
DOD LAW OF WAR MANUAL REVIEW
WORKSHOP

WORKSHOP REPORT
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DOD LAW OF WAR MANUAL REVIEW WORKSHOP

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INTRODUCTION TO THE REVIEW OF THE 2015 DOD LAW OF WAR MANUAL

On March 4th, 2016, the Standing Committee on Law and National Security of the American Bar Association convened a selected group of individuals with expertise in the Law of Armed Conflict to engage in a review of the DOD Law of War Manual published in June, 2015. This session used, as a basis for discussion, a significant preparatory review of selected chapters of the Manual conducted by a small Working Group of Law of Armed Conflict experts over the preceding three months. These nine chapters, chapters 1-6, 8, 16, and 17, were deemed to be those dealing with those issues most worthy of comment. The text that follows reflects both the observations contained in the preparatory review of the chapters in issue, and, to the extent possible, the discussion that occurred on March 4th. This discussion was wide ranging, with often disparate views expressed on the many issues presented. The comments made and questions posed have been cross-referenced to specific paragraphs of the Manual.

Particular note should be made that the individuals who participated in the March 4th review of the Manual collectively praised both the genuine interest of the Department of Defense in receiving constructive feedback on the contents of the Manual, as well as the gracious manner in which this feedback was received. In the words of the ABA Committee Chair, "The manner in which the office of the Department of Defense Deputy General Counsel for International Affairs has considered the comments offered by this ABA Manual Review Group truly honors the concept of public service and reflects the commitment of that office to the rule of law."

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CHAPTER 1: GENERAL BACKGROUND

Purpose and Scope of the Manual

The purpose and scope of the Manual, spoken to in paragraphs 1.1.1 and 1.1.2, generated significant discussion amongst those present at the 4th March session. The Manual's purpose is said to be that of providing "information" on the Law of War (LOW) to Department of Defense (DOD) personnel responsible for its implementation and for executing military operations. This statement thus raised the question of whether, given the "informational", vice rule-making nature of the Manual, it is actually intended to be authoritative in nature-binding on all U.S. Government (USG) personnel. Additionally, the Manual states that, while it represents the legal views of DOD, DOD is not precluded from subsequently changing its interpretation of various aspects of the LOW. This statement generated a discussion as to the types of circumstances/factors that might dictate such interpretive changes--and the manner in which these changes might be communicated/reflected. At this point, DOD observers noted that, not only is the Manual intended to be iterative in nature, it is designed to serve as a resource starting point, rather than an end point, for military attorneys dealing with LOW issues.

Finally, the Manual notes that, while attorneys from the Departments of State and Justice participated in its drafting, the Manual does not "necessarily" reflect the views of any other USG department or agency-or even the views of the U.S. Government as a whole. This statement, consequently, once again raised the issue of the "authoritative" nature of the Manual, given that it apparently does not reflect a unanimous USG interpretation of the various aspects of the LOW contained therein, but simply that of DOD. Indeed, it was suggested that this comment strongly indicated that there actually exist differences of opinion within the USG regarding the manner in which certain fundamental norms of the LOW are to be interpreted and applied.

Discussion related to the purpose and scope of the Manual evolved into essentially two schools of thought. The first questioned both the utility and credibility of the Manual, given the above noted caveats regarding the authoritative nature of its contents. Those who assumed this view voiced the belief that this post-9-11 Manual differed substantially from that which was in draft-and would have been produced-pre-9-11. Rather than a true, LOW Manual, this publication

had taken on the posture of a White Paper--the purpose of which was to justify/defend U.S. legal determinations made regarding the status and treatment of both al-Qaeda as a non-State Armed Group, as well as individual members of al-Qaeda. This was said to be evidenced by the Manual's fixation on non-State Armed Groups as a whole and on its attempt to unilaterally re-define the long-established definition of a non-international armed conflict (NIAC), the latter matter being cited as but one example of the Manual's efforts to either reinterpret existing LOW or to create new LOW principles. In a similar vein, it was noted that if, in fact, the Manual represented U.S. policy choices, rather than an authoritative interpretation of the LOW, this should have been made known to its users, particularly to potential coalition partners who might well take differing views on a number of the issues concerned. In a somewhat similar context, others observed that presenting this as a DOD, vice USG LOW Manual, served as an operational impediment. That is, how were Judge Advocates to operate effectively in the field if they were uncertain as to whether other USG agencies would adhere to the contents of the Manual? Given this fact, it was submitted that every effort should be made to gain USG inter-agency concurrence on the full content of the Manual at the earliest possible time. Absent this, it was submitted that the Manual lacked any form of legal status, even within the U.S. Government.

Those who advocated for the utility of the Manual recalled that it represented the first U.S. publication to focus on the full scope of the LOW since the 1956 Army Field Manual dealing with this subject. While, as in the case of most publications, it might not satisfy everyone's concerns and needs, it was, in fact, the product of a large, collaborative Working Group and had received the concurrence of all Service Judge Advocates General and General Counsels. The Manual sought to focus on novel LOW matters that had arisen in the aftermath of 9-11--and to offer clear U.S. positions on these issues. While such positions would, of course, evolve over time, the Manual does, nevertheless, serve as an effective legal resource for the LOW community at large. Others voiced the view that, far from consisting simply of policy statements, the Manual represents LOW legal determinations made by that agency of the USG principally concerned with the interpretation and implementation of the LOW. Rather than attempting to justify USG post-9-11 legal determinations, the Manual seeks to counter those who have criticized past USG failures to respond effectively to both the legal and policy realities of the post-911 world. Still others opined that, as "a living document", the Manual will evolve over time as a consensus forms within the international community regarding how to approach newly minted, 21st century,

LOW matters. Finally, there were those who found it strange that some would question why a DOD LOW Manual would reflect considered U.S. positions on contested LOW issues. It was, in fact, a U.S. publication. Why would it not set forth the U.S. stance on such subjects? A failure to do so might well result in the U.S. being "buried" under customary LOW--ultimately losing what can only be characterized as an ongoing "strategic legal conflict" in the LOW arena.

Definition of the Law of War

Discussion next moved to the Manual's definition of the Law of War set forth in paragraph 1.3: "For the purposes of this Manual, the LOW is that part of international law that regulates the resort to armed force; the conduct of hostilities and the protection of war victims in both international and non-international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States". This definition was further supplemented by a discussion of the concept of *jus ad bellum* appearing at paragraph 1.11: "The LOW has been categorized into *jus ad bellum* (law concerning the resort to war) and *jus in bello* (law concerning conduct during war). Although *jus ad bellum* is an essential part of the LOW to consider in the political process of whether to resort to the use of military force, this Manual focuses on *jus in bello*."

The accuracy of this definition was vigorously challenged by those who questioned why any definition of the LOW (*jus in bello*-law in war) would include those international law principles that regulate when and where a State might legitimately resort to the use of force (*jus ad bellum*-law before war)-asserting that these two legal regimes have always been viewed as distinct in nature. To now conflate these bodies of law in the Manual, it was argued, is both inaccurate and confusing.

To support this contention, reference was made to subsequent language of the Manual itself, appearing at paragraphs 3.5.1-2: General Distinction Between *Jus in Bello* and *Jus ad Bellum*. "As a general matter, *jus in bello* and *jus ad bellum* address different legal issues and should not be conflated. Conflating *jus in bello* and *jus ad bellum* risks misunderstanding and misapplying these concepts. One important attribute of rules for conduct during war (*jus in bello*) is that, in general, they operate independently from rules regarding the resort to force (*jus ad bellum*)."

Given the confusion generated by these contradictory statements, it was recommended that the definition of the LOW be limited only to *jus in bello* principles.

The concern expressed regarding the Manual's definition of the LOW was not unanimous. Support was voiced for the inclusion of a discussion of *jus ad bellum* concepts in the Manual--in order to provide those in the field with an understanding of when the application of *jus in bello* principles would be triggered. To not do so, it was said, would be a disservice to Judge Advocates in the field who must make decisions regarding the applicability of the LOW. Others countered this view, however, with the observation that a decision to apply the LOW in any given operational setting is not one to be made by individual service attorneys. That is, *jus ad bellum* concepts are undoubtedly relevant to decisions made by those in "the Building" as to when and where the LOW is to be applied, but not to those in the field. Indeed, there already exists a DOD Directive that explicitly states that all DOD components will apply the LOW in all armed conflicts, however characterized, as well as in all other military operations. And, finally, it was noted that, though there might exist a general consensus regarding *jus in bello* principles, this is certainly not true of *jus ad bellum* norms--and that, accordingly, these should not be set forth as an integral part of the LOW. Again, it was submitted, these are two distinct legal regimes at play.

The Terms "Law of War" and "International Humanitarian Law"

Paragraph 1.3.1.2 notes that: "International Humanitarian Law is an alternative term for the LOW that may be understood to have the same substantive meaning as the LOW."

The question was posed as to whether this was, in fact, an accurate statement. That is, is there not a persistent view expressed that this term, "international humanitarian law" (IHL), includes not only codified and customary LOW norms, but also certain, but unspecified--situationally dependent, international human rights principles? And, if so, how can IHL be said to have the same substantive meaning as the LOW? Views on this issue were mixed. Some advocated that, in order to avoid confusion and uncertainty, the U.S. should use only the term, LOW, or, alternatively, the Law of Armed Conflict (LOAC), but that, currently, various U.S. agencies use both of these terms, often interchangeably, when dealing with LOW matters. Others expressed the view that a consensus has now been achieved that the term, IHL, while perhaps duplicative in nature, does

refer exclusively to traditional LOW principles--and does not incorporate any international human rights norms. There was agreement, however, that the USG, as a whole, should be consistent in its use of the term "LOW" when addressing LOW issues, vice that of "IHL".

Purposes of the Law of War

Paragraph 1.3.4 sets forth what are said to be the "main" purposes of the LOW, yet no reference is made to one of the very fundamental purposes of the LOW--the regulation of the methods and means used to conduct warfare. While this was viewed as a fundamental omission, the comment was made that perhaps, inherent in this list, is the silent understanding that those purposes listed all relate, in fact, to the regulation of the methods and means of conducting armed conflict. There appeared to be a consensus, nevertheless, that the Manual should specifically reference the regulation of the methods and means of conducting warfare as a primary purpose of the LOW.

Relationship Between Human Rights Treaties and the LOW

The Manual addresses the relationship between human rights treaties and the LOW in paragraph 1.6.3.1. Not surprisingly, this issue generated significant discussion. Some expressed the view that the Manual's treatment of this matter does not adequately reflect the controversy surrounding this subject--that is, that the U.S. view that the International Covenant on Civil and Political Rights (ICCPR) does not apply extraterritorially is one that conflicts with that of the majority of the international community. Should this fundamental difference of opinion not be discussed?

In contrast, there were those who questioned why a U.S. LOW Manual would devote even this much discussion to this subject, given the fact that the U.S. has always taken the position that, during times of armed conflict, the LOW is a *lex specialis*, displacing any other legal norms that might be in effect during times of peace.

Still others viewed this section of the Manual as, perhaps, the U.S. seizing the opportunity to explain its legal rationale for its continued detention of detainees at Guantanamo Bay (GTMO). In making this observation, reference was made to several Manual statements related to this subject. "The U.S. has understood that Article 9 of the ICCPR (the right to challenge the lawfulness of an

arrest before a court) does not affect a State's authorities under the LOW, including a State's authority in both international and non-international armed conflicts to detain enemy combatants until the end of hostilities."

Additionally, footnote 92 cites a statement by the U.S. before the United Nations Human Rights Committee in 2014: "...paragraph 15 incorrectly implies that the detention of enemy combatants in the context of a non-international armed conflict 'would normally amount to arbitrary detention, as other effective measures addressing the threat, including the criminal justice system, would be available'. On the contrary, in both international and non-international armed conflicts, a State may detain enemy combatants consistent with the law of armed conflict until the end of hostilities. Similarly, to the extent paragraphs 15 and 66 are intended to address law-of-war detention in situations of armed conflict, it would be incorrect to state that there is a 'right to take proceedings before a court to enable the court to decide without delay on the lawfulness of the detention' in all cases."

Given these statements, the question was posed as to whether, under specific provisions of the ICCPR, a detainee, held in the context of a non-international armed conflict occurring within the territory of a State-signatory to the ICCPR, was not entitled to challenge his arrest. And, if, in fact, this was the case, the Manual statements referenced above could be understood only in the sense that, in making them, the U.S. was using the Manual to reaffirm its contention that, as it remains engaged in an ongoing, global, albeit "non-international", armed conflict with al Qaeda and its associated forces, it can lawfully detain "enemy combatants" seized in this NIAC, at GTMO, until the termination of hostilities. And, while there was a general acknowledgment that the U.S. stance on this matter, as well as on other issues dealt with throughout the Manual, is premised on a substantive U.S. re-definition of a NIAC, as spoken to in Common Article 3 of the '49 Geneva Conventions and Protocol II Additional to these Conventions, a decision was made to delay any extended assessment of this subject until a discussion of Chapter 17, which deals specifically with non-international armed conflict.

Jus ad bellum Issues

While, as noted, the inclusion of *jus ad bellum* concepts in the Manual's definition of the LOW was a contentious matter, a discussion of the *jus ad bellum* topic, beginning with paragraph 1.11, did

generate several comments.

Paragraph 1.11.5: Responding to an Imminent Threat of an Attack. "Under customary international law, States had, and continue to have, the right to take measures in response to imminent attacks."

Simply as a matter of clarity, it was noted that a State cannot "respond" to an attack that is "imminent", but has not yet occurred, but can respond to a "threat" of an imminent attack.

The observation was also made that, while the "Caroline" definition of anticipatory self-defense is almost universally recognized as a customary right of self-defense, it is not referenced in the Manual. Why?

Moreover, given the recent U.S. contention that it reserves the right to engage in the use of force against an individual or individuals who it has determined to pose an "imminent" threat to U.S. individuals or interests, but for which it has declared the criteria for making such determinations to be classified, would it not be useful to at least note the Caroline criteria for engaging in anticipatory self-defense—that is, "a threat that is instantaneous, overwhelming, leaving no choice of means or moment of deliberation"? Or—is the Manual's treatment of the right to engage in self-defense against an "imminent attack" designed to preserve a right to engage in a form of self-defense far broader than the anticipatory right set forth in the Caroline definition?

Paragraph 1.11.5.4: Right of Self-Defense Against Non-State Actors.

Note was made that the Manual states that: "The inherent right of self-defense, recognized in Article 51 of the UN Charter, applies in response to any "armed attack", not just attacks that originate with States."

In this regard, it was observed that Article 51 of the Charter establishes a "codified" right to engage in self-defense against an armed attack; the "inherent" right of self-defense is considered to be "customary" in nature.

CHAPTER 2: PRINCIPLES

In introducing the discussion of Chapter 2, it was noted that, in addition to providing instructions on specific legal provisions and rules, a well-established function of military LOW manuals has been to identify and analyze broad legal principles relevant to the application of military force. The majority of manuals regard these principles in the nature of general guidelines-set forth to assist in the interpretation and application of specific rules. Additionally, manuals have also regarded LOW principles as actual rules of conduct-in the absence of more specific rules dealing with any particular aspects of armed conflict.

Five LOW Principles

The DOD Manual identifies five LOW principles in paragraph 2.1: "Three interdependent principles--military necessity, humanity, and honor-provide the foundation for other law of war principles, such as proportionality and distinction, and most of the treaty and customary rules of the law of war."

In assessing this statement, it was observed that the Manual's treatment of LOW principles is, in some respects, entirely consistent with the work of its predecessor, the 1956 Army Field Manual, 27-10, as well as with interceding doctrinal publications. However, other aspects of the Manual's treatment of these principles appeared to be quite novel. This fact thus gave rise to a number of questions, designed, principally, to examine the extent to which the Manual has ostensibly introduced changes in the manner in which the U.S. perceives LOW principles as conditioning battlefield conduct. As a secondary consideration, these questions were also designed to explore the extent to which the Manual's treatment of these principles will prove to be beneficial, or how easily, consistently, and confidently military operational lawyers will be able to operationalize the guidance in issue.

The first questions posed focused on how LOW principles operate as a general matter and the extent to which such principles can realistically be expected to regulate battlefield conduct in both a consistent and coherent manner. Paragraph 2.1.2 states that: "Law of war principles provide the foundation for the specific law of war rules. Legal principles, however, are not as specific as rules, and thus interpretations of how principles apply to a given situation may vary."

Given this statement, the following questions were tabled:

* This paragraph acknowledges the variances-the inconsistencies-between States' views on the operational application of LOW principles, In doing so, is the Manual also conceding that, to the extent that it instructs lawyers to employ these principles to guide operational legal advice, variances in the manner in which they are interpreted will inevitably arise between the advice rendered by various elements of DOD?

* Is DOD prepared to actively monitor and resolve such internal variances? More importantly-does the Manual meet what would appear to be its inherent responsibility to provide guidance sufficient enough to enable DOD components to avoid, or, to at least, resolve such inconsistencies?

* Should discernible variances in the application of these principles by DOD components be permitted to stand-or does the LOW anticipate/require uniform State application?

Responses to these questions reflected a diversity of opinions. Some expressed the view that, given the broad nature of these principles, there were bound to be differences in the manner in which they were applied. Application was inherently subjective in nature and often situationally dependent. Others questioned whether substantive variances in the application of these principles by U.S. personnel had actually ever been identified. For example, has there even been a prosecution of any U.S. individual for a violation of a LOW "principle"? If the answer is, no, it was submitted, then these principles exist only in the form of general guidance; they do not rise to the level of law. Given this reality, absent truly egregious differences in their interpretation and application by U.S. personnel, this should not be a matter of concern. Note was also made that, while the 1956 Army Field Manual spoke to three of these principles in a very cursory manner--this was the first attempt to deal with these concepts in a meaningful way. And, in terms of interpreting and applying these principles, it was suggested that this be done by assessing their applicability in the context of the other, more specific, rules contained in the various chapters of the Manual. And, while similarity in the application of these principles across the Services was certainly desirable, complete uniformity of application is not a necessity.

The Principle of "Military Necessity"

While it was viewed as essential that the Manual identifies "military necessity" as a fundamental principle of the LOW, it was noted that history had proven this concept susceptible to substantial abuse as a justification for what would otherwise be considered unlawful conduct. And, while the Manual makes it clear that "military necessity" cannot justify departures from the LOW, it was submitted that it, nevertheless, offers a somewhat expansive interpretation of this concept, particularly with respect to its application to strategic, vice purely tactical, considerations.

