

Pentagon Revamps Law of War Manual to Protect Journalists

NYTimes

Image

An Agence France-Presse reporter hit the ground as a Syrian soldier ran past him during sniper fire in the town of Maaloula in 2013. Credit: Anwar Amro/Agence France-Presse — Getty Images

By Charlie Savage

July 22, 2016

WASHINGTON — The Pentagon on Friday revised its manual for interpreting the international laws of war, adding language to protect reporters engaged in battlefield news gathering.

But the Defense Department's overhaul of its Law of War Manual left unchanged other disputed sections that scholarly critics have called inaccurate and dangerous — including rules for weighing when it is lawful to fire on a military target even though civilians are present.

The manual, issued last year, is the latest in a series of official guides to rules for warfare tracing back to a set of concise rules, known as the “Lieber Code,” that President Abraham Lincoln issued to Union soldiers during the Civil War. But last year's version, which is about 1,200 pages, has attracted controversy.

Its section about war correspondents portrayed journalism as close to spying, said reporters should get authorization to enter a war zone, and spoke of censoring their work. And it stated that if reporters relayed information that could be useful in combat, that “could constitute taking a direct part in hostilities” — meaning it would become lawful to intentionally kill them.

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Journalism advocates objected, saying that the section could lead commanders to put reporters at risk, and that other governments might cite the manual as justification for targeting them.

The revision focused mainly on the journalism section, which now has a different tone. It lauds “open and independent reporting” as vital and does not compare journalists to spies or

encourage censorship, saying only that the laws of war do not prohibit states from taking steps to protect sensitive information.

And it emphasizes that “engaging in journalism does not constitute taking a direct part in hostilities,” urging efforts to make sure that if reporters meet with enemies for journalistic purposes, commanders do not mistakenly assume they are part of the enemy.

The revision was overseen by Charles Allen, the Pentagon deputy general counsel. In a briefing with reporters on Thursday, Mr. Allen said the section was reorganized to emphasize that “journalists are civilians and are to be protected as such,” adding, “One of the problems with the previous version of this section was that it was maybe just too blunt in some ways.”

The revisions left unchanged another section that discusses deception that is permitted by law, saying it is not a war crime for a fighter to feign being a civilian to facilitate spying or sabotage. As an example, it cites representing oneself as a reporter.

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David Glazier, a Loyola University law professor who has co-written a forthcoming article in The Yale Journal of International Law criticizing the manual, said the changes were largely cosmetic.

The problem with the original section about journalists, he said, was that its tone unwisely “planted the seed in the military mind” that journalists might pose a threat. But its description of the law was essentially correct, he said.

By contrast, other parts of the manual are wrong about the law, he and other legal scholars have contended, and those sections were not overhauled. The concerns of those scholars center on the protection of civilians.

In war, it can be lawful to fire on a target even though civilians are nearby — but only if the anticipated collateral damage is proportionate. The manual suggests commanders need not weigh entire categories of civilians, including those who are used as human shields and who work in a place that helps sustain the enemy’s forces.

It also states that when there is doubt about the identity of potential targets, commanders need not presume they are civilians.

Adil Haque, a Rutgers University law professor who recently wrote an article criticizing the manual, said in an interview that it “systematically undermines legal protections for civilians” in a way that is not supported by mainstream international law.

He also criticized the manual for using several quotations in its footnotes, including a 1907 claim that citizens of an occupied town do not enjoy protections from an attacking force unless they leave, and a Vietnam War-era statement suggesting that children forced to work as porters for enemy forces are targetable.

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“We were all expecting, at the very least, that these really outrageous, antiquated and shocking things would be taken out, and from what I’ve seen, none of them have been,” Professor Haque said.

Asked why the revisions did not address such criticism, Lt. Col. Valerie D. Henderson, a Defense Department spokeswoman, said she could not comment.

“As we have said and shown by the update released today, we will be continuing to review the manual, and another update is likely in due course,” she said.

The manual has a tortured bureaucratic history dating to 1995, when the Pentagon decided it needed to replace old, service-specific manuals with an updated, departmentwide document. It created a working group led by W. Hays Parks, then a lawyer in its general counsel’s office.

Mr. Parks labored for years, but the treatise was not completed when he retired in 2010. The project had been bogged down toward the end, current and former officials said, partly because Justice and State Department lawyers objected that parts conflicted with the Obama administration’s positions on international law.

In 2012, Mr. Parks gave a speech complaining that the draft manual had been held up for political reasons and was then being unwisely changed. He declined to comment this week.

The next year, the Senate Armed Services Committee pressed Stephen Preston, then seeking confirmation to become the Pentagon general counsel, to complete it. It was finally published

in 2015 without interagency approval, and with a note stating that it represented the views of only the Defense Department — not the government as a whole.

Correction: July 23, 2016

An earlier version of this article misspelled the surname of a Pentagon lawyer who worked on a draft of the Department of Defense Law of War Manual prior to his retirement in 2010. His name is W. Hays Parks, not Park.

A version of this article appears in print on July 23, 2016, on Page A3 of the New York edition with the headline: Pentagon Revises Law of War Manual to Protect Press. [Order Reprints](#) | [Today's Paper](#) | [Subscribe](#)