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Framing Thoughts on the DoD Law of War Manual and this Commentary

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1 INTRODUCTION

The US Department of Defense (DoD) Law of War Manual (the Manual) is a remarkable accomplishment. It is a watershed document that took form over nearly three decades culminating with the publication of the first edition in June 2015. DoD professed its willingness in the Preface to consider changes recommended from users in the field and provided a method for such submissions from experts and academics. It moved with rare (and refreshing) alacrity to ameliorate some of the most egregious flaws in the original text by issuing a Revised Manual less than a year later on May 31, 2016 followed by a second updated edition on December 13, 2016.[1] The stakes in this endeavor are high: debates over the applicability of the laws of war often carry profound policy consequences, including momentous implications for human dignity and the possibility of building sustainable peace following hostilities.

This Commentary and Critique points the way toward further needed improvements, even as it highlights many areas of international consensus that accord with US practice. The Manual is already a highly visible component of the international discourse in this field. It provides an important resource to international experts who continue to debate the contours of law and policy amidst the world's seemingly intractable conflicts. Thus, it provides a useful touchstone for assessing the common threads of legality that bind complex operations conducted in the modern world.

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[1] Unless otherwise noted, all references in this volume to the Manual refer to the Dec. 13, 2016 edition, which is the most current at the time of this writing.

The Manual is remarkable because for the first time in American history it represents the single most authoritative consolidation of US policy and legal positions regarding the lawful conduct of hostilities. Its 7,029 footnotes[2] contain a rich set of references to US law and practice, as well as ample offerings from US policy documents, current operational guidance, and selected academic commentary. It also has inherent value as a rich compilation of historical examples and precedent ranging, among many other sources, from General Petraeus's Rules of Engagement guidance, to policy speeches by key US officials, to details of US statutory guidance. The Manual exceeds the 1956 Army Law of War Manual by nearly 1,000 pages, yet shares the primary purpose of any military manual, which is to facilitate the lawful conduct of military operations across the spectrum of modern hostilities. As two distinguished American scholars have noted:

> Manuals are not an end in themselves. They are an instrument for achieving an end: the prescription and application of a law of armed conflict that tempers the harshness and cruelty of combat and confines human and material destruction to targets of military necessity and utility.[3]

In its opening paragraphs, the Manual acknowledges that it is "not a definitive explanation of all law of war issues."[4] It nonetheless "seeks to address the law of war that is applicable to the United States, including treaties to which the United States is a Party, and applicable customary international law. It provides legal rules, principles, and discussion, particularly with respect to DoD practice." The Manual significantly advances these important goals, notwithstanding the reality that its voluminous approach often obscures the precise take-away needed by tactical level war-fighters and lawyers.

Consistent with the nature of the Manual, this volume contains contributions from some of the world's most remarkable practitioners and scholars in the field. Every author in this Commentary and Critique shares a deep commitment to the rule of law and to the core purposes of the laws and customs of warfare or, as many North Atlantic Treaty Organization (NATO) manuals refer to the same field, the "law of armed conflict" (LOAC).[5] DoD

[2] See Table 1.1 for a breakdown of notes by source and by chapter.

[3] Michael Reisman and William Lietzau, "Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict" (1991) 64 *International Law Studies* 12.

[4] DoD Law of War Manual, ¶ 1.1.2.

[5] The phrase "law of armed conflict" serves a sort of straddling function between "the laws of war" and "international humanitarian law." Many NATO militaries and other experts prefer usage of "the law of war," and manuals of, *inter alia*, Australia, Canada, UK, and Germany employ that term in addition to many US policy documents. Authors in this volume frequently use the shorthand annotation LOAC to refer to the phrase "the law of armed conflict."

accepts and occasionally uses the nearly synonymous phrase "international humanitarian law." These chapters do not form an unbalanced polemic taken together, but guide readers into probing inquiry of the Manual's place within the larger field of international humanitarian law. DoD construes the term "law of war" as having "the same substantive meaning" as the increasingly common phrase "international humanitarian law." The Manual is careful to note the DoD view that the latter phrase has narrower application due to the omission of the law of neutrality (which in itself is a bit curious as the entirety of Chapter XV addresses the law of neutrality).[6] The approach of these authors is deeply thoughtful but of necessity an incomplete summation of every detail of this ponderous document. They focus on the many laudable aspects of the Manual, yet do not shirk examination of its flaws.

