

# Article

## Failing Our Troops: A Critical Assessment of the Department of Defense Law of War Manual

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## INTRODUCTION

In June 2015, the Department of Defense (DoD) General Counsel issued a massive new manual intended to provide the U.S. military with its first unified guidance on the international law governing armed conflict. U.S. armed forces previously had to rely on individual service publications that were frequently out of date and sometimes inconsistent, particularly with respect to the interpretation of customary legal rules. The goal behind the new 1,200-page volume, matter-of-factly titled *The Department of Defense Law of War Manual*,<sup>1</sup> is thus admirable, and the effort long overdue. Unfortunately, as this Article will argue, the Manual fails to meet the real needs of our military personnel for definitive, and accessible, legal guidance due to its critical shortcomings in both sub-

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1. GENERAL COUNSEL OF THE DEP'T. OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL (2015) [hereinafter 2015 MANUAL], <http://archive.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf>. A new version, containing very minor updates was issued in May 2016; the most recent update was issued in December of that year. See GENERAL COUNSEL OF THE DEP'T. OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL (2016), <https://www.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190> [hereinafter LOW MANUAL].

stantive content and form, while some provisions actually disserve larger U.S. national interests.

Even if it was true in his age, the maxim famously attributed to Cicero, “*inter arma leges silent*”—in time of war the laws are silent—has long since been rendered obsolete.<sup>2</sup> Today, the conduct of hostilities is governed by a complex set of international legal mandates contained in a large overlapping body of multinational treaties and customary law rules. Although the long history of wartime horrors and the steady stream of media reports of atrocities in current conflicts create the impression that the law of war is violated with impunity, this is not entirely accurate. While badly dated in some respects, the U.S. Army’s 1956 Law Of War Field Manual (FM 27-10, still in effect as of early 2017), notes violators’ liability to prosecution under both military and regular domestic law, and proclaims “[c]ommanding officers of United States troops must insure [sic] that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.”<sup>3</sup> Offenders may also be prosecuted by the enemy, by third-party states relying on universal jurisdiction, and by international tribunals. As British law of war expert Charles Garraway noted in describing the essential functions of national military manuals, “If service personnel are expected to act within the 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.”<sup>4</sup> The United States thus owes its military personnel clear, comprehensive, and legally authoritative guidance on the law of war.

The importance of law of war compliance goes well beyond avoiding criminal prosecution, however. Violations undermine overall war efforts, diminishing prospects for success. In crafting this body of law, states struck a deliberate balance between permitting the military actions necessary to prevail, and providing humanitarian protections for civilians and fighters placed *hors de combat* by wounds, sickness, or capture. While less well-informed soldiers and political leaders may chafe at perceived restrictions, in reality states have granted themselves all the authority necessary to prevail, including the right to use lethal force even when it predictably results in “collateral” civilian casualties. Astute U.S. commanders from the time of George Washington on have recognized the strategic importance of complying with the rules of war in order to maintain political support for their cause regardless of whether the enemy reciprocated.<sup>5</sup> Unsurprisingly, the Army’s new counterinsurgency manual emphasizes this point, declaring that to “lose moral legitimacy” is to “lose the

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2. GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 3-7 (2010).

3. DEP’T OF THE ARMY, FM 27-10, *THE LAW OF LAND WARFARE*, Change No. 1, 182 (1976) [hereinafter FM 27-10].

4. Charles Garraway, *Military Manuals, Operational Law and the Regulatory Framework of the Armed Forces*, in NATIONAL MILITARY MANUALS ON THE LAW OF ARMED CONFLICT 45, 47 (Nobuo Hayashi ed., 2d ed. 2010).

5. See, e.g., DAVID HACKETT FISCHER, *WASHINGTON’S CROSSING* 375-79 (2004); SOLIS, *supra* note 2, at 13.

war,” and describing how French use of torture led to its defeat in Algeria.<sup>6</sup> Whether deliberate or inadvertent, noncompliance is costly. U.S. failure to follow legal rules governing belligerent occupation fueled the initial Iraqi resistance,<sup>7</sup> for example, and revelations of detainee abuse at Abu Ghraib correlated with the doubling of insurgent attacks.<sup>8</sup> Providing military personnel explicit guidance on the law of war in a readily accessible form thus serves real national interests.

The consensual nature of international law results in interstate differences depending on which treaties a country has ratified, whatever reservations it entered to them, and whether it has persistently objected to the formation of any customary law rules. The law thus varies from state to state, at least at the margins, and militaries need tailored national legal guidance. This is particularly true for the United States, which has not ratified the two Additional Protocols to the Geneva Conventions of 1949, which were concluded in 1977,<sup>9</sup> leaving its personnel unsure which provisions of these key treaties they must follow as customary law, which they may be expected to apply as a matter of policy, and which mandates they can legally ignore. Moreover, success in coalition operations requires allies fighting together to know specifically what each participating force may and may not do.

A national military manual also serves an important signaling function to enemies, alerting them to the standards with which they will be expected to comply, and the crimes for which their captured personnel risk trial. The United States relies upon the law of war as both a sword—granting the authority necessary to prevail in conflict—and a shield, protecting U.S. personnel from enemy abuse; a comprehensive enumeration of recognized war crimes is therefore essential to protecting our own personnel from unjustified prosecutions by other states.

Credible national manuals also play an important role in the larger international legal milieu, facilitating the evolution of customary international law (CIL) rules. Although some U.S. officials have argued that “state practice” should be assessed based only on conduct on the ground, the International Court of Justice contends that “verbal” acts, such as views states express in official manuals, also constitute evidence of such practice.<sup>10</sup> Even more obviously, by identifying rules that a state is following out of a sense of legal obligation rather than just policy choice, manuals provide evidence of the *opinio juris*

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6. DEP'T OF THE ARMY, COUNTERINSURGENCY, FM 3-24, p. 7-9 [hereinafter Counterinsurgency Manual]

7. See David Glazier, *Ignorance is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq*, 58 RUTGERS L. REV. 121 (2005).

8. See, e.g., *Insurgent Attacks in Iraq Increase Again*, USA TODAY (Apr. 26, 2005), [usatoday30.usatoday.com/news/world/Iraq/2005-04-26-iraq-attacks\\_x.htm](http://usatoday30.usatoday.com/news/world/Iraq/2005-04-26-iraq-attacks_x.htm).

9. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3-608 [hereinafter 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, June 8, 1977, 16 I.L.M. 1442, 1125 U.N.T.S. 609-99 [hereinafter Additional Protocol II].

10. See David Turns, *Military Manuals and the Customary Law of Armed Conflict*, in NATIONAL MILITARY MANUALS, *supra* note 4, at 65-66, 68, 75-76.

necessary for conduct to become binding customary law. As the leading military power, there is little doubt that U.S. officials wish to have substantial influence on the evolution of the law of armed conflict. An authoritative top-level U.S. law of war manual would serve this goal.

Public discussion following the Manual's original 2015 release initially focused on media perceptions that it was biased against journalists, increasing the risk for those seeking to cover events in conflict zones. Academic commentators have subsequently addressed a handful of specific substantive concerns, generally taking issue with one or a small set of positions articulated in the Manual. A particular focus of this criticism has been the Manual's treatment of "proportionality" and precautions in planning and conducting attacks.<sup>11</sup> DoD released a minor mid-2016 update, cosmetically rewriting the section on journalists without significantly altering its substantive content.<sup>12</sup> This was followed that December with a second update refining the treatment of proportionality and requisite attack precautions, addressing some, but not all, of critics' concerns.<sup>13</sup>

This Article endeavors to move beyond these specific issues and provide a broader critical appraisal than any work to date, assessing whether or not the Manual's substance and form credibly meet our military's needs and advance overall U.S. national interests.

Part I considers the Manual's place in the larger context of the law of war, reviewing historical antecedents en route to establishing the appropriate scope for a twenty-first century edition. It identifies several ways in which the Manual fails to measure up to important core attributes for this type of work, such as its uncertain hierarchical standing and lack of interagency concurrence. The Manual's express caveat that it "does not necessarily reflect . . . the views of the U.S. Government as a whole,"<sup>14</sup> leaves military readers unsure if they can count on national support if following its guidance, and undermines its external credibility as an indicator of U.S. national *opinio juris*.

Part II focuses on several problem areas in the revised Manual's substantive content. Its approach to the principle of distinction, for example, effective-

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11. See, e.g., Adil Ahmad Haque, *Off Target: Selection, Precaution, and Proportionality in the DoD Manual*, 92 INT'L L. STUD. 31 (2016) (addressing the three issues identified in the article's title); Jordan Paust, *Errors and Misconceptions in the 2015 DoD Law of War Manual*, 26 MINN. J. INT'L L. (forthcoming 2017) (offering specific criticism of the Manual's treatment of several issues, including herbicides and non-international armed conflict); see also *A Readers' Guide to Our Mini-Forum on DoD's New Law of War Manual*, JUST SECURITY (Aug. 12, 2015, 2:07 PM), <https://www.justsecurity.org/25371/readers-guide-mini-forum-dods-law-war-manual> (summarizing a series of posts by eleven different authors providing these commentators' initial reactions to various aspects of the Manual).

12. See, e.g., U.S. DEP'T OF DEF., *DoD Announces Update to the DoD Law of War Manual* (Jul. 22, 2016), <http://www.defense.gov/News/News-Releases/News-Release-View/Article/852738/dod-announces-update-to-the-dod-law-of-war-manual>; LOW MANUAL, *supra* note 1.

13. For a complete list of these changes, see attachment to DoD General Counsel Letter of Promulgation dated May 31, 2016 in the unpaginated front matter in LOW Manual 2016, *supra* note 1. For a representative critique noting the mixed nature of the latest revisions, see Geoffrey S. Corn, *Initial Observations on the Law of War Manual Revision: Three Ups/Three Downs*, JUST SECURITY (Dec. 14, 2016 11:12 AM), <https://www.justsecurity.org/35531/initial-observations-law-war-manual-revision-three-upsthree-downs>.

14. LOW MANUAL, *supra* note 1, at 1.

ly guts the law of restraining value about what can be attacked. Resurrecting “honor” as a core principle while employing drones flown by invulnerable remote operators—criticized as cowardly and dishonorable in target states<sup>15</sup>—hands media-savvy adversaries a public relations bonanza exploitable to our detriment. And its poorly supported claim of a U.S. right to use expanding bullets—despite universal recognition of doing so as a war crime—places U.S. personnel at significant risk of prosecution.

Part III examines flaws in the Manual’s basic approach to law, including its problematic use of sources, misunderstanding of international law concepts such as “persistent objector” and “specially affected state,” and overstatement of the power of “*lex specialis*” to deny the application of human rights law to conflict situations. It also gives inadequate recognition to the role of treaties in CIL formation. These kinds of errors call into question the validity of many of the Manual’s assertions and will ultimately undermine its international credibility.

Finally, Part IV identifies shortcomings in the Manual’s form and style, as well as critical substantive omissions that impair its utility as a reference for U.S. military personnel needing quickly accessible, complete, and authoritative legal information. These defects include failing to authoritatively provide to U.S. personnel the key information that they need with respect to war crimes and which provisions of the two Additional Protocols of 1977 are binding on U.S. forces. The latter is particularly ironic because providing guidance on the protocols was the original impetus for developing a joint U.S. manual.<sup>16</sup>

The Manual is not without its virtues. It fills some gaps in the sixty-year-old FM 27-10, enumerating rules found in such newer treaties as the 1954 Hague Cultural Property Convention<sup>17</sup> and the 1980 United Nations Convention on Certain Conventional Weapons and its associated Protocols.<sup>18</sup> While many pundits portray law as an impediment to military success,<sup>19</sup> the Manual stresses that it “poses no obstacle to fighting well and prevailing,”<sup>20</sup> and explains why *Kriegsraison geht vor Kriegmanier*—the prior German assertion that “military necessity could override specific law of war rules”—has been definitively rejected.<sup>21</sup> It takes a clear stance against renewed use of torture,<sup>22</sup> declaring that “it would be unlawful, *of course*, to use torture or abuse to interro-

15. See, e.g., Doyle McManus, *U.S. Drone Attacks ‘Backfiring,’ Congress Told*, L.A. TIMES (May 3, 2009), <http://articles.latimes.com/2009/may/03/opinion/oe-mcmanus3>.

16. LOW MANUAL, *supra* note 1, at 184.

17. See *id.* at 1174.

18. See, e.g., *id.* at 1181.

19. See, e.g., Steve Benen, *Carson Makes a Rare Endorsement of War Crimes*, MSNBC: THE NATION BLOG (Feb. 17, 2015, 9:20 A.M.), [www.msnbc.com/rachel-maddow-show/carson-makes-rare-endorsement-war-crimes](http://www.msnbc.com/rachel-maddow-show/carson-makes-rare-endorsement-war-crimes).

20. LOW MANUAL, *supra* note 1, at ii.

21. *Id.* at 53.

22. This stance against torture came at a time when some GOP presidential candidates were articulating renewed support for such practices. See Steve Benen, *GOP Presidential Candidates Voice Growing Support for Torture*, MSNBC (Dec. 2, 2015 11:09AM), [www.msnbc.com/rachel-maddow-show/gop-presidential-candidates-voice-growing-support-torture](http://www.msnbc.com/rachel-maddow-show/gop-presidential-candidates-voice-growing-support-torture).

gate detainees,”<sup>23</sup> with a footnote showing coercion is counterproductive.<sup>24</sup> The Manual rejects “law-free” zones where detainees lack legal protection<sup>25</sup> and also rejects determining legal status via the application of “conclusory” labels such as “enemy combatant”; instead, the Manual requires individual fact-based determinations.<sup>26</sup> Ironically, given its initial issuance under authority of a former CIA general counsel, it makes the important point, overlooked by drone proponents to date, that “only military aircraft are entitled to engage in attacks in armed conflict,”<sup>27</sup> repudiating the legitimacy of CIA drone strikes. This may be internally contradicted, however, by problematic assertions (discussed in Part II), that civilians employed by a state—as compared to “non-state” actors—can serve in traditional military roles).

Despite these positive attributes and modest changes made to the Manual in 2016, this Article concludes that in its current form, the Manual fails both to meet the needs of our military forces for accurate, concise, and authoritative legal guidance, and to faithfully serve larger overall national interests. Exercising authority claimed by the Manual—such as using expanding bullets, or overbroad definitions of what can be lawfully targeted—will predictably undermine support for U.S. war efforts and redound to the advantage of its adversaries. Moreover, past prosecutions have definitively established that compliance with national laws or directives is no defense to war crimes charges.<sup>28</sup> A credible law of war publication must thus reflect the most objective possible assessment of current international law; anything less is a breach of faith with the men and women called upon to risk everything in the service of their country. The DoD Manual fails this test, and should be officially withdrawn until it can be brought up to an appropriate professional standard, or replaced with a volume more faithfully serving the law, our armed forces, and America’s true national interests.

## I. THE DOD LAW OF WAR MANUAL IN CONTEXT

### A. *The Purpose and History of Military Manuals*

As its preface notes, this Manual is the latest entry in a genre that originated during the American Civil War with the colloquially titled “Lieber Code.”<sup>29</sup> Although knowledge of the rules of warfare was a core professional competency for nineteenth-century officers, that conflict saw a massive influx of individuals commissioned directly from civilian life without formal training

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23. *Id.* at 33 (emphasis added).

24. *Id.* at 518 n.52.

25. *Id.* at 508.

26. *Id.* at 99.

27. *Id.* at 927.

28. U.N. WAR CRIMES COMM’N, 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS 160-61 (1949).

29. LOW MANUAL, *supra* note 1, at iii; *see also* FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863), [https://www.loc.gov/rr/frd/Military\\_Law/Lieber\\_Collection/pdf/Instructions-gov-armies.pdf](https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Instructions-gov-armies.pdf) [hereinafter Lieber Code].

or military expertise. Columbia University professor Francis Lieber thus proposed to write “a little book on the Law and Usages of War” to address the resulting knowledge gap.<sup>30</sup> After editing by Union commanding general Henry Halleck (a leading international law scholar in his own right) and approval by President Lincoln, it was issued to the Army as *Instructions for the Government of Armies in the Field* under cover of General Order No. 100 in April 1863.<sup>31</sup> The “rules of war” were more customary practice than formal law at that time, so Lieber’s slim volume was not just a restatement.<sup>32</sup> Together with the 1864 Geneva Convention,<sup>33</sup> providing the first treaty protections for the sick and wounded, and the 1868 St. Petersburg Declaration, banning exploding bullets because they inflicted unnecessary suffering,<sup>34</sup> the Code made a seminal contribution to the development of the modern law of war.

Although officially distributed to the Union Army as an overall guide to rules of warfare, some provisions relating to matters like the treatment of escaping slaves,<sup>35</sup> retaliation for enslavement of captured U.S. troops,<sup>36</sup> and the treatment of rebels,<sup>37</sup> were logically intended for Southern adversaries as well. Copies were provided to the enemy, and high Confederate officials, including President Jefferson Davis and Secretary of War James Seddon, demonstrated awareness of—even if not full agreement with—its content.<sup>38</sup>

Lieber’s work provided the model for other national military manuals, the unratified 1874 Brussels Declaration, and the Institute of International Law’s 1880 Oxford Manual.<sup>39</sup> It also significantly influenced the formal codification of land warfare regulations at the 1899 and 1907 Hague Conferences. The Hague Convention rules, recognized as having become CIL by the Nuremberg International Military Tribunal, mandate that armies be provided instructions “respecting the laws and customs of war on land.”<sup>40</sup>

General Order No. 100 was reissued as an expediency during the 1899-1902 Philippine Insurrection. In 1914, the Army published a more comprehensive *Rules of Land Warfare*, including Hague Convention rules, as a serialized

30. For a more detailed history of these developments, see David Glazier, *Ignorance is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq*, 58 RUTGERS L. REV. 121, 155 (2005).

31. See *id.* at 155-57.

32. See Gary D. Solis, Book Review, 107 AM. J. INT’L L. 279, 281-82 (2013) (reviewing JOHN FABIAN WITT, *LINCOLN’S CODE* (2012)).

33. Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 129 Consol. T.S. 361, <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=477CEA122D7B7B3DC12563CD002D6603&action=openDocument>.

34. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, Dec. 11, 1868, 138 Consol. T.S. 297, <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=3C02BAF088A50F61C12563CD002D663B&action=openDocument> [hereinafter St. Petersburg Declaration].

35. LIEBER CODE, *supra* note 29, at 15-16.

36. *Id.* at 20.

37. *Id.* at 42-45.

38. JOHN FABIAN WITT, *LINCOLN’S CODE* 245 (2012).

39. See Glazier, *supra* note 30, at 159-63.

40. Hague Convention (IV) Respecting the Laws and Customs of War on Land § 1, Oct. 18, 1907, 36 Stat. 2277-309 [hereinafter 1907 Hague Regulations].

War Department document.<sup>41</sup> By 1940, the Army's guidance had taken its current form as Field Manual (FM) 27-10, *Rules of Land War Warfare*, which was last substantially revised in 1956 following U.S. ratification of the 1949 Geneva Conventions.<sup>42</sup> That version remained in effect as of early 2017, with only a minor 1976 change reflecting belated U.S. ratification of the 1925 Geneva Gas Protocol.<sup>43</sup> It thus fails to provide any guidance on the roughly two dozen law of war treaties adopted since the Geneva Conventions.<sup>44</sup>

The Army Judge Advocate General's School has informally promulgated an annually revised *Operational Law Handbook* to lawyers in the field; several dozen of each volume's 500-plus pages deal with the law of war.<sup>45</sup> But the 2015 preface cautions in bold text that it "IS NOT an official representation of U.S. policy regarding the binding application of various sources of law, and should not be used as such."<sup>46</sup> It refers the reader to the DoD Manual while also proclaiming that replacement of FM 27-10 with an updated edition (to be re-numbered FM 6-27) "is imminent."<sup>47</sup>

The Air Force Chief of Staff issued that service's only official law of war publication, *Air Force Pamphlet 110-31, International Law – The Conduct of Armed Conflict and Air Operations* in November 1976.<sup>48</sup> The DoD Manual states that this publication was updated in 1980 and includes it among its list of "frequently cited" documents.<sup>49</sup> But other sources report its rescission in 1995 without direct replacement.<sup>50</sup> Like its Army counterpart, the Air Force JAG School has provided informal legal guidance, publishing three editions of *Air Force Operations and the Law* between 2002 and 2014.<sup>51</sup> It too, carries a disclaimer, identifying itself as "secondary authority" and cautioning that it

41. WAR DEP'T, RULES OF LAND WARFARE (1914) (issued as Document No. 467 by the Office of the Chief of Staff).

42. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217 [hereinafter Second Geneva Conventions]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter Fourth Geneva Convention] [hereinafter, collectively, the 1949 Geneva Conventions].

43. See DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, FM 27-10, 1 (1976).

44. See, e.g., *Treaties, States Parties and Commentaries*, INT'L COMM. RED CROSS (ICRC), <http://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByDate.xsp> (last visited Jan. 10, 2016) (listing effective law of war treaties and providing links to lists of signatories and parties).

45. Each version of the handbook issued since 2007 can be accessed via the Library of Congress website, *Operational Law Handbook*, LIBRARY OF CONG., MILITARY LEGAL RESOURCES, [https://www.loc.gov/tr/frd/Military\\_Law/operational-law-handbooks.html](https://www.loc.gov/tr/frd/Military_Law/operational-law-handbooks.html) (last visited Jan. 10, 2016).

46. DAVID H. LEE ET AL., OPERATIONAL LAW HANDBOOK 2015, at i (2015).

47. *Id.*

48. DEP'T OF THE AIR FORCE, AIR FORCE PAMPHLET (AFP) 110-31, INTERNATIONAL LAW – THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (1976).

49. See LOW MANUAL, *supra* note 1, at iii, xvii-xviii.

50. See, e.g., Matthew L. Beran, *The Proportionality Balancing Test Revisited: How Counterinsurgency Changes "Military Advantage,"* ARMY LAWYER Aug. 2010, at 4, 4 n.4.

