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THE NEW LAW OF LAND WARFARE

WILLIAM F. FRATCHER*

On April 24, 1863 the United States War Department issued General Orders No. 100, entitled, "Instructions for the Government of Armies of the United States in the Field."¹ These orders summarized the rules of international law recognized by civilized nations as governing the conduct of war on land, including the law of military occupation and government of hostile territory. When General Orders No. 100 were issued the rules of land warfare consisted almost wholly of customary usages. Since then, many of them have been codified in multilateral international treaties. On April 25, 1914 the War Department issued a pamphlet of 221 pages entitled "Rules of Land Warfare." This contained a revised version of General Orders No. 100, copies of treaties relating to the subject, and notes of historical applications of the rules. A smaller pamphlet, also entitled "Rules of Land Warfare" and designated FM 27-10, was issued on October 1, 1940. This did not contain the full text of the treaties or the historical examples but it was supplemented in 1943 and 1944 by TM 27-250, "Cases on Military Government", and TM 27-251, "Treaties Governing Land Warfare."

On February 2, 1956 the United States became bound by four multilateral treaties known collectively as the 1949 Geneva Conventions for the Protection of War Victims.² These four treaties revised the pre-existing

*Professor of Law, University of Missouri; Colonel, Judge Advocate General's Corps, United States Army Reserve; member of the Committee on the Law of Occupied and Extraterritorial Defense Areas, Section of International and Comparative Law, American Bar Association; sometime Chief, War Crimes Branch, Legal Division, Office of Military Government for Germany (U.S.).

1. Prepared by Dr. Francis Lieber of Columbia College, New York, and revised by a board of officers presided over by Major General E. A. Hitchcock. These orders were republished by the War Department in 1898.

2. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, T.I.A.S. 3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 Aug. 1949, T.I.A.S. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949 T.I.A.S. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, T.I.A.S. 3365. As between the parties thereto, these conventions supersede several earlier multilateral treaties. The United States is a party to

rules and established new rules of international law relative to sick and wounded members of armed forces, prisoners of war, and civilians in occupied enemy territory or otherwise within the power of hostile forces or governments. In July 1956 the Department of the Army issued a revised and expanded edition of FM 27-10 entitled "The Law of Land Warfare."³ The new field manual contains not only changes necessitated by the recent treaties but numerous modifications of and additions to those parts of the international law of war which rest upon customary usage. The treaties and the other changes reflect situations in which the pre-existing rules proved to be inadequate or unworkable in World War II or Korea. The new edition of FM 27-10 has, of course, the binding force of a military order on members of the Army of the United States. It is also a document of international importance. As the international law of war consists, to a considerable extent, of the customary usages of civilized nations, the authoritative publication of the usages followed by such a great power as the United States is bound to have extensive influence on the practises of other countries and the development and fixation of accepted international custom. In consequence, the differences between the 1956 and 1940 editions of the official United States manual are matters of interest and importance everywhere.

other multilateral treaties relative to the laws of war, notably Hague Convention No. IV of 18 Oct. 1907 Respecting the Laws and Customs of War on Land, 36 STAT. 2277, Treaty Series 539, and the Annex thereto embodying the Regulations Respecting the Laws and Customs of War on Land, 36 STAT. 2295, Treaty Series 539.

For the manner in which the 1949 Conventions were drafted, see Pictet, *The New Geneva Conventions for the Protection of War Victims*, 45 AM. J. INT. L. 462 (1951).

The parties to the 1949 Conventions undertake, in time of peace as in time of war, to disseminate the texts of the Conventions as widely as possible and to include study of them in their programs of military and, if possible, civil instruction, so that their principles may become known to the entire population. To this end The Judge Advocate General's School at Charlottesville, Virginia, has prepared excellent instructional materials. Effective performance of these undertakings in the United States will require the voluntary cooperation of civilian educational institutions. The House of Delegates of the American Bar Association has urged such performance by unanimous resolution. 42 A.B.A.J. 1062 (1956).

3. Prepared in the Office of The Judge Advocate General of the Army. Major General C. B. Mickelwait, then The Assistant Judge Advocate General, Colonel Howard S. Levie, Chief of the International Affairs Division, and Professor Charles Fairman of Harvard Law School, were concerned in its preparation. Consultation with the British War Office, designed to harmonize the British and United States manuals, preceded the final draft. The new manual has been supplemented by Department of the Army Pamphlet 27-1, "Treaties Governing Land Warfare," 7 December 1956, which contains the full text of the Geneva Conventions of 1949 and supersedes TM 27-251, 7 January 1944.