In the memorable framing of Yoram Dinstein, "every single norm" within the laws and customs of armed conflict operates as "a parallelogram of forces; it confronts an inveterate tension between the demands of military necessity and humanitarian considerations, working out a compromise formula."[7] Since the end of World War II, the United States military has fought three conventional armed conflicts with other States for a cumulative period of less than five years. In the same span, it has conducted counterinsurgency operations in three major conflicts and numerous smaller operations lasting more than a cumulative thirty years. Previously promulgated American military manuals proved to be insufficient over the years because they failed to incorporate evolving treaty obligations and became less fitted to the changing character[8] of modern armed conflicts as the decades passed and World War II-era technologies became obsolete. The Manual is notable for its inclusion of chapters devoted to modern weaponry such as lasers,[9] as well as Air and Space Warfare[10] and Cyberwar.[11]

American commanders have frequently been faced by enemies seeking to use the constraints of humanitarian law as a force multiplier to facilitate asymmetric warfare that helps negate the technological superiority of US forces. The Manual accordingly addresses many modern operational realities. For example, the Manual speaks to an array of modern themes such as

[6] DoD Law of War Manual, ¶ 1.3.1.2.

[7] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed. (Cambridge University Press, 2010), 5.

[8] Many experts in the field and military practitioners argue persuasively that the nature of warfare has changed little; rather its character and contexts have undergone dramatic evolution. Hence, Pembroke College at Oxford maintains the Changing Character of War Centre, www.ccw.ox.ac.uk.

[9] DoD Law of War Manual, ¶ 6.15. [10] *Ibid.*, Chapter XIV.

[11] See Chapter 15 of this book for a thoughtful assessment of the limitations of Chapter XVI of the Manual.

the use of human shields, the modern meaning of the commander's duty to take "feasible measures" to eliminate human suffering and damage to protected property, and the evolving law of occupation in the aftermath of the occupation of Iraq. In recent decades, even as the corpus of the law of war developed, Article 3 Common to the 1949 Geneva Conventions and its progeny in the form of the welter of applicable human rights treaties have become load-bearing pillars of modern conflicts and flashpoints for disputes concerning the applicability of particular protections for civilians. When it was promulgated in 1956, the Army Field Manual that formed the impetus for beginning the effort to draft the Manual confined its entire discussion of that body of law to one paragraph. Though the text of Common Article 3 represented the sole aspect of the 1949 Conventions touching on armed conflicts not of an international character, such non-international armed conflicts (NIACs) merited a full chapter in the Manual some sixty-six years later.

In its broadest contours, the Manual is part hornbook, part pablum, part practical guidance, yet suffused throughout with an overlay of specific US policy imperatives. For many practitioners or lawyers, the hornbook function of the Manual will be helpful. For example, the text defines the commonly encountered concept "*hors de combat*" that is used without explanation in Common Article 3 of the 1949 Geneva Conventions and Article 41 of Additional Protocol I.[12] There are many other places where drafters defined key terms such as "*lex specialis*"[13] and "*tu quoque*."[14] Experts will note that DoD drafters in many instances have not selected the most pertinent sources supporting such definitions, but they are nevertheless substantively accurate. At the other extreme, there are hundreds of instances where the main text states a treaty rule using identical language drawn from international law, but the footnote merely cites the relevant article and restates precisely the same

[12] DoD Law of War Manual, ¶ 5.9.1 ("Notes on Terminology. Hors de combat is a French phrase that means 'out of the battle.' It is generally used as a term of art to mean persons who may not be made the object of attack because they are out of the fighting and who therefore must be treated humanely."). The accompanying footnote makes clear that persons who are hors de combat are legally entitled to be equated with a civilian who remains uninvolved in the conflict. To do so is to place at risk the respect, based on law, to be accorded to the civilian population.

[13] *Ibid.*, ¶ 1.3.2.1 (The maxim *lex specialis derogat legi generali* means that "[a]s a rule the special rule overrides the general law." The rule that is more specifically directed towards the action receives priority because it takes better account of the particular features of the context in which the law is to be applied, thus creating a more equitable result and better reflecting the intent of the authorities that have made the law.)

[14] *Ibid.*, ¶ 18.21.2 (The international law doctrine *tu quoque* may be understood as an argument that a State does not have standing to complain about a practice in which it itself engages.)

language in quotation marks.[15] Such redundancies add to the Manual's bulk and do not advance its objectives.

