

Law of War Manuals and Warfighting: A Perspective

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INTRODUCTION

The development and publication of any law of war manual is not easy. This is particularly so when the focus is on an area such as air and missile warfare that involves relatively new technology that is the subject of few international treaties and does not always easily fit within the legal traditions that emerge from many centuries of conflicts on the land and sea domains.¹ Moreover, when it involves a means and method of warfare that largely is dominated by a few countries, the challenge is even more daunting to reconcile the legitimate concerns of the leading aviation powers with those of the rest of the family of nations.

All of this makes the development of the Manual on International Law Applicable to Air and Missile Warfare (AMW Manual)² such a towering achievement. Fortunately, it was shepherded to success by an individual of

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1. See generally Javier Guisández Gómez, *The Law of Air Warfare*, 323 INT'L REV. OF THE RED CROSS (1998), <http://www.icrc.org/eng/resources/documents/misc/57jpl.htm>.

2. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2009), available at <http://ihlresearch.org/amw/HPCR%20Manual.pdf> [hereinafter AMW MANUAL].

Broddingnagian intellect, energy, patience, and determination: Professor Claude Bruderlein, the director of Harvard's Program on Humanitarian Policy and Conflict Research, who was central to the success of the effort. Undoubtedly, he would be the first to insist on crediting Professor Yoram Dinstein, whose significance to this project cannot be overstated. Still, the fact that this project overcame so many obstacles is much due to Professor Bruderlein's tireless efforts.

The publication of the AMW Manual is extremely timely, coming as it does at a time in history when air warfare is increasingly becoming the weaponry of choice to battle transnational terrorists, especially in remote locations. That said, any assessment of the role of law of war manuals, to include the AMW Manual, must acknowledge the heritage of the Lieber Code,³ which was produced long before powered aircraft or missiles became commonplace instruments of war. Many authorities consider this Civil War-era document the "seminal step" in the "detailed codification and exposition of the laws of war."⁴ It was, historians say, "the first instance in western history in which the government of a sovereign nation established formal guidelines for its army's conduct toward its enemies."⁵ Since the Lieber Code, a number of manuals of various styles have been produced.

Hays Parks, speaking in November 2010 about the drafting of the as yet unreleased U.S. Department of Defense Law of War Manual (DoD Manual), detailed the role of law of war manuals in the development of the modern law of armed conflict (LOAC).⁶ He, too, noted the importance of the Lieber Code, but also listed the 1914 edition of the U.S. War Department's *Rules of Land Warfare* as well as other American and foreign manuals as examples of the genre.⁷ From his study, Parks, who is the principal drafter of the forthcoming DoD Manual, concludes that the best manuals "*explain* the law with State practice examples," and that is the style he chose for the DoD Manual.⁸

Because of this different approach, the DoD Manual is expected to weigh in at over 1,000 pages and be documented with more than 3,000 footnotes.⁹ According to Parks, this more detailed explication is intended to add perspective to the rules, complete with illustrations, so that practitioners in particular will understand the intended context of the law and policy pronouncements the DoD Manual is expected to contain.¹⁰ Again, Parks' view is that "providing a treaty text without explanation,

3. U.S. War Dep't, Instructions for the Government of Armies of the United States in the Field, Gen. Orders No. 100 (1863), available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>.

4. STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 186 (2005).

5. Curtis A. Bradley, *The Story of Ex parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization*, in *PRESIDENTIAL POWER STORIES* 93, 99 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (quoting RICHARD SHELLY HARTIGAN, *LIEBER'S CODE & THE LAW OF WAR* 1-2 (1983)).

6. W. Hays Parks, Former Senior Assoc. Deputy Counsel, Int'l Affairs, Dep't of Def., National Security Law in Practice: The Department of Defense Law of War Manual, Speech at the ABA Standing Committee on Law and National Security Breakfast Series 1-7 (Nov. 18, 2010), available at http://www.americanbar.org/content/dam/aba/migrated/natsecurity/hays_parks_speech11082010.authcheckdam.pdf.

7. *Id.* at 1.

8. *Id.* at 5.

9. *Id.* at 8.

10. W. Hays Parks, Former Senior Assoc. Deputy Counsel, Int'l Affairs, Dep't of Def., U.S. and The Laws of War, Summary of the International Law Discussion Group Meeting Held at Chatham House 16 (Feb. 21, 2011), available at <http://www.chathamhouse.org/sites/default/files/public/Research/International>

clarification, elaboration, or evidence of State practice (other than similar manuals), has resulted in lawyers, military and civilian, incorrectly viewing law of war treaties as the sole source for the law.”¹¹

The Commentary to the AMW Manual serves something of a similar purpose.¹² For U.S. government practitioners, this is, however, somewhat problematic—as any such document built upon the unofficial contributions of experts from a variety of nations is likely to be. U.S. government military operations are often dominated by American policy considerations, to include interpretations of international law that may not be shared by other nations. As will be discussed in more detail below, this is especially so with respect to customary international law that is reflected in both the AMW Manual and its Commentary.

