

Publication Series

National Military Manuals on the Law of Armed Conflict

Nobuo Hayashi (editor)



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Minutes of the Discussion

Reported by Erika Ellyne*

Bill Fenrick expressed his doubts on the practicality of incorporating human rights into a military manual. While human rights are clearly important, their variability is problematic. Is human rights law generic enough to be contained in a chapter of a military manual? Or is the law's application so dependent upon each factual situation that what is truly needed is an independent manual of its own?

Fenrick also cautioned against adopting *De Mulinen's Handbook* as a substitute for other manuals such as the *UK Manual*. The former is more a compilation of checklists than a book of legal interpretation.

Dieter Fleck asked if the panellists could offer any advice to governments involved in multinational operations on how to handle national particularities. With reference to *habeas corpus*, which is a hot topic before the ECHR these days, would the panellists be of the view that peacekeeping forces in a post-conflict situation might detain persons without a judge's consent? Should military manuals be adapted for use by law enforcement forces on their respect for human rights?

Tony Rogers raised the question of occupied territory and asked whether it is equivalent to "effective control" which would call for the application of human rights. The *UK Manual* mentions the *Banković* case¹ according to which human rights law might in fact apply depending on the circumstances of each situation. In a wise choice of words, the House of Lords has effectively ruled on the application of human rights in "occupied" territories. It declined to say that the British were obligated to apply human rights law in Basra in the

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¹ European Court of Human Rights, *Banković*, *op. cit.*, quoted in *UK Manual*, *op. cit.*, §11.19, p. 282.

aftermath of the Iraq War. Occupation is not necessarily the same as effective control. It would be interesting to hear what the ECHR would have to say on the matter.

As a co-author of the disappointing *ICRC Model Manual*, Rogers nevertheless considered that it was salvageable and could in fact contribute to the preparation of another manual. It was, in effect, put together at the last minute and suffered from the many authors having conflicting views.

Vasilka Sancin² observed that all seemed to agree on the incorporation of individual criminal responsibility into military manuals. What space, if any, should state responsibility be given within these manuals? Would the enforcement of Article 1 common to the Geneva Conventions be relevant?

Louise Doswald-Beck agreed that there is a difference between discussing human rights rules in a global perspective, on the one hand, and discussing their application to a specific state or group of states, on the other. The main point is that it is appropriate for military manuals to refer to human rights and human rights treaties. Complications arise from the fact that not all countries have ratified the same treaties and thus may have the same obligations under human rights law. This would become an issue in joint ventures such as that envisaged here, and particularly as to what needs to be written into the manual. It is easier for one state to refer to its obligations under human rights law; no difficulty arises if a number of states share the same obligations. As all Nordic countries are probably parties to the European Convention on Human Rights, its provisions could, as a minimum, be incorporated into a common manual.

Doswald-Beck noted that military manuals aim to inform officials at the highest level of the rules that must be heeded in the conduct of engagements. References to human rights can and should

² Vasilka Sancin holds a Ph.D. in law from the University of Ljubljana where she lectures. She is also involved in a research project of the Slovene Ministry of Defence entitled "Analysis of requirements for understanding the international law of armed conflicts and international humanitarian law and elaboration of a manual for Slovenian armed forces".

be made at this level. Otherwise, those acting honestly and in good faith can end up unwittingly violating human rights. Including human rights into military manuals aimed at these upper echelons of power would permit the various rules of engagement to be formulated in accordance with human rights.

In Doswald-Beck's view, it would be possible for generic rights, such as the right to a fair trial and independent tribunal, to be articulated. It must be noted however that human rights do depend on the concept of "effective control". The question, then, is this: is "occupation" synonymous with "effective control"? The *Banković* case raised the question of effective control but within the context of air raids. It is therefore more appropriate to examine the Northern Cyprus case.³ In that case, effective control was found to exist where 40,000 Turkish soldiers occupied the territory in question and where the local government, though it had limited autonomy, was for the most part under Turkish control. In contrast, where parties are still battling over an area, as in the *Issa* case⁴ involving Turkish soldiers in Northern Iraq, the situation is different. Here, "effective control" is not present. Courts are not certain because ongoing operations blur the notion of control.

Doswald-Beck observed that *habeas corpus* would bind peacekeepers. To date, neither the IACHR nor the Inter-American Commission has permitted derogations from *habeas corpus*. The ECHR has agreed that the traditional judge may be replaced by a comparably independent body. If it is possible for foreign judges to be brought in and resolve disputes concerning Article 5 of Geneva Convention III, then why would it not be possible for an independent body to be formed for the resolution of *habeas corpus* matters? In *Ireland v. United Kingdom*,⁵ the ECHR gave the bottom line, namely that there ought to be an independent body of sorts.

³ European Court of Human Rights, *Cyprus v. Turkey*, *op. cit.*

⁴ *Ibid.*, *Issa v. Turkey*, *op. cit.*

⁵ *Ibid.*, *Ireland v. United Kingdom*, *op. cit.*

Doswald-Beck stated that the relevance of state responsibility under common Article 1 would depend on whether third states were involved as belligerents.

Bill Boothby cautioned that, although other states should be consulted, a state's manual must express its own position on, and interpretation of, issues and legal questions. Where there are difficulties in the application of human rights and national obligations, the state must set out its view.

Boothby noted that, whereas human rights law remains applicable, sometimes international humanitarian law takes precedence. It all depends on the circumstances of each situation. It is important to make the manual practical; only then is there any reasonable prospect that it will be implemented.

François Sénéchaud agreed that one could not compare *De Mulinen's Handbook* with the *UK Manual*. Not only did the former seek to explain IHL obligations from a strictly international point of view; but these obligations, as well as international humanitarian law itself, have also undergone profound changes in the international arena. The *UK Manual*, in contrast, takes an exclusively national approach to the matter and develops it in greater detail. The fact remains, however, that *De Mulinen's Handbook* is still a cornerstone of IHL manuals and the backbone to the ICRC's dissemination and integration activities around the world. Consequently, the ICRC is currently reviewing and updating this essential document.

Sénéchaud conceded that the *ICRC Model Manual* had shortcomings. It had been prepared in a hurry. Also, paradoxically, it backfired against the ICRC – for example, one government misquoted it in an effort to justify the targeting of civilians. Since then, the ICRC has put it on the backburner. Of course, all states are still welcome to use it.

Finally, Sénéchaud observed that, in 1995 and 1996, the ICRC began working with police forces in Brazil on law enforcement and human rights. There is consultative work being done with the military. Most armed forces in Latin America do not and will not operate in international armed conflicts or non-international armed conflicts

within the meaning of international humanitarian law. They will, however, perform law enforcement. As a result, a number of specialists work actively in this domain.

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National Military Manuals on the Law of Armed Conflict

Nobuo Hayashi (editor)

States are duty-bound to disseminate and ensure respect for the law of armed conflict (LOAC) among their personnel. A number of national military LOAC manuals have been issued to this end. But what are they exactly? What do they do? Is such a manual really necessary for a state that does not have one yet? What are the experiences of those states which already issue manuals? What areas of law should a good manual cover? These and other questions were considered at an international seminar held under the auspices of the Forum for International Criminal and Humanitarian Law (FICHL) in Oslo, Norway, on 10 December 2007. This publication records the seminar's deliberations and findings. It also contains an introductory article and a checklist prepared by the editor for the benefit of those considering writing a new manual.

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