51. LOW MANUAL, *supra* note 1, at iii.

“should not be used as the basis for action.”<sup>52</sup> Moreover, neither of these JAG publications—distributed only to serving lawyers—would be readily accessible by actual warriors.

The Navy has done the best job of providing legal guidance to its forces via the periodically updated *Commander's Handbook on the Law of Naval Operations*, which bears official status as a Naval Warfare Publication (currently NWP 1-14M) and Marine Corps Warfighting Publication (MCWP 5-12.1).<sup>53</sup> It provides concise, straightforward, stand-alone explanations of law of the sea and law of war principles governing naval operations in both peacetime and conflict. The Naval War College's International Law Department has produced an “annotated supplement” containing detailed source information for those wishing to assess the legal authority underlying specific rules.<sup>54</sup>

As the commanding officer of a guided missile frigate, author Glazier personally kept a copy of the Commander's Handbook close at hand for quick reference. Although the number of military lawyers has expanded over the past few decades, the reality is that they are still generally remote from the scene of most military operations, and typically located at much higher echelons of the chain of command than those actually engaging in direct combat. In one author's experience, the closest naval lawyer was typically on the staff of the commander located two rungs above him in the chain of command. Not exactly someone he could demand immediate legal answers from in time-critical situations, or call upon—and expect to remain in command for long—if he had a question about the legality of complying with an order from an immediate superior. Moreover, commanders are personally responsible for the detailed training of their own units and the preparation of timely tactical guidance to their subordinates, both of which require personal knowledge of the law and the ability to quickly find guidance about unanticipated situations or to refresh one's memory when required.

The Army and Marine Corps have frequently made at least junior legal advisors available to battalion-level commanders (essentially the equivalent of a warship commanding officer) deployed to post-9/11 conflicts in Afghanistan and in Iraq. But this does not obviate the need for a good legal manual. First these lawyers generally lack significant prior experience with law of war issues, and they need ready access to comprehensive guidance on the subject themselves. Moreover, actual ground combat operations in these conflicts often take place on a much lower small-unit level, with key tactical decisions made by non-commissioned squad leaders; junior officers commanding platoons; or, at most, at company level. Realistically, none of these individuals will bring a law of war manual to the battlefield, or consult one under fire even if they have a compact electronic device with them. But they still need access to a well-

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52. KIRK L. DAVIES ET AL., *JUDGE ADVOCATE GENERAL'S SCHOOL AIR FORCE OPERATIONS AND THE LAW*, at i (3d ed. 2014).

53. *LOW MANUAL*, *supra* note 1, at iii-iv, iv n.9.

54. *See id.* at iv nn.9-10. For the most recent version, see *ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* (A.R. Thomas & James C. Duncan eds., 1999).

crafted, readily usable publication when preparing for combat deployments, during after-action reviews, and while conducting training sessions for peers and subordinates.

*B. The Need for a Joint U.S. Law of War Manual*

Our reliance on individual service manuals has seriously shortchanged our warriors. Air Force personnel have lacked any official guidance for more than two decades, while the Army's sixty-year-old volume is necessarily silent on the many significant intervening legal developments. The naval manual has excellent coverage of maritime matters, but predictably gives short shrift to land warfare, requiring the Marines to promulgate the outdated FM 27-10 as a supplemental Marine Corps Reference Publication<sup>55</sup> while leaving naval forces operating ashore, such as Navy special forces (SEALs) and naval construction battalions (SEABEES), in the dark about the extensive set of rules governing land warfare.

Even if these volumes were all current and complete, having each service provide its own legal interpretations makes no sense when U.S. military policy is to fight "as a joint force."<sup>56</sup> The DoD mandates that U.S. forces "comply with the law of war during all armed conflicts,"<sup>57</sup> but the efficacy of joint operations is impaired if service participants bring differing interpretations of law with them. Consider the potential legal chaos that could arise from Air Force and Navy officers with divergent views about permissible targeting jointly planning and conducting an air campaign; ground units calling for air support might have different standards still. Moreover, since most military undertakings are now coalition operations, allied forces must understand the legal restrictions governing each other's conduct. This, too, requires clear national guidance.

Other leading nations are ahead of the United States in this respect. The International Committee of the Red Cross (ICRC) documents Australia, Canada, France, Germany, Indonesia, Israel, Russia, the United Kingdom, and Ukraine as being among those countries that already have unified military legal manuals.<sup>58</sup> The current U.K. version, available commercially from Oxford University Press, is probably the single best summation of the law of war available today.<sup>59</sup> The United States is thus an outlier among leading states with its plethora of official and quasi-official single service publications.<sup>60</sup>

55. U.S. MARINE CORPS, THE LAW OF LAND WARFARE, MCRP 5-12.A (1976), [www.marines.mil/Portals/59/MCRP%205-12.1A.pdf](http://www.marines.mil/Portals/59/MCRP%205-12.1A.pdf).

56. U.S. DEP'T OF DEF., DEP'T OF DEF. DIRECTIVE NO. 2311.01E, DOD LAW OF WAR PROGRAM (2011).

57. Department of Defense Directive Number 2311.01E, DOD LAW OF WAR PROGRAM, May 9, 2006 (incorporating Change 1 of November 15, 2010), <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf> [hereinafter DoD Directive].

58. See International Committee of the Red Cross, *Customary IHL Sources, III. Military Manuals*, [https://www.icrc.org/customary-ihl/eng/docs/src\\_iiimima](https://www.icrc.org/customary-ihl/eng/docs/src_iiimima) (last visited Jan. 12, 2016).

59. U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004) [hereinafter U.K. MANUAL]. Author Glazier has used this manual as his primary text for law school and undergraduate Law of War courses for a number of years.

60. See International Committee of the Red Cross, *supra* note 58.

### C. *Critical Shortcomings of the DoD Manual*

Given that the United States was the first nation to provide its army an authoritative, concise, and stand-alone publication explicating the rules for conducting hostilities, one would expect the new Manual to satisfy these criteria. Despite culminating more than two decades of effort,<sup>61</sup> the new volume nevertheless falls short in each one of these areas.

#### 1. *Uncertain Authority of the Manual*

Each prior “official” manual, starting with the Lieber Code, has been disseminated on the authority of an official or organization within the chain of command and in a recognized format. U.S. personnel understand the hierarchical standing of a general order, field manual, or naval warfare publication. But the Manual enjoys no such pedigree; it is simply a “manual,” issued over the signature of the DoD General Counsel<sup>62</sup>—a civilian outside the chain of command. A military lawyer might understand the General Counsel’s role and authority; most U.S. combatants would not. The one sentence cover letter states only that the Manual was “promulgated pursuant to Department of Defense Directive 2311.01E, *DoD Law of War Program* (May 9, 2006),”<sup>63</sup> failing even to note that only versions of that directive incorporating Change 1 of November 15, 2010 include the relevant guidance.<sup>64</sup> That change expanded the General Counsel’s duties to require that they “[d]evelop and promulgate the DoD Law of War Manual,” declaring that it “will serve as the authoritative statement on the law of war within the Department of Defense.”<sup>65</sup> But there is nothing in those portions of the directive addressed to the military branches that commands each branch to respect the Manual. Instead, each service secretary is still instructed to “[p]rovide directives, publications, instructions, and training so the principles and rules of the law of war will be known to members of their respective Departments.”<sup>66</sup> Fairly read, this language requires the continued publication of service-unique law of war guidance, and the Army’s stated intent to produce an updated field manual implicitly confirms this interpretation.<sup>67</sup>

The Manual itself never claims entitlement to any authoritative standing. The preface merely describes it as a “resource” for DoD personnel<sup>68</sup> and says that “[a]n effort has been made to reflect in this manual sound legal positions based on relevant authoritative sources of the law . . . .”<sup>69</sup>

61. The preface says the Army and Navy agreed conceptually on this approach in the 1970s; however, work on the volume began in the mid-1990s. *LOW MANUAL*, *supra* note 1, at v.

62. *See id.* at i.

63. *Id.*

64. *See, e.g.*, DIR. 2311.001E, U.S. DEP’T OF DEF., *DOD LAW OF WAR PROGRAM* (May 9, 2006), [www.au.af.mil/au/awc/awcgate/DoD/231101p.pdf](http://www.au.af.mil/au/awc/awcgate/DoD/231101p.pdf) (providing the original directive text without the change).

65. DoD Directive, *supra* note 57, § 5.1.3 (incorporating the relevant change).

66. *Id.* § 5.8.1.

67. *See* LEE ET AL., *supra* note 46, at i.

68. *LOW MANUAL*, *supra* note 1, at iii.

69. *Id.* at v.

## 2. Lack of Coordination with Other U.S. Government Agencies

Contemporary legal and political realities require that a credible law of war manual be coordinated across the executive branch, particularly with the Justice and State Departments. Although it may surprise some outside the U.S. Government, the military is generally not the “go to” source for law of war interpretations by national security decision makers. Many Americans had never heard of the Justice Department’s Office of Legal Counsel (OLC) until its controversial opinions on post-9/11 interrogations came to light. While OLC attorneys got the law wrong in several important instances (and those opinions have been rescinded),<sup>70</sup> the take-away is that senior officials are more likely to seek law of war guidance from OLC than DoD. Indeed, the DoD itself sought OLC guidance on interrogation and targeting questions.<sup>71</sup> And it was State Department Legal Adviser Harold Koh, not anyone in the DoD, who provided the initial legal justification for drone employment.<sup>72</sup> U.S. Government organizations thus need a common understanding of the law so that the same answer is provided, regardless of who is asked the question.

Furthermore, the military no longer has a monopoly on U.S. war crimes prosecution. Under both the War Crimes Act and Military Extraterritorial Jurisdiction Act, current and former service persons, as well as DoD employees and contractors, can face war crimes trials in ordinary federal courts.<sup>73</sup> If military personnel are to rely on compliance with the manual as a shield from risk of domestic prosecution, they thus need Justice Department concurrence that the manual accurately reflects the law.

Similarly, the risk of foreign trial calls for coordination with the State Department’s Office of Global Criminal Justice to ensure that the United States is operating on common ground as to what constitutes war crimes. Other State Department elements, including the Office of the Legal Adviser and Bureau of Political-Military Affairs, should also vet the Manual for consistency with U.S. legal interpretations. As the January 2016 Iranian detention of two U.S. Navy boat crews demonstrated, the military often needs the State Department to have its back.<sup>74</sup> To facilitate this support, the DoD must ensure that the legal guidance it provides to its military forces reflects the consolidated interpretation of the U.S. Government.

The lack of formal Justice and State Department concurrence are thus major red flags, highlighting the Manual’s unsuitability for U.S. military use until this shortcoming is rectified. And it should be quite clear that this Manual is not a credible indicator of U.S. national *opinio juris* since it fails to speak for the government as a whole.

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70. JACK GOLDSMITH, THE TERROR PRESIDENCY 142-58 (2007).

71. *See id.* at 152; CHARLIE SAVAGE, POWER WARS 233-34 (2015).

72. SAVAGE, *supra* note 71, at 242-43.

73. *See* 18 U.S.C. §§ 2441, 3261 (2012).

74. *See, e.g.*, David E. Sanger, Eric Schmitt & Helene Cooper, *Iran’s Swift Release of U.S. Sailors Hailed as a Sign of Warmer Relations*, N.Y. TIMES (Jan. 13, 2016), <http://www.nytimes.com/2016/01/14/world/middleeast/iran-navy-crew-release.html>.

### 3. *Problematic Definition of the Law of War*

Modern international law divides rules addressing the use of force into two distinct bodies: *jus ad bellum*, governing resort to force, and *jus in bello*, governing the conduct of hostilities.<sup>75</sup> This bifurcation has two important consequences for conflict participants. First, liability for aggression—criminal violation of *jus ad bellum*—is limited to senior decision makers; subordinates need only worry about conforming their conduct to *jus in bello*.<sup>76</sup> Second, it clarifies that participants in hostilities are personally accountable for complying with *jus in bello* rules regardless of the legality of their side's resort to the use of force.<sup>77</sup> An individual fighter thus has incentive to obey the law of war even if their side is the aggressor.

The overarching DoD Law of War Program directive recognizes this distinction, defining the “law of war” as:

That part of international law that regulates the conduct of armed hostilities. It is often called the “law of armed conflict.” The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.<sup>78</sup>

Inexplicably, the Manual—presumptively drafted in response to that directive—adopts a more expansive definition, defining “law of war” as “that part of international law that regulates *the resort to armed force*; the conduct of hostilities and the protection of war victims in both international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States.”<sup>79</sup>

This departure has two potential consequences. First, it arguably undermines the Manual's legitimacy. The DoD directive provides the Manual's sole claim to official status; by adopting a differing definition, it logically fails to respond to that mandate. If it does not, then it lacks any authoritative standing whatsoever.

More importantly, the Manual's definition has potentially significant consequences for “good order and discipline.” Several modern U.S. military interventions, such as the 1983 Grenada invasion,<sup>80</sup> the 2003 overthrow of Saddam Hussein,<sup>81</sup> and 2014 Syrian operations,<sup>82</sup> have arguably violated contemporary

75. See, e.g., YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 3 (2010) [hereinafter DINSTEIN, *THE CONDUCT OF HOSTILITIES*]; SOLIS, *supra* note 2, at 22; U.K. MANUAL, *supra* note 59, at 7.

76. See, e.g., YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF DEFENCE* 142-44 (2011).

77. See, e.g., DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 75, at 3-4.

78. DoD Directive, *supra* note 57.

79. LOW MANUAL, *supra* note 1, 7 (emphasis added).

80. See, e.g., G.A. Res. 38/7, ¶ 1, U.N. Doc A/RES/38/7 (Nov. 2, 1983) (declaring the Grenada invasion “a flagrant violation of international law”); Christopher C. Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131 (1984).

81. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 364 (2008) (noting the personal statement by U.N. Secretary General Kofi Annan that the invasion was unlawful and its condemnation by numerous countries and international organizations).

82. See, e.g., Eric Posner, *The U.S. Has No Legal Basis to Intervene in Syria*, SLATE (Aug. 28, 2013, 5:17 PM), [www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2013/08/the\\_u\\_s\\_has\\_](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/08/the_u_s_has_)

*jus ad bellum* mandates. The bifurcation of *jus in bello* and *jus ad bellum* rules absolves individual soldiers from responsibility for the resort to hostilities, allowing states to command service members to participate in operations without risk that they personally violate international law by doing so. The Army thus fairly sought to prosecute Lieutenant Ehren Watada for refusing to deploy to Iraq on his legally naïve belief that he would commit a crime by participating in what he concluded was an “illegal” war.<sup>83</sup> But defining the *jus ad bellum* as part of the law of war creates a defense for future Watadas, letting them argue for a right, or even an obligation, to disobey deployment orders if they decide that a conflict is unlawful. The Manual itself declares, “[e]ach member of the armed forces has a duty to comply with the law of war in good faith”<sup>84</sup> and “must refuse to comply with clearly illegal orders to commit law of war violations.”<sup>85</sup> But no military can function effectively if its members can individually decide whether or not to participate in a particular conflict.

#### 4. Requirement to Consult Other Sources

Prior U.S. manuals served as stand-alone references, but the new volume specifically cautions that it “is not a substitute for the careful practice of law,”<sup>86</sup> calling for consultation of “relevant legal and policy materials (*e.g.*, treaty provisions, judicial decisions, past U.S. practice, regulations, and doctrine).”<sup>87</sup> But these are not things that personnel in the field have handy, or time to consult, during operational planning. An “official” manual should provide definitive official interpretations and obviate the need for reliance on external materials.<sup>88</sup> The fact that the DoD law of war directive continues to call for production of individual service guidance<sup>89</sup> further undermines the credibility of this publication as a resource for operational forces.

## II. SUBSTANTIVE CONTENT ISSUES

Turning from these general concerns to specific content, the Manual’s peculiar treatment of several major areas of the law of war is specifically problematic, further undermining its utility as a reference for U.S. military personnel. This Part examines in detail the Manual’s handling of core law of war principles; its approach to the issue of unprivileged belligerents (an issue of

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no\_legal\_basis\_for\_its\_action\_in\_syria\_but\_that\_won\_t\_stop\_us.html.

83. See, *e.g.*, John Kifner & Timothy Egan, *Officer Faces Court-Martial for Refusing to Deploy to Iraq*, N.Y. TIMES (July 23, 2006), [www.nytimes.com/2006/07/23/us/23refuse.html](http://www.nytimes.com/2006/07/23/us/23refuse.html); Joel Roberts, Associated Press, *Army Officer Refuses Iraq Duty*, CBS (June 7, 2006), [www.cbsnews.com/news/army-officer-refuses-iraq-duty/](http://www.cbsnews.com/news/army-officer-refuses-iraq-duty/).

84. LOW MANUAL, *supra* note 1, at 1074.

85. *Id.*

86. *Id.* at 1.

87. *Id.* at 2.

88. See W.H. Boothby, *Addressing the Realities, Development and Controversies Regarding the Conduct of Hostilities*, in NATIONAL MILITARY MANUALS ON THE LAW OF ARMED CONFLICT (Nobuo Hayashi ed., 2008) 125, 126 (stating the importance of military manuals providing definitive statements of national positions).

89. See *supra* notes 66-67 and accompanying text.

particular relevance to ongoing U.S. conduct of detention and trials at Guantánamo); and its treatment of several weapons, including expanding bullets, serrated bayonets, and cluster munitions.

*A. The Manual's Treatment of Law of War Principles*

While the law of war consists of hundreds of specific rules defined by both effective treaties and CIL,<sup>90</sup> it is also understood to incorporate several underlying core “principles.” The earliest of these to be formally recognized, “necessity,” was defined by the Lieber code in 1863 as “those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”<sup>91</sup> By 1914, the Army’s manual identified three key principles as the core of the unwritten rules of warfare supplementing treaty law: necessity; “humanity, which says that all such kinds and degrees of violence as are not necessary for the purpose of war are not permitted”;<sup>92</sup> and “chivalry, which demands a certain amount of fairness on offense and defense, and a certain mutual respect between opposing forces.”<sup>93</sup> The 1956 Army field manual continues to refer to these three principles, although neglecting to provide definitions for “humanity” or “chivalry.”<sup>94</sup>

While there is some variance between states and commentators as to which principles they currently acknowledge and precisely how they denominate them,<sup>95</sup> the majority view now articulates four principles: military necessity, humanity (or unnecessary suffering), distinction, and proportionality.<sup>96</sup> Oddly, and arguably contrary to U.S. national interests, the Manual seeks to resurrect “honor” as a separate fifth principle. Honor, or chivalry, was typically recognized as a fundamental principle through the early post-World War II period, but it is typically portrayed as a subset of the principle of humanity today,<sup>97</sup> and reinvigorating its status has predictable adverse consequences for U.S. interests.

Although the DoD Manual asserts that these principles have become less important over time due to the growing body of more specific rules,<sup>98</sup> they are still of major significance because their general nature makes them adaptable to changing circumstances and technology, which can place more specific rules at risk of obsolescence. Perhaps even more importantly, the principles of distinc-

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90. The ICRC CIL study identified 161 CIL rules; it did not assess the customary law status of the 1949 Geneva Conventions which collectively contain more than 400 articles. See *The Principle of Distinction between Civilian Objects and Military Objectives*, n.5 Customary IHL Database, ICRC, [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule7#Fn\\_37\\_5](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule7#Fn_37_5) [hereinafter ICRC CIL Study].

91. Lieber Code, *supra* note 29, at 7.

92. WAR DEP’T, *supra* note 41, at 13.

93. *Id.*

94. FM 27-10, *supra* note 3, at 3.

95. DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 75, at 4-8 (identifying only two “cardinal principles”: “distinction” (protecting civilians) and “unnecessary suffering” (protecting combatants), but recognizing “military necessity” and “humanity” as “driving forces” behind the law).

96. U.K. MANUAL, *supra* note 59, at 21.

97. *Id.* at 23-24.

98. LOW MANUAL, *supra* note 1, at 51.

tion and proportionality continue to impose critical constraints on the conduct of any attack.

### 1. Military Necessity

The Manual's approach to necessity is more aggressively asserted than in the U.K.'s counterpart volume,<sup>99</sup> but to its credit, the DoD version clearly declares that military necessity "does not justify actions prohibited by the law of war," refuting the prior German approach of "Kraegsraeson."<sup>100</sup> It asserts, however, that necessity must be assessed across the larger scope of the conflict; that is to say strategically, rather than on a local basis under prevailing circumstances.<sup>101</sup> Most accounts of military necessity do not address this point per se, other than in the context of attacks, where there seems to be a general consensus that the military value should be judged across the full operation rather than analyzed piecemeal—i.e., by treating each individual component separately.<sup>102</sup> The U.S. position is thus not plainly erroneous, but if its strategic view is meant to be broader than the common approach to attacks, it will prove controversial, if not untenable.

The Manual also challenges the notion, advocated by commentators such as Nils Melzer and Ryan Goodman,<sup>103</sup> that there is now an obligation to use the minimum amount of force in any situation—e.g., to capture, or wound, if possible, rather than kill. While the DoD view likely reflects the *lex lata* currently accepted by states, the Manual does not help its cause by relying on a 1989 Hays Parks memorandum on assassination that states:

In the employment of military forces, the phrase "capture or kill" carries the same meaning or connotation in peacetime as it does in wartime. There is no obligation to attempt capture rather than attack of an enemy. In some cases, it may be preferable to utilize ground forces in order to capture, e.g., a known terrorist. However, where the risk to U.S. forces is deemed too great, if the President has determined that the individual[s] in question pose such a threat to U.S. citizens or the national security interests of the United States as to require the use of military force, it would be legally permissible to employ, e.g., an airstrike against that individual or group rather

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99. Compare *id.* at 52 (defining military necessity as "the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war"), with U.K. MANUAL, *supra* note 59, at 21-22 (defining military necessity as "permit[ting] a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources").

100. LOW MANUAL, *supra* note 1, at 53 ("Kriegsraeson geht vor Kriegsmanier—'necessity in war overrules the manner of warfare'").

101. *Id.* at 57.

