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Chapter I

Moving International Law from Theory to Practice: the Role of Military Manuals in Effectuating the Law of Armed Conflict

by
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Military manuals and handbooks containing operational rules prescribed by international law (hereinafter "manuals") are important to the operation of the international legal system for two related reasons. First, they are the indispensable modality for disseminating normative information to those whose behavior is the target of the norms in question. Second, they are an essential component in the international lawmaking process, often the litmus test of whether a putative prescriptive exercise has produced effective law. Without adequate dissemination, this putative international lawmaking is an exercise in the elaboration of myth through *lex simulata*[1] rather than the installation of an effective operational code.

There is a developmental aspect to both of these properties in the sense that if they are effectuated adequately, they contribute to the operation of the sector of international law concerned with armed conflict. There is, as well, a necessarily comparative aspect to inquiry about these properties in that this area of law, even more than others, depends for its vigor on reciprocity. Unless there is a comparable and manifest "scoring" on the manuals (or their functional equivalents) of adversaries, the symmetry necessary for reciprocity will be absent and the norms with which they are concerned are unlikely to be effectively incorporated into international legal practice.

I. Military Manuals As A Mode of Dissemination

A. The Importance of Dissemination

In small groups and micro-communities, the same persons who make law, act on it, apply it and enforce it.[2] But, as Durkheim observed, the large social organizations characteristic of most sectors of modern life require labor and role divisions and refined task specializations.[3] As a result, it is not only probable that entirely different persons will make law, act on it, apply it and

enforce it, but it is also likely that there will be considerable temporal and social distance between the specialists performing each of these functions. The phenomenon is not unique to international law. In the United States, the Supreme Court encounters much the same problem. James Levine writes,

> The conditions necessary for Supreme Court efficacy are much more stringent when the people and institutions to be controlled are farther removed from the Court's range of command and less threatened by the force of its sanctions. It is much easier for the Supreme Court to curb a few cantankerous federal judges than to reallocate the fundamental values of the society.[4]

"Causal distance," as Levine styles it, can be an even greater problem in the more complex international political system.

In large social organizations, effective lawmaking requires an additional step: the efficient dissemination and effective internalization of authoritative norms in those persons "in the field" as it were, whose behavior is the target of the norm in question. The process of dissemination is a necessary component of any communication that extends beyond the mediation of subjectivities between two proximate persons. It can be most economically expressed in terms of Harold D. Lasswell's classic paradigm of Who/What/Whom/How/Results/Effects. Less cryptically, Lasswell's heuristic asks for pertinent information to be organized in terms of:

Who is communicating (Communicators)
What (Content)
To whom (Target Audiences)
Through what channels (Channels)
With what results (Immediately Changed Subjectivities)
And with what longer term effects (Long Term Changed Subjectivities).[5]

When information is so organized, the aggregate consequences of a communication are clarified and the factors that accounted for success or failure may be analyzed, appraised and made the subject of policy recommendations.

Our focal content is the law of armed conflict and related internationally prescribed norms. Audiences may vary depending upon the type of activity sought to be regulated. Decisions about the use of nuclear weapons, for example, are unlikely to be made by men and women in the ranks. Dissemination of norms regarding nuclear weapons employment should therefore target higher military and political echelons. Comparative examinations of manuals must take account of variables such as these.

We are concerned with identifying channels because, as is well known, human beings mediate subjectivities on different levels and with varying degrees of explicitness. As we will see, contrary messages about prescribed behavior may be modulated simultaneously through different channels. We are concerned with results, for lawmaking is not a form of communication that is ritualistic, with its social functions fulfilled by the action of

communication itself. It is designed to precipitate social results. To the extent that it fails to do this, the entire exercise has failed. We are concerned with longer term effects because prescriptive communications also shape perspectives about the constitutive process[6] and value regulations other than those which have been manifestly targeted.

In a socially meaningful sense, then, the making of law necessarily involves much more than the clarification and establishment of some community policy in authoritative form. If law is to be effective, it must be transmitted and, where necessary, translated into formulations appropriate for those operating in the field whose behavior is the ultimate target of the principles in question. This process, which has been variously described as promulgation, dissemination, implementation, or publication, is a necessary step if law is to be transformed from an exercise in theory to a matter of practice.[7]

Unless a large number of those who are the target of particular formulations become familiar with and internalize the norms in question, the entire burden of enforcement is shifted to appliers and is greatly magnified. Their resources are limited, however, and would hardly suffice for such an enormous task. Moreover, if the norms they are asked to apply have not been internalized by a large part of the community, their actions appear arbitrary, retroactive and *ex post facto* and undermine rather than reinforce the symbol of law.[8] Though many legal systems insist that *ignorantia legis haud excusat*, all seem to appreciate that the point of legislative exercises is not to punish those who prove to be ignorant of the law. It is to get the message across beforehand to those who are expected to adjust their behavior in accordance with the norm.[9]

Dissemination can also precipitate the reciprocal consequence. Where an international prescription has been internalized at the rank-and-file level, it may serve to limit violations among the elites themselves. Even when prescriptive violations appear to serve short-term special interests, elites may find that there is rank-and-file resistance to norm repudiations. In effect, by disseminating rules of warfare, national command authorities raise the costs of violating those rules both in peace and war. Essentially, they are divesting themselves of power in return for other expected gains. Policy changes must first be communicated to the appropriate field authorities and then disseminated to relevant actors—in some cases the individual troops. Even if successfully communicated, the cost of deviating from a known policy is much greater than that of simply reversing a government-to-government statement. Neither personal demands for rectitude nor notions of chivalry are dead among military personnel. Moreover, the effectiveness of military units depends on leadership which exemplifies integrity.

The point merits emphasis. Dissemination not only internalizes norms within the domestic system; it internalizes them within the members of a warrior class who take their profession seriously. This is not to say that soldiers

can not be made to violate international law; some will predictably do so in violation of orders. What effective dissemination does mean, however, is that the default position is set in favor of accepted norms, and the costs of resetting will have to be weighed.

B. Methods of Dissemination

Law, like all types of learned behavior, can be transmitted in many, not necessarily exclusive ways: by single or repetitive communication, in manifest or latent forms, by precept and example, by positive or negative reinforcement, etc. Transmission can be relatively simple and single-step, for example, publication in an official gazette, or complex and multi-step as in a sequential opinion-formation process. Each phase may be inhabited and/or dominated by different specialist groups which are expected to interpret, digest and formulate the message in ways that make it comprehensible and practicable to the level they are serving.