Enforcement of the Laws of War

Prior to World War II the international laws of war were looked upon as being primarily laws binding nations rather than individuals. Consequently, the sanctions for their violation were, in the main, directed against governments, not against individuals. During hostilities, when one hostile government conducted warfare in an unlawful manner, the opposing government might seek to induce it to desist by reprisals, that is, otherwise improper acts of retaliation, or by the seizure and, if necessary, killing of hostages. After hostilities, an offending government was liable to pay compensation for violations of the laws of war. Individuals who violated the laws of war on their own initiative could be punished, after trial and conviction by their own or a captor government, but individuals who acted pursuant to the orders of their superiors were exempt from punishment. Moreover, high government officials who directed violations of the laws of war were generally deemed exempt from punishment. In consequence, when violations of the laws of war were committed at the direction of a hostile government, no individual, as such, was punishable. The 1940 Manual reflected these views.⁴ For example, Paragraph 347 provided, "Individuals of the armed forces will not be punished for these offenses (violations of the laws of war) in case they are committed under the orders or sanction of their government or commanders."

During the course of World War II considerable agitation developed for the punishment of individuals involved in war crimes, including high government officials who directed them and subordinates who committed them pursuant to superior orders.⁵ On November 15, 1944 FM 27-10 was changed by deleting the language just quoted and adding a new paragraph,

345.1 . . . Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished.

4. ¶¶ 5, 345-359.

5. WRIGHT, ed., HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR, 101-102, 262-288 (1948).

The arrangements for trial of war criminals after the close of hostilities in World War II provided that superior orders should not be a defense and that high government position did not exempt one who gave illegal orders from punishment.⁶

The 1956 edition of FM 27-10 contains a greatly expanded treatment of the topic of enforcement of the laws of war, most of it devoted to the punishment of individuals.⁷ It restates provisions of the 1949 Geneva Conventions which prohibit the taking of hostages and limit reprisals to enemy troops who have not yet fallen into the hands of the forces making the reprisals. As to individual responsibility, the new manual states that high government position does not relieve from responsibility,⁸ that a commander who fails to take reasonable steps to prevent his subordinates from committing war crimes is subject to punishment,⁹ and that the fact that the law of war has been violated pursuant to an order of a superior authority is not a defense in the trial of an accused individual "unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful."¹⁰

Conduct of Hostilities

The development of the rules of land warfare prior to World War I manifested two major tendencies: (1) To make a sharp distinction between combatants and non-combatants, with an accompanying limitation of permissible hostilities to those directed solely against combatants. (2) To prohibit the use of newly-developed weapons which were more deadly, painful or destructive than those previously known. The actual practices of the nations involved in World Wars I and II paid little heed to these tendencies and the 1956 Manual virtually recognizes that they have both been re-

6. *Id.* E.g., Control Council for Germany Law No. 10, 20 Dec. 1945, § 4, printed in 13 Mo. L. Rev. at p. 73 (1948).

7. ¶¶ 3b, 495-511. ¶ 498 recognizes that, in addition to war crimes proper (violation of the laws of war), individuals may be punished under international law for the categories of offenses defined after World War II and denominated "crimes against peace" and "crimes against humanity." The Manual states, "members of the armed forces will normally be concerned only with those offenses constituting 'war crimes.'" This statement reflects the post-World War II activities of the Army proper in Europe. See Fratcher, "American Organization for Prosecution of German War Criminals," 13 Mo. L. Rev. 45, 66 (1948).

8. ¶ 510.

9. ¶ 501. This provision is based on *In re Yamashita*, 327 U. S. 1 (1946).

10. ¶ 509. The fact that the individual was acting pursuant to orders may, however, be considered in mitigation of punishment.

versed. Much as we may regret it, the tendency of modern war is to visit destruction upon the whole population with increasingly deadly weapons.

The 1907 Hague Regulations respecting the laws and customs of war on land prohibited attack or bombardment of undefended towns, villages, dwellings or buildings and, except in case of assault, required warning before bombardment of defended places.¹¹ The 1940 Manual stated that defended places, subject to bombardment, included: *a.* A fort or fortified place. *b.* A town surrounded by detached forts. *c.* A place occupied by a combatant military force or through which such a force is passing.¹² The 1956 Manual greatly expands this list by substituting "detached defense positions" for "detached forts" and adding the following sub-paragraph:

Factories producing munitions and military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places devoted to the support of military operations or the accommodation of troops may also be attacked or bombarded even though they are not defended.¹³

Both Manuals interpret the Hague Regulations as requiring warning only prior to bombardment of places where parts of the civil population remain.¹⁴ The 1940 Manual stated that, even when the belligerents are not subject to the warning provision of the Hague Regulations, it is the American practise to warn before bombardment.¹⁵ The new Manual restricts this practise to bombardment by *ground* forces.¹⁶

The 1940 Manual quoted the provision of Hague Declaration XIV of 1907¹⁷ prohibiting "the discharge of projectiles and explosives from balloons or by other new methods of a similar nature" but qualified it by a statement that there is no prohibition of general application among the great powers against the discharge of authorized projectiles from aircraft against combatant troops or defended places.¹⁸ The 1940 Manual contained

11. Arts. 25, 26, 36 STAT. 2295.

12. ¶ 47.