102. See, e.g., DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 75, at 94-95.

103. For an articulation of this view, see Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUR. J. INT'L L. 819 (2013). The Manual cites earlier work by Nils Melzer and Jean Pictet. LOW MANUAL, *supra* note 1, 57 n.44 (citing JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL LAW, 75-76; and Melzer, *supra* note 71, at 79).

than attempt his, her, or their capture, and would not violate the prohibition on assassination.<sup>104</sup>

This paragraph is addressing the *jus ad bellum* governing resort to force in peacetime, not the *jus in bello* applicable during armed conflict. Even if we accept the view of DoD that Goodman, Melzer, and Pictet misstate the current law of war, a state only has the option to capture or kill at its true discretion under the *jus in bello*—i.e., in an armed conflict. “Necessity,” as the term is used with respect to self defense, is a more stringent standard than the “military necessity” principle applicable during an armed conflict, requiring the use of force to be a last resort (which must also be proportional to the threat).<sup>105</sup> The Manual itself notes that these are different concepts.<sup>106</sup> There is thus logically a legal obligation to attempt to capture rather than kill wherever feasible when force is employed in self-defense outside the context of an actual armed conflict. U.S. attempts to justify “targeted killings” of suspected terrorists are often unclear as to whether a particular strike is part of an ongoing conflict or a separate act of self-defense, endeavoring to apply the capture or kill rule outside of armed conflict.<sup>107</sup> This approach is controversial, and international authorities, such as the U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions<sup>108</sup> and the International Court of Justice<sup>109</sup> criticize such killing outside an ongoing conflict as violating international law.

## 2. *Humanity*

The Manual next provides reasonably concise treatment of the principle of humanity, which it defines as forbidding “the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose.”<sup>110</sup> In other words, the Manual declares, humanity is “the logical inverse of the principle of military necessity.”<sup>111</sup> But as previously noted, it omits the view found in other modern law of war texts that the principle of humanity now incorporates earlier rules of chivalry.<sup>112</sup>

104. LOW MANUAL, *supra* note 1, at 57, n.45 (quoting W. Hays Park, *Executive Order 12333 and Assassination*, in III CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, 1981-1988, at 3411, 3419 (1989)).

105. See Gabriela Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 145, 146 (2010); Matthew Pollard, *Terrorism, Counterterrorism, and Human Rights*, in 1 HUMAN RIGHTS, HUMAN SECURITY, AND STATE SECURITY: THE INTERSECTION 99, 112 (Saul Takahashi ed., 2014).

106. LOW MANUAL, *supra* note 1, at 42.

107. Blum & Heymann, *supra* note 105, at 168.

108. Special Rapporteur on Extrajud., Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶¶ 40-41, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston).

109. Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194 (July 9) (stating that only attacks from foreign states can give rise to the use of self-defense under Article 51 of the U.N. Charter).

110. LOW MANUAL, *supra* note 1, at 58.

111. *Id.* at 59.

112. See, e.g., U.K. MANUAL, *supra* note 59, at 23-24.

### 3. Proportionality

The principle of proportionality is curiously treated next in the Manual. Most law of war resources place distinction first as that principle establishes the basic rule that combatants must distinguish between valid military objects of attack and impermissible (normally civilian) ones, with proportionality essentially a yardstick by which compliance with distinction is assessed. The proportionality principle permits predictable civilian harm, termed “collateral damage” in military parlance,<sup>113</sup> so long as it is not disproportionate to the military advantage expected from the attack. FM 27-10 expressed this concept six decades ago as “loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.”<sup>114</sup> Modern formulations are typically based on paragraph 5(b) of the 1977 Additional Protocol I’s Article 51, which defines attacks “expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated” as “indiscriminate,” and hence unlawful.<sup>115</sup>

The Manual’s initial treatment of proportionality and requirement (vel non) to take specific precautions when planning and conducting attacks were the subject of a substantial portion of the academic criticism it has received to date.<sup>116</sup> The DoD’s December 2016 reissue focused on these issues, making what it termed “[s]ubstantial revisions to the discussion of the principle of proportionality” and necessary “conforming edits.”<sup>117</sup> In essence, the revisions:

(1) Acknowledge the responsibility to take feasible precautions to reduce civilian collateral damage when planning and conducting attacks; a requirement that the DoD considers to be derived from the proportionality principle.<sup>118</sup>

(2) Clarify the U.S. view that while “feasible precautions must be taken to reduce the risk of harm to military personnel and objects that are protected from being made the object of attack” (e.g., medical facilities, the sick, and wounded), the principle of proportionality per se applies only to the protection of civilians and civilian objects and not to military ones.<sup>119</sup>

(3) Limit the responsibility of subordinates for making independent proportionality determinations by justifying their reliance on decisions made by higher level commanders, unless they know that the commander ordering the attack knew themselves that it was unlawful, or the subordinate has been given broad personal discretion with respect to its conduct.<sup>120</sup>

113. DEP’T OF DEF., JOINT PUBLICATION 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 35 (2016) [hereinafter JP 1-02].

114. FM 27-10, *supra* note 43, at 19.

115. See Additional Protocol I, *supra* note 9, art. 51(4), (5)(b).

116. See, e.g., Haque, *supra* note 11.

117. Description of Changes Promulgated on December 13, 2016, attachment to Jennifer M. O’Connor memorandum of Dec. 13, 2016, inserted in the unpaginated front matter of LOW MANUAL, *supra* note 1, attachment at 1, 5.

118. LOW MANUAL, *supra* note 1, at 249-50.

119. *Id.* at 241-42.

120. *Id.* at 247.

(4) Seek to bolster U.S. credibility by providing examples of situations in which the DoD has exercised restraint in conducting attacks to prevent or minimize civilian harm.<sup>121</sup>

Despite these obviously carefully crafted provisions, the revised Manual still includes its own idiosyncratic and ambiguous definition of proportionality “as the principle that even where one is justified in acting, one must not act in a way that is unreasonable or excessive.”<sup>122</sup> It then conflates the *jus in bello* and *jus ad bellum* once again by relying upon a supporting citation to an 1841 Daniel Webster letter declaring that the permissible scope of an exercise of the right of self defense must be limited by the scope of the necessity, even though that is wholly distinct from the “military necessity” standard of the law of war.<sup>123</sup> Even more bizarrely, the Manual declares proportionality to be “a legal restatement of the military concept of economy of force,” implying that the reason for not destroying more civilians is to preserve military capacity for striking more important targets, rather than reflecting law based on humanitarian considerations.<sup>124</sup>

These issues are relatively trivial, but the issues associated with the Manuals treatment of the principle of distinction—largely overlooked by critical commentary to date—are not.

#### 4. Distinction

The Manual’s definition of “distinction” as requiring parties to a conflict to distinguish “between the armed forces and the civilian population, and between unprotected and protected objects” is basically consistent with other sources.<sup>125</sup> What is truly problematic is the supporting analysis in subsequent chapters of the Manual, which relies on overbroad definitions of military objective, and implicitly shifts a substantial compliance burden from the attacker onto the defender.

Virtually all modern sources accept the Additional Protocol I definition of military objectives as objects “which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>126</sup> The Manual adopts this terminology as well, although citing only to the less widely ratified protocols to the U.N. Convention on Certain Conventional Weapons and the U.S. Military Commissions

121. See, e.g., *id.* at 1247-48 nn.322-28, 250-52 nn.336-45, 253-54 nn.350-51.

122. LOW MANUAL, *supra* note 1, at 60 n. 67

123. *Id.* This letter was part of the resolution of the Caroline incident involving issues of anticipatory self-defense against a non-state actor across a national border. See, e.g., William K. Lietzau, *Old Laws, New Wars: Jus ad Bellum in an Age of Terrorism*, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 383, 387-89 (2003); Le Van Den Hole, *Anticipatory Self Defence Under International Law*, 19 AM. U. INT’L L. REV. 69, 72 (2003).

124. JP 1-02, *supra* note 113, at 73 defines “economy of force” as “the judicious employment . . . of forces so as to expend the minimum necessary combat power on secondary efforts in order to allocate the maximum possible combat power on primary efforts.”

125. See ICRC CIL Study, *supra* note 90, n.5

126. Additional Protocol I, *supra* note 9, art. 53(b).

Act<sup>127</sup> rather than addressing more directly whether the Additional Protocol I rule now constitutes CIL.

But it is the amplification of these terms in later sections of the Manual that ultimately proves more troubling. For example, section 5.6.6.1 provides expansive definitions of the terms “nature,” “location,” “purpose,” and “use.” Every student of the law of war recognizes that an otherwise civilian object can become a legitimate object of attack if put to actual military use; a church can be attacked, for example, if its steeple is being used as a sniper post.<sup>128</sup> But the Manual goes much further, suggesting that under the “location” prong, a civilian object located so that it “*would provide a vantage point from which attacks could be launched or directed*” might be attacked, without any explicit requirement that the enemy be actually making, or at least preparing to make, such use.<sup>129</sup> This definition seems to go much too far based on a reasonable reading of the law, and will predictably lead to uses of force that will prove counterproductive to U.S. strategic interests. Military history (and medieval architecture) buffs will recall the devastating U.S. World War II bombing of the sixth century Abbey of Monte Cassino motivated by fear that the Germans might use it as a military observation post. The perverse irony was that the Germans only entered it after the U.S.-wrought destruction made its ruins an excellent defensive position, and were then able to inflict huge losses on attacking Allied forces.<sup>130</sup>

Similarly, the Manual seems to stretch “purpose” too far. Purpose must logically mean something other than “use,” or it would be redundant for sources such as Article 51 of Additional Protocol I to use both terms successively. Both the Australian and U.K. Manuals differentiate these terms, declaring: “Purpose means the future intended use of an object while ‘use’ means its present function.”<sup>131</sup> The DoD volume cites these Australian and U.K. counterparts, but then dramatically expands this notion from “intended” to include the much more speculative “possible use in the future.”<sup>132</sup> This critical distinction effectively guts the rule of its restraining value. The Manual uses the example of civilian airport runways, as these could be “subject to immediate military use in the event that runways at military air bases have been rendered unserviceable or inoperable.”<sup>133</sup> By not requiring any evidence of intent to make such use, this example makes every civil airport capable of accommodating a military aircraft a legitimate object of attack at the outbreak of hostilities. Striking airport runways may not seem terribly problematic, but since almost any object could be described as having *some* possible future military use, very little—if anything—would be “off limits” to attack under the Manual’s approach.

The Manual also adopts an exceptionally broad interpretation of Additional Protocol I’s requirement that the object “make an effective contribution

127. See LOW MANUAL, *supra* note 1, at 210-12 nn.150, 157, 162.

128. See DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 75, at 93-94.

129. See LOW MANUAL, *supra* note 1, at 213 (emphasis added).

130. SOLIS, *supra* note 2, at 261-62.

131. LOW MANUAL, *supra* note 1, at 213 n.170 (quoting the 2004 U.K. MANUAL and 2006 Australian counterpart).

132. *Id.* at 213.

133. *Id.* at 209.

to military action,”<sup>134</sup> declaring that contributions might be “effective, but remote” and that “effective contribution to the . . . war-sustaining capability of an opposing force is sufficient.”<sup>135</sup> This assertion was previously found in the Navy’s handbook, although categorically rejected as “untenable” by distinguished Israeli scholar Yoram Dinstein,<sup>136</sup> who ironically has twice held the U.S. Naval War College’s rotating Charles H. Stockton Chair in International Law.<sup>137</sup> The Manual’s sources for this proposition are just a book chapter by Hays Parks and an Air Force legal journal article by retired Navy Judge Advocate General Horace B. Robertson.<sup>138</sup> It also states (without supporting authority) that civil aircraft lose their immunity from attack when incorporated “into the enemy’s war-fighting or war sustaining effort.”<sup>139</sup> Given the extensive reliance by the military on U.S. commercial airlines for personnel movement, the participation of major domestic airlines in the DoD’s Civil Reserve Air Fleet program,<sup>140</sup> and the role of civil aviation in facilitating overall U.S. economic activity, the Manual provides a strong argument for the legality of targeting almost any U.S. commercial aircraft.

The same definition of military objective is included in the Military Commissions Act governing the Guantánamo tribunals.<sup>141</sup> Coupled with the Manual’s treatment of civil aircraft, this opens the door for the accused 9/11 conspirators to argue that the economic significance of the World Trade Center made it, and the four airliners destroyed, lawful “war-sustaining” targets, and the nearly 3,000 civilian deaths just “collateral damage.” Since the estimated losses due to 9/11 came to \$178 billion, and the total cost, including the military response, has reached \$3.3 trillion,<sup>142</sup> the Manual’s approach would seem to make this a colorable military commission defense.

The Manual further endeavors to largely shift the burden to avoid civilian harm to the defender, declaring, with no support other than unilateral U.S. pronouncements, that “[t]he party controlling civilians and civilian objects has the primary responsibility for the[ir] protection.”<sup>143</sup> Additional Protocol I Article 57 requires that an attacker “[t]ake all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”<sup>144</sup> A footnote indicates that the United States has accepted the

134. Additional Protocol, *supra* note 9, art. 52, ¶ 2.

135. LOW MANUAL, *supra* note 1, at 213-14 (emphasis added).

136. DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 75, at 95.

137. See *History of the Charles H. Stockton Chair*, U.S. NAVAL WAR COLLEGE, <https://www.usnwc.edu.edu/Departments—Colleges/International-Law/Stockton-Chair/Charles-H-Stockton-Chair.aspx>.

138. LOW MANUAL, *supra* note 1, at 214 n.175.

139. LOW MANUAL, *supra* note 1, at 937.

140. See, e.g., *Fact Sheet: Civil Reserve Air Fleet*, AIR MOBILITY COMMAND (June 1, 2016), [www.amc.af.mil/library/factsheets/factsheet.asp?id=234](http://www.amc.af.mil/library/factsheets/factsheet.asp?id=234).

141. LOW MANUAL, *supra* note 1, at 214 n.174 (citing to the definition of military objective found in the Military Commissions Act, currently codified at 10 U.S.C. § 950p(a)(1) (2012)).

142. Shan Carter & Amanda Cox, *One 9/11 Tally: \$3.3 Trillion*, N.Y. TIMES (Sept. 8, 2011), [www.nytimes.com/interactive/2011/09/08/us/sept-11-reckoning/cost-graphic.html](http://www.nytimes.com/interactive/2011/09/08/us/sept-11-reckoning/cost-graphic.html).

143. LOW MANUAL, *supra* note 1, at 187.

144. Additional Protocol I, *supra* note 9, art. 57, ¶ 2(a)(ii).

principle that “all practicable precautions, taking into account military and humanitarian considerations, be taken . . . to minimize incidental [harm].”<sup>145</sup> But the text asserts that attackers can consider such factors as impact on their own mission accomplishment, risk to their own forces, and costs of taking precautions,<sup>146</sup> before concluding that “a commander may determine that a precaution would not be feasible because it would result in operational risk (i.e., a risk of failing to accomplish the mission) or an increased risk of harm to his or her forces,” then the precaution would not be feasible and would not be required.<sup>147</sup> This will have the practical effect of allowing U.S. commanders to regularly decide that precautions are unnecessary, since any significant measure to protect civilians is likely to require acceptance of some increased risk of mission failure or harm to friendly forces.

Protections accorded to civilians are further weakened by the Manual’s low standards concerning the effort commanders must make to acquire information about their target. Although modern capabilities, such as reconnaissance drones, now offer unprecedented pre-strike observation capabilities, the Manual declares in a section unchanged by the most recent revision that “the importance of prevailing during armed conflict often justifies taking actions based upon limited information that would be considered unreasonable outside armed conflict.”<sup>148</sup> In making this assertion, the Manual only cites Justice Jackson’s dissent in the *Korematsu* decision upholding Japanese-American internment.<sup>149</sup> This approach has the unfortunate consequence of easily justifying such actions as the Ukrainian separatists’ inadvertent downing of Malaysia Airlines flight MH17.

The Manual rejects Additional Protocol I’s requirement that in case of doubt, objects be treated as having civilian status, asserting instead that “no legal presumption of civilian status exists for persons or objects” under CIL.<sup>150</sup> (Curiously, although it referenced the DoD Manual, the U.S. military investigation into the accidental October 2015 airstrike on Medecins Sans Frontieres’ hospital in Kunduz, Afghanistan faulted the participants for failing to accord it presumed civilian status.)<sup>151</sup> The Manual’s text merely requires commanders to act in “good faith” based on “information available to them at the time.”<sup>152</sup> The critical legal requirement that commanders make use of information “reasonably available,” rather than just whatever they might have immediately at hand or selectively elect to consult, is buried in the footnotes.<sup>153</sup> This is particularly troubling since the Manual pronounces that it is unnecessary to read its foot-

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145. LOW MANUAL, *supra* note 1, at 190 n.35.

146. *Id.* at 193.

147. *Id.* at 193-94.

148. *Id.* at 196.

149. *Id.*

150. *Id.* at 200.

151. GEN. JOHN F. CAMPBELL, U.S. FORCES AFGHANISTAN, INVESTIGATION REPORT OF THE AIRSTRIKE ON THE MEDECINS SANS FRONTIERES/DOCTORS WITHOUT BORDERS TRAUMA CENTER IN KUNDUZ, AFGHANISTAN ON 3 OCTOBER 2015, at 59 (2015), [http://fpp.cc/wp-content/uploads/01.-AR-15-6-Inv-Rpt-Doctors-Without-Borders-3-Oct-15\\_CLEAR.pdf](http://fpp.cc/wp-content/uploads/01.-AR-15-6-Inv-Rpt-Doctors-Without-Borders-3-Oct-15_CLEAR.pdf).

152. LOW MANUAL, *supra* note 1, at 196.

153. *Id.* at 196 nn.66-67.

notes to understand the law.<sup>154</sup> It will thus predictably be overlooked by most readers, who will likely note only the lesser requirement in the body of the text that attacks “may not be directed against civilians or civilian objects based on merely hypothetical or speculative considerations.”<sup>155</sup>

In keeping with the effort to shift responsibility for collateral damage to the defender, the Manual gives attackers a potential free pass for unintended destruction of military medical units or facilities, proclaiming that “incidental harm to medical units or facilities, due to their . . . proximity to combatant elements . . . gives no just cause for complaint.”<sup>156</sup> The only external support offered for this proposition is a Vietnam-era military writer’s claim that a North Vietnamese hospital damaged by U.S. airstrikes was sited near lawful targets including a military airfield and air defense command center.<sup>157</sup> Probably as a result of both academic criticism and the negative fallout associated with the U.S. strike on the Medicin Sans Frontiers hospital four months after the Manual’s publication, as well as the more recent furor over damage to hospitals in Syria,<sup>158</sup> the December 2016 revision clarified that this language applied only to “military” medical facilities and, as previously noted, does now at least call for “feasible precautions” to be taken.<sup>159</sup>

### 5. Honor

The concept of honor, also called chivalry, originated in the Middle Ages. It was recognized as a fundamental principle in various law of war sources through the mid-twentieth century, including the 1863 decision in the *Prize Cases*,<sup>160</sup> the United States’, and United Kingdom’s 1914 Law of War Manuals,<sup>161</sup> Lauterpacht and Oppenheim’s 1952 International Law Treatise,<sup>162</sup> and the 1956 edition of the U.S. Army’s Field Manual 27-10,<sup>163</sup> by which time the concept was clearly waning. Most nations no longer recognize this as a fundamental principle. While the 1958 U.K. Manual did so, the 2004 iteration now states that the principle of humanity “incorporates the earlier rules of chivalry.”<sup>164</sup> The 2001 Canadian Law of War Manual identifies chivalry as a “prima-

154. *Id.* at 2.

155. *Id.* at 201.

156. *Id.* at 467-68.

157. *Id.* at 468 n.239 (quoting Col. Robert D. Heinl, Jr., *Military Writer Charges: Reds Dupe Doves on Hanoi Hospital*, THE PITTSBURGH PRESS, Jan. 10, 1973).

158. See, e.g., *Doctors Without Borders Calls Deadly Hospital Attack in Syria ‘Deliberate’*, ABC NEWS (Feb. 15, 2016), [www.abcnews.go.com/international/doctors-borders-calls-deadly-hospital-attack-syria-deliberate/story?id=36952507](http://www.abcnews.go.com/international/doctors-borders-calls-deadly-hospital-attack-syria-deliberate/story?id=36952507).

159. See LOW MANUAL, *supra* note 1, List of Changes, p. 6 of 9 (identifying change to § 7.10.1.1).

160. *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. 635, 667 (1863).

161. WAR DEP’T, *supra* note 41 at 13; UNITED KINGDOM WAR OFFICE, MANUAL OF MILITARY LAW 284 (1914) (declaring corporal punishment “and cruelty in any form” as impermissible punishments for war crimes).

162. 2 L. OPPENHEIM, INTERNATIONAL LAW, DISPUTES, WAR AND NEUTRALITY 79 (Hersch Lauterpacht ed., 7th ed. 1952).

163. WAR DEP’T, OFFICE OF THE CHIEF OF STAFF, FIELD MANUAL 27-10: RULES OF LAND WARFARE (1940).

164. U.K. MANUAL, *supra* note 59, at 23-24.

ry concept,” but not as a fundamental or operational principle.<sup>165</sup> It notes that the concept is “reflected in specific prohibitions such as those against dishonourable or treacherous conduct and against misuse of enemy flags or flags of truce.”<sup>166</sup>

Affirming this contemporary view, the Australian Law Of Armed Conflict Manual states, “[t]raditionally, chivalry has been included in the list of principles but this is now classified as an element of the principle of unnecessary suffering [humanity] and is not treated as a separate topic.”<sup>167</sup>

It is problematic for the United States to identify an outmoded conception of honor (or chivalry, with its chauvinistic legacy) as a fundamental principle today.<sup>168</sup> The Manual acknowledges “[h]onor demands a certain amount of fairness in offense and defense and a certain mutual respect between opposing forces.”<sup>169</sup> But with the U.S. reliance on cutting-edge technology and remotely operated weapons, it cannot be considered to be on an equal footing with its enemies, as the principle of honor would require. Indeed, the Chairman of the Joint Chiefs of Staff recently told Congress that U.S. personnel should never be sent into a “fair fight.”<sup>170</sup> U.S. drone use is widely viewed as cowardly in the Muslim world.<sup>171</sup> Handing our adversaries the opportunity to quote the DoD’s own Manual against itself is thus particularly shortsighted.