This short essay is intended to provide some perspectives on the role the AMW Manual can play in the future. It aims to provide special emphasis on the practical issues associated with air and missile operations. It assesses the potential of the manual to turn the norms it promotes into accepted practice among nations, if not into customary international law.

I. THE AMW MANUAL’S EDUCATIVE FUNCTION

Beyond its potential as a norm-setter in international law, the AMW Manual could provide an enormous service by helping to teach not just military audiences but also the public at large the fundamentals of the law applicable to air and missile warfare. Education about the law applicable to these technologies is critical. In the larger context, Protocol I to the 1949 Geneva Conventions already recognizes the importance of efforts like the AMW Manual by calling upon the parties to “encourage the study [of the Conventions] by the civilian population.”¹³

Though the United States is not a party to the Protocol,¹⁴ and it is doubtful that this section would be considered customary international law, it nevertheless makes practical sense. Why? Consider what Professors Michael Riesman and Chris T. Antoniou contend in their 1994 book, *The Laws of War*: “In modern popular democracies, even a limited armed conflict requires a substantial base of popular support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people believe that the war is being conducted in an unfair, inhumane, or iniquitous way.”¹⁵

%20Law/il210211summary.pdf.

11. *Id.* at 9.

12. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2010), available at <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf>; see also AMW MANUAL, *supra* note 2, at iii (“[T]he Commentary clarifies the prominent legal interpretations and indicates differing perspectives.”).

13. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 83, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

14. See States Parties, Int’l Comm. of Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (June 8 1977), <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P#ratif> (last visited Jan. 14, 2012) (U.S. not included as a party).

15. W. MICHAEL RIESMAN & CHRIS T. ANTONIOU, *THE LAWS OF WAR* xxiv (1994).

In order for “people” to make the appropriate judgment about the war’s conduct, they need to understand exactly what the rules require. In this country, however, there is considerable evidence that such an understanding is wanting. For example, in a survey released in April 2011, the American Red Cross found that “only 1 in 5 American youth is familiar with the Geneva Conventions”¹⁶ and just 44% “believe that rules and laws governing actions in war are a good way to reduce human suffering.”¹⁷ The only encouraging bit of news from this survey is that nearly 80% of youth recognize the need for better instruction on the law of war.¹⁸

Of course, the first priority has to be ensuring that those in the armed forces and in the civilian defense establishment have a keen understanding of the law of war. In this respect, the AMW Manual is especially well-suited because it clearly displays the central concepts in a cogent and direct format; even the physical shape of the manual is such that it easily slips into a cargo pocket of the military uniform. Attention to such details is an important attribute of a document intended for real-world use.

Having the law readily accessible to those who must use it is necessary not just to conform to moral and legal requirements, but also for practical, warfighting reasons—particularly for modern democracies that honor the rule of law. Professor William Eckhart points out that today’s adversaries aim to turn adherence to and respect for the rule of law into vulnerabilities. He says:

Knowing that our society so respects the rule of law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and our execution of those plans as contrary to the law of war. Our vulnerability here is what philosopher of war Carl von Clausewitz would term our “center of gravity.”¹⁹

This is especially true in the kind of “irregular” conflicts that predominate today.²⁰ There is no question that many belligerents in such conflicts seek to gain an advantage by portraying U.S. and other forces as violating the law of war, and thus erode the popular support that Professors Riesman and Antoniou say democracies need to sustain a warfighting effort.²¹ In particular, they try to show that the United States and other nations with air war capabilities are violating the principle of distinction—which Professor Gary Solis characterizes as “the most significant battlefield concept a combatant must observe”²²—by causing civilian casualties in airstrikes.

16. Press Release, American Red Cross, Red Cross Survey Finds Young Americans Unaware of Rules of War (Apr. 12, 2011), <http://www.redcross.org/portal/site/en/menuitem.94aae335470e233f6cf911df43181aa0/?vgnnextoid=801dbe9f0e64f210VgnVCM10000089f0870aRCRD>.

17. SURVEY ON INTERNATIONAL HUMANITARIAN LAW, AMERICAN RED CROSS 7 (March 2011), available at <http://www.redcross.org/www-files/Documents/pdf/international/IHL/IHLSurvey.pdf>.

18. *Id.* at 14.

