17

Armed Groups and the DoD Manual: Shining a Light on Overlooked Issues

Katharine Fortin

1 INTRODUCTION

The purpose of this chapter is to examine how the Department of Defense (DoD) Law of War Manual (the Manual) addresses certain issues specific to armed groups operating in non-international armed conflicts (NIACs). The decision to include a chapter focusing specifically on armed groups stems from an apprehension that nowadays the majority of armed conflicts are between States and armed groups, rather than between States. This changed conflict landscape creates an imperative to give more attention to how armed groups fit within the legal framework applying in times of NIAC.[1] Indeed, in a system where it is largely accepted that States are the primary makers of the law applying in times of NIAC, it might seem all too tempting to ignore armed groups in the development of policy and practice regarding military operations to be carried out by States. However, it is noteworthy that although the purpose of the Manual is to address the law of war that is applicable to the United States,[2] the principle of equality suggests that the Manual is also implicitly setting out the law that is applicable to non-State armed groups.[3] This observation explains why it is imperative to examine DoD's assessment of the law of war in respect to NIAC not only in respect of the rules it sets out for State armed forces, but to also examine how the Manual sets out rules relating to armed groups and their members.

[1] Notable recent studies focusing on the legal framework applying in NIAC and the obligations of non-State armed groups include S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012); K. Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press, 2017); D. Murray, *Human Rights Obligations of Non-State Armed Groups* (Oxford and Portland OR: Bloomsbury, 2016).

[2] See DoD Law of War Manual, ¶ 1.1.2. [3] See *ibid., inter alia* ¶ 17.2.4.

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

In assessing how the Manual addresses issues relevant to armed groups, this chapter examines only a select number of issues. In order to avoid overlap with other chapters, it does not focus in detail on how the Manual handles the threshold of NIAC or the classification of armed conflicts. It also does not examine how the Manual addresses detention by armed groups or the detention of armed group members, as this issue is addressed in another chapter. Instead, this chapter examines four issues which have not been addressed elsewhere in this volume, which are specifically relevant to armed groups and/or their members and which have hitherto slipped under the radar in existing analysis of the Manual. Section 2 of the chapter examines how the Manual understands armed groups to be addressees of international humanitarian law. In other words, it analyses how the Manual understands armed groups to be bound by different sources of law (e.g., treaty law, custom), and considers how the Manual explains these sources to be binding upon them. Connectedly, section 3 examines how the Manual addresses the principles of international humanitarian law, looking in particular at the Manual's reliance on the concept of honor in NIAC. Section 4 assesses the approach that the Manual takes to the targetability of members of armed groups. Section 5 examines the assertion that members of insurgent groups can be compelled to fight on behalf of a State.

2 HOW ARE ARMED GROUPS BOUND BY THE LAWS OF WAR?

Although it is generally accepted that armed groups are bound by the law of war, the question of *how* armed groups are bound has puzzled and divided academics ever since Common Article 3 was drafted.[4] The legal question is as follows: How can States bind non-State actors to international norms without their consent? As NIACs have become the more dominant paradigm in recent decades, increased academic attention has been given to this question.[5] The existence of this debate makes it interesting to examine how the

[4] F. Siordet, "Les Conventions de Genève et la guerre civile" (1950) 81 *Bulletin International des Sociétés de la Croix-Rouge* 104–22, 105; Y. Dinstein, "The International Law of Civil Wars and Human Rights" (1976) 6 *Israel Yearbook on Human Rights* 62–80, 68; R. Baxter, "*Jus in Bello Interno*: The Present and Future Law," in J. Moore (ed.), *Law and Civil War in the Modern World* (Baltimore: John Hopkins, 1974), 527; A. Cassesse, "The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts" (1981) 30 *International and Comparative Law Quarterly*, 416; T. Fleiner-Gerster and M. Meyer, "New Developments in Humanitarian Law: A Challenge to the Concept of Sovereignty" (1985) 34 *International and Comparative Law Quarterly* 267, 272.

[5] L. Moir, *The Law of Non International Armed Conflict* (Cambridge University Press, 2002), 52; J. Kleffner, "The Applicability of International Humanitarian Law to Organised Armed

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

Manual approaches this matter, as it is rare to see a State's view on the issue. Perhaps most importantly, the Manual strongly affirms that armed groups *are* largely bound by international humanitarian law, to the same extent as States in a NIAC.[6] The fact that the United States is not a party to either Additional Protocol I (AP I) or Additional Protocol II (AP II) of the 1949 Geneva Conventions adds a number of qualifications to this position. First, the Manual makes clear that the United States does not accept that national liberation movements are bound by the rules of IAC.[7] Second, on the basis that the United States is not a party to AP II, the Manual recognizes only one threshold of NIAC, namely the threshold of Common Article 3. As such, the Manual does not distinguish between armed groups which control territory and armed groups which do not control any territory.

Strangely, in certain places, the Manual seems to indicate that only some armed groups will be bound by international humanitarian law. For example, Chapter III implicitly indicates that *only* armed groups "with the intention of conducting hostilities" will be bound by the law of war.[8] Similarly, in the section entitled "Binding Force of the Law of War on Insurgents and Other Non-State Armed Groups" in Chapter XVII, the text asserts that customary law of war rules are binding on "those parties to the armed conflict that intend to make war and to claim the rights of a belligerent, even if they are not States."[9] These two passages indicate that the "intention" of the armed group is a determinative factor in assessing whether an armed group is bound by the law of war. The second passage also seems to indicate that only armed groups with belligerent status are bound by customary international law. If this was indeed the US position, it would constitute an unusual stance, as it is widely accepted elsewhere in doctrine that the question of whether an armed group is bound by the law of war, or can enjoy belligerent status, is not dependent upon subjective factors – that is, its own beliefs, intentions, or claims.[10] Yet in other

Groups" (2011) 882 *International Review of the Red Cross* 443–61; S. Sivakumaran, "Binding Armed Opposition Groups" (2006) 5 *International and Comparative Law Quarterly* 369–94; D. Murray, "How International Humanitarian Law Treaties Bind Non-State Armed Groups" (2014) 20(1) *Journal of Conflict and Security Law* 101–31; Fortin (above note 1), Chapter 7.