Nor, as the next Section will discuss, does the United States treat current adversaries as legal equivalents meriting mutual respect. Instead, the Manual endeavors to manipulate the concept of “honor” to brand them as “unprivileged belligerents” outside traditional legal protections by claiming “[lawful] combatants are a common class of professionals who have undertaken to comport themselves honorably.”<sup>172</sup>

### B. Unprivileged Belligerents

Virtually all law of war sources recognize the existence of “combatants” and “civilians” as distinct legal categories, with separate rules as to when, and under what conditions, members of each group may be targeted or detained. The United States, however, controversially asserts the additional existence of a third category, which the Manual terms “unprivileged belligerents,”<sup>173</sup> to justi-

165. DEP’T NAT’L DEF., JOINT DOCTRINE MANUAL: LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS 2-1 (Aug. 13, 2001) (Can.) [hereinafter Canadian Manual].

166. *Id.*

167. AUSTL. DEF. FORCE, AUSTRALIAN DEF. DOCTRINE PUBL’N 06.4, LAW OF ARMED CONFLICT 2-2 (May 11, 2006) [hereinafter Australian Manual].

168. See, e.g., Rachel VanLandingham, *The Law of War is Not About “Chivalry,”* JUST SECURITY, (July 20, 2015, 9:13 AM), <https://www.justsecurity.org/24773/laws-war-chivalry/>. A minor change in the 2016 update now seeks to distinguish honor from chivalry, perhaps in response to Professor VanLandingham’s critique. See LOW MANUAL, *supra* note 1, at 66.

169. LOW MANUAL, *supra* note 1, at 65-66.

170. Jim Garamone, *U.S. Troops Should Not Be Sent Into Fair Fights, Dunford Says*, DOD NEWS (Apr. 27, 2016), <http://www.defense.gov/News-Article-View/Article/744390/no-fair-fights-for-us-troops-chairman-says>.

171. See, e.g., McManus, *supra* note 15 (quoting counterinsurgency theorist David Kilcullen).

172. LOW MANUAL, *supra* note 1, at 69.

173. See *id.* at 101-05, 160-64.

fy the targeting and detention of adversaries in its so-called “war on terror,” while denying them the traditional protections accorded to either POWs or civilians preventively detained as security threats. (Since 9/11, these individuals have also been variously described by U.S. Government sources as “detainees,” “enemy combatants,” and “unlawful enemy combatants.”<sup>174</sup>)

Combatants are legally recognized as authorized participants in hostilities. Since core combat functions—the deliberate killing or wounding of other human beings and the destruction of material objects—are crimes in every domestic legal system, it is necessary to exempt combatants from ordinary criminal law in order to legalize their participation in hostilities. To keep this conduct from being wholly lawless, it must instead be judged under the law of war.<sup>175</sup> This “belligerent immunity” from domestic law is granted by international law, but comes at a cost. Combatants receiving the privilege are themselves lawfully targetable at essentially any time or place, and may be preventively detained as “prisoners of war” for the duration of hostilities, subject to specific legal protections.<sup>176</sup> Although not perfectly congruent, a combatant’s exemption from domestic law and eligibility for treatment as a POW essentially go hand-in-hand. As a result, qualification for “POW status” is commonly used as a shorthand expression for entitlement to belligerent immunity.<sup>177</sup>

Civilians, in contrast, have no legal immunity from the operation of domestic law when they participate in hostilities, but are concurrently protected from deliberate attack so long as they do not actively join in the conflict. If a civilian directly participates in hostilities, she forfeits this protection and may be targeted for the duration of her participation.<sup>178</sup> Because civilians lack belligerent immunity, they can also be prosecuted for any acts of violence they commit under ordinary domestic law. Additionally, they may be preventively detained or interned if determined to present a significant security threat, but unlike the combatant, who is subject to blanket detention for the duration of hostilities, the civilian detainee’s status as a continuing threat must be reviewed on at least a semiannual basis.<sup>179</sup>

In the Manual’s view, unprivileged belligerents are a separate third category, comprising individuals who “lack the privileges” but are “subject to the liabilities” of both combatant and civilian status simultaneously.<sup>180</sup> The Manual concedes that the “unprivileged belligerent” is “seldom explicitly recognized as a class in law of war treaties.”<sup>181</sup> The reality is that such a distinct category has never been explicitly recognized with respect to either targeting or non-punitive preventive detention; the term has traditionally just been used to identify participants in hostilities who are denied belligerent immunity and may thus be criminally tried for any violent acts they perpetrate, as well as privileged belliger-

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174. SOLIS, *supra* note 2, at 224.

175. DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 75, at 37.

176. SOLIS, *supra* note 2, at 190.

177. *See, e.g.*, LOW MANUAL, *supra* note 1, at 108.

178. DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 75, at 146.

179. *Id.* at 147.

180. LOW MANUAL, *supra* note 1, at 160-64.

181. *Id.* at 102-03.

ents who violate the law of war. The Manual notes the distinct ways military and civilian persons become unprivileged belligerents, as the category is said to include both (1) lawful combatants who lost their privilege by “engaging in spying, sabotage, and similar acts behind enemy lines,” and (2) “private persons engaging in hostilities” who never had lawful combatant status.<sup>182</sup>

1. *The Military Spy, Saboteur, or Combatant Failing to Distinguish Himself*

Spying is defined by the law of war that authorizes punishment under domestic law as a deterrent for the victim state’s self-protection, but does not criminalize the practice under international law per se.<sup>183</sup> (Commentators typically agree that military saboteurs out of uniform behind enemy lines are liable for the same treatment as spies.<sup>184</sup>) Because the cloak of belligerent immunity must be removed from these individuals to permit their domestic prosecution, they are frequently described as losing the right to “POW status.”<sup>185</sup> They are not bereft of protections under international law, however. Summary punishment of spies without trial was prohibited by the Hague Land Warfare Regulations in 1899.<sup>186</sup> Since the conclusion of Additional Protocol I, these individuals are now protected at a minimum by the extensive fair trial guarantees of its Article 75.<sup>187</sup> While the military spy is unique in being subject to trial outside the specific legal regime established for POWs, this is not a true third category in that there is no separate targeting or detention regime for spies. If not imprisoned (or executed) pursuant to a criminal sentence imposed after a trial meeting Article 75 standards, the military spy logically defaults back to POW status.

Similarly, Article 44 of Additional Protocol I says that a combatant captured during an attack or pre-attack deployment while failing to distinguish himself by carrying arms openly “forfeit[s] his right to be a prisoner of war,” yet the treaty mandates that he receives protections fully equivalent to those “accorded to prisoners of war by the Third Convention [GPW] and by this Protocol.”<sup>188</sup> In other words, the only practical difference in treatment between these individuals and an actual POW is that combatants failing to distinguish themselves lose belligerent immunity and can be tried under applicable domestic law for their actions.

182. *Id.* at 101.

183. *See, e.g.*, Additional Protocol I, *supra* note 9, art. 46; 1907 Hague Regulations, *supra* note 40, arts. 29-31, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277; U.K. MANUAL, *supra* note 59, at 45-47.

184. *See, e.g.*, SOLIS, *supra* note 2, at 223; U.K. MANUAL, *supra* note 59, at 46 (noting that “earlier rules which, which equated saboteurs with spies, have been superseded,” but then states at 63 that sabotage attacks behind enemy lines are only lawful if, *inter alia*, “carried out by combatants who distinguish themselves from the civilian population”). Unfortunately the DoD Manual’s assertion to this end is supported only by sources addressing spying, not sabotage. *See* LOW MANUAL, *supra* note 1, at 152, n.353.

185. *See, e.g.*, Additional Protocol I, *supra* note 9, art. 46, ¶ 1.

186. 1907 Hague Regulations, *supra* note 40, arts. 29-30.

187. Additional Protocol I, *supra* note 9, art. 75.

188. *Id.* at art. 44, ¶ 4.

### 2. *Civilian Spies, Saboteurs, and Irregular Combatants*

The issue is simpler with respect to civilians. Because they receive no immunity with the single (and exceptionally rare) exception of a *levée en masse*—essentially a large-scale call to arms or popular uprising against an invading army<sup>189</sup>—any other civilian participation in hostilities, including spying or sabotage, is liable to domestic prosecution. Unlike the military spy, the civilian thus does not need to be exempted from the ordinary rules governing his/her class. The Fourth Geneva Convention protecting civilians permits only a minor derogation; in territory under military occupation, the “rights of communication” can be temporarily suspended for those detained for spying, sabotage, or “suspicion of activity hostile to the security of the Occupying Power.”<sup>190</sup> The ICRC Commentary notes that the right to delay announcing such captures could be important in facilitating “capturing a whole organization or spy ring.”<sup>191</sup> Aside from this single derogation, however, civilian “spies, saboteurs, or irregular combatants” remain protected by the Fourth Geneva Convention.<sup>192</sup>

The targeting of civilians falling into these categories is governed by the “direct participation in hostilities standard,” while criteria for their non-punitive preventive detention are addressed by specific provisions in the Fourth Geneva Convention.<sup>193</sup> Alternatively, they can be punitively incarcerated following a trial meeting the international standards set forth in Articles 66-77 of the Fourth Geneva Convention<sup>194</sup> or Article 75 of Additional Protocol I.<sup>195</sup>

### 3. *A Third Category?*

The Manual’s claim of the existence of “unprivileged belligerent” as a distinct third category is thus highly problematic given the comprehensive scope of law of war rules applicable to combatants and civilians. It seems conceptually rooted in the use of the similar term “unlawful combatant” in the 1942 Supreme Court decision *Ex parte Quirin*,<sup>196</sup> in reference to eight state-sponsored combatants who had removed issued uniform items after landing in the United States in order to blend in with the civilian population.<sup>197</sup> But ulti-

189. See, e.g., U.K. MANUAL, *supra* note 59, at 38, 45.

190. Fourth Geneva Convention, *supra* note 42, art. 5.

191. OSCAR M. UHLER ET AL., GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 53 (1958).

192. *Id.*

193. See Fourth Geneva Convention, *supra* note 42, arts. 42-43 (addressing internment of aliens in the territory of a conflict party when “absolutely necessary” for that state’s security); *id.* art. 78 (allowing internment in occupied territory “for imperative reasons of security”).

194. *Id.* arts. 66-77.

195. Additional Protocol I, *supra* note 9, art. 75.

196. 317 U.S. 1 (1942); see, e.g., LOW MANUAL, *supra* note 1, at 102-05, 102 n.29, 103 n.35.

197. The defendants “had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government.” *Ex parte Quirin*, 317 U.S. at 2.

mately *Quirin* just held that they could be tried for this conduct, saying nothing about them constituting a separate category in any other respect.

The Manual argues, however, that the “unprivileged belligerent” classification follows as an “implicit consequence of creating the classes of lawful combatants and peaceful civilians,”<sup>198</sup> although neither of these modifiers are used with “combatants” or “civilians” in the Third or Fourth Geneva Conventions, and, as noted previously, protections found in both agreements extend to those who engage in spying, sabotage, or other unprivileged acts. Although it cites to other sections of the Fourth Geneva Convention commentary with apparent approval, the Manual omits its clear assertion that there is “no intermediate status” between POW and civilian.<sup>199</sup> For sixty years, the Army’s official legal manual has endorsed this same view, declaring in a section captioned “Persons Committing Hostile Acts Not Entitled To Be Treated as Prisoners of War” that such individuals are still protected persons under the Fourth Geneva Convention.<sup>200</sup> This position was reinforced by Additional Protocol I Article 50, which provides for a broad interpretation of “civilian” as anyone not meeting the legal criteria for combatant status.<sup>201</sup>

The Manual also ignores the views of other states dealing with this issue. It does not address, for example, the Israeli High Court of Justice’s specific consideration and explicit rejection of the arguments in favor of a distinct third category,<sup>202</sup> holding instead that “an unlawful combatant is not a combatant, but a ‘civilian.’”<sup>203</sup> Nor does it acknowledge the Council of Europe’s pronouncement that those not qualifying for POW status are “protected persons” under the Fourth Geneva Convention, including specifically “illegal combatants.”<sup>204</sup> Nor does it acknowledge that the International Criminal Tribunal for the Former Yugoslavia (ICTY) also found that those not falling into POW protection “necessarily fall[] within the ambit” of that treaty, provided that its nationality requirements are met.<sup>205</sup>

#### 4. Civilians Directly Participating in Hostilities

The congressionally endorsed decision to treat 9/11 as an act of war and employ military force against al Qaeda and the Taliban,<sup>206</sup> coupled with the subsequent presidential determination denying members of these groups status

198. LOW MANUAL, *supra* note 1, at 103.

199. UHLER ET AL., *supra* note 191, at 51.

200. FM 27-10, *supra* note 43, at 31.

201. Additional Protocol I, *supra* note 9, art. 50, ¶ 1.

202. HCJ 769/02 Pub. Comm. Against Torture v. Gov’t Israel 459, 489 (2006) (Isr.).

203. *Id.* at para. 26.

204. “Suspected members of an international terrorist network, such as al Qaeda, who are nationals of a party to such a conflict, fall into the category of other ‘protected persons’ under GC IV, though they usually do not qualify for POW status . . . .” Eur. Comm’n for Democracy Through L., *Opinion on the Possible Need for Further Development of the Geneva Conventions*, ¶ 84, CDL-AD (2003) 18 (Dec. 17, 2003); *see also id.* at ¶ 68 (noting that “illegal combatants” are protected under the Fourth Geneva Convention).

205. Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, para. 271 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

206. Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001).

as privileged combatants,<sup>207</sup> necessitates justifying the targeting under another categorization. The most credible approach would be to rely upon the universally recognized category of civilians who become liable to attack when they take an “active” or “direct part in hostilities.”<sup>208</sup> As the Manual notes, “[f]or the purpose of applying the rule . . . ‘civilians’ are persons who do not fall within the categories of combatan[t] . . . .”<sup>209</sup>

Following a multiyear series of expert meetings, the ICRC published a ten-chapter volume in 2009 on how it recommends the Additional Protocol I language on direct participation be interpreted.<sup>210</sup> Overall, the interpretive guidance concedes to states the latitude to treat full-time members of non-state groups—those having what it terms a “continuous combat function”—as being continuously liable to targeting.<sup>211</sup> The United States, and some experts involved in the development, take legitimate issue with Chapter IX’s assertion of an obligation to use the least amount of force necessary to achieve military objectives—i.e., endeavoring to capture, wound, or kill in that order.<sup>212</sup> Nevertheless, given the ICRC’s respected stature and humanitarian focus, the U.S. could gain valuable political top cover if it adopted, and cited to, those provisions in the guidance that are in general accord with its views. The Manual’s specific discussion of “Taking a Direct Part in Hostilities,” for example, is generally consistent with the ICRC guidance.<sup>213</sup>

Instead the Manual takes a different tack, effectively doubling down on its claims—despite the general lack of credible international legal support—as to the existence of unprivileged belligerents as a discrete third category. It contains several assertions to this end, unsupported by citation to external authority,<sup>214</sup> before ultimately conceding that “[e]ither approach may yield the same result: members of hostile, non-state armed groups may be made the object of attack unless they are placed *hors de combat*.”<sup>215</sup> The Manual gives examples of a range of conduct that it considers to qualify as “direct participation,” including “planning, authorizing, or implementing a combat operation,” “acting as a member of a weapons crew,” “emplacing mines or improvised explosive devices,” “providing or relaying information of immediate use in combat operations,” or “supplying weapons and ammunition . . . or assembling weapons . . . in close geographic or temporal proximity to their use.”<sup>216</sup>

207. Bush, *infra* note 344.

208. See LOW MANUAL, *supra* note 1, at 226.

209. *Id.* at 227.

210. NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009).

211. *Id.* at 70-73.

212. See, e.g., W. Hays Parks, *Part IX of the ICRC Direct Participation in Hostilities Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769 (2010); LOW MANUAL, *supra* note 1, at 56-57.

213. Compare LOW MANUAL, *supra* note 1, at 226-36, with MELZER, *supra* note 210.

214. See, e.g., LOW MANUAL, *supra* note 1, at 102, 160-61.

215. *Id.* at 228.

216. *Id.* at 231-32.

Regardless of whether one accepts the Manual's conception of classifying its adversaries in the post-9/11 "War on Terror" as unprivileged belligerents or as civilians directly participating in hostilities, it still creates the unprecedented situation of a wholly one-sided transnational conflict in which the United States asserts the right to kill its adversaries but holds everyone on the opposing side to be criminals if they shoot in turn. This is not armed conflict—and certainly not one implicating any principle of "honor"—but a human hunting season. In previous conflicts of this nature dating back to the mid-eighteenth century (that is, concurrent with the initial development of the contemporary law of war), the United States consistently recognized the legal right of its adversaries to participate in hostilities against it as the cost of asserting belligerent rights itself.<sup>217</sup>

### 5. *The Problem of Unprivileged U.S. Belligerents*

The Manual's hard line with respect to unprivileged belligerency also risks hoisting the U.S. Government on its own petard thanks to post-9/11 U.S. conduct. The significant expansion of U.S. civilian participation in conflict, from CIA drone strikes to the extensive use of contractors in traditional military roles, is legally dubious.<sup>218</sup> So, too, is the use of CIA paramilitary, and even U.S. special forces personnel, fighting out of uniform. Although not war crimes per se, these activities logically cost military personnel their belligerent immunity, thus subjecting them—along with their civilian counterparts—to ordinary criminal liability for any acts of violence they participate in.

Although the Manual declares that "only military aircraft are entitled to engage in attacks in armed conflict"<sup>219</sup>—itself sufficient to place lethal employment of CIA-owned and operated drones outside of international law—virtually all other respected law of war sources, including those cited by the Manual, take a broader view. A more typical formulation is that attributed to the equivalent German law of war manual, which states that "[o]nly military aircraft are entitled to exercise belligerent rights."<sup>220</sup> Transmission of "intelligence for the immediate use of a belligerent" has been considered to be participation in hostilities since the 1923 Draft Hague Rules of Air Warfare<sup>221</sup> and falls within the Manual's own definition of "direct participation in hostilities."<sup>222</sup> CIA drone flights providing real-time feeds to the military are thus

217. David Glazier, *A Court Without Jurisdiction: A Critical Assessment of the Military Commission Charges Against Omar Khadr* 9-18 (Loyola Law Sch. L.A. Legal Studies Working Paper No. 37, 2010), <http://ssrn.com/abstract=1669946>; see also ROGER DI SILVESTRO, IN THE SHADOW OF WOUNDED KNEE 180-94 (2005) (documenting the acquittal of Plenty Horses for killing Lieutenant Edward Casey, the last Indian War fatality, because he was a participant in an armed conflict).

218. See, e.g., William Cole, *Pilot Error Cited in Fatal Afghanistan Crash*, HONOLULU STAR-ADVERTISER (Feb. 28 2016), <http://www.staradvertiser.com/2016/02/28/hawaii-news/pilot-error-cited-in-afghanistan-crash>.

219. LOW MANUAL, *supra* note 1, at 910 (emphasis added).

220. *Id.* at 910 n.63.

221. See *General Report of the Commission of Jurists at the Hague*, 17 AM. J. INT'L L. 242, 245 (1923) (containing the 1923 Hague Draft Rules of Aerial Warfare, art. 16 [hereinafter Hague Draft Rules]).

222. See *supra* note 216 and accompanying text.

problematic even when missiles are not fired, as is letting civilians pilot tactical signals-intelligence flights.

The Manual deals with this fact in a unique, but ultimately unpersuasive, way, articulating an incomplete, and state-centric view of what constitutes privileged belligerency. Its discussion of privileged belligerency omits the primary source for this status, Article 1 of the Hague Land Warfare Regulations, which proclaims:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

- 1) To be commanded by a person responsible for his subordinates;
- 2) To have a fixed distinctive emblem recognizable at a distance;
- 3) To carry arms openly; and
- 4) To conduct their operations in accordance with the laws and customs of war.<sup>223</sup>

Although acknowledging that combatants must distinguish themselves from civilians,<sup>224</sup> the Manual does so based only on a citation to a comparatively obscure 1976 treatise on POWs by a Finnish jurist.<sup>225</sup> It fails to emphasize the need for formal command, a distinctive emblem, open carriage of arms, or organization to receive privileged status, other than identifying these as requirements for “militia and volunteer corps.”<sup>226</sup> Instead, other than the *levée en masse*, the Manual would effectively just hinge a combatant’s lawfulness on membership in an armed group belonging to a state.<sup>227</sup> Making state-affiliation the lynchpin for lawful combatant status cleverly avoids capturing recent U.S. conduct, such as special-operations personnel fighting out of uniform, and extensive use of military contractors or civilian personnel accompanying armed forces, while simultaneously undercutting any claim to legitimacy on the part of non-state adversaries.

According to the Manual, U.S. special-operations personnel do not lose their lawful status if they doff their uniforms to look like “friendly forces,” since they are not doing so to blend with civilians, and thus are not “acting clandestinely or under false pretenses.”<sup>228</sup> And it claims that non-military personnel of the state who “support military operations” are protected from attack, as non-combatants are, yet entitled to legal immunity and “POW status” as privileged belligerents would be.<sup>229</sup> The Manual supports its assertion of legal immunity, however, only by citation to commentary that identifies this view as “U.S. practice.”<sup>230</sup>

In marked contrast, the Manual proclaims that a civilian providing analogous support to a non-state entity engaged in hostilities against a state is con-

223. 1907 Hague Regulations, *supra* note 40, art. 1.

224. LOW MANUAL, *supra* note 1, at 106.

225. *Id.* at 206 n.122 (citing a 1976 text by Allan Rosas).

226. *Id.* at 206.

227. *Id.* at 104.

228. *Id.* at 113 (referring to § 5.25.2.1 “Mimicking Other Friendly Forces,” citing W. Hays Parks, *Special Forces’ Wear of Non-Standard Uniform*, 4 CHI. J. INT’L L. 493, 554 (2003)).