Each phase of the transmission process may, in turn, become a sub-power-arena, in which politically relevant social forces bring to bear whatever bases of power are relevant in the setting in order to secure an interpretation and refashioning of the authorized policy that discriminates in their own favor.[10] In politics, as its practitioners know, there is no end to politics and, as the adage puts it, "nothing is finished until it's done."

Consider, by way of example, the sequence of linkages by which the Supreme Court's ruling in *Miranda*[11] filtered down from the Supreme Court, through the law enforcement bureaucracy, to the policemen on the beat. Institutional interpreters at different levels acted as mediators between the Court, with its general policy objective, and the actual law enforcement officers. The mediators, sensitive to contexts of application in ways in which the Court could not have been, introduced nuanced changes as they reformulated the *Miranda* doctrine into an operational code. There were many steps in this translation, involving attorneys in the Department of Justice, in many local police departments reflecting regional diversities, and finally commanding officers and police officers in lower grades. Before the principles became established, there were numerous feedback loops and challenges to the courts, with reinterpretations of various sorts.[12] Academies and private interest groups made their power felt at many points. The media played an important role, both in transmitting the normative content of *Miranda* and its social importance, while firmly anchoring it in folklore. The point of emphasis is that a sequence of steps of this sort is indispensable if formal prescriptions are to be even minimally effective.

The dissemination of general normative information to the modern military is substantially the same as dissemination to any other sub-specialized organization. Hence one will not be surprised to discover, at the constitutive level, authorized channels for dissemination,[13] authorized symbols denoting

normative information and its level of importance[14] and, at lower and more mundane levels, the handbooks, manuals and loose-leaf collections[15] so symptomatic of large, contemporary social organizations operating in the fluid environments that are the quintessence of modernity.

But the dissemination of international legal information and, in particular, that part of it now known as the "law of armed conflict" makes the military organization distinctive. The dissemination of normative information is ordinarily eufunctional, incorporating and reinforcing the organization's authority. In contrast, the dissemination of the law of armed conflict in the military is (i) premised on a distinct supra-organizational authority, that is (ii) assumed to be competent to prescribe behavior which by definition contributes to the operation of the larger system but, at the same time, limits and may even undermine the particular military organization which has incorporated it. An important element of this prescribed behavior is reciprocity, which must sometimes be ascertained by the actors subject to the norms. Thus, the disseminating scheme is of critical significance in this context, for it represents the closest parallel to an "act" which can verify national intent. Moreover, it is the *only* means to achieve deterrence, since there are few opportunities for employment of "example" in which a *post hoc* violation/punishment nexus can be observed. Hence dissemination of normative information in the military setting is marked by simultaneous contrary organizational dynamics in which some authoritative elements are pressing for compliance while others are resisting it.[16]

These unique features of the law of armed conflict are important in comparative appraisals of dissemination. Precisely because there are strong organizational dynamics militating against norm implementation, dissemination must be contextually and systematically analyzed, not simply acknowledged via a perfunctory check for the presence or absence of a manual containing certain verbal formulae. Unless information in the manuals is accompanied by secondary guidance or metacommunications indicating the gravity and preeminence of the information, and the transmission is embedded in an enforcement system which is adequate and vigilant, manuals themselves mean nothing. And unless comparable manuals are in operation and in evidence in the different latent war communities, much of the normative information in the manuals may not be acted upon.[17]

One may, then, examine the effectiveness of a military manual in terms of content, mode of delivery, the secondary norms establishing its relative position in the effective normative hierarchy, its system of enforcement and reciprocity. Let us consider each of these components briefly.

(i) **Content:** We are not interested in the existence of a manual on the simple-minded assumption that all manuals are the same.[18] Of critical importance is the *specific content* of the manual under examination in terms of more generally prescribed international norms. It is not enough to develop

a mechanical checklist to verify that certain items are in the manual. How they are translated into the pertinent vernacular and with what nuance and shading are also important. Content must be examined not only in terms of what is manifest in a particular manual, but in terms of the aggregate of orders about action putatively regulated by the law of armed conflict. Consideration should also be given to the relative ease with which a provision could be perversely construed to allow for self-serving interpretations in the future. In short, inquiry must identify the larger, functional manual and not only the words enclosed by pasteboard covers on which the word "manual" is emblazoned. Training publications and other instructional material regarding tactics may, for example, implicate referenced norms. If, by way of hypothesis, classified orders were to state that, on the occurrence of certain contingencies, those orders come into operation and override normative material that is found in any other communication, those orders would have to be considered part of the manual.

(ii) **Mode of Delivery or Vehicle:** Normative information may be conveyed in many forms. The advantage of a manual, especially in a hierarchical setting, is that it is relatively precise and unchanging, allowing for standardization and clarity in communication and ease in ascription of responsibility. It is also relatively easy to disseminate.[19] Each operative may be given a complete manual. The test is not satisfied, however, unless the content of the manual is *in fact* disseminated to the appropriate levels in credible fashion.[20] Timing here can be of moment since early indoctrination might stimulate more resistance to a potential violation.

Equally relevant, a manual simplifies international surveillance. While one should resist elevating form over substance, form here is of decided importance. Written prescriptions have a permanence which makes repudiation observable even to those not targeted by the dissemination.[21] There is a greater political cost involved in violations which are inconsistent with previous governmental statements. On the other hand, there are military organizations or situations in which manuals may be inappropriate. Where, for example, officers and ranks are illiterate or semi-literate, other vehicles for dissemination must be sought.[22] Likewise, dissemination should take account of the decision-making level of the target. Each sailor, for example, need not possess a manual explaining the juridical bay concept.

(iii) **Secondary Norms:** Unless a manual is identified by secondary norms within the organization as of transcending importance, it is not worth the paper on which it is printed. The key norms in this regard are, first, the preeminence of international law over national law and second, that superior orders do not constitute a defense to a violation of international law. These secondary norms must be effective. Here again, words do not suffice. The expectations of the effectiveness of norms are sustained and reinforced by the availability of manifest and credible methods of implementation; norms

erode into *lex simulata* if it becomes apparent that there is neither means nor will to implement them. During combat, the more proximate authority and control system will prevail over the more distant. Hence, from a practical standpoint, it is important that the substantive content of the international norm be incorporated *before* conflict. This will constitute effective superordination of international over national law.[23]

(iv) **Systems of Enforcement:** There must be an environing indigenous system of enforcement of the norms which is sufficiently manifest and efficient to become part of the expectation pattern of those whose behavior is the target of the norms in question. This component is closely tied to that of secondary norms in that it is the domestic enforcement system which gives teeth to the acknowledged preeminence of international law.[24]

(v) **Reciprocity:** The military organization must provide for an accurate method for determining whether adversarial behavior is reciprocal where reciprocity is an element of continuing validity.[25] It is important that there be distinctions between the inevitable single unauthorized violations of prescribed norms, on the one hand, which should not authorize suspension of the norms by the other party, and systematic authorized violations, which should warrant suspension.[26] Without the means for making such distinctions, certain norms are likely to be suspended shortly after the first shot is fired.[27]

On the basis of the foregoing factors, comparative appraisals of the effectiveness of military manuals may be expressed in terms of a general quotient. More importantly, these distinct inquiries may be useful in terms of identifying pathologies with particularity and targeting them for appropriate remedies.

