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Article

Errors and Misconceptions in the 2015 Department Of Defense Law of War Manual

Jordan J. Paust*

Introduction

This Article focuses primarily on several errors and manifest misconceptions contained in portions of Part I of the 2015 Department of Defense Law of War Manual (the “2015 Manual” or the “Manual”).¹ These are related to the unavoidable duty of all members of the Executive branch, including members of the armed forces, to faithfully execute the law; the authority of the Executive to execute treaties; the relationship between the laws of war and other forms of international law applicable during armed conflict; the applicability and reach of human rights law during armed conflict; and the nature, reach, and content of customary international law. This Article also addresses certain other errors and concerns with respect to the nature of war crimes, compensation, targetable civilians, military necessity, the test regarding weapons of a nature to cause unnecessary suffering, dum-dum bullets, herbicides, destruction of food and water, justified force in the context of Kosovo, the proper test for legitimate self-defense, and the nature of non-international armed conflicts.

Importantly, with respect to manifest errors and misconceptions, it would be a grave breach of a lawyer’s professional responsibilities to base legal advice on manifestly erroneous statements of law. If manifestly in error, the appearance of such statements in a DOD Manual affords no

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1. OFFICE OF GEN. COUNSEL DEP’T OF DEF., LAW OF WAR MANUAL (2015) [hereinafter DOD MANUAL]. Not all errors or concerns are addressed in this Article.

ethical² or legal³ excuse. If the lawyer is in uniform, her duty to the law is even stronger⁴ and her professional leadership will require opposition to misstatements of law.

2. See Jose Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 215–21 (2006); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. L. & POL'Y 455 (2005); Marjorie Cohn, *Advising Clients to Commit War Crimes with Impunity: An Unethical Practice*, 10 SEATTLE J. FOR SOC. JUST. 249 (2011); Charles J. Dunlap, Jr., *A Tale of Two Judges: A Judge Advocate's Reflections on Judge Gonzales's Apologia*, 42 TEX. TECH. L. REV. 893, 897–98 (2010) (noting that government lawyers should not merely take a “legalistic view of a practitioner’s responsibilities” or be “simply agents of the executive branch”); George C. Harris, *The Rule of Law and the War on Terror: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT'L SEC. L. & POL'Y 409, 431–41 (2005); Milan Markovic, *Advising Clients After Critical Legal Studies and the Torture Memos*, 114 W. VA. L. REV. 109 (2011); Keith A. Petty, *Professional Responsibility Compliance and National Security Attorneys: Adopting the Normative Framework of Internalized Legal Ethics*, 4 UTAH L. REV. 1563 (2011); Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1 (2006); Michael P. Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT'L L. 389 (2010); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005); Philip Zelikow, *Codes of Conduct for a Twilight War*, 49 HOUS. L. REV. 1 (2012); see also DOD MANUAL, *supra* note 1, at 2, § 1.1.2 (“This manual is not a substitute for the critical practice of law. As specific legal issues arise, legal advisers should consider relevant legal and policy materials . . . and should apply the law to the specific factual circumstances.”). Clearly, it would be unethical for Department of Defense (“DOD”) or military lawyers to act like automatons or rely on manifest error proffered previously by a lawyer in the White House, NSA, or Department of State.

3. See Rome Statute of the International Criminal Court art. 32(2), *opened for signature* July 17, 1998, 2187 U.N.T.S. 1002 (entered into force July 1, 2002) [hereinafter Rome Statute] (“A mistake of law . . . shall not be a ground for excluding criminal responsibility . . . [m]ay, however be a ground for excluding criminal responsibility if it negates the mental element required by such a crime”); *id.* art 33(1)(c) (stating that a manifestly unlawful order shall not relieve a person of criminal responsibility); UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 443, § 16.43 (2004) [hereinafter UK MANUAL] (“Ignorance of the law is no excuse”); GEOFFREY S. CORN ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 515–16 (2012) (summarizing that illegal orders are no defense); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 244–45 (2004) (explaining that mistake of law and ignorance of the law are not an excuse but may negate a particular mental element required, but a mental element “cannot be negated if the illegality of the war crime is obvious to any reasonable man.”); *id.* at 250–51 (emphasizing that manifestly unlawful orders are not a defense); JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 122–35 (4th ed. 2013) (explaining that superior orders or authorizations that are manifestly or obviously unlawful provide no defense with respect to criminal conduct); see also DOD MANUAL, *supra* note 1, at 1058, § 18.3.2 (“[M]ust refuse to comply with clearly illegal orders . . .”).

4. See *United States v. Lee*, 106 U.S. 196, 220 (1882); DIANE H. MAZUR, A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY

I. MANIFEST ERRORS AND RECOGNIZABLE MISCONCEPTIONS

A. ALL MEMBERS OF THE EXECUTIVE BRANCH ARE BOUND BY THE LAWS OF WAR

One of the most egregious and troubling manifest errors in the 2015 Manual is the bald assertion that “[t]he customary law of war is part of U.S. law insofar as it is not inconsistent with . . . a controlling executive . . . act.”⁵ This statement is patently false, seriously threatening to the rule of law, and dangerously inattentive to the unavoidable constitutionally-based duty of the President of the United States and all members of the Executive branch faithfully to execute the laws,⁶ which famously include customary international laws of war.⁷ As noted in a prior writing, with respect to unanimous recognition by the judiciary of the president’s express and unavoidable constitutional duty to faithfully execute the laws of war,

In view of such a constitutionally-based mandate and limitation on presidential power, there has been a unanimous and unswerving recognition by Founders, Framers, and the

STRONGER 113–15 (2010) (stressing that military personnel have a duty to the Constitution and the country, not merely to a particular president); *see also* Dunlap, Jr., *supra* note 2.

5. DOD MANUAL, *supra* note 1, at 39, § 1.10.2.2.

6. U.S. CONST. art. II, § 3 (“[H]e shall . . . take care that the laws be faithfully executed . . .”).

7. *See, e.g.*, Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT’L L. & POL’Y 205, 240–45 n.135 (2008) [hereinafter Paust, *In Their Own Words*] (addressing fourteen U.S. Supreme Court cases, four other cases when future Supreme Court Justices were on circuit [*United States v. American Gold Coin*, 24 F. Cas. 780, 782 (C.C.D. Mo. 1868) (No. 14,439) (Miller, J., on circuit); *Elgee’s Adm’r v. Lovell*, 8 F. Cas. 449, 454 (C.C.D. Mo. 1865) (No. 4,344) (Miller, J., on circuit); *Dias v. The Revenge*, 7 F. Cas. 637, 639 (C.C.D. Pa. 1814) (No. 3,877) (Washington, J., on circuit); *The Joseph*, 13 F. Cas. 1126, 1130–31 (C.C.D. Mass. 1813) (No. 7,533) (Story, J., on circuit) (stating that he “cannot yield to this construction” that the President can “abridge the general rights of capture” under the laws of nations)], and other cases, opinions, and materials on point, including a famous Opinion of the Attorney General during the Civil War, 11 Op. Att’y Gen. 297, 299–300 (1865)); *see also* *United States v. Smith*, 27 F. Cas. 1192, 1229 (C.C.D.N.Y. 1806) (Paterson, J., on circuit) (explaining that the Neutrality Act “is declaratory of the law of nations” and the President is bound to “take care that the laws be faithfully executed.”); *Henfield’s Case*, 11 F. Cas. 1099, 1102 (C.C.D. Pa. 1793) (Jay, C.J.) (“[T]he laws of nations . . . are those laws by which civilized nations are bound to regulate their conduct . . .”).

federal and state judiciary that during an armed conflict to which the laws of war apply, the President, despite whatever competence the Commander in Chief power provides, and all persons within the executive branch are bound by the laws of war.⁸

The president is not above the law and has no authority to violate or control the law. As the Supreme Court emphasized more generally with respect to unlawful executive conduct just after and in connection with the United States Civil War,

No man in this country is so high that he is above the law . . . All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office . . . is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.⁹

The 2015 Manual provides only one citation in alleged support of its manifestly unconstitutional and dangerous error,¹⁰ namely, a partial quotation of two sentences from the 1900 Supreme Court opinion in *The Paquete Habana*.¹¹ In complete contrast to the Manual's assertion, the Supreme Court famously ruled that executive claims regarding the content of customary laws of war were not controlling, that executive conduct against enemy aliens abroad during war was in violation of the laws of

8. Paust, *In Their Own Words*, *supra* note 7, at 240.

9. *Lee*, 106 U.S. at 220; *see also* *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (“The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.”); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866) (explaining that there are no powers *ex necessitate* outside the Constitution and its reach); *United States v. Tiede*, Crim. Case No. 78-001A, 86 F.R.D. 227, 242 (U.S. Ct. for Berlin Mar. 14, 1979) (“[T]here has never been a time when United States authorities exercised governmental powers in any geographical area – whether at war or in times of peace – without regard for their own Constitution.”), *reprinted in* 19 I.L.M. 179, 188, 191–92 (1980).

10. *See* DOD MANUAL, *supra* note 1, at 39 n.178.

11. *The Paquete Habana*, 175 U.S. 677, 700 (1900). The DOD Manual misquotes the case, as the first sentence actually states: “International law is part of our law, and *must* be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.” *Id.* (emphasis added).

war, and that appropriate compensation was required.¹² What the 2015 Manual impliedly supports is one of the false claims proffered by President George W. Bush, Vice President Dick Cheney, and their complicit entourage in an infamous effort to facilitate a program of systematic and widespread serial criminality by claiming that the president and others in the Executive branch were not bound by the laws of war and—in serious subversion of the United States Constitution—that they were above the law.¹³

The same erroneous sentence in the 2015 Manual sets forth a manifestly compounded error when alleging that “[t]he customary law of war is part of U.S. law insofar as it is not inconsistent with any treaty to which the United States is a Party”¹⁴ There is no known Supreme Court or other federal court decision holding that treaties necessarily trump inconsistent customary international law. On the contrary, it is well known that the opposite occurs when customary

12. See, e.g., *The Paquete Habana*, 189 U.S. 453 (1903) (explaining that Justice Holmes reaffirmed the earlier ruling and affirmed compensation that was owed); *id.* at 698 (“[L]aw of war”), 700, 708 (“[B]y the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, [even] in the absence of any treaty or other public act”), 714 (“[I]t is the duty of this court . . . administering the law of nations, to declare and adjudge that the capture was unlawful”) (1900) (alteration in original); Jordan J. Paust, *Paquete and the President: Rediscovering the Brief for the United States*, 34 VA. J. INT’L L. 981 (1994) (providing full documentation of actual claims, which never involved a claim to violate the laws of war; the meaning of several sentences in Justice Gray’s opinion, similar phrases in an earlier opinion of Justice Gray, and their relation to judicial responsibility to identify and clarify the content of customary international law, and the holding). Concerning the primacy of judicial power to identify, clarify, and apply international law, especially with respect to rights, duties, status, and competencies during war, see also Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503, 517–25 (2003) [hereinafter Paust, *Judicial Power*].

13. See, e.g., JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR* (2007); Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2 UTAH L. REV. 345, 345–73 (2007); Jordan J. Paust, *The Bush-Cheney Legacy: Serial Torture and Forced Disappearance in Manifest Violation of Global Human Rights Law*, 18 BARRY L. REV. 61, 67 (2012) [hereinafter Paust, *Serial Criminality*]; Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law*, 43 COLUM. J. TRANSNAT’L L. 811, 856–61 (2005).

14. DOD MANUAL, *supra* note 1, at 39, § 1.10.2.2.

international law achieves the peremptory status of *jus cogens*.¹⁵ Additionally, the Manual's sweeping reference to "any treaty" would allegedly set a primacy for any bilateral treaty over customary international law, an illogical result that has no known support in international or domestic United States law.

The same sentence in the Manual alludes to the possibility that an inconsistent legislative act would be controlling within the United States domestic legal process.¹⁶ However, several opinions of Supreme Court justices have recognized that customary international law has primacy, including primacy over the laws of war. At least twelve cases that affirm the primacy of customary international law are based on opinions of Supreme Court justices (which must necessarily be determinative), and cases affirming the primacy of customary international law outnumber those lower court opinions stating that domestic legislation prevails.¹⁷ Importantly, predominant

15. See, e.g., Vienna Convention on the Law of Treaties arts. 53, 64, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; Human Rights Comm., General Comment No. 24, General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 2, 1994); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmts. a, n (AM. LAW INST. 1987); JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 3–4, 61–63 (3d ed. 2009). *Jus cogens* norms are peremptory norms of universally applicable customary international law. Examples of rights, duties, and prohibitions *jus cogens* have been identified.

