its staff. Similarly, its decision-making process must establish precisely at what stage(s) the balance takes place – *e.g.*, at the stage of mission analysis, action development – and what its exact format should be.

Accordingly, a military manual must set aside abstract notions. Rather, it should relate international regulations to the practical situations in which armed forces may find themselves and to the context and capacities of their units. To state in a military manual that "all feasible precautions shall be taken to spare the civilian population, the civilians and civilian objects", though entirely correct, would be merely to paraphrase the law as contained in Article 57 of Additional Protocol I. It would not instruct the armed forces as to what they or their state regard as *feasible* precautions and what concrete measures they are required to take in view of their missions and capacities. In short, a manual should provide guidance in a manner that is realistic and practical.

The *UK Manual* is interesting in this regard. It regularly refers to existing policies and draws consequences from them. For example, in the case of precautions in attacks, the manual contains a veritable checklist for consultation during target selection by a commander in his efforts to comply with the "legal obligation to do everything feasible to verify that the proposed target is not protected from an attack"¹⁰:

- a. whether he can personally verify the target;
- b. instructions from higher authority about objects which are not to be targeted;
- c. intelligence reports, aerial or satellite reconnaissance pictures, and any other information in his possession about the nature of the proposed target;
- d. any rules of engagement imposed by higher authority under which he is required to operate;
- e. the risks to his own forces necessitated by target verification.¹¹

Similarly, the manual lists factors to be taken into account when considering the means or methods of attack to be used:

- a. the importance of the target and the urgency of the situation;
- b. intelligence about the proposed target – what it is being, or will be, used for and when;
- c. the characteristics of the target itself, for example, whether it houses dangerous forces;
- d. what weapons are available, their range, accuracy, and radius of effect;
- e. conditions affecting the accuracy of targeting, such as terrain, weather and time of day;
- f. factors affecting incidental loss or damage, such as the proximity of civilians or civilian objects in the vicinity of the target or other protected objects or zones and whether they are inhabited, or the possible release of hazardous substances as a result of the attack;
- g. the risks to his own troops of the various options open to him.¹²

One might question whether an IHL manual is the best vector to provide the military with an interpretation of the law and guidance for its respect. Arguably, international humanitarian law could simply be integrated into existing field manuals (*e.g.* those relating to military decision-making processes and staff organisations) so that they would ensure the lawfulness of decisions and orders. Although such an approach may appear more direct and therefore

⁹ This obligation is contained in provisions such as Article 1, Hague Convention IV 1907; Articles 47/48/127/144, Geneva Conventions I/II/III/IV 1949; Articles 83, 87(2), Additional Protocol I; Article 19, Additional Protocol II; Article 7, Additional Protocol III; Article 25, Hague Cultural Property Convention; Article 30, Hague Cultural Property Protocol II.

¹⁰ *UK Manual, op. cit.*, §5.32.2, p. 82. Footnote omitted.

¹¹ *Ibid.* Footnotes omitted.

¹² *Ibid.*, §5.32.4, pp. 83-84. Footnotes omitted.

preferable, a number of reasons still speak in favour of an IHL manual. To begin with, some armed forces have doctrines that are not extensively developed and, as a result, revert either to unwritten standard principles which guide their actions at the strategic, operational and tactical levels, or to foreign field manuals. An IHL manual may provide a useful alternative to such eventualities. Even where doctrines are well developed, an IHL military manual remains useful at least for two reasons. Firstly, it permits the systematisation of various measures needed to ensure respect for the law before their integration within different manuals and thereby facilitates a flawless process. Secondly, it provides an easy reference not only for legal advisers but also for commanders and their staff.

3. Conditions for Acceptance and Effective Use

Adopting a national IHL manual in itself is not sufficient, however. As with any tool, it is of little use unless it is accepted, regularly used and referred to. Practice shows that a number of conditions are decisive for a manual's acceptance and effective use, especially beyond the mere circle of legal advisers. In addition to the requirement of clear guidance, two main conditions need to be fulfilled. On the one hand, the manual must be the result of a genuine commitment by the authorities or leadership to see the law respected. On the other hand, the manual must be recognised by the armed forces as one of "their own" – in other words, they must feel a sense of ownership.

As mentioned earlier, the first condition for a successful IHL manual is its capacity to provide its users with relevant interpretation of the law and guidance for its respect. Two issues need to be solved here. Firstly, the manual must be understandable to the practitioners without simplifying the law up to the point where the rules are no longer legally accurate. Secondly, the manual must be written in a way that is familiar to its users. Members of armed forces are more likely to accept the ideas put forward to them if they are familiar with the expressions used. The success of *De Mulinen's Handbook* can certainly be explained by the fact that it fulfils these conditions. By applying military logic and vocabulary to the presentation of the law, de Mulinen made his handbook easily accessible to armed forces and enabled them to reproduce the same within themselves. Moreover, he offered a general interpretation and not a national one. This meant that he did not need to go into the same degree of detail as a drafting committee would in order to produce a national manual. Indeed, he wrote under the presumption that all existing conventions would be ratified effectively and without reservations or interpretations; he did not have to take any national legislation into account either. What was arguably an initial weakness for such a generic work has become its major strength over time, especially as the Geneva Conventions secured universal acceptance and more states ratified the two 1977 Additional Protocols.

The Spanish manual¹³ is a case in point. It follows the manner in which the *De Mulinen's Handbook* is structured and defines the different responsibilities for each position within the staff at battalion level and higher. At the same time, however, the manual is adapted to Spain's specificities and realities.

Equally important to the success of an IHL manual are the motives that lead to its adoption. A genuine commitment to the law's implementation must exist from the top of the armed forces and down the chain of command. That the military itself comes to the conclusion that it needs a manual, that it feels a sense of ownership over the drafting or editing process, that the necessary material, intellectual and financial resources are allocated, and that there is an unequivocal preface by the highest ranking officer on the need to know and respect the legal framework – all these usefully indicate the existence of such a commitment. For instance, the *IHL Code of Conduct for the Republic of Sierra Leone Armed Forces* provides an interesting foreword by the Chief of Defence Staff urging "all our troops to read and digest this small booklet and put the IHL principles therein in practice".

The decision to adopt a manual must not be dictated merely by reasons of politics and propaganda. Otherwise, the manual would become an end in itself and end up on the same obscure shelf as the legal instruments it is meant to support. Should the armed forces adopt a foreign manual such as *De Mulinen's Handbook* without making any effort for its national adaptation, the genuineness of their motive might be doubted.

Lastly, the form of the manual will also have a definite impact on its acceptance and effective use. A manual may offer relevant interpretation and guidance, and reflect a genuine commitment by the authorities and leadership to respect the law. It will still be of little use, however, if the armed forces to which the manual addresses itself do not have a sense of ownership whereby it is recognised as one of "their own".

Experience shows that the military feels a greater sense of ownership whenever the LOAC manual is produced as a field manual and forms an integral part of its doctrine. Again, the Spanish manual is a case in point. It is an Army field manual, similar in all aspects to any such document. It was produced for internal use within the armed forces by the J-3 Operations of the General Staff of the Army and approved by its Chief. The manual's structure, which reflects the Spanish military decision-making process, facilitates quick referencing and understanding by any officer.

¹³ *Orientations, the Law of Armed Conflict (Orientaciones, el derecho de los conflictos armados) OR7-004.*

As a matter of policy, the ICRC has resisted requests from armed forces to have its name or logo printed on their military manuals for whose creation it provided cooperation and support. This policy reflects the ICRC's desire to strengthen a sense of ownership by the practitioners. Examples range from Mexico's *Law of Armed Conflict Manual*, another national adaptation of *De Mulinen's Handbook*, to the LOAC training manual developed by the armed forces of Tajikistan.

4. Conclusion

IHL manuals are undoubtedly useful, and arguments for their adoption have been voiced since early on in history. In order to be accepted and effectively used, however, such manuals must fulfil a number of conditions. They must provide an interpretation of the law and clear guidance as to its respect. In so doing, they must account for the practical situations in which armed forces might find themselves and for the context and capacities of their units. Manuals must emanate from a genuine commitment throughout the chain of command to see the law known and respected. Finally, their form must guarantee acceptance by the military.