II. Military Manuals As Part Of The Process Of Making International Law

In addition to their important function in dissemination and transmission of international legal information, manuals are an important mode for making international law as well as evidencing its existence.

Lawmaking, in any setting, involves the determination and communication of normative information accompanied by authorizing symbols and credible indications of control intention. In organized national systems, the popular and scholarly conception of this activity has involved prescription through legislatures and other highly institutionalized prescribing modes.

Consensual international law is essentially made in two ways: by explicit agreement and by implicit agreement—which is usually referred to as custom. Explicit agreement includes treaties, the classic mode, as well as many newer methods involving explicit clarification of policy in an organized arena. Implicit agreement includes all the modes by which authoritative policy is informally arrived at and intercommunicated.

With regard to international law concerning the conduct of military conflict, manuals are important in both modes. Even when norms are prescribed in formal settings, a critical phase in their consolidation is national incorporation. Because international law notoriously lacks its own enforcement system, national implementation is often a critical factor in successful international lawmaking. The content of manuals, while not absolutely probative that particular international norms are being effected at the national level, is a *conditio sine qua non* for their implementation. Certainly, both the absence of a manual or the use of manuals whose content does not include the relevant norms would strongly suggest that those norms have not been adopted.[28]

Manuals play an even larger role in processes of implicit agreement. In the international system, as is well known, the bulk of international prescription is accomplished through processes which are informal and non-institutionalized. The critical building block in these processes is national action. It is not surprising that the U.S. Military Tribunal at Nuremburg stated that while not in themselves a competent source of international law, "[army regulations], as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions had been put into general practice."[29] Customary law is even more significant to the law of naval warfare since, it has been argued, attempts to codify norms relevant to land warfare have historically enjoyed more success than similar attempts regarding naval warfare.[30]

Some international norms are formed by homologous national action. Consider *The Scotia* case[31] in which Justice Strong ruled in favor of a British ship which had collided with an American vessel. He found that British orders regarding navigational lights had in fact become international law. Homologous national action may be evidenced in manuals or their functional equivalent.[32] Given the competitive character of their enterprise, specialists in adversary organizations will scrutinize the operational codes of their opponents to determine whether particular international norms have been adopted and put into effect.[33] The extent to which they have will obviously influence the willingness of others to adopt and act on them.

The chivalric code of the Middle Ages was largely generated in this fashion. Since a vast majority of warriors, like the population at large, were illiterate, a written manual would have been pointless. Functional manuals transmitted authorized norms of warfare through a familiar oral tradition. Froissart recorded a fourteenth century incident which evidences the existence of this functional manual. Upon surrender, three French knights gave themselves to their English captors saying, "We are yours: you have vanquished us. Act therefore to the law of arms."[34]

A number of norms in the contemporary law of armed conflict may be traced to this pattern of lawmaking. Even in antiquity rules of warfare were

often orally disseminated to troops. Cyrus, King of Persia (559 B.C.), Alexander the Great (333 B.C.), and Titus of Rome (70 B.C.) all insisted that their troops observe basic humanitarian rules such as sparing civilian populations and property and respecting religious buildings.[35] Protection of enemy wounded and prisoners of war can also be traced to earlier oral codes.[36]

For the latent lawmaking function no less than for the immediate operation of the laws of armed conflict, it is important that manuals be made available to potential adversaries.[37] Ironically, however, notifying an adversary regarding battlefield intentions may yield strategic or tactical advantages. It will be recalled that many in the military felt and still feel that the publication by Senator Goldwater of Rules of Engagement for part of the Vietnam theatre undermined U.S. military efforts there.[38] There is, thus, an understandable reluctance to publicize this material. On the other hand, its suppression decreases the probability of the norms being adopted by the adversary. It might be useful for the International Committee of the Red Cross (ICRC) to act as a clearinghouse for such material as a way of facilitating implementation and reinforcement of this part of the law of armed conflict.[39]

III. Military Manuals In Future Constructs

Alexander Bickel described the heroes among common law judges as those who "imagined the past and remembered the future."[40] Generals are often cautioned against fighting their last war. Likewise, those who play a role in defining legal relationships must keep abreast of developing trends and technological advances. The probable role of military manuals in future conflicts is a question as perplexing as that of how the next battle will be fought.

Many futures can be imagined; in each, the role and degree of effectiveness of military manuals will vary. In many, however, it would seem that effective dissemination, which is favorably measured by the criteria laid out earlier, will have some mitigating effect on the harshness and cruelty of warfare. Technological advances and the melange of future conflicts may be significant factors affecting the impact of manuals on the law of warfare. Dissemination needs must be constantly reconsidered in light of these concerns.

Burgeoning technologies can significantly increase or decrease the number of actors necessary to perpetrate an act of violence. It is unlikely that the role of the individual rifleman will ever become obsolescent, but an increase in irregular warfare can vastly increase the numbers of willing and unwilling combatants and, as it were, consumers of the law of armed combat. At the same time, however, each technological advance can also significantly reduce the number of individual entities who need be concerned with the full range of the rules of warfare. As more sophisticated and efficient radars, targeting systems, sensing devices and weapon delivery systems are developed,

battlefield decisions become more concentrated at higher echelons. This is especially true at sea where improved combat information systems allow centralized control of myriad weapon systems. Manuals that are to be continuously relevant will need to focus on the type of decisions made at these levels.

Concurrent with increased efficiency and destructiveness, modern weapon systems tend toward increasing the physical distance and reducing the psychological linkages between the initiator of violence and its recipient. As victims become more remote, the effect of the principle of chivalry declines as an influence on conduct,[41] and humanitarian law receives less assistance from other cultural restraints on human behavior. The task of constraining warfare becomes more difficult. Prescribers must make themselves cognizant of the effects of such latent pathologies in technology-assisted decision-making if effective humanitarian norms are to be crafted and maintained.

