The Pentagon's Law of War Manual: Part two

A recipe for total war and military dictatorship

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This is the second of four articles analyzing the new US Department of Defense Law of War Manual. *The* first article *was posted November 3*.

A framework for military dictatorship

The most menacing passages of the Pentagon's *Law of* War *Manual* concern its relationship to other areas of law. According to the manual, the law of war is separate from and supersedes all other bodies of law, including international human rights treaties and the United States Constitution's Bill of Rights. This is nothing less than a formula for martial law, military dictatorship and the suspension of the Constitution.

Citing a legal treatise entitled "Military Law and Precedents," the manual states that the law of war can supersede the Constitution: "'On the actual theatre of military operations,' as is remarked by a learned judge, 'the ordinary laws of the land are superseded by the laws of war. The jurisdiction of the civil magistrate is there suspended, and military authority and force are substituted.' Finding indeed its original authority in the war powers of Congress and the Executive, and thus constitutional in its source, the Law of War may, in its exercise, *substantially supersede for the time even the Constitution itself* …" (p. 10, emphasis added).

With the entire world declared to be the "battlefield" in the "war on terror," this is a formula for the Pentagon to impose military dictatorship on all of Planet Earth.

When the Pentagon refers to the "law of war," it is not referring to historic precedents or international treaties. The phrase "law of war," in the context of the manual, is a euphemism for "the law according to the Pentagon."

Under the Pentagon's pseudo-legal framework, the "law of war" is an independent source of legal authority that overrides all democratic rights and sanctions arbitrary rule by the military. The manual states: "Although the law of war is generally viewed as 'prohibitive law,' in some respects, especially in the context of domestic law, the law of war may be viewed as permissive or even as a source of authority" (p. 14).

Changing a few words here and there, these doctrines could have been copy-pasted from the writings of the Nazi "crown jurist" Carl Schmitt (1888-1985). According to Schmitt's infamous "state of exception" doctrine, under conditions of a national emergency, the executive is permitted to override democratic protections and disregard the rule of law. Under this doctrine, democratic rights are not formally abrogated, they are simply suspended indefinitely.

Schmitt's "state of exception" doctrine was used as a legal justification for the 1933 "Act to Relieve the Distress of the People and the Reich," also known as the "Enabling Act," which codified Hitler's dictatorship.

The Pentagon manual invokes Schmitt's "state of exception" theory in all but name. Having claimed that the law of war is a "special" discipline of law, as opposed to a "general" discipline, the manual states that "the special rule overrides the general law" (p. 9). For added effect, a Latin legal maxim saying the same thing is cited: "lex specialis derogat legi generali."

Thus, according to the Pentagon, the law of war is the exception to the general "law of peacetime." Here we have nothing less than a Nazi legal doctrine, incorporated by the Pentagon into a major policy document.

"In some circumstances," the Pentagon's manual states, "the rules in the law of war [i.e., the rules invented by the Pentagon] and the rules in human rights treaties may appear to conflict; these apparent conflicts may be resolved by the principle that the law of war is the *lex specialis* during situations of armed conflict [again, the state of exception], and, as such, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims" (p. 9).

In other words, whenever the Pentagon's policies conflict with human rights treaties, the human rights treaties should be ignored.

The manual continues, "Underlying this approach is the fact that the law of war is firmly established in customary international law as a well-developed body of law that is separate from the principles of law generally applicable in peace" (p. 10). The implication is that during wartime, America's vast military establishment is a "separate," independent branch of government, subject to its own rules and accountable to no one.

Despite the references to the war powers of Congress and the executive under the American Constitution, the Pentagon's conceptions are the opposite of the framework envisioned by the framers of the Constitution. The Declaration of Independence, in its list of grievances against the British monarch, charges that the king "affected to render the Military independent of and superior to the Civil power."

Both the Bush and Obama administrations have been fond of invoking the phrase "commander in chief," which appears in Article II of the US Constitution, in a manner that turns its original meaning upside down. The American revolutionaries described the president as the commander in chief of the navy and army as a way of expressing the subordination of the military to civilian authority. This phrase was not meant to elevate the military, with the president as its head, into some kind of supreme authority over the rest of the state and the population.

The manual's reference to "principles of law generally applicable in peace" has particularly sinister implications.

"Human rights treaties," according to the Pentagon, are "primarily applicable to the relationship between a State and individuals in

peacetime" (p. 22). Therefore, in "wartime"—including the "war on terror" of indefinite scope and duration—human rights treaties no longer apply.

This formula would allow the Pentagon to override more than just human rights treaties. The manual's authors include the Bill of Rights and other guarantees of civil liberties in the category of laws that apply in "peacetime" only. The arguments made by the manual justify suspending the Bill of Rights altogether as a "peacetime" law that is superseded for the duration of the "war on terror."

But why stop there? Aren't elections also part of a system of laws "generally applicable in peace?" What about other civil liberties? What about the right to freedom of speech, or the right to form political parties? What about the right to trial by jury? What about the right to privacy, and the ban on "cruel and unusual punishment?" What about laws against racial discrimination? The right to a minimum wage?