This is reflected in paragraph 2.2.3.1: "In evaluating military necessity, one may consider the broader imperatives of winning the war as quickly and efficiently as possible and is not restricted to considering only the demands of the specific situation.... For example, in assessing the military advantage of attacking an object, one may consider the entire war strategy rather than only the potential tactical gains from attacking that object."

This language thus gave rise to the following questions:

- * Is there a general consensus, internationally, that this is the manner in which the principle of "military necessity" should be applied?

- * Is the application of this principle, in this manner, subject to an overly broad and abusive use of this concept?

- * The Manual includes extensive citations to authority throughout. With this in mind, does the Manual citation of support for the strategic application of "military necessity" effectively and directly support this proposition? (See, specifically, footnotes 43 and 45.)

- *Is the discussion of the capture, not kill, scenario set forth in this paragraph an accurate/useful reflection of the application of the strategic interpretation of "military necessity"?

Some viewed this interpretation of "military necessity" to be the Manual's broadest articulation of any of the five LOW principles, and, while understanding the U.S. desire to preserve such an interpretation of this concept, the danger of an abusive application of this principle to "the entire war strategy", vice a tactical situation, was

recognized. The question was raised as to whether the U.S. had considered the ramifications of the "military necessity" principle being applied in this same manner by potential adversaries. Was this really in the interest of the U.S.-or the international community at large? Perhaps, it was noted, this broad interpretation of this concept could be reasonably implemented if its application was restricted exclusively to the U.S. military, vice political, strategy in any given conflict. Inherent in all of these comments was an apparent belief, however, that the Manual's broader application of "military necessity" was not an agreed international norm. There were no comments directed toward the matter of whether the Manual's citation support for its interpretation of this principle was either sufficiently relevant-or persuasive.

The Principle of "Proportionality"

Discussion of this principle was introduced with the observation that, while the 1956 Army Field Manual did not identify "proportionality" as a basic LOW principle, subsequent U.S. military legal doctrine routinely identified this concept as such. It was noted, however, that, in most instances, these sources offered a formulation of "proportionality" relevant specifically to targeting operations that involved the potential for civilian casualties or death. That is, military lawyers have traditionally been trained in an understanding and application of a discrete, *jus in bello*-specific notion of "proportionality"--distinct from a version of this principle drawn from *jus ad bellum* or general principles of international law. The Manual, in contrast, offers a much broader formulation of this principle, instructing lawyers to consider "proportionality" in situations and operations where they might not previously have done so. This is evidenced in paragraphs 2.4 and 2.4.2:

"Proportionality may be defined as the principle that even where one is justified in acting, one must not act in a way that is unreasonable or excessive."

"Proportionality also plays a role in assessing whether weapons are prohibited, because they are calculated to cause unnecessary suffering.... Proportionality is also a requirement for reprisals, which must respond in a proportionate manner to the preceding illegal act by the party against which they are taken."

Drawing upon the content of these paragraphs, the following questions were tabled for discussion:

* By their very nature, proportionality determinations are highly contextual. In keeping with the principle of "proportionality", an operation, weapon, or tactic that is perfectly lawful in one scenario may be entirely forbidden in another. With this in mind, does the Manual's expression of "proportionality" as essentially a reasonableness standard offer sufficiently specific guidance to those who must effect this concept in the field?

* Will the Manual's emphasis on considering "proportionality" in situations beyond classic targeting scenarios involving potential civilian casualties compromise the doctrinal integrity of the very specific formulation of "proportionality" emphasized by previously existing doctrine? That is, can military legal advisors now reliably-and consistently- apply appropriate formulations of this principle?

* Given the inherent ambiguity of this principle, particularly with respect to the specific threshold at which acts become so disproportionate as to be unlawful, is the Manual's expanded application of the principle of "proportionality" warranted? What advantages and disadvantages to States will result? What operational consequences from an expanded application of this principle are likely to result?

While there was a recognition of the relevance of these questions, no definitive responses were offered, other than an acknowledgment that the Manual's broad formulation of this principle does represent an expansion of its traditional application to *jus in bello* targeting scenarios to what are, decidedly, *jus ad bellum* considerations. Some cautioned against an undue mixing of the principles of "proportionality" and "unnecessary suffering" ("humanity"). Still others expressed concern regarding the Manual's reference to the need for "proportionality" in the conduct of "reprisals"--noting not only that this was a reference to a concept that had not yet been discussed in the Manual, but questioning whether, in the view of DOD, reprisals were still deemed to be a legitimate form of use of force self-help.

The Principle of "Humanity"

This principle generated little discussion, other than several comments alluding to the relatively ambiguous manner in which it was discussed in the Manual. This led, in turn, to both the observation that

this principle was subject to differing doctrinal explanations and a recommendation that a more descriptive and better understood term for this concept would be that of "unnecessary suffering".

The Principle of "Honor"

Paragraph 2.6: "Honor demands a certain amount of fairness in offense and defense and a certain mutual respect between opposing forces."

In introducing discussion of the principle of "honor", it was noted that the appearance of this particular principle represents the Manual's most significant adjustment to recent legal doctrine, considering that essentially all modern U.S. military doctrinal publications simply identify four principles of the LOW: "military necessity", "distinction", "proportionality", and "unnecessary suffering". The principle of "honor", or "chivalry", as it appeared in the 1956 Army Field Manual, has largely fallen out of U.S. use—primarily leaving the increasingly narrow prohibition of perfidy as the only clearly expressed limitation on treacherous or bad faith means and methods of conducting warfare. The Manual's revival of the principle of "honor" thus appears to indicate a desire to restore "good faith" as a legal restraint on the conduct of military operations. Given the fact that the former use of this term had taken place in periods of relative symmetry between militaries with shared professional military traditions and values, it might be concluded that disuse of "honor" as an international LOW principle has resulted from the discernible erosion of this model. With this possibility in mind, the following questions were posed:

- * Can "honor" really serve as a relevant consideration in combat waged between asymmetrically capable and asymmetrically moral belligerents?

- * Can "honor" be conceived and articulated in a sufficiently concrete and uniform manner to be of any practical utility in modern military operations?

- * Will inclusion and an emphasis on "honor" as a LOW principle strengthen universal respect for the LOW? Or—is this more likely to simply alienate parties that already view the LOW suspiciously?

- * Will any doctrinal adjustments to the conduct of military operations result from the resurrection of "honor" as a LOW principle? If so, what might these be?

Once again, views regarding the Manual's revival of "honor" as a principle of the LOW differed significantly. Some expressed the belief that the entire discussion of "honor" as a fundamental LOW principle was so abstract in nature that it offered very little in the way of useful application or guidance--that in the context of today's armed conflicts it lacked both credibility and any useful and relevant utility. Others disagreed--stating that "honor" is a reflection of, a commitment to, U.S. values--an essential element of a professional military. The observation was also made that the concept of "honor" informs ethical decisions on the battlefield--and that law and ethics were one in the same. On this last point, however, there was substantial disagreement: "A commander cannot be told that, while a potential course of action complies with the LOW, you must also decide whether it is the 'right' thing to do." That is, legal and ethical considerations are not one in the same.

CHAPTER 3: APPLICATION OF THE LAW OF WAR

Discussion of this chapter was introduced with the observation that its treatment of law applicability is unsurprisingly based on Common Articles 2 and 3 of the 1949 Geneva Conventions, the associated International Committee of the Red Cross (ICRC) Commentary, and international and domestic jurisprudence interpreting these treaty provisions. And, while the chapter was deemed much more instructive than prior treatment of this subject in the 1956 Army Field Manual, it was thought that it would most probably generate a certain degree of controversy, due to its inclusion of a number of U.S. interpretations of LOW applicability that deviate from generally accepted views on this subject.

Paragraph 3.1 introduces this chapter with the statement that "Many of the legal issues underlying the application of the LOW may be confusing, because they are complex and may appear to result in contradictory legal positions."

This language gave rise to the query as to whether this was, in fact, the message that the Manual wants to provide its users--that the LOW is so complex and confusing that it will often produce contradictory interpretations of a State's legal obligations? Should the purpose of the Manual not be to set forth the most straightforward and specific guidance possible? And-is the U.S. subject to the claim that, if such confusion now exists, it is largely U.S. self-generated, due to its more recent interpretations of LOW applicability? And, finally, is it fair to say that this section, like many sections of the Manual, is overly academic and somewhat abstract, reading more like a treatise than a LOW Manual?

This same paragraph notes that "Whether a particular law of war rule applies to a situation may depend on a variety of issues, such as (1) whether a state of 'war', 'hostilities', or 'armed conflict' exists, (2) whether a party is recognized as a belligerent or as a State; or (3) whether an enemy State has accepted that law of war rule." This statement elicited the comment as to whether it was meant to suggest that there must be some formal evidence of an "acceptance" of a rule widely considered to be customary international law in order for it to be binding on a particular State. And, if so, what was the basis for such a theory?

Paragraph 3.1.1.2.: Applying Law of War Standards as Reflecting Minimum Legal Standards. "DOD practice has been to adhere to certain standards in the law of war, even in situations that do not constitute "war" or "armed conflict", because these law of war rules reflect standards that must be adhered to in all circumstances." The question was posed as to why these rules must be adhered to in all circumstances, even in situations in which they are not applicable as a matter of law. This may simply be a statement of U.S. policy, it was observed, and, if so, this should be noted. However, this language strongly suggests that such rules may be binding as the result of some unidentified source of legal obligation. Or- is this language a somewhat veiled reference to international human rights law (IHRL) obligations that mirror LOW rules? And, this apparent uncertainty was said to be exacerbated by the following portion of the same paragraph: "Certain prohibitions and certain other rules in the law of war that reflect customary international law have been described as reflecting 'elementary considerations of humanity'. These 'elementary considerations of humanity' have been understood to be 'even more exacting in peace than in war'. Thus, these legal standards, at a minimum, must be adhered to in all circumstances." Again, it was asked-what is the legal basis for such a statement?

Paragraph 3.2.: Situations to Which the LOW Applies. This paragraph again states that the LOW establishes "rules governing the resort to force (*jus ad bellum*). And, once again, for the reasons previously stated, objection was taken to the Manual's inclusion of *jus ad bellum* principles in its definition of the LOW.

Paragraph 3.3.1.1.: Application of *Jus in bello* Rules Does Not Necessarily Affect the Legal Status of the Parties. "Although the legal status of an opponent affects the character of the conflict and what rules apply as a matter of law, the application of *jus in bello* rules does not necessarily affect the legal status of parties to a conflict. For example, a belligerent may, as a policy matter, afford a person POW protections and treatment without affording that person legal status as a POW. Similarly, the application of humanitarian rules, such as those reflected in Common Article 3 of the 1949 Geneva Conventions, towards enemy non-State armed groups does not affect their legal status (e.g., such application does not amount to recognizing the group as lawful belligerents or as the legitimate government of a State)."

This language triggered the contention that this paragraph represented, in fact, simply a U.S. attempt to set forth, as established

LOW rules, the process through which it has chosen to deal with al Qaeda, its members, and the Taliban government of Afghanistan, post-911. As such, it establishes the foundation for the Manual's treatment of non-international armed conflict contained in Chapter 17, one which sets forth a U.S. re-definition of the commonly understood meaning of NIAC as spoken to in Pictet's Commentary to Common Article 3 and Protocol Additional II to the '49 Conventions. However, a decision was once again made to table any extended assessment of this contentious issue until discussion of Chapter 17 itself.

Paragraph 3.3.2.: Unrecognized Governments. "Even if a State does not recognize an opponent as the legitimate government of a State, under certain circumstances, rules of international armed conflict may apply to a conflict between a State and a government that it does not recognize. For example, members of the regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power nonetheless would be entitled to POW status if they fall into the power of the enemy during international armed conflict."

In view of this statement, the question was posed as to how this language could be reconciled with the USG decision to not afford POW status and protections to members of the Taliban government's armed forces. Was this decision based on a conclusion that the Taliban armed forces were not "regular armed forces", in that they failed to meet certain criteria said to be required of such forces? If so, would it not have been beneficial to explain this fact in a supporting footnote?

Paragraph 3.3.3.2.: Assertion of War Powers by a State Engaged in Hostilities Against a Non-State Armed Group. "Occasionally, a State that has been engaged in hostilities against a non-State armed group has taken actions that have recognized the belligerency of the non-State armed group, at least for certain purposes. For example, President Lincoln's proclamation of a blockade during the U.S. Civil War was viewed as recognizing the existence of a state of war, at least for the purposes of imposing the blockade of foreign vessels seeking to trade with the Confederacy."

The accuracy of the use of the U.S. blockade of the Confederacy as an illustrative example of the point being made in this paragraph was questioned. It was noted that, while the paragraph suggests that it was President Lincoln's assertion of war powers and recognition of a state of war that led to the recognition of the Confederate States as a belligerent, it was, in fact, the de facto nature of the rebellion that led

the Supreme Court to conclude that the exercise of authority derived from the *jus belli* was within the President's constitutional authority. This, it was submitted, is consistent with the view that LOW applicability is primarily a constitutive, rather than a declarative, test.

Paragraph 3.3.4.: AP I Provision on National Liberation Movements. "AP I treats as international armed conflicts 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'. The United States has strongly objected to this provision as making the applicability of the rules of international armed conflict turn on subjective and politicized criteria that would eliminate the distinction between international and non-international conflicts. The United States has understood these types of conflicts to be non-international armed conflicts."

Why, it was asked, reference only the U.S. objection to this provision of Protocol I? Might it not be beneficial if the Reservations and Statements of Understanding made in connection with this provision by any number of State Parties to this Protocol are also cited?

Paragraph 3.4.1.: Intent-Based Test for Applying *Jus in Bello* Rules. "*Jus in bello* rules apply when a party intends to conduct hostilities. If a State chooses to go to war, then it is bound by *jus in bello* rules for the conduct of those hostilities. For example, if a State considers it necessary to respond to attacks with military force, then those military operations must comply with *jus in bello* rules."

The text of this paragraph and its supporting footnote elicited a number of comments. The view was expressed that this was a dangerously overly broad statement. As currently written, it would appear to suggest that any use of military force (and no distinction is made as to whether the force employed is under national or state authority) in response to a domestic threat is an invocation of "war" power, indicating the existence of an armed conflict. It was also noted that, while it was true that the use of military force or the intent to use such force is certainly an indicator of armed conflict, in order to avoid circular logic, it must be recognized that the use of force, alone, is not dispositive of the existence of an armed conflict; that is, not every use of force constitutes an armed conflict. Given this fact, this section of the Manual should emphasize that the determination of the existence of an armed conflict should be driven by a fact-specific, totality-of-the-circumstances approach.

Additionally, the question was posed as to why, in fact, the obligation to apply *jus in bello* rules was "intent-based" when a State makes a determination to resort to the use of force. That is, why does there appear to be a perceived need to determine, often somewhat subjectively, a State's "intent" to conduct hostilities? Why not: "When" a State uses military force, it must apply *jus in bello* rules--in the case of both international and non-international armed conflicts.

The observation was also made that the third sentence in this paragraph is supported by footnote 49, the content of which appears to be somewhat of a non-sequitur. Referring to the 9-11 terrorist attacks on the U.S., the footnote speaks to a November, 2001 Opinion of the DOJ Office of Legal Counsel, which states that the U.S. had determined that it was necessary to respond to these attacks with military force. This, the Opinion notes, was significant, "... because one element often cited for determining whether a situation involving a non-state actor rises to the level of an "armed conflict" (for example, for purposes of Common Article 3 of the Geneva Conventions) is whether a state responds with its regular military forces." At issue, here, is the fact that the "element" referenced, a State's response to an armed attack through the use of its regular military forces, is, per Pictet's Commentary to Common Article 3, a principal factor to be considered in determining whether the level of violence occurring within a State has risen to the level of a non-international armed conflict; that is, whether the violence in issue has transitioned into a civil war. In contrast, the initial U.S. response to the 9-11 attacks, its use of military force against Afghanistan, was considered an international armed conflict. Accordingly, the statement contained in the OLC Opinion referenced in footnote 49 would appear to be a misnomer, in that it relates to determining the existence of a NIAC, rather than an IAC. As such, it would appear to be a poor choice to offer in support of the fundamental point being put forward in this section of the Manual.

Paragraph 3.4.2.: Act-Based Test for Applying *Jus in Bello* Rules. "The United States has interpreted "armed conflict" in Common Article 2 of the 1949 Geneva Conventions to include...'any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity or scope of the fighting.'"

This provision of the Manual elicited the observation that this was not a universally accepted interpretation of "armed conflict". It was recommended, accordingly, that it be noted, at least by means of

a footnote, that other States, as well as a number of international law scholars, believe that an "armed conflict", even one of an international character, occurs only when a certain threshold of intensity of hostilities has been reached.

Paragraph 3.4.2.2.: Distinguishing Armed Conflict From Internal Disturbances and Tensions. "In assessing whether de facto hostilities exist for the purpose of applying *jus in bello* restrictions, situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature do not amount to armed conflict....'Armed conflict not of an international character' for the purpose of applying the obligations in Common Article 3 of the 1949 Geneva Conventions was not specifically defined in those conventions."

This statement raised the question of why reference was made to only *jus in bello* "restrictions". Why not to *jus in bello* as a whole? It was also noted that the Manual's treatment of this matter is dealt with in a seemingly disingenuous manner. The footnote cite to this statement (footnote 73), in quoting only a brief section of the Commentary to the 1949 Conventions, gives the impression that the Commentary is unclear as to the manner of conflict to which the language, "armed conflict not of an international character", was meant to apply. This is simply not the case. Any objective reading of the Commentary would leave no doubt that the language in issue was intended to apply to conflicts occurring within a State, between the de jure government of that State and an organized armed group attempting to displace that government; that is, the language applies to internal armed conflicts (civil wars, insurgencies). Indeed, the last paragraph of the Commentary's treatment of the field of application of Common Article 3 ends with this statement: "Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities-- conflicts, in short, which are in many respects similar to an international war, but which take place within the confines of a single country." Too, somewhat ironically, footnote 74, in making reference to a 1977 Inter-American Commission on Human Rights case, makes this same point: "Common Article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular State." Finally, it is universally recognized that Protocol II Additional to the '49 Conventions, which deals with NIAC, applies exclusively to such conflicts occurring within the territorial confines of a State. Again, the Manual's treatment of this subject, it was opined,

goes directly to the manner in which the Manual has chosen to define NIAC in Chapter 17.