A related factor affecting future combat is likely to be the development of advanced rapid communication systems. As observed in recent U.S. engagements,[42] modern communication systems drastically reduce battlefield decision-making, proportionately diminishing the need for field manuals, while pushing manual requirements "upstairs."[43]

On the other hand, the centrality of command and control in modern warfare will certainly make communications a preferred early target. Current strategies must consider the likelihood that adversaries will make every attempt to disrupt communications.[44] The same prudence demanded tactically must be observed when considering the effect of contingencies on observance of international law. Additionally, commanders' handbooks and manuals can serve to prepare leaders for contingencies which implicate international law. While a decision regarding neutral shipping, for example, may indeed be made at higher levels than that of the on-site commanding officer, prior training and familiarity with the manual may trigger an awareness of potential international law problems. Thus, even if the manual is not explicitly used as a reference to resolve a problem or question, it precipitates an identification of the issue which can be transmitted to higher echelons or used in split-second decisions.[45]

The most unpredictable construct regarding international norms is the twentieth century phenomenon of "total war." Partly a product of technological advances, recent wars have entailed an element of totality involving both mass participation and mass destruction. The ravages of the First World War led nations to renounce war entirely with the Kellogg-Briand Pact,[46] but they also highlighted the negative effects of losing. While total war may not have total winners, it can have total losers. Thus, a curious irony ensues. The current law of armed conflict has been framed by parties who have rejected warfare in general. Yet, when and if they do ever go to war, their interest in winning will be compelling, to say the least.

The potential severity of defeat in modern conflicts aggravates the compliance problem. Indeed the advent of total warfare has spelled for several theorists the death of *jus in bello*.[47] To some, the psychopathic character of von Clausewitz's statement, "[t]o introduce the principle of modernization into the theory of war itself would always lead to logical absurdity," is elevated to normality in total war scenarios.[48] When loss could mean national extinction, it is reasonable to assume that elites will reconsider past agreements or decisions which are strategically limiting. In an absolute conflict, a specific norm will rarely be attributed as much importance as winning.[49]

While key components of *jus in bello* seem likely to be an early casualty on the battlefield, effective multilateral dissemination could serve to preserve some lasting import for rules of warfare. Elites might understandably choose to reject customary rules during a given conflict, but their ability to do so is severely reduced once the rules have been effectively promulgated as we described earlier. By the time a conflict escalates to such a level that elites might consider abandoning norms, manuals will have been used for planning and training, and the norms they establish will have been internalized by the military and civilian components of the community.[50] The costs of attempting to change those norms will have been raised.

All putative future legal constraints must take account of reciprocity. If a given adversary does not demonstrate reciprocal compliance with rules of warfare, pressure to abandon norms is likely to come from the combatants themselves. Similarly, the perceived content of the law of armed conflict could quickly change if one were losing a large-scale war with an adversary which had not adopted reciprocal normative constraints. Hence the effect of military manuals may depend not only on the nature of the conflict but the identity and behavior of the adversary.

In these future constructs, the target of dissemination shifts "upward" to a few relatively senior leaders. In such an environment, the utility of manuals both in effectuating and in making law may be greatly diminished. Accepted norms will not incorporate the stability of wide-spread dissemination, and secondary constraints will only be effective as they operate on elites. The effect of domestic systems of enforcement and inherent constraints will be low and, in a total war setting, the motivation to violate norms may be high. Assurance of reciprocity, then, must come not through promises of non-use but through more measurable agreements, e.g. verifiable disarmament,[51] or imaginative new schemes such as programming norms into weapon targeting systems.

The design of manuals for the total war construct is not the end of inquiry; the terminology, "armed conflict," instead of "war" or "warfare," suggests that a certain number of future conflicts are expected to be limited in scope and conducted in the context of routine peaceful activities or as protracted,

low intensity belligerencies.[52] Extended troop-intensive counter-insurgencies must also be considered as well as limited reprisals and antiterrorist activities.

The resurgence of circumscribed reprisal/self-defense initiatives seen in recent years[53] provide limited opportunities for actual field reference to manuals due to the above mentioned nature of command and control. Similarly, specialized antiterrorist or rescue operations are likely to be specifically and thoroughly planned so as to obviate the need for referencing a manual of international norms. Therefore, it is all the more urgent to incorporate a manual of appropriate norms in the formative and training processes. Manuals will only have value in these conflicts if the norms they contain have been internalized before the fact.

Guerrilla warfare and other forms of combat which may be extended in time but limited in scope, could prove to be most suited for effective use of military manuals.[54] In guerilla warfare, decision-making, by necessity, must be delegated; the proliferation of inevitable personal contacts gives rise to the kinds of situations most appropriately addressed in manuals and other disseminations.[55] Unfortunately, this type of combat situation is not adequately addressed by current conventions and treaties.[56]

In all of the constructs outlined above, the effectiveness of military manuals depends on two conditions: (i) dissemination and internalization of the norms *prior* to the fact, and (ii) reciprocity. The current focus should be on thoroughly incorporating international norms into planning and training exercises so that they will not be quickly jettisoned in combat. Moreover, we must "remember the future" and consider new schemes for effectively ensuring reciprocal observance in the evolving social organization of armed conflict.

Conclusion

Manuals are not an end in themselves. They are an instrument for achieving an end: the prescription and application of a law of armed conflict which tempers the harshness and cruelty of combat and confines human and material destruction to targets of military necessity and utility.

Conflict is a social organization which requires a great deal of subjective and objective symmetry between the antagonists if the conflict is to be conducted in normatively authorized ways. The lower the level of subjective and objective symmetry, the more difficult it will be to establish and make effective norms regarding how armed conflict is to be conducted. Hence one will find in the socio-political situation the ultimate limits for lawmaking in this regard.

The point is of moment in any consideration of the possibilities of the contemporary law of war. It is ironic that perspectives of how civilized peoples are supposed to fight are relatively homogenous within alliances and, formal documents notwithstanding, heterogeneous as between manifest and

latent antagonists. The differences loom increasingly large in confrontations between the West and Fundamentalist Islamic groups, for the latter draw upon a history that has authorized and justified terror as a legitimate weapon for an expanded notion of self-defense. Information available about the training academies for terrorists in Iran suggest a functional manual, diverging widely from that common in western military organizations.[57] Part of the contemporary war against terrorism is, in fact, a war of manuals, in which coercion is being used to make adversaries fight "civilized." The outcome of this war is far from certain. If it is lost, future manuals will look quite different from the one reviewed in this volume. The implications for national values and domestic political processes could be grave.