16. DOD MANUAL, *supra* note 1, at 39, § 1.10.2.2.

17. See, e.g., JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 108–15 (2d ed. 2003); Paust, *In Their Own Words*, *supra* note 7, at 217–30. The thirteen opinions of Supreme Court Justices are in *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 261 (1984) (concluding that although political branches may terminate a treaty, power "delegated by Congress to the Executive . . . [,]" presumably by statute, and such a Congress-Executive "arrangement" must not be "exercised in a manner inconsistent with . . . international law"); *The Scotia*, 81 U.S. (14 Wall.) 170, 187 (1871) ("Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world."); *Tyler v. Defrees*, 78 U.S. (11 Wall.) 331, 354–55 (1871) (Field, J., dissenting); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 316 (1870) (Field, J., dissenting); *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 537, 539–40 (1867) (explaining that a federal statute of limitations contained no exception regarding suspended claims during war, but "principles of international law" and the customary "law of nations" required a de facto exception because "the operation of the statute of limitation is also suspended . . . by the existence of the war and the law of nations"); *Strother v. Lucas*, 37 U.S. (12 Pet.) 410, 436–37 (1838) (explaining that obligations of the U.S. "were regulated by the law of nations" and a private right to property protected thereunder is "inviolable"); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 641–42 (1818) ("[C]ongress

views of the Founders and Framers,¹⁸ Supreme Court opinions,¹⁹ and a famous opinion of the Attorney General during the Civil

cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts”); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress can never be construed to violate . . . rights . . . [under the customary law of nations] further than is warranted by the law of nations”); *Dole v. New England Mutual Marine Ins. Co.*, 7 F. Cas. 837, 847 (C.C.D. Mass. 1864) (No. 3,966) (Clifford, J., on circuit) (stating that the legislative authority of a country may doubtless enlarge the definition of piracy, but, implicitly, must not “diminish” the prohibition under customary law); *United States v. Darnaud*, 25 F. Cas. 754, 759–60 (C.C.E.D. Pa. 1855) (No. 14,918) (Grier, J., on circuit) (recognizing that if Congress “were to call upon courts of justice to extend the jurisdiction of the United States beyond the limits . . . [set by the “law of nations”], it would be the duty of courts of justice to decline”); *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 847–51 (C.C.D. Mass. 1822) (No. 15,551) (Story, J., on circuit) (recognizing “an offence against the universal law of society” and that “no nation can rightfully permit its subjects to carry it on, or exempt them . . . [and] no nation can privilege itself to commit a crime against the law of nations”); JAMES WILSON, A CHARGE DELIVERED TO THE GRAND JURY IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF VIRGINIA (1791) (emphasizing that the customary law of nations cannot be altered or abrogated by domestic law), *reprinted in* 2 THE WORKS OF JAMES WILSON 803, 813–14 (Robert G. McCloskey ed., 1967); *see also* *Penhallow v. Doane’s Adm’r*, 3 U.S. (3 Dall.) 54, 82–84 (1795) (quoting a resolution of the Continental Congress of March 6, 1779, which had claimed a supreme power [as opposed to that of the states] “of executing the law of nations” to assure that the “legality” of any action taken was, since it “must be, determined by the law of nations” adding that “the law of nations [must] . . . be most strictly observed”); Paust, *In Their Own Words*, *supra* note 7, at 217 n.34.

18. *See, e.g.*, Paust, *In Their Own Words*, *supra* note 7, at 217–21 (addressing views of Addison, Allen, Chase, Duponceau, Gallatin, Iredell, Jay, Jefferson, Johnson, Kent, Livingston, Madison, Marshall, Nicholas, Paterson, Randolph, Tucker, and Wilson regarding a March 6, 1779, Resolution of the Continental Congress, and an April 15, 1787 letter of the Continental Congress, quoted in *id.*, at 221 n.55 (“[I]t is our duty to take care that all the rights . . . by the laws of nations . . . remain inviolate.”), regarding the primacy of customary laws of nations over congressional legislation). Further, it was understood that the people are bound by international law and could not delegate to the federal government a power that they did not possess; *see id.* at 208–16.

19. *See, e.g.*, *Miller*, 78 U.S. (11 Wall.) at 315–16 (Field, J., dissenting) (“[L]egislation founded [on] the war powers . . . is subject to limitations . . . imposed by the law of nations [T]he power to prosecute war . . . is a power to prosecute war according to the law of nations, and not in violation of that law. The power to make rules . . . is . . . subject to the condition that they are within the law of nations. There is a limit . . . imposed by the law of nations, and [it] is no less binding upon Congress than if the limitation were written in the Constitution.”) (alteration in original); *Murray*, 6 U.S. (2 Cranch) at 77 (“As far as Congress have thought proper to legislate us into a state of war, the law of nations in war is to apply.”), 118; *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (“If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations”). For affirmation that international law imposes limitations on or

War,²⁰ affirm that the customary laws of war must prevail and the Manual should note that the laws of war will have primacy over conflicting federal statutes. Additionally, the Manual should provide clear warning that regardless of whether a customary rule of international law could be displaced domestically, military personnel must comply with the customary rule on the battlefield because, first, domestic law is not an excuse,²¹ and second, violations of international law are subject to civil and criminal sanctions in international and foreign tribunals.²²

exceptions to the war power, see also *United States v. Macintosh*, 283 U.S. 605, 622 (1931) (“[T]he war power . . . tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law.”); *United States ex rel. Schlueter v. Watkins*, 67 F. Supp. 556, 564 (S.D.N.Y. 1946) (“By virtue of . . . [the war power], Congress could . . . [act], provided it be according to the laws of nations and to treaties.”) (alterations in original) (quote by Albert Gallatin, 1798).

20. See 11 Op. Att’y Gen. 297, 299–300 (1865) (“Congress . . . cannot abrogate them . . . [L]aws of nations . . . are of binding force upon the departments and citizens of the Government, though not defined by any act of Congress . . . Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government [i.e., the Executive, to do so either] . . .”) (alterations in original).

21. See, e.g., VCLT, *supra* note 15, art. 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”); *Treatment of Polish Nationals and Other Persons of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44, at 24–25 (Feb. 4); *Report of the International Law Commission to the General Assembly*, 5 U.N. GAOR, Supp. No. 12, at 11, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int’l L. Comm’n 374, U.N. Doc. A/CN.4/34; 9 Op. Att’y Gen. 356, 357, 362–63 (1859) (“A sovereign State who tramples upon the public law of the world cannot excuse himself by pointing to a provision of her own municipal code . . . [and what you, the President,] will do must of course depend upon the law of our own country, as controlled and modified by the law of nations.”) (alteration in original); U.S. DEPT OF ARMY, THE LAW OF LAND WARFARE, at 183, ¶ 511 (1956) [hereinafter LAW OF LAND WARFARE], https://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf (“The fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.”); DOD MANUAL, *supra* note 1, at 38, § 1.10.1.4, at 1119, § 18.22.2 (summarizing that lack of a penalty under domestic law does not obviate personal responsibility); DINSTEIN, *supra* note 3, at 250 (stating that national law is no excuse); DAVID P. STEWART, INTERNATIONAL CRIMINAL LAW IN A NUTSHELL 95 (2014); see also INT’L MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947) (“He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.”).

22. See generally *infra* Part II.C (relating military necessity with potential sanctions from violations of international law).

B. THE EXECUTIVE HAS AUTHORITY TO EXECUTE TREATIES

The express and unavoidable constitutional duty of the Executive to take care that the laws are faithfully executed provides a constitutionally-based competence to do so.²³ Notable views of the Founders,²⁴ at least eight Supreme Court decisions,²⁵ and opinions of three Supreme Court justices while on circuit,²⁶ recognized that the president has authority to

23. See, e.g., Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1567 (1984) (“[T]he President has the duty, as well as the authority, to take care that international law as part of the law of the United States is faithfully executed. The President does that regularly”); Jordan J. Paust, Medellín, Avena, *the Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT’L L. REV. 301, 312 n.40 (2008) [hereinafter Paust, *The Supremacy of Treaties*]; see also U.S. CONST. art. II, § 3; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111, cmt. h (AM. LAW. INST. 1987) (“[I]mplementation by . . . appropriate executive or administrative action.”).

24. See, e.g., PAUST, INTERNATIONAL LAW OF THE UNITED STATES, *supra* note 17, at 180 n.2 (quoting Madison); Paust, *The Supremacy of Treaties*, *supra* note 23, at 312 (quoting Alexander Hamilton and Representative John Marshall). John Marshall’s recognition that the Executive has a duty to execute a treaty by any means it possesses was considered to be “masterly and conclusive” in *Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893), and later in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 684–85 (1952) (quoting *Fong Yue Ting*, 149 U.S. at 714).

25. See, e.g., *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9, 18 (1936) (discussing that the president executes extradition treaties with respect to extraditable individuals and that the president’s “power, in the absence of [a] statute . . . [is] found in the terms of the treaty” as well as where a “treaty confers the power”); *Sanitary District v. United States*, 266 U.S. 405, 425–26 (1925) (discussing how the Executive can choose to sue a state agency to enjoin it and to enforce “treaty obligations” and “no statute is necessary to authorize the suit”); *Francis v. Francis*, 203 U.S. 233, 240 (1906) (“The location of the lands became a duty devolving on the President by the treaty. This duty he could execute without an act of Congress; the treaty, when ratified, being the supreme law of the land, which the President was bound to see executed.”); *Dooley v. United States*, 182 U.S. 222, 231 (1901) (explaining that executive authority in occupied territory is “regulated and limited” as well as “derived directly from the laws of war”); *Cunningham v. Neagle*, 135 U.S. 1, 64 (1890) (stating executive duty to execute treaties exists and implicitly includes authority to assure compliance with all “obligations growing out of . . . our international relations”); *Chew Heong v. United States*, 112 U.S. 536, 563 (1884) (Field, J., dissenting) (“[T]reaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the President”); *Lessee of Pollard’s Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 415 (1840) (“[I]f any act is required on the part of the United States, it is to be performed by the executive, and not the legislative power, as declared in the case of the Peggy in 1801”); Paust, *The Supremacy of Treaties*, *supra* note 23, at 313 & nn.45–46.

26. See *Taylor v. Morton*, 23 F. Cas. 784, 786 (C.C.D. Mass. 1855) (No.

execute treaties. Another Supreme Court decision recognized that a treaty can be executed by a sole executive agreement and that the president can take measures to comply with the agreement.²⁷

In view of these salient recognitions of the constitutionally-based competence of the Executive to execute treaties, it is odd that the 2015 Manual prefers to emphasize a claim that a non-self-executing treaty “would require” that Congress execute the treaty before it would be law before our courts.²⁸ The Manual correctly quotes dictum from the majority opinion in *Medellín v. Texas*,²⁹ but the majority opinion—and hence the Manual—misses or ignores relevant views of the Founders and each of the twelve Supreme Court justice opinions noted above.³⁰ Furthermore, the dictum in *Medellín* was clearly in error.³¹ For military personnel, the issue of whether a treaty or portion thereof is self-executing as domestic law may at best be tangential because, on the battlefield, members of the military necessarily execute treaty-based competencies and obligations every day. Obviously, some competencies require choice regarding proper deployment of combatants, persons who may be targeted, and persons who may be detained. In addition, treaty-based competencies must be lawfully executed whether they are self-operative or not.³² Further, the domestic status of a treaty (*e.g.*, as non-self-executing or automatically

13,799) (Curtis, J., on circuit) (“[T]reaties must . . . [be] executed by the President.”); *In re Sheazle*, 21 F. Cas. 1214, 1217 (C.C.D. Mass. 1845) (No. 12,734) (Woodbury, J., on circuit) (explaining that the president can exercise “ministerial acts” to implement a treaty); *United States v. Cooper*, 25 F. Cas. 631, 641-42 (C.C.D. Pa. 1800) (No. 14,865) (Chase, J., on circuit) (“If the president, . . . by this treaty, was bound to give this Nash up to justice, he was so bound by law; for the treaty is the law of the land . . . His delivery was the necessary act of the president, which he was by the treaty and the law of the land, bound to perform; . . . [the] president . . . [had the] duty [of] . . . carrying a solemn treaty into effect.”).

27. See *Wilson v. Girard*, 354 U.S. 524, 530 (1957) (finding that a treaty can be executed by executive agreement); PAUST, *INTERNATIONAL LAW OF THE UNITED STATES*, *supra* note 17, at 79.

28. See DOD MANUAL, *supra* note 1, at 38, § 1.10.2.1.

29. See *id.* at 39 n.177 (quoting *Medellín v. Texas*, 552 U.S. 491, 525–26 (2008)) (“The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.”). *But see supra* notes 24–27.

30. See *supra* notes 24–27.

31. See Paust, *The Supremacy of Treaties*, *supra* note 23, at 311–14.

32. Because every violation of the laws of war is a war crime (see *infra* Part II A), law of war competencies should be lawfully executed.

incorporated domestic law) provides no excuse with respect to violations of the treaty.³³

To illustrate the need for choice, Article 5 of the Geneva Civilian Convention provides a treaty-based competence of the United States to detain a civilian in the country without trial where “[the U.S.] is satisfied that an individual . . . is definitely suspected of or engaged in activities hostile to the security of the State.”³⁴ Article 42 adds that detention “may be ordered only if the security of the Detaining Power makes it absolutely necessary.”³⁵ Though each provision is incorporated into the treaty law of the United States, they nonetheless require an executing choice and are therefore not self-operative. Nonetheless, when the Executive makes a choice to detain a person and thereafter complies with the standards articulated in the treaty, the choice to detain can have domestic legal effect and the detention will be lawful under the treaty even though the Executive decision will be subject to judicial review.³⁶

C. THERE IS NO LEX SPECIALIS DISPLACEMENT OF HUMAN RIGHTS LAW

The 2015 Manual’s statement that “the law of war, as the *lex specialis* of armed conflict, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims”³⁷ is necessarily false. Another manifestly erroneous statement is the purported need to construe other laws to avoid conflict with the laws of war.³⁸ Rather, each sentence should be deleted. As documented in another article with respect to the actual interrelationship between human rights law and the laws of war,

33. See *supra* note 21 and accompanying text.

34. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 5, Aug. 12, 1949, 75 U.N.T.S. 287.

35. *Id.* art. 42.

36. See, e.g., Paust, *Judicial Power*, *supra* note 12, at 507–10, 514, 518–24.

37. DOD MANUAL, *supra* note 1, at 9, § 1.3.2; see also *id.* at 8 n.11, 9 n.13 (quoting similar remarks); *id.* at 22, § 1.6.3.1 (repeating the false claim that the law of war is necessarily the controlling body of law). These should be deleted.

