

# Update on the DOD Law of War Manual

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Good morning. I was asked by the Panel Moderator to provide information as to the status of the draft Department of Defense (DOD) Law of War Manual. I am happy to do so.

On November 18, 2010, I addressed the ABA Standing Committee on Law & National Security to summarize the process by which the DOD Law of War Manual was prepared.<sup>2</sup> A similar presentation was offered at Chatham House in London on February 21, 2011.<sup>3</sup> I will provide a brief overview.

## I. Background

The United States military historically has held a leadership position in the development and publication of law of war manuals for its forces and those who command them to ensure compliance with the law of war obligations of this nation. U.S. Army General Orders No. 100, prepared by Professor Francis Lieber during the U.S. Civil War, was accepted and promulgated by President Abraham Lincoln on April 24, 1863. Thereafter the U.S. Army published RULES OF LAND WARFARE in 1914, in amended version in 1917, in an updated version in 1940, and again in slightly amended form in 1944. The Navy (May 1941, in draft form only) and Air Force (1976) published separate manuals. In 1956 the Army prepared and adopted a new manual, Field Manual 27-10, THE LAW OF LAND WARFARE, following U.S. ratification of the four 1949 Geneva Conventions the preceding year.

In the years that followed a number of events created a need for a new manual. As noted above, heretofore the individual military services “did their own thing”. The Goldwater-Nichols Department of Defense Reorganization Act of 1986 placed emphasis on the military services thinking in terms of joint operations. Further, U.S. ratification of fifteen law of war treaties or protocols since 1956, and U.S. signature of the 1977 Protocols I and II additional to the 1949 Geneva Conventions, necessitated a new manual.

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<sup>1</sup> American Bar Association 22<sup>nd</sup> Annual Review of the Field of National Security Law, Ritz Carlton Hotel, Washington, D.C., November 30, 2012. The views expressed herein are solely those of the speaker.

<sup>2</sup>[www.americanbar.org/content/dam/aba/migrated/2011\\_build/law\\_national\\_security/hays\\_parks\\_speech\\_2010.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/law_national_security/hays_parks_speech_2010.authcheckdam.pdf)

<sup>3</sup>[www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il210211summary.pdf](http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il210211summary.pdf)

Accordingly, in 1995 Major General Michael J. Nardotti, Jr., The Judge Advocate General, U.S. Army, proposed to his other-service counterparts preparation of a Joint Services Law of War Manual in recognition of the need to ensure consistency in interpretation of the law of war. The Judge Advocates General of the Navy and Air Force and the Staff Judge Advocate to the Commandant of the Marine Corps agreed.

The DOD Law of War Working Group, consisting of international law experts from the four military services and a representative from the Office of the General Counsel, DOD, began work on the manual in 1996 with an initial meeting with counterparts from Australia, Canada, Denmark, New Zealand and the United Kingdom. Ultimately the U.S. contribution involved more than forty military judge advocates and civilian attorneys, almost all with advanced law degrees (LL.M.), collectively representing more than two centuries of experience. This experience grew exponentially with combat operations in Afghanistan and Iraq. State Department lawyers were full partners throughout this process. Justice Department lawyers were invited but expressed no interest in participating.

Several basic points were agreed:

- An apolitical approach would be taken in writing the manual.
- The manual would return to the 1910 Army manual format of going beyond simply re-printing law of war treaty provisions (as occurred with the 1956 manual) but instead offer an explanation of provisions based upon the negotiation record and State practice (that is, history). Historical examples followed the precedent of the 1910 U.S. manual but also the 1958 British manual prepared by Professors Sir Hersch Lauterpacht and G.I.A.D Draper. There was consensus that the manual would follow these precedents in style in that it would not engage in contemporary law review practice of footnoting virtually every other sentence but offer the historical examples without citation to sources.

By the spring of 2009, following many hours of research, drafting, Law of War Working Group reviews and comments, a draft manual was completed – 1,100 single-spaced typewritten pages. This led to an International Peer Review, sponsored by Jeh Johnson, the DOD General Counsel, and hosted at The Judge Advocate General's Learning Center, Charlottesville, Virginia. Peer committee membership consisted of:

- Senior (flag rank) judge advocates from Australia, Canada, New Zealand, and the United Kingdom, each with considerable law of war knowledge and experience
- Professor Kenneth Anderson, American University School of Law
- Professor Robert K. Goldman, American University School of Law
- Professor Jack Goldsmith, Harvard Law School

- Professor Sean Murphy, George Washington University School of Law
- Sir Adam Roberts, Emeritus Professor of International Relations at Oxford University, President of the British Academy, and author of numerous law of war publications.

