

Introduction

In July 2015, the United States Department of Defense (US DoD) published its long-awaited *Law of War Manual*¹ ('the *Manual*' or '*DoD Manual*'). It is well known that there had been earlier drafts of this publication, on which the present authors had been invited to comment. Indeed, one of the present authors was a peer reviewer of that earlier text and attended a meeting in Charlottesville, Virginia at a time when its publication appeared to be imminent. There followed, however, a period in which that text was the subject of reassessment and amendment, and it is a revised text that has now been published under the authority of the US DoD.

The United States is to be congratulated on its decision to publish a manual on this topic, a decision that cannot have been easy. There is always the fear that by publishing an authoritative text on such a subject, the State may be tying itself to legal interpretations that may prove inconvenient or damaging in light of future, unpredictable circumstances. It must also always be borne in mind that the legal interpretations offered by a State of the stature of the United States are likely to be employed by its adversaries and potential adversaries at times of their choosing and to potentially adverse effect. The operational and rhetorical flexibility that silence may appear to afford may for some officials be an attractive argument against publication. That a country like the United States is prepared to set forth its appreciation of what the law requires, as well as its basis for reaching those conclusions, advances the law itself and gives the US a departmentally approved benchmark against which personnel can be trained in this most important body of law.

On any reckoning, the publication of a military manual on the law of war by the United States is an event of the most considerable significance. Such

¹ *United States Department of Defense Law of War Manual*, Office of the General Counsel, Department of Defense (12 June 2015).

a document would normally be regarded as having the status of State practice – or at least of *opinio juris* – and as representing the United States' official interpretation of the vitally important matters of law therein addressed. The *Manual* does, however, state that the collective view of all departments of the US Government is not necessarily reflected in its pages, and the reader is therefore somewhat left to speculate as to its actual status and claimed authority in international law.

While there has already been discussion of elements of the *Manual*, particularly among United States commentators, there has not yet been a comprehensive published assessment of its contents by commentators from outside the US. This volume is intended to provide that assessment. The present authors have addressed all 1200 pages of the *Manual*, including the two amendments published in 2016, on a paragraph-by-paragraph, line-by-line and sometimes word-by-word basis in order to set forth their personal appreciations. It must be stressed that those personal appreciations are based exclusively on the published *Manual* text and do not draw in any sense on versions of the proposed *Manual* previously seen by them.

In order to achieve this detailed assessment of the *Manual's* provisions, sufficient of the propositions given in the *Manual* have been reported in the book's text in order that the specific comments will make sense to the reader. Where statements in the *Manual* are considered to be legally correct, this is made clear. By the same token, where criticism seems to be merited, the present authors do not shy away from offering that critique. Throughout, the aim is to offer a fair and balanced assessment with the purpose of assisting the reader to form his or her own view as to the various propositions of law that are being addressed.

In order to assist the reader as far as possible, the *Manual's* chapter numbering system is replicated in this volume, with the *Manual's* roman numeral chapter numbers having their equivalents in this volume in Arabic numerals. The *Manual's* system of section headings is also replicated, and all comments are made referring to the relevant paragraph numbers in the *Manual*, with the specific text that is considered to merit comment being quoted where doing so is considered necessary to ensure clarity of understanding. As the intended purpose of this book is to achieve a detailed assessment of the *Manual* that reflects the personal views of the present authors, the reader will find the present text generally to be lightly footnoted.

When considering the criticisms offered in this book, it should be appreciated, as the present authors do, that to prepare and publish a military manual on the present scale is a very considerable task involving much scholarship. The present authors congratulate the United States for its decision to publish

and hope that their comments will be accepted in the spirit in which they are offered, namely as constructive suggestions.

As even the most casual observer of the *Manual* will note, it is a very lengthy document in which there is extensive reference to authorities in the very numerous footnotes accompanying its formal text. The present authors largely focus their comments on the main text, but refer where necessary to specific footnotes in order to develop relevant points of critique. A couple of comments should, however, be made here about the footnotes in the *Manual*. They often cite internal memoranda, academic articles, speeches of officials, documents transmitting treaties for consideration of ratification and similar items. It is often unclear whether these texts are being cited as purported legal justification for the proposition of law being advanced in the *Manual's* main text, or whether they are intended merely to explain the US view of a particular matter.

It should therefore be recalled that it is the general practice of States supported by *opinio juris*, not the practice of an individual State, that must be demonstrated to establish a customary law rule. Moreover, and as a matter of international law, if the United States has become a party to a particular treaty, its obligations under that treaty fall to be determined by reference to the normal rules of treaty interpretation, taking into account any relevant statements of interpretation or reservations that the United States may have submitted, and that have not been rejected by the other States party. If the interpretation argued in the *Manual* is not supportable by applying these rules of interpretation, then the interpretation becomes legally incorrect and no amount of correspondence between or from senior US Government officials will alter the obligations binding on the United States at the level of international law.

Another point of a general nature concerns the importance of identifying which rules are customary in nature, being something that the *Manual* all too frequently avoids doing. A reader of the *Manual* will be concerned to know which rules are recognised by the US as customary not just because they will be the rules by which the US considers itself bound under customary law. That reader will also wish to know by which rules the US considers an adverse party, or for that matter some other State or armed group operating with the United States, to be bound, as this will identify the behaviours to be expected from that State or group, and will be the basis for arguing that there has, or has not, been a legal breach. While the *Manual* occasionally identifies certain rules that are considered to be customary, it does not address the matter consistently. The present authors consider that this is a matter that requires rectification.

Comment may be made in the following chapters because the relevant passage is of particular legal value, because it raises issues of legal interest, because it contains assertions that can be questioned or for some other reason. It should not be assumed that the present authors necessarily agree with all of the statements to which no reference is made in the present text. Indeed, the challenge in preparing a book of this nature is to limit sufficiently the scope of the paragraphs that are considered and of the comments that are made with a view to achieving an overall text that is of manageable length, that discusses the issues with the required clarity and that, it is hoped, adds value. That is what is being attempted here. When considering any words of criticism, however, the reader should bear in mind, as the present authors have done, the difficult task that the writing of a manual of this sort represents, and should appreciate the scholarship and hard work that it represents accordingly.

It is appreciated that two sets of amendments have been published by the DoD since the appearance of the original *Manual* text. There were two possible approaches to that situation. The first would have been to prepare the present volume on the basis of the *Manual* text as most recently amended. However, the present authors could not know when further amendments might appear. Moreover, the *Manual* did originally appear and was published in its June 2015 version, on which it is therefore legitimate to comment. Chapters 1 to 19 of this book therefore address the corresponding chapters of the *Manual* in their original, June 2015 form, and Chapter 20 considers the amendment lists that have appeared as at the date of publication. The present authors plan to publish comment on any amendment lists that appear after the publication of the present book by electronic means to be agreed with the publishers.

The present authors stress that this book reflects their personal views on the various topics addressed. They do not seek to represent the view of any Government, State or institution, and they absolutely accept that other observers may well have differing views. Their purpose in publishing the present text is not necessarily to seek to persuade the reader of the correctness of their own view as such, but rather, where appropriate, to place before the reader their own appreciation based on their own collective experience.

THE READERSHIP

The target audience for this book consists, essentially, of the users of the *DoD Manual* itself. Military lawyers, commanders, specialists in military doctrine, military staff colleges, ministry and military policy staffs, academics and all

those with an interest and/or professional involvement in the conduct of military and other operations associated with conflict will all benefit from this book. The book has, however, also been carefully written as a self-standing text so that its readers will gain a thorough view of the law of war as a whole. The title has therefore been carefully chosen in order to reflect this.