38. *Id.* at 10, § 1.3.2.2. The manifestly erroneous claim that there is a necessary primacy of laws of war over “other laws” would supposedly include primacy over the U.S. Constitution. *But see supra* note 9 and accompanying text. It would also supposedly include all international laws that are *jus cogens*. *But see supra* note 15 and accompanying text.

human rights law generally applies on the battlefield and in occupied territory. There is no *lex specialis* law of war override of human rights law during war. Indeed, two types of human rights have a recognized and unavoidable primacy during war and in any other social context: (1) customary human rights as rights guaranteed through the U.N. Charter and (2) customary human rights that have an additional preemptory status as rights *jus cogens*. Additionally, treaty-based human rights that are nonderogable must be adhered to and (1) have at least a status equal to that of nonderogable laws of war, (2) have a status higher than that of derogable laws of war, and (3) will not be displaced by non-*jus cogens* laws of war.³⁹

The 2015 Manual correctly notes, however, that human rights law and the laws of war can, and have been, used to inform the meaning of each other,⁴⁰ especially with respect to broad human rights standards and limitations contained in words such as “arbitrary” that pertain to lawful killings and detention during armed conflict.⁴¹

39. Jordan J. Paust, *Human Rights on the Battlefield*, 47 GEO. WASH. INT'L L. REV. 509, 561 (2015) [hereinafter Paust, *Human Rights on the Battlefield*]; see also *id.* at 519–20, 522–23, 525–26 (documenting these general points and noting that human rights law and the laws of war have been used to inform the meaning of each set of laws and that “a contrived displacement of human rights would also be fundamentally inconsistent with a symmetry of rights and obligations that exists in part under each form of law”). The article addresses several types of human rights at stake, provides detailed comparison of human rights and laws of war applicable during an international armed conflict, and illuminates why compliance with global human rights law on a foreign battlefield should not inhibit use of lawful measures of warfare under the laws of war. See *id.* at 531–60.

40. See DOD MANUAL, *supra* note 1, at 8, § 1.3.2 (“[T]he law of war may relate to other bodies of law through . . . law of war rules informing the content of general standards in other bodies of law”); *id.* at 12, § 1.3.2.3 (“[T]he law of war has been used to inform the content of general authorizations to conduct military operations.”); *id.* at 13, § 1.3.2.3 (“[I]nternational courts and commissions have characterized human rights . . . by standards and tests drawn from the law of war.”).

41. Compare International Covenant on Civil and Political Rights art. 6(1), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (“arbitrar[y]” deprivation of life), and *id.* art. 9(1) (“arbitrary” detention), with Paust, *Human Rights on the Battlefield*, *supra* note 39, at 531–35, 542–44, 561 (noting that lawful killing and detention under the laws of war will not be “arbitrary” and adding that “some law of war requirements provide contextually relevant meaning, some are symmetrical, and some are more strict and limiting than those under global human rights law”).

D. HUMAN RIGHTS OBLIGATIONS OF THE UNITED STATES AND
ITS MILITARY APPLY GLOBALLY

With respect to the human rights obligations of the United States and its military personnel set forth in the International Covenant on Civil and Political Rights (“ICCPR”), the 2015 Manual repeats an erroneous and needless Executive assertion that “the ICCPR [does] not apply abroad.”⁴² Like the claims listed in Part I.C above, this claim should be abandoned. It is widely known that the reach of the ICCPR is global and that its provisions apply to all persons within the effective control of a Party to the treaty as well as in territory that it occupies.⁴³ With respect to the reach abroad of the Convention Against Torture (“CAT”),⁴⁴ the 2015 Manual correctly recognizes that the treaty’s phrase “any territory under its jurisdiction”⁴⁵ requires that the CAT provisions “extend to certain areas beyond the sovereign

42. DOD MANUAL, *supra* note 1, at 24, § 1.6.3.3, 739, § 11.1.2.6 (setting forth a fairly shocking claim that the ICCPR “does not create obligations for an Occupying Power with respect to occupied territory”). *But see* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 104–106, 112, 128, 136 (July 9) (discussing that Articles 12 and 17 of the ICCPR are among those that apply to persons in occupied territory). This was also one of the nine false claims that Bush-Cheney *et al.* made in an effort to avoid the restraints of law. *See* Paust, *Serial Criminality*, *supra* note 13, at 64 & n.7. This clearly erroneous claim can have deleterious consequences regarding deflation of U.S. authority abroad and can contribute to terrorist propaganda regarding U.S. adherence to human rights law. *See generally* Jordan J. Paust, *Serial War Crimes in Response to Terrorism Can Pose Threats to National Security*, 35 WM. MITCHELL L. REV. 5201, 5214–15, 5218–19, 5221 (2009). The claim is needless because application of the ICCPR to persons within the effective control of the U.S. will not inhibit lawful measures of warfare. *See supra* note 39 and accompanying text.

43. *See, e.g.*, Paust, *Human Rights on the Battlefield*, *supra* note 39, at 520–22; Paust, *Serial Criminality*, *supra* note 13, at 70–74; Human Rights Comm., General Comment No. 31, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004) (“anyone within the power or effective control of that State Party,” including “those within the power or effective control of the forces of a State Party acting outside its territory”). ICCPR obligations also apply to individuals. *See, e.g.*, ICCPR, *supra* note 41, at 173 (“[r]ealizing that the individual, having duties to other individuals”), art. 14(1) (“his . . . obligations”); Human Rights Comm., General Comment No. 20, ¶¶ 2, 13, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994) (“whether committed by public officials or other persons acting on behalf of the State, or by private persons,” and “whether inflicted by people acting in their official capacity, outside their official capacity, or in a private capacity”); Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992).

44. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

45. *See id.* art. 2(1).

territory of the State Party, and more specifically to ‘all places that the State Party controls as a governmental authority.’”⁴⁶ Nonetheless, the Manual should at least mention that it is well recognized that the CAT also applies wherever a State Party exercises effective control over a person and, therefore, that United States military personnel will be expected to comply with the CAT’s obligations abroad with respect to any detainee within their effective control.⁴⁷

Most troubling in the context of human rights obligations is the failure of the 2015 Manual to mention either the United States’ human rights obligations under the United Nations Charter or the Charter’s primacy over other international agreements.⁴⁸ The United Nations Charter expressly requires that “the United Nations shall promote . . . *universal* respect for, and observance of, human rights and fundamental freedoms for all.”⁴⁹ By referring to human rights, the Charter-based mandate incorporates customary human rights by reference and requires global respect for and observance of customary human rights.⁵⁰

46. DOD MANUAL, *supra* note 1, at 25, § 1.6.3.4, & n.103.

47. *See, e.g.*, Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture, United States of America, July 25, 2006, U.N. Doc. CAT/C/USA/CO/2, ¶¶ 14 (the U.S. “should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction”), 15 (“provisions of the Convention . . . apply to, and are fully enjoyed by, all persons under the effective control of its authorities, of whichever type, wherever located in the world”), 17 (“The State party should ensure that no one is detained in any secret detention facility under its *de facto* effective control. Detaining persons in such circumstances constitutes, *per se*, a violation of the Convention.”), 24 (the U.S. “should rescind any interrogation technique—including methods involving sexual humiliation, ‘water boarding,’ ‘short shackling,’ and using dogs to induce fear, that constitute torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its *de facto* effective control, in order to comply with the Convention.”); Paust, *Serial Criminality*, *supra* note 13, at 74–75.

48. *See* U.N. Charter, arts. 55, para. c, 56, 103.

49. U.N. Charter arts. 55, para. c, art. 1, para. 3; *see also* Paust, *Human Rights on the Battlefield*, *supra* note 39, at 516–20.

50. *See, e.g.*, THOMAS BUERGENTHAL, DINAH SHELTON & DAVID STEWART, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 30, 33, 39–40, 124 (3d ed. 2002); *see also* MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 274, 302, 325–27 (1980) (explaining part of customary human rights law, peremptory human rights and duties *jus cogens* are also protected through the U.N. Charter); Karima Bennouna, *All Necessary Measures? Reconciling International Legal Regimes Governing Peace and Security, and the Protection of Persons, in the Realm of Counter-Terrorism*, in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL

This obligation expressly reaches all members of the United Nations through Article 56 of the U.N. Charter, which requires all members “to take joint and separate action . . . for the achievement of the purposes set forth in Article 55.”⁵¹ Therefore, under the Charter all members of the U.N. have a duty to promote, through joint and separate action, “universal respect for, and observance of, human rights and fundamental freedoms for all” in accordance with the Charter.⁵² Further, Charter members should not violate customary and Charter-based human rights within or outside of their territory.⁵³ There are no geographical limitations regarding the obligation to promote universal respect for and observance of human rights and there are no limits with respect to social contexts, such as those involving terrorism, self-defense, or war. Any limits that exist with respect to relevant customary human rights of particular persons will depend on the nature and reach of relevant human rights that are incorporated by reference through Articles 55(c) and 56 of the U.N. Charter.

Importantly, the International Court of Justice (“ICJ”) has recognized that “a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.”⁵⁴ This recognition must necessarily pertain with respect to conduct engaged in during an armed conflict that violates human rights protected through the U.N. Charter. In

ORDER 667, 676, 680–81 (Larissa Van den Herik & Nico Schrijver eds. 2013).

51. U.N. Charter art. 56.

52. See *id.* arts. 55, para. c, 56; see also Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970), U.N. G.A. Res. 2625 (“Every State has the duty to promote, through joint and separate action universal respect for and observance of human rights”), 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971); HURST HANNUM, S. JAMES ANAYA & DINAH L. SHELTON, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 83 (5th ed. 2011) (quoting George Aldrich, Acting Legal Adviser, U.S. Dep’t of State, “members of the United Nations have a legal duty to promote respect for and protection of human rights around the world”); MCDUGAL, *supra* note 50, at 241 (“universal”), 323 (“universal”), 339 (“human rights prescriptions are applicable . . . to all the activities of nation-states and their officials”).

53. See MCDUGAL, LASSWELL & CHEN, *supra* note 50, at 323–25, 328; RICHARD B. LILLICH ET AL., INTERNATIONAL HUMAN RIGHTS 69, 74–77, 155 (4th ed. 2006) (the duty is to observe, not to violate human rights); 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 923 (Bruno Simma et al. eds., 2d ed. 2002).

54. Legal Consequences for States of Continued Presence of South-Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 131 (June 21).

1980, the United States declared in pleadings before the ICJ that several rights reflected in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights are part of customary international law that are also operative through the U.N. Charter, adding:

[F]undamental rights for all human beings . . . and the existence of a corresponding duty on the part of every State to respect and observe them, are now reflected, *inter alia*, in the Charter of the United Nations, the Universal Declaration of Human Rights and corresponding portions of the International Covenant on Civil and Political Rights.⁵⁵

As recognized by the ICJ in the same case, “[w]rongly to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.”⁵⁶

Significantly, Article 103 of the United Nations Charter assures the primacy of Charter-based human rights duties of member States over those in any non-*jus cogens* treaty by mandating that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”⁵⁷ For this reason, if a particular law of war treaty, or a portion thereof, is inconsistent with human

55. Memorial of the Government of the United States of America (U.S. v. Iran), Pleadings, 1980 I.C.J. 182, at 182 n.36 (Jan. 12) (declaring that customary human rights reflected in the Universal Declaration include those set forth in Articles 3 (rights to life, liberty, and security of person), 5 (rights to freedom from torture and cruel, inhuman, and degrading treatment), 7 (equal protection), 9 (freedom from arbitrary arrest or detention), 12 (freedom from arbitrary interference with privacy), and 13 (freedom of movement)).

56. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, ¶ 91 (May 24).

57. U.N. Charter art. 103; *see also* MCDUGAL, LASSWELL & CHEN *supra* note 50, at 339 (“Article 103 of the United Nations Charter and . . . *jus cogens* . . . confirm that the contemporary human rights prescriptions are applicable, even inalienably applicable, to all the activities of nation-states and their officials.”), 341 (“treaties the contents of which violate the generally recognized human right . . . are invalid”) (quoting JOHANN K. BLUNTSCHLI, MODERN LAW OF NATIONS OF CIVILIZED STATES (1867)).

rights obligations under the U.N. Charter, and if relevant laws of war do not have a higher status as *jus cogens*, the obligations under the U.N. Charter to respect and observe human rights must prevail. This Charter-based primacy of customary human rights is enhanced with *jus cogens*, because rights and concomitant duties *jus cogens* prevail over any inconsistent non-*jus cogens* international agreement or non-*jus cogens* customary international law.⁵⁸ Necessarily, a *lex specialis* law of war override of Charter-based human rights or human rights *jus cogens* is legally impossible.

E. THE NATURE AND UNIVERSAL REACH OF CUSTOMARY INTERNATIONAL LAW

Surprisingly, the 2015 Manual declares that customary international law must be based on a “virtually uniform” practice of States.⁵⁹ The Manual further claims in error that “States whose interests are specially affected, e.g., States with a distinctive history of participation in the relevant matter, must support the purported rule.”⁶⁰ Illogically, the Manual prefers that “States that have been persistent objectors to a customary international law rule during its development are not bound by that rule,” and, therefore, can supposedly engage in deviant practice.⁶¹ This is inconsistent with the Manual’s claims that the practice of States must be virtually uniform and that States

58. See Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 64 (1996) (“codified laws of war do not eliminate nor nullify the effect of *jus cogens*”); see, e.g., PAUST ET AL., *supra* note 15.