19. William George Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 CHI. J. INT’L L. 431, 441 (2003).

20. The U.S. Department of Defense defines “irregular warfare” as a “violent struggle among state and non-state actors for legitimacy and influence over the relevant population(s). Irregular warfare favors indirect and asymmetric approaches, though it may employ the full range of military and other capabilities, in order to erode an adversary’s power, influence, and will.” *Irregular Warfare*, DICTIONARY OF MILITARY TERMS (Nov. 15, 2011), http://www.dtic.mil/doctrine/dod_dictionary/data/i/19843.html.

21. RIESMAN & ANTONIOU, *supra* note 15, at xxiv.

22. GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 251 (2010). This legal principle requires combatants to at all times distinguish between civilians and combatants, and direct attacks only against the

Candidly, they have enjoyed some success in Afghanistan, where “Afghan anger over civilian casualties has been a long-standing issue . . . [and civilian casualties] dominate Afghan critiques of international forces.”²³ Unsurprisingly, Afghan militants have made orchestrating such events a centerpiece of their strategy. Former Secretary of Defense Robert Gates noted in 2009 that in Afghanistan, “provoking or exploiting civilian casualties is a ‘princip[al] strategic tactic’ of the Taliban.”²⁴ This is particularly true with respect to airpower because it is a military capability that they do not have and that they cannot defend against with the weaponry they typically possess.²⁵ Accordingly, they try to use the civilian casualty issue as a way of limiting the use of airpower by creating political pressure, often by exploiting popular misconceptions about the law.²⁶

Defeating this tactic requires knowledge of the law of armed conflict as applicable especially to air operations, and the AMW Manual can help provide that. An absence of such knowledge and, indeed, understanding, can have profoundly unproductive unintended consequences.²⁷ A classic example is the North Atlantic Treaty Organization’s (NATO) clumsy efforts to offset Taliban manipulation of the civilian casualty issue. NATO virtually invited problems when it announced in June 2007 that its forces “would not fire on positions if it knew there were civilians nearby.”²⁸ Just a year later, a spokesman reiterated that “[i]f there is the likelihood of even one civilian casualty, [NATO] will not strike, not even if we think Osama bin Laden is down there.”²⁹

The law of armed conflict—as is clear in the AMW Manual—certainly does not demand such deference.³⁰ “By creating restrictions beyond what [LOAC] would

latter. *Id.*

23. Erica Gaston, *Karzai’s Civilian Casualty Ultimatum*, FOREIGN POLICY (Jun. 2, 2011), http://afpak.foreignpolicy.com/posts/2011/06/02/karzais_civilian_casualties_ultimatum.

24. John J. Kruzal, *U.S. Denies Using White Phosphorous in Afghanistan, Gates Pledges More Investigation*, AMERICAN FORCES PRESS SERVICE (May 11, 2009), <http://www.defense.gov/news/newsarticle.aspx?id=54294>.

25. Cf. Erin Cunningham, *Taliban Attack Highlights Its Growing Power*, GLOBALPOST (Aug. 7, 2011), <http://www.globalpost.com/dispatch/news/regions/asia-pacific/afghanistan/110807/taliban-attack-highlights-its-growing-power> (explaining that the Taliban does not currently “maintain serious anti-aircraft capabilities”).

26. See Charles J. Dunlap, Jr., *Does Lawfare Need an Apologia?*, 43 CASE W. RES. J. INT’L L. 121, 130 (2011) [hereinafter Dunlap, *Does Lawfare Need an Apologia?*] (“Exploiting civilian casualties, or more academically, exploiting the adherence—or lack thereof—to the law of armed conflict axiom of distinction has become the ‘principle strategic tactic’ of the Taliban much out of sheer necessity.” (quoting then-U.S. Secretary of Defense Robert Gates, quoted in John J. Kruzal, *U.S. Denies Using White Phosphorous in Afghanistan, Gates Pledges More Investigation*, AM. FORCES PRESS SERVICE (May 11, 2009), <http://www.defense.gov/news/newsarticle.aspx?id=54294>)).

27. See *id.* at 133–35 (discussing the “unintended consequences” of restrictions the North Atlantic Treaty Organization placed on airstrikes in response to concerns about civilian casualties).

28. Noor Kahn, *Afghan Civilians Said Killed in Clash*, WASH. POST (June 30, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/30/AR2007063000028.html> (quoting Maj. John Thomas, spokesman for NATO’s International Security Assistance Force).

29. Pamela Constable, *NATO Hopes to Undercut Taliban with ‘Surge’ of Projects*, WASH. POST (Sept. 27, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/09/26/AR2008092603452_pf.html (quoting Brig. Gen. Richard Blanchette, chief spokesman for NATO forces).