Paragraph 3.6.2.: Reciprocity in the Enforcement of the Law of War. "Reciprocity may be reflected in the enforcement of the law of war. For example, the principle of reciprocity is reflected in the concept of reprisal, which under very limited circumstances permits a belligerent to take action that would otherwise be unlawful in order to remedy an enemy's breach of the law. However, the prohibitions on reprisal in the law of war also may be understood to reflect important limitations on the principle of reciprocity in enforcing the law of war."

It was suggested that a discussion of reciprocity in the enforcement of the LOW in the context of "reprisals"--given the controversial, and somewhat conflicting-nature of this concept, might well generate more confusion than clarity. Was there not a less confusing manner in which to explain the notion of reciprocity?

Paragraph 3.6.3.1.: Reciprocity---"Golden Rule". "A principle of reciprocity may be understood to be reflected in law of war rules that reflect the golden rule. For example, the treatment of POWs has been based on the principle that POWs should be treated as the Detaining Power would want its forces held by the enemy to be treated. Similarly, during the process of releasing and repatriating POWs, it is proper to expect that each Party's conduct with respect to the repatriation of POWs will be reasonable and broadly commensurate with the conduct of the other."

This Manual provision elicited a number of comments. Some felt that this particular discussion of reciprocity added nothing of benefit to the Manual--and that it should be omitted. An observation was also made that this "golden rule" discussion of reciprocity was not only unnecessary, but that it was, in fact, dangerous. It might well serve as a justification for those who believe that LOW rules should be suspended--or deemed inapplicable--when a State is engaged with an enemy that does not respect or comply with the LOW.

Paragraph 3.6.3.2.: Benefits-Burdens Principle in Law of War Rules. "In some cases, the law of war requires that those seeking to obtain certain benefits under the law of war also accept certain burdens as a condition for receiving those benefits."

This statement drew the comment that the footnote authority cited in support of this proposition (footnote 118) appeared to

represent the idea that members of the Taliban armed forces were not afforded POW status and protections due to an application of the concept of "reciprocity"; that is, that, as they did not comply with the requirements of the '49 Geneva Conventions, as a matter of "reciprocity", they were not accorded the protections of the POW Convention. The question was then posed as to whether this example did, in fact, reflect an accurate application of "reciprocity"-at least in the context of the LOW.

Paragraph 3.6.3.3.: Law of War Duties That Are Reinforced by Corresponding Duties for the Enemy. "Similarly, the ability of a party to comply with a particular duty may be affected by whether its opponent has complied with a corresponding duty. For example, the ability of a party to discriminate in conducting attacks may be affected by whether its adversary has properly distinguished its military objectives from the civilian population and other protected persons and objects."

The statement was made that, as articulated, this comment is a dangerous one. It may well support an improper inference that enemy non-compliance with LOW obligations, most notably the passive distinction obligation, has the result of freeing U.S. forces from positive obligations. Would it not be much more effective, instead, to explain how implementation of targeting rules will inevitably be influenced by the tactical and operational situation-and that reasonableness of attack judgments will accordingly be influenced by enemy non-compliance with LOW obligations?

Paragraph 3.7.2.1.: *Jus in Bello* Rules and Situations Involving Neutral or Non-Belligerent States. "Although States developed *jus in bello* rules to address relations between enemies, some *jus in bello* rules may be applied by analogy to other situations, such as relations between a belligerent and a neutral or between co-belligerents. For example, a belligerent might take feasible precautions to protect the civilian population of a neutral or co-belligerent State from its military operations, even though such actions might not be required by the law of war."

This Manual provision gave rise to a concern couched in the following questions: Why is it not a LOW requirement for a belligerent to take reasonable precautions to protect the civilian population of a neutral or co-belligerent State? Is it not true that the requirement to protect civilians from the effects of hostilities is not restricted by nationality or territory-or to the parties to the ongoing armed conflict?

Paragraph 3.8.1.: General Cessation of the Application of the Law of War at the End of Hostilities. "Hostilities end when the opposing parties decide to end hostilities and actually do so, i.e., when neither the intent-based nor act-based tests for when hostilities exist are met. Of course, if the test for the existence of hostilities continues to be met, then hostilities cannot be deemed to have ceased."

The question was posed in connection with this statement as to how, in this context, a determination is to be made regarding a continued existence of "hostilities", particularly with respect to the "continued" existence of hostilities between the U.S. and al Qaeda. In response, footnote 134 was noted, wherein a U.S. DOJ representative, in 2009, opined, in response to a question dealing with the authority of the U.S. to continue to hold al Qaeda detainees, that, "At a minimum, we believe active hostilities will continue--and detention of enemy forces will be authorized--as long as the United States is involved in active combat operations against such forces. In reaching the determination that active hostilities have ceased, we would likely consider factors that have been recognized in international law as relevant to the existence of an armed conflict, including the frequency and level of intensity of any continuing violence generated by enemy forces; the degree to which they maintain an organizational structure and operate according to a plan; the enemy's capacity to procure, transport and distribute arms; and the enemy's intent to inflict violence."

CHAPTER 4: CLASSES OF PERSONS

General comments related to this chapter, as a whole, included the view that the chapter often lacks clarity, due largely to the fact that critical information is often clouded by tangential discussion, with actual guidance often difficult to discern. It was recommended that consideration be given to segregating the rules concerning classes of persons by those related to targeting purposes and those applicable exclusively to detention and penal matters. It was also noted that the chapter fails to clearly identify those relevant provisions of Protocols Additional I and II to the '49 Geneva Conventions that the U.S. believes to constitute customary international law--those that it does not--and those to which it has persistently objected, apart from a brief discussion related to this subject contained in paragraph 4.6.1.2. Finally, a concern was expressed regarding the chapter's methodological approach, which was deemed to be problematic in the sense that the Manual quite often cites only U.S. practice for what many would consider to be somewhat questionable declarations of the applicable rules and law.

Paragraph 4.2.3.: Mixed Cases. "Certain classes of persons do not fit neatly within the dichotomy of the armed forces and the civilian population, i.e., combatants and civilians. Each of these particular classes has some attributes of combatant status and some attributes of civilian status; in certain respects persons in these classes are treated like combatants, but in other respects they are treated as civilians."

In connection with this provision, the comment was made that the apparent generic use of the word, "treated", in this context, was confusing, as "treatment" is different in meaning when used in connection with dealing with a class of persons for targeting purposes.

Paragraph 4.3.1.: "Unprivileged Belligerents" as a Category in Treaty Law. "Although seldom explicitly recognized as a class in law of war treaties, the category of 'unprivileged belligerent' may be understood as an implicit consequence of creating the classes of lawful combatants and peaceful civilians. The concept of unprivileged belligerency, i.e., the set of legal liabilities associated with unprivileged belligerents, may be understood in opposition to the rights, duties, and liabilities of lawful combatants and peaceful civilians. Unprivileged belligerents include lawful combatants who have forfeited the privileges of combatant status by engaging in spying or sabotage, and

private persons who have forfeited one or more of the protections of civilian status by engaging in hostilities."

Note was made, in connection with this statement, that, as was often the case in this chapter, the citation support for this view consisted exclusively of U.S. sources. Thus, the query-was this concept of "unprivileged belligerent"-and the concomitant liabilities incurred by such a class of individuals-a matter of established LOW-or merely a statement of U.S. policy and practice?

Paragraph 4.3.3.2.: "Lawful", "Privileged", and "Qualified" Combatants. "The distinction between "lawful" and "unlawful" combatants has sometimes been called a distinction between "privileged" and "unprivileged" belligerents, i.e., distinguishing between persons who are entitled to the privileges of belligerent status, and those who are not."

While no concern was expressed with the content of this statement, itself, the footnote (footnote 39) associated with this language was challenged. The footnote, to a 1958 UK LOW Manual, paragraph 96, states: "Should 'regular' combatants fail to comply with these four conditions, they may in certain cases become unprivileged belligerents. This would mean that they would not be entitled to the status of prisoners of war upon their capture."

Why, the question was posed, reference a 1958 UK Manual, when a much more recent version exists? And how is the language cited particularly relevant to the statement it purportedly supports, as it obviously pertains to the specific issue of how members of a State's regular armed forces might, in some way, lose their status as "privileged belligerents". Indeed, the four "conditions" referenced in this section of the Manual refer to those that must be met by non-regular militia, volunteer corps, and organized resistance group members who do not form a part of, but simply belong to, a regular armed force. (Article 4. A. (2) of the '49 Geneva POW Convention). Is this, then, an oblique effort to support the USG's determination that, even though members of the Taliban armed forces served as the "regular" armed forces of the de facto Afghan government, they were not be afforded POW status and protections in that they did not meet all of the conditions of Article 4. A. (2)? Others viewed this cite to the '58 UK Manual as simply an effort to trace the historical development of the concept in issue.

Paragraph 4.3.2.3.: "Combatant" Used Without Modification. ""Combatant" and "belligerent", when used without modification (such as "lawful" or "unlawful", or "privileged" or "unprivileged"), have referred implicitly to lawful or privileged combatants."

Again, while no objection was raised to this statement, itself, this was singled out as but one of many examples throughout the Manual whereby a supporting cite is to a provision of Protocol I Additional (here, Article 43. (2))-and no clarification is made as to whether the U.S. views the provision cited as constituting customary LOW-or not.

Paragraph 4.4.: Rights, Duties, and Liabilities of Combatants. "Combatants have legal immunity from domestic law for acts done under military authority and in accordance with the law of war."

It was noted, in connection with this statement, that the truth of this comment is a matter of debate, vis a vis NIACs. Would it be advisable to caveat this statement with the note that U.S. personnel, if captured in certain NIAC situations, might be vulnerable to domestic prosecution for otherwise lawful acts of belligerency?

Paragraph 4.5.2.1.: Classes of Persons Within the Armed Forces-Special Operations Forces. "Special operations personnel, like other members of the armed forces, remain entitled to the privileges of combatant status, unless they temporarily forfeit such privileges by engaging in spying or sabotage. In some cases, military personnel who do not wear the standard uniform of their armed forces may nevertheless remain entitled to the privileges of combatant status because the wearing of such uniforms does not constitute the element of "acting clandestinely or under false pretenses." For example, special operations forces have sometimes dressed like friendly forces. Special operations forces personnel remain entitled to the privileges of combatant status even when operating detached from the main body of forces behind enemy lines."

Note was made that, though this statement sets forth the U.S. view on this matter, this subject is contentious in nature-and is far from settled. As previously discussed, the Manual has taken the position that the conditions set forth in Article 4. A. (2) of the '49 Geneva Convention on POWs must also be met, in full, by members of a State's "regular" armed forces. And, if so, are not those who wear "non-standard uniforms" (or simply the clothing of the indigenous population) still required to distinguish themselves from the civilian

population? Thus, if friendly forces with whom U.S. Special Operation Forces (SOF) might be operating (such as the Northern Alliance forces in Afghanistan) fail to distinguish themselves from the local population, are not U.S. personnel fighting with these forces in violation of the principle of "distinction"? Too-are these personnel not "acting clandestinely or under false pretenses"? Is there any form of identification that such SOF personnel might carry in order to avoid being prosecuted for a violation of the LOW by a capturing State? Are these not issues about which users of the Manual should be aware--even if this awareness is effected only in a cite to a source that discusses the controversy surrounding this subject?

Paragraph 4.6.1.3.: Application of GPW 4. A. (2) Conditions to the Armed Forces of a State. "The text of the GPW does not expressly apply the conditions in Article 4. A. (2) of the GPW to the armed forces of a State. Thus, under the GPW, members of the armed forces of a State receive a combatant status (including its privileges and liabilities) by virtue of their membership in the armed forces of a State. Nonetheless, the GPW 4. A. (2) conditions were intended to reflect attributes of States' armed forces. If an armed force of a State systematically failed to distinguish itself from the civilian population and to conduct its operations in accordance with the law of war, its members should not expect to receive the privileges afforded lawful combatants."

This provision--and its supporting footnote source (the OLC Bybee Memo of February, 2002), once again drew comments, with the view expressed that, as had already been noted, this U.S. interpretation and application of Article 4. A. (2) to the "regular" armed forces of the Taliban government--and the resulting denial of POW status to all members of those forces--was not without controversy. While it was understood that this is a U.S. Manual--and that it thus understandably reflects U.S. views on LOW matters, would it not be useful to acknowledge, even in a footnote, that the U.S. view on this particular issue may not represent that of the international community as a whole? Is there a danger in recognizing a State's right to unilaterally make a determination that an adversary State's armed forces personnel do not meet the requirements of 4. A. (2)--and thus can be denied POW status and protections? Is not such a judgment inherently subjective in nature--and thus subject to abuse?

Paragraph 4.10.1.: Military Medical and Religious Personnel. "Military medical and religious personnel generally may not commit acts harmful to the enemy (e.g., resisting lawful capture by the enemy

military forces). Military medical and religious personnel, however, may employ arms in self-defense or in defense of their patients against unlawful attacks."

This provision gave rise to the question of whether it would not be useful to clarify what is meant by "unlawful attacks", as well as "acts harmful to the enemy". Others expressed the view, however, that these phrases were sufficiently clarified in the relevant sections of Chapter 7 dealing with military medical personnel.

Paragraph 4.15.: "Persons authorized to accompany the armed forces may not be made the object of attack unless they take direct part in hostilities. They may, however, be detained by enemy military forces, and are entitled to POW status if they fall into the power of the enemy during international armed conflict. They have legal immunity from the enemy's domestic law for providing authorized support services to the armed forces."

This paragraph elicited the following statement/question. While the paragraph states that the personnel in issue may not be made the object of attack unless they take direct part in hostilities, should it not be noted that, even though the Manual also states that such personnel possess legal immunity from the enemy's domestic law for providing "authorized support services" to the armed forces, there may well exist a question as to whether a State might not view these "support services", "authorized" by an adversary, as constituting, in fact, a direct participation in hostilities, thus subjecting these personnel to an enemy's domestic law? A response to this statement noted that this very concern is addressed in paragraph 4.15.2.2-Employment in Hostilities.

Paragraph 4.15.2.4.: Self-Defense and Arming. "The arming of persons authorized to accompany the armed forces is analogous to the arming of military medical and religious personnel. DOD practice has been to permit commanders to authorize persons authorized to accompany the armed forces to carry defensive weapons if necessary."

Several questions evolved from this statement. Leaving aside the fact that a number of difficult issues have arisen from the practice of allowing the personnel in question to arm themselves, was it really accurate to describe their arming as analogous to that of arming military medical and religious personnel? Would not the concept of what constitutes "self-defense" appear to involve fundamentally different considerations in the case of these two categories of

personnel? And, what are "defensive weapons"? Cannot almost any type of weapon be used for both defensive and offensive purposes? And, what about the issue of "civilians" employed by private firms to provide security for other, non-DOD, U.S. agencies functioning in the same theater of operations? Given the issues this practice has generated, should this not be a subject dealt with in this Manual?

Paragraph 4.15.2.5.: Wearing of Uniform. "However, the mere wearing of a uniform or being authorized by a State to wear a uniform does not necessarily authorize that person to act as a combatant."

This statement was said to be confusing. Can a civilian authorized to accompany U.S. armed forces ever be "authorized" to act as a combatant? This would appear to be a misnomer.

Paragraph 4.15.4.: Persons Authorized to Accompany the Armed Forces-Liability Under Domestic Law for Participation in Hostilities. "[I]nternational law contemplates that persons authorized to accompany the armed forces may lawfully support armed forces in the conduct of hostilities. Such persons should not be liable under an enemy State's domestic law for providing authorized support services."

This statement was said to be a return to a matter previously discussed-that of whether an adversary might possibly adjudge "support services" performed by civilians accompanying a force, even though "authorized" (i.e., declared to be such) by an enemy State, as constituting a direct participation in hostilities, thus subjecting these individuals to prosecution under the domestic law of the capturing State. Is there universal agreement on what activities might be deemed, "support services"? May a State unilaterally declare certain activities to be "support services" for the purpose of exempting civilians accompanying its military forces from prosecution for engaging in unprivileged belligerency?

Paragraph 4.18.1-5: Private Persons Who Engage in Hostilities-Notes on Terminology. "This section refers to and discusses "private persons" who engage in hostilities, rather than to "civilians" who engage in hostilities-- for three reasons."

This is an exceptionally difficult section of the Manual to understand, both with respect to the terminology used and analysis provided. Indeed, the view was expressed that, here, the Manual was essentially "creating", rather than stating or commenting upon, existing LOW provisions, as evidenced by the fact that all of the

supporting cites to the statements made are exclusively U.S., to include a reference to the U.S. congressional Authorization for the Use of Military Force following 9-11. Who are "private" persons? Not combatants; not civilians; but a completely new category of persons said to now be subject to the LOW. Why such a labored attempt to create this new category of individuals? The answer would appear to be so that an explanation—a theoretical LOW basis—can be established for the post-9-11 U.S. selective application of the LOW to individual members of al Qaeda and the Taliban. Again, it was noted, that this analysis hinges on the legitimacy of the premise that the U.S. remains engaged in an ongoing global, yet non-international, armed conflict with al Qaeda and its associated forces. Additionally, however, the comment was made that this section of the Manual attempts to posit this discussion of "private" persons as settled LOW principles applicable to members of non-State armed groups, to include the contention that membership, alone, in such groups gives rise to the status-based targeting of individual group members—a view that ostensibly lacks international consensus.

Paragraph 4.19.: Rights, Duties, and Liabilities of Unprivileged Belligerents-4.19.2.: Unprivileged Belligerents-Conduct of Hostilities.: "Although unprivileged belligerents lack the right to engage in hostilities, international law nevertheless requires that they observe the same duties as lawful combatants during their conduct of hostilities."

The question was posed, but not answered, as to whether there existed an international, vice solely U.S., source for this statement.

Paragraph 4.19.4.1.: Unprivileged Belligerency and the Law of War--Notes on Terminology.