13. ¶ 40.

14. 1940, ¶ 49; 1956, ¶ 43b.

15. ¶ 50.

16. ¶ 43c.

17. 36 STAT. 2439, quoted in ¶ 27. The United States and Great Britain were the only major powers which ratified this declaration.

18. ¶ 48.

an express prohibition on aerial bombardment of undefended localities.¹⁹ A War Department directive of May 7, 1942 provided that Hague Declaration XIV of 1907 "is not binding and will not be observed."²⁰ The 1956 Manual omits all reference to the Hague Declaration or any other restriction on aerial bombardment, declaring, "There is no prohibition of general application [against bombardment from the air of combatant troops, defended places, or *other legitimate military objectives*."²¹ A completely new paragraph relative to aerial warfare states,

The law of war does not prohibit firing on paratroops or other persons who are or appear to be bound upon hostile missions while such persons are descending by parachute. Persons other than those mentioned in the preceding sentence who are descending by parachute from disabled aircraft may not be fired upon.²²

The 1907 Hague Regulations forbade the employment of poison, poisoned weapons, and arms, projectiles or material calculated to cause unnecessary suffering.²³ The 1914 United States Manual stated that these provisions prohibited bacteriological warfare, contamination of sources of water by putting dead animals or poisonous substances into them, lances with barbed heads, irregular-shaped bullets, projectiles filled with glass, substances on bullets that would tend unnecessarily to inflame wounds, scored or filed bullets and, probably, soft-nosed and explosive bullets. The 1914 Manual also stated that the United States, in practice, refrained from the use of poison gas.²⁴ The 1940 Manual repeated the statements in the 1914 edition with three changes: (1) Contamination of sources of water

19. ¶ 46, based on Art. 25 of the Hague Regulations, note 11, *supra*.

20. Sect. I, Circular No. 136, 7 May 1942. This was probably based on a provision of the Declaration itself that "it shall cease to be binding from the time when, in a war between the Contracting Powers, one of the belligerents is joined by a non-contracting power."

21. ¶ 42. The last phrase, like the sub-paragraph added to the paragraph defining defended places (note 13, *supra*) indicates a shift from the land warfare concept of protecting noncombatants by restricting bombardment to *defended places* to the naval warfare concept of accomplishing this object by restricting bombardment to *military objectives*. See 2 OPPENHEIM, INTERNATIONAL LAW, c. IV A (6th ed., rev., 1944). No doubt the naval concept is better suited to the problems of aerial bombardment. As to the need for a new treaty codifying the rules governing the conduct of hostilities, see Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision*, 45 AM. J. INT. L. 37 (1951).

22. ¶ 30.

23. Art. 23, 36 STAT. 2295.

24. Rules of Land Warfare, 1914, ¶¶ 175 Note, 177, 185.

was permitted provided it was evident or the enemy was informed thereof. (2) It declared that the United States was not a party to any treaty prohibiting or restricting the use of gas, smoke or incendiary materials. (3) The reference to soft-nosed and explosive bullets was omitted.²⁵ The 1956 Manual goes further in relaxing restrictions on types of weapons by asserting that the United States is not bound by any treaty prohibiting or restricting the use of gas, smoke, incendiary materials or bacteriological warfare, that international law does not prohibit the use of atomic or incendiary weapons, including flamethrowers, and that the poison prohibition of the Hague Regulations does not extend to the use of chemical or bacterial agents, harmless to man, to destroy crops intended for consumption by the armed forces.²⁶ The new Manual omits all reference to contamination of sources of water and makes no statement as to whether bacteriological warfare against human beings is in violation of customary international law.

In addition to recognizing the legitimacy of new types of weapons, the 1956 Manual approves several new non-physical methods of waging war, including encouraging defection or insurrection among the enemy civilian population, corrupting enemy civilians or soldiers by bribes, transmitting false or misleading radio or telephone messages, deceiving the enemy by bogus orders purporting to have been issued by the enemy commander, deceptive supply movements, deliberate planting of false information, erection of dummy installations and airfields, use of signal deceptive measures and psychological warfare activities.²⁷ While countenancing such devices, the new Manual warns, "Treacherous or perfidious conduct in war is forbidden because it destroys the basis for a restoration of peace short of the complete annihilation of one belligerent by another."²⁸ This warning was probably written by an officer who does not approve of the United States's insistence upon unconditional surrender as a prelude to the cessation of hostilities against Germany in World War II. The 1956 Manual also contains another warning, applicable to other aspects of the laws of war but especially to the conduct of hostilities,

25. ¶¶ 28, 29, 34.