30. See, e.g., Charles J. Dunlap, *Lawfare Amid Warfare*, WASH. TIMES (Aug. 3, 2007), <http://www.washingtontimes.com/news/2007/aug/03/lawfare-amid-warfare/?page=1> (explaining that international law recognizes “legitimate attacks on combatants” that may put civilians at risk).

require, NATO's pronouncements encourage the Taliban to shield themselves from air attack by violating the law of armed conflict [by] embedding themselves among civilians."³¹ And this is exactly what has happened.³² Nevertheless, when he took command of NATO operations in Afghanistan in June 2009, General Stanley A. McChrystal put in place new restrictions on airstrikes in an effort to limit civilian casualties, even though only a small percentage of the civilian losses were attributable to airstrikes.³³ Tragically, a year after the restrictive policy was put in place, the United Nations (U.N.) reported that civilian casualties skyrocketed by 31%³⁴ and Coalition military casualties reached an all-time high.³⁵ The policy was a stunning failure from every perspective as it had precisely the opposite effect than that intended.

General David Petraeus replaced General McChrystal in June 2010 and put in place rules that were more permissive³⁶ and resulted in a 65% increase in the number of airstrikes in his first year.³⁷ Importantly, not only did the security situation in Afghanistan improve, but civilian and military casualties also decreased remarkably. Civilian casualties dropped from about 230 per month in 2010 to about 115 per month in the first five months of 2011,³⁸ 85% of which were caused by the Taliban

31. Dunlap, *Does Lawfare Need an Apologia?*, *supra* note 26, at 134.

32. *Id.* at 134 n.67.

33. See Gen. Stanley A. McChrystal, *Tactical Directive (2009)*, available in part at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf ("The use of air-to-ground munitions and indirect fires against residential compounds is only authorized under very limited and prescribed conditions . . ."); U.N. Assistance Mission to Afg., *Afghanistan: Mid Year Bulletin on Protection of Civilians in Armed Conflict, 2009, 10–11*, (Jul. 31, 2009), <http://unama.unmissions.org/Portals/UNAMA/human%20rights/09july31-UNAMA-HUMAN-RIGHTS-CIVILIAN-CASUALTIES-Mid-Year-2009-Bulletin.pdf> (reporting that 20% of the total number of civilian casualties were caused by airstrikes, which is lower than the previous year, in which airstrikes caused 26% of the total civilian casualties).

34. *Afghan Civilian Casualties Rise 31 Per Cent in First Six Months of 2010*, U.N. ASSISTANCE MISSION IN AFG. (Aug. 10, 2010), <http://unama.unmissions.org/Default.aspx?tabid=1741&ctl=Details&mid=1882&ItemID=9955>.

35. Elena Becatoros, *700 NATO Troops Killed in Afghanistan in 2011*, WASH. TIMES (Dec. 28, 2010), <http://www.washingtontimes.com/news/2010/dec/28/700-nato-troops-killed-afghanistan-2010> ("This year is by far the deadliest for the coalition . . .").

36. See Julian E. Barnes, *Petraeus Resets Afghan Airstrike Rules*, WSJ.COM (Aug. 1, 2010), <http://online.wsj.com/article/SB10001424052748703314904575399770077260834.html> ("describing General Petraeus' easing of a specific use of force rule and his "broader effort . . . to review [General McChrystal's] tactical directive limiting airstrikes").

37. Noah Shachtman & Spencer Ackerman, *5,800 Attacks Are Just the Beginning After Petraeus' Year-Long Air War*, WIRED (Jul. 5, 2011), <http://www.wired.com/dangerroom/2011/07/5800-attacks-are-just-the-beginning-after-petraeus-year-long-air-war/#more-50792>.

38. SUSAN G. CHESSER, CONG. RESEARCH SERV., R4108, *AFGHANISTAN CASUALTIES: MILITARY FORCES AND CIVILIANS 2–3* (June 9, 2011), <http://www.hsdl.org/?view&did=8855> (showing in a table the civilian casualties in 2010 and January-May 2011 in Afghanistan). Regrettably, in February 2012 the United Nations Assistance Mission in Afghanistan reported that by the end of 2011, civilian casualties had risen 8% over 2010. U.N. Assistance Mission to Afg., *Afghanistan: Annual Report 2011, Protection of Civilians in Armed Conflict 1*, (Feb. 2012), http://unama.unmissions.org/Portals/UNAMA/Documents/UNAMA%20POC%202011%20Report_Final_Feb%202012.pdf. The report attributes 77% of "conflict-related" civilian deaths in 2011 to "Anti-Government Elements." *Id.* The report also indicates that the increased pace of air attacks that paralleled a reduction in the number of civilian deaths did not persist, as it states that in 2011 there was a "reduced number of aerial operations." *Id.* at 24. Aerial attacks were responsible for just 187 of the 3,021 civilian deaths in 2011. *Id.* at 1, 24.