59. See DOD MANUAL, *supra* note 1, at 31, § 1.8.2.1 & n.138. *But see id.* at 29, § 1.8 (“Customary international law results from a *general* and consistent practice”) (emphasis deleted and added in part). A radical requirement of “virtually uniform” practice would necessarily result in termination of a customary rule once it is violated. Further, a single deviant practice would prevent the creation of a customary rule and could become a recipe for anarchy.

60. DOD MANUAL, *supra* note 11, at 32, § 1.8.2.3 & n.140. Acceptance of this claim would lead to the illogical result that any state that has a history of participation in war could defeat the creation or continuation of a customary rule by simply not supporting the rule. At Nuremberg, the IMT rejected a claim that prohibitions reflected in a law of war treaty allegedly did not apply when a number of Germany’s allies had consistently refused to ratify the treaty because, despite their persistent refusal, the prohibitions had become part of the customary laws of war and were, therefore, universally binding. See discussion *infra* note 118.

61. *Id.* at 30, § 1.8; see also *id.* at 34, § 1.8.4.

whose interests are “specially affected” must uniformly support a customary rule.

Contrary to each of these assertions, it is well recognized that the subjective element of customary international law, *opinio juris* (or patterns of expectation that something is legally appropriate or required), need only be generally shared in the international community.⁶² As the United States Supreme Court aptly recognized in *The Paquete Habana*,

62. See, e.g., *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 186 (“should generally have been treated as”), 187 (“great majority of international lawyers” and “it is generally considered by publicists”), 190 (“frequently referred to . . . as being . . . customary international law”) (June 27); see also *North Sea Continental Shelf Cases*, 1969 I.C.J. 3, 43 ¶ 74 (Feb. 20) (“a general recognition that a rule of law or legal obligation is involved”); *id.* at 229 (“need not . . . [have] universal acceptance” and “some States . . . [could have been] adopting an attitude apart . . . [or] may have opposed the rule from its inception . . . [but such] cannot be held to have disturbed the formation of a general rule of law”), 231 (“it is surely over-exacting to require proof that every State having applied a given rule did so because it was conscious of an obligation to do so”) (Lachs, J., dissenting); see also *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No.10, at 18 (Sept. 7) (“International law . . . rules . . . binding upon States . . . emanate [1] from their own free will as expressed in conventions or [2] by usages generally accepted as expressing principles of law,” which can relate “to the achievement of common aims” (emphasis added)); *id.* at 28 (a rarity of practice “merely would show that States had often, in practice, abstained . . . and not that they recognized themselves as being obliged . . . [or that they were] being conscious of having a duty”); *id.* at 34 (M. Loder, J., dissenting) (“it rests on a general consensus of opinion” and “may be gradually modified, altered or extended, in accordance with the views of a considerable majority of these States, as this consensus of opinion develops, but it seems to me incorrect to say that the municipal law of a minority of States suffices”); *id.* at 56, 58 (Lord Finlay, J., dissenting) (has not been such “general consent”); *id.* at 60 (M. Nyholm, J., dissenting) (“the foundation of a custom must be the united will of several or even of many States constituting a union of wills, or a general consensus of opinion”); *id.* at 96 (M. Altamira, J., dissenting) (patterns of municipal legislation are “of no value . . . unless it has been duly ascertained that general agreement prevails” about international law); *The Paquete Habana*, 175 U.S. 677, 691 (“general recognition”), 694 (“by the general assent of civilized nations”), 700 (“the approved usage of nations, or the general opinion respecting their mutual conduct,”) (quoting HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 15 (Richard Henry Dana ed., 8th ed. 1866)), 701 (“determined by the general consent of civilized nations”), 708 (quoted *supra* note 12), 711 (“by the general consent of civilized nations”), 717 (“by the general consent of the civilized nations”) (1900); *The Scotia*, 81 U.S. (14 Wall.) 170, 187–88 (1871) (quoted in text associated with note 63 *infra*); *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863) (“founded on the common consent as well as the common sense of the world”); *The Antelope*, 23 U.S. (10 Wheat.) 66, 115 (1825) (“general acquiescence”), 121 (“general assent”); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 140 (1814) (Story, J., dissenting) (“by the general consent of nations”), 142 (“general opinion”); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 227

Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation . . . Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force . . . because it has been generally accepted as a rule of conduct . . . [and] by the concurrent sanction [of nations].⁶³

(1796) (“established by the general consent of mankind, and binds all nations”); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4 (5th ed. 1998) (“general recognition”) (quoting J.L. BRIERLY, *THE LAW OF NATIONS* 62 (5th ed. 1955) (one need only identify “general recognition among states of a certain practice as obligatory . . . it is not necessary, to show that every state has recognized . . . This test is one of *general* recognition.”) (emphasis in original)); ANTONIO CASSESE, *INTERNATIONAL LAW* 162 (2d ed. 2005) (“it is sufficient for a majority . . . to be aware of its imperative need”); LUNG-CHU CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE* 344–55 (2d ed. 2000) (“Uniformity is no more realistically required than unanimity . . . The requisite patterns in past behavior and subjectivities are *generality*, not universality . . . The express consent of every nation-state is not a prerequisite to the authority of a particular customary law . . . the function of customary international law is precisely to vitiate the requirement of specific consent as the basis of international obligation.”); ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 189–90, 197 (1971) (“law that is generally accepted or ‘acquiesced in’”); MCDUGAL, LASSWELL & CHEN, *supra* note 50, at 270 (“uniformities in past behavior and subjectivities required are those of generality, not of universality” and “the function of . . . [C.I.L.] is precisely to eliminate any requirement of specific consent as a basis of international obligation”); PAUST, *supra* note 17, at 3–4, 18–19 nn.2–4, 21 n.11; PAUST ET AL., *supra* note 15, at 29 (“grows out of the common reactions and the composite thinking . . . the general attitude of the citizens of states . . . unanimity . . . is not required”) (quoting *United States v. Von Leeb* (U.S. Mil. Tribunal 1948); W. MICHAEL REISMAN, *NULLITY AND REVISION* 556 (1971) (customary international law “is a set of shared subjectivities about normative behavior . . . [A] majority of the nations of the world may . . . make law for all states of the globe, they may do the same by custom. In this regard . . . unanimity is not required.”); *see also* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 266, 495 (July 8) (Weeramantry, J., dissenting) (“It would be an interpretation totally out of context that the ‘*Lotus*’ decision formulated a theory . . . that a State could do whatever it pleased so long as it had not bound itself to the contrary,” an admonition that is clearly correct in view of the actual language used in the *S.S. Lotus* case quoted above concerning the difference between (1) international agreements, supposedly binding because of “free will” to join, and (2) customary international law that is binding when “usages [are] generally accepted” as law). With respect to the *Lotus* case, see generally An Hertogen, *Letting Lotus Bloom*, 26 EUR. J. INT’L L. 901 (2015) (demonstrating that an alleged principle of freedom state action unless such is explicitly restrained by international law and a related theory that a state can only be restricted by a prohibition that it has consented to are not supported by a proper reading of the majority opinion in the *Lotus* case).

63. *Scotia*, 81 U.S. (14 Wall.) at 187–88 (Chase, J.), quoted in *Paquete Habana*, 175 U.S. at 711.

Similarly, the behavioral element of customary international law (*i.e.*, general patterns of practice) is free from the need for total conformity,⁶⁴ and it rests not merely upon the practice of States as such, but ultimately upon the practice of all participants in the international legal process.⁶⁵ Therefore, a particular State might disagree as to whether a particular norm is customary, and in fact that State might even violate such a norm. Nonetheless, the State would still be bound if the norm is supported by patterns of generally shared legal expectations and

64. See, *e.g.*, Statute of the International Court of Justice art. 38(1)(b) (“international custom, as evidence of a *general* practice accepted as law” (emphasis added)), T.S. No. 993, 59 Stat. 1055 (1945); see also *Nicar. v. U.S.*, 1986 I.C.J. Rep. 14, ¶¶ 184 (“the essential role played by general practice” (quoted in Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 144, ¶ 12 (Feb. 14) (Van Den Wyngaert, J., dissenting))), 186 (“sufficient that the conduct of States should, in general, be consistent”); North Sea Continental Shelf Cases, 1969 I.C.J. at 229 (“a practice widespread enough,” “generally . . . adopted in the practice of States” (quoting “Fisheries Case, Judgment, I.C.J. Reports 1951, p. 128”), “the behaviour of a great number of States, possibly the majority,” and some states may have acted “at variance”), 231 (“general practice”) (Lachs, J., dissenting); *Paquete Habana*, 175 U.S. at 710 (“a rule of international law, established by the general usage of civilized nations”); *The Antelope*, 23 U.S. (10 Wheat.) 66, 119 (“general” practice) (1825); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 124 (1814) (Marshall, C.J.) (“although the practice in this respect may not be uniform”); BROWNIE, *supra* note 62, at 4 (“generality of practice” and “universality is not required”); CASSESE, *supra* note 62, at 165 (“sufficient for a majority . . . to engage in a consistent practice” and “universal . . . participation in the formation . . . is not required”); CHEN, *supra* note 62; PAUST, *supra* note 15, at 93–94, 106–08; see *infra* note 85 and accompanying text. Cf. North Sea Continental Shelf Cases, 1969 I.C.J. at 43 ¶ 74 (while merely focusing on whether “the passage of only a short period of time . . . [is] a bar to the formation of a new rule . . . , an indisputable requirement would be that within the period in question . . . practice . . . should have been both extensive and virtually uniform”). One should not misread this last statement to mean that practice must always be virtually uniform, a radical test that would likely result in the lack of any rule of customary international law.

65. See, *e.g.*, PAUST ET AL., *supra* note 15, at 107 (explaining that international law has never been merely state-to-state and there have been certain non-state actors with formal participatory roles in the creation and shaping of international law); Jordan J. Paust, *Non-State Actor Participation in Int'l Law and the Pretense of Exclusion*, 51 VA. J. INT'L L. 977, 979–81, 983 n.12, 994–97 (2011) [hereinafter Paust, *Non-State Actor Participation in Int'l Law and the Pretense of Exclusion*]. For this reason, the DOD MANUAL’s statement that “[t]raditionally, international law has governed relations between States” and that there is predominantly an inter-state nature of international obligations is ahistorical, misleading, and should be deleted (see DOD MANUAL, *supra* note 1, at 37, § 1.10.1.3). Rights and obligations can pertain for states, nations, peoples, tribes, belligerents, insurgents, corporations, other groups, and individuals. See generally Paust, *Non-State Actor Participation in Int'l Law and the Pretense of Exclusion supra*, at 979–89.

conforming behavior extant in the community.⁶⁶ If the patterns of violation become too widespread, however, one of the primary bases of customary law may be lost. As recognized by the ICJ,

It is not to be expected that in the practice of States the application of the rules in question should have been perfect . . . with complete consistency . . . In order to deduce the existence of customary rules . . . it [is] sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself . . . the significance of that attitude is to confirm rather than to weaken the rule.⁶⁷

As noted above, the 2015 DOD Manual sets forth a preference regarding objectors who persistently oppose a particular norm during that norm's formation as customary international law.⁶⁸ This so-called persistent-objector preference for avoiding responsibility under customary international law is not reflected in any known treaty or General Assembly resolution. Rather, it is the preference of a few professors and those who wrote the Restatement in the 1980s.⁶⁹ Although there is supportive dictum in rare cases, no known case has actually

66. See PAUST ET AL., *supra* note 15, at 111 (regarding the practice of violators).

67. See *Nicar. v. U.S.*, 1986 I.C.J. Rep. 14, ¶¶ 184, 186.

68. See *supra* note 64 and accompanying text.

69. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmts. b & d (AM. LAW INST. 1987); (“in principle” although “historically, such . . . exemption . . . has been rare”—citing no actual case or incident, but misconstruing what was involved in the Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. 116 (Dec. 18)); see also PAUST, *supra* note 17, at 22–26 n.14. The 1951 Fisheries case did not address objection to the existence of a customary rule of law concerning a coastal state's right to a territorial sea. Instead, the Court addressed the necessary circumstance at the time for extension of the Norwegian territorial sea up to four nautical miles and its need to control that area without significant interruption or objection over a long period of time (*i.e.*, factors of control and intent that are relevant to the reach of a particular territorial sea, not to the existence of the rule of customary law concerning the existence of territorial seas under the customary law of the sea). See *generally* U.K. v. Nor., 1951 I.C.J. at 116.

used the minority persistent-objector preference to decide a case or to determine that customary international law is not binding on a “persistent objector.”⁷⁰ Moreover, this theory is inconsistent with predominant trends in international, domestic, and other judicial opinions.⁷¹ It is theoretically unsound because customary international law does not require consent and rests upon general patterns of expectation or opinion. Further, the preference cannot be a rule of customary international law concerning the nature or reach of customary international law because the preference is not supported by the two general requirements for the existence of a rule of customary international law: (1) general patterns of conforming practice;⁷²

70. See CASSESE, *supra* note 62, at 163 (quoted *infra* note 74). *C.f.* Alvarez-Machain v. United States, 331 F.3d 604, 613 (9th Cir. 2003) (dictum); *Prinz v. Federal Republic of Germany*, 26 F.3d 1166, 1181 (D.C. Cir. 1994) (Wald, J., dissenting); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (citing the Restatement and stating in significant error that customary international law rests on “consent” as opposed to general patterns of expectation).