The experience surrounding numerous IHL manuals, such as South Africa's *Law of Armed Conflict Manual*, shows that their adoption should not be seen in isolation. It is only one step in the process through which doctrine provides the measures, mechanisms and means to ensure respect for the law. Education must transmit theoretical knowledge on what needs to be done. Training must offer practical experience on how to do it. Finally, an effective sanctions mechanism must exist in order to enforce the law in case of violations.

MINUTES OF THE DISCUSSION

Reported by Erika Ellyne*

Bill Fenrick expressed his doubts on the practicality of incorporating human rights into a military manual. While human rights are clearly important, their variability is problematic. Is human rights law generic enough to be contained in a chapter of a military manual? Or is the law's application so dependent upon each factual situation that what is truly needed is an independent manual of its own?

Fenrick also cautioned against adopting *De Mulinen's Handbook* as a substitute for other manuals such as the *UK Manual*. The former is more a compilation of checklists than a book of legal interpretation.

Dieter Fleck asked if the panellists could offer any advice to governments involved in multi-national operations on how to handle national particularities. With reference to *habeas corpus*, which is a hot topic before the ECHR these days, would the panellists be of the view that peacekeeping forces in a post-conflict situation might detain persons without a judge's consent? Should military manuals be adapted for use by law enforcement forces on their respect for human rights?

Tony Rogers raised the question of occupied territory and asked whether it is equivalent to "effective control" which would call for the application of human rights. The *UK Manual* mentions the *Banković* case¹ according to which human rights law might in fact apply depending on the circumstances of each situation. In a wise choice of words, the House of Lords has effectively ruled on the application of human rights in "occupied" territories. It declined to say that the British were obligated to apply human rights law in Basra in the aftermath of the Iraq War. Occupation is not necessarily the same as effective control. It would be interesting to hear what the ECHR would have to say on the matter.

As a co-author of the disappointing *ICRC Model Manual*, Rogers nevertheless considered that it was salvageable and could in fact contribute to the preparation of another manual. It was, in effect, put together at the last minute and suffered from the many authors having conflicting views.

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¹ European Court of Human Rights, *Banković*, *op. cit.*, quoted in *UK Manual*, *op. cit.*, §11.19, p. 282.

Vasilka Sancin² observed that all seemed to agree on the incorporation of individual criminal responsibility into military manuals. What space, if any, should state responsibility be given within these manuals? Would the enforcement of Article 1 common to the Geneva Conventions be relevant?

Louise Doswald-Beck agreed that there is a difference between discussing human rights rules in a global perspective, on the one hand, and discussing their application to a specific state or group of states, on the other. The main point is that it is appropriate for military manuals to refer to human rights and human rights treaties. Complications arise from the fact that not all countries have ratified the same treaties and thus may have the same obligations under human rights law. This would become an issue in joint ventures such as that envisaged here, and particularly as to what needs to be written into the manual. It is easier for one state to refer to its obligations under human rights law; no difficulty arises if a number of states share the same obligations. As all Nordic countries are probably parties to the European Convention on Human Rights, its provisions could, as a minimum, be incorporated into a common manual.

Doswald-Beck noted that military manuals aim to inform officials at the highest level of the rules that must be heeded in the conduct of engagements. References to human rights can and should be made at this level. Otherwise, those acting honestly and in good faith can end up unwittingly violating human rights. Including human rights into military manuals aimed at these upper echelons of power would permit the various rules of engagement to be formulated in accordance with human rights.

In Doswald-Beck's view, it would be possible for generic rights, such as the right to a fair trial and independent tribunal, to be articulated. It must be noted however that human rights do depend on the concept of "effective control". The question, then, is this: is "occupation" synonymous with "effective control"? The *Banković* case raised the question of effective control but within the context of air raids. It is therefore more appropriate to examine the *Northern Cyprus* case.³ In that case, effective control was found to exist where 40,000 Turkish soldiers occupied the territory in question and where the local government, though it had limited autonomy, was for the most part under Turkish control. In contrast, where parties are still battling over an area, as in the *Issa* case⁴ involving Turkish soldiers in Northern Iraq, the situation is different. Here, "effective control" is not present. Courts are not certain because ongoing operations blur the notion of control.

² Vasilka Sancin holds a Ph.D. in law from the University of Ljubljana where she lectures. She is also involved in a research project of the Slovene Ministry of Defence entitled "Analysis of requirements for understanding the international law of armed conflicts and international humanitarian law and elaboration of a manual for Slovenian armed forces".

³ European Court of Human Rights, *Cyprus v. Turkey*, *op. cit.*

⁴ *Ibid.*, *Issa v. Turkey*, *op. cit.*

Doswald-Beck observed that *habeas corpus* would bind peacekeepers. To date, neither the IACHR nor the Inter-American Commission has permitted derogations from *habeas corpus*. The ECHR has agreed that the traditional judge may be replaced by a comparably independent body. If it is possible for foreign judges to be brought in and resolve disputes concerning Article 5 of Geneva Convention III, then why would it not be possible for an independent body to be formed for the resolution of *habeas corpus* matters? In *Ireland v. United Kingdom*,⁵ the ECHR gave the bottom line, namely that there ought to be an independent body of sorts.

Doswald-Beck stated that the relevance of state responsibility under common Article 1 would depend on whether third states were involved as belligerents.

Bill Boothby cautioned that, although other states should be consulted, a state's manual must express its own position on, and interpretation of, issues and legal questions. Where there are difficulties in the application of human rights and national obligations, the state must set out its view.

Boothby noted that, whereas human rights law remains applicable, sometimes international humanitarian law takes precedence. It all depends on the circumstances of each situation. It is important to make the manual practical; only then is there any reasonable prospect that it will be implemented.

François S  n  chaud agreed that one could not compare *De Mulinen's Handbook* with the *UK Manual*. Not only did the former seek to explain IHL obligations from a strictly international point of view; but these obligations, as well as international humanitarian law itself, have also undergone profound changes in the international arena. The *UK Manual*, in contrast, takes an exclusively national approach to the matter and develops it in greater detail. The fact remains, however, that *De Mulinen's Handbook* is still a cornerstone of IHL manuals and the backbone to the ICRC's dissemination and integration activities around the world. Consequently, the ICRC is currently reviewing and updating this essential document.

S  n  chaud conceded that the *ICRC Model Manual* had shortcomings. It had been prepared in a hurry. Also, paradoxically, it backfired against the ICRC – for example, one government misquoted it in an effort to justify the targeting of civilians. Since then, the ICRC has put it on the backburner. Of course, all states are still welcome to use it.

⁵ *Ibid.*, *Ireland v. United Kingdom*, *op. cit.*

Finally, Sénéchaud observed that, in 1995 and 1996, the ICRC began working with police forces in Brazil on law enforcement and human rights. There is consultative work being done with the military. Most armed forces in Latin America do not and will not operate in international armed conflicts or non-international armed conflicts within the meaning of international humanitarian law. They will, however, perform law enforcement. As a result, a number of specialists work actively in this domain.

SESSION IV

A NORDIC MILITARY MANUAL?

OPENING REMARKS

Ove Bring*

We have now come to the difficult topic of a common Nordic military manual.

Let me first say that there has been some Nordic cooperation in the field of international humanitarian law for some years. But it has been done on an *ad hoc* basis. When Sweden ratified Additional Protocol I in 1978, it established an IHL commission with a view to restating the law. The commission worked for a number of years. During that time, we travelled to Oslo, Helsinki, Copenhagen and Bern to speak with the respective governments, and to Geneva to speak with the ICRC. This work resulted in the publication of a report, a sort of restatement of post-Additional Protocol I international humanitarian law, in 1984. An English abridged version of the report followed shortly thereafter.

Sweden's cooperation with its Nordic neighbours was very informal. They all had their own working groups or commissions interested in the field of international humanitarian law, and we spent time at the ministries of foreign affairs and defence to look at the situation.