and al-Qaeda, not the Coalition.³⁹ Moreover, Coalition fatalities, which averaged nearly sixty per month in 2010, fell in 2011.⁴⁰

The logic of the Petraeus approach seems clear: by seizing the opportunity to use airpower more liberally (but fully consonant with LOAC), fewer enemies escaped. Since the enemy kills the overwhelming number of civilians, removing more adversaries from the equation naturally reduces the peril to noncombatants. It certainly serves no military or humanitarian purpose to create a de facto sanctuary for Taliban and al-Qaeda fighters by a policy pronouncement that erodes the underlying rationale for the law of war's rule. In short, the numbers indicate that increasing airstrikes actually *decreases* the number of civilian and military deaths. In fact, a U.N. report released in March 2011 declared that “[a]lthough the number of air strikes increased exponentially, the number of civilian casualties from air strikes decreased in 2010.”⁴¹

To be sure, criticism of U.S. airstrikes continues, but the rationale may not be as much about violating the law or even the deaths, per se. After all, a 2010 study found that airstrikes were responsible for less than a sixth of all civilian deaths attributable to Coalition actions.⁴² Indeed, traffic accidents with NATO vehicles killed more Afghan women and children than did airstrikes.⁴³ Rather, the criticism may be something of a veiled protest against the presence of foreign ground troops. Reporter Alissa Rubin remarked in the *New York Times* that even though the Taliban and al-Qaeda cause the vast majority of civilian casualties in Afghanistan, “those that are caused by NATO troops appear to reverberate more deeply because of underlying animosity about foreigners in the country.”⁴⁴

When the law is well understood, and is informed by relevant cultural factors, it is easier to parse the subtleties. In this instance, for example, if NATO's desire was to limit Afghan protests due to civilian deaths, then the better approach might have been to limit the number of troops on the ground, not the airstrikes that kill those doing most of the killing of civilians. Ironically, troops on the ground are related to the civilian casualties that do occur from airstrikes. A study released by Human Rights Watch in 2008 reported that the “vast majority of known civilian deaths” caused by airstrikes came from those called in by ground forces under insurgent attack.⁴⁵ Following the law as outlined in the AMW Manual, as opposed to trying to

39. Jim Michaels, *Taliban Behind Most Afghan Civilian Casualties*, USA TODAY (June 22, 2011), http://www.usatoday.com/news/world/afghanistan/2011-06-22-afghan-civilian-casualties_n.htm.

40. *Coalition Military Fatalities By Year and Month*, ICASUALTIES.ORG, <http://icasualties.org/OEF/Index.aspx> (last visited Jan. 29, 2012) (showing that Coalition casualties fell to 566 in 2011 from 711 in 2010).

41. U.N. Assistance Mission in Afg. & Afg. Indep. Human Rights Comm'n, *Afghanistan: Annual Report 2010, Protection of Civilians in Armed Conflict*, 24 (Mar. 2011), <http://unama.unmissions.org/Portals/UNAMA/human%20rights/March%20PoC%20Annual%20Report%20Final.pdf>.

42. Luke N. Condra et al., *The Effect of Civilian Casualties in Afghanistan and Iraq* 39, (Nat'l Bureau of Econ. Research, Working Paper No. 16152, 2010, revised 2011), available at <http://www.nber.org/papers/w16152> (last visited Jan. 29, 2012).

43. *Id.*

44. Alissa J. Rubin, *Afghan Leader Calls Apology in Boys' Deaths Insufficient*, N.Y. TIMES (Mar. 6, 2011), <http://www.nytimes.com/2011/03/07/world/asia/07afghanistan.html>.

45. HUMAN RIGHTS WATCH, “TROOPS IN CONTACT” AIRSTRIKES AND CIVILIAN DEATHS IN AFGHANISTAN 29–30, (2008), available at <http://hrw.org/reports/2008/afghanistan0908/afghanistan0908web.pdf>.

“improve” upon it, is much more likely to produce the desired military and strategic outcome.

II. THE AMW MANUAL AND THE DOD MANUAL

The AMW Manual aims to apply to all nations, but in reality, accomplishing that end is a profoundly challenging proposition. Afghanistan is a good example of why this is true. Given that international law is comprised principally of treaties and customary international law,⁴⁶ the fact that not all Coalition partners may be parties to the same international agreements can—and does—create complication in Afghanistan.