Peer comments were taken and the manual text reviewed, adjusted, and edited by a non-lawyer editor working closely with the DOD Law of War Working Group over the next seventeen months.

At the time I retired on October 29, 2010, the manual was acknowledged (in football terms) as “being on the one yard line”, ready to score. It would have required one last non-substantive review to adjust footnotes and text inadvertently misplaced or left out in the final editing process.

Three points cannot be emphasized enough:

- *The draft DOD Law of War Manual was a corporate effort of Department of Defense, military, and State Department lawyers prepared over Democrat and Republican Administrations as an apolitical document.*
- *The contents of the draft DOD Law of War Manual were not created out of thin air by its authors. In the main it is based upon treaties carefully negotiated by governments, including a strong U.S. delegation, reviewed by the relevant agencies of the Executive Branch – the Departments of Defense, State, and Justice – each treaty forwarded by the President to the Senate requesting its advice and consent to ratification, which after lengthy hearings offered favorable advice and consent resulting in U.S. ratification. As such, it is part of the law of the land.*
- *The draft DOD Law of War Manual enjoyed consensus within the DOD Law of War Working Group, including the Office of the Legal Adviser, Department of State – or so it was believed to be the case at the time of my retirement.*

## II. The demise of the DOD Law of War Manual

In February 2011, State, Justice Department, and National Security Counsel lawyers (the latter seconded from the State Department, including individuals who had participated in Law of War Working Group work on the manual) requested DOD delay manual publication in order to permit each to review it, a demand without precedent. The DOD General Counsel agreed, with conditions:

- Comments within one month
- Substantive comments only

These conditions did not survive. Comments (on first four chapters only) were not received until May 2011. They were more non-substantive than substantive: akin to changing “puppy” to “small dog”.

Editing responsibilities were assumed by a young DOD attorney lacking military or law of war training or experience.

By way of example of State Department comments: The manual contains a chapter providing an explanation of each of the basic law of war principles. Even though they previously agreed to them, State Department lawyers complained that there was an unduly lengthy discussion of *military necessity* while not providing sufficient discussion of and emphasis on *proportionality*.

The law of war principle of *military necessity* was contained in U.S. Army General Orders No. 100 written by Francis Lieber (e.g., articles 14-16). Because it often is misunderstood, a long explanation was necessary. In contrast, *proportionality* was not a part of any law of war treaty until 1977, at which time it was adopted on the condition that the term *proportionality* itself not be used in the treaty text because a vast number of nations – including the former Soviet Bloc, Middle Eastern (other than Israel) and African nations – declined to accept that the principle existed.

Ironically, the manual’s discussion of *military necessity* was carefully researched and drafted by the late Edward Cummings who until his untimely death in 2006 was the State Department’s most senior and experienced law of war expert. The text had been endorsed by State Department lawyers as well as the international peer review.

Without consultation with the DOD Law of War Working Group, the new DOD editor deleted the discussion of *military necessity* from the main body of the manual, copying it and inserting it as a footnote, apparently to “reduce its emphasis”; and placed the paragraphs on *proportionality* ahead of the discussion of the principle of *distinction* until it was brought to his attention that but for the centuries-old pedigree of the principle of *distinction* there would be no principle of *proportionality*.

By way of another example, State Department lawyers, wanted the term “belligerent” to be substituted for “combatant”.

As adopted and used by nations for more than a century, *combatant* is the accepted law of war term. It was adopted in the Annex to the 1899 Hague Declaration II (ratified by the United States in 1902) and its successor, the 1907 Hague Declaration IV (ratified by the United States in 1909), and Articles 43(2) and 44 of the 1977 Protocol I Additional to the 1949 Geneva Conventions (signed by the United States in 1977 but not ratified due to objections not relating to use of the term *combatant*). In contrast, the term *belligerent* is not used in any law of war treaty insofar as reference to individuals is concerned.