This period also saw the production of IHL text books – not manuals – in Nordic countries. Here in Norway, Morten Ruud, a delegate to the 1977 Diplomatic Conference, published one in 1980. Arne Willy Dahl recently published the second edition of his own handbook. In Finland, Gunnar Rosén of the Finnish Red Cross published a similar book. In Sweden, Torgil Wulff, who was active in the weapons committees during the Diplomatic Conference, published a handbook; after his death, some of us working at the Swedish National Defence College have republished it in new editions. Last but not least, Carl Ivar Skarstedt, legal adviser to the Swedish Ministry of Defence and chairman of the official IHL commission, produced the commission's 1984 report.

This was a process that went on for some years. Contacts were established in the Nordic region, but were never formalised. The idea of having a common Nordic manual never struck us. It was perhaps too ambitious at the time. It is a completely new idea, something I heard for the first time during the preparations for this conference.

* Ove Bring is Professor of International Law, Swedish National Defence College.

ARGUMENTS FOR AND AGAINST A NORDIC MILITARY MANUAL

Göran Melander*

Reported by Maria Bergram Aas

Göran Melander noted that the *ICRC Customary Law Study* lists military manuals of fifty-two states. *If* they are manuals that is, as it is clear from previous discussions that it is a challenging task to define what a military manual really is. It can be a restatement of international humanitarian law, but it can also be a very progressive document. In this respect, Melander agreed with Ove Bring who stated earlier that a common Nordic military manual should be a progressive one. In addition, a manual plays an important role in the education of members of armed forces. Of course, some manuals may carry many of these different characteristics.

Melander enumerated arguments *for* a common Nordic military manual:

- All five Nordic states have to a large extent ratified the same treaties in the field of international humanitarian law. These states are regarded as proponents of peace and guardians of human rights. In a way, it can be seen as slightly embarrassing that they have not produced a military manual at this point.
- Furthermore, it would be a good financial solution. By combining their efforts, Nordic ministries of defence may save resources.
- The Nordic defence systems also have more or less similar interests. Hopefully, no Nordic state will ever go to war. Meanwhile, Nordic states routinely participate in various peacekeeping operations.
- Another argument relates to the implementation of international humanitarian law. Sweden is the only Nordic state which clearly practices dualism when it comes to treaty law, while the others argue that they adopt a monistic approach. A common military manual would perhaps force Sweden to apply international humanitarian law properly. This would be a reason in favour of a joint manual. On the other hand, different approaches to the implementation of treaty law may also be an argument against a common manual.
- The negotiations that would have to be conducted towards a common military manual could result in an even closer relationship between Nordic states.

* Göran Melander is Founder and former Director, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, and Professor Emeritus of Public International Law, Faculty of Law, University of Lund.

Melander then proceeded with arguments which may be forwarded *against* a common Nordic military manual:

- Nordic states have different interests, in particular regarding their security policy. Norway and Denmark are members of NATO, whereas Sweden and Finland are not. This might create problems. The logical solution for Norway and Denmark would be the creation of a common NATO military manual, although this is clearly unrealistic.
- National pride could be an obstacle for a joint Nordic manual.
- Nordic states hold slightly different treaty obligations under international humanitarian law. To Melander's knowledge, Finland has not yet ratified the Ottawa Convention, as opposed to all the other Nordic states. At the same time, Finland is the only Nordic state that has ratified one of the Protocols to the 1954 Hague Cultural Property Convention.
- Seminar participants discussed the possible impact of the British, Canadian and German manuals on a Nordic manual. One should try to make use of these. Copyright issues were mentioned earlier, but there must be a way of translating these manuals and circulating them in the Nordic region. This could, after all, be a fairly cheap procedure.
- Another problem with military manuals is that their creation may overshadow the importance of actually implementing international humanitarian law. Melander compared this to human rights law. Until the 1980s, a number of legal standards, conventions and rules were developed on the international level. The issue of implementation was completely ignored, however. Only in the 1990s did implementation become fashionable. The same problem may arise in the field of international humanitarian law and military manuals. The drafting or adopting of a military manual is not an objective in itself; it is extremely important to explore and develop systems of implementing international humanitarian law as well. Every combatant is well aware of the principle of individual responsibility. Still, only the most serious perpetrators were brought to justice following the war in the former Yugoslavia. Only a very few cases against low-ranking members of the armed forces were brought before national tribunals. At least fifteen persons from the former Yugoslavia were granted refugee status in Sweden on the basis that they had committed torture during the war and therefore could not return to their home countries. This is completely unacceptable. These people should have been prosecuted and punished. Hundreds of perpetrators like them have settled in new countries, and impunity is granted to a great extent. This practice should be rectified in the future.

MINUTES OF THE DISCUSSION

Reported by Lydia Tujuba Atomssa and Mariamah Crona*

Ove Bring stated that he saw a practical need among Nordic countries for guidance in field operations, be it for troops in Afghanistan, Darfur or the Congo. In all these situations, peacekeepers face the prospect of having to detain people and in some cases deliver them to other bodies. In Sweden, this need has resulted in soldiers frequently seeking advice on how to deal with such situations. The upcoming plan for Sweden and Norway to field together in Darfur with a common engineering unit is a concrete example of how relevant this issue is for Nordic countries at present. The guidance needed could very well be included in a manual, covering human rights issues alongside humanitarian law issues. The prospects for Nordic cooperation in such an effort are also present, as the interest Sweden and Finland have expressed in cooperating with NATO can easily be translated to a Nordic cooperation as well.

Charles Garraway stressed the importance of defining terms before deciding on a manual. The terms "manual" and "international humanitarian law" must both be defined, and the first question that must be answered is: "what is the purpose of a manual?" So far, the discussions concerning a manual for Nordic countries have generally revolved around post-conflict peace support operations as opposed to peace enforcement operations. Useful as post-conflict guidance may be, however, it must be remembered that international humanitarian law is the law of armed conflict, not peacekeeping. This distinction must be maintained when looking at a manual to cover post-conflict rather than peace enforcement operations as it would not normally involve international humanitarian law. One needs to work out exactly the purpose for which the manual is being designed and then have another look at its title.

Garraway also expressed his concerns about today's increasing use of criminal law as a means of enforcing international humanitarian law. IHL breaches can only be adequately enforced through criminal law when they are the exception and not the rule. Where there has been a general breakdown of international humanitarian law, criminal law is not going to solve the problem by itself and therefore one has to look beyond that for a solution. Though the lack of IHL enforcement needs to be considered in a wider field, this question might *as*

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such not be directly relevant to a military manual. The main question here is whether or not it is a military manual that Nordic countries want.

Bill Fenrick's first comment related to *De Mulinen's Handbook*. If Nordic states are intending to adopt a handbook like that, then it is not really a LOAC manual. A LOAC manual is an implementation document.

Fenrick's second comment was that a manual should be confined to international humanitarian law. There is no need for Nordic states to address *jus ad bellum* issues in their military manual. Meanwhile, there is a tendency these days to move towards a merger of the law of international armed conflict and that of non-international armed conflict. In view of the fact that most contemporary conflicts are technically regarded as non-international, Nordic countries would do well – that is, should they adopt a manual – to decide whether to apply automatically the norms of international armed conflict whenever their forces are deployed abroad.

Fenrick's third comment concerned the linkage between international criminal law and international humanitarian law. There is undoubtedly some linkage, but it is not clear exactly what that is. International humanitarian law is basically a body of preventive law. It does not exist in order to provide a basis for criminal litigation; rather, it is supposed to prevent casualties being caused in the first place and this should really be the emphasis. It is up to Nordic states themselves, and themselves alone, to decide what they want to include in their manual. That being said, it is probably a good idea for Nordic states to have a manual in whose preparation they have at least participated, rather than simply taking somebody else's thinking.

Dieter Fleck summarised a few ideas concerning the definition of a military LOAC manual. First, a military manual could be a restatement. Second, it could also be a progressive or innovative document reflecting one's national policy and interest. It could thus embody a Nordic innovation in the implementation of international humanitarian law and human rights, as well as in the application of the rule of law to military operations. Third, it could be a training device needed, *e.g.*, for Darfur. The ICRC's experience with *De Mulinen's Handbook* and its 1999 *Model Manual*, including in particular its perceived need to produce the latter's second edition, amply illustrates the complexity of manual writing. Nordic countries might find themselves in a difficult situation today since they are not supposed to be engaged in armed hostilities very easily except in difficult areas such as Afghanistan. A manual would be a very good idea to transport the idea of Nordic innovation for international peace operations.