Notes

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1. *Lex simulata* has been defined as a legislative exercise that produces an apparently operable statutory instrument which neither prescribers nor target ever intend to be applied. W. Michael Reisman, *Folded Lies* (New York: Free Press, 1979), pp. 31-34.

2. Consider, for example, the internal workings of social organizations or "clubs," or the adoption of procedures by the Constitutional Convention in 1787. For a discussion of law making in micro-communities *see* W. Michael Reisman, "Law From the Policy Perspective" in Myres S. McDougal and W. Michael Reisman, eds., *International Law Essays: A Supplement to International Law in Contemporary Perspective* (Mineola, NY: Foundation Press, 1981), pp. 7-9.

3. Emile Durkheim, *The Division of Labor in Society* (G. Simpson trans.) (New York: Macmillan, 1933).

4. James P. Levine, "Methodological Concerns in Studying Supreme Court Efficiency," *Law and Society Review*, v. 4, p. 583, 584 (1970).

5. See, Myres S. McDougal, et al., *The Interpretation of Agreements and World Public Order* (New Haven, CT: Yale University Press, 1967), pp. xii-xvi. *See Also* Harold D. Lasswell, *Politics: Who Gets What, When, How* (New York: Peter Smith, 1950) (earlier formulation); W. Michael Reisman, "International Lawmaking: A Process of Communication," *American Society of International Law: Proceedings*, 1981, pp. 105-13 (Harold D. Lasswell Memorial Lecture discussing Lasswell's approach to understanding lawmaking's communicative nature).

6. This is especially true in those fields in which assessments of reciprocity must be made before the fact. In other fields reciprocity can be measured because adherence to a norm can be observed. In the area of armed conflict, however, true, or at least, operational intentions—the intentions that "count"—cannot be easily observed until after the conflict has begun. Effective dissemination, coupled with the metacommunication of a military law enforcement system (discussed below), demonstrates intention and practice. Both serve as earnest for future agreements.

7. Dissemination is required by numerous provisions of treaties addressing the law of armed conflict for this very reason. *See e.g.* article 47 of the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31); article 48 of the Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949 (6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85); article 127 of the Geneva Convention (III) Relative to Treatment of Prisoners of War, 12 August 1949 (6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135); article 144 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287); article 25 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954 (249 U.N.T.S. 240; U.S. not a party); and article 19 of the Protocol (II) Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (16 I.L.M. 1448; U.S. not a party).

Protocol (I) Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (16 I.L.M. 1391; U.S. not a party) serves as a good example of the emphasis placed on dissemination; article 6 (training of qualified personnel); article 82 (legal advisors

in armed forces); article 84 (rules of application); and article 87 (duty of commanders). The principal provision regarding dissemination, article 83, states:

> 1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.
>
> 2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.
> *Id.*, p. 1427.

8. Some scholars from vanquished countries have opined that norms argued at the Nuremburg and Tokyo war crimes trials are representative of this detrimental kind of *ex post facto* prescription. *See, e.g.*, Wilbourn E. Benton and George Grimm, eds., *Nuremburg, German Views of the War Trials* (Dallas, TX: Southern Methodist University Press, 1955); William J. Bosch, *Judgment on Nuremburg* (Chapel Hill, NC: University of North Carolina Press, 1970); Eugene Davidson, *The Nuremburg Fallacy* (New York: Macmillan, 1973); Chihiro Hosoya, et al., eds., *The Tokyo War Crimes Trial* (New York: Kodansha International, 1986); Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton, NJ: Princeton University Press, 1971). *Cf.* Ann Tusa and John Tusa, *The Nuremburg Trial* (New York: Atheneum, 1984).

9. Even Nuremburg prosecutors had at their disposal evidence demonstrating that international norms had indeed been disseminated to German officers. *See, e.g.*, "Introduction of the Hague Convention on Land Warfare in the German Army," *Proceedings of the Investigating Committee of the German Constitutional Assembly and the German Reichstag 1919-1928* (resolution adding the Hague Convention text to the German Field Manual); "German Military Law and Law of War," *Journal of Military Law* (German), January 1944, pp. 389-93 (synopsis of course on military law); and A. Waltzog, *Kriegsgerichtsrat der Luftwaffe* (1942) (German Air Force manual).

10. Consider, for example, Senate reservations and understandings regarding various treaties or the evolution of departmental understandings of "customary law". One example, brought to our attention by Professor Levie, concerns chemical warfare. After signing the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, the Department of the Navy decided that it was in its interest to view the normative content as representative of custom. The Navy's action may indeed have helped the norm to become custom. *See* Howard S. Levie, "Nuclear, Chemical, and Biological Weapons," *infra* chapter XI.

A related example involves the U.S. practice of "restrictively" interpreting the use of straight baselines. *The Commander's Handbook on the Law of Naval Operations*, Naval Warfare Publication 9, 1987, par. 1.3.2 [hereafter cited as *Handbook*]. This shaping of the general norm is a result of the transmission process. *See* article 4 of the Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958 (15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205).

See, generally, Harold D. Lasswell, et al., *Propaganda and Promotional Activities* (Chicago: University of Chicago Press, 1969). For material on the bureaucratic process *see* Peter M. Blau and Marshall W. Meyer, *Bureaucracy in Modern Society*, 2nd ed., (New York: Random House, 1971); Michel Crozier, *The Bureaucratic Phenomenon* (Chicago: University of Chicago Press, 1964); Henry Jacoby, *The Bureaucratization of the World* (E. Kanes trans.) (Berkeley, CA: University of California Press, 1973); Joseph LaPalombara, ed., *Bureaucracy and Political Development*, 2nd ed., (Princeton, NJ: Princeton University Press, 1967); Max Weber, "Bureaucracy," in H. H. Gerth and C. Wright Mills, eds., *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1958). *Cf.* Robert Presthus, *The Organizational Society* (New York: Alfred A. Knopf, 1962). For a specific case study *see* Graham T. Allison, *Essence of Decision: Explaining the Cuban Missile Crisis* (Boston: Little Brown, 1971).