As noted previously, the DOD Law of War Manual did not simply republish treaty texts. It was a well-researched, comprehensive explanation of the law of war obligations of the United States. It follows the precedent of previous U.S. and British law of war manuals in providing historical examples to supplement and reinforce the explanation.

The DOD Law of War Working Group agreed also to follow the precedent of those manuals in providing the historical examples but not citations to published works or other references. For example, a number of examples were derived from the personnel knowledge of an author or authors who witnessed or otherwise was directly involved in the events cited.

These historical examples suffered their first damage in comments from State Department lawyers.

In noting the historic reluctance of governments to acknowledge they are in an armed conflict and/or that the law of war is applicable to engagement of armed threats by its own military forces, two examples of U.S. official statements were offered. The first was one from 1983 made by President Reagan. The second was from 1999 made by Secretary of State Albright in testimony before Congress.

The State Department insisted upon deletion of reference to Secretary Albright's statement, but offered no objection to retaining the example of President Reagan. Insistence on deletion of Secretary Albright's statement likely was political – delete the statement by a Democrat, keep that of the Republican – or to cover up the State Department Legal Advisor's faulty legal advice to Secretary Albright. In either case, it reversed the manual's objective to remain apolitical.

The young editor, despite being privy to the agreed policy of offering historical examples without citation, unilaterally and without prior consultation deleted all the historical examples because they lacked law review-type citations. This action destroyed material praised by the Peer Review – contents invaluable to judge advocate practitioners and the military commanders they advise.

### III. Results

At the very least, the Justice Department sought to alter the manual to make it consistent with legal terminology and arguments it has offered in litigation rather than ensure its terminology and arguments are consistent with the law of war.

Justice Department attorneys in the main are specialists in constitutional and criminal law. They have framed Justice Department opinions and litigation arguments related to combat operations and detainee matters with reference to domestic criminal law rather than attempt any comprehension of the law of war (e.g., Attorney General Holder's March 5, 2012, speech regarding targeting U.S. citizens operating as active members of al Qaeda such as Anwar Al-Awlaki, killed in Yemen on September 30, 2011).

With the exception of a subtle reference to the law of war relating to neutrality, Attorney General Holder's speech essentially followed U.S. domestic use of force rules for law enforcement officers operating on the streets of the United States rather than rules of engagement for military forces operating overseas in a combat environment, traditionally a military responsibility. Had Attorney General Holder or any of his attorneys consulted the draft DOD Law of War Manual, he or they might have learned that the law of war protects civilians from direct attack "unless and for such time as they are taking a direct part in hostilities" – providing the United States legal authority to attack Al-Awlaki.

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State Department lawyers similarly have sought to edit the manual to fit the conflict at hand because it is the only conflict they have experienced rather than offer a manual based upon a substantially broader historical experience and a text applicable across the conflict spectrum.

Almost two years later, comments have been received for only five of the manual's nineteen chapters. Whereas the DOD Law of War Working Group met weekly with regard to the manual, the Office of the General Counsel, DOD, convened one meeting this year to discuss the manual.

The consensus the manual enjoyed at the end of 2010 no longer exists. JAG representatives have indicated the manual as amended by the Departments of State and Justice, or through other injudicious editing such as I have noted, is not likely to be accepted by the leadership of all the military services. In that regard it has been pointed out to me on more than one occasion that as a result of legislation enacted during the administration of President George W. Bush, senior military lawyers for the four military services by law<sup>4</sup> have a right to provide "independent legal advice" to their respective Department Secretary and/or military service chief. Thus the original plan of reaching consensus with a manual containing an introductory letter signed by the Secretary of Defense or the DOD General Counsel to the effect that the manual is the statement of DOD interpretation of U.S. law of war obligations is unlikely, returning the situation to the potential legal Tower of Babel a DOD manual intended to avoid.

It is a disappointment that a draft manual over which many experienced individuals toiled diligently for fourteen years, a manual praised by an international peer review, has not been published principally for political reasons. In the midst of an on-going conflict, inside-the-beltway bureaucratic complacency ignores the vacuum that desperately required filling to ensure military commanders fulfill their obligation to conduct their operations in a manner consistent with the law stated therein.

Thank you.

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<sup>4</sup> For example, for the Army, 10 U.S. Code § 3037.