The view was expressed that this entire section of the Manual sets forth what can best be described as a U.S.-unique analysis of offenses committed by unprivileged belligerents as "war crimes"--an expansive approach toward war crimes that fails to reflect the common understanding of a LOW violation, vice a "war crime", vice a domestic law offense. It was further suggested that, perhaps, the ultimate purpose of this somewhat confusing terminological discussion of unprivileged belligerency and the LOW was to establish/reaffirm a basis for the trial of unprivileged belligerents (members of al Qaeda) for "war crimes" before U.S.-established Military Commissions.

Paragraph 4.24.3: Journalists-Risks in Areas of Military Operations: "Journalists who enter areas of military operations assume a significant risk that they could be injured or killed incidental to an enemy attack or from other dangers. To minimize the risk that they will be made the object of attack, journalists should seek to distinguish themselves from military forces. Moreover, in some cases, the relaying of information (such as providing information of immediate use in combat operations) could constitute taking a direct part in hostilities. Civilian journalists and journalists authorized to accompany the armed forces should not participate in the fighting between belligerents in this or other ways if they wish to retain protection from being made the object of attack. Like other civilians, journalists who engage in hostilities against a State may be punished by that State after a fair trial."

There were those who expressed the view that this paragraph emphasized the liability of journalists being made the object of attack if, in some of the ways indicated, they were viewed as having overstepped the bounds of legitimate journalism. That is, rather than noting the generally protected status of journalists, this provision appeared to place them at a greater targeting risk on the battlefield.

Others indicated that such a concern was overblown, indicating that the Manual simply articulates the applicable law. The language contained in this paragraph, it was submitted, does not indicate-or even imply-that journalists must now assume a greater degree of risk when covering combat operations.

[In connection with the Manual's paragraph dealing with the issue of the status of journalists who enter areas of military operations, it is noted that, in late March 2016, the Pentagon announced that it had revised this paragraph by removing a clause "suggesting that journalists could be seen as combatants, following outcry from news organizations that argued the rules would endanger media workers." This appears to be the first publicly announced DOD revision of the Manual.]

CHAPTER 5: THE CONDUCT OF HOSTILITIES

The discussion of this Chapter was introduced with the general comments that, given the proactive use of military force by the U.S. over the past 15 years of conflict in the Middle East, perhaps no other chapter in the Manual had a greater potential to apply lessons learned and to make a clear statement as to how significantly the LOW had progressed since the issuance of the 1956 Army LOW Field Manual than this one. In this regard, it was said, the reality would appear to be that those who were anticipating a tangible progression of U.S. views on the LOW toward those of its European allies would likely be disappointed, while those who were seeking doctrinal confirmation (and support) for U.S. positions taken on any number of LOW issues over the past 15 years in the fight against various terrorist groups would welcome this chapter as a valuable resource.

Paragraph 5.1.2.: Adherence to Law of War Obligations in the Conduct of Hostilities During Military Operations. "Although the law of war creates international obligations regarding the conduct of hostilities that apply to the parties of a conflict, responsibility for implementing certain international obligations would only apply to those persons belonging to the party's forces with the domestic authority to make the decisions necessary to implement those obligations. For example, a pilot would be entitled to rely on the determination by headquarters that a given target is, in fact, a military objective."

This statement solicited the question as to whether it-and the supporting footnote-were intended to indicate that a pilot, or any other combatant, never bore an obligation to make individual, perhaps, last-minute, decisions regarding whether a particular target was-or remained-a legitimate military objective.

Paragraph 5.3.1.: Responsibility of the Party Controlling Civilian Persons and Objects. "The party controlling civilians and civilian objects has the primary responsibility for the protection of civilians and civilian objects. The party controlling the civilian population generally has the greater opportunity to minimize risk to civilians."

Note was made that this paragraph reflects an approach toward the role of the defender, posited by Hays Parks as early as 1990, which has now formally become the U.S. position on this issue. While certainly not a significant departure from recognized LOW rules, it was

said that placing this statement as the first substantive provision under the heading of "Overview of the Rules for the Protection of Civilians" clearly reflects the U.S. experience as a State that has conducted military operations in other countries, as opposed to doing so on its own soil, and, as such, it emphasizes the imbalance between the minimal LOW provisions directed toward the role of the defender, as opposed to the numerous rules limiting the actions of the State engaged in the attack.

Others observed that the wording of this paragraph differs from the language dealing with this subject in Protocol I Additional. Is the intent, then, to indicate a U.S. belief that the precautionary obligations of an attacker are less than those reflected in Protocol I? Would the U.S. be comfortable with the rest of the international community assuming this U.S. approach?

Paragraph 5.5.4.: Failure by the Defender to Separate or Distinguish Does Not Relieve the Attacker of the Duty to Discriminate in Conducting Attacks. "A party that is subject to attack might fail to take feasible precautions to reduce the risk of harm to civilians, such as by separating the civilian population from military objectives. Moreover, in some cases, a party to a conflict may attempt to use the presence or movement of the civilian population or individual civilians in order to shield military objectives from seizure or attack. When enemy persons engage in such behavior, commanders should continue to seek to discriminate in conducting attacks and to take feasible precautions to reduce the risk of harm to the civilian population and civilian objects. However, the ability to discriminate and to reduce the risk of harm to the civilian population likely will be diminished by such enemy conduct. In addition, such conduct by the adversary does not increase the legal obligations of the attacking party to discriminate in conducting attacks against the enemy."

This paragraph, particularly the last sentence, generated significant discussion. It was observed that the consideration of the value to be given-the protection to be afforded-human shields, both voluntary and involuntary, has been a matter of intense debate over the past several decades-with no international consensus having been achieved. In keeping with the prior Manual statements on the role of the defender, this provision would appear to imply that the U.S. has formally adopted an approach of eliminating the presence of human shields from any required proportionality analysis of an attacker. Even more interesting, it was noted, this provision makes no attempt to distinguish between voluntary and involuntary human shields.

This provision was viewed by some as "very problematic"-a pronounced move away from the obligation to "discriminate" in the attack. This section represented, it was opined, the opportunity to reiterate the "constant care" obligation. Instead, the wording of this paragraph diminishes both this obligation and the duty to take "feasible precautions" to protect civilians. Another individual queried as to whether it was now actually the U.S. position that the presence of human shields was not a factor to be considered in a proportionality analysis. Another responded to this question, however, by asking whether the last sentence of this paragraph actually says this. In fact, it says only that the presence of human shields does not "increase" the legal obligation of the attacker to discriminate-not that their presence does not factor into such a required legal obligation.

Others approached this matter differently. Are not voluntary human shields directly participating in hostilities? And, if so, what precautionary consideration should be afforded these individuals, other than that of the propaganda value to be gained by an enemy when they are injured/ killed in an attack? This does, however, highlight the need for the Manual to distinguish between voluntary and involuntary human shields. And, finally, the comment was made that the Manual, does in fact, approach the matter of human shields in a very straightforward manner: it does not-and should not-conflate the two concepts of "precaution" and "proportionality". While the rule of "precaution" does apply in this situation, the presence of human shields need not be given any undue consideration in any proportionality analysis.

At this point, it was noted that, having heard the discussion regarding this subject, it was apparent that there was no consensus as to the specific intent of this provision-and that if confusion existed among this assembled group of so-called LOW "experts", how were those in the field to be expected to interpret and apply its meaning? This, then, clearly indicated a drafting problem with the Manual that requires correction.

Paragraph 5.5.5.: Permissible Location of Attacks. "Attacks on military objectives in the enemy rear or diversionary attacks away from the current theaters or zones of active military operations are lawful. The law of war does not require that attacks on enemy personnel or objectives be conducted near ongoing fighting, in a theater of active military operations, or in a theater of active armed conflict."

This provision drew the observation that many governments and academics, as well as numerous NGOs, and the ICRC, have contested the U.S.-professed right to apply force outside the geographic constraints of what has been termed the "hot battlefield". These contend that the U.S. is justified in using force only against personnel or objects present in an area of active hostilities. Notwithstanding this argument, however, this Manual statement makes the U.S. position- and practice-on this matter very clear: no such geographic constraints exist.

A response to this comment noted that the U.S. assertion of a right to attack enemy personnel and objectives away from a "hot battlefield" is caveated with the language, "outside neutral territory", thus limiting the right to the use of force in issue. However, another observation made was that this apparent caveat was itself the subject of a caveat set forth in footnote 89, in which the U.S. does assert the right to use force in another country-away from a "hot battlefield"-if that country consents to the use of force-or, importantly, "...is unable or unwilling to take action against the threat."

Still another observation was that the ongoing controversy surrounding the U.S. use of force away from a "hot battlefield" was essentially tied to-and revolved around- the U.S. contention that it remains engaged in an ongoing "global", yet "non-international", armed conflict with a non-State armed group (al Qaeda)-an assertion that is yet to win broad agreement in the international community. If, in fact, the language of this provision was seen as applying only to State-on-State international armed conflicts, little to no controversy would exist. It is clear, however, that the Manual language in issue is intended to serve as a legal basis for the U.S. use of force, away from a "hot battlefield", in various States, as an essential element in its ongoing "NIAC" with al Qaeda and its associated forces.

Paragraph 5.5.6.: Force that May Be Applied Against Military Objectives. "In the absence of expected harm to civilians and civilian objects or of wanton destruction that is not justified by military necessity, the law of war imposes no limit on the degree of force that may be directed against enemy military objectives, including enemy military personnel (but not including enemy personnel who are placed hors de combat). For example, the principle of military necessity does not require that only the minimum force that is actually necessary in a specific situation may be used against military objectives."

This provision drew the observation that it was intended as a response to assertions made both by academics and the ICRC, in Chapter 9 of the ICRC's "Interpretive Guidance on Direct Participation in Hostilities", assertions revolving around the contention by some that the LOW establishes a "least harmful means" rule. That is, in certain instances, there is a duty to capture, rather than kill, enemy personnel. This Manual provision makes it clear that the U.S. does not accept such a rule.

Paragraph 5.5.6.4.: Attacks on Specific Individuals. "Military operations may be directed against specific enemy combatants. U.S. forces have often conducted such operations."

There was a consensus that the U.S. targeting of individuals in the prosecution of its declared armed conflict with al Qaeda has generated controversy. This Manual provision is supported by a footnote that quotes a statement by Harold Koh, who was serving as the Legal Advisor to the U.S. Department of State at the time that the statement was made: "...some have suggested that the very act of targeting a particular leader of an enemy force in an armed conflict must violate the law of war. But individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law...."

It was suggested that, while this is certainly an accurate statement, the supporting cites (the Koh statement in footnote 102 and that of President Obama announcing the killing of Osama Bin Laden in footnote 103) once again place this provision squarely in the context of the U.S.-declared NIAC with al Qaeda. Thus the question: Are these examples really the best to use in illustrating the validity of this provision--or is this simply another example of an attempt by the Manual to establish/reaffirm a legal basis for the U.S. targeting of individual al Qaeda members?

Paragraph 5.7.2.: Persons Who Are Military Objectives. "Certain classes of persons are military objectives and may be made the object of attack. These classes of persons include:

- * combatants, such as military ground, air, and naval units, or unprivileged belligerents; and

- * civilians taking part in hostilities.

Note was made that this provision, like others in the Manual, confirms that the U.S. will apply a status of "unprivileged belligerent" to certain individuals (apparently, all members of a non-State armed group with which the U.S. declares itself to be engaged in hostilities). These individuals will thus be targetable, as are lawful combatants, solely on the basis of this "status", as opposed to those civilians who take a direct part in hostilities (targetable due to their "conduct").

Paragraph 5.7.6.2.: Make an Effective Contribution to Military Action. "Military action has a broad meaning and is understood to mean the general prosecution of the war. It is not necessary that the object provide immediate tactical or operational gains or that the object make an effective contribution to a specific military operation. Rather, the object's effective contribution to the war-fighting or war-sustaining capability of an opposing force is sufficient. Although terms such as "war-fighting", "war-supporting", and "war-sustaining" are not explicitly reflected in the treaty definitions of military objective, the United States has interpreted the military objective definition to include these concepts."

This paragraph was the subject of a number of comments. It was noted that the targeting of "war-sustaining" enemy assets has been a matter of controversy, even, apparently, within DOD. The Navy, via its doctrinal publication, NWP1-14, allows for the targeting of such assets, while Army and Air Force doctrine have not embraced this terminology. As reflected in this paragraph, however, DOD has clearly adopted the view that "war-sustaining" assets may not only be targeted, but that an analysis conducted as to whether to target such an asset is not to be made in the context of any specific operation, but in that of an enemy's strategic capability as a whole. It was observed, moreover, that this U.S. approach is reinforced by the following two additional Manual provisions:

Paragraph 5.7.7.2.: In the Circumstances Ruling at the Time. "...the purpose (i.e., future use) of the object can be considered in whether an object provides an effective contribution to the adversary's military action. In addition, the definite military advantage offered by the attack need not be immediate, but may be assessed in the full context of the war strategy."

Paragraph 5.7.8.: "Examples of Objects Often Regarded as Military Objectives. "The following types of objects generally have met the definition of "military objective" in past conflicts, but may not be military objectives in all circumstances:...(5) economic objects

associated with military operations or with war-supporting or war-sustaining industries."

Finally, it was noted that the Manual has taken a similar approach with respect to interpreting the meaning of the term, "military advantage". As in the case of the Manual's interpretation of "effective contribution", per paragraph 5.12.5, the analysis effected in the interpretation of "military advantage" is not limited to the advantage to be gained in a specific military operation.

Paragraph 5.12.5.: Concrete and Direct Military Advantage Expected to be Gained. "There is no requirement that the military advantage be "immediate". However, the military advantage may not be merely hypothetical or speculative. Similarly, "military advantage" is not restricted to immediate tactical gains, but may be assessed in the full context of war strategy."

Some voiced the concern that a characterization of "military objective" and "military advantage" in such broad terms would appear to legitimize cyberattacks on a tremendous number of entities.

The observation was also made that these terms are so broadly defined that, in reality, no clear targeting boundaries have been established-that such broad interpretations lend themselves to an abuse of what are meant to be limiting LOW rules; that is: "It may not appear to be a legitimate military objective, providing a concrete military advantage, now, but, trust us, it will all prove to be perfectly legitimate in a year or two."

Still others expressed an understanding for the need for relatively broad interpretations of these terms, given the complexities of both modern and asymmetrical warfare, but acknowledged that, as stated, these interpretations were vulnerable to subjective and variable application in the absence of more specific guidance in the form of theater-specific ROE.

Paragraph 5.8.1.: Armed Forces and Groups and Liability to Being Made the Object of attack. "Membership in the armed forces or belonging to an armed group makes a person liable to being made the object of attack, regardless of whether he or she is taking a direct part in hostilities. This is because the organization's hostile intent may be imputed to an individual through his or her association with the organization."

Paragraph 5.9.2.1.: Persons Belonging to Hostile, Non-State Armed Groups. "The U.S. approach has generally been to refrain from classifying those belonging to non-State armed groups as "civilians" to whom this rule (that of refraining from attacking these individuals unless they are taking a direct part in hostilities) would apply. The U.S. approach has been to treat the status of belonging to a hostile non-State armed group as a separate basis upon which a person is liable to attack, apart from whether he or she has taken a direct part in hostilities."

Comments relating to these paragraphs included a notation that the language of paragraph 5.8.1 once again confirms the now, oft-stated, U.S. position that membership, alone, is the key indicator for targeting individuals associated with a non-State armed group. While, of course, others-to include the ICRC- have contended that such persons can be targeted only when they are engaged in a "continuous combat function", the Manual, in this paragraph (and others) clearly rejects this position. Of interest, it was observed, is the fact that cited support (footnote 186) for this U.S. position is a quote from the ICRC Commentary to Additional Protocol II: "Those who belong to armed forces or armed groups may be attacked at any time." It would appear that DOD and the ICRC do not interpret this language in a similar fashion.

Another observation was that paragraph 5.9.2.1 ties the continued targetability of members of a non-State armed group to that group's "hostile intent". This application of a tactical self-defense justification for a use of force against individual members of a non-State armed group, it was noted, is controversial--and one that is also contained in the following provision of the Manual:

Paragraph 5.8.3.: Persons Belonging to Non-State Armed Groups. "Like members of an enemy State's armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group's 'hostile intent'."

With regard to these provisions, it was submitted that conventional wisdom might argue that members of an enemy State's armed forces are targetable because they have been granted combatant status by their sovereign-and can thus act as agents of that sovereign. That is, the "hostile intent" of an enemy State's armed forces plays no role in their targetability. They are targetable because two States are engaged in a war/armed conflict. Thus, the Manual's

reliance on the normally "conduct-based" analytical tool of "hostile intent" to justify the targeting of both members of a State's armed forces, as well as members of non-State armed groups, appears to be a misnomer.

The view was also expressed that the Manual deals with persons belonging to non-State armed groups to a much greater extent than would have been the case, pre-9-11. A response to this comment was that a focus by the Manual on such individuals is simply a reflection of the times--that such groups now represent a threat to the major security interests of the U.S. Still, it was noted, that having indicated that "...persons belonging to non-State armed groups and leaders whose responsibilities include the operational command and control of the armed forces or of a non-State armed group" are "combatants" for the purpose of assessing their liability to attack, the Manual then engages in an extensive discussion of formal and functional membership in such groups, the renunciation of such membership, and the leaders of such groups--all with the intent, as evidenced by the "all-American" supportive footnotes, to reaffirm, quite specifically it would appear, that the leaders and members of al Qaeda and its associated forces were-and remain-liable to attack. Was this not, once again, a case of the Manual being used as a mechanism by which to set forth a legal foundation for U.S. decisions regarding its interpretation and application of the LOW to both al Qaeda as an organization and to individual al Qaeda members.

This comment was met with the observation, once again, that this is, after all, a U.S. LOW Manual. Why would it not set forth the U.S. interpretation and application of certain LOW rules?

Paragraph 5.9.4.2.: No Revolving Door Protection. "The law of war, as applied by the United States, gives no "revolving door" protection; that is, the off-and-on protection in a case where a civilian repeatedly forfeits and regains his or her protection from being made the object of attack depending on whether or not the person is taking a direct part in hostilities at that exact time."

This provision elicited the observation that, for the sake of accuracy and transparency, the phrase used in this paragraph, "The law of war, 'as applied by the United States'", is one that could/should have been used in numerous instances throughout the Manual.