26. ¶¶ 34-38. It has been asserted that the use of flame throwers is unlawful because they cause unnecessary suffering in violation of Article 23 of the Hague Regulations, note 23, *supra*. 2 OPPENHEIM, INTERNATIONAL LAW, 272 note (6th ed., rev., 1944).

27. ¶¶ 49, 51.

28. ¶ 50.

The prohibitory effect of the law of war is not minimized by 'military necessity' which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.²⁹

Prisoners of War

The 1949 Geneva Convention Relative to the Treatment of Prisoners of War³⁰ superseded, as among the parties thereto, the 1929 Convention on the same subject.³¹ The 1956 Manual reflects the rules laid down by the later treaty.

The new rules add to the classes of persons entitled to treatment as prisoners of war members of armed bodies not organized by a recognized government, such as partisan and resistance movements, and members of the hostile forces, such as specially trained commando and airborne troops, who operate singly. On the other hand, the new rules exclude from the category of prisoners of war medical personnel, chaplains, and all civilians who do not accompany the armed forces.³² When there is doubt as to whether a captured person who has committed belligerent acts is entitled to treatment as a prisoner of war, he is given such treatment until a board of three officers has determined that he is not a prisoner of war.³³

29. ¶ 3a. ¶4a. of the 1940 Manual declared that one of the basic principles of the unwritten laws of war was "The *principle of military necessity*, under which, subject to the principles of humanity and chivalry, a belligerent is justified in applying any amount and any kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money." ¶ 23 suggested that measures warranted by military necessity were limited to those "not forbidden by the modern laws and customs of war" but the qualification of the broad language of ¶ 4a was not evident without very careful reading. See Downey, *The Law of War and Military Necessity*, 47 AM. J. INT. L. 251 (1953).

30. T.I.A.S. 3364.

31. 47 STAT. 2021; Treaty Series 846.

32. 1956 Manual, ¶¶ 61, 63, 67. Cf. 1940 Manual, ¶¶ 9, 70, 72, 76.

33. 1956 Manual, ¶ 71. This provision is new.

As to treatment of prisoners of war, the 1956 Manual contains a new paragraph, the necessity for which is a sad commentary on the actual practises in World War II:

A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears certain that they will regain their liberty through the impending success of their forces. It is likewise unlawful for a commander to kill his prisoners on grounds of self-preservation, even in the case of airborne or commando operations, although the circumstances of the operation may make necessary rigorous supervision of and restraint upon the movements of prisoners of war.³⁴

In similar vein, the Manual quotes language of the 1949 Treaty prohibiting the subjection of a prisoner of war to physical mutilation or to medical or scientific experiments which are not justified in the interest of the prisoner himself.³⁵ These provisions were, of course, implicit in the prior rules. Before the experiences of World War II it had not been thought necessary to state them.

The 1929 Convention and the 1940 Manual required segregation of prisoners of war by race and nationality.³⁶ The 1949 Convention and the 1956 Manual provide,

. . . all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.³⁷

The new rules provide additional safeguards to protect prisoners of war against the hazards of war. The location of prisoner of war camps is to be communicated to enemy governments, the camps are to be marked

34. ¶ 85. The view that prisoners of war might lawfully be put to death under the circumstances described in this paragraph has been deemed obsolete since the adoption of the Hague Regulations of 1907. 2 OPPENHEIM, INTERNATIONAL LAW, 271 note (6th ed., rev., 1944). See note 29, *supra*.

35. ¶ 89.

36. 1929 Convention, Art. 9; 1940 Manual, ¶ 82.

37. 1949 Convention, Art. 16; 1956 Manual, ¶ 92a.

to discourage aerial attack and they are to be equipped with air raid shelters.³⁸

As to food, the 1929 Convention and the 1940 Manual prescribed substantially the Golden Rule: that prisoners of war should be given rations equal in quantity and quality to those of the troops at base camps of the detaining power.³⁹ This provision proved, in practice, unsatisfactory when prisoners of European stock were held by an oriental power whose own troops subsisted on rice and fish heads. The 1949 Convention and the 1956 Manual require rations which take account of the habitual diet of the prisoners, sufficient in quantity, quality and variety to keep them in good health and prevent loss of weight or the development of nutritional deficiencies.⁴⁰