Fleck recalled that the drafting process of the *German Handbook* was an international exercise from the very beginning. At that time, Germany had reason to involve allies and friends including Nordic countries, and even the Soviet Union, for input. The intention was to apply the same law on both side of the Iron Curtain which at that time was still in existence. Germany sought support from all around the world, including the support of those experts who were not affiliated with NATO.

In Fleck's view, the *German Handbook* may be a good example for Nordic states because Germany had ratified all major international instruments at the time and those it had not yet ratified were candidates for ratification. Admittedly, Germany did make interpretative statements. These statements were not reservations, however; nor were there any negative reactions from other states.

Fleck stated that having multinational headquarters would be a very good practical approach. Nordic states might include those on the southern coasts of the Baltic Sea in some of their exercises. For instance, there is a joint Danish-Polish-German headquarters with much support from other countries. German-Netherlands military integration is already highly developed, and not without the help of Norwegian legal advisers. The reality in NATO is that there is a need to cooperate.

Fleck was of the opinion that, if Nordic states still felt that it would be wise to focus on international humanitarian law proper, then they should look at the realities and refer, *e.g.*, to the operations in Darfur and to the armed conflict in Afghanistan. What is required here for a Nordic manual is to look into all necessary legal rules and to do so through international cooperation.

Arne Willy Dahl observed that a joint Nordic manual would not come about if national differences were too great. One could not say how great these differences were right now. Although there are few reservations to Additional Protocol I, more complicated matters of interpretation such as that of proportionality might generate considerable disagreements among Nordic countries. Still, enough reasons exist to see where an attempt at creating a Nordic manual might take us – even if the end result might be national manuals. Discussions can benefit all participating countries, deepening their understanding of the matters at issue.

Magne Frostad,¹ speaking on the basis of his experience serving in Afghanistan on two occasions as the Norwegian legal adviser, stated that Norway should start work on a Norwegian if not a Nordic manual, both on the law of war and on other legal fields of relevance to such developments.

¹ Magne Frostad is Associate Professor, University of Tromsø.

According to Frostad, Nordic states need to synchronise their views if they are to deploy soldiers in the Sudan. Frostad thus concurred with Dahl that perhaps having a common manual is not as important as starting the process to see where our differences are.

Richard Brennan² agreed with Garraway that the fundamental question in this discussion is the kind of manual one wants. Ireland, like Nordic countries, has traditionally been involved in peace support operations and peacekeeping operations.

Brennan also raised the question of the interface between human rights law and international humanitarian law. One must ensure that there is a clear distinction in what might be called "the dichotomy between human rights obligations and LOAC obligations". Because a manual's ultimate aim is dissemination, this distinction must be made clear in the way the manual is written. Any blurring of the distinction will feed into the operational planning process.

As an illustration, Brennan referred to his recent experience in Chad where he had witnessed a debate on the ground regarding the question of detention. This debate would not have occurred if there had been a clear line as to where we stand on the matter. A lack of clarity will prevent appropriate dissemination of the law, which will in turn affect the consistency of its operational application on the ground.

Tom Staib noted the danger of obstacles during multinational operations and of caveats being added to ROEs as a result. Would a common manual actually reduce the chances of having many or all of those operational obstacles and caveats?

Fenrick was of the opinion that ROEs are primarily concerned with the use of force in self-defence. There should nevertheless be roughly the same approach to the use of force for periods of prolonged combat. For the purposes of self-defence, some countries have more stringent rules than other countries on hostile intent and so on. It follows that one cannot be sure whether even a common treaty obligation would contribute to the harmonisation of self-defence-type ROEs. A common manual may be more helpful for situations other than self-defence.

Fleck suggested that a military manual could explain the strict application of *habeas corpus* requirements in peace operations. If it did, it would make it more difficult for states to deploy forces without deploying police officers and judges at the same time. In this way, military manuals might serve as a very good instrument to reduce national caveats.

² Richard Brennan is Commandant and Legal Advisor, Irish Defence Forces.

Garraway argued that caveats would typically concern matters such as defending property. They are governed by domestic law as well as by international law. The situation is relatively straightforward where one is clearly in a situation of armed conflict; in a grey zone, however, it is often not clear as to whether domestic law, human rights law or the law of armed conflict applies. This is where the caveats come in.

Fenrick added that the situation would be compounded by the lack of clarity in the UN mandate which establishes a force in the first place. It is perfectly possible to envisage a UN mandate specifying the circumstances in which one might be authorised to use force. Yet there is a tendency nowadays towards a high degree of fuzziness in UN mandates. For example, it would have been preferable that the International Force (IFOR) and the Stabilisation Force (SFOR) in Bosnia and Herzegovina had a straightforward mandate to arrest and detain ICTY indictees. Unfortunately, they had exceptionally fuzzy language in their mandates because the authorities concerned were unable to agree. The caveat that was created was mostly due to the obscurities in the original mandate.

Malin Greenhill³ asked what legal basis the Nordic battle group would have for their mandate and field operations. To this Cecilia Hellman⁴ replied that, when the Swedish Ministry of Defence considered which position it should take, it identified two important questions: first, how to define self-defence and, second, how to define its human rights obligations. The battle group will be on stand-by as of 1 January 2008, and maybe again in 2011. This long-term collaboration might well be an incentive for a Nordic military manual.

Hans-Peter Gasser stated that it would be a pity if everyone left this room and said everything was too complex, there were too many controversial issues and we could not do it. Take, for instance, the question of merging international and non-international armed conflict rules. Even if not everyone agreed on the applicability of prisoner-of-war status in Sierra Leone, everyone would agree that civilians should not be targeted. Prohibitions against targeting civilians apply to both international and non-international armed conflicts. The same is true of the issues of direct participation in hostilities and the treatment of detainees. Joining or not joining the international and non-international norms should not be seen as a matter that is insoluble. At a minimum, it is possible to open up the gate and to write a manual on issues we all care for.

³ Malin Grenhill is a Legal Adviser with the Swedish Red Cross.

⁴ Cecilia Hellman is a Legal Adviser with the Swedish Defence Ministry.

Jani Leino⁵ expressed his support for the idea of Finland having some kind of military manual. In view of today's discussions, a common Nordic manual should perhaps focus on peacekeeping operations. Whether as a general restatement of the law with regard to difficult policy questions or as a practical guide on operational issues, a manual should reflect the importance of effective implementation on the ground.

Fenrick replied that, in his view, the scope of a manual need not be restricted to peacekeeping operations in which Nordic countries are most likely to take part. The fact that Nordic countries have not been involved in armed conflict recently is not, in itself, a good reason not to have a LOAC manual. Countries have armed forces because of the possibility that they may one day be engaged in armed conflict. They should have a LOAC manual because, in the event of an armed conflict, their forces have to comply with a set of obligations and they need to be trained on these obligations in advance. Having appropriate structures in place makes this possible. Although Canada has historically not expected to find itself engaged in sustained hostilities, it has nevertheless suffered a loss of at least seventy-four people in Afghanistan.

Darren Stewart observed that the views of Nordic countries, whether individual or collective, do count in a broader sense. An effort at harmonising their positions in this area would not be wasted. Nevertheless, some of the ideas mentioned today were perhaps too progressive. They might be more suitably implemented through national policy than through a military manual or operational manual. Launching an effort to implement these ideas on a four- or five-nation basis could be an aspiration too far. Regardless, the views and positions of Nordic countries on the law, whether expressed individually or as a result of a collaborative effort, are what all their allies want to see.

Göran Melander stated that one topic of today's discussions, namely the application of human rights in peacekeeping operations, was completely innovative. This is something one does not yet know how to do as the rules are very vague for the time being. Military personnel functioning as police during peacekeeping operations must follow a set of rules different from that which the ordinary police must follow. For instance, whereas the latter are allowed to use tear gas during riots, the former are not. States need to agree upon the relationship between human rights law and humanitarian law in these situations. This may not in itself be part of a military manual, but an additional set of rules needs to be developed.

