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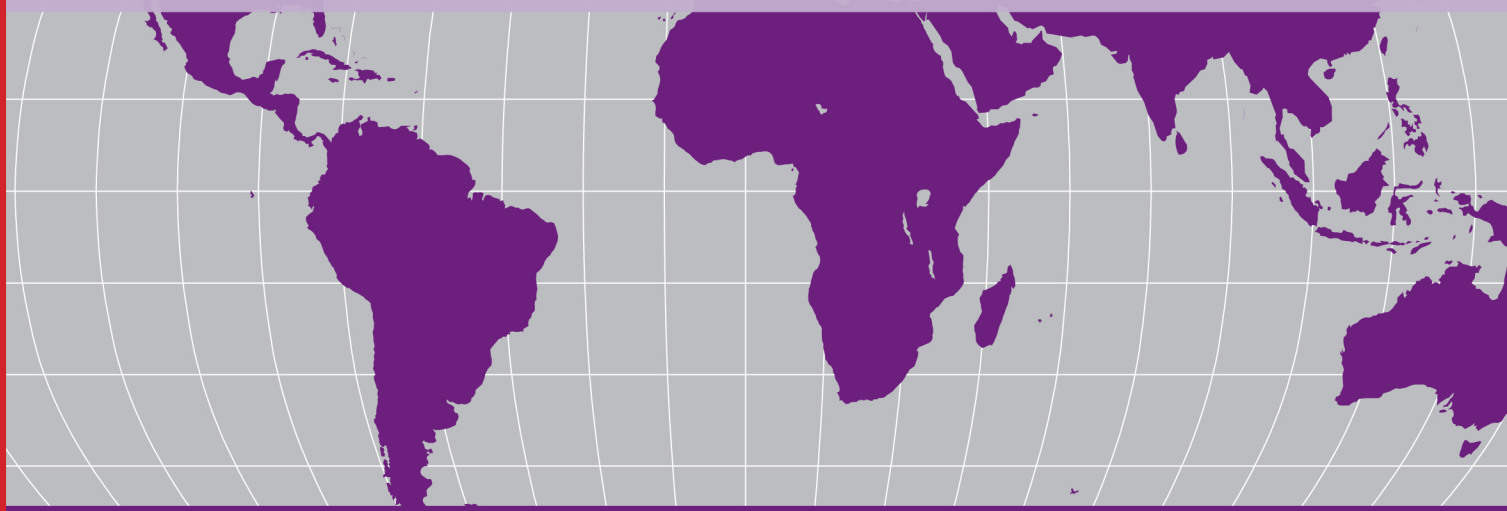
Publication Series

# National Military Manuals on the Law of Armed Conflict

Nobuo Hayashi (editor)



**E-Offprint:**

Charles Côte-Lépine, "Minutes of the Discussion", in Nobuo Hayashi (editor), *National Military Manuals on the Law of Armed Conflict*, 2nd edition, Torkel Opsahl Academic EPublisher, Oslo, 2010 (ISBNs: 978-82-93081-02-9 (print) and 978-82-93081-03-6 (e-book)). This book was first published on 19 December 2008. The Second Edition was published on 23 July 2010. TOAEP publications may be openly accessed and downloaded through the web site www.toaep.org which uses Persistent URLs (PURLs) for all publications it makes available. These PURLs will not be changed and can thus be cited. Printed copies may be ordered through online distributors such as www.amazon.co.uk.

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# Minutes of the Discussion

**Reported by Charles Côte-Lépine**[*]

Louise Doswald-Beck[1] explained the labelling of official sources in the *ICRC Customary Law Study*. The study uses the word "manual" to describe the various sources on which it relies in proving or disproving the existence of a rule of international customary law. In the study, the word "manual" is used simply for reasons of space; the actual names of all the sources can be found in the annex. The study looked at as many sources of state practice from around the globe as possible, rather than affirming the existence of a rule of customary law having examined only a few states.

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

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

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

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

As a former ICTY prosecutor, Bill Fenrick[2] expressed his disinclination to use customary law. While it might be easy for a judge to *confirm* the existence of a rule of customary law, it is difficult for a prosecutor to *prove* its existence. Those ICTY prosecutors who seek to establish the existence of a rule of customary law tend to look at the practice of the states with which the judges would be familiar.

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

Roberta Arnold[3] observed that the outcome would depend on the status that the state wants to give its manual. Despite David Turns' statement that manuals do not constitute law, the Swiss manual does constitute law in Switzerland. A breach of this manual is a criminal offence under Swiss law. If a state wants to attach more importance to its military manual, it can do so by restating criminal provisions or by creating legal rules that would engage responsibility for its breaches.

Ove Bring[4] noted that the discussion so far had mostly focused on international law. In his view, military manuals are important as a form of state practice. According to Turns, while Brownlie believed that manuals are evidence of international customary law, Lord Wright concluded that they do not "constitute international law". Bring argued

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

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

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

that manuals represent state practice but not necessarily international law and that there are no different views on this issue. Lord Wright and Brownlie dealt with different matters and their views can easily be reconciled. On the one hand, Brownlie considered that manuals represent *evidence* of state practice; he did not say whether they always represent *international customary law*. On the other hand, Wright concluded that manuals do not represent *international customary law* as such; he did not refer to the issue of *evidence of state practice*. Wright did not deny that the norms contained in manuals *could* express applicable international law.

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

Daniel Geron[5] advised caution in developing rules of international customary laws when such developments are asserted by states that may not have sufficient practice or experience in the field. This is essential for *lex ferenda* and should be borne in mind in the context of a common Nordic manual.

Darren Stewart[6] observed that an increasing number of states participate in multinational operations and that interoperability has become a major concern. Experience shows that military manuals are

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

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

extremely important when understanding other countries' legal positions. Here, military manuals have a double purpose. First, as Charles Garraway noted, they are useful in the sense that they provide a solid basis for training. Second, military manuals help allies understand one another's positions.

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

Tom Staib[7] noted that many states, including Norway, have given the role of legal adviser in their armed forces to civilians. National military manuals would be important in order to guide them. But creating a common Nordic manual would be a highly complex enterprise.

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

### 6.1. Status of a Military Manual

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

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

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

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

they consider to be their rights and obligations, they will then be bound by them?

### 6.2. Military Manuals and Penal Sanctions

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

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

### 6.3. Military Manuals and *Lex Ferenda*

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

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

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

### 6.4. Clarity of Positions Taken in a Military Manual

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

FICHL Publication Series No. 2 (2010, Second Edition)

# 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 nessescary 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.

ISBN 978-82-93081-02-9

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