The 1929 Convention and the 1940 Manual required the detaining power to give officer prisoners the same pay it gave its own officers, to compensate prisoners who performed work at rates comparable to those paid the detaining power's own workers, to give prisoners injured in the course of their work the benefits of its own workmen's compensation laws, and to permit prisoners to send funds to their families or home banks.⁴¹ The 1949 Convention and the 1956 Manual substantially reduce these financial obligations of the detaining power. Under the new rules the detaining power need only pay prisoners of war rather small allowances (\$2 a month for privates; \$15 a month for colonels) and such compensation as it shall fix, not less than a quarter of a Swiss franc (6¢) per day, for work. The prisoners' own government is responsible for the balance of their pay, allotments to dependents, and workmen's compensation benefits.⁴²

The new rules regulating discipline of prisoners of war are similar to the old. They may be given summary punishment, not to exceed 30 days' confinement, or given formal trials by the detaining power for offenses committed. There are a few innovations. Summary punishment may not be imposed without a hearing in which the accused prisoner is informed of the charges against him and given an opportunity to speak and call

38. 1956 Manual, ¶ 99.

39. 1929 Convention, Art. 11; 1940 Manual, ¶ 84.

40. 1949 Convention, Art. 26; 1940 Manual, ¶ 102.

41. 1929 Convention, Arts. 23, 24, 27, 34; 1940 Manual, ¶¶ 96, 97, 100, 107.

42. 1949 Convention, Arts. 54, 60, 62, 63, 68; 1956 Manual, ¶¶ 130, 136, 138, 139, 144.

witnesses in his defense. Power to impose summary punishment may not be exercised by an officer who is himself a prisoner of war.⁴³ The right to counsel in a formal trial has been amplified.⁴⁴

Both the 1929 and the 1949 Conventions provide that prisoners of war shall be repatriated upon the cessation of hostilities.⁴⁵ The 1949 Convention expressly provides that prisoners of war may not renounce in part or in entirety the rights secured to them by the Convention.⁴⁶ The 1956 Manual declares that prisoners of war are precluded from renouncing not only their rights but their status as prisoners of war, whether they seek to become civilians or to join the armed forces of the detaining power.⁴⁷ Nevertheless, the new Manual asserts that a detaining power may, in its discretion, lawfully grant asylum to prisoners of war who do not desire to be repatriated.⁴⁸ It is difficult to reconcile these provisions. They bring to mind the practice of the Confederate States of permitting captured Union soldiers to join the Confederate Army and the controversies following World War II and Korea over prisoners of war who did not want to go home.

As to wounded, sick, chaplains and medical personnel who fall into the power of the enemy, the provisions of the 1949 Conventions and the 1956 Manual are similar to those of 1929 and 1940. There are some differences. Under the 1929 Convention and the 1940 Manual captured chaplains and medical personnel could not be detained. They were required to be sent back to their own army as soon as military exigencies permitted.⁴⁹ The new rules permit the captor to retain those required to see to the health and spiritual needs of prisoners of war. Retained chaplains and medical personnel are not technically prisoners of war and are to be used only for religious and medical duties.⁵⁰ Similarly, whereas the old rules

43. 1949 Convention, Art. 96; 1956 Manual, ¶ 172a.

44. 1949 Convention, Art. 105; 1956 Manual, ¶ 181.

45. 1929 Convention, Art. 75; 1940 Manual, ¶ 161; 1949 Convention, Art. 118; 1956 Manual, ¶ 198.

46. Art. 7.

47. 1956 Manual, ¶ 87b.

48. ¶ 199.

49. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 27 July, 1929, Art. 12, 47 Stat. 2074, Treaty Series 847; 1940 Manual, ¶ 186.

50. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, Art. 28, T.I.A.S. 3362; 1956 Manual, ¶ 230.

required the return of captured medical vehicles,⁵¹ the new permit the captor to retain them for use in care of the wounded and sick.⁵²

Protection of Civilians; Military Government

The 1907 Hague Regulations Respecting the Laws and Customs of War on Land contained fifteen brief articles relative to military government of occupied enemy territory.⁵³ The 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War⁵⁴ supplements the regulations for military government of occupied territory and also lays down detailed rules for the protection of civilians who are in the domestic territory of a belligerent state subject to its own government. The necessity for these rules stems from the great extent to which modern methods of warfare affect non-combatant civilians. Whereas in earlier centuries hostilities were normally limited to a relatively small battle zone peopled only by armies and persons serving with them, twentieth century war involves strategic bombing, airborne operations, raids by armored columns and infiltrating commandos, fifth column movements, psychological warfare and other techniques which affect civilians in the heart of the domestic territory of the warring nations, far from the formal battle line of the contending armies. In modern total war the battle zone really includes the whole of the territory of the belligerent states and subjects their whole populations to both danger and the temptation to subversion.