71. See, e.g., PAUST, *supra* note 15, at 111; *Nicar. v. U.S.*, 1986 I.C.J. Rep. 14, ¶¶ 184, 186; *supra* note 64 and accompanying text; *infra* notes 83–84 and accompanying text; see also CASSESE, *supra* note 62, at 162–63 (explaining the claim is not “tenable today,” “there is no firm support in State practice and international case law,” and “a State is not entitled to claim that it is not bound by a new customary rule because it opposed it before it ripened into a customary rule.” “[T]wo obiter dicta of the ICJ” were the 1950 Asylum Case (*Colom. v. Peru*), 1950 I.C.J. 266, 277–78, and the 1951 Fisheries Case. Regarding the Fisheries Case (*U.K. v. Nor.*), see *supra* note 69; Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 538–40 (1993) (explaining it is rarely claimed, it is not supported by state practice, the I.C.J. mentioned it only twice in *dicta*, “[t]hus, state practice and other evidence do not support the existence of the persistent objector rule”); see also Anthony D’Amato, *Groundwork for International Law*, 108 AM. J. INT'L L. 650, 659 (2015) (explaining “[i]ndividual members of a system cannot tell the system what to do”), 660 (C.I.L. “is not created by the will . . . [or] consent of individual states”), 667 (“[t]here can be no ‘persistent objector’ exception to customary-law formation” and such would “strain, if not tear a hole in, the fabric of the network” or system of international law); D. W. Bowett, *The Impact of the U.N. Structure, Including that of the Specialized Agencies, on the Law of International Organization*, 64 AM. J. OF INT'L L. 48, 57 (explaining remarks from Myres S. McDougal, “The realistic function of customary law has been to get rid of minority veto, either in the making or the termination of a principle.”); W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 PROC., AM. SOC. INT'L L. 101, 111 (1981) (explaining “norms are prescribed because they are policies which part of the community does not voluntarily or spontaneously support”); *infra* note 73 and accompanying text; Jose E. Alvarez, *Positivism Regained, Nihilism Postponed*, 15 MICH. J. INT'L L. 747, 780 (1994) (explaining there is “little evidence that such objectors actually exist”). Regarding a relevant decision of the I.M.T. at Nuremberg, see *supra* note 60 and accompanying text.

72. See *supra* notes 64, 71 and accompanying texts.

and (2) general patterns of conforming *opinio juris*.⁷³ For this reason, use of the preference in the Manual will not protect United States military personnel from criminal or civil responsibility for violations of customary international law.

As the United States Supreme Court declared emphatically, customary international “law is of universal obligation.”⁷⁴ Most significantly, the ICJ has rejected the possibility of an opt-out from the reach of customary international law. It emphasizes that, unlike choosing whether to become a party to a treaty or to join with reservations, declarations, or understandings (“RUDs”), “customary law rules and obligations[,] . . . by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.”⁷⁵

II. OTHER ERRORS AND CONCERNS

A. WAR CRIME BY ANY OTHER NAME

Any violation of the laws of war is a war crime.⁷⁶ However, the 2015 Manual attempts to rewrite the laws of war on the basis

73. See PAUST, VAN DYKE & MALONE, *supra* note 15, at 11; *Nicar. v. U.S.*, 1986 I.C.J. Rep. 14, ¶¶ 184, 186.

74. *The Scotia*, 81 U.S. (14 Wall.) 170, 187 (1871); see also *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 227 (1796) (“established by the general consent of mankind, and binds all nations”); PAUST, INTERNATIONAL LAW OF THE UNITED STATES, *supra* note 17, at 22–26 n.14 (addressing numerous cases and materials regarding the universal reach of customary international law).

75. *North Sea Continental Shelf Cases*, 1969 I.C.J. 4, ¶ 63. This quoted language was used after the dicta in the 1951 *Fisheries Case* and the 1950 *Asylum Case* (which some writers claim is the basis for the preference). The language quoted in the *North Sea Continental Shelf Cases* necessarily rejects prior dicta regarding an alleged ability of a persistent objector to avoid being bound by customary international law and reliance on the prior dicta would be decidedly inappropriate. The DOD Manual relies on the prior dicta. See DOD MANUAL, *supra* note 1, 34 n.149. The erroneous preference should be deleted.

76. See, e.g., INT’L COMM. OF THE RED CROSS, IV COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR OF 12 AUGUST 1949, at 583 (1958) [hereinafter IV COMMENTARY] (“The Geneva Conventions form part of what are generally called the laws and customs of war, violations of which are commonly called ‘war crimes.’”); INT’L COMM. OF THE RED CROSS, III COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF 12 AUGUST 1949, at 421 (1960) [hereinafter III COMMENTARY] (“The International Law Commission has defined war crimes as: ‘Acts in violation of the laws or customs of war’”); LAW OF LAND WARFARE, *supra* note 21, ¶ 499, at 178 (“Every violation of the law of

of unknown and unproven “usage”⁷⁷ and, allegedly, a United States statute,⁷⁸ to exclude criminal responsibility for “minor” violations as well as those that are not “particularly serious.”⁷⁹ Importantly, however, “usage . . . is merely long-term practice, not law.”⁸⁰ Moreover, one domestic statute cannot change treaty-based or customary laws of war.⁸¹ In addition, domestic law provides no excuse, and there is no evidence that the United States statute attempts to redefine the laws of war to exclude criminal responsibility for minor, non-serious violations, or any of the other numerous violations of the laws of war that are not explicitly listed in the statute.⁸² On the contrary, the statute addressed in the Manual expressly covers only certain crimes under certain “circumstances described,”⁸³ and alerts the reader that the list of crimes set forth is not a complete list, noting “[a]s used in this section the term [sic] ‘war crime’ means any conduct” expressly set forth.⁸⁴ Additionally, it would be nonsensical to claim that the short list contained in the statute is a list of all “serious” war crimes,⁸⁵ much less all war crimes generally.

war is a war crime”), ¶ 504, at 180 (“violations of the law of war (‘war crimes’)”); DOD MANUAL, *supra* note 1, at 1076, § 18.9.5.1 & nn.102–03; UK MANUAL, *supra* note 3, at 424, §16.21 (“War crimes . . . ‘violations of the laws or customs of war’”) (quoting the Charter of the International Military Tribunal at Nuremberg); Charter of the International Military Tribunal at Nuremberg, art. 6(b), Aug. 8, 1945, 82 U.N.T.S. 279 (“War crimes: namely, violations of the laws or customs of war.”); Charter of the International Military Tribunal for the Far East, art. 5(b), Jan. 19, 1946, T.I.A.S. No. 1589 (“Namely, violations of the laws or customs of war . . .”); Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), art. II(1)(b) (“War Crimes. Atrocities or offences against persons or property, constituting violations of the laws or customs of war”); Principles of the Nuremberg Charter, *supra* note 21, princ. VI(b) (“War crimes: Violations of the laws and customs of war . . .”); PAUST ET AL., *supra* note 3, at 673, 677 n.6, 700–01, 709.

77. See DOD MANUAL, *supra* note 1, at 107, § 18.9.5.2.

78. See *id.* at 1076, § 18.9.5.2 & n.106 (quoting part of 18 U.S.C. § 2441 (2006)).

79. See *id.* at 1076, § 18.9.5.2.

80. PAUST ET AL., *supra* note 3, at 7.

81. See generally *supra* notes 21, 67 and accompanying text.

82. See 18 U.S.C. § 2441.

83. *Id.* § 2441(a) (explaining that war crimes committed “in any of the circumstances described in subsection (b)” will result in a punishment).

84. *Id.* § 2441(c).

85. Compare the far more extensive list of serious war crimes, itself still incomplete and limiting of jurisdiction, in the Rome Statute, *supra* note 3, art. 8(2) (“[f]or purposes of this Statute, ‘war crimes’ means”), 8(2)(a) (“[g]rave breaches”), 8(2)(b) (“[o]ther serious violations”), 8(2)(c) (“serious violations”),

Further, another federal statute incorporates all offenses under the laws of war as crimes under the law of the United States,⁸⁶ and prosecution of any war crime can occur in United States military tribunals,⁸⁷ or in a federal district court.⁸⁸ Of course, those responsible for authorizing, committing, or abetting a war crime can also be prosecuted in an international or foreign state tribunal that has jurisdiction.⁸⁹

B. THE RIGHT TO COMPENSATION

With respect to civil sanctions for war crimes, the 2015 Manual is at the very least misleading when it suggests that there is no private right to compensation under customary international law.⁹⁰ Whether or not private claims can be made directly against a State,⁹¹ there have been a number of successful civil suits against individuals and corporations for both direct and complicit responsibility for violations of the laws

8(2)(e) “[o]ther serious violations”), with *id.* art. 5 (stating “jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole”), and art. 22(3) (stating the limits of ICC jurisdiction “shall not affect the characterization of any conduct as criminal under international law independently of this Statute.”).

86. See 10 U.S.C. § 818; *In re Yamashita*, 327 U.S. 1, 7–8 (1946); *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942) (“Congress has incorporated by reference . . . all offenses which are defined as such by the law of war . . .”); *United States v. Schultz*, 4 C.M.R. 104, 111, 1 U.S.C.M.A. 512, 519, (1952) (“Congress incorporated by reference . . . all offenses which are defined as such the law of war”); Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6, 10–12 (1971) [hereinafter Paust, *After My Lai*].

87. See 10 U.S.C. §§ 818, 821; LAW OF LAND WARFARE, *supra* note 21, ¶ 505(d)–(e), at 180–81; Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 123–24 (1992) (addressing U.S. recognitions regarding the existence of early U.S. implementing legislation with respect to violations of the Geneva Conventions).

88. See PAUST ET AL., *supra* note 3, at 273–79 (quoting 18 U.S.C. § 3231 and Paust, *After Mai Lai*, *supra* note 86, at 10–28).

89. See *generally id.* at 15, 179–87 (regarding universal jurisdictional competence of all states), 582–83 (regarding ICC jurisdiction).

90. See DOD MANUAL, *supra* note 1, at 37, § 1.10.1.3 (stating that private individuals do not have a right “to claim compensation directly from a State for violations of the law of war,” but correctly noting that “there may be responsibility for individuals, apart from State responsibility”); *id.* at 1092, § 18.16.4.

91. With respect to claims in response to the United States’ violations of international law, see generally *The Apollon*, 22 U.S. (9 Wheat.) 362, 371, 374, 376–79 (1824); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 350–55 (1822).

of war.⁹² The Manual should inform military personnel of the possibility of civil sanctions in the United States and abroad if they violate the laws of war or other forms of relevant international law.

C. MILITARY NECESSITY

The 2015 Manual appears to slightly loosen the general requirement of military necessity regarding permissible measures of warfare from customary standards—such as certain

92. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762-63 (2004) (Breyer, J., concurring in part and concurring in judgment) (“criminal courts of many nations combine civil and criminal proceedings, allowing those injured . . . to recover damages . . . [and] universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery”); *United States v. The Spanish Smack Paquete Habana*, 189 U.S. 453, 463–64 (1903); *The Paquete Habana*, 175 U.S. 677, 700, 711, 714 (1900); *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 743–44, 747, 749, 763–67 (9th Cir. 2011); *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1019 (7th Cir. 2011); *Weisshaus v. Swiss Bankers Ass’n*, 225 F.3d 191 (2d Cir. 2000); *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996) (regarding command responsibility); *Kadic v. Karadzic*, 70 F.3d 232, 242–43 (2d Cir. 1995); *Linder v. Portocarrero*, 963 F.2d 332, 336-37 (11th Cir. 1992); *Warfaa v. Ali*, 33 F. Supp. 3d 653 (E.D. Va. 2014); *Yousuf v. Samantar*, 2012 WL 3730617 (E.D. Va. 2012); *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1259–61 (N.D. Ala. 2003); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 310–11, 320–25 (S.D.N.Y. 2003); *Barrueto v. Larios*, 205 F. Supp.2d 1325, 1333 (S.D. Fla. 2002); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1350–52 (N.D. Ga. 2002); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 5, 8 (D.D.C. 1998); *Xuncax v. Gramajo*, 886 F. Supp. 162, 171–72 (D. Mass. 1995); *Dills v. Hatcher*, 69 Ky. 606 (1869); *Ferguson v. Loar*, 68 Ky. 689, 692–95 (1869); *Lewis v. McGuire*, 66 Ky. 202, 203 (1867); *Terrill v. Rankin*, 65 Ky. 453, 457–62 (1867); *Christian Cty. Court v. Rankin & Tharp*, 63 Ky. 502, 505–06 (1866); PAUST, ET AL., *supra* note 3, at 734–35; PAUST, *supra* note 17, at 226–27, 291 nn.488–91, 293 n.503, 313 n.581; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY HUMANITARIAN LAW: RULES 554-55 (ICRC 2005) (stating that individual civil liability is possible in many countries); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 780 n.31 (2d ed. 1920); *supra* note 12 and accompanying text; *see also* Rome Statute of the ICC, *supra* note 3, art. 75(2); CAT, *supra* note 44, art. 14(1); ICCPR, *supra* note 41, arts. 2(3)(a), 14(1), 50 (regarding the express mandate, in self-executing language that was approved by the United States, that all of the provisions of the ICCPR “shall extend to all parts of federal States without any limitations or exceptions”); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), art. 8; General Comment No. 24, *supra* note 15, ¶¶ 11–12 (regarding the right of access to courts and to an adequate remedy).

measures “necessary,”⁹³ “indispensable,”⁹⁴ and “required”⁹⁵—to “all measures needed” for certain military purposes.⁹⁶ However, the phrase “measures needed” may reflect general practice and *opinio juris*⁹⁷ and may set a higher threshold than the phrases “definite,” “concrete and direct military advantage,” which appear in Geneva Protocol I.⁹⁸ This is because what is considered a definite, concrete, and direct advantage may not be *needed* in a given circumstance.⁹⁹

93. See LAW OF LAND WARFARE, *supra* note 21, ¶ 3a, at 3 (“not actually necessary for military purposes”); Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, § I, art. 14 (1866) [hereinafter Lieber Code] (“Military necessity . . . consists in the necessity of those measures which are indispensable . . .”). The DOD Manual recognizes the interrelated principle of humanity which “forbids the infliction of suffering, injury, or destruction *unnecessary* to accomplish a legitimate military purpose.” DOD MANUAL, *supra* note 1, at 58, § 2.3 (emphasis added); see also *id.* at 59, § 2.3.1.1 (“Humanity is related to military necessity, and these principles logically complement one another.”).

