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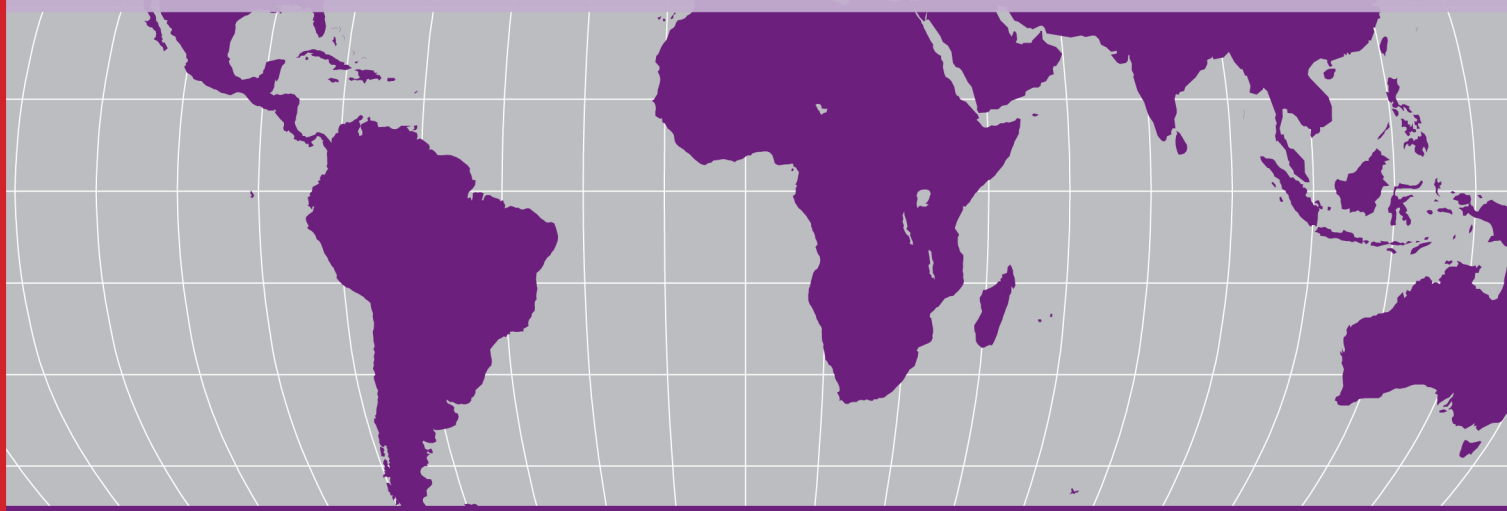
National Military Manuals on the Law of Armed Conflict

Nobuo Hayashi (editor)



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Military Manuals, Operational Law and the Regulatory Framework of the Armed Forces

Charles Garraway[*]

Why bother with a manual? After all, surely it is more trouble than it is worth. People quote them back at you and cite them in legal proceedings. Is it not better to retain flexibility by publishing nothing?

This somewhat defeatist attitude can be found in some circles. It is like the politician who goes through his career saying nothing so that nobody can disagree with him! To the soldier on the ground – and sailor, airman and marine – the luxury of sitting on a fence is not given. They have to make decisions, often life and death decisions, with little time to reflect and imperfect information. They do not have international law degrees – many do not have much education at all. And yet, it is on them that the burden often falls. In modern warfare, tactical actions can have strategic consequences. The results of Abu Ghraib will be with us for generations to come. The question is how one develops a clear set of instructions that reach from the strategic to the tactical. Where do manuals come in?