6 See DoD Law of War Manual, ¶ 3.4.1.2, and ¶ 17.2.4.

7 *Ibid.*, ¶ 3.3.4 (on the basis of strong US objections "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.").

8 *Ibid.*, ¶ 3.4.1.2 compared to ¶ 3.4.2.2 and in particular fnn. 75 and 76.

9 *Ibid.*, ¶ 17.2.4. This text may have originated from the 1956 Manual which states "The customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents."

10 Sivakumaran (above note 1), 10–11 on the belligerency framework. At times, the language that the State authority has used to describe or address the violence has been noted in decisions

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

sections of the Manual, more mainstream positions come to the fore. For example, when setting out the threshold of NIAC in Chapter III, the Manual does not indicate a need to assess whether an armed group has the "intention to conduct hostilities."[11] This constitutes an implicit recognition that armed groups acting in circumstances where this threshold has been met will be bound by the law of war, irrespective of whether they manifest an intention to conduct hostilities.

The Manual sensibly chooses to refrain from getting heavily involved in the legal debate about how armed groups are bound by treaty law.[12] However, the Manual does provide a view that treaty provisions in NIAC bind not only the State, but each party to the conflict. It goes on to explain that as a "practical matter" non-State armed groups would "often be bound by their State's treaty obligations due to the very fact that the leaders of those non-State armed groups would claim to be the State's legitimate representatives."[13] The Manual's adoption of this line of reasoning raises the interesting question whether the US would also accept that armed groups who claim to be a State's legitimate representatives will be bound by human rights treaty law, as well as treaties containing the law of war. For while the Manual does not address this point, it is noteworthy that the growing practice of holding armed groups bound by human rights law is often justified on similar lines, albeit without reference to the armed groups' subjective views.[14] The Manual also notes that special agreements are another important means by which the parties to a non-international armed conflict can bring the law of war rules into force. It highlights that Article 3 of the Geneva Conventions and Article 19(2) of the Hague Cultural Property Convention urges the parties to endeavor to bring about a fuller application of the law pertaining to IACs to NIACs.[15]

3 ARMED GROUPS AND HONOR

When examining the sources that the Manual draws upon in relation to armed groups, another important point to note is the way the Manual asserts and relies on the principle of honor. Chapter II of the Manual identifies three

determining the application of international humanitarian law, but no consideration is given to the views of the armed group on the matter. See *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04–82-T, Trial Judgment, ¶ 800 (ICTY, July 10, 2008; *Prosecutor v. Milutinović et al.*, Case No. IT-05–87-T, Trial Judgment, ¶¶ 238, 245–47 (ICTY, Feb. 26, 2009).

[11] DoD Law of War Manual, ¶ 3.4.2.2. [12] See above note 5 for literature on this debate.

[13] DoD Law of War Manual, ¶ 17.2.4.

[14] For a discussion of these arguments see Fortin (above note 1), 19–20, 155–57, 240–84, and 375–78.

[15] DoD Law of War Manual, ¶ 17.3.

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

interdependent core principles – military necessity, humanity, and honor – underlying the law of war and indicates that these principles "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.[16] The Manual then enters into a detailed discussion of how the three main principles are defined, how they manifest themselves in the legal framework, and how they are applied in practice. In Chapter XVII, addressing NIAC, the Manual asserts that the foundational principles are common to both IAC and NIAC.[17]

Indeed, Chapter XVII asserts that the principles will likely be "most useful" when assessing the rules applicable during NIAC, presumably due to their gap-filling function in an area where treaty law is scarce.[18] For according to the Manual, the principles have two core functions. First, they "provide the foundation for the rules applicable during non-international armed conflict" and, second, they provide a "general guide for conduct," when no specific rule applies.[19] Since the Manual's publication, a number of commentators have remarked that the Manual's emphasis on the principles of the law of war constitutes a "significant recalibration" of the 1956 Manual.[20] While a debate can be had about the advantages and disadvantages of this recalibration in more general sense, the following paragraphs demonstrate how this recalibration poses particular challenges with respect to the principle of honor and armed groups.

It seems fair to assume that the principle of honor in the Manual is the successor to the principle of "chivalry" which was one of the three principles identified by the 1956 DoD Manual on the Law of War, alongside the principles of humanity and military necessity.[21] Chapter II stipulates that the terms "honor" and "chivalry" are largely synonymous; the main difference being that the term "honor" draws from warrior codes beyond those that emerged in Europe during the Middle Ages.[22] The Manual clarifies that honor demands a certain amount of fairness in offense and defense and an acceptance that belligerent rights are not limited, forbidding the resort to means, expedients, or conduct that constitute a "breach of trust" with the enemy.[23] It finds the principle to underlie rules requiring that enemies deal with one another in "good faith" in their non-hostile relations. It also finds that

[16] *Ibid.*, ¶ 2.1.2. [17] *Ibid.*, ¶ 17.1.2.2. [18] *Ibid.* [19] *Ibid.*, ¶ 17.2.2.1.

[20] S. Watts, "The DoD Law of War Manual's Return to Principles," *Just Security Blog*, June 30, 2017, www.justsecurity.org/24270/DoD-law-war-Manuals-return-principles.

[21] Field Manual 27-10, The Law of Land Warfare (Washington: US Dep't. of Army, July 18, 1956) (FM 27-10), ¶ 3.

[22] DoD Law of War Manual, ¶ 2.6.1. [23] *Ibid.*, ¶ 2.6.2.2.