229. LOW MANUAL, *supra* note 1, at 141-47.

230. *Id.* at 146 n.318.

structively part of the non-state group and subject to treatment “in one or more respects as an unprivileged belligerent,” even if not formally a member.<sup>231</sup>

The Manual’s justification for its assertion that an armed group is only lawful when it belongs to a state is too clever by half, requiring two separate acts of conflation. First, it confuses the philosophical just war doctrine, which establishes a set of criteria for the *moral* legitimacy of armed conflict, including that decisions to use force be made only by lawful government officials—known as “right authority”—with the actual international legal rules governing the use of the force, or *jus ad bellum*.<sup>232</sup> But as Yoram Dinstein explains in his *jus ad bellum* text:

In the nineteenth (and early part of the twentieth) century, the attempt to differentiate between just and unjust wars in positive international law was discredited and abandoned. States continued to use the rhetoric of justice when they went to war, but the justification produced no legal reverberations. Most international lawyers conceded openly that ‘[w]ith the inherent rightfulness of war international law has nothing to do.’ Or, in the acerbic words of T. J. Lawrence, distinctions between just and unjust causes of war ‘belong to morality and theology, and are as much out of place in a treatise on International Law as would be a discussion on the ethics of marriage in a book on the law of personal status.’<sup>233</sup>

But even if “right authority” was a recognized component of the *jus ad bellum*, the Manual would still repeat its previous mistake of conflating that body of law with the *jus in bello*. Categorically excluding non-state actors from the law of war would be contrary to historical U.S. practice<sup>234</sup> and undermine the separation of *jus ad bellum* and *jus in bello* rules in order to encourage compliance with the latter by those in violation of the former. Although the United States objects to this provision, the fact that both the UN General Assembly,<sup>235</sup> and the 174 states which have ratified Additional Protocol I, recognize “national liberation movements” as legitimate participants in international armed conflict proves that the international community does not mandate state status as being requisite for lawful participation in hostilities.

### C. Weapons

The Manual contains a number of controversial assertions about the international rules regulating weapons. This Section addresses three issues representative of these concerns: (1) the claim of a U.S. military right to use expanding bullets;<sup>236</sup> (2) the permissibility of using bayonets with serrated edges; and, (3) U.S. legal obligations when employing cluster munitions.

231. *Id.* at 158.

232. *See id.* at 40.

233. DINSTEIN, *supra* note 76, at 69.

234. *See, e.g.,* David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 989-90 (2009).

235. G.A. Res. 3103 (XXVIII) (Dec. 12, 1973).

236. *See generally* Statute of the International Criminal Court, art. 8.2(b)(xix), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (outlawing “bullets which expand or flatten easily in the human body such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions”).

### 1. *Expanding Bullets*

The Manual makes the astonishing claim that “[t]he law of war does not prohibit the use of bullets that expand or flatten easily in the human body. Like other weapons, such bullets are only prohibited if they are calculated to cause superfluous injury.”<sup>237</sup> This assertion has three fundamental flaws:

(1) it flies in the face of a widely recognized CIL prohibition of these bullets, and the explicit codification of their employment as a war crime in the Rome Statute of the International Criminal Court (ICC);

(2) it misrepresents the actual CIL rule governing superfluous injury; and,

(3) it inverts the concept of *lex specialis* by calling for compliance with a general rule against superfluous injury in the face of a specific rule banning this weapon.

#### *a. Customary International Law Prohibits the Use of Expanding Bullets*

Expanding bullets were addressed at the first Hague peace conference in 1899 following their development by the British at their Dum-Dum arsenal in India to “stop the impetuous charges of certain Afghan warriors.”<sup>238</sup> They are thus colloquially known as “dum-dum bullets.” Other nations considered the harm they inflicted to be excessive, however, and the resulting Declaration on Expanding Bullets required parties to “abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.”<sup>239</sup> The Declaration’s prefatory language acknowledged inspiration by the 1868 St. Petersburg Declaration<sup>240</sup> which proclaimed “the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable . . . contrary to the laws of humanity.”<sup>241</sup> But the 1899 ban is based on the physical characteristic of ready deformation in the human body, not on causing superfluous wounds. Indeed, the United States objected to the text specifically for that reason, arguing for a more inclusive ban based on the nature of the wound inflicted rather than the physical characteristics of the bullet.<sup>242</sup> Britain objected to the Declaration because it wanted to continue using these particular bullets, but the U.S. objection was based on the idea that the ban did not go far enough. Army Judge Advocate General George B. Davis explained that by basing the ban on “mechanical construction . . . [o]ther forms of bullet, of which there are a great number, some of which inflict wounds that exceed in cruelty

237. LOW MANUAL, *supra* note 1, at 347.

238. Burrus M. Camahan, *Unnecessary Suffering, the Red Cross and Tactical Laser Weapons*, 18 LOY. L.A. INT’L & COMP. L. REV. 705, 718 (1996).

239. Hague Declaration (IV, 3) Concerning the Prohibition of the Use of Expanding Bullets, July 29, 1899, 187 Consol. T.S. 459.

240. *Id.*

241. St. Petersburg Declaration, *supra* note 34.

242. ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 63 (3d ed. 2000).

those described in the convention, do not fall within the scope of the prohibition and . . . may be employed with impunity.”<sup>243</sup>

But as Adam Roberts notes, “the objections of both Great Britain and the United States were overruled and the Declaration was adopted.”<sup>244</sup> Britain soon had a change of heart, ratifying it in response to political pressures in 1907, despite the British Army’s continued arguments about the military necessity of the greater stopping power of an expanding bullet.<sup>245</sup>

Although the Declaration only attracted twenty parties,<sup>246</sup> its core rule has subsequently received virtually universal recognition as CIL.<sup>247</sup> The ICRC’s CIL study documented widespread state support for this view, identifying the prohibition as applicable to both international and non-international armed conflict.<sup>248</sup> The U.K. Manual notes that “the Declaration should be regarded as reflecting customary international law and binding on all states and individual combatants.”<sup>249</sup> Denmark sent three soldiers found with hollow point (expanding) bullets in their pistols home from Afghanistan to face trial, and potential life sentences, under its military penal code.<sup>250</sup> Leading U.S. commentators also agree that the ban is binding CIL.<sup>251</sup>

Moreover, use of expanding bullets is specifically defined, in the Declaration’s language, as a war crime under the Rome Statute of the ICC. This provision was included in the original treaty for international armed conflict.<sup>252</sup> The United States participated in those negotiations and reportedly voiced no objection.<sup>253</sup> A subsequent amendment adopted by the 2010 Kampala review conference extends the rule to non-international armed conflicts.<sup>254</sup> The Rome Statute’s ban is a specific prohibition; the following paragraph generically bans “weapons . . . of a nature to cause superfluous injury.”<sup>255</sup> The Rome delegates had difficulty in agreeing on what other weapons were specifically banned, so

243. George B. Davis, *Amerlioration of the Rules of War on Land*, 2 AM. J. INT’L L. 63, 75 (1908).

244. *Id.*

245. See Edward M. Spiers, *The Use of the Dum Dum Bullet in Colonial Warfare*, 4 J. IMPERIAL & COMMONWEALTH HIST. 3 (1975).

246. See Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St. Petersburg., Dec. 1868, [https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=170](https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=170).

247. See, e.g., MICHAEL SCHMITT, CHARLES GARRAWAY & YORAM DINSTEIN, *THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY* 35 (2006) (“[T]here is no doubt that the prohibition represents customary international law in international armed conflicts . . .”).

248. ICRC CIL Study, *supra* note 90, Rule 77.

249. U.K. MANUAL, *supra* note 59, at 109 n.32.

250. *Afghanistan: Soldiers Accused of Using ‘Dum-Dum’ Bullets*, GLOBAL RES. (Sept. 30, 2009), <http://www.globalresearch.ca/afghanistan-soldiers-accused-of-using-dum-dum-bullets/15490>. The soldiers were ultimately only fined because there was no evidence that they had actually fired any of these rounds. Email from Helene Højfeldt, PhD Fellow, Aarhus Univ. Dep’t of Law, to author (May 29, 2016) (on file with author).

251. See SCHMITT, *supra* note 247 (reflecting the views of Michael Schmitt); SOLIS, *supra* note 2, at 55.

252. Rome Statute, *supra* note 236, art. 8(2)(b)(xix).

253. ICRC CIL Study, *supra* note 90, Rule 77.

254. Rome Statute, *supra* note 236, art. 8(2)(e)(xv).

255. *Id.* art. 8(2)(b)(xx).

they deferred the issue by providing that the ICC cannot prosecute anyone for using a weapon causing superfluous injury until it is identified in a treaty annex via the Statute's formal amendment process.<sup>256</sup> But states had no similar reservations about prohibiting expanding bullets in the treaty body along with bans on poison and asphyxiating gas.<sup>257</sup>

The DoD Manual stresses that the "interpretation and application" of crimes set forth in the Rome Statute are supported by a separate "Elements of Crimes,"<sup>258</sup> which "explain that this rule is not violated unless, inter alia, '[t]he perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.'"<sup>259</sup> (The Manual's quotation of this language is ironic since it demonstrates the clear international consensus that the "nature" of a weapon is dispositive, rather than its "calculated" or design intent, as discussed in the next Section *infra*.) But commentary to the Statute clarifies that this language does not alter the definition of a weapon the use of which the Statute criminalizes, such as bullets which "expand or flatten easily in the human body."<sup>260</sup> The element refers only to the mens rea and is intended just to avoid strict liability for personnel issued these bullets by superiors with no reasonable basis to know they were prohibited.<sup>261</sup>

b. *The Manual's Misstatement of "Unnecessary Suffering"*

The concern about "uselessly aggravate[d]" suffering initially articulated in the 1868 St. Petersburg declaration was more fully developed by paragraph (e) of Article 23 of the Hague Land Warfare Regulations of 1899 and 1907. Only the French texts of these agreements are authentic, and the relevant portion of Article 23 reads exactly the same in both versions, prohibiting "*d'employer des armes, des projectiles ou des matières propres à causer des maux superflus.*"<sup>262</sup> The meaning was accurately captured in the U.S. translation of the 1899 text, which declares that it is especially forbidden "to employ arms, projectiles, or material of a nature to cause superfluous injury."<sup>263</sup> Although the actual treaty language was unchanged in 1907, the U.S. version of that accord inexplicably mistranslated it as "calculated to cause unnecessary suffering."<sup>264</sup> This unilateral U.S. text is the only place that the "calculated" formulation appears. Subsequent treaties, including Additional Protocol I Arti-

256. *Id.*

257. *Id.* art. 8(2)(b)(xvii)-(xviii).

258. LOW MANUAL, *supra* note 1, at 349.

259. *Id.* (quoting the Rome Statute, Elements of Crime art. 8(2)(b)(xix), Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, ICC-ASP/1/3, 112, 146 (Sept. 3-10, 2002)).

260. See WILLIAM A. SCHABUS, THE INTERNATIONAL CRIMINAL COURT 243-44 (2010).

261. KRIANGSAK KITTICHAIRSAREE, INTERNATIONAL CRIMINAL LAW 178-79 (2001).

262. See DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 75, at 63; see also WAR DEP'T, *supra* note 41, at 153-65 (providing full French text of 1907 treaty).

263. See DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 75, at 63.

264. See CARNEGIE ENDOWMENT FOR INT'L PEACE, *supra* note 348, at 116 (providing side-by-side text of both agreements).

cle 35(2),<sup>265</sup> (recognized by the DoD as CIL);<sup>266</sup> Article 8(2)(b)(xx) of the Rome Statute;<sup>267</sup> the preamble of the 1980 UN Convention on Certain Conventional Weapons (which received U.S. ratification in 1995);<sup>268</sup> and the 1997 Ottawa Convention,<sup>269</sup> all employ “of a nature” to cause,<sup>270</sup> confirming that states consider it to be the correct linguistic formulation. The difference between “nature” and “calculated” is significant; the former calls for an objective assessment of the weapon’s actual effect, while “calculated” suggests subjective intent on the part of the designer. In other words, a weapon actually causing superfluous injury might still be lawful if a permissible rationale for its design could be articulated. Given the official French text, and the use of “nature” rather than “calculated” in subsequent agreements, the Manual’s insistence on the subjective standard is not credible. Its claim that “[l]ike other weapons, such bullets are only prohibited if they are calculated to cause superfluous injury”<sup>271</sup> thus cannot be true.

But even if the Manual’s view of the superfluous injury rule was correct, it would still only be a general rule that would not overcome the specific prohibition on expanding bullets now accepted as CIL. The Manual’s effort to give supremacy to the superfluous injury standard endeavors to invert the *lex specialis* concept it so strongly endorses in other contexts.

This issue goes beyond expanding bullets. The Manual relies upon this same approach, applying “calculated” rather than “of a nature” to cause in its overall consideration of weapons legality and required reviews, as well as its discussion of other specific weapons, such as blades with serrated edges.<sup>272</sup> Those sections thus also require careful review to bring the Manual into conformance with actual international law.

*c. A Claim of U.S. Status as a Persistent Objector to the Ban Is Not Credible*

The Manual stresses the U.S. refusal to join the 1899 Declaration,<sup>273</sup> and claims that it has been consistent in not applying a “distinct prohibition” against expanding bullets; instead prohibiting such bullets only to the extent they are “calculated to cause unnecessary suffering.”<sup>274</sup> This raises the question as to whether the United States might fairly claim to be a persistent objector to the metamorphosis of the ban from treaty law to CIL. The ICRC notes, without en-

265. Additional Protocol I, *supra* note 9, art. 35(2).

266. See, e.g., W. Hays Parks, *Memorandum of Law—Sniper Use of Open-Tip Ammunition*, ARMY LAW 86, 87 (Feb. 1991).

267. Rome Statute, *supra* note 236, art. 8(2)(b)(xx).

268. 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, Oct. 10, 1980, 80 Stat. 271, 1342 U.N.T.S. 137.

269. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507-19.

270. DINSTEN, *THE CONDUCT OF HOSTILITIES*, *supra* note 75, at 63-64.

271. LOW MANUAL, *supra* note 1, at 347.

272. See *id.* at 60, 338, 341-45, 349, 357-58, 362-63, 385-86, 1057-58, 1157-58, 1184-85, 1187.

273. See, e.g., *id.* at 348.

274. *Id.* at 61-62.

dorsing its legitimacy, that the United States is the only state that claims the right to use these weapons.<sup>275</sup> The issue is thus whether the United States has consistently objected to the prohibition of expanding bullets with sufficient clarity and regularity to qualify for this status.

Ironically, the United States soon faced the same type of challenge that had led Britain to develop the dum-dum bullet. Knife-wielding Moro warriors opposing American imperialism in the Philippines demonstrated the ability to persist in their attacks even after being shot several times by contemporary Army issue .38 Colt revolvers. The Army thus recognized the need for a handgun with greater stopping power.<sup>276</sup> In 1904 it conducted test firings of various types of pistol rounds into live cattle and suspended human cadavers. This crude study concluded that a minimum handgun caliber of .45 should be adopted, and also recommended:

In case [ ] an automatic pistol of the caliber recommended, or higher, be adopted for service at any time, thereby necessitating a jacket, the point of the jacket should be made thinner and the lead core softer than in the case of any jacketed bullet tried by or known to the members of the Board . . . . The object of this is, of course, to secure "mushrooming" of [the] bullet, with its attendant great shock effect and stopping power.<sup>277</sup>

In other words, the study recommended adopting both a larger caliber weapon and expanding bullets. Despite this recommendation, the Army ultimately procured the legendary .45 caliber Model 1911 semi-automatic Colt pistol with a fully-jacketed (non-expanding) round,<sup>278</sup> declining to act contrary to the Hague rule at its first, and best, opportunity to do so.

While this selection process was ongoing, the United States unsuccessfully proposed amending the Declaration in 1907 to prohibit bullets that "inflict unnecessarily cruel wounds . . . and, in general, every kind of bullet which [sic] exceeds the limit necessary for placing a man immediately *hors de combat*. . . ."<sup>279</sup> Judge Advocate General Davis made clear that the U.S. proposal was intended to be more restrictive than the Declaration, extending its prohibition to other bullet types.<sup>280</sup> The Army's 1914 Rules of Land Warfare noted that the United States had not joined the 1899 Declaration, but adhered to the amendment that it proposed.<sup>281</sup> Since the amendment was more restrictive than the Declaration, logically the United States did not object to the substance of the lesser included rule. We cannot prove that the decision not to adopt an expanding .45 caliber round was based on legal considerations, but such a bullet would logically be impermissibly excessive under the U.S. formulation given the stopping power of the jacketed round. In any case, U.S. claims to persistent

275. ICRC CIL Study, *supra* note 125, Rule 77.

276. LEROY THOMPSON, THE COLT 1911 PISTOL 7-8 (2011).

277. *The Thompson-Lagarde Report*, in JOHN POTOCKI, THE COLT MODEL 1905 AUTOMATIC PISTOL 121, 163 (1998).

278. See THOMPSON, *supra* note 276, at 8-14.

279. George B. Davis, *Amelioration of the Rules of War on Land*, 2 AM J. INT'L L. 63, 77 (1908).

280. *Id.* at 75-77.

281. WAR DEP'T, *supra* note 41, at 56 n.1.

objector status are surely weakened by the fact that it declined to procure these bullets even when advised to do so by its own expert study team.

The Manual engages in selective, if not duplicitous, citation in support of its position that there is no CIL ban on expanding bullets. For example, in a single extensive footnote 78 on page 348,<sup>282</sup> it:

(1) truncates Davis’s quotation of the U.S. amendment, leaving out the provision related to bullets which do more than place a man immediately *hors de combat*;

(2) indicates that the 1914 Rules of Land Warfare said that the United States had not ratified the Hague Declaration but omits the proviso stating that it adheres to the language of its more restrictive proposed amendment;

(3) quotes a 1920 Army publication reporting that “The Judge Advocate General’s Office has given the opinion that the armor-piercing ammunition [with a soft lead nose that mushrooms] is a lawful weapon,” but omits several highly relevant facts found in the original source.<sup>283</sup> First, this was an aircraft weapon intended for use against material objects—“airplanes, tanks, trucks, and other defenses”—not an anti-personnel round. So finding this bullet to be legal would have been consistent with the concurrent treatment of exploding bullets. Although the latter were categorically banned by the 1868 St. Petersburg Declaration, they were employed by both sides during WWI in, and against, aircraft and observation balloons, which was ultimately considered to be lawful even while the general ban remained effective with respect to deliberate anti-personnel employment other than by aircraft.<sup>284</sup> Moreover, the armor piercing bullets under discussion were not actually used. The Army noted that in the European theater, “any one found with a dum dum bullet on his person is shot without any formalities,” and U.S. pilots were thus hesitant to use it.<sup>285</sup> (Given that the Hague Declaration facially only applied to conflicts in which all participants were parties—which the United States was not—this suggests that the ban was already becoming CIL at this time.) As a result, the U.S. leadership in Europe decided against using the ammunition and General Pershing insisted that Washington needed to “furnish[ ] new type armor piercing at the earliest possible moment.”<sup>286</sup>

(4) indicates (although the citation is woefully incomplete) that a 1985 JAG opinion on the “Use of Expanding Ammunition by U.S. Military Forces in Counterterrorist Incidents” reiterated that the United States is not a party to the Hague Declaration. But this citation misleadingly fails to note that the opinion clearly proclaims that “as a matter of policy,” the United States has “acknowledged and respected” the applicability of the Declaration on Expanding Bullets in “conventional combat operations in the wars in which United States forces

282. LOW MANUAL, *supra* note 1, at 348, n.78.

283. U.S. ORDNANCE DEP’T, HISTORY OF SMALL-ARMS AMMUNITION 15 (1920).

284. *See, e.g.*, U.K. MANUAL, *supra* note 59, at 109; WILLIAM H. BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT 142 (2009).

285. U.S. ORDNANCE DEP’T, *supra* note 283, at 15.

286. *Id.*

have participated since the declaration was adopted.”<sup>287</sup> The opinion ultimately bases the U.S. claim to be able to use expanding bullets against terrorists on the view that such situations fall outside the law of war, not that it is permitted by that corpus juris.<sup>288</sup> So even while asserting that the United States is not bound by the Declaration rule as treaty law, it also clearly demonstrates that the United States does not object to the rule since it follows it as a matter of policy. Given that (1) a rule does not require fully universal acceptance to become CIL; (2) there is no evidence of any nation other than the United States questioning the ban on expanding bullets; and (3) the United States itself follows the rule as a matter of policy, it is hard to see how the United States can assert either that the ban is not CIL as a specific prohibition on expanding bullets or that the United States has a credible claim itself to be a persistent objector.

Although the Manual implies that U.S. opposition to the Declaration’s ban on expanding bullets has been consistent, this fact has escaped the notice of most of the United States’ own experts. Leading U.S. law of war commentators Michael Schmitt and Gary Solis both recognize the ban as CIL without noting the United States as a persistent objector, despite the fact that both served as career JAGs in the Air Force and Marine Corps, respectively, before continuing to serve in DoD in civilian law of war roles.<sup>289</sup> And the International and Operational Law Department of the Army’s Judge Advocate General’s Legal Center and School did not recognize this subtlety either; in fact, it accepted a student thesis<sup>290</sup> and published multiple annual volumes of its Operational Law Handbook acknowledging this prohibition as recently as 2012.<sup>291</sup> This phraseology was notably—but much too belatedly, for the purpose of establishing qualification for persistent objector status—removed from the 2014 version.<sup>292</sup> It strains credibility to assert that the United States could convincingly claim persistent objector status when most of its own law of war experts were unaware that it was doing so.

As the totality of this history demonstrates, there is no credible basis to doubt that the rule against expanding bullets reflects CIL, and having failed to

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287. Opinion of the Judge Advocate General, International Law Note, *Use of Expanding Ammunition by U.S. Military Forces in Counterterrorist Incidents*, ARMY LAW 45 (Nov. 1985).

288. *See id.* at 45-46.

289. After serving twenty years as an Air Force JAG, Michael Schmitt served as Dean of the George C. Marshall European Center, and is currently Director of the Stockton Center for the Study of International Law and Charles H. Stockton Professor at the United States Naval War College. *See Faculty Profile, Michael N. Schmitt*, U.S. NAVAL WAR C., <https://www.usnwc.edu/MichaelSchmitt> (last visited Apr. 13, 2017). Gary Solis, who holds a doctorate in the Law of War from the London School of Economics, is a retired Marine Corps Lieutenant Colonel and a “retired Professor of Law of the United States Military Academy, where he directed West Point’s Law of War program for six years.” SOLIS, *supra* note 2, at i.