First, it is necessary to define our terms. The word "manual" is used in different contexts. There is the "international manual". This type of manual attempts to bring together international law and often move it forward outside the treaty process. Examples include the *Oxford Manual* of 9 September 1880.[1] In the words of the preface:

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[1] *The Laws of War on Land,* Manual published by the Institute of International Law (1880), printed in Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed*

> The Institute [of International Law], too, does not propose an international treaty, which might perhaps be premature or at least very difficult to obtain; but, being bound by its by-laws to work, among other things, for the observation of the laws of war, it believes it is fulfilling a duty in offering to the governments a *Manual* suitable as the basis for national legislation in each State, and in accord with both the progress of juridical science and the needs of civilized armies.
>
> Rash and extreme rules will not, furthermore, be found therein. The Institute has not sought innovations in drawing up the *Manual*; it has contented itself with stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and practicable.[2]

A more modern example of this process is to be found in the 1994 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*.[3] However, these manuals, important though they are in the development of international law, are not what we are dealing with here. Our subject is national manuals and they fall into two categories. At the highest level, national manuals provide evidence of state practice and *opinio juris* in relation to the states by whom they are issued. Whilst such manuals will of course look at contentious areas, their aim is not to reach a consensus but to reflect the position adopted by the state concerned. They do not form law, as of themselves, but will inevitably be cited as an example of "international custom, as evidence of a general practice accepted as law".[4] On the lower level, manuals may still be issued but the requirement here is different. Indeed, in the words of Article 1 of Hague Convention IV 1907, they

Conflicts, 3rd revised and completed edition, Martinus Nijhoff Publishers/Henry Dunant Institute, 1988, p. 36 *et seq*.

2 *Ibid*, p. 36. Emphasis in original.

3 Louise Doswald-Beck (ed.), San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Cambridge University Press, 1995.

4 Article 38(1)(b), Statute of the International Court of Justice, printed in Ian Brownlie (ed.), *Basic Documents in International Law*, 5th edition, Oxford University Press, 2002, p. 319.

should contain "instructions".[5] At the very lowest level, those instructions need to be reduced still further. In the United Kingdom, the soldier, when deploying on operations, is issued with a small "LOAC card" which contains the key "dos and don'ts". It is drafted in simple language and designed for easy reference. This is separate from rules of engagement (ROEs), containing the operational and political instructions. These too are often reduced to a card.

It is important to realise that "[m]anuals are not an end in themselves. They are an instrument for achieving an end".[6] Within the national environment, there needs to be a cascade of information. Furthermore, it needs to be "joined up". On the operational side, rules of engagement are approved usually at high levels of government; they then cascade down the chain of command until they reach the soldier again in the form of simple "dos and don'ts". Commanders at each level may make their own adjustments, but they can only act within the confines of the strategic instructions that have come down from government. If the government has decided that a particular weapons system cannot be used for political reasons, the commander further down cannot authorise its use – even if in law it might be legal to use it.

If that is true for operational requirements, it is also true for legal requirements. It is no good starting from the bottom and working up. 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.

I can give an example of what I mean. The *Operational Law Handbook* issued by the International and Operational Law Department of the Judge Advocate General's Legal Center & School,

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5 Article 1, Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, printed in Schindler and Toman, *op. cit.*, p. 71.

6 Michael Reisman and William Lietzau, "Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict", 64 *International Law Studies* 1, p. 12.

US Army,[7] is described in its preface as "a 'how to' guide for Judge Advocates practicing operational law".[8] Although this handbook covers a wide field of "operational law" including fiscal and administrative law, it also covers "the law of war". For many years, there has been much debate on the official position of the US Government in relation to Additional Protocol I 1977, a treaty that the United States signed but has not ratified. When recommending to the Senate that the United States should not ratify the Additional Protocol, President Reagan stated that, whilst it had "certain meritorious elements", it was "fundamentally and irreconcilably flawed".[9] The problem has always been to assess which parts are accepted by the United States as customary law, and thus binding, and which are not. For many years, academics and operators have relied upon an article published by Michael Matheson, then Deputy Legal Adviser at the Department of State, as the authority for the US position on particular articles.[10] This was reflected in the text of the 2005 *Operational Law Handbook*.[11] However, the authors were forced to publish an "Errata Sheet" which stated:

> This information was taken from an article written by Michael Matheson in 1986. It takes an overly broad view of the US position and as a result may cause some confusion as to US policy.[12]

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7 International and Operational Law Department, *Operational Law Handbook,* The Judge Advocate General's Legal Center & School. The 2007 version can be downloaded from http://www.fas.org/irp/doddir/army/law2007.pdf.

