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National military manuals on the law of armed conflict

An international seminar organized in the series of the

Forum for International Criminal Justice and Conflict¹

by the Norwegian Centre for Human Rights (University of Oslo), the Norwegian Red Cross, the Danish Red Cross, the Finnish Red Cross, the Swedish Red Cross, the Norwegian Defence Command and Staff College, the Norwegian Institute for Defence Studies, and PRIO.

Monday, 10 December 2007 09:00 – 17:00

Henri Dunant Hall, Norwegian Red Cross, Hausmanns gate 7, Oslo

This seminar explores various aspects of national military manuals on the law of armed conflict and some of the challenges concerning their preparation, maintenance and function. As no Nordic state currently has a military manual, the seminar also examines the desirability and feasibility of a joint manual for the armed forces in the region.

The law of armed conflict is a culmination of practice and agreements between warring states meticulously observed and recorded over the centuries. However, it has long proved a major challenge to ensure that the law is known to the armed forces, understood by their members and observed on the ground. Despite its numerous and often highly technical provisions, the law remains notoriously open-textured and indeterminate in key respects. States routinely disagree with one another as to the applicability of certain rules or their interpretation. Many soldiers are left uninstructed on the law due to the indifference, inability or unwillingness of their governments. Factors such as a dearth of competent military lawyers and particular “corporate cultures” prevalent in parts of the armed forces also undermine compliance.

Articles 82-84 and 87 of the First Additional Protocol of 1977 specifically obligate contracting states to provide competent legal advisers, acquaint military and relevant civilian personnel with the law and require commanders to take preventive and/or punitive action *vis-à-vis* non-compliance by their subordinates. In order to fulfill these obligations, states need to acquire expertise and reference material necessary for a clear, uniform and accurate account of the legal rules – whether they emanate from the law of armed conflict or domestic law, or both as the case may be – that govern military operations. The need is particularly acute for the vast majority of soldiers who are not lawyers themselves and can not reasonably be expected to resolve complex legal problems without specialist assistance.

Military manuals are meant to help the armed forces clarify those rules of warfare by which their states consider themselves bound. Good manuals offer sound operational guidance to the military in the field and reduce indeterminacies of the rules for their addressees.

This seminar focuses on four issue-areas:

- First, what exactly is a national military manual? What does it do? Where within the broad legal, institutional and normative framework of the armed forces – *e.g.*, domestic law including criminal law, mili-

¹ A debate forum open to individuals interested in issues concerning international criminal justice and conflict, started as an informal initiative under the ENI Programme of PRIO (by its Senior Researcher Morten Bergsmo, in consultation with Dr. Jo Stigen, Department of Public and International Law, University of Oslo). The Forum aims to identify and facilitate debate on key issues in international criminal justice and conflict, including accountability-related measures other than criminal justice, and to bring together practitioners, government officials, NGO representatives, academics, students and others with an interest in this emerging field of practice and research. Information about the Forum can be found at www.prio.no/ficjc/.

tary justice, operational doctrine, rules of engagement and battlefield ethics – does a military manual fall? What are the functions and status of military manuals under the law of armed conflict? Are military manuals evidence of state practice and/or *opinio juris*, or neither?

- Second, what has been the experience of states which maintain national military manuals? For whose benefit do these states maintain such manuals – members of their armed forces, officials of government departments, *etc.*? How are the intended beneficiaries of military manuals trained on them? Have military manuals been effective in doing what they are intended to do? In what way, if any, have military manuals affected the conduct of those concerned with the application and observance of the law of armed conflict? What role have military manuals played in peace operations? Would a national as opposed to an international approach to military manuals be appropriate in the context of such operations?
- Third, what subject-matters and areas of law should military manuals include or exclude? How should military manuals deal with the fluid realities of warfare, rapid development of the law of armed conflict and controversial weapons and tactics? How should military manuals cope with the numerous points at which the law of armed conflict overlaps with other fields of international law, such as international human rights law and international criminal law? From whose input, expertise and perspectives should good military manuals benefit – military lawyers, non-legal military personnel, civilian specialists, Red Cross experts, *etc.*?
- Fourth, is a military manual really necessary for a state which does not have one yet? What, if any, is its added value? What are the pros and cons of a state having or not having a military manual for its armed forces? Are there any conditions for a military manual to be legitimate, feasible and/or useful and, if so, what are these conditions? Might there be a ‘Nordic military manual’?