290. *See* Joshua F. Berry, *Hollow Point Bullets: How History Has Hijacked Their Use in Combat and Why It Is Time To Reexamine the 1899 Hague Declaration Concerning Expanding Bullets*, 206 MIL. L. REV. 88 (2010) (initially written as a JAG School thesis).

291. INT’L & OPERATIONAL LAW DEP’T, JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 27 (2012), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/operational-law-handbook\\_2012.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf).

292. INT’L & OPERATIONAL LAW DEP’T, JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 28 (2014), [http://www.loc.gov/rr/frd/Military\\_Law/pdf/operational-law-handbook\\_2014.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2014.pdf).

establish itself as a persistent objector, the United States is now legally bound as well, even if it has failed to publicly acknowledge this fact.

*d. The Importance of Getting the Law on Expanding Bullets Right*

In 1985, the U.S. military replaced the .45 caliber M1911 as its primary handgun with the Beretta M9, using the smaller 9mm NATO round.<sup>293</sup> While a 9mm weapon has practical advantages, including much lower recoil and greater magazine capacity, it also has correspondingly less stopping power. Coming back full circle to the situation Great Britain faced in the 1890s, U.S. personnel now complain about their inability to stop determined insurgents in Afghanistan and Iraq.<sup>294</sup> Some units, including Marine Corps special operations components, have therefore continued using older .45s.<sup>295</sup>

The Army's response, consistent with the Manual's flawed logic, has been to initiate procurement of a new handgun and expanding bullets to use in it.<sup>296</sup> Despite unilateral U.S. legal rationalizations, the reality is that any other nation could prosecute U.S. personnel using these rounds as war criminals. This does *not* mean that U.S. leaders should condemn our troops to combat with problematic weapons. As a near-term solution, the United States can acquire new larger caliber pistols with fully jacketed rounds. In the longer run, in order to capitalize on the other advantages of a smaller caliber weapon, the CIL prohibition on expanding bullets could be overridden by a treaty authorizing the use of hollow-point expanding bullets in pistols. Given the widespread police use of these rounds, their ability to protect potential aggression victims by more effectively incapacitating would-be attackers, the reduced risk of bystander harm from rounds passing through the intended targeted or ricocheting, and current global concerns about terrorism—particularly suicide bombers—a carefully crafted proposal could predictably command significant international support. It could be helpful to note that this approach does not really undermine the Hague Declaration prohibition, which was intended to address the harms of expanding high-velocity rifle bullets, but instead reflects the careful balance between military necessity and humanitarian considerations at the core of the entire law of war.

Current Army leaders need to follow Pershing's lead in insisting that our soldiers be given the weapons they need to do their assigned missions while remaining within the bounds of the law. To procure weapons unilaterally based on military expediency without addressing the law is nothing more than an application of *Kriegsraison*, which the Manual acknowledges as impermissible.

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293. Matthew Cox, *U.S. Army Is Considering Hollow-Point Bullets To Go With New Pistol*, MILITARY.COM (July 10, 2015), <http://www.military.com/daily-news/2015/07/10/us-army-is-considering-hollow-point-bullets-to-go-with-new.html>.

294. See, e.g., Berry, *supra* note 290, at 88-91.

295. THOMPSON, *supra* note 276, at 55-56.

296. Kyle Jahner, *Army To Consider Hollow Point Bullets for New Pistol*, ARMY TIMES (July 9, 2015), <http://www.armytimes.com/story/military/tech/2015/07/09/handgun-system-solicitation-hollowpoint/29886907/>.

## 2. *Legality of Bayonets with Serrated Edges*

The Manual states that the law of war contains no specific prohibition against weapons with serrated edges<sup>297</sup> followed by a specific discussion related to bayonets:

Many bayonets or knives have a serrated edge (a formation resembling the toothed edge of a saw). Provided that the design *intent* of the serrated edge is not to aggravate suffering unnecessarily, such as by making the wound more difficult to treat, the serrated edge is not prohibited. For example, a serrated edge may improve the capabilities of the blade as a multipurpose field utility tool, rather than be intended to increase the pain and suffering of enemy personnel injured by the blade.<sup>298</sup>

This declaration is predictable; U.S. troops are currently issued bayonets with serrated edges that double as saws<sup>299</sup> and it would be surprising for DoD to admit error in doing so. But legal history is not on the U.S. side. The Allies denounced German serrated-edge (“saw back”) bayonets during World War I, and soldiers captured with one were reportedly subject to summary execution.<sup>300</sup> Unlike expanding bullets, they were never addressed by a specific treaty prohibition, but had to be assessed under the more general CIL treatment of weapons causing superfluous injury. These bayonets were *calculated* to do double duty as saws, but the serrated teeth had the unintended consequence of aggravating the wound when the weapon was pulled out of the adversary. They thus became a paradigmatic example of a weapon subject to CIL prohibition on the basis that they caused unnecessary suffering. Yoram Dinstein explains that “it is uncontested that—even without a specific treaty provision—the use of bayonets with a serrated edge . . . would be in breach of the norm proscribing unnecessary suffering to combatants.”<sup>301</sup> Similarly, the U.K. Manual states that bayonets are legal weapons “provided they are not *of a nature to cause* superfluous injury or unnecessary suffering, for example, because they have . . . serrated edges.”<sup>302</sup> The Hague Regulation prohibition of weapons causing unnecessary suffering is now incorporated into U.S. federal criminal law as well.<sup>303</sup>

Design intent—which the Manual contends should be relied upon rather than practical effect for determining whether a weapon causes unnecessary suffering—logically does matter in the very limited sense that the mere possibility of impermissible misuse should not render an otherwise lawful implement or

297. LOW MANUAL, *supra* note 1, at 344.

298. *Id.* (emphasis added).

299. See, e.g., Tony Perry, *New Bayonet Puts Marine Corps on the Cutting Edge*, L.A. TIMES (Jan. 19, 2003), <http://articles.latimes.com/2003/jan/19/nation/na-bayonet19>.

300. Samuel Issacharoff & Richard Pildes, *Drones and the Dilemma of Modern Warfare*, in DRONE WARS: TRANSFORMING CONFLICT, LAW, AND POLICY 388, 396 (Peter L. Bergen & Daniel Rothenberg, eds., 2015). The practice of summarily executing soldiers found with serrated edged-bayonets is described in highly regarded novels written from the perspective of both sides in the conflict. See JOSEPH BOYDEN, *THREE DAY ROAD* 62 (2005); ERICH MARIA REMARQUE, *ALL QUIET ON THE WESTERN FRONT* 103 (Ballantine Books, 1982) (1929).

301. DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 75, at 67.

302. See U.K. MANUAL, *supra* note 59, at 105.

303. See 18 U.S.C. § 2441(c)(2) (defining violations of Hague Article 23 as war crimes subject to punishment by life in prison if either perpetrator or victim is a U.S. national).

weapon illegal.<sup>304</sup> But generally speaking, legality is determined by the weapon's "nature," as virtually all sources relying on the authentic Hague Land Warfare Regulation language agree; weapons regulations would be meaningless if states could avoid their application simply by asserting an "innocent" subjective intent.

It is unclear how the United States came to adopt its current bayonets, although it is not terribly surprising that once having made this decision, the DoD Manual endeavors to excuse or justify it rather than admitting that the services made a legal error.

### 3. Cluster Munitions Precautions

Cluster munitions are conventional bombs or artillery rounds which disperse explosive submunitions (called "bomblets") over a wide area. A typical cluster bomb might contain 200 to 300 bomblets, which could be dispersed over an area as large as 1,100 by 1,600 feet (forty acres or sixteen hectares).<sup>305</sup> The Implementation Support Unit for the Convention on Cluster Munitions notes two major concerns about these weapons:

Firstly, they have wide area effects and are unable to distinguish between civilians and combatants. Secondly, the use of cluster munitions leave behind large numbers of dangerous unexploded ordnance. Such remnants kill and injure civilians, obstruct economic and social development, and have other severe consequences that persist for years and decades after use.<sup>306</sup>

To its credit, the United States has been somewhat responsive to these concerns. The DoD has unilaterally committed to fielding munitions with a dud rate of no more than one percent by 2018, and requires that top-level commanders approve the use of existing weapons prior to that time.<sup>307</sup>

The DoD Manual unequivocally declares that cluster munitions "are not specifically prohibited or restricted by the law of war,"<sup>308</sup> but this is not quite accurate. The international community partially addressed long-term concerns in the Explosive Remnants of War Protocol to the UN Convention on Certain Conventional Weapons (CCW), which the United States has ratified.<sup>309</sup> Despite U.S. objections, a comprehensive ban was then incorporated in the subsequent Dublin Convention on Cluster Munitions that now has one hundred other state

304. See WILLIAM H. BOOTHBY, *WEAPONS AND THE LAW OF ARMED CONFLICT* 143-45 (2009) (discussing similar design intent issues with respect to bullets that flatten easily).

305. See, e.g., SOLIS, *supra* note 2, at 591. The area values are obtained by multiplying the dispersal dimensions provided by Solis (1,600 x 1,000 feet) and dividing by the number of square feet in an acre (43,560) and square feet in a hectare (107,639) respectively.

306. Convention on Cluster Munitions, *opened for signature* Dec. 3 2008, 2688 U.N.T.S. 39.

307. LOW MANUAL, *supra* note 1, at 404 (stating that approval authority rests with "combatant commanders"); see 10 U.S.C. § 162(b) (2012) (mandating that combatant commanders report only to the Secretary of Defense and President).

308. LOW MANUAL, *supra* note 1, at 403.

309. Protocol on Explosive Remnants of War to the Convention on Certain Chemical Weapons, *opened for signature* Nov. 28, 2003, T.I.A.S. No. 09-721.3, 2399 U.N.T.S. 100.

parties: more than half the current world order.<sup>310</sup> So at most the Manual should state that the United States is not party to an agreement prohibiting these weapons.

Although ultimately explaining the rules that the Convention imposes on ratifying states, the Manual extols cluster munitions' virtues while neglecting to specifically inform commanders of the legal obligations concerning the unexploded ordnance that inevitably results from their employment.<sup>311</sup> Of equal, if not greater concern, despite the documented horrors of continuing post-conflict civilian casualties, the Manual gives commanders a free pass with respect to having to consider any longer-term impact of cluster munitions use, having previously dismissed such considerations as "too remote" to require inclusion in proportionality calculus.<sup>312</sup>

Unlike the previously discussed examples of expanding bullets and serrated bayonets, the consistent U.S. approach to cluster munitions should qualify it as a persistent objector if a cluster munitions ban were to become CIL. But this does not excuse the United States from having to comply with either the Explosive Remnants of War accord, or the principles of distinction and proportionality, and the Manual should be more explicit about the application of these requirements to cluster munitions.

### III. THE DoD MANUAL AND CUSTOMARY INTERNATIONAL LAW

As the Manual explains, the law of war is international law, which "comprises treaties and customary international law applicable to the United States."<sup>313</sup> Although its substantive treatment of treaty rules is generally unobjectionable—stylistic concerns about verbosity and redundancy discussed in the next Part notwithstanding—this is not true of the Manual's handling of CIL.

Customary rules are a critical component of the contemporary law of war. The universally ratified Geneva Conventions are the best known, and most widely cited, law of war instruments. But what is less well appreciated is that they only provide protections for specific categories of persons who no longer are, or never were, lawful objects of attack. Core warfighting rules, in contrast, come primarily from (1) unratified draft treaties;<sup>314</sup> (2) older treaties not in force with the majority of nations that gained independence since World War II;<sup>315</sup> and (3) Additional Protocol I, ratified by 174 other states, but not the

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310. SOLIS, *supra* note 2, 590-93; Convention on Cluster Munitions, *supra* note 306; Implementation Support Unit, . . . and Palau is Number 100 (Apr. 20, 2016), <http://www.clusterconvention.org/2016/04/20/palau-bans-cluster-munitions-and-is-the-100th-state-party/>

311. LOW MANUAL, *supra* note 1, at 379. No mention is made anywhere in the sections on cluster munitions about the obligations with respect to unexploded ordnance, which are subsequently addressed at 419-32, while nothing in these latter sections alerts the reader to

312. *Id.* at 242 n.308.

313. *Id.* at 7.

314. See Hague Draft Rules, *supra* note 221

315. See, e.g., Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, in DOCUMENTS ON THE LAWS OF WAR, *supra* note 242, at 111.

United States. These rules thus generally govern U.S. conduct today to the extent that they are CIL.

This Part will address concerns about the Manual's application of CIL concepts and its definition of the law of war, as well as the credibility and persuasiveness (or lack thereof) of the sources relied upon in support of many of the Manual's assertions about the current content of customary law.

#### A. *Application of International Law Concepts*

In endeavoring to identify applicable international rules, the Manual relies upon both an idiosyncratic approach to the formation of CIL, as well as definitions of several international law concepts, which it employs in problematic ways. These include internal inconsistencies or contradictions between the Manual's definitions and its own use of sources. In some cases, these approaches are contrary to larger U.S. national interests, calling for careful reconsideration of many provisions or supporting citations, as well as a comprehensive interagency review of the overall text.

##### 1. *Formation of International Law*

Recognizing gaps in existing treaty coverage, the ICRC undertook a decade-long effort to identify CIL rules applicable to modern armed conflicts. In 2005, the study culminated in a mammoth publication divided into two parts: Volume I provides thorough explanations of the rules, and Volume II extensively details supporting evidence of state practice.<sup>316</sup>

Although most of the 161 rules identified in the study are unexceptional, then-State Department Legal Adviser John Bellinger and the DoD General Counsel William Haynes submitted a joint letter to the ICRC criticizing the study's methodology.<sup>317</sup> While conceding that a "significant number" of the overall rules were either treaty law or CIL, at least in international conflicts, the letter stressed that "the United States is concerned about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and evidence to support those rules."<sup>318</sup> Among the specific criticisms were concerns that the study cited state practice "insufficiently dense to meet the 'extensive and virtually uniform' standard" required by international law, that it relied too heavily on military manuals, and that it "fails to pay due regard to the practice of specially affected States."<sup>319</sup> These concerns are now echoed in the DoD Manual, which incorporates the Bellinger-Haynes letter as a "frequently cited document" meriting its own short form abbreviation, and makes extensive

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316. Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175, 175-78 (2005).

317. The Nov. 11, 2006 letter was reprinted in the *International Review of the Red Cross*. See John B. Bellinger III & William J. Haynes II, *A U.S. Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443 (2007).

318. *Id.* at 443-44.

319. *Id.* at 444-45.

use of it, particularly with respect to the specific rules the letter objected to.<sup>320</sup> But there are several contentious aspects of this approach.

First, as explored further later in this Part, the Manual itself fails to measure up to the standards it proclaims, relying extensively on single examples of U.S. practice, and prior U.S. military manuals, as the only support for the existence of many rules it declares to be CIL.

Second, the Manual gives insufficient recognition to the contribution of treaties to the crystallization of new CIL rules. Its section captioned “Relationship Between Treaties and Customary International Law,” focuses on the relationship of treaties with existing CIL, noting that treaty provisions may “(1) not reflect customary international law; (2) reflect customary international law; or (3) be based on customary law, but not precisely reflect it.”<sup>321</sup> It then downplays the relationship by noting, “[i]n most cases, treaty provisions do not reflect customary international law.”<sup>322</sup> But it fails to address the ability of provisions originating as treaty law to become CIL.

Draft conclusion 12 of the International Law Commission’s work on CIL, in contrast, declares:

A treaty provision may reflect or come to reflect a rule of customary international law if it is established that the provision in question:

(1) at the time when the treaty was concluded, codifies an existing rule of customary international law;

(2) has led to the crystallization of an emerging rule of customary international law; or

(3) has generated a new rule of customary international law, by giving rise to a general practice accepted as law.<sup>323</sup>

Those familiar with the modern law of war will recognize the major impact treaties—both ratified and not—have had on its development. Many rules in areas governed by CIL today, particularly air and naval warfare, have direct roots in these historic treaty sources.<sup>324</sup>

Moreover, the United States is critically reliant on provisions created from whole cloth in the 1982 Law of the Sea Convention concerning transit passage through international straits and archipelagic waters in order to maintain naval access to key strategic regions such as the Arabian Gulf and Mediterranean Sea. Since the United States has failed to ratify this treaty, it necessarily insists that these rules—which are incorporated as “law” in the Manual’s naval warfare chapter<sup>325</sup>—immediately became CIL upon the treaty’s entry into force. The failure to address this aspect of international practice is thus shortsighted.

320. LOW MANUAL, *supra* note 1, § xxvi.

321. *Id.* at 30.

322. *Id.*

323. Int’l Law Comm’n, Third Rep. on Identification of Customary International Law, U.N. Doc A/CN.4/682, at 31 (2015).

324. *See, e.g.*, U.K. MANUAL, *supra* note 59, at 4-12; ROBERTS & GUELFF, *supra* note 242, at 7-8.

325. LOW MANUAL, *supra* note 1, at 879-86.

In a similar vein, the Manual endeavors to classify the broad underlying law of war principles (e.g., necessity, distinction, proportionality) as “general principles of law common to the major legal systems of the world” as that term is used in Article 38 of the Statute of the International Court of Justice identifying primary sources of law to be applied by the ICJ.<sup>326</sup> But this misunderstands the fundamental concept; these core law of war principles are unique to the international law of armed conflict, they are not derived from widespread national domestic laws. Moreover, the sources cited by the Manual specifically discuss the “Martens clause,” created from whole cloth in the 1899 Hague Land Warfare Convention, which addresses sources of law to be applied in the absence of treaty rules,<sup>327</sup> not the core law of war principles.

## 2. *Specially Affected States*

The Manual, like the U.S. response to the ICRC study, places significant emphasis on the role of “specially affected states,” declaring that “States that have had a wealth of experience, or that have otherwise had significant opportunities to develop a carefully considered military doctrine, may be expected to have contributed a greater quantity and quality of State practice relevant to the law of war than States that have not.”<sup>328</sup> (Ironically “military doctrine” is found in publications, which DoD declaims as a legal source; a footnote in this section nevertheless quotes international judge Theodor Meron on how states develop law through “military manuals.”<sup>329</sup>)

The Manual’s use of “specially affected state” is overbroad. The term comes from the International Court of Justice decision delimiting North Sea continental shelf claims in which the ICJ discusses whether a “purely conventional rule” can rapidly become CIL and apply to states not party to the treaty. The Court says this could happen, as a result of participation in the convention by “States whose interests were *specially affected*,” or within a comparatively short amount of time if “State practice, including that of States whose interests are *specially affected*, should have been both extensive and virtually uniform.”<sup>330</sup> But this does not require the concurrence of all “specially affected states” to a rule for it to become CIL, as the Manual claims.<sup>331</sup>

The *North Sea* discussion is directly relevant to the issue of UNCLOS rules quickly becoming CIL, but the Manual misses the opportunity to make use of that fact. Reading between the lines, it seems to be asserting that as the leading military power, and the state perhaps most frequently resorting to the use of force in the modern era, the United States should have the dominant say

326. LOW MANUAL, *supra* note 1, at 5.

327. *See id.* at 50 n.3.

328. *Id.* at 32.

329. *Id.* at 32 n.141 (quoting Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT’L L. 238, 249 (1996)).

330. North Sea Continental Shelf Cases (Ger. v. Den. & Neth.), 1969 I.C.J. 3, ¶¶ 73-74 (Feb. 28).

331. *See* LOW MANUAL, *supra* note 1, at 32.

in establishing the content of the current law of war. But that is not quite how international law, formally based on sovereign equality, works.

### 3. *Persistent Objector Status*

A key difference between treaties and CIL rules is that the former only bind states voluntarily ratifying them; the latter generally bind all states. Although some commentators, including Manual critic Jordan Paust, disagree,<sup>332</sup> the clear majority view is that there is a narrow exception from individual CIL rules for states qualifying as “persistent objectors.” As the appellation implies, a state must both *object* to the emerging rule at the time of its formation, and *persist* in that objection over time, to qualify.<sup>333</sup>

The DoD Manual presents an incomplete expression of this concept, however, and endeavors to require only the *initial* objection while conveniently ignoring the “persistent” element.<sup>334</sup> It thus seeks to avoid the application of at least one widely recognized CIL rule, the prohibition on expanding bullets, on the grounds that the United States did not join the initial agreement that later ripened into customary law.<sup>335</sup> There are two distinct flaws with this argument. First, the initial U.S. declination only establishes that it did not wish to be bound by those rules as treaty law at the time of the agreement’s conclusion; a claim to persistent objector status requires demonstrable objection at the time, which could be substantially later, when the treaty rule began to evolve into customary law. Moreover, initial objection is a necessary, but insufficient, condition for establishing exemption from a customary rule; the state has to demonstrate persistence in that objection “repeated as often as circumstances require.”<sup>336</sup> So the burden of proof on would-be persistent objectors is much greater than just showing an initial refusal to be bound by a treaty.

### 4. *The Concept of Lex Specialis and the Application of Human Rights Law*

A significant legal issue confronting militaries today, particularly those combating non-state actors, is the applicability *vel non* of international human rights law (IHRL) alongside law of war rules.<sup>337</sup> The challenge is particularly acute for U.S. allies because the European Court of Human Rights holds that human rights mandates can follow them into conflict overseas.<sup>338</sup> The United States has adopted two lines of defense. One is a general denial of the extrater-

332. See, e.g., Paust *supra* note 11.

333. Michael Wood (Special Rapporteur), *Third Rep. on Identification of Customary International Law*, ¶ 95, U.N. Doc. A/CN.4/682 (Mar. 27, 2015) [hereinafter *Third Report on Identification of Customary International Law*].

334. LOW MANUAL, *supra* note 1, at 1.

335. See *id.* at 345.

336. *Third Report on Identification of Customary International Law*, *supra* note 333, ¶ 93.

337. Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INT'L L. STUD. 20, 20-21 (2014).