Paragraph 5.10.5.2.: Persons Deploying Into Combat by Parachute. "Persons deploying into combat by parachute may be

attacked even if they deploy from an aircraft in distress (e.g., the enemy has attacked the aircraft to resist the assault). It may be the case, however, that airborne forces are parachuting from an aircraft in distress outside the context of an airborne assault. Since they would not be "deploying into combat", they would be 'hors de combat' while descending by parachute."

This provision was challenged as being overly broad. Would this particular contention of airborne forces' immunity not be subject to any number of operational qualifiers?

Paragraph 5.11.: Feasible Precautions in Conducting Attacks to Reduce the Risk of Harm to Protected Persons and Objects.

Paragraph 5.11.1.: Effective Advance Warning Before an Attack That May Affect the Civilian Population. "Effective advance warning must be given of an attack that may affect the civilian population, unless circumstances do not permit."

Paragraph 5.11.13.: Unless Circumstances Do Not Permit. "These circumstances include legitimate military reasons, such as exploiting the element of surprise in order to provide for mission accomplishment and preserving the security of the attacking force."

The language that qualifies the duty to provide an effective warning before an attack that may affect the civilian population, "unless circumstances do not permit", drew the comment that it represented an overly broad exception. Was such an exception not subject to substantial abuse in its application?

Paragraph 5.17.1.: Definition of Enemy Property.: "All property located in enemy territory is regarded as enemy property, regardless of its ownership."

The accuracy of this statement was questioned, particularly with respect to the status of property for targeting purposes. What about embassies, as well as UN and NGO facilities?

Paragraph 5.23.1.1.: Improper Use of Enemy Uniforms and Perfidy. "The prohibition on the use of enemy uniforms in combat has been described as a prohibition against using enemy uniforms to kill or wound treacherously. However feigning enemy military status is not technically "perfidy", as the term is used in this manual, because perfidy requires the feigning of protected status, and the law of war

generally does not protect enemy military personnel from being made the object of attack."

This statement elicited the comment that this appeared to be an unusual parsing of the rule in issue. Does its inclusion in the Manual preserve some unstated operational purpose? And, the rather obtuse logic of this provision is carried over to that contained in paragraph 5.25.1.2, which deals with acts that are intended to mislead an adversary or to induce an adversary to act recklessly, but that do not infringe upon any rule of international law:

"According to the definition in API, ruses do not infringe upon any rule of international law applicable in armed conflict. For example, misusing certain signs and symbols would not constitute ruses. Similarly, although fighting in the enemy's uniform would not be perfidy since enemy military personnel are not generally protected by the law of war, fighting in the enemy's uniform would also not be a ruse, since such action would infringe upon the rule against improper use of the enemy's uniform."

Is not the bottom line, it was noted, that fighting in the enemy's uniform is a violation of the LOW. That is, doing so is not/not a lawful ruse. Why not just say this? Why the convoluted preservation of the idea that fighting in the enemy's uniform does not constitute perfidy, even though it violates the LOW? Again, is there some unstated operational purpose for engaging in this circular reasoning?

Paragraph 5.25.2.1.: Mimicking Other Friendly Forces. "It is a permissible ruse of war for combatant forces to mimic other friendly forces... Units of one type may pretend to be units of another type. Markings that identify equipment or personnel as belonging to a particular unit may be removed. Individuals or units may also dress like friendly forces."

In commenting on this provision, and while noting the accuracy of this statement, it was asked as to whether the example of this practice referenced in the supporting cite was the best to use in illustrating this concept? The footnote (footnote 706), refers to a U.S. commentator (Hays Parks) who states that, in conducting military operations in Afghanistan following 9-11, Special Forces personnel dressed in the indigenous attire of "friendly forces", the Northern Alliance--not to appear as civilians or to blend in with the civilian population, but simply to lower the visibility of the U.S. personnel vis-à-vis the forces they were supporting. Does the "indigenous attire" of the Northern Alliance, in this instance, actually serve as a good

example of what is meant by "dressing like friendly forces"? Or--is this simply a U.S. interpretation of this LOW rule that serves to support this Special Forces' practice in Afghanistan?

Paragraph 5.27.: Prohibition Against Compelling Enemy Nationals to Take Part in the Operations of War Directed Against Their Own Country.

Paragraph 5.27.2.: Nationals of a Hostile Party....Against Their Own Country.: "This rule applies to nationals of a hostile party; States are not prohibited by the law of war from compelling their own nationals to serve in the armed forces. Similarly, this rule would not prohibit States from compelling persons to betray an allegiance to a non-State armed group during non-international armed conflict."

Once again, the comment was made that, with the U.S. declaration of a continuous "non-international armed conflict" with al Qaeda and its associated forces, commentary regarding "non-State armed groups" has assumed a significant presence in this LOW Manual.

A series of questions were asked regarding the meaning of the word, "persons" in this provision. Who are these "persons"? Are they nationals of the State engaged in the compelling conduct? Are they third country nationals? Does it make a difference?

This question was also posed: Given the past use of "enhanced interrogation techniques" by the U.S., what is meant by the word, "compelling", in this context?

CHAPTER 6: WEAPONS

This chapter was not a subject of discussion on March 4th, but was reviewed, in detail, by the Working Group tasked with conducting a preparatory review of the noted Manual chapters. In doing so, the Working Group observed that, given that the U.S. military is the most technologically advanced in the world, this chapter on weapons will very likely be looked to by other States and international organizations as a definitive U.S. statement on both the lawfulness of various weapons systems-and the manner in which such systems might be employed.

Paragraph 6.2.1.: Review of New Types of Weapons. "The development of new types of weapons has often resulted in public denunciation of their allegedly cruel effects and in attempts to prohibit their use in armed conflict....Like other aspects of the law of war, the rules relating to weapons are generally characterized as prohibitive law forbidding certain weapons or the use of weapons in certain instances, rather than positive law authorizing the weapon or its use. The lawfulness of the use of a type of weapon does not depend on the presence or absence of authorization, but, on the contrary, on whether the weapon is prohibited. Thus, the mere fact that a weapon is novel or employs new technology does not mean that the weapon is illegal. The law of war does not require States to establish a general practice of using a weapon before it is to be regarded as legal. Moreover, it would appear absurd to suggest that a new type of weapon should automatically be prohibited because there is no State practice supporting such use, or to suggest that States must continue using a weapon in each conflict simply to maintain its legality."

This paragraph sets forth the "default approach" as that of the U.S. in discerning the legality of weapon systems. It must be read, of course, in the context of the very robust U.S. weapons review process. However, even with this in mind, this statement clearly reflects the U.S. conclusion that, as a foundational principle of weapons development and use, it is to be presumed that a new weapon, or an old weapon that applies a new technology, is legal-absent a specific prohibition of the weapon in issue.

Paragraph 6.5.2.: Other Examples of Lawful Weapons. "...aside from the rules prohibiting weapons calculated to cause superfluous injury and inherently indiscriminate weapons, there are no law of war rules specifically prohibiting or restricting the following types of

weapons by the U.S. armed forces:

*small arms, cannons, and other guns, including shotguns, 'exploding bullets, expanding bullets', suppressors, or large-caliber guns."

This statement is followed by an extensive discussion of "exploding" and "expanding" bullets in paragraphs 6.5.4.3-6.5.4.5. The clear intent of this expanded discussion of these types of rounds is to clearly set forth the U.S. position that the use of such rounds is not/not prohibited by the LOW. In making this point, The Manual notes that the U.S. is a party to neither the 1868 St. Petersburg Declaration on Exploding Bullets or the 1899 Declaration on Expanding Bullets-- asserting that neither reflects customary international law. The Manual states, nevertheless, that both types of rounds are subject to the "superfluous injury rule"; i.e., that these rounds are prohibited only to the extent that they are calculated to cause "unnecessary suffering".

While the Manual notes, in paragraph 6.5.4.4, that the U.S. position on expanding bullets set forth above reflects a "longstanding position of the United States", candor would seemingly require that this much more stringent U.S. advocacy of the lawfulness of expanding rounds be acknowledged as one of a much more contemporary nature. In the very recent past, LOW instruction provided to U.S. personnel generally emphasized the prohibition against the use of such ammunition. This discernible change in tone on this issue thus offers up the following questions:

* As the most basic of considerations, why has the U.S. now taken the lead in advocating the lawfulness of expanding bullets? Is it the result of a considered operational/tactical determination? That is; is it due to the demonstrated nature of asymmetric urban warfare--in which U.S. armed forces and those of its coalition partners are now increasingly involved? This fighting is conducted in close quarters, with civilians often present. The thinking in this case might well be that the use of expanding ammunition (standing a much greater chance of not penetrating a target's body) will reduce unintended injury to both civilians and friendly military personnel.

* Additionally, is this new-found U.S. advocacy of the lawfulness of expanding rounds also driven by the fact that the U.S. now finds itself engaged in an ongoing "armed conflict" with al Qaeda-a non-State armed group-all of whose members are "unprivileged belligerents"-and thus not entitled to "combatant immunity" and its

concomitant protections? That is; the U.S. has long taken the position, as indicated in the Manual, that the use of expanding bullets against individuals who are not combatants, but criminals, is permissible under international law.

* Does this stated position of the U.S. regarding the lawfulness of expanding rounds portend a use of such rounds in future combat operations?

* The U.S. qualifies the use of exploding and expanding rounds with the caveat that such use is prohibited only "...if they are calculated to cause superfluous injury". How is a determination to be made as to whether, in any given situation, the use of an expanding round is "calculated" to cause "superfluous injury" or "unnecessary suffering"? Is the guidance provided regarding the term, "superfluous injury", contained in paragraph 6.6, sufficient to enable such determinations?

* Is this U.S. position on exploding and expanding bullets stated in the Manual consistent with the view of the international community, as a whole, on this matter?

Paragraph 6.6.: Weapons Calculated To Cause Superfluous Injury. "It is especially forbidden to use weapons that are calculated to cause superfluous injury."

Paragraph 6.6.1.: Superfluous Injury or Unnecessary Suffering-Notes on Terminology. "The prohibition against weapons calculated to cause superfluous injury or of a nature to cause unnecessary suffering has been formulated in a variety of ways, both in treaties to which the United States is a Party and in other treaties. The United States is not a Party to a treaty that provides a definition of 'superfluous injury'."

Paragraph 6.6.3.: Applying the Superfluous Injury Rule. "The test for whether a weapon is prohibited by the superfluous injury rule is whether the suffering caused by the weapon provides no military advantage or is otherwise clearly disproportionate to the military advantage reasonably expected from the use of the weapon. Thus, the suffering must be assessed in relation to the military utility of the weapon. Weapons that may cause great injury or suffering-or inevitable death-are not prohibited, if the weapon's effects that cause such injury are necessary to enable users to accomplish their military missions."

Paragraph 6.6.3.3.: Clearly Disproportionate. "A weapon is only prohibited by the superfluous injury rule if the suffering it inflicts is clearly disproportionate to its military utility. This excessiveness should be assessed in light of State practice and *opinio juris* and the principle of humanity. Because of the difficulty of comparing the military necessity for the weapon and the suffering it is likely to cause, a weapon is only prohibited if the suffering is clearly or manifestly disproportionate to the military necessity. The suffering likely to result from the use of the weapon and its military effectiveness are likely to be difficult to assess, much less to compare to one another."

As evidenced by these Manual provisions, "superfluous injury" is a most difficult concept, exceptionally subjective in nature, and one for which the Manual cannot provide precise and definitive guidance regarding its application. As is true in the case of many other sections of the Manual, this discussion of "superfluous injury", in the context of determining the lawfulness of weapon systems, would appear to be more of a statement of U.S. policy on this matter (to inform the international community at large) than an effort to provide "... information on the law of war to DOD personnel responsible for implementing the law of war and executing military operations." (Paragraph 1.1). Why not state this overarching policy purpose of the Manual, upfront?

This "statement of policy" purpose of the Manual is further reflected in still another portion of paragraph 6.6.3.3.: "A State's acceptance of a treaty prohibition against a weapon should not be understood as necessarily reflecting that State's conclusion that the weapon is calculated to cause superfluous injury. For example, the CCW and its Protocols generally do not reflect a conclusion that the weapons prohibited or restricted by them are calculated to cause superfluous injury. On the other hand, a prohibition or restriction in a treaty can be relevant in determining that a weapon is not calculated to cause superfluous injury.... In addition, even if a treaty declared that certain weapons were calculated to cause superfluous injury, such treaty language would not necessarily mean that the weapon was prohibited by customary international law."

Some participants maintain this is particularly circuitous reasoning -or, perhaps, in truth, some language has been omitted in this paragraph. In any case, this particular discussion of the concept of "superfluous injury" is obviously not intended to provide information on the law of war to those DOD personnel responsible for executing military operations in the field. Others accepted the evaluation that

inclusion among weapons banned by treaties does not in all cases mean the weapon in question produces superfluous injury.

Paragraph 6.7.2.: Inherently Indiscriminate Weapons. "The test for whether a weapon is inherently indiscriminate is whether its use necessarily violates the principles of distinction and proportionality, i.e., whether its use is expected to be illegal in all circumstances. Special consideration should be given to the planned or intended uses of the weapon, i.e., those that are reasonably foreseeable. For example, a practitioner conducting a legal review of the proposed acquisition or procurement of a weapon should consider the uses of the weapon that are planned and reflected in the design documents. Practitioners should advise if the planned uses of the weapon are not consistent with the principles of distinction and proportionality, with a view towards ensuring that either the weapon or the planned uses are modified accordingly."

This provision of the Manual appears to state two tests that might be used in making a determination as to whether a weapon is indiscriminate in nature: (1) Would the weapon be "illegal in all circumstances"? ; (2) Will the weapon be illegal only if its use is indiscriminate in view of "the uses of the weapon that are planned and reflected in the design documents"? These are two distinct tests-which may not result in the same conclusion when applied to any given set of facts. The follow-on Manual commentary appears to favor the latter of the two tests.

Footnotes 209-211, page 352. As a matter of form, while these footnotes reference specific provisions of the ENMOD Convention, there is no cite to the Convention itself until footnote 406.

Paragraph 6.14.2.1.: Use of Non-Incendiary Weapons to Set Fire to Objects or Cause Burn Injury to Persons. "The use of non-incendiary weapons to set fire to objects or to cause burn injury is technically not subject to the additional restrictions described in paragraph 6.14.3 (Restrictions on the Use of Incendiary Weapons). For example, white phosphorus may be used as an anti-personnel weapon. However, such use must comply with the general rules for the conduct of hostilities, including the principles of discrimination and proportionality. In addition, feasible precautions to reduce the risk of harm to civilians must be taken... As a practical matter, however, it might be more effective to attack enemy combatants through other means, rather than seeking to cause them burn injury."

Does the U.S. really wish to assert the legitimacy of this particular use of white phosphorus? Is it not true that the U.S.-and the international community, as a whole-have recently taken the Government of Israel/Israeli Defense Force to task for a use of white phosphorus in Gaza that led to civilian burn injuries and the destruction of civilian property? Is not white phosphorus, by its very nature, indiscriminate in character?

Paragraph 6.17.3.: ENMOD Convention and Herbicides. "Under certain circumstances, the use of herbicides could be prohibited by the ENMOD Convention. However, the use of herbicides to control vegetation within U.S. bases and installations or around their immediate defensive perimeters has been understood by the United States to be permitted under international law."

Does this reference to "U.S. bases and installations" include those located on foreign soil? Should this matter be clarified?

Paragraph 6.18.: Nuclear Weapons. "...attacks using nuclear weapons must not be conducted when the expected incidental harm to civilians is excessive compared to the military advantage expected to be gained."

It was noted that this provides very minimal, but probably useful, guidance regarding the use of nuclear weapons.

CHAPTER 8: DETENTION: OVERVIEW AND BASELINE RULES

As in the case of Chapter 6, dealing with weapons, chapter 8 was not tabled for discussion on March 4th. It was, however, reviewed by the preparatory LOW Working Group. The comments below reflect this review.

The review of this chapter was introduced with the observation that it commendably condemns torture and cruel, inhumane and degrading treatment-and that it also identifies a number of significant detainee rights. It is also noted, however, that it is specifically stated that the chapter will not deal with the internment of POWs or that of protected persons. The purpose of this chapter, instead, is to establish "baseline rules" for "detention" situations for which these more specific rules do not apply. Examples of these are said to be:

- * the detention of persons who have participated in hostilities or who belong to armed groups, but who are not entitled to POW status or protected person status in international armed conflict;

- *the detention of persons held for reasons related to a non-international armed conflict; and

- *any other detentions.

In essence, then, a fundamental purpose of the chapter is seemingly to set forth what appear to be essentially U.S.-centric legal rationales for the detention and treatment of certain individuals engaged in "transnational non-international armed conflicts", particularly those held by the U.S. at Guantanamo Bay. Again, it is noted that there would appear to be an over reliance on exclusively U.S. sources to support the statements made regarding the status and treatment to be afforded specific detainees (members of a non-State armed group), with very little reference to relevant treaty or customary international law. The ultimate goal of this chapter, then, is, principally, to maximize the ability of the U.S. to detain a particular category of individuals seized outside the context of an international armed conflict. Assuming the validity of this conclusion, a number of the chapter's more problematic provisions were said to merit discussion.

Paragraph 8.1.4.4.: Analogous GPW and GC Provisions. "In some cases, analogous provisions of the GPW and the GC may also be

helpful in understanding the baseline rules for detention. For example, it may be appropriate to apply the principles of the GPW and GC, even when the relevant provisions do not apply as a matter of law."

This statement, while non-controversial, cites a most unlikely supportive source, the George W. Bush Memorandum: "Humane Treatment of Taliban and al Qaeda Detainees", paragraph 5 (Feb. 7, 2002) ("I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.").

The language of this memorandum, qualifying the treatment of detainees in a manner consistent with the principles of Geneva with the caveat that such treatment will be afforded only to the extent that it is "appropriate and consistent with military necessity", has been the subject of substantial criticism. It has often been referenced as a possible contributing cause for the subsequent maltreatment of U.S.-held detainees. As such, it is an interesting supportive reference choice. Its use also serves as yet another example of an over-reliance on the use of U.S. sources, when numerous codified and customary LOW sources were available for citation.

"In addition, as a general matter, analogous provisions of the GPW and GC may be helpful for understanding the requirements in international law for conducting detention operations, because the baseline standards for such operations during armed conflict are not more restrictive upon States than the requirements with respect to POWs and civilian internees under the GPW and GC, respectively."