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

the concept of "good faith" (and therefore honor) underlies the prohibition of perfidy, the misuse of certain signs, fighting in the enemy's uniform, feigning non-hostile relations in order to seek a military advantage, and compelling nationals of a hostile party to take part in the operations of war directed against their own country.[24] According to the Manual, the principle of honor – in addition to being a tenet of personal conduct – is based on, and demands, a certain mutual respect between opposing military forces. The Manual states that "opposing military forces should respect one another outside of the fighting because they share a profession and they fight one another on behalf of their respective States and not out of personal hostility."[25] Later, the Manual states that the principle of honor reflects the premise that military forces are a common class of professionals who have undertaken to comport themselves honorably.[26] As a result, it demands a "certain mutual respect between opposing military forces."[27]

Rachel van Landingham has noted that the Manual's reliance on the principle of 'honor' will be objectionable to many, as it draws on traditions that are "outdated, chauvinistic, and frankly distasteful."[28] She points out that its invocation connotes "elitism and the inhumanity of the Crusades," and argues that it harks back to the "assumed, white, Christian superiority of the day."[29] In making this critique, van Landingham questions whether it is necessary for the US Manual to resort to the principle of honor, when it could have relied upon the term humanity for many of the same provisions.[30] However, it is no coincidence that all the law of war rules which the Manual finds to be based on the principle of "honor" protect enemy fighters, rather than civilians or fighters *hors de combat*. For although some of these provisions can indeed be deemed to be rooted equally in the principle of humanity (e.g., perfidy) many, such as the prohibition of fighting in the enemy's uniform, cannot, as their violation brings no consequences for protected persons.[31] This observation sheds light on the fact that the inclusion of the principle of honor recognizes that there are other restrictive principles at

[24] *Ibid.* [25] *Ibid.*, ¶ 2.6.3. [26] *Ibid.*, ¶ 2.6.3.2. [27] *Ibid.*, ¶ 2.6.

[28] R. van Landingham, "The Law of War Is Not about 'Chivalry'," *Just Security Blog*, July 20, 2017, www.justsecurity.org/24773/laws-war-chivalry/.

[29] *Ibid.* See also L. Doswald-Beck and S. Vité, "International Humanitarian Law and Human Rights Law" (1993) 33 (293) *International Review of the Red Cross* 94–119, who state "The last criterion [chivalry] seems out of place in the modern world."

[30] For a similar questioning see R. Liivoja, "Chivalry without a Horse: Military Honor and the Modern Law of Armed Conflict" (2012) 15 *ENDC Proceedings* 75–100, 77.

[31] For analysis of the crime of perfidy in NIAC rooting it in the principle of distinction see R. Jackson, "Perfidy in Non-International Armed Conflicts" (2012) 88 *International Law Studies* 237–62. See also Sivakumaran (above note 1), 418 who points out that the reasoning

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

play in the legal framework, in addition to military necessity and humanity.[32] Rather than aiming to protect persons or restrict and protect military operations, the principle of honor or chivalry has been invoked primarily to remind parties of the need to respect a moral sensibility and prevent battlefield practices from descending into wanton destruction.[33]

While recognizing that it may be necessary to rely on a force beyond military necessity and humanity, it remains important to question what kind of role the concepts of honor or chivalry should play in a modern military manual espousing the law of war, if any. Indeed, the need to question this issue arises not only because of the chauvinism and elitism that the terms evoke but also because modern historical scholarship increasingly advises against viewing chivalry or honor in a rose-tinted manner. Indeed, modern scholars of chivalry have commented that the greatest honor in medieval times, was to "win."[34] They have equally pointed out that romantic tales placing chivalric exploits of knightly courage in the foreground, often admit a "mind-numbingly constant" ravaging, looting, raping, burning, destruction, and arson in the background.[35] They also stress the specific historical context of the concept, emphasizing that individuals adopting chivalric codes in a military sense would be equally familiar with the idea of honor in a social sense.[36] For these reasons, literature on honor and chivalry warns against modern attempts to "return to Camelot," questioning whether honor or chivalry ever existed as something to realistically be emulated as a best practice and highlighting the impossibility of transposing such principles out of the specific social context in which they emerged.[37]

At a baseline, these critiques reinforce the need for the drafters of the Manual to have given serious consideration to whether the notions of honor

behind the prohibition of certain perfidious conduct is that committing the prohibited acts will decrease respect for the law of armed conflict.

32 Liivoja (above note 30), 93.

33 T. Gill, "Chivalry: A Principle of the Law of Armed Conflict?," in M. Matthee, B. Toebes, and M. Brus (eds.), *Armed Conflict and International Law: In Search of the Human Face* (The Hague: TMC Asser Press, 2013), 33–51, 35. Jean Pictet noted that the principle of chivalry "brought with it the recognition that in war as in during a game of chess there should be rules and that one does not win by overturning the board." J. Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht: Martinus Nijhoff, 1985), 15.

34 R. Kaeuper, *Medieval Chivalry* (Cambridge University Press, 2016), 165, 169, 183–84. See also Gill (above note 3), 169.

35 Kaeuper (above note 34), 165, 169, 183–84. See also Gill (above note 3), 47.

36 C. Taylor, *Chivalry and the Ideals of Knighthood in France during the Hundred Years War* (Cambridge University Press, 2013), 55; and Kaeuper (above note 34), 8 and 22.

37 For analysis of historical instances of romantic revival termed "return to Camelot" and their distortions, see Kaeuper (above note 34), 16–20.