The Manual also contains numerous instances where drafters inserted bland phraseology as the predicate for more detailed legal and policy discussions. Such attempted aphorisms appear throughout the text. The reader may groan reading the obvious truism that the "trial and punishment of POWs must comport with the rules prescribed by the GPW [1949 Geneva Convention III Relative to the Treatment of Prisoners of War],"[16] but note that it serves a constructive purpose by directing the reader to the relevant provisions found in Chapter IX dealing with the subject in more detail. Other trite sentences such as the reminder that "[a]dversary use of human shields can present complex moral, ethical, legal, and policy considerations" provide the placeholder to support citation to other US policy documents, speeches, or US cases.[17]

In sum, readers must be diligent to decode the Manual with some precision and consider the totality of its many cross-references. The merits of particular propositions can be assessed only after reconstructing the baseline of support marshalled by DoD, which is seldom limited to one concise section, as well as the actual merit of supporting citations. It is not an intuitive document that can be rapidly referenced. The Manual's complexity, along with the interconnected crosscurrents of law and policy, create some uncertainty at the macro level regarding its most important function. Some national manuals, such as the 2006 Australian manual were written primarily for commanders; principles are plainly stated, and citations are almost uniformly to the applicable treaty provisions. The Manual accords with the 2001 Canadian Joint Service Manual, the German Manual, and the UK Manual in providing extensive citations to the relevant law, key policy documents, and other explanatory texts. Because modern armed conflicts are infrequently conducted by a single service acting alone, the trend toward consolidated joint service manuals that assist commanders and their lawyers is likely to continue.[18]

[15] *Ibid.*, ¶ 18.9.3 (replicating the Grave Breach provisions of the Geneva Conventions in verbatim text and in sequential footnotes), ¶ 4.12 (duplicating language from Art. 27 of the Second Geneva Convention), ¶ 9.17.3 ("Canteen profits shall be used for the benefit of the POWs, and a special fund shall be created for this purpose," citing Art. 28 of the Third Convention and including identical language).

[16] *Ibid.*, ¶ 18.21.4.1.

[17] *Ibid.*, ¶ 5.12.3.4 (directing the reader in turn to the Presidential Policy Directive issued on June 24, 2015 by President Obama entitled *U.S. Nationals Taken Hostage Abroad and Personnel Recovery Efforts*).

[18] Earle A. Partington, "Manuals on the Law of Armed Conflict," in Frauke Lachenmann and Rüdiger Wolfrum (eds.), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2017), 673, 677.

As a result, the Manual seldom presents clear statements that are self-supporting and independent of the larger whole. The DoD decision to deviate from prior US practice in Field Manual 27–10 by eliminating the concise index magnifies the importance of careful reading and comparison of companion texts. Taking the time to consider the interdependent sections will enable readers to evaluate the relative merits of US policy promulgations as authoritative statements of law and practice. Likewise, the decision not to produce a published text and rely instead on purely digital forms makes the document more difficult for a casual user to decode successfully. Phrased another way, readers must carefully consider the Manual's many policy pronouncements as part of an interwoven totality. Of course, this very feature of the Manual erodes its utility as a ready reference in the midst of operational demands. The chapters in this Commentary and Critique endeavor to assess various policy and legal statements in the entirety of the holistic text.

2 THE NEED FOR A NEW AMERICAN MANUAL

Despite its internecine nature and overall complexity, The Manual is a notable bureaucratic achievement. The United States ratified the 1949 Geneva Conventions in 1955, and issued the classic Field Manual, entitled *The Law of Land Warfare*, only a year later as Department of the Army Field Manual 27–10, known in expert circles around the globe as FM 27–10. Efforts to update FM 27–10 began as a side project under the leadership of one of the most distinguished law of war experts in the world, who subsequently shared drafts with a coterie of highly influential international experts. Although reviewed by officials or scholars affiliated with close US allies, authorship of its early draft was limited to a small cadre of lawyers in the DoD General Counsel's Office. The Preface to the Manual merely notes that:

> The origin of this manual may be traced to work in the late 1980s to update Department of the Army Field Manual 27–10, The Law of Land Warfare. Then, in the mid-1990s, work began on an all-services law of war manual to reflect the views of all DoD components. It was envisioned that the manual would provide not only the black letter rules, but also discussion, examples of State practice, and references to past manuals, treatises, and other documents to provide explanation, clarification, and elaboration. The present manual has sought to realize that vision and thus it falls within the tradition of the 1914 War Department manual, as well as the 1989 and 1997 Commander's Handbook on the Law of Naval Operations, which also adopted this general approach of an annotated manual.