This paragraph is exceptionally confusing. It is assumed that the "baseline standards" for "detention operations" referenced, here, are those related to the treatment of "unprivileged belligerents" detained during any "armed conflict" that is not an international armed conflict. If this assumption is correct, would it not be helpful to state which GPW and GC provisions are "analogous" to the detention operations to be conducted during these particular types of armed conflicts? Too, would it not be equally instructive to provide guidance regarding how to apply the "analogous" provisions of Additional Protocol II to such detention operations?

The cite used to support this statement regarding the "baseline standards" to be applied to the individuals detained during the "armed

conflicts" in issue is to a U.S. source: In re Guantanamo Bay Litigation, "Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees held at Guantanamo Bay", Misc. No. 08-442, 1 (D.D.C., Mar. 13, 2009), (" The laws of war have evolved primarily in the context of international armed conflicts between the armed forces of nation states. This body of law, however, is less well-codified with respect to our current, novel type of armed conflict against armed groups such as al-Qaida and the Taliban. Principles derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has authorized for the current armed conflict. ... The President also has the authority under the AUMF [Authorization for the Use of Military Force] to detain in this armed conflict those persons whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable.").

As it does frequently, the Manual uses a circular logic to support its interpretation of the "baseline standards" of treatment to be applied to certain categories of individuals in certain "armed conflicts". Why are these the "baseline standards? Because an "authoritative" U.S. Government source says so. Too-the content of this section of the Manual is, once again, premised on an acceptance of the U.S. contention that it has been-and remains-engaged in an ongoing, global, non-international armed conflict with the non-State armed group, al-Qaeda.

Paragraph 8.2.2.2.: Protection Against Public Curiosity.
"Detainees must be protected against insults and public curiosity. For example, displaying detainees publicly with the purpose of exposing them to ridicule and humiliation is prohibited."

The language, "with the purpose" is not contained in Article 13 of the GPW. There is simply the specific requirement to protect POWs "against insults and public curiosity". The Manual's language would appear to introduce a subjective judgment aspect to this GPW provision that does not exist.

Paragraph 8.3.1.: Searches. "Although detainees must always be treated humanely, detainees and their property may be searched and secured, when necessary for security reasons and intelligence purposes. The dignity and honor of the detainee being searched should be protected to the greatest degree possible under the circumstances."

Does this statement take into consideration GTMO detainees who are facing criminal charges--and who are entitled to attorney-client privilege? This language would appear to justify no-notice searches of detainee property/documents. Is this the intent?

Paragraph 8.6.: General Conditions of Detention Facilities.
"Detainees shall be afforded, to the same extent as the local civilian population, safeguards as regards health and hygiene and protection against the rigors of the climate and the dangers of the armed conflict."

This statement is supported by a cite to Protocol II Additional, when as previously noted, the Manual states that the "baseline standards" of detainee operations conducted in armed conflicts that are not international in nature should be guided by analogous provisions of the GPW and GC. Why not cite to analogous provisions of the GPW, GC, as well as Protocol II, throughout this chapter? Citing the Conventions in some cases-and Protocol II in others-would appear to be an inconsistent, perhaps self-serving, and somewhat confusing approach.

Paragraph 8.6.4.: No Prohibition Against Detention Aboard Ships.
"Provided the above requirements are met (all previously noted provisions dealing with the conditions of detention facilities), there is no prohibition against the humane detention of persons on ships. The GPW generally requires that POWs be interned on premises located on land."

This is obviously a deviation from the Manual's call for an application of the "analogous provision" of the GPW to this situation, due, rather transparently, to the fact that the U.S. has engaged in the detention of individuals aboard ships. As such, it is another example of U.S.-made rules applicable to the detention of "unprivileged belligerents"-or, in this particular case, a "hybrid detainee"--part "unprivileged belligerent" for intelligence purposes and part criminal (terrorist) for the purpose of prosecution. And, once again, citation support for this statement is U.S.-centric and occurs in the form of an article in the New York Times. Charlie Savage, "U.S. Tests New Approach to Terrorism Cases on Somali Suspect", THE NEW YORK TIMES, Jul. 6, 2011 ("In interrogating a Somali man for months aboard a Navy ship before taking him to New York this week for a civilian trial on terrorism charges, the Obama administration is trying out a new approach for dealing with foreign terrorism suspects. ...The administration notified the International Committee of the Red Cross of

his capture, and a Red Cross representative flew out to the ship and met with him. The visit came about two months after his capture, during a four-day break between his interrogation for intelligence purposes and separate questioning for law-enforcement purposes.").

Does a U.S. newspaper article really constitute an authoritative source for an arguably controversial "baseline standard" for "detainee" detention operations set forth in the LOW Manual? Might this statement be criticized as simply serving as an attempt to legitimize, retroactively, this U.S. practice?

Paragraph 8.10.4.: ICRC Access to Detainees. "An impartial humanitarian body, such as the ICRC, may offer its services to the parties to the conflict.... All departments and agencies of the Federal Government shall provide the International Committee of the Red Cross with notification of, and timely access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the U.S. Government or detained within a facility owned, operated, or controlled by a department or agency of the U.S. Government, consistent with Department of Defense regulations and policies."

Paragraph 8.15.1.: Registration of Detainees. "The detaining authority should register detainees promptly. Detainees should be registered within a reasonable time, taking into account other essential tasks and resource limitations that may affect the detaining authority's ability to register detainees."

The language of these paragraphs raises the issue of the meaning of "timely access", "prompt" registration", and "reasonable time". In the past, the U.S. has sometimes denied access to detainees for extended periods. Why not provide commanders with a reasonable, but definite, baseline for "timely access" to detainees-in order to ensure uniformity of approach for all DOD components? The same is true for the "prompt" registration of detainees within a "reasonable" time. Registration within two weeks has been the operable standard (with a deviation from this requirement being subject to OSD approval) for the past 15 years of conflict. Why not provide commanders with this requirement, with any necessary operational caveat, in this section of the Manual?

Paragraph 8.14.2.: Review of Continued Detention for Security Reasons. "DOD practice has been to review periodically the detention of all persons not afforded POW status or treatment. A detainee who

has been deprived of liberty for security reasons is to have, in addition to a prompt initial review, the decision to detain reconsidered periodically by an impartial and objective authority that is authorized to determine the lawfulness and appropriateness of continued detention.

The authority conducting the review is not necessarily outside the military, and often would be a military commander.

There is no fixed requirement regarding how often the review must occur, and the period between reviews will depend on a variety of factors, including: (1) operational necessities or resource constraints, such as force protection, the availability of interpreters, or large numbers of detainees, (2) the thoroughness of the review process; and (3) whether there is a true prospect that the legal or factual predicates justifying detention have changed."

These statements are, of course, supported exclusively by U.S. resource cites. This is understandable in the sense that these rules for the review of the continued detention of "unprivileged belligerent" detainees are, as in the case of numerous other rules set forth in this Manual, once again, U.S.-only pronounced LOW rules, evolving from the U.S. detention of al-Qaeda and Taliban personnel, post-9-11. The U.S.-centric nature of these rules is, again, the product of the fact that the U.S. is the only State that has engaged in such detention activities-driven by its continued contention that it is engaged in an ongoing, global, non-international armed conflict with al-Qaeda and its associated forces. Whether these "rules" are accepted as customary LOW practice by the international community as a whole remains to be seen, as noticeably absent in this section of the Manual are any references to those "analogous" provisions of the GPW and GC said by the Manual to be used in establishing "baseline standards" for detainee operations. For example-why is there no reference to "analogous" provisions of GCIV, provisions which do set forth more specific detention review guidelines? Given the past criticism of U.S. practice regarding continued detention reviews for the category of individuals in issue, DOD may wish to consider establishing more specific guidance and timelines for such reviews.

Paragraph 8.14.3.1.: Participants in Hostilities or Persons Belonging to Armed Groups That Are Engaged in Hostilities. "For persons who have participated in hostilities or belong to armed groups that are engaged in hostilities, the circumstance that justifies their continued detention is the continuation of hostilities. Thus, release of

such persons is generally only required after the conflict has ceased. As a matter of policy, release of lawfully detained persons often occurs before the conclusion of hostilities. However, even after hostilities have ceased, other circumstances may warrant continued detention of such persons."

As in the case of much of this chapter, this paragraph represents U.S.-created "LOW rules", rules once again supported exclusively by U.S. court cases and a DOD Directive. In essence, then, these are U.S.-generated rules formulated to apply to-and resolve problematic issues associated with-a uniquely U.S.-conceived form of detention of certain "unprivileged belligerents". As indicated previously, whether these "rules" will be viewed as representing customary LOW by the international community is yet to be determined.

The proclaimed right to detain the individuals in issue-until a "cessation of hostilities"-would appear to be based on their U.S.-designated status as "unprivileged belligerents", while the stated concomitant right to detain in order to bring law enforcement proceedings against these same individuals is apparently based on their U.S.-designated dual status as "criminals". Thus, once again, the Manual posits the case of the "hybrid detainee".

This paragraph again raises the issue of how, in applying the "rules" set forth in this section, a determination is made as to when a "cessation of hostilities" occurs in the context of a non-international armed conflict-that type of armed conflict in which the U.S. is said to be engaged with al-Qaeda. This issue has been addressed previously in the discussion pertaining to paragraph 3.8.1.

Paragraph 8.15.1.: Registration of Detainees, "The detaining authority should register detainees promptly. Detainees should be registered within a reasonable period of time, taking into account other essential tasks and resource limitations that may affect the detaining authority's ability to register detainees."

This paragraph raises the same types of concerns addressed in paragraphs 8.10.4 and 8.15.1--the vagueness of the terms, "promptly" and "within a reasonable period of time". Past U.S. practice has not always met even these undefined standards. Again, why not provide commanders with more definitive and uniform guidance?

Paragraph 8.16.2.2.: No Crime or Punishment Without Prior Law. "No one shall be accused or convicted of a criminal offense on account of any act or omission that did not constitute a criminal offense under the national or international law to which he or she was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offense was committed; if, after the commission of the offense, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby."

Do all of the offenses for which charges have been brought against individuals subject to the Military Commission process established by the U.S. meet this test? That is, is the principle of "*nullum crimen sine lege*" applied by such Military Commissions?

Paragraph 8.16.3.1-6: Rights of Defense and Trial Procedure. "The procedure shall provide for an accused to be informed without delay of the particulars of the notice alleged against him or her and shall afford the accused before and during his or her trial all necessary rights and means of defense.

Does the existing U.S. Military Commission process afford an accused all of the rights set forth in this section?

CHAPTER 16: CYBER OPERATIONS

In introducing the discussion of the Manual's chapter dealing with cyber operations, it was noted that the chapter reflects the rapid maturation of cyberspace as a domain of military operations. While U.S. national strategy and policy documents have previously cited cyberspace as such a domain-together with land, sea, air, and space, the inclusion of cyberspace in the DOD LOW Manual would appear to represent a concrete signal of the importance of cyberspace to both the current and future Law of War. This chapter, it was observed, is clearly the most significant publicly available DOD legal analysis of the LOW applicable to cyberspace published since the 1999 Department of Defense General Counsel publication, "An Assessment of International Legal Issues in Information Operations".

As groundbreaking as this chapter might appear, however, the observation was made that it leaves unaddressed a number of important Law of War issues and developments particularly relevant to cyberspace. Indeed, the chapter's omissions were viewed as significant as its observations. With this in mind, a series of questions were tabled, with the intent to prompt both a general exploration of the substantive contributions of this chapter to the existing Law of War applicable to cyber operations and to evaluate its effectiveness as a U.S. effort to shape emerging or new law in this area.

The chapter opens with the assertion that the legal clarity of the cyber Law of War is essential to-and in the interest of-the U.S. A passage from the chapter's initial paragraph states:

Paragraph 16.1.: Introduction. "As a matter of U.S. policy, the United States has sought to work internationally to clarify how existing international law and norms, including law of war principles, apply to cyber operations."

* Should this statement be taken at face value? Is the U.S. actually committed to legal clarity in this area? Or, does the lingering ambiguity with respect to what the U.S. regards as lawful and unlawful actions in the cyber domain still actually serve U.S. interests?

* Is the cyber domain sufficiently mature to the extent that the U.S. can afford to forfeit operational flexibility in favor of specific legal commitments to unequivocally forgo legally questionable cyber operations?

* What would be the costs of permitting legal developments to progress in this area without significant, formal, U.S. participation?

*The DOD Manual makes no direct references to the significant legal work undertaken in the area of the cyber Law of War, such as the "Tallinn Manual on International Law Applicable to Cyber Warfare" and other strictly academic publications. Should the Manual have attempted to directly and thoroughly address such work, given the widely acknowledged unsettled state of the Law of War pertaining to cyber operations?

While the questions posed were important ones, minimal discussion of these-and those that follow-occurred. The view was expressed, however, that the chapter does not adequately address the significant work in this area of the law reflected in the Tallinn Manual. This fact, alone, it was submitted, is an indication that DOD has not given sufficient thought to the cyber Law of War--and the many associated legal issues--either by a conscious choice to avoid these issues or by simply providing inadequate attention to this increasingly important area of the law. Similarly, it was also noted that the chapter reads as if it was written in 2002.

Others, however, questioned whether the U.S. should attempt to get "too far out front" in this very new and uncertain area of the law, particularly with respect to the Law of War aspects of cyber operations. The comment was also made that the U.S. has not formally been involved in the Tallinn process, by choice--and does not subscribe to all of the content of the Tallinn Manual. Too, it was noted, not all academics agree with the essentially private Tallinn efforts, preferring, instead, to see the work in this area done by States, in an international forum.

The observation was also made that prior discussion had focused on the extent to which the Manual deals with *jus ad bellum*, vice *jus in bello*, matters--issues not addressed in the 1956 U.S. Field Manual or in the LOW Manuals of other States. In this regard, the DOD Manual's chapter on cyber operations includes two passages addressing such operations and the *jus ad bellum*.

Paragraph 16.3.2.: Peacetime Intelligence and Counterintelligence Activities. "International law and long-standing international norms are applicable to State behavior in cyberspace, and the question of the legality of peacetime intelligence and

counterintelligence activities must be considered on a case-by-case basis. Generally, to the extent that cyber operations resemble traditional intelligence and counter-intelligence activities, such as unauthorized intrusions into computer networks solely to acquire information, then such cyber operations would likely be treated similarly under international law. The United States conducts such activities via cyberspace, and such operations are governed by long-standing and well-established considerations, including the possibility that those operations could be interpreted as a hostile act."

* This statement is undoubtedly correct and, candidly, a frank admission of ongoing U.S. policy and activities. However, does this paragraph actually provide sufficiently clear legal guidance? Are the references to "long-standing and well-established considerations" specific enough to enable military lawyers to render effective legal advice to commanders on such matters? If intrusive cyber capabilities are likely to proliferate to lower military echelons, does this statement make it clear to a subordinate military legal advisor the extent to which a command's cyber reconnaissance will constitute spying-or internationally wrongful intrusions into an adversary's networks?

* If this passage is ambiguous-and it appears to be so-is this a function of intentional U.S. reluctance to be clearer on this matter, a reflection of the undeveloped state of the law in this area--or a combination of both possibilities?

Paragraph 16.3.3.1.: Use of Force Versus Armed Attack. "The United States has long taken the view that the inherent right of self-defense potentially applies against any illegal use of force. Thus, any cyber operation that constitutes an illegal use of force against a State potentially gives rise to a right to take necessary and proportionate action in self-defense."

* "The Tallinn Manual on the International Law Applicable to Cyber Warfare" took note of this controversial view of the U.S. prior to the publication of the DOD Manual. However, not a single member of the Tallinn Manual's group of international experts elected to adopt this U.S. position. In essence, this U.S. approach acknowledges no response gap between the "use of force" prohibited under Article 2(4) of the UN Charter and an "armed attack" giving rise to self-defense under Article 51 of the Charter. Is this legal position taken by the U.S. sustainable in the face of persistent opposition by a very wide array of international legal authority?

* In light of the admitted U.S. activities undertaken in cyberspace, now set forth in the Manual, does this U.S. position continue to serve U.S. security interests?

These questions gave rise to the comment that the statement pertaining to U.S activities conducted in cyberspace, contained in paragraph 16.3.2, was a surprisingly frank and formal U.S. admission that the U.S. "breaks into" other States' network systems in an unauthorized way. Does such an admission not raise fundamental international law issues of State sovereignty? In response to this query, it was noted that this concern was the very reason that the Tallinn group has chosen to view such intrusions, not as use of force situations, but as matters of traditional espionage.

Others commented that this U.S. statement regarding its activities in cyberspace simply acknowledges that which is widely recognized as a common State practice. As such, it cannot be characterized as "an admission of guilt". Too, the real issue would appear to be whether the U.S. chooses to view all foreign State intrusions into U.S. cyber networks as "illegal uses of force". Obviously, it does not.

Attention was then directed to the fact that the law of neutrality is an important, but very often neglected, aspect of international law relevant to international armed conflict. As a reflection of this, the LOW Manual's chapter on cyber warfare acknowledges this concept with several passages, one of which seeks to resolve a persistent ambiguity with respect to cyber operations and the law of neutrality. The 1907 Hague Convention V, article 2, states: "Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power." In interpreting this particular provision in the context of cyberspace, the DOD Manual observes:

Paragraph 16.4.1. Cyber Operations That Use Communications Infrastructure in Neutral States. "[I]t would not be prohibited for a belligerent State to route information through cyber infrastructure in a neutral State that is open for the service of public messages, and that the neutral State would have no obligation to forbid. This rule would appear to be applicable even if the information that is being routed through neutral communications infrastructure may be characterized as a cyber weapon or otherwise would cause destructive effects in a belligerent State (but no destructive effects within the neutral State or States.)"

* Clearly, it was noted, the drafters of the Hague Neutrality Convention did not anticipate the conduct of cyber operations, leaving considerable room for interpretation by any number of international law interpretive methods. In this respect, it was observed that a majority of the members of the Tallinn group had concluded, contra to the position taken on this matter by the DOD Manual, that transmission of a cyber weapon across networks of a neutral State would, in fact, violate article 2 of Hague V. Accordingly, it was asked, does either of these two views better serve the object and purpose of the law of neutrality?

* What are the likely practical consequences of a widespread resort to the U.S. position on this issue?