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

is a concept that is sufficiently alive in modern culture to be drawn upon as an effective source of norms today. Indeed, on the basis that the Manual is aimed at DoD personnel it is most pressing to consider whether the concept is alive in US culture. Yet on the basis that it is also intended to be a "description of the law" more generally, binding upon States and non-State groups, it is also important to look beyond US shores.[38] During the course of this review, it is also relevant to consider the extent to which the notion of honor that is articulated in the Manual is referring back to the reciprocal codes of warrior brethren, or a value of personal conduct. For, in its latter incarnation, one can see that such a concept may have significant value with a State's armed forces and be particularly useful in NIAC. Indeed, it is often said that in insurgency – an environment characterized by "violence, immorality, distrust and deceit" – even greater steps need to be taken to safeguard the "ethical climate" of the organization and the "values" of soldiers and marines.[39] It is also noted that "honor" is one of the seven US Army values, alongside loyalty, duty, respect, selfless service, integrity, and personal courage. Significantly, new recruits are encouraged to "exhibit a higher sense of honor than that to which they are exposed in popular culture."[40] Equally, it would be misguided to conceive of members of armed groups as strangers to conceptions of honor, bravery, courage, and principled fighting.[41] While adherence to them may be poor, many armed groups have internal rules which reiterate values such as honor, morality, and discipline.

Yet as a source of rules, the notion of honor in the US Manual is articulated mainly as a shared code between "enemies," rather than as a personal value. In this embodiment, the principle is based upon professional solidarity between soldiers on opposing sides. In this incarnation, the principle of honor relies upon reciprocity in the sense that it arises out of a mutual respect between the fighting parties. Herein lies the problem in NIAC. For while it is widely accepted that the notion of good faith between sides remains important in NIAC (e.g., in the context of negotiating special

[38] DoD Law of War Manual, p. 1 and p. 2.

[39] Brigadier General H. R. McMaster, "Remaining True to Our Values – Reflecting on Military Ethics in Trying Times" (2010) 9(3) *Journal of Military Ethics* 183–94, 188.

[40] *Ibid.*, 189.

[41] O. Bangerter, "Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not" (2011) 93(882) *International Review of the Red Cross* 353–84, 358 fn. 22. O. Bangerter, *Internal Control: Codes of Conduct within Insurgent Armed Groups*, Occasional Paper 31 (Geneva: Small Arms Survey, 2012), 15–16 and 90 for an example of a code of conduct emphasizing honor.

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

agreements and peace agreements),[42] it is often severely strained. Indeed, from a State perspective, combatants might question why they should "fight in accordance with notions of chivalry and honor, or even in accordance with the laws of war against a foe which has no regard for them and routinely violates the law of war."[43] From an armed group's perspective, a fighter might question why they should fight in accordance with the laws of war, if they are already condemned to criminal prosecution when they first resort to arms. Crucially, the Manual's recourse to this kind of reciprocal honor would not be so important if it was not given such a strong normative role in the Manual. The 1956 Manual, for example, identifies chivalry as one of the principles of the law of war at the beginning but never mentions the principle again with the result that its inclusion, though open to critique, is not of substantial normative consequence.

Yet the 2016 Manual not only clearly states that the principle of honor articulated in Chapter II is relevant in NIAC, it also identifies it as a core concept upon which other concrete rules that many States accept apply in NIACs are based, such as perfidy.[44] Perhaps of even more concern, the Manual finds the principle of honor to "support the entire system" of the law of war and give parties confidence in it.[45] On the basis that the concepts of chivalry and honor translate uncomfortably into relations *between* State forces and armed groups and relations *between* armed groups and armed groups, the Manual's strong reliance upon the concepts of honor and chivalry in NIAC is troubling. Indeed, it is helpful to remember that studies into the forces that motivate parties to violate or comply with the law of war show that while reliance on principles can be effective in encouraging compliance with the law, rules are also essential.[46] Moreover, while the paragraphs above have shown that humanity and military necessity cannot be used to explain all rules of the law of war, equally there is no need for the Manual to rely as heavily on the principle of honor in NIACs as it does. It would have also been possible for

[42] See, e.g., rule 66 of the ICRC's Study on Customary International Law which holds that the principle of good faith applies by definition in both international and non-international armed conflicts. J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, I: *Rules* (Cambridge University Press, 2005), 228.

[43] Gill (above note 33), 48.

[44] It is unclear whether the Manual finds the prohibition of perfidy to apply in NIACs, as, despite Chapter XVII referring back to Chapter II, Chapter II does not show any awareness of Chapter XVII or any mention of NIACs.

[45] DoD Law of War Manual, ¶ 2.1.2.3.

[46] ICRC, "The Roots of Behaviour in War: Understanding and Preventing IHL Violations" (2004), 15; ICRC, "The Roots of Restraint in War" (2018), 32.

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

the Manual to have relied upon personal (rather than reciprocal) honor, treaty law, historical precedent, and (sometimes) humanity to provide a justification for many of the rules mentioned in Chapter II.

4 MEMBERSHIP AND TARGETING

The third issue which this chapter examines is the issue of how the Manual treats armed groups and their members for the purposes of targeting. These rules are found in Chapter V of the Manual on "The Conduct of Hostilities." Reciting the full history of the Manual's provisions on membership would take readers deep into the history of the "direct participation in hostilities" debates that took place in the context of the International Committee of the Red Cross's proceedings between 2003 and 2008.[47] While it is not possible to do justice to these debates here, it remains important to note that this is a key section of the Manual where there are problems with the Manual's intention to provide guidance to US troops on the one hand and be a more general statement of the law on the other. For the Manual takes a position (quite likely driven by litigation interests and ongoing political debates) relative to "membership," that differs from the approach taken by the International Committee of the Red Cross (ICRC) and States who have ratified AP I.[48] DoD asserts that like members of enemy forces, individuals who are formally or functionally part of a non-State armed group that is engaged with hostilities may be made the object of attack because they share their group's hostile intent.[49] According to the Manual, formal membership can be demonstrated by formal or informal information: for example, the use of a rank, title, or style of communication; the taking of an oath of loyalty to the group of the group's leader; wearing of uniform or other clothing, adornments, or body markers; carrying of documents issued or belonging to the group that identify the individual as a member, for example membership lists, identity cards, or membership applications.[50]

According to the Manual, formal membership may also be denoted by an individual's behaviour. Examples of behaviour denoting formal membership include acting at the direction of the group or within its command structure; performing a function for the group that is analogous to a function usually performed by a member of a State's armed forces; taking direct part in

[47] See ICRC Clarification Process on the Notion of Direct Participation in Hostilities (Proceedings), www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm.