11. Miranda v. Arizona, 384 U.S. 436 (1966) (seminal case regarding custodial interrogation and the exclusionary rule).

12. *See, e.g.*, Adam Carlyle Breckenridge, *Congress Against the Court* (Lincoln, NE: University of Nebraska Press, 1970) (detailed account of Congressional reaction to *Miranda*); Fred P. Graham, *The Self-Inflicted Wound* (New York: Macmillan, 1970), pp. 305-32 (account of reaction to *Miranda*); Yale Kamisar, "How to Use, Abuse—and Fight Back with—Crime Statistics," 25 Okla. L. Rev. 239 (1972). *See also* Michigan v. Tucker, 417 U.S. 433 (1974) (construing *Miranda* not to mean that the procedures themselves are rights); State v. Bliss, 238 A.2d. 848 (Del. 1968) (*Miranda* not applicable to minor crimes and traffic offenses).

13. *E.g.*, Congressional endorsement of executive law regarding the discipline of the armed forces, chains of command, delegated agencies assigned the task of writing various publications.

14. *E.g.*, "Orders" as opposed to "guidelines," posters and their locations, letterheads and other trappings of officialdom.

15. *See Handbook supra* note 10; Department of the Army, FM 27-10, the *Law of Land Warfare* (Washington: Government Printing Office, 1956); Department of the Air Force, AFP 110-31, *International Law—The Conduct of Armed Conflict and Air Operations* (Washington: Government Printing Office, 1976). Lower level dissemination involves a wide variety of less comprehensive training and instructional publications.

16. Consider the complex situations afflicting many decisions in the Vietnam conflict. The common use of hamlets to shield Viet Cong combatants and the effective use of snipers, for example, contributed to tensions with respect to prescriptions against attacking undefended villages and norms regarding proportionality of response. *See* Guenter Lewy, *America in Vietnam* (New York: Oxford University Press, 1978), pp. 230-32.

17. It is important to realize, however, that the very existence of the manual, if adequately internalized, is of significance regardless of any adumbrations of reciprocal dissemination or compliance. Treatment of prisoners of war, for example, is an area in which reciprocity can rarely be observed until after the fact. Additionally, the targets of dissemination will seldom be the same actors who make comparisons of other operational codes. Thus even without reciprocity, manuals may serve, at least temporarily, to restrain one force in a manner which will not be reciprocated by the adversary. In a way whose significance may vary with context, effective dissemination of unreciprocated norms could clearly disadvantage the complying party.

18. Even historically related military organizations may construe international norms differently in their manuals. The British equivalent to the U.S. Army's field manual on the law of war states that defectors should not be treated as prisoners of war. (The British War Office, *The Law of War on Land being Part III of the Manual of Military Law* (London: Her Majesty's Stationery Office, 1958), par. 126). U.S. policy, derived from the same treaty provisions, is the opposite (Howard S. Levie, *International Law Studies v. 59: Prisoners of War in International Armed Conflict* (Newport, RI: Naval War College Press, 1979), p. 80). For differences between the British manual and the U.S. counterpart, *see* R.R. Baxter, "The Cambridge Conference on the Revision of the Law of War", *Am. Journal of Int'l Law*, v. 47, p. 702 (1953).

19. Dissemination via military manuals is an encouraged means. *See*, International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff, 1987), p. 963 [hereinafter cited as *Commentary*].

20. The International Committee of the Red Cross [hereinafter ICRC] regularly attempts to define "credible fashion" in its publications and training programs. *See, e.g.*, ICRC, *Dissemination of International Humanitarian Law and of the Principles and Ideals of the Red Cross*, XXIVth ICRC Conference (1981). The ICRC publishes a monthly periodical on the dissemination of international humanitarian law entitled *Dissemination*. It also organizes courses for teaching humanitarian law throughout the world. *See* "Dissemination Among the Armed Forces", *Dissemination*, April 1985, p. 2.

ICRC conferences which have stressed the necessity of dissemination include: Centenary Congress, 1963, Resolution IV; XXth International Conference of the Red Cross, 1965, Resolution XXI; XXIst International Conference of the Red Cross, 1969, Resolution IX; XXIInd International Conference of the Red Cross, 1973, Resolution XII; XXIIIrd International Conference of the Red Cross, 1977, Resolution VII; XXIVth International Conference of the Red Cross, 1981, Resolution X.

A notable exception to the groups successfully targeted by the ICRC dissemination program has been the armed forces of Warsaw Pact countries. *See* Independent Commission on International Humanitarian Issues, *Modern Wars: The Humanitarian Challenge* (Atlantic Highlands, NJ: Zed Books, 1986), p. 174.

21. For an example of the potential long-term effects of written manuals on surveillance, *see* Military and Paramilitary Activities In and Against Nicaragua (Nicar, v. U.S.), 1986 I.C.J. 14, pars. 113 and 122 (merits 27 June 1986) (Court finding that CIA supplied FDN with a 1983 manual of psychological guerrilla warfare which advocated certain violations of international law).

Written statements can also focus critical attention on a nation if legal norms espoused in writing are later rejected. A state may lose the benefit of not signing a specific treaty or convention if it later promulgates regulations which comport with the norms therein.

22. The ICRC regularly participates in programs to promote the dissemination of international humanitarian law throughout the world, often in collaboration with the Henry Dunant Institute or the International Institute of Humanitarian Law. *See supra* note 20.

23. The point bears emphasis. Genuine humanitarian concerns might cause a soldier to disobey a national legal requirement, but international law will probably be ineffective in doing the same. Indoctrination and training of military personnel is such that few would ever consider elevating international law over national law, especially during war. Superordination must therefore take place within the national system; national law, with its more immediate and effective sanctioning, must be made to reflect accepted international norms.

24. Military discipline can be said to serve the dual function of ensuring that orders are carried out expeditiously *and* in accordance with the law. *See* AFP 110-31, *supra* note 15, pp. 1-5, pars. 1-3. A graphic example of this latter function with respect to the law of armed conflict is found in article 44 of the "Lieber Code" of 1863:

> All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.
>
> A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

Secretary of War, General Orders No. 100, "Instructions for the Government of Armies of the United States in the Field", 24 April 1863, *reprinted in* Richard Shelly Hartigan, *Lieber's Code and the Law of War* (Chicago: Precedent Publishing, 1983), p. 54.