Taken to its logical conclusion, the *Law of War Manual* would justify imposing a military dictatorship, suspending all democratic rights and rounding up and imprisoning all dissenters.

Should any reader think this analysis far-fetched, it should be remembered that one top American military man recently called for setting up military internment camps for "disloyal" and "radicalized" Americans. Retired Gen. Wesley Clark (a Democrat) declared: "If these people are radicalized and they don't support the United States and they are disloyal to the United States, as a matter of principle, fine. It's their right, and it's our right and obligation to segregate them from the normal community for the duration of the conflict." He added, "We've got to cut this off at the beginning."

Clark's extraordinary proposals provoked no significant discussion or disagreement within the political or media establishment. None of the current presidential candidates from either major party has referred to Clark's statement, presumably because they do not fundamentally disagree with it. There have been no consequences for Clark's lobbying and consulting firm. The Pentagon's manual makes clear that Clark was merely testing the waters, revealing plans that have been broadly discussed, developed and approved at the highest levels of the state.

When asked last year about the military internment of Japanese-Americans during the Second World War, US Supreme Court Justice Antonin Scalia responded, "You are kidding yourself if you think the same thing won't happen again." He added, in a formulation that mirrors the Pentagon's manual, "In times of war, the law falls silent."

The manual also features a heavy dose of the Obama administration's trademark "balancing" rhetoric. Pursuant to this approach, a basic democratic right or legal principle will be affirmed in abstract terms. But then it will be "balanced" against some authoritarian counter-principle, with the result that the basic principle will be rendered meaningless. The Obama administration has invoked this formula repeatedly as its justification for NSA spying, as well as for drone assassinations.

The document states, "Civilians may not be made the object of attack, unless they take direct part in hostilities." This seems clear enough, but then a "balancing" formula is introduced. "Civilians may be killed incidentally in military operations; however, the expected incidental harm to civilians may not be excessive in relation to the anticipated military advantage from an attack, and feasible precautions must be taken to reduce the risk of harm to civilians during military operations" (p. 128).

In other words, after applying the "balancing" formula, it turns out that it is acceptable to kill civilians if, on balance, the expected "military advantage" outweighs the harm to civilians. This effectively makes the rule against killing civilians meaningless. In practice, the "balancing" formula translates to the unfettered power of military leaders to order mass killing and destruction.

The brutality of imperialist war

The manual features a chilling discussion of killing civilians. According to the Pentagon, massacres of civilians are permissible if they help achieve "operational objectives."

The authors take pains not to state that the killing of civilians is prohibited per se. Instead, the manual indicates that "feasible precautions" should be taken to "avoid" civilian casualties, which should not be "excessive" or "unreasonable." However, the manual defines "feasible precautions" as merely "those that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations" (p. 190).

"For example," the document states, "if a commander determines that taking a precaution would result in operational risk (i.e., a risk of failing to accomplish the mission) or an increased risk of harm to their own forces, then the precaution would not be feasible and would not be required" (p. 191). This is a blank check for mass killings of civilians if a military leader decides that failing to do so would be an "operational risk." If exterminating the population of a hostile city would reduce the "risk of harm" to US forces, then the Pentagon manual would allow it.

This "balancing" formulation appears to contradict previous statements of American policy, such as the following remarks from 1987 by a State Department legal adviser: "[C]ivilian losses are not to be balanced against the military value of the target. If severe losses would result, then the attack is forbidden, no matter how important the target" [2].

The manual also codifies the tendentious "human shields" doctrine, whereby civilian deaths are blamed on the targets of indiscriminate bombing. "A party that is subject to attack might fail to take feasible precautions to reduce the risk of harm to civilians, such as by separating the civilian population from military objectives … the ability to discriminate and to reduce the risk of harm to the civilian population likely will be diminished by such enemy conduct" (p. 198).

This is merely a justification for collective punishment by another name. If the Pentagon identifies a "military objective" in a densely populated area, then the military supposedly has the legal right to obliterate the neighborhood with high explosives and blame the civilian population for being "human shields." Collective punishment is, under international law, a war crime. It is designed to terrorize a population and discourage resistance.

The manual expressly authorizes targeted killings. "Military operations may be directed against specific enemy combatants," the document states, adding, "US forces have often conducted such operations" (p. 201).

In support of targeted killings, the manual cites Obama's speech on May 2, 2011: "Today, at my direction, the United States launched a targeted operation against that compound [suspected of housing Osama Bin Laden] in Abbottabad, Pakistan. A small team of Americans carried out the operation with extraordinary courage and capability. No Americans were harmed. They took care to avoid civilian casualties. After a firefight, they killed Osama bin Laden and took custody of his body" (p. 201).

The manual fails to mention that journalist Seymour Hersh has exposed the account given in Obama's speech as a pack of lies.