[48] See DoD Law of War Manual, ¶ 5.8.2.1 where this is emphasized.

[49] *Ibid.*, ¶ 5.7.3.

[50] *Ibid.*, ¶ 5.7.3.1.

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

hostilities (taking into account frequency, intensity and duration of those hostilities); accessing facilities exclusive to the armed group, such as safe-houses or training camps, travelling along clandestine routes used by those groups, or travelling with members of the groups in remote locations.[51] The Manual goes on to note that not all groups are organized in a formal command structure. In recognition of this, the Manual sets out how a group's *functional* members can be identified and distinguished from individuals merely sympathetic to the group. According to the Manual, it is relevant to find evidence that an individual is integrated into a group, such that its hostile intent may be imputed to him or her. Evidence that an individual is integrated into a group in this manner may be found in the fact that an individual follows the directions of the group or its leaders; takes part in hostilities on behalf of the group on a sufficiently frequent or intensive basis; or performs tasks for the group similar to those provided in combat, combat support, or combat service support roles.[52]

While setting out these concepts of membership, DoD recognizes that it takes a different position to other States that, for example, treat individuals associated with armed groups as "civilians," who cannot be attacked unless and until they participate directly in hostilities.[53] It clarifies that it does not recognize a "revolving door" protection, where a civilian repeatedly regains and loses his or her protection.[54] It explains that such an approach would place civilians who directly participate in hostilities on a better footing than members of the US armed forces, who can be targeted even when not taking part in hostilities.[55] The Manual also confirms that although AP I recognizes a presumption in favor of civilian status when conducting attacks, the United States does not consider this provision to be part of customary international law. In a similar vein, it refutes the contention that there is a rule preventing military commanders from acting upon information available to him, in doubtful cases.[56]

The Manual explains its position on these points by arguing that a legal presumption of civilian status "would not account for the realities of war."[57] It also indicates a view that opposing sides might exploit the existence of such a presumption, by blurring their status and thereby escaping lawful targeting.[58] It thus explains that the US non-recognition of a lack of civilian presumption is intended to avoid an increase of harm to the civilian population, and decreased respect for the law of war.[59] This provision is particularly important when reading the rules on membership of armed groups, because – when

[51] *Ibid.*, ¶ 5.7.3.1. [52] *Ibid.*, ¶ 5.7.3.2. [53] *Ibid.*, ¶ 5.8.2.1. [54] *Ibid.*, ¶ 5.8.4.2.
[55] *Ibid.*, ¶ 5.4.3.2. [56] *Ibid.* [57] *Ibid.* [58] *Ibid.* [59] *Ibid.*

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

combined with the Manual's approach on membership – it constitutes a double permissibility. A soldier can draw inferences from the persons with whom an individual associates or by his location, and, any doubts she or he has regarding the accuracy of his or her assessment do not constitute a prohibition to targeting that individual.

The approach espoused by the Manual to the targetability of so-called members of armed groups is not only far-reaching but also significantly idiosyncratic. Notably while the ICRC, the formal guardian of the law of war, has recently also espoused the notion of membership when considering the targetability of individuals associated with armed groups, it takes a much more restrictive and cautious approach to its definition. Indeed, like the United States, the ICRC's starting point is that membership can be difficult to discern because members of armed groups rarely express or declare their membership in ways analogous to members of State forces.[60] Yet rather than reacting to this difficulty by casting the net of membership widely, the ICRC explicitly rejects adopting membership criteria based on abstract affiliation.[61] Instead, the ICRC defines "members" as individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation of hostilities.[62] Unlike the United States, the ICRC does not include individuals accompanying the armed group, with a supporting role or those who assume political, administrative, or other noncombat roles.[63] It also does not include individuals whose location (e.g., in a particular guesthouse) or behavior (e.g., travelling along a particular path) suggests that they have an affiliation with the armed group. Additionally, the ICRC underlines that the evaluation of whether an individual has a continuous function directly participating in hostilities should be subject to all feasible precautions and to the presumption of protection in the case of doubt.[64]

While a full comparison of the different approaches of the United States and ICRC on this issue is beyond the scope of this chapter, a few important points are noted below. The first is that the US position towards membership seems to come close to drawing a geographical perimeter around the leadership of an armed group and identifying all individuals that come within that physical space as members of the armed group. The Manual indicates that an individual's location in a safehouse, training camp, or base is enough of an

[60] N. Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2009), 32–33.

[61] *Ibid.*, 33. [62] *Ibid.*, 34. [63] *Ibid.*, 34.

[64] *Ibid.*, 35. This presumption is contained in Art. 50(1) of AP I which states "in cases of doubt whether a person is a civilian, that person shall be considered to be a civilian."

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

indicator for membership. It is argued that such an approach ignores the variation of operation and organization between armed groups and new research emerging on rebel governance.[65] Specifically, it remains unclear how such criteria can effectively be applied in areas under the control of armed groups, without scooping up large proportions of the civilian population. It also remains unclear how the criteria can take account of the reality that civilians are often forced to cooperate with armed groups, on matters of governance for their survival.[66] The criteria also leaves little scope for distinguishing between individuals with a fighting function and individuals working in an armed group's civilian infrastructure, such as police force, judges, and government workers. Unless this distinction is respected, it seems little use for the international community to continue to exhort armed groups such as the Taliban to cease targeting Afghan judges and government workers, on the basis that it is unlawful under international humanitarian law.[67] Perhaps most worryingly, there is a risk that the Manual's broad-brush approach to membership will end up as a self-fulfilling prophecy. Multiple studies have shown that the loss of a family member is a key motivating factor for individuals to join armed groups.[68] This observation highlights the important final fact that while the Manual justifies its approach to membership in strategic terms, there is actually a strong strategic argument for approaching conceptions of membership narrowly.