See also Calley v. Callaway, 519 F.2d. 184 (1975), *cert. den.* 425 U.S. 911. Lieutenant Calley's court martial demonstrates one answer to the need for an enforcement scheme in the post-Nuremburg world of limited conflicts. Several provisions in the Uniform Code of Military Justice parallel or may implicate international humanitarian law. *See, e.g.*, art. 90 (Assaulting or willfully disobeying superior commissioned officer); art. 92 (Failure to obey order or regulation); art. 93 (Cruelty and maltreatment); art. 97 (Unlawful detention); art. 99 (Misbehavior before the enemy); art. 102 (Forcing a safeguard); art. 103 (Captured or abandoned property); art. 104 (Aiding the enemy); art. 105 (Misconduct as prisoner); art. 106 (Spies); art. 106a (Espionage); art. 116 (Riot or breach of peace); art. 118 (Murder); art. 119 (Manslaughter); art. 120 (Rape and carnal knowledge); art. 121 (Larceny and wrongful appropriation); art. 122 (Robbery); art. 124 (Maiming); art. 125 (Sodomy); art. 126 (Arson); art. 127 (Extortion); art. 128 (Assault); art. 129 (Burglary); art. 130 (Housebreaking); art. 134 (General article). Uniform Code of Military Justice, 10 U.S.C. sections 801-940 (1982 and Supp. IV 1986). If other states do not apply similar domestic enforcement schemes, dissemination of content is likely to be ineffectual.

25. Policies must be determined well before conflict but may be substantially based on expectations regarding a potential adversary's likely conduct during a future encounter. Since the midst of combat is too late for identifying pathologies or specific norms which are destined for nullification, we can only look to "actions" which incorporate or manifestly demonstrate intent to obey (*e.g.* disarmament and/or dissemination). The centrality of expectations of reciprocity is dramatic in U.S. policy regarding chemical weapons. *See Handbook*, *supra* note 10, par. 10.3.2.1. The failure to reject second use of such weapons illustrates the deleterious effect on the norm caused by expected deviations.

26. It is worth noting that the Soviet Union claims to comply with Geneva Convention obligations to disseminate norms. *See* I. Blishchenko and V. Grin, *International Humanitarian Law and the Red Cross* (Moscow: Executive Committee of the Order of Lenin Alliance of Red Cross and Red Crescent Societies of the USSR, 1983), p. 36. (the authors state, "[t]he members of the Soviet Armed Forces study the provisions of international humanitarian law regularly and systematically. . . . All members of the Armed Forces are familiarized with the texts of the Geneva Conventions. . . . The officer corps thoroughly study the provisions of international humanitarian law." *Id.*, p. 39. For an extensive compilation of various state claims regarding dissemination *see* ICRC, *Dissemination of Knowledge and Teaching of International Humanitarian Law and of the Principles and Ideals of the Red Cross, Answers from Governments and National Societies to the I.C.R.C. Questionnaire*, XXIVth ICRC Conference, (1981) [hereinafter cited as Answers].

27. It is important to differentiate those norms which are based primarily on reciprocity and those which are not. Where absolutist concepts animate a construction of the rules, they will justify adherence regardless of reciprocity. Some norms will be upheld for good order and discipline or to prevent grossly uncivilized behavior. *See*, Thomas Nagel, "War and Massacre" in Charles R. Beitz, et al., eds., *International Ethics* (Princeton, NJ: Princeton University Press, 1985), pp. 53-74. Internalizing norms within the rank-and-file can thus have an effect even outside of reciprocal agreement.

28. Even if a norm has been adopted, lack of a written manual greatly reduces the costs involved in later disavowing it. Expectations therefore cannot be drawn.

29. *Trials of War Criminals Before the Nuremburg Military Tribunal* (Washington: Government Printing Office, 1950), v. XI, p. 1237. The effect of this dictum is unfortunately blurred since its focus was the incompetence of regulations in authoritatively defining international law. The statement defeats a defense claim that U.S. Army Regulations encouraged obedience even to unlawful orders.

30. *See* Robert W. Tucker, *Naval War College International Law Studies, 1955: The Law of War and Neutrality at Sea* (Washington: Government Printing Office, 1957), p. 26.

31. The Scotia, 81 U.S. (14 Wall.) 170 (1871).

32. Cooperative intergovernmental efforts in the development of manuals may assist in the process of international norm formulation. *See* Baxter *supra* note 18 (discussing collaborative efforts between the United States and Great Britain in updating army field manuals).

33. There seems to be little evidence that systematic comparisons are being made in the United States. The ICRC has been actively monitoring disseminations however. *See* Answers *supra* note 26; and International Institute of Humanitarian Law in San Remo, *Annexe documentaire* (1972) (containing extracts from the Federal Republic of Germany Military Instruction Manual, the U.S. Field Manual, the French Regulations on general discipline in the armies, the British Manual of Military Law, the Italian "Law of War" and the Swiss Manual on Laws and Customs of War).

34. Kervyn de Lettenhove, ed., *Oeuvres de Froissart* (Brussels: 1869), tome VIII, p. 43, *reprinted in* M.H. Keen, *The Laws of War in the Late Middle Ages* (London: Routledge and Kegan Paul, 1965), p. 1 (treatment of early codes and the principles of chivalry).

35. Kuhn, "Responsibility for Military Conduct and Respect for International Law," *Dissemination*, August 1987, p. 1. *See also*, William E.S. Flory, *Prisoners of War* (Washington: American Council on Public Affairs, 1942), pp. 10-15 (discussing treatment of prisoners in ancient and medieval times).

36. *See* Flory *supra* note 35. *See also* Keen *supra* note 34.

37. Intergovernmental communication of manuals has been specifically encouraged by the ICRC *See* Commentary, *supra* note 19; International Institute of Humanitarian Law supra note 33.

38. "Statement of Senator Goldwater," *Congressional Record*, 6 June 1976, p. S17551.

39. The ICRC has historically been extremely active in promoting dissemination of the law of armed conflict. Indeed, the ICRC proposed a third paragraph to article 83 of the 1977 Protocol (I) to the 1949 Geneva Conventions which read: "The High Contracting Parties shall report to the depositary of the Conventions and to the International Committee of the Red Cross at intervals of four years on the measures they have taken in accordance with their obligations under this article." Commentary, *supra* note 19, p. 961, n. 15. The proposal was defeated in plenary. *Id.*, p. 963. The ICRC has begun soliciting dissemination reports despite the failure to obtain a provision mandating them. *See* Answers *supra* note 26.

40. Bickel was quoting Namier in an address originally delivered in the 1969 Oliver Wendell Holmes Lecture series at Harvard Law School, *reprinted in* Alexander Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper and Row, 1970), p. 13.