The first of these two questions elicited the comment that the U.S. position on this matter reflected a "very surprising" view of the law of neutrality—one that was difficult to defend in view of the manner in which this particular Hague V provision traditionally had been interpreted. In turn, this statement drew the view that the Internet must be seen-and treated-as a Global Commons, rather than as a mechanism regulated by a provision of a century-old treaty that could not possibly have contemplated the means and methods of 21st century warfare. There was no response to the second question posed.

Discussion was then directed to the fact that, as the DOD Manual makes clear, operational legal advice requires that careful attention be directed toward the various thresholds of the application of the Law of War. Classically, it was noted, only operations conducted during armed conflict constituting an "attack" have provoked the detailed prohibitive rules and precautions applicable to targeting. Operations undertaken that fall short of an attack, although perhaps limited by LOW principles, are not subjected to the traditional rules applicable to attacks. In this regard, a widely accepted provision defines an "attack" as "acts of violence against the adversary, whether in offence or defence." (Additional Protocol I, Article 49). Cyber operations, with their wide range of destructive and non-destructive effects, have thus highlighted the importance of the somewhat neglected concept of what constitutes the "threshold" of an attack. The Manual addresses the threshold of an attack in cyberspace as follows:

Paragraph 16.5.2.: Cyber Operations That Do Not Amount to an "Attack" Under the Law of War. "A cyber operation that does not constitute an attack is not restricted by the rules that apply to attacks.

Factors that would suggest that a cyber operation is not an "attack" include whether the operation causes only reversible effects or only temporary effects. Cyber operations that generally would not constitute attacks include:

- * defacing a government webpage;
- * a minor, brief disruption of internet services;
- * briefly disrupting, disabling, or interfering with communications; and
- * disseminating propaganda.

Since such operations generally would not be considered attacks under the law of war, they generally would not need to be directed at military objectives, and may be directed at civilians or civilian objects."

In assessing the Manual's treatment of cyber operations that do not, in the view of the U.S., constitute "attacks", the following questions were presented.

* Does the position of the DOD Manual with respect to disruption of internet services adequately account for the contemporary value and importance of connectivity and access to computing and digital communications? For the purpose of cyberspace, should acts short of violence or destruction be subject to the prohibitions applicable to attacks?

* Can the last sentence of the Manual paragraph quoted above-sanctioning , with certain caveats , the directing of cyber operations against civilians and civilian objects, be squared with the principles of "military necessity", "distinction", and "humanity"?

* What are the likely practical consequences of widespread resort to the Manual's position on cyber operations, short of "attacks" being directed at civilian populations?

While the questions posed above entail both policy and legal issues that will ultimately require extensive examination and resolution, time constraints prohibited any meaningful discussion of these matters.

CHAPTER 17: NON-INTERNATIONAL ARMED CONFLICT (NIAC)

As to be expected, the contents of this chapter generated significant discussion. It was introduced with the observation that the decision to include a chapter in the Manual dealing exclusively with LOW issues arising in the context of non-international armed conflict (NIAC) represents an important-and very positive development-in that Field Manual 27-10 has provided very minimal guidance on this subject, essentially reproducing only Common Article 3 of the Geneva Conventions. It was further noted, however, that, given the very limited positive treaty law expressly applicable to NIACs, this must have been, understandably, a very challenging chapter to develop.

Paragraph 17.1.: Introduction.

The ensuing discussion immediately brought the controversial aspects of this chapter to the forefront. Once again, as it had been noted previously in conjunction with other aspects of the Manual, it was submitted that this chapter does not, in fact, deal with NIAC-as the international community has traditionally and systematically defined NIAC, supported by both long-standing State practice and *opinio juris*. Rather, it was submitted, the chapter sets forth LOW "rules" premised entirely on the assumed validity of the U.S. re-definition of the concept of NIAC, post 9-11, a definition supported only by a cite to a prior section of the Manual that posits this same approach (Paragraph 3.3.1). This U.S. proposed definition of NIAC as simply "...those armed conflicts that are not between States", it was submitted, is not only exceptionally broad in nature; it fails, as previously noted, to recognize the universally and historically accepted definition and understanding of NIAC extensively spoken to in both Pictet's Commentary to Common Article 3 of the Geneva Conventions-and Protocol II Additional to these Conventions-as "...an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." And, in this regard, it was stated, Pictet's Commentary leaves absolutely no doubt that a NIAC, at least in terms of currently codified LOW, is deemed to be one in which a Party "... is in revolt against the de jure Government of a State", an armed conflict "...which takes place within the confines of a single country"; that is, a rebellion, an insurgency, a civil war.

In contrast to this long-practiced view of the nature of NIAC, this chapter is said to be focused, instead, on "...the rules applicable to State armed forces conducting military operations against non-State

armed groups.” In practical terms, then, this chapter purports to establish, as LOW rules applicable to NIAC (as defined by the U.S.), those very practices undertaken by the U.S. in dealing with both al-Qaeda, as a whole, and its individual members, post 9-11. And these practices, in turn, would appear to be based, exclusively, on the assumed validity of the continued U.S. assertion that it has been-and remains-engaged in a global, yet non-international, armed conflict with al-Qaeda and its associated forces. Most importantly, it was noted, the validity of these U.S. presumptions ultimately affects, in turn, the credibility and worth of much of the content of this chapter. Does this U.S. re-definition of NIAC and the LOW “rules” and practices set forth as those applicable to this new form of NIAC now represent customary LOW norms? That is, will the international community view these pronouncements as such? Or-is the content of this chapter destined to be seen as simply a U.S.-centric re-definition of NIAC and an establishment of NIAC LOW rules shaped entirely to support U.S. policy choices, post 9-11? Indeed, the Manual notes, in Paragraph 17.1, that the application of the LOW to NIAC “may be complex”, as , in certain cases, the U.S. practice has been to apply LOW rules applicable to international armed conflict to military operations in NIAC—“as a matter of policy”. And, finally, will the now 15-year ongoing self-proclaimed U.S. global “NIAC” with al-Qaeda be viewed at some point in the future as simply an anomaly? That is, is it really likely that, given the experience of these past 15 years, the U.S., or any other State, will declare itself to be engaged in a perpetual global NIAC with a terrorist organization, to which it must apply a completely hybrid form of both the LOW and its ordinary criminal law? The discussion of the content of this entire chapter, it was said, must be undertaken with these considerations in mind.

Others expressed a completely different view of this chapter, applauding its content as an acknowledgment of the practical reality of today’s world; that is, that the traditional State-on-State international armed conflict largely has been replaced by conflicts between States and non-State armed groups. The U.S. assessment of the type of armed conflict that must now be considered a NIAC-and the U.S.-formulated LOW rules deemed essential for dealing with non-State armed groups-and their members-are both necessary and credible. They fill an obvious void in the LOW that previously has been available to regulate this new form of NIAC. And, who better to establish such rules than the U.S.-the State that can draw upon the experience gained through its NIAC engagement with al-Qaeda for the past 15 years? And, is it not far better to have the U.S. establish LOW principles applicable to this newly evolved NIAC than to have either no

rules capable of regulating such conflict, or, even more potentially troubling, to have these rules dictated by a third party or through the evolution of an unworkable form of customary LOW? Given these considerations, the content of this chapter must be viewed as a very positive development. Again, it was submitted; this is a U.S. DOD Law of War Manual. It should-and must- reflect the U.S. position on this-and other related LOW matters.

Still others opined that, while the U.S. re-definition of NIAC is now uniformly espoused by the U.S. Executive branch, U.S. governmental agencies, and, at least ostensibly, the U.S. judiciary, it must be recognized that this is simply not a universally accepted proposition. Accordingly, given that the credibility of the content of this chapter, as well as that of many other portions of the Manual, rests on the presumption that this is, unequivocally, the accepted definition of NIAC, the fact that it is not should at least be footnoted.

Finally, it was noted that, from a purely strategic perspective, if it is anticipated that this U.S. re-definition-and rules created for the regulation-of NIAC will be controversial and meet with resistance, why not maintain a persistent insistence that these are now, in fact, the applicable LOW norms—and thus place the burden on other players in the international community to voice any objections that they might have.

It was in the context of these differing views on this subject that discussion regarding the following paragraphs of this chapter occurred.

Paragraph 17.1.1.: Non-International Armed Conflict-Notes on Terminology. "Although there has been a range of views on what constitutes a non-international armed conflict, the intensity of the conflict and the organization of the parties are criteria that have been assessed to distinguish between non-international armed conflict and internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature."

The criteria referenced in this paragraph as those helpful in determining the existence of a NIAC, it was observed, are those set forth in the 1995 Tadic decision. However, in referencing only these criteria, the Manual fails to note the numerous additional criteria set forth in both Pictet's Commentary to Common Article 3 of the Geneva Conventions-and Protocol II Additional to these Conventions-that are to be considered in making such a determination. These additional criteria are, of course, clearly to be assessed in making a

determination as to whether a level of violence prosecuted by an armed group against a constituted government, occurring within a State, has reached the status of a NIAC. In this regard, it was noted that a reference to these long-established NIAC-determinative criteria in the Manual would, however, certainly serve to diminish the credibility of the U.S.-proposed re-definition of NIAC.

Paragraph 17.1.1.2.: NIAC and Internal Armed Conflict. "In some cases, the term internal armed conflict is used as a synonym for non-international armed conflict. Such usage may reflect a traditional definition of non-international armed conflict as only those armed conflicts occurring within the borders of a single State. Non-international armed conflicts, however, are classified as such simply based on the status of the parties to the conflict, and sometimes occur in more than one State. The mere fact that a conflict occurs in more than one State and thus may be characterized as international in 'scope' does not render it 'international in 'character'."

Echoing prior objections to the U.S. re-definition of NIAC, it was observed that the definition of a NIAC set forth in this paragraph is not only U.S.-generated *lex lata*; it is, in addition to being obtuse in nature, supported only by a cite to another section of the Manual that takes this same definitional approach. Additionally, it was noted that the Manual's cite to the Supreme Court decision in *Hamdan* seeks support for its definition of NIAC in a case in which the Court also engaged in a relatively transparent, result-oriented, cherry-picking of Pictet's Commentary in order to achieve its desired result.

Paragraph 17.1.1.3.: Transnational or Internationalized NIACs. "Sometimes the terms of 'transnational' or 'internationalized' are used to describe certain non-international armed conflicts. 'Transnational' has been used to indicate that the non-international armed conflict takes place in more than one State. 'Internationalized' has been used to indicate that multiple States may be involved in a non-international armed conflict."

Again, it was submitted, the Manual references no authority for the statements made in this paragraph, a particularly telling omission given the ongoing controversy surrounding the notion of extraterritorial, transnational, NIACs. Too, it was noted, the term, "internationalized", when used in connection with a NIAC, has always served to indicate the transition of a NIAC to an IAC when third States (other than a State/States responding to a call for support to a recognized, *de jure* government of a State) intervene in a NIAC.

Paragraph 17.1.2.: Important Commonalities Between the Law Applicable to International Armed Conflict and the Law Applicable to Non-International Armed Conflict.

Paragraph 17.1.2.1.: Common Baseline Rules. "Certain baseline rules, in particular relating to the humane treatment of detainees, must be observed regardless of the character of the armed conflict. The fact that certain baseline rules are common to international armed conflict and non-international armed conflict means that it may be unnecessary to determine the character of the armed conflict in order to assess whether the law has been violated."

Several questions were posed in connection with the content of this paragraph.

Other than the "baseline rules" relating to the humane treatment of detainees contained in Common Article 3 of the Geneva Conventions, what other "baseline rules" are common to both international and non-international armed conflict? Would it not have been instructive to reference these rules?

Additionally, the second sentence of this paragraph was seen as confusing. Given the fact that the entire body of the LOW, both codified and customary, is applicable to IAC, vice NIAC, would it not, in fact, be necessary to determine the character of an armed conflict in order to accurately assess whether a violation of the LOW has occurred?

Paragraph 17.1.2.2.: Foundational Principles of the Law of War. "The foundational principles of the law of war are common to both international armed conflict and non-international armed conflict. Thus, reference to first principles in the law of war may be most useful in assessing the rules applicable during non-international armed conflict."

This paragraph also generated questions.

What are the "foundational", "first" LOW principles referenced in this paragraph? Military necessity, distinction, etc.? If so, why not say this?

The Manual simply cross-references to another section of the Manual in support of its contention that these principles are applicable

to both IAC and NIAC. Is there an international consensus that these principles do apply to both IAC and NIAC?

It was also noted that the footnoted reference cited in support of the proposition that these principles are applicable to both IAC and NIAC-the 1995 Tadic decision- is an interesting one, in that it does not support the Manual's re-definition of NIAC. This opinion speaks to those instances "...when States try to put down rebellion by their own nationals on their own territory."

Paragraph 17.1.2.3.: Rules for Conducting Operations Against Unprivileged Belligerents. "Rules for conducting operations against unprivileged belligerents are found in both the law applicable to international armed conflict and the law applicable to non-international armed conflict. The rules for States conducting military operations against unprivileged belligerents in IAC are not significantly different from the rules for States conducting military operations against non-State armed groups during NIAC."

This paragraph gave rise to a number of queries.

What are the "rules" applicable to a State's conducting military operations against "unprivileged belligerents" in IAC?

Do these "rules" differ from those applicable to the conduct of military operations against lawful combatants in IAC? If so, in what ways?

What are the rules applicable to a State's conduct of military operations against a non-State armed group (unprivileged belligerents, per se) in a NIAC?

Why would the rules applicable to a State's conduct of military operations against a non-State armed group, comprised of unprivileged belligerents, in a NIAC not differ substantially from those applicable to a State's conduct of military operations against this same category of individuals in an IAC, given the fact that the entire body of the LOW is applicable to this latter type of conflict, whereas much more limited LOW principles are applicable to NIAC?

Is the statement made in this paragraph designed to support the U.S. contention that, as in the case of its ongoing NIAC with al-Qaeda, a NIAC can be waged, globally, against a non-State armed

group, and that, accordingly, this form of NIAC does, in fact, closely resemble IAC?

Paragraph 17.1.3.: Important Differences Between the Law Applicable to International Armed Conflict and the Law Applicable to Non-International Armed Conflict.

“Certain non-international armed conflicts, however, are not internal armed conflicts.”

Note was made that this statement is again supported only by a reference to other sections of the Manual that state this same proposition. Once again, no non-U.S. authority is cited for support of this contention.

Paragraph 17.2.: Application of International Law to NIACs. “In some cases, there may be important substantive differences between the rules applicable in international armed conflict and the rules applicable in non-international armed conflict. In some cases, only the general essence of a rule that applies during international armed conflict applies during non-international armed conflict, as opposed to the detailed provisions in some treaties relating to many aspects of international armed conflict.”

This provision of the Manual elicited the observation that, except for the fact that it is made in the context of the often noted U.S. re-definition of the nature and scope of NIAC, this statement would be a non sequitur. That is, if not for the U.S. re-defining of NIAC, it is self-evident that important substantive differences would occur between the rules applicable to IAC and those applicable to NIAC in all, not some, cases. The statement appears, here, it is assumed, to provide support for the U.S. post 9-11 practice of applying selected, essentially results-oriented, LOW provisions applicable to IAC to the “global”, “internationalized” NIAC that the U.S. is said to be waging with the non-State armed group, Al-Qaeda.

Additionally, the query arose as to the process through which a legal advisor is to interpret and apply, to a NIAC, the “general essence” of a LOW rule applicable to IAC? That is, what is meant by the “general essence” of a LOW rule?

Once again, it was noted in connection with this paragraph, the footnoted authority for the statements contained therein is the 1995 Tadic decision. However, as evidenced previously, this decision refers

to “internal armed conflicts” and “internal strife”, references that indicate that the Tadic tribunal adhered to the long-standing international understanding of NIAC, vice the expanded definition formulated by the U.S.

“The extent to which the law of war rules that apply during international armed conflict must or should apply during non-international armed conflict has not been clearly defined as the law of war has developed.”

Note was made that, while this is certainly an accurate statement, the cited authority used to support this observation is somewhat surprising-an 1862 publication by Francis Lieber. There have, in fact, been significant developments in applying the LOW to non-international armed conflict in the past 150 years. Why not use more contemporary sources to support the point being made? Moreover, once again, as evidenced by the footnoted language, Lieber is clearly making reference to what later became the Common Article 3 definition of NIAC- internal armed conflicts: “The application of the laws and usages of war to wars of insurrection or rebellion is always undefined, and depends on relaxations of municipal law,...necessitated by the numbers engaged in the insurrection.”

“The discretion afforded States in applying law of war rules to non-international armed conflict results, in part, because treaty provisions applicable to international armed conflict have been presumed not to apply to non-international armed conflict unless explicitly made applicable. For example, in the 1949 Geneva Conventions, only Common Article 3 applies to non-international armed conflict. The discretion afforded States in this regard may also be understood to result from the wide range of circumstances that constitute non-international armed conflict.”

This statement elicited the observation that the discretion afforded States in applying LOW rules, other than Common Article 3 and the provisions of Protocol II Additional, to NIAC most logically results from the fact that, as NIACs have always been deemed to be conflicts waged within a State, against the government of that State, it essentially remains a decision of the government of the State concerned as to whether, and how, it would apply additional LOW rules normally associated with IAC to such a conflict.

“The discretion afforded States in this regard may also be understood to result from the wide range of circumstances that constitute non-international armed conflict.”

This statement gave rise to a challenge as to whether there really are a “wide range of circumstances that constitute non-international armed conflict”. Do not Pictet’s Article 3 Commentary and Protocol II Additional provide tangible, specific, criteria for determining the existence of a NIAC? What are these other, undefined, “wide range of circumstances” that are to be considered in making a determination regarding the existence of a NIAC? Does such a statement serve as a positive development in formulating a better understanding of hostilities that do-and do not-constitute a NIAC? Or—is this statement made for the singular purpose of providing viability to a U.S. contention that its declared global NIAC against al-Qaeda represents, in fact, an example of the “wide range of circumstances that constitute a NIAC”?

“The United States has objected to efforts to make the applicability of the rules of international armed conflict turn on subjective and politicized criteria that would eliminate the distinction between international and non-international armed conflicts.”

This statement drew the comment that, when read in the context of the highly subjective and politicized decisions made by the U.S., post-9-11, regarding the selective application of IAC LOW provisions to its proclaimed global NIAC with al Qaeda, this U.S. declaration might understandably be viewed by objective observers as exceptionally hypocritical in nature. Too, the footnoted reference in support of this statement, the U.S. objection to the “national liberation movement”, Article 1(4), provision of Protocol I Additional, would appear to bear little relevance to the matter of making an informed decision regarding the existence of a NIAC.