Melander also stressed the importance of training in the field of international humanitarian law although, admittedly, training has its limitations as there is no guarantee that personnel will comply with instructions. During human rights training at the Raul Wallenberg Institute,

⁵ Jani Leino is a Legal Adviser with the Finnish Red Cross.

one participating police general from an Asian country had whispered to Melander at the end of a session on the prohibition of torture: "Anyway, I think some soft torture can be useful".

CONCLUSION

CONCLUSION AND REMARKS ON THE WAY FORWARD

Arne Willy Dahl

Reported by Mariamah Crona

Arne Willy Dahl observed that today's discussions seem to indicate the need for a manual both in Norway and elsewhere in the Nordic region. It also appears that such a manual should include within its scope peace operations covering all relevant branches of international law and possibly national law as well. Otherwise, the user would need to have a set of manuals, which would not be much of an achievement. A Nordic manual could contain national law in an annex. The target audience must be considered in this effort. The manual should be clearly written, stating the official positions of the countries involved on customary law and national policy. It would be possible to create a common Nordic core manual, covering customary law as well as relevant treaties that are ratified by all Nordic countries. The problem would be national interpretations. They should be harmonised without sacrificing clarity. It is not clear whether this would be possible or not.

The way forward, Dahl concluded, lies with the seminar organisers to work out a common recommendation addressed to the defence ministries in the region. Preferably, it is these ministries that should take the lead in this matter because, if a military manual is going to be a military manual, it must have military ownership. It cannot be a document imposed on the armies by an outside entity. The ministries should decide whether they want to enter into a project like this, how the work should be organised and to what extent the support, advice and involvement of national Red Cross societies, academic experts and other relevant non-military contributors should be sought.

If it turns out that a common manual is unrealistic, would the process nevertheless be valuable for producing national manuals? To this question Dahl responded affirmatively and recommended that the organisers proceed as suggested.

APPENDICES

GLOSSARY OF TERMS

<i>Additional Protocol I</i>	Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)
<i>Additional Protocol II</i>	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)
<i>Additional Protocol III</i>	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III)
<i>Anglo-Norwegian Fisheries Case</i>	International Court of Justice, <i>Fisheries case, Judgement of December 18th, 1951: I.C.J. Reports 1951</i> , p. 116
<i>Annotated Supplement to the US Navy Commander's Handbook</i>	Naval War College, <i>Annotated Supplement to the Commander's Handbook on the Law of Naval Operations</i> , 1997
<i>Armed Activities Case</i>	International Court of Justice, <i>Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)</i> , Judgement of 19 December 2005
<i>Banković</i>	European Court of Human Rights (Grand Chamber), <i>Banković and others v. Belgium and others</i> , Admissibility, Judgement of 12 December 2001
<i>Bazorkina v. Russia</i>	European Court of Human Rights, <i>Bazorkina v. Russia</i> , Judgement of 27 July 2006
<i>Bámanca Velásquez v. Guatemala</i>	Inter-American Court of Human Rights, <i>Bámanca</i>

	<i>Velásquez v. Guatemala</i> , Judgement of 25 November 2000
<i>"Brothers to the Rescue"</i>	Inter-American Commission on Human Rights, <i>Armado Alejandro Jr. and others v. Cuba ("Brothers to the Rescue")</i> , Report No. 86/99, 29 September 1999
<i>Brussels Declaration 1874</i>	Project of the International Declaration Concerning the Laws and Customs of War
<i>CAT</i>	Committee Against Torture
<i>CF</i>	Canadian Forces
<i>Chemical Weapons Convention 1993</i>	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
<i>Coard et al. v. United States</i>	Inter-American Commission on Human Rights, <i>Coard et al. v. United States</i> , Report No. 109/99, 29 September 1999
<i>Çiçek v. Turkey</i>	European Court of Human Rights, <i>Çiçek v. Turkey</i> , Judgement of 27 February 2001
<i>De Mulinen's Handbook</i>	Frédéric de Mulinen, <i>Handbook on the Law of War for Armed Forces</i> , International Committee of the Red Cross, 1987
<i>Diplomatic Conference</i>	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva, 1974-1977
<i>DOD</i>	Department of Defence
<i>ECHR</i>	European Court of Human Rights
<i>Ergi v. Turkey</i>	European Court of Human Rights, <i>Ergi v. Turkey</i> , Judgement of 28 July 1998
<i>European Convention on Human Rights</i>	Convention for the Protection of Human Rights and Fundamental Freedoms

<i>Geneva Convention 1864</i>	Convention for the Amelioration of the Condition of the Wounded in Armies in the Field
<i>Geneva Convention 1906</i>	Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
<i>Geneva Convention I</i>	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949
<i>Geneva Convention II</i>	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949
<i>Geneva Convention III</i>	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949
<i>Geneva Convention IV</i>	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
<i>German Handbook</i>	<i>Handbook for Humanitarian Law in Armed Conflicts, ZDv 15/2 Humanitäres Völkerrecht in bewaffneten Konflikten – handbuch – 1992</i>
<i>Guerrero v. Colombia</i>	Human Rights Committee, <i>Guerrero v. Colombia</i> , Views, 31 March 1982, UN Doc. CCPR/C/15/D/45/1979
<i>Habeas Corpus Advisory Opinion</i>	Inter-American Court of Human Rights, <i>Habeas Corpus in Emergency Situations</i> , Advisory Opinion OC-8/87 of 30 January 1987
<i>Hague Convention IV 1907</i>	Convention (IV) Respecting the Laws and Customs of War on Land
<i>Hague Cultural Property Convention 1954</i>	Convention for the Protection of Cultural Property in the Event of Armed Conflict
<i>Hague Cultural Property Protocol II 1999</i>	Second Protocol to the Hague Convention of

	1954 for the Protection of Cultural Property in the Event of Armed Conflict
<i>Hague Regulations 1907</i>	Regulations Respecting the Laws and Customs of War on Land
<i>HRC</i>	Human Rights Committee
<i>IACHR</i>	Inter-American Court of Human Rights
<i>ICC</i>	International Criminal Court
<i>ICJ</i>	International Court of Justice
<i>ICRC</i>	International Committee of the Red Cross
<i>ICRC Commentaries to the Additional Protocols</i>	Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), <i>Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949</i> , International Committee of the Red Cross/Martinus Nijhoff Publishers, 1987
<i>ICRC Commentaries to the Geneva Conventions</i>	Jean S. Pictet (ed.), <i>Commentary I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field/Commentary II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea/Commentary III Geneva Convention Relative to the Treatment of Prisoners of War/Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War</i> , International Committee of the Red Cross, 1952/1960/1960/1958
<i>ICRC Customary Law Study</i>	Jean-Marie Henckaerts and Louise Doswald-Beck, <i>Customary International Humanitarian Law</i> , Cambridge University Press, 2005
<i>ICRC Model Manual</i>	Anthony P.V. Rogers and Paul Malherbe, <i>Fight It Right: Model Manual on the Law of Armed Conflict for Armed Forces</i> , International Committee

	of the Red Cross, 1999
<i>ICTY</i>	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991
<i>IDF</i>	Israel Defence Forces
<i>IHL</i>	International humanitarian law
<i>IIHL</i>	International Institute of Humanitarian Law
<i>Inter-American Commission</i>	Inter-American Commission on Human Rights
<i>International Criminal Tribunal for the Former Yugoslavia</i>	See "ICTY"
<i>IRA</i>	Irish Republican Army
<i>Ireland v. United Kingdom</i>	European Court of Human Rights, <i>Ireland v. United Kingdom</i> , Judgement of 18 January 1978
<i>Isayeva v. Russia</i>	European Court of Human Rights, <i>Isayeva v. Russia</i> , Judgement of 24 February 2005
<i>Isayeva, Yusupova and Bazayeva v. Russia</i>	European Court of Human Rights, <i>Isayeva, Yusupova and Bazayeva v. Russia</i> , Judgement of 24 February 2005
<i>Issa v. Turkey</i>	European Court of Human Rights, <i>Issa v. Turkey</i> , Judgement of 12 May 1995
<i>JAG</i>	Judge Advocate General
<i>Joint Doctrine Manual</i>	Office of the Judge Advocate General, <i>Joint Doctrine Manual Law of Armed Conflict at the Operational and Tactical Levels</i> , B-GJ-005-104/FP-021
<i>Lieber Code</i>	<i>Instructions for the Government of Armies of the United States in the Field</i> , prepared by Francis Lieber, LL.D., originally issued as General Orders No. 100, Adjutant General's Office, 1863