The new rules permit a belligerent government to establish in its own territory and areas occupied by it hospital and safety zones, exempt from attack, for the protection of wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.⁵⁵ They contemplate agreements between the belligerent governments for the establishment of neutralized zones for the protection of the wounded and sick and civilians not engaged in war work.⁵⁶ They extend to the civilian wounded and sick, hospitals and transportation facilities used for them, and medical and nursing personnel caring for them, protection analogous

51. 1929 Convention, Arts. 14, 17; 1940 Manual, ¶¶ 188, 191.

52. 1949 Convention, Art. 35; 1956 Manual, ¶¶ 234b, 236a.

53. Arts. 42-56.

54. T.I.A.S. 3365.

55. Convention, Art. 14; 1956 Manual, ¶ 253.

56. Convention, Art. 15; 1956 Manual, ¶ 254a. ¶ 254b authorizes subordinate military commanders to conclude such agreements.

to that afforded similar military personnel and facilities.⁵⁷ They prohibit, in general, interference, by blockade or otherwise, with shipment of medical, hospital and religious goods destined for civilians and essential food, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.⁵⁸ They provide for the protection of war orphans under fifteen.⁵⁹ Heretofore, private correspondence between persons within the control of one belligerent power and persons within the control of a hostile power has been treated as criminal.⁶⁰ The new rules require that persons in the territory of a hostile power and in areas occupied by it be permitted to correspond with their families, wherever they may be.⁶¹

The Convention affords special protection to enemy nationals within the control of a hostile government, both those in its domestic territory and those in areas occupied by it.⁶² They are entitled to respect for their persons, honor, family rights, religion, manners and customs and to protection against violence, murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by their own treatment, insults and public curiosity, without adverse distinction based on race, religion or political opinion.⁶³ Three articles of the new Convention prohibit practises which, heretofore, particularly in the military government of occupied territory, have been common:

No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.⁶⁴

57. Convention, Arts. 16-22; 1956 Manual, ¶¶ 255-261.

58. Convention, Art. 23; 1956 Manual, ¶ 262.

59. Convention, Art. 24; 1956 Manual, ¶ 263.

60. G.O. 100, 1863, Art. 86; 1940 Manual, ¶ 215; Trading with the Enemy Act, Oct. 6, 1917, c. 106, § 3, 40 Stat. 412, 50 U.S.C. App. § 3; *United States v. Krepper*, 159 F. 2d 958 (3rd Cir. 1946), *certiorari denied*, 330 U.S. 824 (1947).

61. Convention, Art. 25; 1956 Manual, ¶ 264.

62. Convention, Art. 4; 1956 Manual, ¶ 247.

63. Convention, Arts. 27-29, 32; 1956 Manual, ¶¶ 266-268, 271. To this end, they are, like prisoners of war, guaranteed communication with a neutral protecting power and with the International Red Cross. Convention, Art. 30; 1956 Manual, ¶ 269.

64. Art. 31; 1956 Manual, ¶ 270a. ¶ 270b interprets this as prohibiting the imprisonment of guides. Does it mean that an enemy national may not be compelled to testify before a court of justice when such compulsion would not violate the Fifth Amendment to the Constitution of the United States and would not force him to be disloyal to his own country?

No protected person may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or terrorism are prohibited.

Pillage is prohibited.

Reprisals against protected persons and their property are prohibited.⁶⁵

The taking of hostages is prohibited.⁶⁶

As to enemy nationals who are within the domestic territory of a belligerent nation, the Convention contemplates that they shall normally be permitted to depart. If they remain they are, in principle, to be regulated by the provisions governing aliens in time of peace and, in any event, allowed to receive relief funds and packages, medical and hospital treatment on the same terms as domestic citizens, religious freedom, permission to move away from dangerous areas and, as to children under fifteen years, expectant mothers and mothers of children under seven years, the benefit of any preferential treatment extended to domestic citizens. They are to be permitted to engage in paid employment or supported by the local government. They may be compelled to work only to the same extent as domestic citizens and, when so compelled, shall have the same working conditions, wages, hours of labor, clothing, equipment and workmen's compensation as domestic citizens. They may not be compelled to do work directly related to the conduct of military operations.⁶⁷

Enemy nationals who are within the domestic territory of a belligerent power or in areas occupied by it may be interned or placed in assigned residences for security reasons or, at their own request, for their protection. When interned, such persons are entitled to treatment substantially similar to that provided for prisoners of war, including adequate food, clothing, shelter and medical care, money allowances, religious service, recreational opportunities, rights to complain and to correspond with relatives. The restrictions on summary punishment and trial of internees are also similar to those on discipline of prisoners of war. Unlike

65. Art. 33; 1956 Manual, ¶ 272. See Albrecht, *War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949*, 47 AM. J. INT. L. 590 (1953).