94. See Lieber Code, *supra* note 93, § I, art. 14 (“indispensable for securing the ends of the war and, which are lawful”); art. 15 (“Military necessity admits of all direct destruction of life and limb of armed enemies, and of other persons whose destruction is *incidentally unavoidable* . . .”) (emphasis added); LAW OF LAND WARFARE, *supra* note 21, ¶ 3a, at 4 (“indispensable”); DOD MANUAL, *supra* note 1, at 52 nn.13, 15.

95. See, e.g., UK MANUAL, *supra* note 3, at 21, § 2.2; Christopher Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 1, 35 (Dieter Fleck ed., 2d ed. 2008).

96. DOD MANUAL, *supra* note 1, at 52, § 2.2; see also DOD MANUAL, *supra* note 1, at 58, § 2.3.

97. See Jordan J. Paust, *Operationalizing Use of Drones Against Non-State Terrorists Under the International Law of Self-Defense*, 8 ALBANY GOV’T. L. REV. 166, 191 (2015) (using the phrase “reasonably necessary” with respect to an analogous *jus ad bellum* principle of necessity).

98. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 51(5)(b) [hereinafter Geneva Protocol I] (“concrete and direct military advantage”), 52(2) (“definite”), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977). The DOD Manual addresses “concrete and direct military advantage” with respect to the requirement to “refrain from attacks in which the expected loss of life or injury to civilians, and damage to civilian objects incidental to the attack, would be excessive.” DOD MANUAL, *supra* note 1, at 241, § 5.12 (“the proportionality rule”).

99. The meaning of the word “advantage” is close to the unacceptable military “benefit” or *Kriegsraison* [war reason] theory. See PAUST ET AL., *supra* note 3, at 718; cf. GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 265–69 (2d ed. 2010) (addressing *Kriegsraison* as a theory that the “military necessity in war overrides the law of war,” but quoting a writer who stated that the theory claimed permissibility for whatever is of a “military advantage.” *Id.* at 267 (quoting William Downey, *The Law of War and Military Necessity*, 47 AM. J. INT’L L. 251, 253 (1953)). At the very least, one should not use the phrase “military advantage” as if it is the

D. TARGETABLE CIVILIANS WHO ARE DIRECT PARTICIPANTS
IN HOSTILITIES (“DPH”)

The 2015 Manual accepts the customary rule that “[c]ivilians who take a direct part in hostilities [and, therefore, who are DPH] forfeit protection from being made the object of attack.”¹⁰⁰ The rule is famously reflected in Article 51(3) of Geneva Protocol I¹⁰¹ and is widely known to be part of the customary laws of war.¹⁰² However, the Manual incorrectly states that Article 51(3) “does not reflect customary international law,”¹⁰³ and further attempts to expand the test regarding who is DPH and targetable to include an alleged but unproven permissibility under customary laws of war of targeting civilians who do not actually take a “direct part in” hostilities, but who “effectively and substantially *contribute* to an adversary’s *ability* to conduct or sustain combat operations.”¹⁰⁴ Scholars have already noted that this attempted expansion is in error and will not protect the United States or its military personnel from responsibility under international law.¹⁰⁵ Moreover, when 153 states voted in Rome in 1998 to create the ICC, they expressly affirmed that “serious violations of the laws and customs applicable in international armed conflict [include] . . . [i]ntentionally directing attacks against . . . individual civilians not taking direct part in hostilities.”¹⁰⁶

test without the further limitations set forth in Geneva Protocol I that require the existence of a “definite,” “concrete and direct” advantage. *See* Geneva Protocol I, *supra* note 98.

100. DOD MANUAL, *supra* note 1, at 222, § 5.9.

101. Geneva Protocol I, *supra* note 98, art. 51(3) (“Civilians shall enjoy the protection . . . [from being the object of attack] unless and for such time as they take a direct part in hostilities.”).

102. *See, e.g.*, DINSTEIN, *supra* note 3, at 27, 129, 152; HENCKAERTS & DOSWALD-BECK, *supra* note 92, at 19–21; NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 319, 321–22, 328–29, 333, 341 (2008); PAUST ET AL., *supra* note 3, at 719–20; UK MANUAL, *supra* note 3, at 54, §§ 5.3.2–5.3.3.

103. DOD MANUAL, *supra* note 1, at 223, § 5.9.1.2.

104. *Id.* at 224–25, § 5.9.3 (emphasis added).

105. *See, e.g.*, Adil Ahmad Haque, *Off Target: Selection, Precaution, and Proportionality in the DOD Manual*, 92 INT’L L. STUD. 31, 32 (2016); *see also* MELZER, *supra* note 102, at 341 (“[where] proposals extend the notion of direct participation in hostilities to the general war effort without requiring a direct connection to the hostilities . . . they clearly go beyond what conventional and customary IHL permits.”).

106. Rome Statute, *supra* note 3, art. 8(2)(b)(i). One-hundred and fifty-three states voted in favor of the Statute, seven against (including the United States). *See* PAUST ET AL., *supra* note 3, at 580 & n.1.

The 2015 Manual should abandon the erroneous attempt to expand DPH status to those who merely contribute to an enemy's ability to conduct and sustain combat. Logically, a civilian who substantially contributes to an ability to conduct or sustain combat operations would include financiers of the armed conflict,¹⁰⁷ enemy gun manufacturers and suppliers, scientists in an enemy's weapons factory,¹⁰⁸ and workers in an enemy's bullet factory.¹⁰⁹ Although combat will be short-lived without money, guns, and bullets, it is evident that none of these persons are generally expected to be DPH and targetable.¹¹⁰

E. WEAPONS OF A NATURE TO CAUSE SUPERFLUOUS INJURY OR UNNECESSARY SUFFERING

Specifically, the 2015 Manual uses an incorrect "calculated to cause" test,¹¹¹ instead of the authoritative and widely-known test under treaty-based and customary laws of war regarding the use of weapons or material "of a nature to cause" superfluous injury or unnecessary suffering, which is the proper test regarding criminal responsibility.¹¹² The Manual should inform

107. *But see* MELZER, *supra* note 102, at 341, 345; NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, 51–52, 54 (2009).

108. *See* DOD MANUAL, *supra* note 1, at 226 n.232.

109. *But see id.* at 229, § 5.9.3.3 & n.242; DINSTEIN, *supra* note 3, at 152; HENCKAERTS & DOSWALD-BECK, *supra* note 92, at 23; UK MANUAL, *supra* note 3, at 54, § 5.3.3.

110. *See* Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment, ¶ 177 (Int'l Crim. Trib. For the Former Yugoslavia July 17, 2008) ("[e]xamples of [non-targetable] indirect participation in hostilities include . . . selling goods to one of the parties to the conflict, . . . supplying food to one of the parties to the conflict, . . . transporting arms and munitions"); Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 TEX. INT'L L. J. 293, 309–10 (2012); Paust, *supra* note 97, at 179 n.34 (quoting lists of persons who are DPH); *see also supra* note 105 and accompanying text.

111. DOD MANUAL, *supra* note 1, at 314, §§ 6.2.2, 6.5.4.4 ("only prohibited if they are calculated to cause superfluous injury"), at 334, §§ 6.6, 6.6.1. *But see id.* at 334, § 6.6.1 ("or of a nature to cause unnecessary suffering").

112. *See, e.g.*, DINSTEIN, *supra* note 3, at 58–59; PAUST ET AL, *supra* note 3, at 716; Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, Annex, art. 23(e) (French version: "propres à causer des maux superflus"), 15 U.N.T.S. 9 (1907) [hereinafter HC IV]; Hague Convention (No. II) Respecting the Laws and Customs of War on Land, Annex, art. 23(e) (French version), 32 Stat. 1803, T.S. No. 403; Geneva Protocol I, *supra* note 98, art. 35(2) ("It is prohibited to employ weapons, projectiles and material . . . of a nature to cause superfluous injury or unnecessary suffering."); UK MANUAL, *supra* note

military personnel of the force prohibition in order to alert them to what the international community expects—namely, to more properly test weapons for compliance, and to more adequately assure conduct conforming to the laws of war.

F. DUM-DUM BULLETS

The Department of Defense's 2015 Manual claims that use of expanding, or "dum-dum," bullets is permissible despite the well-known prohibition reflected in the 1899 Hague Declaration, condemning "use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions."¹¹³ The Manual claims that the 1899 Declaration does not reflect customary international law¹¹⁴ and that it contains a participation clause that requires that all State parties to a conflict be parties to the Declaration lest it will not apply.¹¹⁵ However, the Declaration reflects customary international law¹¹⁶ and, as recognized by the International Military Tribunal

3, § 15.28 ("weapons of a nature to cause unnecessary suffering or superfluous injury"); Rome Statute, *supra* note 3, art. 8(2)(b)(xx) ("[e]mploying weapons, projectiles and material . . . of a nature to cause"); *see also* LAW OF LAND WARFARE, *supra* note 21, at foreword ("the official text of the Hague Conventions of 18 October 1907 is the French text which must be accepted as controlling"). Use of the word "calculated" would create a higher *mens rea* standard than that reflected in treaties and customary laws of war.

113. *See* Hague Declaration No. IV ¶ 3 (July 29, 1899), *reprinted in* PAUST ET AL., *supra* note 3, at 715; *see also* DOD MANUAL, *supra* note 1, at 325, § 6.5.4.4.

114. *See* DOD MANUAL, *supra* note 1, at 323–35, § 6.5.4.4.

115. *See id.*

116. *See, e.g.*, LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT 41 (2013) ("weapons causing unnecessary suffering, such as dum-dum bullets . . . are outlawed"); CORN ET AL., *supra* note 3, at 189 (stating that "dum-dum rounds" are prohibited because of the prohibition of use of weapons "causing unnecessary suffering"), 207–08; DINSTEIN, *supra* note 3, at 64; HENCKAERTS & DOSWALD-BECK, *supra* note 92, at 268–71; SOLIS, *supra* note 99, at 38 ("hollow-point bullets are prohibited"), 55 (the 1899 Declaration's "prohibition of dum-dums became customary law"); Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 119, 128 (Dieter Fleck ed., 2d ed. 2008); Jordan J. Paust, *Does Your Police Force Use Illegal Weapons? A Configurative Approach to Decision Integrating International and Domestic Law*, 18 HARV. INT'L L. J. 19, 32–33, 35–36 (1977); Paul A. Robblee, Jr., *The Legitimacy of Modern Conventional Weaponry*, 71 MIL. L. REV. 95, 105 (1976) (the prohibition of "dum-dum bullets attained the status of customary international law during the First World War"); LAW OF LAND WARFARE, *supra* note 21, ¶ 34b ("Usage has . . . established the illegality of the use of . . . irregular shaped bullets . . . and the scoring of the surface or the filing

at Nuremberg with respect to a similar participation clause in the 1907 Hague Convention No. IV, once what is reflected in an international agreement becomes customary international law, such limiting clauses are of no effect with respect to the universal reach of substantive customary rights, duties, and competencies.¹¹⁷ For these reasons, the section on expanding bullets should be revised.

G. CONCERNS REGARDING USE OF HERBICIDES IN WAR AND DESTRUCTION OF FOOD OR WATER

The 2015 Manual declares that the United States has renounced the first use of herbicides in war “as a matter of national policy . . . [except] . . . for control of vegetation within U.S. bases and installations or around their immediate

off of the ends of the hard cases of bullets.”); UK MANUAL, *supra* note 3, at 9, §§ 1.25 & 1.25.1; *id.* at 109, §§ 6.9 & 6.9.1 & n.32; List of War Crimes prepared by the Responsibilities Commission of the Paris Peace Conference, crime number 27 (prohibiting the “[u]se of . . . expanding bullets”) (Mar. 29, 1919) [hereinafter 1919 List], *reprinted in* PAUST ET AL., *supra* note 3, at 45–46 (nothing that members of the Commission that created this list on behalf of the Conference were Belgium, British Empire, France, Greece, Italy, Japan, Poland, Romania, Serbia, and the United States). *Cf.* Joshua F. Berry, *Hollow Point Bullets: How History Has Hijacked Their Use in Combat and Why It is Time to Reexamine the 1899 Hague Declaration Concerning Expanding Bullets*, 206 MIL. L. REV. 88 (2010) (providing an interesting argument for changing the law of war from an absolute prohibition to regulation of use under the principle of military necessity and the related prohibition of unnecessary death, injury, or suffering of civilians during combat in urban areas); Sean Watts, *Regulation-Tolerant Weapons, Regulation-Resistant Weapons and the Law of War*, 91 INT’L L. STUD. 540, 571–72 (2015) (“It is widely agreed that *general* use of expanding bullets violates customary international law” and conforming practice has “been relatively strong”).