338. See, e.g., Kirby Abbott, *A Brief Overview of Legal Interoperability Challenges for NATO Arising from the Interrelationship Between IHL and IHRL in Light of the European Convention on Human Rights*, 96 INT'L REV. RED CROSS 107 (2015).

ritorial application of its own human rights obligations.<sup>339</sup> But the issue is complicated by situations of occupation, where the outside power exercises jurisdiction over territory, and by U.S. arguments defending its drone programs that mix law of war and self-defense justifications.<sup>340</sup> The latter potentially implicate IHRL considerations regarding the right to life, due process requirements, etc.

The second U.S. approach is to deny the application of IHRL to conflict situations. The Manual thus forcefully asserts a broad conception of *lex specialis*—the legal principle holding that “the special rule overrides the general law”<sup>341</sup>—calling for other bodies of law to either give way entirely to, or else be interpreted consistent with, the law of war.<sup>342</sup> In support, it asserts that “traditionally, the law of war has been described as the only ‘authoritative rules of action between hostile armies,’ or as superseding ordinary law in the actual theater of military operations,” citing two obsolete nineteenth century sources, the Lieber Code and Colonel William Winthrop’s 1896 military law treatise.<sup>343</sup> This categorical legal subordination made sense in an age when there was only a black and white choice between the international law of war and purely domestic law. But subsequent state acceptance of binding IHRL renders this view obsolete and undermines the credibility of sources predating that law’s creation.

The Manual also glosses over the fact that *lex specialis* only comes into play when two rules conflict. IHRL rules that do not contravene law of war mandates, and are not validly derogated from, should remain fully effective during hostilities. U.S. efforts to assert the inapplicability of specific law of war rules, such as those governing prisoners of war,<sup>344</sup> to its current adversaries actually opens the door to wider IHRL application. When fewer law of war rules apply, there will be fewer conflicts with IHRL rules, and hence a greater role for the latter.

We do not dispute that the law of war is the *lex specialis* in armed conflict, or that its mandates prevail when in direct conflict with rules from other more general bodies of law. But IHRL continues to apply in wartime, and a number of factors, including efforts to exclude non-state participants from law of war protections, the future possibility of the U.S. being as an occupying power again, and the trend toward coalition operations, all demand that U.S. military personnel have substantive guidance on human rights law. The Manual’s blanket reliance on *lex specialis* in lieu of meaningful explication of IHRL mandates thus does U.S. personnel a real disservice.

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339. See Van Schaack, *supra* note 337, at 22-23.

340. See, e.g., Michael Isikoff, *Justice Department Memo Reveals Legal Case for Drone Strikes on Americans*, NBC NEWS (Feb. 4, 2013), [http://investigations.nbcnews.com/\\_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans](http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans).

341. LOW MANUAL, *supra* note 1, at 9.

342. See *id.* at 9-10.

343. *Id.* at 10 n.18.

344. See, e.g., Memorandum from President George W. Bush to the Vice President et al., *Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 7, 2002), [www.pegc.us/archive/white\\_house/Bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/white_house/Bush_memo_20020207_ed.pdf).

### B. Questionable Source Selection Practices

It is generally not difficult to identify the treaties that a state has ratified and locate their texts.<sup>345</sup> While treaty rules must be included in a comprehensive legal reference, the Manual's more difficult task is systematically identifying and explaining applicable CIL rules. Although the Manual acknowledges that legal commentary is "only as authoritative as the evidence upon which [it is] based,"<sup>346</sup> it fails to heed its own admonition. The methodology employed in selecting citations for many rules, as well as many cited authorities themselves, are troublesome, impairing the Manual's credibility as a valid reflection of current CIL. Many of the rules it articulates, for example, are supported only by citation to obscure or obsolete documents, or to isolated, historical events that do little to establish widespread state practice or sense of *opinio juris*.

There is little doubt, for example, that the most important sources of rules governing the conduct of hostilities are the Hague Conventions produced by the "peace conferences" of 1899 and 1907, particularly the detailed land warfare regulations annexed to Convention (II) of 1899<sup>347</sup> and slightly revised in 1907.<sup>348</sup> The 1946 Nuremberg judgment declared that the 1907 version had become CIL by 1939, making it an integral part of the modern law of war,<sup>349</sup> and violations of its Articles 23, 25, 27, and 28 are now U.S. federal offenses in the United States under the War Crimes Act of 1996.<sup>350</sup> These developments make the 1899 version relevant only to historical inquiries about pre-World War II events. It was barely mentioned in the Army's 1914 manual, which primarily cited the 1907 Regulations.<sup>351</sup> Yet, the 2015 Manual includes the 1899 Regulations as a frequently cited document,<sup>352</sup> as well as other historical artifacts that include Grotius' 1625 text *De Jure Belli ac Pacis Libri Tres*; Emer de Vattel's *The Law of Nations*, first published in 1758; John Bassett Moore's 1906 *A Digest of International Law*; and multiple earlier versions of current U.S. military manuals.<sup>353</sup> All are great resources for students of legal history, but are irrelevant to explicating the current law.

Some older sources seem to be included to permit the assertion of obsolete views. The claim that a POW can be ordered to receive medical treatment

345. Effective law of war treaties adopted through 1999 are reprinted in ROBERTS & GUELF, *supra* note 242. The ICRC provides a comprehensive collection of historical documents dating back to 1856. *Treaties, State Parties and Commentaries*, INT'L COMM. RED CROSS, <https://www.icrc.org/ihl> (last visited Jan. 23, 2016).

346. LOW MANUAL, *supra* note 1, at 36.

347. Annex to the Hague Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter 1899 Hague Regulations].

348. Annex to the 1907 Hague Regulations, *supra* note 40. The 1899 and 1907 versions are reprinted side by side in CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, at 107-29 (1915).

349. See *Judgement: The Law of the Charter*, AVALON PROJECT, <http://avalon.law.yale.edu/imt/judlawch.asp>.

350. 18 U.S.C. § 2441(c)(2) (2006).

351. See WAR DEP'T, *supra* note 41, at 8 (listing sources used in the Manual), 11-12 (listing important legal developments), 153-65 (reprinting the French and English texts of the 1907 treaty).

352. LOW MANUAL, *supra* note 1, at xvii.

353. *Id.* at xviii-xxvii.

against his or her will, for example, was based largely on a 1958 U.K. law of war manual provision allowing force-feeding.<sup>354</sup> But this rule was cut from the 2004 U.K. Manual,<sup>355</sup> suggesting it is no longer recognized as valid law.

Oddly missing from the DoD Manual's source list are respected modern commentaries produced via the collective wisdom of international experts. It makes no direct use of the 1994 San Remo Manual on naval warfare,<sup>356</sup> even though that volume is the primary source relied on for the U.K. Manual's maritime warfare discussion,<sup>357</sup> figures prominently in the work of leading commentators,<sup>358</sup> and is referenced by the annotated supplement to the U.S. Navy's operational law manual.<sup>359</sup> Its only appearance in the Manual is a passing mention in a quote in one footnote.<sup>360</sup> Similarly, the 2010 Harvard Program on Humanitarian Policy and Conflict Research (HPCR) manual on air and missile warfare<sup>361</sup> is cited only once in the entire air warfare chapter,<sup>362</sup> while there is no mention whatsoever of the 2013 NATO-sponsored Tallinn Manual on cyber warfare.<sup>363</sup> Nor is significant reliance placed on two important works carried out under ICRC auspices, the multi-year study on CIL governing armed conflict<sup>364</sup> and a subsequent interpretation on what constitutes direct participation in hostilities (DPH), causing civilians to lose immunity from attack.<sup>365</sup>

The Manual is similarly biased in favor of classical, yet dated, works by individual commentators, to the general exclusion of even widely regarded recent work. It includes numerous citations to Winthrop's famous, but obsolete, 1896 treatise on military justice, for example.<sup>366</sup> Although the Manual cites a posthumous 1920 reprint,<sup>367</sup> Winthrop died in April 1899,<sup>368</sup> and his work (like Lieber's), thus entirely predates the modern law of war codification, which began in earnest with the convening of the first Hague conference the next month.

354. *Id.* at 449 n.104.

355. See U.K. MANUAL, *supra* note 59.

356. INT'L INST. OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995).

357. See U.K. MANUAL, *supra* note 59, 347-75 (enumerating the current laws governing naval warfare while citing the San Remo Manual in 115 of 150 footnotes).

358. See, e.g., DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 75, at 111-15 (citing the San Remo Manual thirteen times in five pages of discussion of naval warfare issues).

359. See *supra* note 54, at xxxi.

360. See LOW MANUAL, *supra* note 1, at 460 n.320.

361. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIV., COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2010).

362. LOW MANUAL, *supra* note 1, at 933 n.103. [The HPCR manual is cited a second time in a later chapter on cyber warfare]; see *id.* at 1021 n.52.

363. TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael Schmitt ed., 2013).

364. ICRC CIL Study, *supra* note 248.

365. NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009).

366. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (1920) (Government Printing Office "Second edition" reproduction of 1896 volume); see also LOW MANUAL, *supra* note 1, at 515 n.31.

367. *Id.* at xxvi.

368. JOSHUA E. KASTENBERG, THE BLACKSTONE OF MILITARY LAW 312 (2009).

Similarly, Gerhard von Glahn's classic 1957 text on belligerent occupation<sup>369</sup> is listed as a frequent source and cited almost thirty times; Eyal Benvenisti's well-regarded more modern work on the same subject<sup>370</sup> appears only once, as a secondary source following an initial cite to von Glahn.<sup>371</sup> This really matters: von Glahn wrote before the adoption of any modern human rights accords, such as the International Covenant on Civil and Political Rights<sup>372</sup> or Additional Protocol I, which also addresses occupation.<sup>373</sup> Critical readers must thus consider that older sources might be cited to avoid acknowledging subsequent developments constraining U.S. conduct in ways DoD wishes to avoid.

### C. *Reliance on Dubious Individual Sources (or no Source at All)*

In addition to these systematic source issues, many individual citations are uniquely troublesome, impairing their credibility as persuasive indicators of current international law. Some of these citations distill down to assertions that are really nothing more than claims that something can legally be done today just because an example of past U.S. practice or document articulating authority to do so can be found. And in many cases, the Manual cites authorities that are not considered authoritative reflections of the law domestically, and are even less credible as indicators of current international law. Examples include citations to unilateral argument in a government brief,<sup>374</sup> to a concurring opinion in a case later reversed on appeal,<sup>375</sup> and to a Supreme Court dissent.<sup>376</sup>

Some sources initially appear credible, but are problematic under more careful scrutiny. The Manual asserts, for example, that it is permissible for POWs to be "secured temporarily with handcuffs, flex cuffs, blindfolds, or other security devices."<sup>377</sup> The sole source is an oral answer by Winston Churchill to parliamentary questioning in October 1942. Those unfamiliar with the backstory might tend to give a Churchillian pronouncement significant deference. Knowing that this was a unilateral pronouncement at the outset of a major international brouhaha over POW shackling with which its closest allies, Canada and the United States, were not in full accord at the time, could alter that conclusion.<sup>378</sup> It would at least have been more credible to cite the later joint Brit-

369. GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* (1957).

370. EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* (2004).

371. LOW MANUAL, *supra* note 1, at 753 n.97.

372. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (entered into force Mar. 23, 1976).

373. Additional Protocol I, *supra* note 9, art. 3(b).

374. LOW MANUAL, *supra* note 1, at 753 n.97.

375. *Id.* at 73-74 n.21 (providing examples of two distinct issues by citing to the concurrence of Williams, J. in the D.C. Circuit's consideration of *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), reversed in its entirety the next year by *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)).

376. LOW MANUAL, *supra* note 1, at 81 n.60 (citing to the dissent of Thomas, J. in *Hamdan v. Rumsfeld*). It is unclear, however, whether this citation is for a legal or factual assertion.

377. LOW MANUAL, *supra* note 1, at 552.

378. See Kiera Bridley, *Allied Unshackling: British, Canadian, and American Prisoner of War Diplomacy During the Shackling Reprisals, 1942-43* (May 2014) (unpublished M.A. thesis, Minnesota State University); see also JONATHAN F. VANCE, *OBJECTS OF CONCERN: CANADIAN PRISONERS OF WAR THROUGH THE TWENTIETH CENTURY* 134-48 (1994) (discussing the overall policy differences between Canada and Britain over the management of the shackling incident).

ish-Canadian statement on battlefield shackling together with Roosevelt's concurring views.<sup>379</sup> But even trilateral agreement leaves room for real doubt about the validity of this assertion as actual CIL.

The Manual cites extensively to historical examples of unilateral U.S. conduct, which makes little sense given its own assertion that CIL formation requires "extensive and virtually uniform" state practice.<sup>380</sup> Although conceding that the Geneva Convention on Prisoners of War (GPW) "generally requires that POWs be interned . . . on land,"<sup>381</sup> for example, the Manual declares it permissible to conduct detention aboard ships at sea supported only by a New York Times report of U.S. detention of "a Somali man for months aboard a Navy ship before taking him to New York . . . for a civilian trial."<sup>382</sup>

A country cannot logically claim authority to do something today just because it has done the same thing previously. Prior conduct alone fails to establish legality at the time of the original act, let alone now. One footnote even relies upon U.S. Korean War action that the ICRC contended was impermissible at the time.<sup>383</sup> The ICRC's opinion does not definitely establish that the United States was wrong, of course, but without more credible evidence to bolster the U.S. view, it is certainly imprudent to consider it to have been right. Moreover, law changes over time. Spies can no longer be shot without trial,<sup>384</sup> nor military law breakers flogged.<sup>385</sup> So the previous legality of conduct is an insufficient basis to establish that it remains so today.

Other Manual provisions are sourced only to unilateral U.S. rules. The assertion that the controversial force-feeding of hunger striking Guantánamo detainees is permissible, for example, is just supported by a citation to one U.S. document authorizing the practice.<sup>386</sup> (Strangely, the previous citation to the 1958 U.K. Manual<sup>387</sup> is not repeated even though more directly relevant here.) The DoD volume ignores credible arguments that force-feeding is contrary to medical ethics and international law, a conclusion reportedly reached by other U.S. military lawyers considering the issue.<sup>388</sup> In essence, the Manual's logic is nothing more than asserting that a unilateral U.S. assertion of authority is sufficient to justify conduct based on that assertion.

The Manual explicitly cautions that citations to the work of "publicists" should be subjected to a high standard, both as to whose views should be used,

379. *See id.* at 50, 61 n.133.

380. LOW MANUAL, *supra* note 1, at 31.

381. *Id.* at 60.

382. *Id.* at 520 n.63.

383. *Id.* at 567 n.248.

384. 1907 Hague Regulations, *supra* note 40, art. 30.

385. WINTHROP, *supra* note 366, at \*669 (reporting the final abolishment of flogging as a military punishment in August 1861); WAR OFFICE, *supra* note 161, at *Chapter XIV, The Laws and Usages of War on Land*, § 450 (declaring corporal punishment "and cruelty in any form" as impermissible punishments for war crimes).

386. LOW MANUAL, *supra* note 1, at 521 n.72.

387. *See supra* note 354 and accompanying text.

388. Press Release, Physicians for Human Rights, U.S. Military Document Says Force-Feeding Violates Medical Ethics and International Law (Jan. 30, 2015), <http://physiciansforhumanrights.org/press/press-releases/us-military-document-says-force-feeding-violates-medical-ethics-and-international-law.html>.

and that “writings should only be relied upon to the degree they accurately reflect existing law, rather than the author’s views about what the law should be.”<sup>389</sup> Inexplicably, it then includes numerous citations to writings by obscure individuals, and even some “supporting” quotations explicitly indicating they address law as the writer thinks it should be (*lex ferenda*) rather than as it is (*lex lata*). For example, the Manual supports the assertion that persons “[e]ngaged in . . . service in the interests of the enemy State” could be captured if found on a neutral vessel with a citation to a JAG Journal article by a serving U.S. officer, Joe Munster, addressing the need for “old rules concerning the removal of persons from neutral shipping” to be updated.<sup>390</sup> Similarly, the Manual takes an aggressive stance on the law governing hospital ships, arguing that they can be outfitted with secure communications—despite express prohibition against this in the universally ratified GWS-Sea Convention—and weapons beyond the minimal self-defense standard permitted by that treaty.<sup>391</sup> But a primary source cited by this section reports the U.S. Navy’s desire to change the law to permit these measures, again providing clear evidence that these assertions are *lex ferenda*, not *lex lata*.<sup>392</sup>

#### D. Citations to Erroneous Translations

Many fundamental law of war rules originated as treaty language that subsequently came to be respected as law by states not party to the original agreements. The 1907 Hague Land Warfare Regulations are the paradigmatic example, recognized as binding on *all* states by the outbreak of World War II despite treaty wording limiting application to conflicts in which “all of the belligerents are parties.”<sup>393</sup>

In at least two significant instances, the Manual relies on demonstrably flawed English translations of the authentic French Hague text, resulting in plainly erroneous statements of the actual law. With respect to belligerent occupation, for example, the Manual misrepresents Hague Regulations Article 43 as requiring that an occupier “take all the measures in his power to restore, and ensure, as far as possible, *public order and safety*,”<sup>394</sup> based on the original U.S. English translation. But the authoritative French text reads “*l’ordre et la vie publics*” (“order and public life”)—a more extensive obligation<sup>395</sup> that the United States failed to uphold, with disastrous consequences, following the 2003 Iraq invasion.<sup>396</sup> And the Manual’s treatment of weapons regulation, including its assertion that the United States is not bound by widely recognized prohibition on expanding bullets, discussed in Part II *supra*, is based on a

389. LOW MANUAL, *supra* note 1, at 36.

390. *Id.* at 1000 n.312.

391. *Id.* at 487.

392. *Id.* at 482 n.321 (quoting Michael Sirak, *US Navy Seeks to Revise Laws of War on Hospital Ships*, JANE’S DEFENSE WKLY. 1-3 (Aug. 19, 2003)).

393. ROBERTS & GUELF, *supra* note 242, at 68.

394. LOW MANUAL, *supra* note 1, at 773 (emphasis added).

395. *See, e.g.*, BENVENISTI, *supra* note 370, at 78 (favoring translation as “public order and civil life”).

396. Glazier, *supra* note 30.

flawed translation of Hague Regulations Article 23 dealing with superfluous injury.<sup>397</sup>

#### *E. Entirely Unsupported Assertions*

Because the Manual is awash in 6,916 footnotes, it is easy to overlook the fact that some significant assertions are unsupported by any authority at all. section 6.5.3.1, “Serrated Edges,” provides a critical example, stating without any support that “[t]he law of war does not prohibit the use of serrated-edged weapons by military forces, including against enemy personnel.”<sup>398</sup> The problem is that, as discussed in Part II *supra*, customary law rules have long banned this type of weapon.

Similarly, section 17.17.1.1. asserts, without support, that “a state may detain persons belonging to enemy armed groups, by analogy to the detention of POWs in international armed conflict.”<sup>399</sup> The authors likely feel compelled to include this provision as it describes U.S. practice with respect to Guantánamo, but that does not establish its legality.

Without the provision of more credible supporting authority, the Manual will fail to persuade critical readers—particularly those outside the United States—that it has the law right on many of these points. That it very well may be wrong on many matters should give U.S. personnel serious grounds to question whether they should place any significant reliance on those assertions not cited to actual treaties or other reputable sources.

#### IV. KEY OMISSIONS AND FORMAT ISSUES IMPACTING THE MANUAL’S UTILITY

To be of meaningful use to operational forces, a military manual must provide comprehensive yet clear, concise, and accessible explanations of applicable law. But as U.K. defense official Juliet Bartlett wryly observed about the Manual, “This is not a little book!”<sup>400</sup> At twelve-hundred pages, the Manual is twice the overall length of its U.K. equivalent, yet the latter includes detailed tables of authorities, reproduces technical appendices from key treaties, and incorporates a comprehensive 118-page index, all lacking from the U.S. version.<sup>401</sup> The lack of an index alone should have been sufficient reason to find the Manual unsuitable for release in its current form. The U.K. Manual’s well-written substantive text is thus less than forty percent the size of its prolix DoD counterpart.<sup>402</sup>

397. See *supra* Section II.C.1.b.

398. LOW MANUAL, *supra* note 1, at 344.

399. LOW MANUAL, *supra* note 1, at 1063.

400. Juliet Bartlett, U.K. Ministry of Defence, Address at American Society of International Law Annual Meeting Panel on the DoD Law of War Manual (Mar. 31, 2016).

401. See U.K. MANUAL *supra* note 59.

402. While differences in margins and typefaces, as well as the excessive “below the line” content in DoD’s footnotes may explain some of this difference, the substantive body of the U.K. Manual contains 445 pages compared to 1,147 for the U.S. version. Compare LOW MANUAL, *supra* note 1, with U.K. MANUAL, *supra* note 59.

### A. *Critical Omissions*

#### 1. *Failure to Identify Currently Recognized War Crimes*

Justice requires that an individual subject to potential criminal prosecution be able to determine *ex ante* what conduct will run afoul of the law. The international community has sought to avoid any repetition of the Nuremberg Tribunal's somewhat controversial application of previously undefined "crimes against humanity" and "crimes against peace," by clearly prohibiting *ex post facto* crime creation in subsequent international human rights and law of war instruments.<sup>403</sup> Unfortunately, there is no single authoritative source that either U.S. personnel, or enemies risking prosecution by them, can consult, or that the United States can rely upon as a shield to protect our own personnel from impermissible liability when in foreign hands. This is a real concern given the Manual's own documentation of enemy attempts to fabricate allegations of U.S. war crimes.<sup>404</sup> Although the Rome Statute of the International Criminal Court includes a substantial set of agreed upon war crimes (forty-six offenses applicable to international armed conflict and twenty-eight in non-international struggles),<sup>405</sup> it was understood by the drafters that these fixed limits on the jurisdiction of that tribunal were not an all-inclusive list of what CIL might permit states to try.<sup>406</sup>

The U.K. Manual provides both a complete itemization of the crimes defined by earlier treaties and the Rome Statute and identifies additional CIL war crimes, such as "mutilation of a dead body" and "firing on shipwrecked personnel."<sup>407</sup> The DoD Manual, in contrast unhelpfully provides alternative definitions of war crimes as either "any violation of the law of war,"<sup>408</sup> which could include such trivial infractions as medical personnel failing to wear a distinctive armband,<sup>409</sup> or "particularly serious violations of the law of war,"<sup>410</sup> without ever proffering a U.S. Government position. International criminal law and law-of-war scholars, in contrast, have generally defined a war crime as "a serious violation" of the international law of war entailing "individual criminal responsibility."<sup>411</sup> More importantly, the Manual fails to provide any semblance of a complete list of war crimes beyond grave breaches of the 1949 Ge-

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403. See, e.g., David Glazier, *Destined for an Epic Fail: The Problematic Guantánamo Military Commissions*, 75 OHIO ST. L.J. 903, 965 (2014).