To those experts from around the world who know him and respect his work and decades of service to the American Republic, this bland reference in the Manual to the enduring value of Hays Parks's work is puzzling, and indeed off-putting. He was the architect of the Manual for some two decades while serving in the Office of the US Army Judge Advocate General, before he moved to the DoD Office of General Counsel prior to his retirement. While acknowledging his role only implicitly in a footnote,[19] the Manual does reference Mr. Parks's works as substantive authority for the US position in more than thirty instances. His vision of an apolitical document based on the integrity of the law, rather than political expedience or situational convenience, provided the driving force behind early drafting. The Manual achieved consensus from the US Armed Forces as early as 2010 grounded in the firm position that it should represent a definitive statement of the law rather than seeking to advance political formulations.

In this sense, it represented the culmination of the American articulation of key LOAC principles that began during the Civil War era. The first comprehensive effort to describe the law of war in a written code, the Lieber Code, began as a request from the General-in-Chief of the Union Armies, based on his confusion over the distinction between lawful and unlawful combatants.[20] General Henry Wager Halleck recognized that the LOAC never accorded combatant immunity to every person who conducted hostilities, but confronted the necessity for providing pragmatic guidance to Union forces adapting to the changing tactics of war.[21] On August 6, 1862, General Halleck wrote to Dr. Francis Lieber, a highly regarded law professor at the Columbia College in New York, to request his assistance in defining guerrilla warfare.[22] This request, appropriately described as the catalyst that precipitated more than 150 years of legal effort that produced the modern web of international agreements and the publication of the Manual's first edition in 2015, read as follows:

> My Dear Doctor: Having heard that you have given much attention to the usages and customs of war as practiced in the present age, and especially to the matter of guerrilla war, I hope you may find it convenient to give to the public your views on that subject. The rebel authorities claim the right to send men, in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses and to destroy property and persons within our lines.

[19] DoD Law of War Manual, v fn. 15.
[20] Letter from General Halleck to Dr. Francis Lieber, Aug. 6. 1862, reprinted in Richard Shelly Hartigan ed., *Francis Lieber, Lieber's Code and the Law of War* (Chicago: Precedent, 1983), 2.
[21] *Ibid.* [22] *Ibid.*

> They demand that such persons be treated as ordinary belligerents, and that when captured they have extended to them the same rights as other prisoners of war; they also threaten that if such persons be punished as marauders and spies they will retaliate by executing our prisoners of war in their possession. I particularly request your views on these questions.[23]

The Union Army issued a disciplinary code governing the conduct of hostilities, known worldwide as the Lieber Code, as "General Orders 100 Instructions for the Government of the Armies of the United States in the Field" in April 1863.[24] General Orders 100 was the first comprehensive military code of discipline that sought to define the precise parameters of permissible conduct during conflict; it in turn spawned military manuals in other nations. From this baseline, the principle endures in the law today that persons who do not enjoy lawful combatant status are not entitled to the benefits of combatant status derived from the laws of war, including prisoner of war (PoW) status,[25] and are subject to punishment for their warlike acts.[26] There are many other instances of text where the Manual neatly summarizes extant LOAC and illustrates the consistency of the US interpretation with that of key allies.[27]

The legal landscape changed dramatically in the six decades between the publication of FM 27–10 and the 2016 Revisions due to a welter of new treaty provisions. Chapter XIX of the Manual provides a summation of "DoD views and practice relating to those documents as of the date of publication of this manual." The Manual as issued in 2015 was an overdue compilation for three important reasons. As the Preface notes, early work grew out of a "concept plan for a new all-Services law of war manual that would be a resource for implementing the 1977 Additional Protocols to the 1949 Geneva Conventions." At the time, US experts expected ratification of the Protocols because the United States had been deeply engaged in their negotiation. Forty-one years after the adoption of the 1977 Additional Protocols, the United States

[23] *Ibid.*

[24] For a description of the process leading to General Orders 100 and the legal effect it had on subsequent efforts, see Grant R. Doty, "The United States and the Development of the Laws of Land Warfare" (1998) 156 *Military Law Review* 224; George B. Davis, "Doctor Francis Lieber's Instructions for the Government of Armies in the Field" (1907) 1 *American Journal of International Law* 13.

[25] DoD Law of War Manual, ¶ 4.3 ("Unlawful combatants" or "unprivileged belligerents" are persons who, by engaging in hostilities, have incurred one or more of the corresponding liabilities of combatant status (e.g., being made the object of attack and subject to detention), but who are not entitled to any of the distinct privileges of combatant status (e.g., combatant immunity and PoW status)).

[26] *Ibid.*, ¶ 18.19.3.7.