When 153 States voted in Rome to create the Rome Statute, they recognized the customary and serious war crime of “[e]mploying bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.” Rome Statute, *supra* note 3, art. 8(2)(b)(xix). This is nearly the exact language found in the 1899 Declaration. *Compare* Rome Statute, *supra* note 3, art. 8(2)(b)(xix) *with supra* text accompanying note 109. *Cf.* Elements of Crimes, art. 8(2)(b)(xix), quoted in the DOD Manual, which requires an alleged perpetrator to be “aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect” of such bullets. *See* DOD MANUAL, *supra* note 1, at 325, § 6.5.4.5 & n.84.

117. *See In re Goering*, 13 ILR 203 (Int’l Mil. Trib. 1946), *reprinted in* PAUST ET AL., *supra* note 3, at 494–95; *see also* DOD MANUAL, *supra* note 1, at 1144, § 3.6.1 & n.99; ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 63 (3d ed. 2003) (as customary law, “its ‘general participation clause’ would cease to be relevant.”).

defensive perimeters.”¹¹⁸ The Manual rightly notes that “[h]erbicides that are harmless to human beings are not prohibited under the rule against the use of poison or poisoned weapons.”¹¹⁹ However, policy could change and, as noted in this section, some herbicides can be poisonous and trigger the prohibition of deleterious or asphyxiating gases or chemicals, especially when herbicides are used on or indiscriminately near crops and water. Further, the preamble to the 1993 Chemical Weapons Convention recognizes “the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare.”¹²⁰ Therefore, important concerns are raised regarding proper or any use of certain herbicides during warfare, especially if United States policy prevents merely their first use in war, and the Manual does not provide adequate attention to relevant legal requirements and needed guidance for military personnel.

1. The Absolute Prohibition of Use of Poison in Any Form

Use of poison by any means is a war crime under customary and treaty-based international law. Customary international law reflected in Article 23(a) of the Annex to the 1907 Hague Convention expressly affirms the *per se* prohibition of poison—that is, it may never be used under any circumstances and, therefore, regardless of attempts at justification or claims of military necessity.¹²¹ It does not matter how poison is employed (e.g., by pellet, liquid or gas, or dropped by hand or modern aircraft), and it does not matter against whom the poison is employed (e.g., solely against enemy combatants, against a mixture of enemy combatants and noncombatants, or in areas inhabited merely by noncombatants). By the plain meaning of Article 23(a), “to employ” poison in any manner is prohibited. Further, the treaty does not merely prohibit “poisoned weapons,”

118. See DOD MANUAL, *supra* note 1, at 392, § 6.17.

119. *Id.* at 392, § 6.17.1.

120. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 317, pmbl.

121. HC IV, *supra* note 112, annex art. 23(a) (“[I]t is especially forbidden to employ poison or poisoned weapons.”); see HENCKAERTS & DOSWALD-BECK, *supra* note 92, at 251–52; DOD MANUAL, *supra* note 1, at 344, § 6.8.1 & n.166; UK MANUAL, *supra* note 3, at 109–19, §§ 6.10–6.19.1; *id.* at 397, § 15.28; *id.* at 427, § 16.27; Rome Statute, *supra* note 3, art. 8(2)(b)(xvii).

but also prohibits the employment of poison; again it is prohibited “[t]o employ poison” of any sort in any manner.¹²²

The customary prohibition of any employment of poison is general, all-inclusive, and absolute. The 1863 Lieber Code recognized that customary laws of war prohibited “the use of poison in any way,”¹²³ even in the face of claims of “military necessity,”¹²⁴ and that “[t]he use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.”¹²⁵ The “[p]oisoning of wells” also appears in a list of customary war crimes recognized by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties that was presented to the Preliminary Peace Conference in Paris following World War I.¹²⁶ The 1956 United States Army Field Manual also recognized that it is a war crime to employ poison, including the poisoning of wells or streams.¹²⁷

122. See *supra* note 121 and accompanying text.

123. Lieber Code, *supra* note 93, art. 16.

124. *Id.*

125. *Id.* art. 70; see also III COMMENTARY, *supra* note 76, at 421 (“poisoning of springs and water sources”); DINSTEIN, *supra* note 3, at 63 (“poisoning of drinking water (e.g., wells used by enemy forces) or foodstuffs”); HENCKAERTS & DOSWALD-BECK, *supra* note 92, at 254 (“poisoning the food and drink of the adverse party . . . poisoning wells and other water supplies”); DOD MANUAL, *supra* note 1, at 342, § 6.8.1 & nn.166–67 (“poisoning the enemy’s food or water supply is prohibited”); UK MANUAL, *supra* note 3, at 73 n.134 (Geneva Protocol I’s recognition that it is unlawful to attack, destroy, remove or render useless certain foodstuffs, crops, and drinking water is “wide enough to cover use of chemical agents or defoliants against these objects”), § 6.19.1, at 119 (“The prohibition applies to any use of poison, including the poisoning or contamination of water supplies.”), 427 n.102 (“poisoning of wells, streams, and other sources of water supply”); Sir Henry S. Maine, Lecture VII: Mitigation of War (1887) (“The poisoning of water or food is a mode of warfare absolutely forbidden.”), reprinted in Yale Law Sch., *INTERNATIONAL LAW BY HENRY MAINE*, THE AVALON PROJECT, http://avalon.law.yale.edu/19th_century/int07.asp (last visited Feb. 4, 2017).

126. See 1919 List, *supra* note 116, at 46 (crime no. 32).

127. LAW OF LAND WARFARE, *supra* note 21, ¶ 37, at 18, ¶ 504(i), at 180 (listing “poisoning of wells or streams” as a war crime). The 1956 Field Manual reflected customary law on this point that had been recognized in a number of British texts prohibiting “[t]he contamination of sources of water.” See U.S. Dep’t of Army, Pam. 27-161-2, 2 INTERNATIONAL LAW 41 (1962). For example, the 1958 British Manual on The Law of War on Land recognized that “poisoning of wells, streams, and other sources of water supply” were examples of war crimes. U.K. WAR OFFICE, THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW ¶ 626(i), at 175 (1958).

More generally, it was known by the Founders that “poisoners . . . by profession” were international criminals.¹²⁸

Because some herbicides are poisonous, the 2015 Manual should inform military personnel that poisonous herbicides should not be used in warfare. Also, because use of any form of poison is prohibited *per se*, it is incorrect to claim that the prohibition applies only to “substances that cause death or disability with permanent effects” and “is based on” an “uncontrolled character” or “inevitability of death or permanent disability.”¹²⁹ Contrary to these assertions, use of poison of any sort for temporary effects, controlled effects, or in any other way or manner is prohibited *per se*.¹³⁰

2. Prohibition of the Use of Deleterious or Asphyxiating Gases and Chemicals

Importantly, “[u]se of deleterious and asphyxiating gases” also appears in the list of customary war crimes recognized by the 1919 Paris Commission on Responsibility of the Authors of the War and on Enforcement of Penalties.¹³¹ Therefore, prior to the adoption of the 1925 Geneva Protocol, use of “deleterious and asphyxiating gases” as well as poison in any form had been recognized as *per se* violations of the customary laws of war. An important issue, therefore, is whether the use of particular herbicides or other chemicals in spray form or gas is “deleterious” or “asphyxiating” even if the use of other herbicides would not reach these customary legal triggers. Further, the customary prohibitions shed light on the meaning of certain phrases in the 1925 Geneva Protocol. When the drafters of the 1925 Protocol affirmed that “use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world,”¹³² the drafters recognized and affirmed what we would term a pattern of general *opinio juris* that recognizably

128. See, e.g., 1 Op. Att’y Gen. 509, 515 (1821) (quoting EMMERICH DE Vattel, *THE LAW OF NATIONS* (1758)); PAUST, *supra* note 17, at 12, 434 n.54.

129. See DOD MANUAL, *supra* note 1, at 344, § 6.8.1.

130. See *supra* notes 127–29 and accompanying text. Moreover, temporary or controlled poisoning can also run afoul of the customary prohibition of causing unnecessary suffering. See *supra* note 112 and accompanying text.

131. See 1919 List, *supra* note 116, at 46 (crime no. 26).

132. See 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571., 94 L.N.T.S. 65.

condemned their use. Importantly, the language set forth in the 1925 Protocol recognizably reflects customary international law.¹³³

3. Additional Concerns Regarding Use of Herbicides in War

In 1945, the Judge Advocate General of the United States Army recognized the potential reach of the customary prohibition of poison to gases and “crop-destroying chemicals which can be sprayed by airplane”¹³⁴ and recognized that “a customary rule of international law has developed by which poisonous gases *and those causing unnecessary suffering* are prohibited,” which include “poisonous and deleterious gases”; that customary law requires that “chemicals do *not produce poisonous effects* upon enemy personnel, *either from direct contact, or indirectly* from ingestion of plants and vegetables which have been exposed thereto”; and that “[w]hether . . . agents . . . are toxic . . . is a question of fact which should be definitely ascertained.”¹³⁵ The 2015 Manual misreads the Judge Advocate General’s memorandum as if it supports a new and unaccepted limitation of the prohibition of asphyxiating, poisonous, or other gases to those “that are *designed* to kill or injure human beings,¹³⁶ a supposed test that is also inconsistent with the customary prohibitions of (1) employment of weapons or material of a nature to cause unnecessary suffering,¹³⁷ (2) employment of indiscriminate methods or means of combat,¹³⁸

133. See DOD MANUAL, *supra* note 1, at 345, § 6.8.2 & nn.175–76; Rome Statute, *supra* note 3, art. 8(2)(b)(xviii).

134. See Memorandum from Major General Myron C. Cramer for the Secretary of War on Destruction of Crops by Chemicals (Mar. 1945), *reprinted in* 10 I.L.M. 1304 (1971).

135. See *id.* at 1305–06 (emphasis added).

136. See DOD MANUAL, *supra* note 1, at 345, § 6.8.2 & n.177 (emphasis added).

137. See *supra* note 112 and accompanying text.

138. See, e.g., Geneva Protocol I, *supra* note 98, art. 51(4)(c) (indiscriminate measures include “those which employ a method or means of combat the effects of which cannot be limited . . . and consequently . . . are of a nature to strike military objectives and civilians or civilian objects without distinction”); HENCKAERTS & DOSWALD-BECK, *supra* note 92, at 40; UK MANUAL, *supra* note 3, at 68, §§ 5.23 & 5.23.1; see also DOD MANUAL, *supra* note 1, at 244, § 5.12 (quoting Geneva Protocol I regarding “excessive” loss of life or injury to civilians).

and (3) the infliction of suffering or injury unnecessary to accomplish a legitimate military purpose.¹³⁹

4. Poisoning or Destruction of Food, Crops, or Water

The 1956 U.S. Army Field Manual affirms that use of poison is unlawful, but it states that efforts “to destroy, through chemical or bacterial agents harmless to man, crops intended solely for consumption by the armed forces (if that fact can be determined)” would be permissible.¹⁴⁰ Therefore, the 1956 Field Manual makes clear (1) that the chemicals or bacterial agents used must not be “poison,” (2) that they must be “harmless to man,” (3) that the crops must be “solely for consumption” by the enemy military,¹⁴¹ and (4) that it must be “determined” that the

139. See *supra* note 106 and accompanying text.

140. LAW OF LAND WARFARE, *supra* note 21, ¶ 37, at 18.

141. *Id.*; see also Gerald J. Adler, *Targets in War: Legal Considerations*, 8 HOUS. L. REV. 1 (1970), reprinted in 3 THE VIETNAM WAR AND INTERNATIONAL LAW 281, 317, 319 (Richard A. Falk ed., 1972); Denise Bindschedler-Robert, *A Reconsideration of the Law of Armed Conflicts*, in THE LAW OF ARMED CONFLICTS: REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS GENEVA: 15–20 SEPTEMBER 1969, at 37 (Carnegie Endowment for Int'l Peace 1971) (“the destruction of crops can only be justified if it is definitely established that they are destined for the enemy army alone”); MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 338–39 (1982); A.P.V. ROGERS, LAW ON THE BATTLEFIELD 44 (1996) (it is correct that targeting “food facilities not being military objectives unless used exclusively by the armed forces or in direct support of military action” would be proscribed).

Geneva Protocol I focuses on a different and limited aspect. See Geneva Protocol I, *supra* note 98, art. 54(2) (“It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies . . . for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party . . .”), (3)(a) (the prohibition “shall not apply to such of the objects covered . . . as are used by an adverse Party: (a) as sustenance solely for the members of its armed forces”). The DOD Manual assumes that this limited focus was meant to be exclusive as if the only prohibition must involve an intent to deny sustenance value. See DOD MANUAL, *supra* note 1, at 293, § 5.20.4 & n.620. A supposed example is “destroying a field of crops to prevent it from being used as concealment by the enemy.” *Id.* First, destroying a field of crops before it is being misused by an enemy would not be necessary and would be a violation if the field of crops was not destined for consumption solely by enemy military. Second, once the enemy misuses a field of crops to hide their advance, like misuse of a Red Cross vehicle or human shields, the enemy can be attacked and loss of the crops would be their crime. Third, it would seem unlikely that it could be “determined” that an entire field was destined for consumption “solely” by enemy military. *But see id.* at 292 nn.612–613, quoting a 1971 letter from a

crops are solely for military consumption.¹⁴² Clearly, crops that cannot be identified as those to be used solely for consumption by the enemy military must not be targeted. Therefore, crops that could be used by enemy military as well as noncombatants cannot be targeted under any circumstances. Whether or not all herbicides are illegal *per se*, the destruction or poisoning of food, crops, or water that noncombatants might use would be indiscriminate¹⁴³ and prohibited *per se*. It would not matter what weapon or tactic produced that result.