There are also concerns about the appropriateness of the Manual adopting a subjective criteria for membership, such as the one it mentions, requiring that individuals share the hostile intent of the armed group. The inclusion of this criterion is presented as the basis upon which the Manual rationalizes the fact that an individual can be targeted, at times when he or she is not conducting

[65] The notion of rebel governance is an expanding topic in social science disciplines. See, e.g., A. Arjona, N. Kasfir, and Z. Mampilly (eds.), *Rebel Governance in Civil War* (Cambridge University Press, 2015).

[66] *Ibid*. See, e.g., E. Wisam and S. al-Hawat, "Civilian Interaction with Armed Groups in the Syrian Conflict," Conciliation Resources, Insight 2 (2015), www.c-r.org/accord/engaging-armed-groups-insight/syria-civilian-interaction-armed-groups-syrian-conflict. See also K. Stathis, *The Logic of Violence in Civil War* (Cambridge University Press, 2006), 91–110.

[67] This has been a key issue for the United Nations Assistance Mission in Afghanistan. See, e.g., United Nations Assistance Mission in Afghanistan (UNAMA) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), Afghanistan Annual Report 2015, "Protection of Civilians in Armed Conflict," 45–46.

[68] See, e.g., P. K. Davis and K. Cragin (eds.), *Social Science for Counterterrorism: Putting the Pieces Together* (Santa Monica: RAND, 2009), 86–90; International Alert, "Why Young Syrians Choose to Fight" (2016), 10–14; Y. Guichaoua, *Understanding Collective Political Violence* (Basingstoke: Palgrave Macmillian, 2011), 158; R. Haer, *Armed Group Structure and Violence in Civil Wars: The Organisational Dynamics of Civilian Killing* (Oxford: Routledge, 2015), Table 7.2.

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

hostilities.[69] However, it is questionable how this criterion can be reliably tested, during the conduct of military operations. Indeed, ironically, while the critique of the Manual's criteria for membership has been criticized above for being too far-reaching, it is argued here that the requirement of "intention" is too restrictive. For while a finding of an individual's "hostile intent" is often one of the requirements mentioned by rules of engagement (ROE) to determine situations where a solder can use deadly force, it has little discernible foundation or relevance in international law.[70] Recourse to such a subjective criterion also fails to take account of the myriad of other considerations that may motivate individuals to join an armed group, alongside hostility towards the opposing party. Indeed, it is well-known that children are often coerced into joining armed groups, and while their forcible recruitment may be a mitigating factor in their sentencing, it is not a mitigating factor in either their ability to violate the law of war or their ability to be targeted by State forces.[71] Indeed, the Manual's reference to individuals' hostile intent sits uneasily with the traditional separation between *jus ad bellum* and *jus in bello* according to which the law of armed conflict is traditionally agnostic to the motivations of either individual fighters or parties.

5 USE OF FORMER INSURGENTS IN COUNTERINSURGENCY

The final issue that this chapter examines is the assertion by the Manual that State forces may use captured or enemy personnel in operations against enemy non-State armed groups. While some readers may be surprised to learn that the US army would want to use captured personnel in their military operations, in fact the use of so-called "turned" insurgents has a long history in counterinsurgency operations. Former insurgents can often provide unique access to the group's location and workings, which States often struggle to obtain in an insurgency.[72] Indeed, although the footnotes to the Manual supporting this provision describe such former insurgents as "pseudoforces," when looking at the examples given a distinction can better be made between pseudoforces and "counter gangs." Although both may include former insurgents, their modus operandi is different.[73] While counter gangs are typically

[69] DoD Law of War Manual, ¶ 5.7.1.

[70] See, e.g., ROE for US. Military Forces in Operation Restore Hope, Somalia 1992-1993, www.globalsecurity.org/military/library/policy/army/fm/100-23/fm100_10.htm.

[71] See, e.g., *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, Confirmation of Charges Decision, ¶¶ 151–54 (Mar. 23, 2016).

[72] Bangerter (above note 41), 37.

[73] G. Hughes, "Intelligence-Gathering, Special Operations and Air Strikes in Modern Counter-Insurgency," in P. Rich and I. Duyvesteyn (eds.), *The Routledge Handbook of Insurgency and Counterinsurgency* (London & New York: Routledge, 2012), 109–18, 111–12.

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

groups of fighters with an intelligence-gathering role, who may also take part in military operations, psuedoforces pose as insurgents on a longer-term basis, in order to secure intelligence, capture weapons and fighters, and conduct surprise attacks on their so-called comrades.[74] Examples of pseudoforces include Force X in the Philippines insurgency and the Selous Scouts in Kenya, both of which included turned insurgents.[75] The use of counter forces and pseudoforces in operations against armed groups raises a number of questions of international law that have been given little attention so far in reviews of the Manual or academic literature more generally.

The first question relates to the legality of compelling a member of an armed group to fight against his or her former comrades. The need to analyze the legality of this practice stems from the recollection that it is strictly unlawful in IAC to compel nationals of a hostile party to take part in the operations of war directed against their own country.[76] Acts violating these prohibitions were the subject of numerous prosecutions after World War II.[77] While recognizing these prohibitions in IAC, the Manual asserts that the situation is different in a NIAC, justifying its position on two main grounds.[78] First the Manual recalls that the prohibitions in IAC are based on the notion that it is unconscionable to force an individual to commit treason, which is not the case when you force an individual to fight on behalf of his or her own State.[79] Second, the Manual recalls that a State can often compel its citizens to fight on its behalf in a NIAC, via draft, meaning that

[74] G. Hughes and C. Tripodi, "Anatomy of a Surrogate: Historical Precedents and Implications for Contemporary Counter-insurgency and Counter-Terrorism" (2009) 20(1) *Small Wars & Insurgencies* 1–35, 16–17.