66. Art. 34; 1956 Manual, ¶ 273.

67. Convention, Arts. 35-40; 1956 Manual, ¶¶ 274-279.

prisoners of war, civilian internees may not be required to work. Members of a family are to be allowed to live together, where possible. Civilian internees are to be permitted to receive visitors. In order to enforce these rights, inspection of internment camps by neutral protecting powers and the International Red Cross is provided for, as in the case of prisoner of war camps.⁶⁸

The new provisions already mentioned modify substantially the regulations respecting military government of occupied territory. The 1956 Manual introduces other changes in the rules for military government. The 1940 Manual contemplated only military government of occupied *enemy* territory. The new Manual recognizes the occasional necessity for military government of friendly foreign territory as a provisional and interim measure and for more permanent military control of such territory by agreement with the friendly government concerned. The latter is referred to as "civil affairs administration."⁶⁹ The 1956 Manual also contains a new provision that, while the law of military occupation applies of its own force only to areas effectively occupied, the rules should, as a matter of policy, be observed as far as possible in areas through which troops are passing and even on the battlefield.⁷⁰

The new rules regulating military government of occupied territory manifest throughout a shift of emphasis from the duty of the inhabitants to obey the occupying forces to the duty of the occupying forces to govern humanely with a view to the welfare of the inhabitants. They contain numerous statements of duties and responsibilities of, and restrictions upon, the occupying forces. The occupying power is charged with responsibility for the maintenance and education of children,⁷¹ ensuring food and medical supplies and service to the population and facilitating religious activity.⁷² It is required to cooperate in schemes for relief of the populace when food, medical supplies or clothing are needed, and to facilitate the activities of such relief agencies as the Red Cross.⁷³

The restrictions on destruction and confiscation of property in the occupied area have been extended and the rules regulating seizure of

68. Convention, Arts. 41-43, 78-143; 1956 Manual, ¶¶ 280-282; 286-350; 433.

69. 1956 Manual, ¶ 354.

70. ¶ 352b.

71. Convention, Art. 50; 1956 Manual, ¶ 383.

72. Convention, Arts. 55-58; 1956 Manual, ¶¶ 384-387.

73. Convention, Arts. 59-63; 1956 Manual, ¶¶ 388-392.

enemy public property and requisition of private property amplified."⁷⁴ The occupying power may not compel the inhabitants to work unless they are over eighteen years of age, and then only within the occupied territory on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. They may not be compelled to do work involving participation in military operations or compelled, pressured or propagandized into joining the armed or auxiliary forces of the occupying power. They may not be induced to work for the occupying power by measures aimed at creating unemployment in other fields. Workers are to be paid a fair wage and given the benefits of the legislation of their country as regards wages, hours of work, equipment and workmen's compensation for injuries. They are not to be formed into organizations of a military or semi-military character.⁷⁵

Under the new rules, an occupying power may restrict freedom of movement within the occupied territory but it may not compel inhabitants of that territory to go out of it except temporarily for their own security or for imperative military reasons.⁷⁶ These rules are designed to prohibit forcible mass transfers of population.

The 1956 Manual contains several new provisions as to financial management of occupied territory. The occupying power is not to create new taxes unless required to do so by considerations of public order and safety.⁷⁷ If the occupying power requires money contributions in excess of the existing taxes, they may not be imposed for the enrichment of the occupying power, for the payment of war expenses generally, or for other than the needs of the occupying forces and the administration of the occupied territory.⁷⁸ A new paragraph is aimed at financial measures of the type used by the German armies of occupation in World War II to enrich themselves indirectly at the expense of the inhabitants of the occupied territory:

74. Convention, Arts. 53, 55, 57; 1956 Manual, ¶¶ 393b, 394, 395, 399, 404, 407, 409, 410, 413, 414.

75. Convention, Arts. 51, 52; 1956 Manual, ¶¶ 418-421.

76. Convention, Art. 49; 1956 Manual, ¶¶ 375, 382.

77. ¶ 426b.

78. ¶ 428b.

The occupying power may leave the local currency of the occupied area in circulation. It is also authorized to introduce its own currency or to issue special currency for use only in the occupied area, should the introduction or issuance of such currency become necessary. The occupant may also institute exchange controls, including clearing arrangements, in order to conserve the monetary assets of the occupied territory. Such measures must not, however, be utilized to enrich the occupant or otherwise circumvent the restrictions placed on requisitions, contributions, seizures, and other measures dealing with property. Intentional debasement of currency by the establishment of fictitious valuation or exchange rates, or like devices, as well as failure to take reasonable steps to prevent inflation, are violative of international law.⁷⁹

The fundamental basis of all the restrictions on financial measures is, for the first time, explicitly stated:

The economy of an occupied country can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear.⁸⁰

The new Manual sets out in greater detail than previous editions the right of an occupying power to change the laws in force in the occupied territory. In brief summary, such a power is not authorized to alter private law—the law governing the rights of the inhabitants against each other⁸¹—but it may repeal, suspend or add to the criminal law to the extent necessary to maintain orderly government, ensure its own security, and enable it to carry out the duties of an occupying power under international law.⁸² New provisions of criminal law enacted by the occupying power may not be retroactive and may not come into force until published and brought to the knowledge of the inhabitants in their own language.⁸³ If the occupying power chooses to try inhabitants for offenses in courts established by it, they must be properly constituted, non-political military courts and must sit in the occupied territory. Sentence may not be pronounced except after

79. ¶ 430.

