

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 18, 2015
CORRESPONDENTS' REPORTS

UNITED STATES¹

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Military Manual – Law of War

- Office of General Counsel, *Department of Defense Law of War Manual* (2015)
<<http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf>>

The single most significant development for the years 2014 and 2015 was the long-awaited publication of a Department of Defense (DoD) manual on international humanitarian law applicable to all US military services. In development for over thirty years, the manual is the work product of civilian and uniformed lawyers representing the US Army, Navy, Air Force and Marine Corps, as well as the DoD Office of General Counsel.

The manual's declared purpose is to provide a 'resource for DoD personnel – including commanders, legal practitioners, and other military and civilian personnel – on the law of war.'² As a practical matter, however, the manual is likely to be of little use to field commanders and other non-lawyers. Over 1200 pages in length and heavily footnoted to primary sources, the manual resembles an academic legal treatise more than a military manual. It will undoubtedly be a valuable research tool for military lawyers and other legal professionals.

The manual generally reflects long-standing legal positions of the United States, eg, that use of riot control agents in war does not violate the 1925 *Geneva Gas Protocol*,³ that mercenaries are entitled to prisoner of war status if they meet the criteria of the Third Geneva Convention,⁴ and that conspiracy is a legitimate basis of criminal liability for violations of the law of war.⁵ However, the manual cautions users that it does not necessarily reflect the official position of the United States government as a whole, or of agencies of the government outside the Defense Department.

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² Office of General Counsel, *Department of Defense Law of War Manual* (2015) iii ('DoD Manual').

³ Ibid, 389; *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare*, opened for signature 17 June 1925, 94 LNTS 65 (entered into force 8 February 1928).

⁴ Office of General Counsel, above n 1, 170; *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).

⁵ Ibid 1125-26.

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Official Policy—Anti-Personnel Land Mines

- White House, *FACT SHEET: Changes to U.S. Anti-Personnel Landmine Policy* (Press Release, 23 September 2014) <<http://www.whitehouse.gov/the-press-office/2014/09/23/fact-sheet-changes-us-anti-personnel-landmine-policy>>
- White House, *Statement by NSC Spokesperson Caitlin Hayden on Anti-Personnel Landmine Policy* (Press Release, 23 September 2014) <<http://www.whitehouse.gov/the-press-office/2014/09/23/statement-nsc-spokesperson-caitlin-hayden-anti-personnel-landmine-policy>>

The United States is not a party to the Ottawa Convention on anti-personnel land mines.⁶ Nevertheless, on 23 September 2014, the U.S. government announced that it would, as a matter of policy, act as if it were a party, except in relation to the Korean peninsula. Specifically, the United States stated that it would not use anti-personnel land mines outside the Korean peninsula, assist, encourage, or induce anyone outside the Korean peninsula to engage in activity prohibited by the Ottawa Convention, and would destroy anti-personnel land mines stockpiles not required for the defense of the Republic of Korea. The government also reaffirmed its earlier decision not to produce or otherwise acquire any anti-personnel munitions that are not compliant with the Ottawa Convention.

While the announcement noted that over 160 countries were party to the Ottawa Convention, it cannot be considered as recognition by the United States that the Convention's prohibitions had matured into customary international law. This is evident both in the exception carved out for South Korea as well as repeated statements that these changes had been adopted as matters of 'policy' rather than legal obligation. The announcement also expressed the hope that the United States would eventually be able to become a party to the Convention.

Cases – War Crimes by US nationals – US Civilian Courts – United States v Slatten et al.