[75] Major L. M. Greenberg, *The Hukbalahap Insurrection: A Case Study of a Successful Anti-Insurgency Operation in the Philippines: 1946–1955* (Washington, DC: US Army Centre of Military History, 2005); and Lieutenant Colonel R. Reid-Daly, *Selous Scouts: Top Secret War* (London & Johannesburg: Galago Publishing, 1982).

[76] See Art. 130 of Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 which makes it a Grave Breach to compel a prisoner of war to serve in the forces of the hostile power and Art. 147 of Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 which makes it a Grave Breach to compel a protected person to serve in the forces of a hostile power. See also Arts. 6 and 52 of Hague Regulations respecting the Laws and Customs of War on Land, Annex to Convention (IV) respecting the Laws and Customs of War on Land. See DoD Law of War Manual, ¶¶ 5.27.2 and 17.12.1.

[77] See, *inter alia*, *The Milch Case, No. 2, United States v. Milch*, Judgment, Green Series, Vol. II, 773 (Mil. Trib. No. 12947-04-15).

[78] DoD Law of War Manual, ¶¶ 5.27.2 and 17.12.1.

[79] *Ibid.*, ¶ 5.27 which states that the prohibition in IAC is based on the principle that States must not compel foreign nations to commit treason or to otherwise violate their allegiance to their country.

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

former insurgents should be equally compellable.[80] It will be shown below that it remains doubtful whether these arguments are sufficient to prove the legality of this practice, when comparing it to modern interpretations of common Article 3 and human rights norms on torture and inhuman and degrading treatment.

When analyzing this provision, it is relevant to note that the Manual indicates that a mixture of strategies will be employed to get insurgents to fight on the side of the State, ranging from threats and inducements.[81] From a legal perspective, it is clearly unproblematic for a State to recruit former insurgents when they are willing to cooperate with the State. Indeed, there are many historical examples of captured insurgents being persuaded to fight on behalf of the State through gentle treatment, promises of financial remuneration, or amnesties.[82] However, there are also many historical examples of former insurgents being persuaded by means of harsh treatment in the form of the threat of severe penalties (e.g., long prison sentences or the death penalty)[83] or physical punishment sometimes amounting to torture.[84] While the Manual recognizes the need to be careful in this respect – stating that inhumane treatment or other illegal methods cannot be used – it specifically indicates a view that insurgents can be "compelled" to take part in military operations against their former comrades through threats of criminal punishment.[85] It is asserted that the employment of coercion in these circumstances gives cause for concern when compared against modern war crimes jurisprudence. While the historical prohibition on forcing detainees to do work of a military nature in IACs was based on the idea that it would be unconscionable to force an individual to commit treason, in modern case law the prohibition has also been based on notions of inhumane, degrading, or cruel treatment.

80 *Ibid.*, ¶¶ 17.12.1 and 4.5.2.4. 81 *Ibid.*, ¶ 17.12.2.

82 D. French, "Nasty Not Nice: British Counter-Insurgency Doctrine and Practice: 1945–1967" (2012) 23(4–5) *Small Wars & Insurgencies* 744–61, 755; T. Gatchel, "Pseudo-Operations – A Double-Edged Sword of Counterinsurgency," in J. Norwitz (ed.), *Armed Groups: Studies in National Security, Counterterrorism and Counterinsurgency* (Newport, RI: US Naval War College, 2008), 61–72; L. Cline, *Pseudo Operations and Counterinsurgency: Lessons from Other Countries* (Pennsylvania: Strategic Studies Institute, 2005), 12–14.

83 Gatchel (above note 82), 65.

84 See also Cline (above note 82), 22 on the use of torture against Algerian National Liberation Front activists. It is also noteworthy that Frank Kitson an oft-quoted and influential proponent of the use of former insurgents recommended that the first stage of "taming" insurgents should involve "harsh treatment of the prisoner, including chaining him and only feeding him the most basic food." See Gatchel (above note 82), 64.

85 See DoD Law of War Manual, ¶ 17.12.2.

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

Most relevantly, while the Appeals Chamber of the International Criminal Tribunal for Yugoslavia (ICTY) recognized that the use of forced labor is not always unlawful, it found that the use of persons taking no active part in hostilities to prepare military fortifications for use in operations and "against the forces with whom those persons identify or sympathise" is a serious attack on human dignity and causes serious mental (and, depending on the circumstances, physical) suffering or injury.[86] It likewise found that any order to compel "protected persons" to dig trenches or prepare other forms of military installations, in particular when such persons are ordered to do so against their own forces in an armed conflict, constitutes "cruel treatment."[87] On the basis of this analysis, the ICTY Appeals Chamber found such actions to be a violation of common Article 3(1)(a) of the Geneva Conventions, indicating that the practice of coercing captured detainees to take part in military operations against their former comrades is by modern standards prohibited in both IACs and NIACs.[88] It is hard to predict where a criminal tribunal would find the line between coercion and persuasion to fall, but it seems likely that forcing an individual to choose between military service and the death penalty as a possibility subsequent to criminal conviction would be deemed to amount to coercion.[89] Notably, such practices may equally be held to violate human rights standards such as the prohibition of cruel, inhuman, and degrading treatment.

Although the footnotes of the Manual assert that pseudoforces can be of "immense importance," their use raises several important legal questions which suggest that their use should not be eagerly embraced. First, it is important to consider whether it is lawful for pseudoforces to conduct hostilities against members of an armed group while disguised as members of that armed group. Indeed, while it is widely accepted that it is unlawful to take part in hostilities while wearing the uniform of the opposing side in an IAC, the legality of the equivalent practice in NIAC remains a "matter of debate."[90] Notably, the ICRC has argued that the equivalent rule "should" apply in instances where armed groups wear uniforms.[91] Yet if one assumes that such a prohibition does not yet exist, it is important to be aware that the use of subterfuge is more problematic for State forces than for armed groups.