8 *Ibid.*, p. ii.

9 Letter of Transmittal, 29 January 1987, printed in 81 *American Journal of International Law* 1987, p. 911.

10 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 *American University Journal of International Law and Policy* 1987, p. 419.

11 Operational Law Handbook 2005, pp. 15-16.

12 This errata sheet was available for download from the Judge Advocate General's Legal Center & School website at the time of the publication of the First Edition, but has since been removed from the webiste.

That is fine as a statement, but it does not help the judge advocate in the field in that it made no attempt to replace the Matheson view with anything at all. The confusion therefore remained – and indeed was probably greater. Judge advocates in the field had to make up their own mind as to the effect of Additional Protocol I with no guidance whatsoever.

To be fair, the United States is aware of this and is currently working on its own national manual, which will provide the top level analysis that is needed. In the meantime, however, there is a yawning gap – not helped by comments used by Bush Administration officials,[13] such as "quaint",[14] to describe the Geneva Conventions. If you remove the foundations, the house will inevitably be insecure!

There are downsides to publishing manuals, however. Conflict is like a chameleon; it is forever changing. To that extent, the United States is right. International humanitarian law has a habit of changing in response to the last conflict and is not so good at anticipating the next. After all, the Geneva Conventions themselves were developed in response to the events of 1939-1945 and some of the provisions may indeed be outdated in respect of modern conflicts. Prisoner of war records may no longer be sent by first class post to Geneva; they are transmitted at the flick of a switch by computer! Governments are understandably afraid that if they nail their colours to the mast, they will find that the age of sail has passed and the colours are now on the wrong ship! This is not helped by the growing use of manuals by organisations and courts as evidence of state practice. They are, of course, but care needs to be taken as to how they are so used. A national manual such as the 2004 *UK Manual*[15] may indeed carry some

[13] See, *e.g.*, Alberto R. Gonzales, "Memorandum for the President: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban", printed in Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib*, Cambridge University Press, 2005, p. 118 *et seq*.

[14] *Ibid*., p. 119.

[15] UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, 2004.

authoritative weight. It has been approved by government departments at the highest levels. A document prepared lower down the chain of command may have less authority, however, and, indeed, it may take into account factors other than law. Thus – with apologies to the editors of the *ICRC Customary Law Study*[16] – , it was unwise to use *A Soldier's Guide to the Law of Armed Conflict* (Army Code 71130)[17] as an authority and to cite it as a manual. Despite its title, this small booklet of some forty pages is designed for senior non-commissioned officers and junior officers. It is updated every year and contains a "potted" version of the law of armed conflict with references to the appropriate conventions and so on. As a former author, I like to think it is a good document but it does not give an authoritative version of the law as interpreted by the United Kingdom.

This tendency to cite any official document has caused problems and the difficulties are illustrated by some of the caveats that are now to be found in such publications. One solution suggested by officials is to classify all publications of this nature so that they cannot be cited. Many already contain statements similar to that found in the Royal Australian Navy Publication, *Australian Maritime Doctrine*:

> All Defence information, whether classified or not, is protected from unauthorised disclosure under the *Crimes Act 1914*. Defence information may only be released in accordance with the *Defence Protective Security Manual* (SECMAN 4) and/or Defence Instruction (General) OPS 13-4 – *Release of Classified Defence Information to Other Countries*, as appropriate.[18]

[16] There are numerous references in the footnotes to "military manuals".

[17] This is published by the Directorate General of Development and Doctrine (Army) of the United Kingdom.

[18] Royal Australian Navy, *Australian Maritime Doctrine*, RAN Doctrine 1 (2000), p. ii. Emphasis in original. The same statement may be found on page ii of the 2010 edition. As this publication is now available on the internet at http://www.navy.gov.au/w/images/Amd2010.pdf, the provision seems even more esoteric.