<i>LOAC</i>	Law of armed conflict
<i>Manual on the Law of War on Land 1958</i>	<i>The Law of War on Land, being Part III of the Manual of Military Law</i> , Her Majesty's Stationery Office, 1958
<i>Mapiripán Massacre Case</i>	Inter-American Court of Human rights, <i>Case of the "Mapiripán Massacre" v. Colombia</i> , Judgement of 15 September 2005
<i>McCann v. United Kingdom</i>	European Court of Human Rights, <i>McCann and others v. United Kingdom</i> , Judgement of 5 September 1995
<i>MOD</i>	Ministry of Defence
<i>Niyonteze Appeal Case</i>	Swiss Military Appeal Tribunal 1A, <i>Niyonteze Appeal Case</i> , 26 May 2000
<i>North Sea Continental Shelf</i>	International Court of Justice, <i>North Sea Continental Shelf, Judgement, I.C.J. Reports 1969</i> , p. 3
<i>Nuclear Weapons Advisory Opinion</i>	International Court of Justice, <i>Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996</i> , p. 226
<i>OPCAT</i>	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
<i>Operational Law Handbook 2004, 2005, 2007</i>	<i>Operational Law Handbook</i> , International and Operational Law Department, The Judge Advocate General's Legal Center & School
<i>Ottawa Convention</i>	Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction
<i>Oxford Manual 1880</i>	<i>The Law of War on Land</i> , Manual published by the Institute of International Law, 1880
<i>Öcalan v. Turkey</i>	European Court of Human Rights, <i>Öcalan v. Tur-</i>

	key, Judgement of 12 May 2005
<i>Palestinian Wall Advisory Opinion</i>	International Court of Justice, <i>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004</i> , p. 136
<i>Pueblo Bello Massacre Case</i>	Inter-American Court of Human Rights, <i>Case of the Pueblo Bello Massacre v. Colombia</i> , Judgement of 31 January 2006
RAF	Royal Air Force
ROE	Rules of engagement
<i>Rome Statute</i>	Rome Statute of the International Criminal Court
<i>San Remo Manual</i>	Louise Doswald-Beck (ed.), <i>San Remo Manual on International Law Applicable to Armed Conflicts at Sea</i> , Cambridge University Press, 1995
<i>Scotia, The</i>	Supreme Court of the United States, <i>The Scotia</i> , 81 U.S. 14 Wall. 170 170 (1871)
<i>Swiss Military Manual</i>	<i>Swiss Military Manual on Behaviour during Deployment</i> , Rechtliche Grundlagen für das Verhalten im Einsatz, Reglement 51.007/IV
<i>Tadić Jurisdiction Decision</i>	International Criminal Tribunal for the Former Yugoslavia, <i>Prosecutor v. Duško Tadić a/k/a "Dule"</i> , Case No. IT-94-1-AR72, <i>Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction</i> , 2 October 1995
<i>UK Manual</i>	UK Ministry of Defence, <i>The Manual of the Law of Armed Conflict</i> , Oxford University Press, 2004
<i>UN Safety Convention 1994</i>	Convention on the Safety of United Nations and Associated Personnel
<i>UN Secretary-General's Bulletin 1999</i>	Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, UN doc. ST/SGB/1999/13

<i>UN Torture Convention</i>	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
<i>US Army Field Manual</i>	<i>Department of the Army Field Manual FM27-10: The Law of Land Warfare</i> , Department of the Army, July 1956
<i>US Navy Commander's Handbook</i>	Department of the Navy, Office of the Chief of Naval Operations and Headquarters, U.S. Marine Corps, Department of Homeland Security and U.S. Coast Guard, <i>The Commander's Handbook on the Law of Naval Operations</i> , NWP1-14M
<i>Velásquez-Rodríguez</i>	Inter-American Court of Human Rights, <i>Velásquez-Rodríguez v. Honduras</i> , Judgement of 29 July 1988
<i>Voulanne v. Finland</i>	Human Rights Committee, <i>Voulanne v. Finland</i> , Views, 2 May 1989, UN Doc. CCPR/C/35/D/265/1987

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Roberta Arnold, Ph.D. (Bern, Hons.), LL.M. (Nottingham), is specialist officer (1st Lt.) and candidate examining magistrate, Military Tribunal 8, Swiss Military of Justice; independent legal adviser in international criminal law and international humanitarian law. She was formerly a legal adviser within the Staff of the Chief of the Swiss Armed Forces, Laws of Armed Conflict Section, Swiss Department of Defence (2003-2005).

W.H. Boothby, Group Captain, is a serving member of the Royal Air Force Legal Branch. A qualified lawyer since 1977 and an RAF Officer since 1981, he has served in the United Kingdom, Germany, Hong Kong, Cyprus and Croatia. He is a member of the Editorial Board of the *UK Manual of the Law of Armed Conflict*. He was a member of the UK Delegation to the Oslo negotiations that gave rise to the Ottawa Convention on Anti-Personnel Mines and was a member of the UK Delegation to Conventional Weapons Convention negotiations from 2000 to 2005.

Ove Bring is Professor of International Law, Swedish National Defence College, Stockholm. He is formerly special legal adviser of international law at the Swedish Ministry for Foreign Affairs. In that capacity, he covered matters of diplomatic protection, UN peacekeeping and peace-enforcement, international humanitarian law and arms control law. In 1993, he was appointed professor of public international law at Uppsala University and, in 1997, Carl Lindhagen Professor of International Law at Stockholm University. Since 2005, he has been Head of the International Law Centre at the Swedish National Defence College (Stockholm). He is a member of the Executive Council of the International Law Association (London) and of the International Law Delegation of the Swedish Ministry for Foreign Affairs.

Arne Willy Dahl is Judge Advocate General for the Norwegian Armed Forces, and in that capacity responsible for penal prosecution in military cases and for legal advice in summary punishment cases. He was born in 1949 and finished law school at the University of Oslo in 1974. He has received reserve officer training in the infantry and the medical corps. Since 1982, he has taken positions as a lecturer at the Army Academy, Judge Advocate for eastern Norway, District Attorney (public prosecutor) in Oslo, Head of the Legal Services of the Norwegian Armed Forces, and Prosecutor at the Office of the Director for Public Prosecutions with special responsibility for war crimes. He has written *Håndbok i militær folkerett* ("Hand-

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Louise Doswald-Beck was appointed Professor of the Graduate Institute of International and Development Studies and Director of the University Centre for International Humanitarian Law (now the Geneva Academy of International Humanitarian Law and Human Rights) on 1 October 2003. Of British origin, she began her academic career in 1975 after being called to the Bar in London. She was a lecturer in international law at Exeter University and then at London University where she taught, *inter alia*, LL.M. courses on the law of armed conflict and the use of force and the international protection of human rights. Between 1987 and February 2001, she was a legal adviser at the International Committee of the Red Cross (ICRC) and became Head of the Legal Division in March 1998. During her period at the ICRC, she played a major role in negotiations that led to various international instruments such as the Statute of the International Criminal Court and its Elements of Crimes, Protocols II (amended) and IV of the Convention on Certain Conventional Weapons, the Ottawa Convention on Anti-Personnel Landmines, Protocol II to the Hague Convention on Cultural Property and the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*. Between March 2001 and August 2003, she was Secretary-General of the International Commission of Jurists, a non-governmental organisation that works for the protection of human rights through the rule of law. She has written extensively on subjects relating to the use of force, humanitarian law and human rights law, including the ICRC's study on customary international humanitarian law for which she was awarded the Ciardi Prize at the time of the XVIIth Congress of the International Society for Military Law and the Law of War.