80. ¶ 364.

81. 1907 Hague Regulations, Art. 23, par. (h), 1956 Manual, ¶ 372.

82. Convention, Art. 64; 1956 Manual, ¶¶ 369-371.

83. Convention, Art. 65; 1956 Manual, ¶ 435.

a regular trial in which the accused is informed of the charges against him, given an opportunity to call witnesses and present evidence in his defense, and allowed counsel of his own choice, which counsel is permitted to visit the accused freely and to enjoy the necessary facilities for preparing the defense. The protecting neutral power, if any, is to be notified of trials for serious offenses.⁸⁴ Article 68 of the Convention provides that the criminal laws enacted by an occupying power may impose the death penalty only for espionage, sabotage or intentional offenses causing death and then only when such offenses were punishable by death under the law of the occupied territory in force before the occupation began. However, the United States has reserved the right to impose the death penalty for such offenses without regard to whether that penalty was imposable under the law of the occupied territory in force before the occupation began.⁸⁵ Sentences to internment or imprisonment are to be served within the occupied country and persons awaiting trial or under sentence at the close of the occupation are to be turned over to the authorities of the liberated territory.⁸⁶

The 1956 Manual contains a new paragraph declaring that military and civilian personnel of the occupying forces and persons accompanying them are not subject to the local law or the jurisdiction of the local courts but that the occupying power should see to it that they are subject to some appropriate system of law and that courts are in existence to deal with their civil litigation and criminal punishment.⁸⁷

The Convention prohibits an occupying power from depriving persons in occupied territory of its benefits by agreement with the authorities of that territory or by annexation of the territory.⁸⁸ This prohibition is amplified by a significant paragraph of the 1956 Manual:

The restrictions placed upon the authority of a belligerent government cannot be avoided by a system of using a puppet government, central or local, to carry out acts which would be un-

84. Convention, Arts. 66, 67, 71, 72, 74; 1956 Manual, ¶¶ 436, 437, 441, 442, 444.

85. 1956 Manual, ¶ 438.

86. Convention, Arts. 76, 77; 1956 Manual, ¶¶ 446, 447.

87. ¶ 374.

88. Art. 47; 1956 Manual, ¶ 365.

lawful if performed directly by the occupant. Acts induced or compelled by the occupant are nonetheless its acts.⁸⁹

In addition to the topics which have been discussed, the 1956 Manual, like its predecessor, contains chapters on neutrality and nonhostile relations of belligerents.⁹⁰

The 1956 Manual on The Law of Land Warfare is, on the whole, a competent, clear and thorough statement of the international law of war on land as understood and applied by the United States. It is to be regretted that the new Manual makes no reference to the use of pilotless missiles and contains no clear statement of the position of the United States with respect to the legality of using poison gas and bacteriological warfare against human beings.

Comparison of the rules stated in the new Manual with those recognized in the past indicates that international law has made distinct progress in the direction of more humane conduct of warfare insofar as the protection of civilians and combatants against suffering arising from causes other than the actual conduct of hostilities is concerned. As to the conduct of hostilities, serious retrogression from the standards recognized at the beginning of this century is evident. The attempt to bar the use of new and more deadly weapons has been abandoned and the prohibition on attack and bombardment of undefended places has been qualified to an extent which leaves every peaceful inhabitant of an industrial city or transportation center a potential victim of aerial bombardment. Perhaps the standards expressed in the treaties and text-books at the beginning of the century represented ideals of humane conduct which could not, as a practical matter, be enforced under conditions of actual war, at least not in such death-struggles between great powers as have occurred during the first half of the century. It is, probably, better that the written laws of war lay down limited rules which can be enforced than broad ideals which are unattainable in practise. The new rules contemplate punishment of individuals for violations of the laws of war directed by their governments. Certainly such punishment should not be imposed for acts which are the common practise of all governments.

89. ¶ 366. This is a paraphrase of a passage in LEMKIN, *AXIS RULE IN OCCUPIED EUROPE*, 11 (1944).

90. 1940 Manual, ¶¶ 215-270, 360-403; 1956 Manual, ¶¶ 449-494, 512-552.