H. JUSTIFIED USE OF FORCE IN KOSOVO

The 2015 Manual addresses use of military force in Kosovo and declares that the United States did not adopt humanitarian intervention “as a legal rationale for NATO’s military action to address the humanitarian catastrophe in Kosovo in 1999, but rather expressed its view that such action was justified on the basis of a number factors.”¹⁴⁴ Humanitarian intervention was a

DOD General Counsel alleging that crops not intended solely for consumption by civilians could be intentionally destroyed. This attempt to reverse the customary test recognized in the Department of the Army Field Manual, Law of Land Warfare, is unacceptable and use of such a test would result in conduct that is indiscriminate, “the effects of which cannot be limited,” and would be “of a nature to strike military objectives and civilians or civilian objects without distinction,” within the meaning of Geneva Protocol I, Article 54.

142. See *supra* note 134 and accompanying text.

143. See *supra* note 138 and accompanying text. In a given circumstance, their destruction might also violate the precautions obligation. As explained by Professor Geoffrey Corn, while raising a concern with respect to the Manual’s treatment of the precautions obligation, it is an “obligation to take all feasible precautions,” “a requirement to take ‘constant care’ to mitigate the risk to civilians and civilian property . . . to reduce risk to civilians.” See Geoffrey S. Corn, *Precautions to Minimize Civilian Harm are a Fundamental Principle of the Law of War*, JUST SECURITY (Jul. 8, 2015), <http://www.justsecurity.org/24493/obligation-precautions-fundamental-principle-law-war>; cf Charles J. Dunlap, Jr., *Let’s Balance the Argument About the DOD Law of War Manual and Targeting*, JUST SECURITY (Jul. 10, 2015), <http://www.justsecurity.org/24542/lets-balance-argument-dod-law-war-manual-targeting> (noting that Geneva Protocol I, art. 57(3), limits application to “[w]hen a choice is possible,” which had been a limit that the U.S. had stressed). The intentional targeting of a truck assumed to be carrying merely food and water to a town in which there are many enemy soldiers and a great deal more civilians, including children, would be a choice that violates the precautions obligation as well as the prohibitions of indiscriminate targeting and unnecessary death, injury, or suffering (see *supra* note 138). It would certainly violate the test set forth in the 1956 Field Manual.

144. See DOD MANUAL, *supra* note 1, at 46, § 1.11.4.4 & n.221.

claim set forth by the United Kingdom.¹⁴⁵ Although some considered the action in Kosovo to be unlawful,¹⁴⁶ NATO's authorization of the use of force exemplified regional peace and security action permitted as "regional action" under Article 52 of the United Nations Charter when the Security Council is veto-deadlocked or otherwise has made no decision limiting permissible regional action.¹⁴⁷

I. SELF-DEFENSE: THE WRONG TEST

Article 51 of the United Nations Charter expressly limits the inherent right of self-defense to a circumstance when "an armed attack occurs."¹⁴⁸ However, the 2015 Manual claims that the "inherent right of self-defense, recognized in Article 51 . . . , may be triggered by . . . an armed attack or imminent threat thereof."¹⁴⁹ As noted in another writing, an "imminent threat logically and by definition is not even a present threat and use of such a remarkably expansive criterion as a trigger for permissible use of force in self-defense would be legal nonsense."¹⁵⁰ The phrase is not the same as "threat of imminent armed attack," which would be consistent with a minority view that anticipatory self-defense should be permissible even though an armed attack is not occurring.¹⁵¹ Indeed, "a claim to use force in self-defense before a threat even materializes would be more dangerous and manifestly unacceptable than a claim to use preemptive self-defense" against an alleged threat.¹⁵²

145. See *id.* at 45-46 & n.220.

146. See, e.g., PAUST ET. AL, *supra* note 15, at 1093.

147. See, e.g., U.N. Charter art. 52 ("Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action"); Jordan J. Paust, *Use of Military Force in Syria by Turkey, NATO, and the United States*, 34 U. PA. J. INT'L L. 431, 437-40 (2013).

148. See U.N. Charter art. 51; Jordan J. Paust, *Armed Attacks and Imputation: Would a Nuclear Weaponized Iran Trigger Permissible Israeli and U.S. Measures of Self-Defense?*, 45 GT. J. INT'L L. 411, 414-15 (2014) (also addressing when an armed attack is underway, *id.* at 437-40).

149. DOD MANUAL, *supra* note 1, at 999-1,000, § 16.3.3.

150. Paust, *supra* note 148, at 419.

151. See *id.* at 41-17, 420.

152. See *id.* at 420-21. Use of force in preemptive self-defense would be a manifest violation of the U.N. Charter that can constitute the crime of aggression. See *id.* at 420 n.12.

The Manual also declares that “the United States has expressed the view that *when warranted*, it will respond to hostile acts . . . as it would to any other threat to the country.”¹⁵³ Of course, a real “threat” or “hostile act” might not constitute an armed attack that would warrant a lawful response in self-defense.¹⁵⁴

J. THERE CANNOT BE A TRANSNATIONAL NIAC

The DOD Manual declares that “States warring against non-State armed groups may be described as ‘non-international armed conflict,’ even if international borders are crossed in the fighting.”¹⁵⁵ As recognized in a recent study,¹⁵⁶ however,

The text of common Article 3 of the 1949 Geneva Conventions contains two significant phrases that stand in sharp opposition to a postulated space for an alleged cross-border or transnational NIAC. First, the phrase “not of an international character” clearly directs attention to the character of the armed conflict and to awareness of real world context. Cross-border and transnational features of an armed conflict are internationalizing features of context that necessarily make the armed conflict one that is international in character. Second, common Article 3 declares that an armed conflict not of an international character is an armed conflict that is “occurring *in* the territory of *one* of the” State parties.¹⁵⁷ Necessarily, a cross-border or

153. See DOD MANUAL, *supra* note 1, at 1000, § 16.3.3 (emphasis added).

154. See also *id.* n.28 (quoting President Obama: “certain hostile acts” “as appropriate and consistent with international law”).

155. DOD MANUAL, *supra* note 1, at 74, § 3.3.1, 1010, § 17.1 (claiming that NIACs are those “that are not between states”). *But see id.* at 1011, § 17.1.1.1 (rightly noting that when the non-state enemy is a “belligerent . . . the law of international armed conflict would be applied.”).

156. See Jordan J. Paust, *NIAC Nonsense, the Afghan War, and Combatant Immunity*, 44 GA. J. INT’L. & COMP. L. NO. 2 (Forthcoming, 2016). The article also addresses proper tests for POW and combatant status based on membership – tests that are important to retain for members of armed forces.

157. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, *supra* note 34, art. 3 (emphasis added). In a related manner, a 1977 Protocol to the 1949 Geneva Conventions that is applicable during an Article 3 conflict declares that it applies to “armed conflicts. . . which take place in the territory of a” State party “between its armed forces and dissident armed forces or other organized armed groups.”

transnational armed conflict will not occur within one country. As the authoritative commentary of the International Committee of the Red Cross (ICRC) clearly reminds, “the conflicts referred to in Article 3 are armed conflicts . . . [that] take place within the confines of a single country.”¹⁵⁸

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1(1), 1125 U.N.T.S. 609 (1977). *See also* Rome Statute, *supra* note 3, art. 8(2)(f) (armed conflicts not of an international character are “conflicts that take place in the territory of a State . . . between governmental authorities and organized armed groups or between such groups”).

158. *See, e.g.*, IV COMMENTARY, *supra* note 76, at 36; III COMMENTARY, *supra* note 76, at 37 (same language); *see also* The Prosecutor v. Musema, Case No. ICTR 96-13-T, Judgment and Sentence, ¶ 247 (Jan. 27, 2000) (during an NIAC, the “government of a single State [is] in conflict with one or more factions within its territory”), ¶ 248 (“non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a single State”); United States v. Noriega, 746 F. Supp. 1506, 1534 (S.D. Fla. 1990) (common Article 3 “applies to . . . internal or civil wars of a purely domestic nature . . . Accordingly, Article 3 does not apply to the United States’ invasion of Panama.”); CORN ET AL., *supra* note 3, at 85–86 (common Article 3 includes “the qualification that the armed conflict occur ‘within the territory of one’ State party, “[a]s a result . . . [an Article 3 conflict or insurgency] was indeed synonymous with internal” conflict, and the ICRC interpretation has been that there are two types of armed conflict under Geneva law: “[1] international armed conflict (when the operations are conducted outside the territory of the state) or [2] non-international armed conflict (limited to operations conducted within the territory of the state).”); IV COMMENTARY, *supra* note 76, at 14 (“international conflicts” are in contradistinction to “an armed conflict which is not international in character”); Robert Weston Ash, *Square Pegs and Round Holes: Al-Qaeda Detainees and Common Article 3*, 17 IND. INT’L & COMP. L. REV. 269, 298–99 (2007) (an armed conflict is an Article 3 insurgency only if the conflict occurs within a single state); *cf.* DOD MANUAL, *supra* note 1, at 1011, § 17.1.1.2 (recognizing “a traditional definition of non-international armed conflict as only those armed conflicts occurring within the borders of a single State,” quoting IV COMMENTARY, *supra* note 76, at 36). *But see* COMMENTARY OF 2016 ON THE CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD, GENEVA, 12 AUGUST 1949 ¶¶ 79–73 (ICRC 2016), <https://www.icrc.org/applic/IHL/IHL.nsf/Comment.xsp?action=openDocument&documentId>. This new Commentary correctly notes that proper application of common Article 2 rests upon “the pre-eminence of the factual existence of an armed conflict . . . [which] must be based solely on the prevailing facts.” *Id.* ¶ 20. It also notes that “[a] determination based on the prevailing facts should also conform to . . . the strict separation of *jus in bello* from *jus ad bellum*” so that “determination of the existence of an armed conflict and the related applicability of international humanitarian law depend only on the circumstances prevailing on the ground.” *Id.* ¶ 24. In sharp contrast, however, the new Commentary would hinge the nature of a cross-border conflict as an armed conflict of an international character on lack of “consent” of a territorial state to outside intervention, which

Also addressed in the article are various internationalizing features of context (such as direct participation in combat by armed forces of other states) that should be taken into account when making a realistic and policy-serving decision whether an armed conflict is of an international character.¹⁵⁹ For U.S. military personnel, it is critically important from

a policy-serving standpoint that whenever U.S. military personnel engage in fighting during hostilities abroad the U.S. Government should recognize that such direct U.S. participation in hostilities has internationalized the armed conflict if it had not previously been an armed conflict of an international character so that U.S. military personnel will have combatant status and combatant immunity for lawful acts of war. Otherwise, U.S. soldiers could be prosecuted under relevant

is what some writers prefer to consider regarding *jus ad bellum* or use of force (often in error). *See id.* n.98. According to the new Commentary, if a state consents “to the use of force in its own territory by a foreign State” the armed conflict will allegedly not be of an international character. *See id.* ¶¶ 69, 73. But if the state does not consent “it would amount to an international armed conflict.” *See id.* ¶ 70. And, if “cross-border or spillover” hostilities occur in the territory of a non-consenting State, “that intervention constitutes an unconsented to intrusion into the territorial State’s sphere of sovereignty . . . amounting to an international armed conflict.” *Id.* ¶ 71 (adding that this “was implicitly affirmed by the ICJ). Further, if the foreign state attacks non-state actors and the attacks “concomitantly affect the local population and the [territorial] State’s infrastructure . . . it better corresponds to the factual reality to conclude that an international armed conflict arises . . . when force is used” without consent of the territorial state. *See id.* § 72. Therefore, the ICRC recognizes that some cross-border violence will change the character of an armed conflict to one of an international nature. However, to rest classification of the character of a conflict on state “consent” is contrary to the ICRC’s own admonition regarding the distinction between law of war and use of force criteria and the recognized need to focus on the facts when making a choice about the existence and character of armed conflicts to which humanitarian law applies. Further, to limit the full reach of humanitarian law because of the happenstance of state “consent” is contrary to general efforts to provide greater protection for human beings during armed conflict. It is also dangerous with respect to soldiers who would have combatant status and combatant immunity for lawful acts of war when the conflict is of an international character, for example, whenever a cross-border conflict occurs without consent. Subsequent “consent” would make soldiers murderers when they lawfully kill enemy fighters during what has supposedly become a NIAC even though the fighting and facts “on the ground” are the same. With respect to the multi-state and transborder war against ISIS, consent by Iraq would supposedly make the war against ISIS in Iraq a NIAC, but lack of consent would supposedly make the same war against ISIS in Syria an IAC.

159. *See Paust, supra note 156.*

domestic law for murder or other domestic crimes for what would have been privileged acts of war during an international armed conflict.¹⁶⁰

Conclusion

This Article has documented several errors and manifest misconceptions that are contained in the 2015 DOD Law of War Manual. The Manual should be revised¹⁶¹ to eliminate the errors and provide proper guidance and protection for U.S. military personnel and others who might use the Manual. Manifestly misstating the content and reach of law will not serve or protect those users.

160. Paust, *supra* note 97, at 170 (citing PAUST ET AL., *supra* note 3, at 685–86, 697–98); Lewis, *supra* note 110, at 309 & n.96.

161. The Manual states that comments and suggestions are invited. DOD MANUAL, *supra* note 1, at vi. Therefore, presumably it will be revised periodically.