William J. Fenrick was a Senior Legal Adviser in the Office of the Prosecutor (OTP) of the International Criminal Tribunal for the Former Yugoslavia (ICTY) from 1994 until the end of 2004. He was the head of the Legal Advisory Section and the Senior Adviser on Law of War Matters. At the ICTY, he has provided international law advice to the OTP and argued at the trial and appeal levels, particularly on matters relating to conflict classification, command responsibility, and crimes committed in combat. He was also the main author of the 2000 *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*. Immediately prior to coming to the ICTY, he was a member of the Security Council Resolution 780 Commission of Experts investigating war crimes allegations in the former Yugoslavia and, as such, he was responsible for legal matters and for on-site investigations. He was a military lawyer in the Canadian Forces from 1974 to 1994, specialising in law of war and operational law matters. He has published widely on law of war matters. He is a graduate of the Royal Military College of Canada (BA (Hons Hist) 1966), Carleton University (MA (Cdn Studies) 1968), Dalhousie University (LL.B. 1973), and George Washington University (LL.M. 1983). At present, he lives in Halifax, Can-

ada, where he teaches international criminal law and international humanitarian law at Dalhousie Law School.

Dieter Fleck, formerly Director International Agreements & Policy of the German Ministry of Defence, is the editor of *The Handbook of International Humanitarian Law* (2nd ed., Oxford 2008) and Honorary President of the International Society for Military Law and the Law of War.

Charles Garraway was, for thirty years, an officer in the British Army Legal Services advising on international and operational law. During that time, he was for several years Editor of the draft UK *Manual of the Law of Armed Conflict* and remained on the editorial committee. Since retirement, he has held a number of academic appointments including the Stockton Chair of International Law at the United States Naval War College. He is currently Associate Fellow of Chatham House; Visiting Professor at King's College London; Visiting Fellow in the Department of Human Rights, University of Essex; and a Commissioner on the International Humanitarian Fact Finding Commission established under Article 90 of Additional Protocol I to the Geneva Conventions of 1949. He has written extensively in the fields of international humanitarian law and international criminal law.

Hans-Peter Gasser, LL.M. (Harvard), Dr. iur. (University of Zurich), is former Senior Legal Adviser, International Committee of the Red Cross and former editor of the *International Review of the Red Cross*.

Wolff Heintschel von Heinegg is Professor of Public Law, especially public international law, European law and foreign constitutional law at the Europa-Universität Viadrina in Frankfurt (Oder), Germany. Since October 2004, he has been the dean of the law faculty of the Europa-Universität and, since 2007, a member of the Council of the International Institute of Humanitarian Law in San Remo, Italy. Previously, he served as Professor of Public International Law at the University of Augsburg. In the academic year 2003/2004 he was the Charles H. Stockton Professor of International Law at the US Naval War College. He had been a Visiting Professor at the Universities of Kaliningrad (Russia), Almaty (Kazachstan), Santiago de Cuba (Cuba) and Nice (France). He was the Rapporteur of the International Law Association Committee on Maritime Neutrality and was the Vice-President of the German Society of Military Law and the Law of War. Professor Heintschel von Heinegg was among a group of international lawyers and naval experts who produced the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*. In 2002, he published the German Navy's *Commander's Handbook on the Law of Naval Operations*. Professor Heintschel von Heinegg is a member of several groups of experts working on the current state and progressive development of international humanitarian law. He is a widely published author of articles and

books on public international law and German constitutional law. For more detailed information see: <http://voelkerrecht.euv-frankfurt-o.de>.

Marja Lehto, Ph.D., LL.M., M.Pol.Sc., is the head of the Unit for Public International Law at the Finnish Ministry for Foreign Affairs. She has been intensely involved in the elaboration and implementation of the EU Guidelines on the Promotion of International Humanitarian Law. From 1995 to 2000, she was stationed at the Finnish Permanent Mission to the UN in New York and participated, *inter alia*, in the negotiations on the Rome Statute of the International Criminal Court as well as the subsequent negotiations on the Elements of Crimes. She has also participated in the negotiations on a number of anti-terrorist conventions and chaired the Council of Europe Committee of Experts on Terrorism in 2006-2007.

Göran Melander is Founder and former Director, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, and Professor Emeritus of Public International Law, Faculty of Law, University of Lund. He holds a doctor of laws degree from Lund University and was a member of the Committee on the Elimination of Discrimination against Women (2001-2004). He has extensive expertise and experience in the areas of human rights, humanitarian law and refugee law, and has taught and acted as expert consultant on human rights issues in Africa, Asia, Europe and Latin America. An internationally acclaimed scholar of human rights and international law, Professor Melander has authored and edited numerous books and articles and is active in a number of international human rights events and organisations.

Trygve G. Nordby, Secretary General of the Norwegian Red Cross, has substantial experience from senior management positions within both the volunteer and public sectors. In the period from 1990 to 1997, he was Secretary General of the Norwegian Refugee Council and Adviser on Return and Integration to the OSCE Mission to Croatia 1998-99. From 1999 to 2001, he worked as an independent consultant in the fields of international humanitarian affairs, management and communication. Before joining the Red Cross/Red Crescent Movement in March 2006, Mr. Nordby was Director General of the Norwegian Directorate of Immigration.

Gro Nystuen, dr. Juris, is Associate Professor of International Humanitarian Law at the University of Oslo. She worked in the Ministry for Foreign Affairs from 1991 to 2005, except from 2000 to 2003 when she was on leave to write her doctoral thesis on the Dayton Peace Agreement at Oslo Law Faculty. While at the ministry, she worked in the Department for International Law; her last position in the ministry was Deputy Director General, head of the Section for Human Rights and Democracy. In addition to public international law in general, she has worked in particular with human rights, international humanitarian law and arms issues, including the Mine Ban Convention. She was stationed at the Norwegian Permanent

Mission to the UN in Geneva (1994-95), and seconded to work as legal adviser at the Yugoslavia Conference for the UN Co-chair, Thorvald Stoltenberg (1995), and for the High Representative in Bosnia, Carl Bildt (1995-1997). She was appointed to chair the Council on Ethics for the Norwegian Government Pension Fund in 2004, and has from 2005 held this office in addition to her teaching position at the University of Oslo.

Peter Otken is a Judge Advocate, Danish Judge Advocate General's Corps. He is a senior Military Prosecutor, primarily responsible for cases concerning members of the Danish armed forces deployed in international operations. He was formerly Special Assistant to the Judge Advocate General for International Humanitarian Law and served as the Military Legal Adviser to Defence Command Denmark (1997-1999). He was deployed as Deputy Legal Adviser to HQ SFOR, Bosnia-Herzegovina (1998) and served as a member of the Danish delegation to the UN Preparatory Commission for the International Criminal Court (1999-2000). Since 1997, he has also taught public international law at the Faculty of Law, University of Copenhagen.

A.P.V. Rogers is Senior Fellow of the Lauterpacht Centre for International Law at the University of Cambridge where he is also Yorke Distinguished Visiting Fellow of the Law Faculty. Formerly Director of Army Legal Services and former Vice-President of the International Humanitarian Fact-Finding Commission, he is the author of the prize-winning book, *Law on the Battlefield* (Manchester, 2nd edition, 2004) and was the general editor of the Ministry of Defence *Manual of the Law of Armed Conflict* (Oxford, 2004).

François Sénéchaud is Head of the Unit for the Relations with Armed and Security Forces, International Committee of the Red Cross (ICRC). A commissioned officer with the rank of major in the Swiss armed forces, he has a law degree from Lausanne University, Switzerland (1989), a certificate in international relations with specialisation in "security policy and disarmament", Graduate Institute of International Studies, Geneva, Switzerland (1991) and an MA in War Studies, King's College London (1992). As a political analyst in the fields of security policy, disarmament and peace support operations with the Swiss General Staff (1992-1993), he was in charge of a study report entitled *The New Environment of Peace Support Operations* written on behalf of the Chief of the General Staff. From 2001 to 2002, Major Sénéchaud served as a scientific collaborator in the field of international law of armed conflicts. In that capacity, he drafted a new field manual entitled *Operational Law for Brigade Commanders and Their Staff*. He also has experience as a legal adviser to the commandant of a multinational brigade. For the ICRC, he served in various capacities such as field delegate, head of office and head of sub-delegation in Croatia (1993), Bosnia (1994), Rwanda (1994-1995) and Peru (1995-1996). Between 1998 and 2000, Major Sénéchaud was based in Guatemala as an ICRC delegate to the armed and security forces of Central America, the Carib-

bean and the United States. His responsibilities included supporting national programmes for integrating the law of armed conflicts into the instruction of armed and security forces in the area.