Still, manuals such as the AMW Manual, along with its Commentary, are very helpful in identifying relevant provisions of both sources; however, it is the determination of *customary* international law that is, by far, the most problematic. At the end of the day, it is principally state practice—at least with respect to the law of armed conflict—that will define customary international law.⁴⁷ It may be that manuals can play a role in developing or even initiating state practice (and some could understandably argue that the Lieber Code did just that), but they are not themselves an independent source of customary international law.

Defining customary international law in the context of the law of war has proven to be especially difficult. Indeed, I think that this will always be the rub with law of armed conflict manuals: to what degree can nations agree with what is, in fact, customary international law in that context? The United States, for example, has sharply differed in the past with interpretations that the International Committee of the Red Cross (ICRC) and others have claimed for customary international law in armed conflicts.⁴⁸ In the case of the dispute with the ICRC, the United States took most issue with the sources relied upon to determine customary international law, and it seems clear that recitation of a particular principle in a law of war manual would not be deemed sufficient.⁴⁹

Obviously, the AMW Manual has to come to conclusions as to customary international law, and in some instances those conclusions may prove to be at odds with the U.S. interpretation. Exactly how much of a difference there may be is hard to say, because the official U.S. government views are not as definitively elucidated as one might hope. That, however, could change with the much-anticipated issuance of the aforementioned U.S. DoD Law of War Manual, the drafting of which Hays Parks oversaw for more than a decade prior to his retirement in 2010.⁵⁰ I suspect that much of it will be in agreement with the AMW Manual, but there could well be important differences.

46. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987).

47. *See, e.g.*, Statute of the International Court of Justice, art. 38, para. 1b, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (stating that the International Court of Justice shall apply, inter alia, “international custom, as evidence of a general practice accepted as law”).

48. *See, e.g.*, Jim Garamone, *DoD, State Department Criticize Red Cross Law of War Study*, AMERICAN FORCES PRESS SERVICE (Mar. 8, 2007), <http://www.defense.gov/news/newsarticle.aspx?id=3308> (discussing criticism by lawyers in the DoD and the State Department of the methodology used in an ICRC study purporting to be the “definitive explanation of the laws of war”).

49. *Id.*

50. *See* Parks, *supra* note 6, at 7–8 (describing the process of drafting the new manual).

Unfortunately, it now appears that the issuance of the DoD Manual will be delayed as the coordination with agencies outside the DoD apparently is taking longer than expected.⁵¹ As the recent controversy over the legal status of air operations against Libya illustrates, there are evidently serious divides within the U.S. government legal community about some rather basic questions.⁵²

The precise nature of the dispute may be unknown, but it is indeed worrisome that a manual that was drafted principally by current and former military lawyers (and peer-reviewed by world-renowned experts)⁵³ might nevertheless be caught up in policy quarrels. In a way, it is reminiscent of previous disputes between military and civilian lawyers as to other law of war issues arising since 9/11.⁵⁴ Regardless, this will make the AMW Manual especially valuable, as it will fill, if not a lacuna in the law, a lacuna in available manuals specializing in this aspect of warfare.

In any event, whenever the DoD Manual is finally published, its analysis of customary international law will likely not be accepted by all, but it will reflect state practice at least with respect to the United States. There are those who will say, understandably, that U.S. practice does not, ipso facto, define state practice for the purpose of defining customary international law. Yet in the area of air and missile warfare especially, the U.S. view will doubtless be authoritative if not controlling. The United States is, and will likely continue to be for the foreseeable future, the foremost practitioner of air and missile warfare. In terms of actual warfighting experience, there are a few nations with some current experience, but none with the dimension of that of the United States. Moreover, the United States is—for now anyway—the leader in air and missile technology.

III. TECHNOLOGY, ROE, AND THE AMW MANUAL PRACTITIONER

Along this line, allow me to observe that it has been my experience that with respect to air and missile weapons, the erudition in the law of some commentators and legal scholars is not always matched by a sophisticated understanding of the weapons and delivery systems, not to mention the doctrine and strategies for their use. This hobbles their analysis and, frankly, undermines the weight their views are given by warfighters, who may consider their legal views too uninformed by the facts to be useful.

51. This observation is based on the author's conversations and correspondence with U.S. Department of Defense attorneys and others with relevant knowledge.

52. Administration lawyers apparently could not agree as to whether or not U.S. involvement in NATO's combat operations over Libya constituted "hostilities" within the meaning of the War Powers Resolution. Charlie Savage, *2 Top Lawyers Lose to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), <http://www.nytimes.com/2011/06/18/world/africa/18powers.html>.