Even the 2004 *UK Manual*, in its loose leaf version issued within the Services,[19] states:

> The information in this manual is Crown copyright and the intellectual property rights for this publication belong exclusively to the Ministry of Defence (MOD). No material or information contained in this publication should be reproduced, stored in a retrieval system or transmitted in any form outside MOD establishments except as authorised by both the sponsor and the MOD where appropriate. This information is released by the United Kingdom Government to a recipient Government for defence purposes only. It may be disclosed only within the Defence Department of a recipient Government, except as otherwise authorised by the MOD. This information may be subject to privately owned rights.

This seems particularly strange when the hardback version is on public sale through Oxford University Press and obviously contains only the standard copyright caveats! The contents are identical and it was intended that amendments to the loose leaf version would be available on the MOD website.

In fact, this sort of information should be freely available, but it illustrates the paranoia that sometimes affects government officials. The old 1958 *Manual on the Law of War on Land*[20] was used all over the world!

Another solution is to caveat the publication so that there can be "plausible deniability" if the authorities wish to change their position! An example can again be found in the 2004 *UK Manual*. It states in its foreword, written jointly by the Chief of the Defence Staff and the Permanent Under Secretary, Ministry of Defence, that

> [i]n this fast moving world, some issues cannot of necessity be stated in absolute terms. What follows is, however, a clear articulation of the UK's approach to the Law of

[19] JSP 383, The Joint Service Manual of the Law of Armed Conflict, 2004 edition.

[20] The Law of War on Land, being Part III of the Manual of Military Law, Her Majesty's Stationery Office, 1958.

> Armed Conflict … The publication of this Manual should be seen as another step in stating publicly the UK's interpretation of what the Law of Armed Conflict requires.[21]

To ensure that the point is made further, the preface states:

> [The Manual] does not commit Her Majesty's Government to any particular interpretation of the law. Every effort has been made to ensure the accuracy of the Manual at this date [1 July 2004] but it must be read in the light of subsequent developments in the law.[22]

So, what deductions can be made from all this? First, a national military manual is an essential part of the legal framework for the operation of the armed forces. It lays down the parameters within which the commanders can make their operational plans. A national manual is only part of that framework, however. The legal foundations which it lays need to be incorporated into operational manuals and operational training so that the law becomes not an overlay on operational matters but an underlay, underpinning everything that the armed forces do from the strategic to the tactical level.

Second, the manual should not try to do too much. The *US Navy Commander's Handbook on the Law of Naval Operations*,[23] as its name implies, goes far further than an international humanitarian law manual. It has to do so because that is the nature of naval operations. Navies operate on the high seas and so are subject to international law almost wherever they are. That is not so with the land component. When the United States was planning its new joint law of war manual, some wanted it to be an "operational law" manual along naval lines. One participant at the meeting is alleged to have commented: "An operational law manual would not be a book; it would be a bookshelf

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21 *UK Manual, op. cit*., p. v.

22 *Ibid*, p. x.

23 Department of the Navy, Office of the Chief of Naval Operations and Headquarters, U.S. Marine Corps, Department of Homeland Security and U.S. Coast Guard, *The Commander's Handbook on the Law of Naval Operations*, NWP1-14M. The July 2007 version can be downloaded from http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP).

of books". A national manual on international humanitarian law should limit itself to just that and not try to go further into other operational areas. Otherwise, it would soon expand beyond any imagination.

Third – and most important – , the manual should be the top of a pyramid of publications, cascading down so that even the soldier on the ground with his "LOAC card" has a basic knowledge of the "dos and don'ts". That cascade must be consistent so that there is no contradiction between the card and the manual – or anything in between.

So, I answer my own question: why bother with a manual? That is because we owe it to our soldiers, sailors and airmen. We ask them to comply with the law – and threaten them with sanction if they do not. They are at least entitled to know the law with which we are asking them to comply.

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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 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.

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