86 *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶ 597 (ICTY, July 29, 2004).

87 *Ibid.* 88 *Ibid.*

89 This conclusion can even be reached by an analysis of the definition of the word "compel" given at ¶ 5.27.1 of the DoD Law of War Manual.

90 Sivakumaran (above note 1), 417.

91 Henckaerts and Doswald-Beck (above note 42), rule 62, 214.

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

The fact that many armed groups do not wear uniform, means that State forces conducting hostilities while disguised as members of a non-uniform-wearing armed group need to be constantly careful not to violate the principle of distinction and the prohibition of perfidy, which although not explicitly recognized by the Manual, is widely seen to be a war crime in NIACs.[92] While in practice the risk may often be small, due to the fact that individuals employed as pseudoforces generally take steps to look "the part" by bearing weapons or adopting dress that clearly identify them as members of that group, it remains an important consideration to bear in mind.[93]

Equally, although the Manual refers to pseudoforces as being of "immense importance," it does not sufficiently note the ethical and legal dilemmas that accompany their use. Indeed, from an operational and command perspective, many authors warn that careful thought needs to be given to "how far" pseudoforces should be allowed to go to attain their goals of gaining acceptance as insurgents or discrediting the armed group among the civilian population.[94] For example, literature on the topic offers up disturbing examples of pseudoforces targeting civilian infrastructure in order to validate themselves as insurgents, in clear violation of international humanitarian law.[95] Equally, pseudoforces have been used to implicate innocent villagers in acts of betrayal, leading sometimes to their execution.[96] Likewise, pseudoforces sometimes deliberately committed atrocities or indiscretions against civilians, in order to turn populations against the "real" armed group.[97] These historical examples demonstrate the challenge of ensuring that pseudo-operations remain lawful, in environments where violations of the law may be strategically advantageous and eminently deniable.[98] For, most dangerously, pseudoforces operate entirely outside the scrutiny of the international community and national oversight mechanisms, making it difficult to attribute

[92] See Art. 8(2)(e)(ix) of the Rome Statute.

[93] See W. Hays Parks, "Special Forces' Wear of Non-Standard Uniforms" (2003) 4 *Chicago Journal of International Law* 493–560, 517. See Human Rights Watch, *Between a Rock and a Hard Place*, Human Rights Watch Report Vol. 16 (No. 12C) (October 2004), www.hrw.org/sites/default/files/reports/nepal1004.pdf, where it is recounted (at p. 27) that police disguised themselves as Maoists by dressing in Maoist-style clothing with red bandanas and giving Maoist greetings.

[94] Cline (above note 82), 16.

[95] J. Cilliers, *Counter-Insurgency in Rhodesia* (London, Sydney, Dover, New Hampshire: Croom Helm, 1985), 127–28.

[96] *Ibid.*, 128; Reid-Daly (above note 75), 128.

[97] Cilliers (above note 95), 119 and 128; Hughes and Tripodi (above note 74), 6 and 21.

[98] Hughes and Tripodi (above note 74), 6.

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

responsibility for unlawful killings.[99] Indeed, it is for these reasons that it would be appropriate for the Manual to emphasize the dangers of their employment.[100]

6 CONCLUSION

When reviewing the Manual for issues pertaining to armed groups, there are a multitude of issues that come to the fore. Indeed, in the preceding analysis, it has been shown that the need to take account of armed groups when clarifying the legal framework that applies in times of armed conflict requires more than an "add armed groups and stir" approach. This is particularly true in relation to issues relating to sources of law, where there is an intense need to be consistent about the indicators that are necessary for armed groups to be bound by the law of war. Likewise, there is a need for serious consideration to be given to whether the principles that are considered to function as the bedrock of the legal framework can be easily transposed to NIAC, without careful consideration of whether they are also meaningful in that context. On this point, the chapter has suggested that while there may be reasons to emphasize notions of "personal honor" in the Manual, it makes less sense for the Manual to assert a heavy reliance on reciprocal honor between fighting parties, as the principles upon which it is based are often under severe strain in fighting between armed groups and States. Equally, studies indicate that compliance with the legal framework is best achieved by emphasizing concrete legal rules, rather than the principles or ethics that underpin them.

In the second half of the chapter, attention has been given to the approach taken by the Manual to the issue of targeting. Here, it has been pointed out that the Manual's associative approach risks drawing too many people into the net of membership. The problems with such an approach are myriad, and do not take into account the wealth of new knowledge on armed groups and governance. This literature not only points out that armed groups increasingly carry out governance activities in areas under their control, but also demonstrates that armed groups often have intricate relationships with civilian populations under their control that require a significant degree of interaction between armed groups and civilians. As it is currently formulated, the US approach to membership and targeting not only risks putting such civilians

99 *Ibid.*, 6 and Reid-Daly (above note 75), 133; Human Rights Watch (above note 93), 55, for evidence of this difficulty in practice.

100 Cline (above note 82), 16; Hughes and Tripodi (above note 74), 22; Reid-Daly (above note 75), 110; Cilliers (above note 95), 132–33.

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press

at risk, but also risks becoming a self-fulfilling prophecy, by attracting more individuals into the ranks of armed groups. Finally, the chapter explores the legality and associated risks of using former insurgents in military operations against their comrades. This is an aspect of the Manual which has been almost entirely unexplored in legal literature, but which deserves careful attention. In particular, the chapter demonstrates that the use of pseudoforces raises serious legal and ethical issues that pose a severe risk to the legal framework.

https://doi.org/10.1017/9781108659727.017 Published online by Cambridge University Press