53. See Parks, *supra* note 6, at 7–8 ("The peer review consisted of senior military legal officers from Australia, Canada, New Zealand, and the United Kingdom; four U.S. law professors from top U.S. law schools with extensive knowledge of the law of war; and Sir Adam Roberts, a distinguished British professor of history with long-time interest in the law of war.").

54. See, e.g., Charles J. Dunlap, Jr., *A Tale of Two Judges: A Judge Advocate's Reflections on Judge Gonzales' Apologia*, 42 TEX. TECH L. REV. 893, 894, 906–908 (2010) (describing the ideological conflicts between then-Attorney General Alberto Gonzales's civilian "War Council" and JAG attorneys post-9/11).

Without a great deal of technical acumen beyond the law, it is simply impossible to be an effective legal advisor for U.S. air and missile operations, regardless of legal, qua legal, expertise. Consider that such operations are typically controlled by Combined Air and Space Operations Centers (CAOCs) that are “comprised of a vast array of people, programs and processes” and filled with “thousands of computers, dozens of servers, racks of video equipment and display screens.”⁵⁵ Much of this technology is directly relevant to efforts to comply with LOAC. For example, *U.S. News & World Report* noted that in the CAOC:

Analysts calculate the size of bomb fragments and the distance they travel from the strike site, using detailed maps and video footage to gauge potential for human casualties and property damage. In another area, analysts don 3D glasses to read maps that show precise heights of palm trees and the walls of any given compound to help determine “collateral concerns.”⁵⁶

The *New York Times* also noted that:

The bombs themselves are chosen carefully and sometimes modified. Some designed for air burst are instead programmed with a delayed fuse to bury themselves before exploding, thus reducing the blast range. One sort of bomb has even been loaded with less explosive, filled instead with concrete, to cause great damage where it hits but no farther.⁵⁷

As the *Times* further reported, Air Force lawyers “vet” the targets to ensure the proposed bombing conforms to “a complex body of military law, including the Geneva Conventions, acts of Congress and court decisions.”⁵⁸ In order to perform this duty, each of these lawyers had to be specially trained not just on the law of air and missile warfare, but also on the systems utilized in the CAOC, as well as a vast body of information concerning weapons, munitions, and the strategies for their use.

Absent such training, legal expertise from a manual or otherwise will be for naught. It just cannot be emphasized enough how important it is for practitioners in this area to thoroughly educate themselves on what may be viewed in traditional terms as the clients’ “business.” This is vitally important, because absent such a demonstrated understanding of the realities military commanders and their forces face, effective legal advice that is accepted is difficult to attain. Mastery of the AMW Manual (and even its Commentary) is not sufficient to minimally qualify an attorney to serve as an air and missile operation legal advisor.

It is also important to understand that as valuable as the AMW Manual or any other manual may be in ensuring that the basics of LOAC are observed, in U.S. air operations today, the core document is what is called the special instructions (SPINS), which include the rules of engagement (ROE).⁵⁹ ROE are defined by the

55. Combined Air and Space Operations Center (CAOC), *U.S. Air Force Fact Sheet*, U.S. AIR FORCES CENTRAL (Feb. 6, 2011), <http://www.afcent.af.mil/library/factsheets/factsheet.asp?id=12152>.

56. Anna Mulrine, *A Look Inside the Air Force's Control Center for Iraq and Afghanistan*, U.S. NEWS & WORLD REP. (May 29, 2008), <http://www.usnews.com/news/world/articles/2008/05/29/a-look-inside-the-air-forces-control-center-for-iraq-and-afghanistan>.

57. Thom Shanker, *Civilian Risks Curb Strikes in Afghan War*, N.Y. TIMES (July 23, 2008), <http://www.nytimes.com/2008/07/23/world/asia/23military.html>.

58. *Id.*

59. See U.S. Air Force Judge Advocate Gen. Corps, *Rules of Engagement*, in AIR FORCE

DoD as “[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.”⁶⁰ Those “circumstances and limitations” usually involve many more constraints than the law would itself require. ROE incorporate myriad policy considerations that may, for example, impose limitations on attacks in certain circumstances that are not mandated by LOAC, or require out-of-theater approvals by high-ranking government officials.

Put another way, in modern air and missile operations conducted by experienced air powers, compliance with the minimum LOAC standards set forth in the AMW Manual is not often a challenge; however, compliance with the ROE can be. ROE can be complex because not all of the requirements are intuitive, and policy decisions not implicating the law of war can change frequently. The United States is not, of course, alone in having ROE so defined; most nations do, and the policy directions they contain can be quite controversial.⁶¹ Although most coalition operations seek to draft universally accepted ROE, in most circumstances nations will retain one or more variances as a matter of national prerogative, or even because of differing legal obligations based on those international agreements to which they are—or are not—parties.