David Turns is Senior Lecturer, Laws of Armed Conflict, UK Defence Academy. Previously, he was a full-time Lecturer in Law at the University of Liverpool (1994-2007); and a part-time Lecturer at the London School of Economics & Political Science (1990-1994) where he completed both his LL.B. (1987-1990) and LL.M. in International Law (1991-1992) degrees. He was called to the Bar of England and Wales by the Inner Temple in 1992 and also taught at Holborn College and Regent School of Law in London (1993-1994).

LIST OF SEMINAR RAPPORTEURS

Maria Bergram Aas, Research Assistant, Norwegian Centre for Human Rights

Lydia Tujuba Atomssa, Masters Student, Faculty of law, University of Oslo

Charles Côté-Lépine, Masters Exchange Student, Faculty of Law, University of Oslo

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LIST OF OTHER CONTRIBUTORS

Maria Bergram Aas, Research Assistant, Norwegian Centre for Human Rights; she assisted Arne Willy Dahl in finalising the written version of his opening remarks and David Turns with the preparation of his seminar paper, and reported on Göran Melander's presentation.

Mariamah Crona, Research Assistant, Norwegian Centre for Human Rights; she assisted Peter Otken and Ove Bring in finalising the written versions of their opening remarks and reported on Arne Willy Dahl's concluding remarks.

Christine M. Delaney, Masters Student, Norwegian Centre for Human Rights; she proofread Hans-Peter Gasser's seminar paper.

FINAL SEMINAR ANNOUNCEMENT

National military manuals on the law of armed conflict

An international seminar organised in the series of the

Forum for International Criminal Justice and Conflict

by the Norwegian Centre for Human Rights (University of Oslo), the Norwegian Red Cross, the Danish Red Cross, the Finnish Red Cross, the Swedish Red Cross, the Norwegian Defence Command and Staff College, the Norwegian Institute for Defence Studies, and PRIO.

Monday, 10 December 2007 09:00 – 17:00

Henri Dunant Hall, Norwegian Red Cross, Hausmanns gate 7, Oslo

This seminar explores various aspects of national military manuals on the law of armed conflict and some of the challenges concerning their preparation, maintenance and function. As no Nordic state currently has a military manual, the seminar also examines the desirability and feasibility of a joint manual for the armed forces in the region.

The law of armed conflict is a culmination of practice and agreements between warring states meticulously observed and recorded over the centuries. However, it has long proved a major challenge to ensure that the law is known to the armed forces, understood by their members and observed on the ground. Despite its numerous and often highly technical provisions, the law remains notoriously open-textured and indeterminate in key respects. States routinely disagree with one another as to the applicability of certain rules or their interpretation. Many soldiers are left uninstructed on the law due to the indifference, inability or unwillingness of their governments. Factors such as a dearth of competent military lawyers and

particular "corporate cultures" prevalent in parts of the armed forces also undermine compliance.

Articles 82-84 and 87 of the First Additional Protocol of 1977 specifically obligate contracting states to provide competent legal advisers, acquaint military and relevant civilian personnel with the law and require commanders to take preventive and/or punitive action *vis-à-vis* non-compliance by their subordinates. In order to fulfill these obligations, states need to acquire expertise and reference material necessary for a clear, uniform and accurate account of the legal rules – whether they emanate from the law of armed conflict or domestic law, or both as the case may be – that govern military operations. The need is particularly acute for the vast majority of soldiers who are not lawyers themselves and cannot reasonably be expected to resolve complex legal problems without specialist assistance.

Military manuals are meant to help the armed forces clarify those rules of warfare by which their states consider themselves bound. Good manuals offer sound operational guidance to the military in the field and reduce indeterminacies of the rules for their addressees. This seminar focuses on four issue-areas:

- First, what exactly is a national military manual? What does it do? Where within the broad legal, institutional and normative framework of the armed forces – *e.g.*, domestic law including criminal law, military justice, operational doctrine, rules of engagement and battlefield ethics – does a military manual fall? What are the functions and status of military manuals under the law of armed conflict? Are military manuals evidence of state practice and/or *opinio juris*, or neither?
- Second, what has been the experience of states which maintain national military manuals? For whose benefit do these states maintain such manuals – members of their armed forces, officials of government departments, *etc.*? How are the intended beneficiaries of military manuals trained on them? Have military manuals been effective in doing what they are intended to do? In what way, if any, have military manuals affected the conduct of those concerned with the application and observance of the law of armed conflict? What role have military manuals played in peace operations? Would a national as opposed to an international approach to military manuals be appropriate in the context of such operations?
- Third, what subject-matters and areas of law should military manuals include or exclude? How should military manuals deal with the fluid realities of warfare, rapid development of the law of armed conflict and controversial weapons and tactics? How should military manuals cope with the numerous points at which the law of armed conflict overlaps with other fields of international law, such as international human rights law and international criminal law? From whose input, ex-

expertise and perspectives should good military manuals benefit – military lawyers, non-legal military personnel, civilian specialists, Red Cross experts, *etc.*?

- Fourth, is a military manual really necessary for a state which does not have one yet? What, if any, is its added value? What are the pros and cons of a state having or not having a military manual for its armed forces? Are there any conditions for a military manual to be legitimate, feasible and/or useful and, if so, what are these conditions? Might there be a "Nordic military manual"?

The seminar considers these questions by drawing on prominent international experts with extensive experience in the law of armed conflict, military manuals and related fields.

FINAL SEMINAR PROGRAMME

09:00 **Welcome**, by Trygve G. Nordby

09:05 **Opening remarks**, by Gro Nystuen

Session I: Fundamentals of military manuals

09:10 **Remarks of the session moderator**, by Arne Willy Dahl

09:15 **Military manuals, operational law and the regulatory framework of the armed forces**, by Charles Garraway

09:35 **Military manuals, legal advisers and the First Additional Protocol of 1977**, by Hans-Peter Gasser

09:55 **Military manuals and the customary law of armed conflict**, by David Turns

10:15 *Discussion*

10:40 Coffee break

Session II: Experiences with military manuals

11:00 **Remarks of the session moderator**, by Peter Otken

11:05 **The United Kingdom manual**, by Tony Rogers

11:25 **The Canadian manual**, by William J. Fenrick

11:45 **The German manual**, by Wolff Heintschel von Heinegg

12:05 **Military manuals and the challenge of multinational peace operations**, by Dieter Fleck

12:25 *Discussion*

12:50 Lunch sandwiches served at the seminar premises

Session III: Scope and content of military manuals

13:20 ***Remarks of the session moderator***, by Marja Lehto

13:25 ***Incorporating international criminal law***, by Roberta Arnold

13:45 ***Addressing the realities, developments and controversies regarding the conduct of hostilities***, by William Boothby

14:05 ***Incorporating international human rights law***, by Louise Doswald-Beck

14:25 ***Military manuals, an ICRC perspective***, by François Sénéchaud

14:45 *Discussion*

15:10 Coffee break

Session IV: A Nordic military manual?

15:30 ***Arguments for and against a Nordic military manual***, by Göran Melander

16:00 ***Panel discussion***

Moderator: Ove Bring

Panelists: Göran Melander
Gro Nystuen
Charles Garraway
William J. Fenrick
Dieter Fleck

16:50 ***Conclusion and remarks on ways forward***, by Arne Willy Dahl

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National Military Manuals on the Law of Armed Conflict

Nobuo Hayashi (editor)

States are duty-bound to disseminate and ensure respect for the law of armed conflict (LOAC) among their military personnel. A number of national military LOAC manuals have been issued to this end. But what are they exactly? What do they do? Is such a manual really necessary for a state that does not have one yet? What are the experiences of those states which already issue manuals? What areas of law should a good manual cover? These and other questions were considered at an international seminar held under the auspices of the Forum for International Criminal and Humanitarian Law (FICHL) in Oslo, Norway, on 10 December 2007. This publication records the seminar's deliberations and findings. It also contains an introductory article and a checklist prepared by the editor for the benefit of those considering writing a new manual.

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