41. Legal limits on belligerent conduct are often described as being delineated by three principles: 1) military necessity (justifying the amount and kind of force necessary to achieve submission of the enemy with minimal expenditure of human and material resources); 2) humanity (prohibiting all force not necessary for military purposes); 3) chivalry (prohibiting resort to dishonorable means). *See* Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War* (Oxford: Clarendon Press, 1982), p. 5; Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order* (New Haven, CT: Yale University Press, 1961), pp. 521-30; Denise Bindschedler-Robert, "A Reconsideration of the Law of Armed Conflicts," in Conference on Contemporary Problems of the Law of Armed Conflicts, *Report*, (New York: Carnegie Endowment for International Peace, 1971), pp. 14-16; Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley, CA: University of California Press, 1959), pp. 313-16.

42. Consider, for example, recent attacks on Iranian oil platforms. Communication resources enabled the entire action to be directed from the White House. Julie Johnson, "Before the Order for Retaliation, a Major Effort to Woo Congress", *New York Times*, 19 April 1988, p. A1:4.

43. The same technological advances have also multiplied the number of situations a commander might confront. The utility curve for any given instruction or manual must consider the downside of such voluminous treatment.

44. *See* Paul Bracken, *The Command and Control of Nuclear Forces* (New Haven, CT: Yale University Press, 1983), pp. 219-20.

45. *See* Joseph Metcalf, III, "Decision Making and the Grenada Rescue Operation," in James G. March and Roger Weissinger-Baylon, *Ambiguity and Command* (Marshfield, MA: Pitman Publishing, 1986), pp. 277-97 (demonstrating the continued need for relevant decision-making at various levels of the chain of command). *See also* Col. William G. Eckhardt, "Command Criminal Responsibility: A Plea for a Workable Standard," 97 Mil. L. Rev. 1 (1982) (examining the criminal responsibility of superiors for subordinate misconduct and the need for effective legal standards of professional military conduct).

46. Renunciation of War as an Instrument of National Policy, 27 August 1928, 46 Stat. 2343, U.S.T.S. 796, 94 L.N.T.S. 57.

47. *See* Michael Howard, "Temperamenta Belli: Can War Be Controlled?" in Michael Howard, ed., *Restraints on War* (Oxford: Oxford University Press, 1979) (arguing that the historical success of rules depended on the limited nature of relevant conflicts); Elaine Scarry, *The Body in Pain* (New York: Oxford University Press, 1985) (criticizing total war); Flory *supra* note 35, p. 9 (many rules become inapplicable in total war).

48. Carl Von Clausewitz, *On War* (M. Howard and P. Paret trans.) (Princeton, NJ: Princeton University Press, 1976), p. 76. *But cf.* Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977).

It may be appropriate to note that rational explanations have been suggested for the validity of many of the laws of warfare. Absolutist concepts and natural law arguments would favor adhering to international norms of warfare without regard to adversary compliance. *See* Nagel *supra* note 27. In some cases utilitarian arguments justify complying with certain rules even from a unilateral perspective. *See* R.B. Brandt, "Utilitarianism and the Rules of War," *Philosophy and Public Affairs*, Winter 1972, p. 145. *Cf.* N.W. Royse, *Aerial Bombardment and the International Regulation of Warfare* (New York: Harold Vinal, 1928) (predicting that only ultimate utility will be able to constrain aerial bombardment). Attention here is directed to the "problem rules" - rules which disallow a tactically prudent or strategically advantageous course of action. In extreme situations it is these rules which are in danger of being violated, and it is these rules which publication in manuals might help to safeguard.

49. Consider the vain attempts to control air power and submarine warfare prior to World War II, *e.g.*, the 1923 Hague Rules of Aerial Warfare (Department of State, *Papers Relating to the Foreign Relations of the United States, 1923* (Washington: Government Printing Office, 1938), v. I, p. 73; *American Journal of International Law (Supp.)*, v. 17, p. 245 (1923); *id.*, v. 32, p. 12 (1938); the Proces-Verbal of 6 November 1936 Relating to the Rules of Submarine Warfare Set Forth in Part IV of the London Naval Treaty of 1930 (3 Bevans 298, 173 L.N.T.S. 353).

50. The import of this ramification obviously depends on the specific situation. If violating a norm requires little additional training or is not particularly offensive to subordinate parties, the manual limitation will be minimal.

51. Consider, for example, a chemical weapon system capable of being deployed via long-range cruise missiles. An agreement to prohibit the use of such weapons is meaningless, even if effectively disseminated, as long as the weapons exist in operational form and military organizations are prepared to employ them. An elite decision to ignore the agreement would only incur international political costs, as opposed to the more immediate concerns of reprogramming an entire military community.

52. *See*, James D. Atkinson and Donovan P. Yeuell, "Must We Have World War III?", *U.S. Naval Institute Proceedings*, July 1956, p. 711; Morton H. Halperin, *Limited War in the Nuclear Age* (New York: John Wiley and Sons, 1963).

53. *E.g.*, U.S. punitive raids against Libya, the Grenada invasion, the Israeli preemptive attack on an Iraqi nuclear facility, Chinese attacks on Vietnam, recent U.S. attacks on Iranian oil platforms.

54. For a didactic illustration of the effect of the Geneva Conventions on a limited conflict, *see* ICRC, *Protection of Victims of Armed Conflict, Falkland-Malvinas Islands* (1984) (discussion of humanitarian law as it applies to the conflict). *See also* Sally V. Mallison and W. Thomas Mallison, *Armed Conflict in Lebanon, 1982: Humanitarian Law in a Real World Setting* (Washington: American Educational Trust, 1983) (discussion of humanitarian law applied to the invasion of Lebanon).

55. *See* Walter Laqueur, *Guerrilla* (London: Weidenfeld and Nicolson, 1976) (guerrilla warfare generally); Walzer, *supra* note 48, pp. 176-96 (humanitarian law applied to guerrilla warfare).

56. *See* Keith Suter, *An International Law of Guerrilla Warfare* (New York: St. Martin's Press, 1984) (discussing lack of progress in drafting rules for guerrilla warfare); Lewy, *supra* note 16, pp. 223-70 (provisions of Geneva conventions found inapplicable in many situations due to problematic tactics used in Vietnam conflict). It is in this type of combat that the U.S. refusal to accept Protocol I to the 1949 Geneva Conventions may have the most impact, since the Protocol changes requirements for prisoner-of-war status.

57. *See* Amir Taheri, *The Holy Terror: Inside the World of Islamic Terrorism* (Bethesda, MD: Adler and Adler, 1987). For historical background *see* Bernard Lewis, *The Assassins: A Radical Sect in Islam* (New York: Basic Books, 1968). For contemporary application *see* Arsanjani, "The Impact of Islamic Fundamentalism on International Politics and Law", *American Society of International Law: Proceedings*, 1988, p. 82 (forthcoming).