CONCLUSION

As noted in the beginning, the AMW Manual is a tremendous accomplishment, one that will serve the relevant communities of interest—practitioners, operators, policymakers, journalists, the general public, and more—for years to come. In fact, it may not be possible to improve upon it very much because of the vagaries of the acceptance of what is or is not customary international law, as well as emerging theories that suggest the hitherto largely unheard of proposition that nations may be able to withdraw from customary international law.⁶² International law, to include the law of war, is in a very dynamic age.

It is important to understand that while the AMW Manual can provide a baseline and its users can be assured that following it will not be “wrong” or create criminal liability of some sort, it is not without controversy. Indeed, if there is a criticism to be made, it may be that the AMW Manual is too conservative. The controversy, such as it may be, could well focus more on the Commentary than on the AMW Manual itself. Still, there are aspects of the AMW Manual not otherwise incorporated into treaty law that may nevertheless rapidly become accepted

OPERATIONS & THE LAW 237 (2009) (“Most SPINS have an ROE subsection, which contains a copy of relevant provisions of the applicable ROE . . .”).

60. *Rules of Engagement*, DICTIONARY OF MILITARY TERMS (Nov. 15, 2011), http://www.dtic.mil/doctrine/dod_dictionary/data/r/6783.html.

61. See, e.g., Andy Bloxham, *Soldiers Told Not to Shoot Taliban Bomb Layers*, THE TELEGRAPH (UK) (July 8, 2011), <http://www.telegraph.co.uk/news/newsttopics/onthe frontline/8626344/Soldiers-told-not-to-shoot-Taliban-bomb-layers.html> (discussing a controversial ROE policy barring British soldiers from shooting insurgents planting roadside improvised explosive devices).

62. See, e.g., Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L. J. 202, 204 (2010) (challenging the historical and functional underpinnings of the “Mandatory View” that “nations never have the right to withdraw unilaterally” from a customary international law rule “once the rule becomes established”).

customary international law, with the Section S (Surrender) and Section U (Contraband, Interception, Inspection and Capture)⁶³ being excellent candidates for early recognition.

This essay has tried to emphasize that to be an effective practitioner in this area of the law requires much more knowledge than the AMW Manual can provide. The effective counselor must bring to bear a broad range of knowledge—technical, cultural, psychological, and more—all with a cognizance that it must resonate with the clientele as a practical and pragmatic enabler of effective warfighting. With respect to considerations beyond the law, per se, an American practitioner may wish to note that the American Bar Association’s Model Rules of Professional Conduct provide: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client’s situation.”⁶⁴

Though perhaps not conceived with the role of the lawyer in armed conflict in mind, this provision promoting a holistic approach to client issues is nevertheless especially relevant in modern air and missile warfare, where each operation is subjected to relentless scrutiny by friend and foe alike. Much of that scrutiny has as much to do with the wisdom of a particular act as its technical legality. The lawyer must be prepared to advise on both, and that preparation can require a very significant intellectual investment.

To be clear, the business of war can be quite demanding on those providing legal advice; such advice has to be given the right way, and its wider effects must be carefully considered. Recognizing the special nature of this kind of practice does not come naturally to some lawyers. Professor Richard Schragger observed in discussing the difference between military and civilian lawyers in the Bush Administration that:

[M]ilitary lawyers understand that when you ask human beings to kill other human beings, rules of decency are required. . . . Instead of seeing law as a barrier to the exercise of their clients’ power, [military lawyers] understand the law as a prerequisite to the meaningful exercise of power. Law allows our troops to engage in forceful, violent acts with relatively little hesitation or moral qualms. Law makes just wars possible by creating a well-defined legal space within which individual soldiers can act without resorting to their own personal moral codes.⁶⁵

Thus, efforts like the drafting of the AMW Manual are but one part of the overall preparation for lawful, ethical combat. The AMW Manual can be instrumental not just to protecting the lives of innocent civilians, or even to defending the perquisites of states, per se. It can also help to provide a degree of confidence, if not comfort, to those who are asked by their nation to perform the most difficult of tasks under the most demanding of circumstances. For this, if nothing else, the enormous effort that produced the AMW Manual finds its justification.

63. AMW MANUAL, *supra* note 2, paras. 125–31, 134–36.

64. MODEL RULES OF PROF’L CONDUCT R. 2.1 (2010).

65. Richard C. Schragger, *Cooler Heads: The Difference Between the President’s Lawyers and the Military’s*, SLATE (Sept. 20, 2006), <http://www.slate.com/id/2150050/?nav/navoa>.