- Department of Justice, *Four Former Blackwater Employees Found Guilty of Charges in Fatal Nisur Square Shooting in Iraq* (Press release, 22 October 2014) <<https://www.justice.gov/opa/pr/four-former-blackwater-employees-found-guilty-charges-fatal-nisur-square-shooting-iraq>>
- Department of Justice, *Four Former Blackwater Employees Sentenced to Decades in Prison for Fatal 2007 Shootings in Iraq* (Press release, 13 April 2015) <<https://www.justice.gov/opa/pr/four-former-blackwater-employees-sentenced-decades-prison-fatal-2007-shootings-iraq>>

On 22 October 2014, one former security guard employed by Blackwater USA was found guilty of murder and three others were found guilty of voluntary manslaughter by a jury for the US District Court for the District of Columbia. The trial arose from an incident in Baghdad, Iraq, on 16 September 2007, in which the accused fired into a crowd of unarmed Iraqi civilians, killing 14 and wounding at least 18 others. At the time, the Blackwater employees were providing security for a convoy of US government personnel. On 13 April, 2015, the defendant convicted of murder was sentenced to life imprisonment and those convicted of manslaughter were given 30 year prison sentences.

⁶ *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction*, opened for signature 18 September 1997, 2056 UNTS 211 (entered into force 1 March 1999) ('Ottawa Convention').

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United States Federal District Courts have jurisdiction over major crimes committed outside U.S. territory by employees of DoD contractors or contractors of 'any other Federal agency, ... to the extent such employment relates to supporting the mission of the Department of Defense overseas.'⁷

Military Investigation –Air Attack on Hospital in Afghanistan

- US Forces-Afghanistan, *Statement on the Kunduz MSF Hospital Investigation*, (Press release, 25 November 2015 <<http://www.rs.nato.int/article/press-releases/statement-on-the-kunduz-msf-hospital-investigation.html>>

In the early morning of 3 October 2015, a US Air Force AC-130 mistakenly attacked a Doctors Without Borders trauma center in Kunduz City, Afghanistan, resulting in the death of 30 staff, patients and assistants, and the injury of 37 others.⁸ The aircrew believed they were attacking a building held by Taliban insurgents, located several hundred meters away from the trauma center.

To ensure an impartial investigation, General John F Campbell, the commander of US Forces-Afghanistan requested that officers from outside his command be appointed to conduct the investigation. Higher headquarters concurred, and an Army major general, assisted by two brigadier generals, one from the Army and another from the Air Force, were appointed. On 25 November, General Campbell issued a statement summarizing the results of the investigation, which concluded the attack was 'the direct result of avoidable human error, compounded by process and equipment failures.' During the flight, much of the AC-130's communications equipment failed and the navigational and fire control system malfunctioned. Despite the darkness, the crew believed they had visually located the target, with tragic results.

The report also determined that the 'personnel who requested the strike, and those who executed it from the air, did not undertake appropriate measures to verify that the facility was a legitimate military target.' General Campbell announced that 'that those individuals most closely associated with the incident have been suspended from their duties, pending consideration and disposition of administrative and disciplinary matters.' 'We will study what went wrong,' the General concluded, 'and take the right steps to prevent it in the future.'

Official Policy—Hostage Ransom Payment to Designated Terrorist Organizations

- Department of Justice, *Department of Justice Statement on US Citizens Taken Hostage Abroad* (Press release, No 15-790, 24 June 2015) <www.justice.gov/opa/pr/department-justice-statement-us-citizens-taken-hostage-abroad>

Under US law, knowingly providing material support, including services or financial support, to a foreign terrorist organization is a felony punishable by up to 20 years' imprisonment.⁹ The families of some US citizens being held hostage such organizations have expressed concern that their efforts to obtain release of their relatives could lead to prosecutions under this statute. On 24 June 2015, the Department issued a statement of policy on this issue. While not completely foreclosing prosecution, the policy suggested it would be very unlikely, stating that the government 'does not intend to add to families' pain in such

⁷ *Crimes and Criminal Procedure*, 18 USC §§ 3261, 3267.

⁸ The AC-130 is a modified cargo plane armed with cannon and automatic weapons, used for close air support of ground forces.

⁹ *Crimes and Criminal Procedure*, 18 USC § 2339B.

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cases by suggesting that they could face criminal prosecution.' It also noted that the Justice Department 'has never used the material support statute to prosecute a hostage's family or friends for paying a ransom for the safe return of their loved one.'

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