[27] See *ibid.*, ¶ 18.3–18.4 (discussing the law of reprisals and describing its contours and practical considerations among nations).

has yet to ratify either treaty despite early aspirations to do so, yet operates in coalitions alongside States that are fully bound, subject to express national reservations, to the treaty texts. For much of that period, US legal and policy positions *vis-à-vis* the Protocol I articulations of law were scattered in academic literature, litigation materials and final opinions, treaty negotiation positions, and formal diplomatic responses to nongovernmental initiatives. Thus, the Manual purports to stake out definitive positions on many of the key issues arising from the 1977 Additional Protocols. Areas of Protocol I practice where allies would expect clear statements that the United States accepts a particular provision as binding law by virtue of custom, yet do not find such express admissions in the Manual, are among its persistent wrinkles.

The Manual does address US policy regarding an array of other treaties that post-date FM 27–10, *inter alia* the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects Certain Conventional Weapons Convention and its Protocols (the CCW provisions);[28] the Rome Statute of the International Criminal Court;[29] the Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of April 10, 1972 (Biological Weapons Convention);[30] the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of May 18, 1977 (ENMOD Convention);[31] and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of January 13, 1993 (Chemical Weapons Convention);[32] the Ottawa Landmines Convention; and the Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict. In doing so, it addresses many of the key controversies of the post 9/11 era.[33]

Second, as noted above, technological developments have generated intense debates among practitioners, resulting in an entire chapter on information and cyberwar operations.[34] In contrast to the single page devoted to weapons in FM 27–10, the Manual contains a ninety-seven-page chapter on

[28] *Ibid.*, ¶ 19.21.

[29] See Chapter 16 of this book for assessment of the Manual's relationship to the provisions of the Rome Statute of the International Criminal Court.

[30] DoD Law of War Manual, ¶ 19.19. [31] *Ibid.*, ¶ 6.10. [32] *Ibid.*, ¶ 19.22.

[33] For a concise explanation of the Manual's approach to these important debates, see DoD Law of War Manual Workshop, The American Bar Association's Standing Committee on Law and National Security (Jan. 9, 2017), www.abanet.org/natsecurity.

[34] See Chapter 15 of this book for a thoughtful assessment of the limitations of Chapter XVI of the Manual.

weapons.[35] The extended period of revisions and interagency debate between 2010 and the Manual's first edition in June 2015 proved inconsequential, as that chapter changed little during interagency discussion.

Finally, the synergy of sources cannot be forgotten. FM 27–10 and other US service manuals preceded the generation of jurisprudential developments that have become widely cited as forming kernels of customary international law as the ad hoc and hybrid tribunals matured. The Manual cites the jurisprudence of international tribunals, but to my taste is far too hesitant in doing so. At the same time, the International Committee of the Red Cross (ICRC) has convened expert groups in recent years to publish guidance on such themes as the law of occupation and the meaning of "direct participation in hostilities." The massive ICRC Customary Law Study purports to prescribe definitive norms of State practice based in large part on military manuals around the world. By an odd quirk of history, the first revisions to the DoD Law of War Manual were released in May 2016 almost simultaneously with the newly Revised ICRC Commentary on the First Geneva Convention. The conjunction of the DoD Law of War Manual added an authoritative text that is highly relevant to the unresolved contestations among experts over *what* the Geneva Conventions, the 1977 Additional Protocols, and other relevant treaties mean, as well as *how* best to read and implement their tenets.

The Law of War remains in a transformative period in many areas, and the Manual provides concrete US perspectives to inform those debates. As only one of many possible examples, the Manual and the Revised ICRC Commentary reach diametrically opposite conclusions on the question of whether wounded and sick members of the armed forces participating in conflict may be categorically excluded from the scope of the proportionality assessment that commanders must undertake.[36] DoD revised the Manual to highlight the US perspective on this point. The Manual restates the truism that wounded and sick members of the armed forces may not be made the object of attack, but nonetheless excludes them from the scope of the prohibition on disproportionate attacks on the ground that they are deemed to have "assumed" such a risk. It also notes that those planning or conducting attacks may consider such military personnel as a matter of practice or policy when applying the proportionality principle.[37] The Revised ICRC Commentary, on the other hand, considers that "in view of the specific protections accorded to

[35] DoD Law of War Manual, ¶¶ 6.1–6.20. [36] DoD Law of War Manual, ¶ 5.10.1.2.
[37] *Ibid.*, ¶ 7.3.3.1 addressing the wounded, sick, and shipwrecked reiterates this position, noting that combatants who are wounded, sick, or shipwrecked on the battlefield are deemed to have accepted the risk of death or further injury due to their proximity to military operations.