Paragraph 17.2.1.1.: Treaties That Have Provisions That Explicitly Apply to NIAC. “Certain treaties to which the United States is a Party have provisions that explicitly apply to non-international armed conflict.”

Here, the observation was made that each of the treaties listed in this section evokes the Common Article 3 view of the nature and scope of NIAC, vice that of the re-defined NIAC espoused by the U.S.

Paragraph 17.2.1.3.: Human Rights Treaties and NIAC. "During an internal non-international armed conflict, a State would continue to be bound by applicable human rights treaty obligations."

Note was made with respect to this particular statement that it was apparently intended to reaffirm the U.S. contention that "internal conflicts" are but one form of NIAC; that is, that there are other types of such conflict, to wit, the U.S. global NIAC being waged against al Qaeda.

"The applicability of a human rights treaty obligation with respect to an individual, such as an obligation under the International Covenant on Civil and Political Rights, for example, may depend on whether the person is located outside the territory of the State Party."

This statement drew the observation that it would appear to be misleading to the intended users of this Manual to not acknowledge that this view concerning State Party obligations under the CCPR represents an increasingly minority view-and that the majority of States, particularly the European allies of the U.S., focus on the concept of "effective control" as an indication of actionable jurisdiction. Could not this fact at least be recognized in a footnote?

Paragraph 17.2.2.2.: Considered Absence of a Restriction in NIAC.

Paragraph 17.2.2.3.: Application of IAC Rules by Analogy.

Note was made in connection with these sections of the Manual that the analysis contained therein, pertaining to the U.S. treatment of al-Qaeda detainees, post-9-11, is premised entirely on the assumed validity and acceptance of the U.S re-defined concept of NIAC, even though, as has often been the case, the footnoted reference used to support this analysis repeatedly refers to NIAC as "internal conflict". Too, as it has again often been the practice, the Manual simply cross-references other sections of the Manual, vice any other form of authority, in support of the statements in issue.

Paragraph 17.2.3.: Application of Humanitarian Rules and the Legal Status of the Parties to the Conflict.

Paragraph 17.2.4.: Binding Force of the Law of War on Insurgents and Other Non-State Armed Groups.

Similar to the observations made regarding the previous two paragraphs of the Manual, it was noted that, while the general content of these paragraphs is an accurate reflection of the LOW as it applies to insurgents, the Manual's use of the additional term, "other non-State armed groups" is apparently intended to again convey the U.S. contention that the subject matter of these paragraphs applies not only to, generally, insurgents engaged in internal armed conflicts, but, specifically, to members of the non-State armed group, al-Qaeda, with which the U.S. is engaged in a global NIAC. Once again, of course, the LOW rule-making authority of these sections of the Manual is premised on both the validity and acceptance of the U.S. re-definition of NIAC.

Paragraph 17.4.1.: Ability of a State to Use Its Domestic Law Against Non-State Armed Groups. "The principle of the sovereign equality of States is not applicable in armed conflicts between a State and a non-State armed group. A State may exercise both sovereign and belligerent rights over non-State armed groups. This means that a State may use not only its war powers to combat non-State armed groups, but it may also use its domestic law, including its ordinary criminal law, to combat non-State armed groups. The limits imposed by international law on a State's action against non-State armed groups do not alter the basic principle that the State may exercise its sovereign powers against the non-State armed group."

Again, it was noted, the Manual is using the term, "non-State armed group", in this paragraph, as, essentially, a synonym for al-Qaeda, rather than as a term to describe insurgents engaged in an internal armed conflict against a constituted government of a State, even though, once again, the footnoted authorities it cites for the content of this paragraph refers to the re-establishment of law and order "in the State"-to "defend the national unity and territorial integrity of the State".

Paragraph 17.4.1.1.: A State's Power to Prosecute Hostile Activities. "[A] State may prosecute individuals (members of a non-State armed group) for participating in hostilities against it. Such conduct frequently constitutes crimes under ordinary criminal law. ... [P]ersons belonging to non-State armed groups lack any legal privilege or immunity from prosecution by a State that is engaged in hostilities against that group. On the other hand, the non-State armed group lacks authority to prosecute members of the State armed forces. In addition, the non-State status of the armed group would not render inapplicable the privileges and immunities afforded lawful combatants and other State officials. Thus, for example, members of the armed

forces of a State would continue to benefit from any privileges or immunities from the jurisdiction of foreign States that sought to exercise jurisdiction with respect to the actions of such State armed forces in a non-international armed conflict.”

The bottom line message of this paragraph, it was observed, is that, while members of the U.S. armed forces are entitled to full combatant immunity in waging a global NIAC against al-Qaeda, members of al-Qaeda are not. More importantly, the Manual states that the immunities and privileges to be afforded members of the U.S. armed forces, as well as other U.S. officials, extend worldwide. That is, these individuals enjoy immunity from any State’s attempt to exercise jurisdiction over them for actions they take, globally, in waging the U.S. NIAC against al-Qaeda. This assessment thus posited this query. Would the position taken by the U.S. in this paragraph not potentially run afoul of the UN Charter, Article 2(4), prohibition against violations of a State’s territorial integrity or political independence? Would the lawfulness of this provision of the Manual not be entirely situationally dependent upon whether a particular State accepts the U.S. contention that it is engaged in a global NIAC with al-Qaeda?

Paragraph 17.4.1.2.: Range of Activities Subject to Prosecution. “A State may use its domestic law to make punishable a wide range of activities that extend beyond the activities that constitute actual fighting against the State. For example, joining the non-State armed group, providing material support to the armed group, failing to report the treasonous activities of the armed group, and other conduct may be punishable under a State’s domestic law.”

Noted here was the fact that this paragraph offers an explanation of the basis upon which the U.S. has prosecuted, domestically, certain individuals who have never engaged in hostilities against the U.S. in its NIAC with al-Qaeda, but who have, nevertheless, been charged with providing some form of support to al-Qaeda. This offers an example of the U.S. application of the hybrid law combination of certain aspects of both the LOW and its ordinary criminal law to members/supporters of the non-State armed group, al-Qaeda, individuals who are, for some purposes, “unprivileged belligerents”, and for others, “terrorists”.

Paragraph 17.4.3.: Special Courts. “As part of its emergency regulations, a State may establish special or emergency courts for cases involving unprivileged belligerents or other persons suspected of committing offenses related to the non-international armed conflict.

Such courts must be regularly constituted and afford all of the judicial guarantees that are recognized as indispensable by civilized peoples. Such courts may distinguish based on nationality. The procedures of such courts may deviate from those applicable during ordinary proceedings, but deviations should be warranted by practical need.”

Similar to the case of the preceding paragraph, it was observed, this provision of the Manual serves to set forth the basis for the U.S. establishment of Military Commissions, post-9-11, to include the U.S. domestic law basis for exempting U.S. citizens from trial by such Commissions. Again, it was noted, these Commissions have been constituted to try al-Qaeda, “unprivileged belligerents”, engaged in a U.S. re-defined global NIAC, as opposed to a Common Article 3 internal armed conflict.

Paragraph 17.5.: Principle of Distinction in NIAC. “[T]he principle of distinction applies during non-international armed conflict. It may be important to note certain differences between the situations that typically arise in non-international armed conflict as compared to those that typically arise in international armed conflict.”

Paragraph 17.5.1.: Discrimination in Conducting Attacks Against the Enemy in NIAC. “Parties to a conflict must conduct attacks in accordance with the principle of distinction. As during international armed conflict, an adversary’s failure to distinguish its forces from the civilian population does not relieve the attacking party of its obligations to discriminate in conducting attacks. On the other hand-also as during international armed conflict-such conduct by the adversary does not increase the legal obligations on the attacking party to discriminate in conducting attacks against the enemy. For example, even though tactics used by non-State armed groups may make discriminating more difficult, State armed forces-though obligated to discriminate-are not required to take additional protective measures to compensate for such tactics.”

This paragraph drew a number of comments. The view was expressed that this language appears to indicate that, when an enemy fails to adhere to established LOW rules, the U.S will never be obligated to take additional precautions to protect non-combatants. Similarly, the observation was made that it was overly broad to state that an enemy’s conduct or tactics-even those of a non-State armed group-will never increase the legal obligations of an attacking force. While it is true that such conduct does not alter the basic nature of the applicable rules, this conduct may well impose greater demands on an

attacking force with respect to the implementation of these rules. That is, there may exist an enhanced obligation to gather better intelligence regarding the nature of the objectives to be targeted-or even an obligation to cancel an attack on an objective due to unresolved uncertainties concerning its status. This view was accompanied by the recommendation that the last sentence of this paragraph be deleted.

Others noted that the U.S. has always taken great pride in the procedural requirements that it employs in order to effectively implement risk management in the targeting process. The language of this paragraph appears to back away from the U.S. commitment to this process in the context of attacks made against non-State armed groups, when just the reverse should be true. An increased emphasis should be placed on precautions to be taken in the attack when a commander takes the field against an enemy which does not comply with the LOW-and thus places non-combatants at risk.

Additionally, it was opined that the controlling touchstone in situations in which an attack is mounted against an enemy which does not comply with the LOW should be "reasonableness". That is, given the circumstances prevailing at the time, when objectively assessed, were the precautionary measures taken those that could reasonably have been expected?

Finally, it was noted that, throughout the Manual's discussion of the application of the principle of distinction to NIAC, uncertainty arises as to whether the Manual is referring to the traditional, Common Article 3, form of NIAC; that is, internal armed conflict, as evidenced by its use of the terms, "insurgents" and "terrorists", or to the U.S. re-defined form of a global NIAC waged against a non-State armed group. Many of the footnotes used to support the statements made in this section of the Manual clearly make reference to traditional, internal armed conflict, NIAC scenarios. This uncertainty thus results in the question as to whether the totality of the rules for the application of the principle of distinction to NIAC set forth in paragraph 17.5, as a whole, apply to the traditional form of NIAC, the U.S. re-defined concept of NIAC-or to both.

Paragraph 17.7.: Rules on Conducting Attacks in NIAC. "Parties to a conflict must conduct attacks in accordance with the principles of distinction and proportionality. In particular, the following rules must be observed:" The Manual then goes on to list six rules said to be applicable to "...all parties in a non-international armed conflict, including persons belonging to non-State armed groups. However,

persons who belong to non-State armed groups...may also be subject to the State's domestic law."

Several questions were posed in connection with this paragraph. Why carve out a specific reference to "persons belonging to a non-State armed group" in the context of this paragraph? Are not all persons engaged in a NIAC against a constituted government, in fact, members of a non-State armed group? Given this fact, is this term referenced, here, for the specific purpose of reaffirming the U.S. contention that, in addition to individuals who may engage in the "traditional" internal NIAC, there may also be persons belonging to a non-State armed group who are participants in a "global NIAC"; that is, members of Al-Qaeda? And, finally, the query was made as to whether the "rules" said by the Manual to apply, apparently, to both internal and global NIAC reflect an international consensus regarding the applicability of such? If so, do these "rules" now reflect customary LOW principles applicable to NIAC?

Paragraph 17.7.1.: AP II Rule on Works and Installations Containing Dangerous Forces.

The observation was made that the language of this paragraph appears to be both internally contradictory—and confusing. Does the AP II restriction on attacks against such works and installations apply in NIAC-or not?

Paragraph 17.9.1.1.: Security of the Civilians Involved or Imperative Military Reasons. "Legitimate reasons to order the movement of the civilian population may include, for example:

- affording the civilian population greater protection from insurgents; and
- reducing the support provided to insurgents from elements of the civilian population.

The second reason listed as a legitimate cause for ordering the movement of the civilian population was challenged, with the comment that there existed insufficient support for this assertion. While, indeed, such movement for the purpose of denying support to insurgents may, in fact, ultimately be deemed to constitute a necessary military imperative, a cite to one article in the "Marine Corps Gazette" does not offer sufficient support for this proposition.

Paragraph 17.15.2.1.: Types of Units and Vehicles That Are Considered Medical Units and Transports. "Medical units and transports include those units and vehicles that are exclusively (e.g., permanently) engaged in those activities. For example, units and transports that intermittently are used in hostilities are not considered medical units and transports."

The accuracy of the language of this provision was questioned. The view was expressed that there is no authority for the statement that the term, "exclusive" use, connotes "permanent" use. The requirement, it was submitted, is that a transport be used "exclusively" for medical purposes at the time of its use—not that a vehicle can never be used for another purpose, at another time.

Paragraph 17.17.: Detention in NIAC.

It was noted, in connection with this section of the Manual, that many of the comments made in relation to the Manual's Chapter VIII, "Detention: Overview and Baseline Rules", are equally relevant, here. Again, many of the stated "analogies" to the LOW applicable to international armed conflict reflected in this section would be unnecessary—if not for the fact that they serve as a means of ratifying the U.S. detention and treatment of al-Qaeda personnel captured in the U.S. "global" NIAC being waged against this non-State armed group.

Paragraph 17.18.: Non-Intervention and Neutral Duties in NIAC.

Note was made in connection with the contents of this paragraph of the Manual that, as observed in conjunction with other portions of the Manual, this section deals essentially with conflict management, *jus ad bellum*, principles, vice LOW concepts. Thus, this section focuses on when force may—and may not—be used, in a NIAC context, in the territory of another State. Having noted this, however, attention was called to the following language set forth in connection with Paragraph 17.18.2, the "Duty of Belligerent States to Respect the Sovereignty of Other States".

"It may be unnecessary for a belligerent State to seek consent [to use force in another State] when there is a strong, reasonable, and objective basis for concluding that the seeking of consent would be likely to undermine materially the effectiveness of the action against the non-State armed group (e.g., reasons of

disclosure, delay, incapacity to act) or would increase the risk of armed attack, vulnerability to future attacks, or other developments that would give rise to an independent imperative to act in self-defense.”

This statement, it was contended, should be qualified as a U.S.-unique interpretation of the controlling *jus ad bellum* principle.

Discussion of Chapter 17 ended with the expression of the following general statements and questions:

This chapter fails to recognize the applicability of International Human Rights Law (IHRL) to NIAC—at least to the traditionally recognized, Common Article 3, internal armed conflict form of NIAC. The U.S. cannot continue to insist that the minimal norms of codified and customary LOW contained in Common Article 3 and Protocol II Additional are the only, *lex specialis*, rules applicable to NIAC. Parties to the International Covenant on Civil and Political Rights, as well as to other human rights conventions, are obligated to apply the provisions of these conventions, as well.

The question was posed as to whether, if a State becomes engaged in a NIAC upon the request of the *de jure* government of a State waging the NIAC, the former State is obligated to comport only with the domestic law of the latter, or does this former State remain subject to additional IHRL and LOW obligations it has assumed?

After somewhat extensive discussion, no agreement could be reached as to whether the U.S. assertion that it was engaged in an ongoing, “global” NIAC with al-Qaeda afforded it a legal basis for targeting al-Qaeda personnel away from a “hot battlefield”- and absent the consent of the State in which such personnel might be targeted.

The concept of “transnational” armed conflict was again visited, with, again, no consensus achieved as to whether, under existing international law, this was a recognized form of conflict, and, if it was, how it might be defined. There did appear to be agreement, however, that cross-border operations conducted against an organized armed group seeking sanctuary in a neighboring State-in the context of a traditional Common Article 3 NIAC (the so-called “spillover” theory)-should not be viewed as the type of conflict generally purported to be “transnational” in nature. However, the point was made that even this “spillover” theory is contentious and still evolving, dependent exclusively upon State practice, rather than *opinio juris*.

CLOSING COMMENTS

A recommendation was made to delete all references to the 2002 Bush Memorandum, "Humane Treatment of Taliban and al Qaeda Detainees", as, in the view of the individual making this recommendation-and shared by others-this Memorandum has generally been interpreted as placing "military necessity" caveats on the humane treatment of detainees. Referencing controversial documents of this nature as authoritative support for the Manual's content, it was said, adversely impacts the credibility of the Manual as a whole.

The view was expressed that the position taken in the Manual regarding the relationship between IHRL and the LOW, particularly with respect to NIAC, is both problematic and out of sync with the rest of the international community. It was urged that the U.S. re-visit its contention that the LOW is a *lex specialis* that displaces every other legal regime in both IAC and NIAC.

It was noted that this Manual will significantly impact not only U.S. forces, but those of our coalition partners, who might not, in all cases, share the U.S. views set forth in the Manual. This must be taken into consideration when coalitions are formed and the professional development of U.S. military attorneys is conducted. Nevertheless, the U.S. need not be apologetic for putting forth its own framework for the application of the LOW in today's challenging operational environment.

It was again emphasized that the Manual affords the U.S. with the opportunity to showcase the precautionary measures taken by commanders in the process of target selection-across the operational spectrum. There must be no retreat from these standards.

Consideration must be given, it was observed, to the manner in which the content of this Manual is presented in LOW instruction provided to U.S. personnel, and, in particular, U.S. military attorneys. We must be prepared to note when various positions taken in the Manual do not necessarily reflect those of the international community.

Finally, it was submitted that, while the Manual represents a substantial step toward restoring the U.S. voice on LOW matters, particularly given the U.S. experience over the past 15 years, the key

to the future utility of this Manual will reside in the U.S. willingness to exercise its ability to periodically modify and revise its views on LOW issues. The Introduction to the Manual states that such modifications and revisions will occur. It is imperative that this be accomplished in a considered, but timely, manner.

CONCLUSION

It is important to again emphasize the fact that the comments and questions posed in this review of the DOD Law of War Manual reflect the often divergent views of both the Working Group tasked with framing the principal issues to be discussed by those individuals convened on March 4th-and those of the discussants themselves. In this regard, it is self-evident that the views expressed herein do not serve to represent those of the American Bar Association, the Standing Committee on Law and National Security, or the consensus views of the individuals who participated in the March 4th Manual review.

The Standing Committee on Law and National Security wishes to express its sincere thanks to the individuals who comprised the Working Group, as well as those who participated in the March 4th review of the Manual. It is the hope of the Committee that the efforts of these individuals will promote both a discussion of specific issues that will serve as a catalyst for any future revisions of the Manual and advance the effectiveness and credibility of the legal regime of the LOW as a whole.