404. See, e.g., LOW MANUAL, *supra* note 1, 468 n.239.

405. Rome Statute, *supra* note 236, art. 8.

406. See, e.g., ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 271 (3d ed. 2014).

407. U.K. MANUAL, *supra* note 59, at 422-27, 432-35.

408. LOW MANUAL, *supra* note 1, at 1093-94.

409. *Id.* at 1094.

410. *Id.*

411. See, e.g., CRYER ET AL., *supra* note 406, at 268 (endorsing the criteria identified by the International Criminal Tribunal for the Former Yugoslavia's *Tadić* decision); SOLIS, *supra* note 2, at 302 (quoting U.N. WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 24 (1948)).

neva Conventions; only a handful of other crimes are sporadically identified in isolated parts of the Manual.<sup>412</sup>

This omission does a real disservice to both individual U.S. service persons, who are unable to assess the scope of their own liability, and to larger U.S. efforts to effectively prosecute violations and defend against excessive claims of authority to try our own personnel. It also means that the Manual fails to fulfill one of the most basic requirements for a publication of this genre.<sup>413</sup>

## 2. *Failure to Enumerate the Status of the Additional Protocols as Customary International Law*

The Manual fails to provide U.S. personnel with definitive legal guidance on Additional Protocol I and II of 1977, the two single most important treaties governing international and non-international armed conflict, respectively. Until that time the law of war had two distinct branches: “Geneva Law” providing humanitarian safeguards for persons protected from attack, and “Hague Law” addressing means and methods of warfare. This distinction broke down with Additional Protocol I.<sup>414</sup> Although formally updating the 1949 Geneva Conventions’ humanitarian protections, it included additional rules addressing the conduct of hostilities as well. This broad scope makes it of critical importance, along with the much shorter Additional Protocol II which concurrently expanded legal regulation of non-international conflict.

While the 1949 Geneva Conventions have been universally ratified, ensuring their applicability to any international conflict, the Additional Protocols have been slightly less successful. Additional Protocol I has 174 state parties, including China, Russia, and most NATO members, but Yoram Dinstein notes that “a determined minority—led by the United States—has utterly rejected salient portions of the Protocol.”<sup>415</sup> President Reagan informed the Senate that he would not submit Additional Protocol I for its approval due to such shortcomings as its treatment of “wars of national liberation” as international armed conflicts, and belief that it would “grant combatant status to irregular forces.”<sup>416</sup> He did request Senate approval to ratify Additional Protocol II, and committed to “consulting with our allies to develop appropriate methods for incorporating [Additional Protocol I’s] positive provisions into the rules that govern our military operations, and as customary international law.”<sup>417</sup>

Neither of these events has come to pass. The United States is thus only bound by those protocol provisions reflecting current CIL; yet U.S. forces have no authoritative way to identify what those might be. For years, the two sources

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412. See, e.g., LOW MANUAL, *supra* note 1, at 863 (listing violation of capitulation agreements as a war crime), 1089-91 (identifying grave breaches of the Geneva Conventions).

413. See *supra* note 4 and accompanying text.

414. SOLIS, *supra* note 2, at 82-83.

415. DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 75, at 16.

416. Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1941, and relating to the Protection of Victims of Noninternational Armed Conflicts, concluded at Geneva on June 10, 1977, S. TREATY DOC. No. 100-2, at III-IV (1987).

417. *Id.* at IV.

commonly identified as being most relevant were a 1986 speech by Deputy State Department Legal Advisor Michael Matheson,<sup>418</sup> and a short DoD Law of War Working Group memorandum from that same year.<sup>419</sup> The single definitive pronouncement is President Obama's 2011 determination that the United States would apply Additional Protocol I Article 75, providing fundamental protections to individuals falling outside any more protective Geneva Convention regime, "out of a sense of legal obligation."<sup>420</sup>

One would thus expect explicit enumeration of binding provisions from the Additional Protocols to be a primary function of the DoD Manual. U.S. personnel, as well as allies fighting alongside them, need to know which of these rules U.S. forces must follow, and which they can depart from. Regrettably, the Manual fails badly in this regard.

Chapter 7, for example, addressing the protection of personnel placed *hors de combat* by wounds, sickness, or shipwreck, summarizes relevant Additional Protocol I provisions "to familiarize service members with them in case U.S. forces are engaged in multinational operations with, or are engaged in armed conflict against, States that are Parties to Additional Protocol I."<sup>421</sup> While this is helpful, it is even more important for U.S. personnel to know which of these rules they are legally obligated to follow. But the Manual is silent on that point, just detailing the Protocol's content. And curiously, there are no parallel sections in the chapters covering other subjects also addressed by Additional Protocol I.

The Manual's last chapter, labeled a "documentary appendix," provides "background information" about select texts, including Additional Protocols I and II.<sup>422</sup> Section 19.20 provides some cursory information on each protocol, noting that "[t]his manual references Additional Protocol I provisions, some of which are consistent with DoD practice," but then caveats that "[u]nless explicitly noted, no determinations are made about whether any of these Additional Protocol I provisions reflect customary international law."<sup>423</sup>

The Manual accomplishes this sidestepping by citing protocol rules with an anomalous new signal, "consider," which "[i]dentifies a treaty that relates to the proposition but to which the United States is not a Party (e.g., Additional Protocol I)."<sup>424</sup> Used repeatedly in conjunction with provisions from both pro-

418. 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 AM. U. J. INT'L L. & POL'Y 419 (1987).

419. Memorandum from W. Hays Parks et al. to John H. McNeill, Assistant Gen. Couns., Int'l & Operational L. Dep't. (May 9, 1986), reprinted in LAW OF WAR DOCUMENTARY SUPPLEMENT 234-35 (John B. Reese & Iain D. Peddon eds., 2011), [www.loc.gov/rf/frd/Military\\_Law/pdf/law-of-war-documentary-supplement\\_2011.pdf](http://www.loc.gov/rf/frd/Military_Law/pdf/law-of-war-documentary-supplement_2011.pdf).

420. Office of the Press Sec'y, *Fact Sheet: New Actions on Guantánamo and Detainee Policy*, WHITE HOUSE (Mar. 7, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

421. LOW MANUAL, *supra* note 1, at 505.

422. *Id.* at 1148.

423. *Id.* at 1170.

424. *Id.* at 6.

tocols, the net effect is to leave the reader wholly uncertain as to the legal effect of these rules for the U.S. military.

The Manual provides some limited, but convoluted, bases for inference about the applicability of a modest subset of Additional Protocol I provisions. A reader might thus assume from these captions that U.S. forces are expected to follow the handful of Additional Protocol I articles identified in those sections.

(1) 19.20.1.1 Examples of AP I Provisions Incorporated Into Other Treaties That the United States Has Accepted;<sup>425</sup>

(2) 19.20.1.2 Examples of AP I Provisions That Are Consistent With Longstanding U.S. Practice;<sup>426</sup> and,

(3) 19.20.1.3. Examples of AP I Provisions That the United States Has Supported;<sup>427</sup>

However, it would be unclear whether they are doing so as a matter of law or policy. And it can reasonably be inferred that the Manual's authors do not consider U.S. forces legally obligated to follow the nine provisions identified in section 19.20.1.5., "Examples of AP I Provisions to Which the United States Has Objected," although the complexity of some rules requires careful reading of cross-referenced sections to try to ascertain the actual scope of U.S. disagreement.<sup>428</sup>

But what is the reader to make of the status of rules in section 19.20.1.4, "Examples of AP I Provisions Based on a Principle That the U.S. Supports, Even Though The Provision Is Not Necessarily Customary International Law Nor Militarily Acceptable In All Respects?"<sup>429</sup> And what of the many protocol rules not addressed at all in this chapter?

The Manual's treatment of Additional Protocol II, dealing with non-international armed conflict, is different but ultimately no more definitive. It explains that Reagan sought Additional Protocol II ratification; that George W. Bush asked for a delay after realizing its practical legal significance might be enhanced by the Supreme Court's decision in *Hamdan v. Rumsfeld*,<sup>430</sup> and that Obama requested Senate action again "after interagency review" in 2011.<sup>431</sup> Unfortunately, the Manual merely declares "the provisions of Additional Protocol II are consistent with U.S. practice; and that any issues could be addressed with reservations, understandings, and declarations." So, despite purporting to be a U.S. law of war publication, the Manual never addresses the legal status of these rules.<sup>432</sup> Nor does it identify the "issues" that would need to be addressed with U.S. reservations—measures which would alter the legal meaning of Ad-

425. *Id.* at 1177-78.

426. *Id.* at 1178.

427. *Id.*

428. *Id.* at 1179.

429. *Id.* at 1178.

430. 548 U.S. 557 (2006).

431. LOW MANUAL, *supra* note 1, at 1180.

432. *See id.* at 1180 n.227.

ditional Protocol II and excuse U.S. forces from following those rules as set forth in the treaty.

The failure to provide urgently needed legal guidance on the status of Additional Protocol I and Additional Protocol II rules critically undermines the Manual's worth as a practical guide for U.S. military personnel.

### *B. Format Issues*

There are several reasons for the Manual's excessive length despite its failure to include key information needed by U.S. military personnel, each of which adversely affects the Manual's overall utility for its intended audience. Many chapters, for example, contain extended background discussion of past approaches, address contrasting views among different commentators, try to identify every possible combination of circumstances, or every potential use of a particular term. Little, if any, of this is relevant to personnel needing to determine what rules they must follow today.

Another contributor to the Manual's length is the repetitive discussion of many subjects in different locations, which are then cross-referenced in footnotes.<sup>433</sup> Much essentially identical content is thus unnecessarily repeated, sometimes in immediately adjacent paragraphs.<sup>434</sup> Typically little, if any, new detail is provided in the additional sections, but the coverage of a topic in multiple separate locations means that a reader must carefully note—and follow—each of the cross references in order to be sure that they have read all relevant discussion of an issue. This makes it unnecessarily difficult, and time consuming, to find answers to legal questions.

The December 2016 Manual update addressing proportionality and precautions in attack provides an extreme example, adding ten pages of text that must now be read in conjunction with the specific sections on those topics,<sup>435</sup> significantly enhancing the burden on readers trying to ascertain what the Manual requires in these areas. The ten new pages contain eighteen additional cross-references to other portions of the Manual, further multiplying the burden on the reader.<sup>436</sup>

The challenge of locating specific legal provisions in the Manual is exacerbated by its lack of an index. The ability to search the PDF version electronically provides only partial compensation; the reader still faces the daunting—and time consuming—task of having to sequence to, and carefully review, each individual section and footnote containing the search term in order to piece together the Manual's full treatment of the issue. A well-constructed index could at least direct the reader to core substantive discussions, while omitting inconsequential references and cross-reference footnotes that merely steer the reader to other substantive content. The DoD may rationalize that it intends primary distribution of the Manual to be in an electronic format, but it should then pro-

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433. See, e.g., LOW MANUAL *supra* note 1, at 338-39, 341.

434. See, e.g., *id.* at 293-301.

435. See *id.* at 241-70.

436. See *id.* at 241 (plus an additional "compare" citation at 247, n.321).

vide a hyperlinked version allowing those reading it on computers to jump directly to core discussion. But it must also recognize that as a practical matter, many field users will predictably elect to print hard copies, and these readers are adequately served only if provided a well constructed index.

Although the Manual criticizes the academic practice of including “tangential” information in footnotes,<sup>437</sup> it has so much “below the line” content that leading law journals would likely be reluctant to print it. Much of this discussion is exactly the type of extraneous explanation the Manual declaims; it requires a three-page chart to explain all the Bluebook-style “signals” that it employs.<sup>438</sup> This suggests it was envisioned more as a pseudo-academic tome than a practical reference for military forces. And it fails to either use quotes or to acknowledge that some definitions, such as that for “no signal,” are lifted verbatim from the copyrighted Bluebook.<sup>439</sup>

The Manual’s treatment of current treaty rules is even more perplexing, particularly the lengthy recitation of those from the 1949 Geneva Conventions. The applicable rule is typically stated verbatim, or largely verbatim, in the body of the text without quotation marks or any value-adding supplementary explanation. A footnote then indicates the rule’s treaty source followed by the actual treaty language, this time in quotation marks.<sup>440</sup> An example of this practice, repeated hundreds of times throughout the Manual, is found in the discussion of rules from the Third Geneva Convention<sup>441</sup> addressing POWs, which it styles as “GPW.” Section 9.7.2., “Identity Documents,” begins by stating “At no time should POWs be without identity documents.”<sup>442</sup> This sentence is supported with a footnote, whose text reads “GPW art. 18 (‘At no time should prisoners of war be without identity documents.’)”<sup>443</sup> The approach is even more redundant when the Manual addresses provisions common to the 1940 Geneva Conventions covering the sick and wounded in the field (GWS) and at sea (GWS-Sea).<sup>444</sup> In these cases operative language is repeated three times: once in the text and twice in a footnote quoting serially from both treaties.<sup>445</sup> In comparison, the U.K. Manual generally summarizes or paraphrases treaty rules; actual convention text is placed in quotation marks.<sup>446</sup> It then just provides short-form citations in its terse, but thorough, footnoting.<sup>447</sup>

437. LOW MANUAL *supra* note 1, at 2.

438. *Id.* at 5-7.

439. Compare *id.* (quoting Bluebook text), with THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005) (providing the original quoted source).

440. See, e.g., LOW MANUAL *supra* note 1, ch. IV, VII, VIII, IX, X, and XI (comprising collectively the discussion of rules found in the four Geneva Conventions of 1949).

441. See Third Geneva Convention, *supra* note 42.

442. LOW MANUAL, *supra* note 1, at 552-53.

443. *Id.* at 531 n.140

444. See First Geneva Convention and Second Geneva Convention, *supra* note 42.

445. See, e.g., LOW MANUAL, *supra* note 1, at 471 n.386

446. U.K. MANUAL, *supra* note 59, at ix.

447. See, e.g., *id.* at 152 n.87 (discussing the same rule from Article 18 of the Third Geneva Convention).

The DoD Manual is similarly repetitive when borrowing language from earlier U.S. manuals. As an illustration, the paragraph in section 11.18.2.3, addressing seizure of property by an occupying power, declares in part: "Valid capture or seizure of property requires both an intent to take such action and a physical act of capture or seizure. The mere presence within occupied territory of property that is subject to appropriation under international law does not operate to vest title thereto in the Occupying Power."<sup>448</sup> A footnote cites this rule to paragraph 395 of FM 27-10, and then repeats the entire text in quotation marks. Obviously a legal manual can find it helpful to "borrow" language that is either authoritative, such as an actual treaty provision, or particularly well expressed. But borrowing legalese from a publication lacking international standing, and reprinting it twice, is illogical. While most FM 27-10 paragraphs include legal references (typically a Geneva or Hague Convention article), the DoD Manual omits these, thereby lessening its own credibility.

In several cases, cross-referencing masks the lack of supporting authority through circular footnoting. This is exemplified by the assertion that enemy civilian aircraft failing to comply with military instructions are subject to attack, which is supported only by a cross-reference to a later section.<sup>449</sup> But the referenced text merely repeats the assertion—in a list of grounds for losing protected status—supported only by a cross-reference back to the original discussion.<sup>450</sup>

The Manual has a number of flaws that should have been caught via careful editorial review. For example, a work whose military readers will predictably lack specialized knowledge of international law should not use terms of art, such as "customary international law," and "innocent passage," without prior definition. CIL, at least, is eventually explained after several prior appearances.<sup>451</sup> The latter term first appears in a section captioned "Innocent Passage of Foreign Vessels Through Territorial Seas and Archipelagic Waters." Footnotes explain the terms "archipelago" and "archipelagic state,"<sup>452</sup> but not the more important "innocent passage," which appears in three subsequent sections but is never defined.<sup>453</sup> The use of "piracy" is uniquely problematic. After appearing six times previously,<sup>454</sup> a footnote in Chapter 18 finally provides an explication from U.S. federal law. But that codification, "[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations . . . shall be imprisoned for life,"<sup>455</sup> is useless to a reader unfamiliar with what constitutes piracy under international law, something the Manual never explains.

448. LOW MANUAL, *supra* note 1, at 781 (quoting DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, ¶ 395 (1956)).

449. *See id.* at 932.

450. *Id.* at 936.

451. This term appears multiple times in both the text and footnotes in Chapter 1 before finally being explained. *Id.* at 29.

452. *See id.* at 883 nn.35-36.

453. *See id.* at 902, 910, 921.

454. *Id.* at 1, 104-105, 159-160, 888, 891-892, 936-937, 1068 (using the term "piracy" without definition, or even cross-reference to a definition).

455. *Id.* at 1121 n.246 (quoting 18 U.S.C. § 1651 (2012)) (emphasis added).

Professional proofreading should have caught internal inconsistencies, such as the conflict between sections 7.2.1. and 7.3.1.2. The first section states that GWS-Sea protections are superseded by the GWS once individuals reach land; the latter says that the GWS-Sea covers persons “stranded on the coast.”<sup>456</sup> And although the Manual calls for reliance on authoritative citations reflecting current law rather than visions of what the law should be, several propositions are supported by sources clearly identifying themselves as aspirational views.<sup>457</sup> These, too, should also have been caught by a careful editor.

#### CONCLUSION

As the Permanent Court of International Justice famously declared in the *Lotus* case, sovereign nations are only bound to follow “the rules of law . . . [that] emanate from their own free will expressed in conventions or by usages generally accepted as expressing principles of law [i.e., customary international law].”<sup>458</sup> Although it may disappoint some critics, it is thus eminently reasonable for a national law of war manual to take a conservative stance and decline to adopt the aspirational views of non-state entities, such as the recently postulated requirement to capture or wound enemy fighters in preference to killing them.

What is not reasonable, however, is for DoD in turn to portray the idiosyncratic views of a small group of its own lawyers as valid expressions of international law, which must necessarily reflect at least the general, even if not unanimous, consensus of the community of nations. While a substantial portion of the new Manual just uncontroversially restates widely ratified treaty rules, its overall validity is undermined by the significant number of problematic assertions discretely interspersed throughout its pages, such as the professed legitimacy of economic support targeting, the justification of extra-conventional treatment of “war on terror” detainees, and the claimed right to use expanding bullets.

These departures from recognized law, coupled with the Manual’s routine reliance on questionable legal authority, problematic understandings of core international legal concepts, failure to speak for the U.S. Government as a whole, and stylistic shortcomings undermine its utility as a reliable legal resource for either U.S. or international readers. Even the most cynical adherent of realpolitik should recognize that these shortcomings have at least three significant consequences.

First, they represent a substantial breach of faith with the United States’ fighting forces. By failing to adequately reflect agreed upon international rules in some key areas—such as the universally recognized prohibition on expanding bullets, and its overly aggressive interpretations of what constitute lawful targets—compliance with the Manual will predictably place U.S. personnel at real risk of war crimes prosecution by foreign states. And its failure to provide

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456. Compare *id.* at 436-37, with *id.* at 439.

457. See *supra* Section III.B.5.

458. Case of the S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, ¶ 44 (Sept. 7).

a comprehensive summary of recognized war crimes does a disservice both to individual service members seeking to identify rules they must comply with as well as commanders and judge advocates having to determine whether war crimes have been committed.

Second, although the Manual itself recognizes the importance of law of war compliance for maintaining political support for military endeavors, it contains a number of controversial provisions such as excusing U.S. forces for responsibility for collateral damage to otherwise protected facilities such as hospitals because they are sited near legitimate military objects, or allowing targeting of civilian infrastructure based merely on the potential for future military use. Engaging in this kind of conduct will quickly weaken international support for the U.S. cause and hand our adversaries propaganda bonanzas that will facilitate their own efforts at recruiting and solicitation of aid.

And third, it will encourage other states, and potentially even non-state conflict participants, to take similar liberties with the law, to the detriment of U.S. national security interests, the safety of U.S. forces, and the larger purposes served by the law in restraining unnecessary violence and loss of human life. Collectively, the Manual's current shortcomings thus logically outweigh its value; it will potentially be more helpful to our adversaries, and to those facing U.S. military prosecution, than to our own fighting forces.

Although the number of specific rules requiring substantive revision are not a terribly large part of the overall volume, the issues related to redundant language, extensive cross-referencing, and lack of credible support which undermine the Manual's value as a ready reference for U.S. forces permeate the entire span of its 1,200 pages. It is thus beyond any prospect for "minor surgery," and should be formally withdrawn until a comprehensive rewrite (and rigorous interagency review) can be completed.

At this point it would be far more practical for the United States to seek permission from the U.K. Ministry of Defence—our closest ally—to use their comparatively concise, well-written, and persuasively supported volume as a starting point rather than to try to salvage the current U.S. tome. The only really significant issue requiring modification would be the fact that the United Kingdom is a party to both Additional Protocol I and II while the United States is not. But the U.S. Government owes it to both our troops and coalition partners to complete a decades overdue assessment of precisely which provisions of those agreements it considers to constitute CIL and which it does not. Once that effort is complete, it would be a very simple matter to tailor the U.K. Manual to match U.S. legal obligations, and then seek timely interagency review, after which it could be promulgated as an authoritative Department of Defense Directive over the signature of the Secretary of Defense, or at least as a formal Joint Publication. The alternative, leaving our individual services to fight jointly yet lacking credible unified guidance on the law of war, should be unacceptable for a nation owing a significant debt to the comparatively small portion of our population that voluntarily undertakes the full burden of our national defense.