Censorship and targeting of journalists as "unprivileged belligerents"

The manual's proposed treatment of journalists as spies has evoked the only media attention to the document. "Reporting on military operations," the manual states, "can be very similar to collecting intelligence or even

spying" (p. 175).

The Pentagon goes on to authorize itself to "capture" and "punish" journalists, forbid journalists to work anonymously, and require that journalists obtain "permission" and "identification documents" from the US military to conduct their work.

The manual states: "A journalist who acts as a spy may be subject to security measures and punished if captured. To avoid being mistaken for spies, journalists should act openly and with the permission of relevant authorities. Presenting identification documents, such as the identification card issued to authorized war correspondents or other appropriate identification, may help journalists avoid being mistaken as spies" (p. 175).

The document further states that journalists can be subject to military censorship. It declares: "States may need to censor journalists' work or take other security measures so that journalists do not reveal sensitive information to the enemy. Under the law of war, there is no special right for journalists to enter a State's territory without its consent or to access areas of military operations without the consent of the State conducting those operations" (p. 175).

There is nothing here that would be out of place in the code of laws of a totalitarian police state. This legal framework, for example, would justify setting up a military internment camp to imprison each journalist who published material disclosed by Edward Snowden. There is nothing in the manual that would prohibit the Pentagon from launching drone strikes against targeted journalists who are deemed to be acting as "spies." (If a journalist's family and friends were killed in the drone strike, it would be the journalist's fault for employing "human shields").

Do we exaggerate? An article appeared in the recent spring/summer issue of the academic *National Security Law Journal* titled "Trahison des Professeurs: The Critical Law of Armed Conflict/Academy as an Islamist Fifth Column" [3 Nat'l Sec. L.J. 278 (2015)]. In this article, West Point law professor William C. Bradford argues that academics who criticize the "war on terror" are "aiding the enemy," such that they should be treated as "unlawful combatants" under the law of war.

Bradford, a professor at the prestigious United States Military Academy, goes on to argue that by criticizing the war on terror, certain professors are working in "the service of Islamists seeking to destroy Western civilization and re-create the Caliphates." These professors, Bradford charges, are guilty of "skepticism of executive power," "professional socialization," "pernicious pacifism," and "cosmopolitanism."

Bradford recommends firing "disloyal" professors and imposing loyalty oaths at universities. He further recommends arresting and prosecuting professors for treason and for providing material support to terrorism. Finally, he argues that "disloyal" professors and the universities that employ them could be considered "lawful targets" for military attack under the law of war.

Bradford has also advocated a military coup ("What conditions precedent would be required before the American military would be justified in using or threatening force to oust a US president…?") and genocide ("total war" until "the political will of Islamist peoples" is broken, or until "all who countenance or condone Islamism are dead"). The latter policy would include the targeted destruction of "Islamic holy sites."

The journal subsequently repudiated Bradford's article, calling it an "egregious breach of professional decorum," and Bradford resigned from West Point on August 30. However, the episode provides a glimpse of what the Pentagon has in mind for its critics under the "law of war." Bradford's fascistic rants simply represent the doctrines expressed in the *Law of War Manual* taken to their logical conclusions.

The persecution of journalists such as Glenn Greenwald (and his partner David Miranda) and Julian Assange, together with whistleblowers such as Edward Snowden and Bradley (Chelsea) Manning, has already made clear that the American government will treat the exposure of official criminality as "espionage" and "aiding the enemy." The Pentagon's manual codifies this position and authorizes the military to carry out repressive measures against journalists.

The Committee for the Protection of Journalists (CPJ) issued a statement on July 31 protesting the manual, pointing to the rising numbers of journalists killed and maimed while covering armed conflicts. "The Obama administration's Defense Department," the CPJ wrote, "appears to have taken the ill-defined practices begun under the Bush administration during the War on Terror and codified them to formally govern the way US military forces treat journalists covering conflicts."

It is significant that the words "freedom of speech" and "freedom of the press" do not appear anywhere in the Pentagon's manual.

In a section setting forth the Pentagon's authority as an "Occupying Power," the manual states that "for the purposes of security, an Occupying Power may establish regulation of any or all forms of media (e.g., press, radio, television) and entertainment (e.g., theater, movies), of correspondence, and of other means of communication. For example, an Occupying Power may prohibit entirely the publication of newspapers that pose a threat to security, or it may prescribe regulations for the publication or circulation of newspapers of other media for the purpose of fulfilling its obligations to restore public order" (pp. 759-60).

A footnote includes the caveat that "this sub-section focuses solely on what is permitted under the law of war and does not address possible implications of censorship under the First Amendment of the Constitution." Presumably, the authors would contend that the First Amendment applies only in "peacetime," and is "superseded" by the Pentagon's "lex specialis" for the duration of the "war on terror."

To be continued

Notes:

[2] See *The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Adviser, United States Department of State, Jan. 22, 1987*, American University Journal of International Law and Policy 460, 468 (1987) (cited in the *Law of War Manual*, p. 247).