The seminar considers these questions by drawing on prominent international experts with extensive experience in the law of armed conflict, military manuals and related fields.

Registration:

To register, please send an e-mail message before 10 November 2007 to ficjc@prio.no (with ‘Seminar 071210’ in the subject field), indicating your wish to register as a Seminar participant. Remember to mention your name, functional title (for example, ‘student’ or ‘Legal Adviser (MFA)’) and e-mail address.

Accommodation:

The Norwegian Red Cross can offer special hotel rates for registered Seminar participants. If interested, please contact Mr. Mads Harlem at mads.harlem@redcross.no.

Programme:

09:00 *Welcome*, Trygve G. Nordby² (Secretary-General, Norwegian Red Cross).

09:05 *Opening remarks*, by Gro Nystuen³ (Associate Professor, University of Oslo).

Session I: Fundamentals of military manuals

09:10 *Remarks by session moderator*, Arne Willy Dahl⁴ (Judge Advocate General, Norway).

09:15 *Military manuals, operational law and the regulatory framework of the armed forces*, by Charles Garraway⁵ (Associate Fellow, Chatham House; Visiting Professor, King's College, London).

09:35 *Military manuals, legal advisors and the First Additional Protocol of 1977*, by Hans-Peter Gasser⁶ (Senior Legal Advisor, International Committee of the Red Cross, ret.).

09:55 *Military manuals and the customary law of armed conflict*, by David Turns⁷ (Senior Lecturer, Laws of Armed Conflict, UK Defence Academy).

10:15 *Discussion*

10:40 Coffee break

Session II: Experiences with military manuals

11:00 *Remarks by session moderator*, by Peter Otken⁸ (Judge Advocate, Denmark).

² **Trygve G. Nordby**, Secretary General of the Norwegian Red Cross, has substantial experience from senior management positions within both the volunteer and public sectors. In the period from 1990 to 1997, he was Secretary General of the Norwegian Refugee Council and Adviser on Return and Integration to the OSCE Mission to Croatia 1998-99. From 1999 to 2001, he worked as an independent consultant in the fields of international humanitarian affairs, management and communication. Before joining the Red Cross/Red Crescent Movement in March 2006, Mr. Nordby was the Director General of the Norwegian Directorate of Immigration.

³ **Gro Nystuen** is dr. juris Associate Professor of International Humanitarian Law at the University of Oslo. She worked in the Ministry for Foreign Affairs (MFA) from 1991 to 2005, except from 2000-2003 when she was on leave to write her doctoral thesis (on the Dayton Peace Agreement) at Oslo Law Faculty. In the MFA, she worked in the Department for International Law; her last position in the Ministry was Deputy Director General, head of the Section for Human Rights and Democracy. In addition to public international law in general, she has worked in particular with human rights, international humanitarian law and arms issues, including the Mine Ban Convention. She was stationed at the Norwegian Permanent Mission to the UN in Geneva (1994-95), and seconded to work as legal adviser at the Yugoslavia Conference (ICFY) for the UN Co-chair, Thorvald Stoltenberg (1995), and for the High Representative in Bosnia, Carl Bildt (1995-1997). She was appointed to chair the Council on Ethics for the Norwegian Government Pension Fund in 2004, and has from 2005 held this office in addition to her teaching position at the University of Oslo.

⁴ **Arne Willy Dahl** is Judge Advocate General for the Norwegian Armed Forces, and in that capacity responsible for penal prosecution in military cases and for legal advice in summary punishment cases. He was born in 1949 and finished law school at the University of Oslo in 1974. He has received reserve officer training in the infantry and the medical corps. Since 1982 he has taken positions as a lecturer at the Army Academy, Judge Advocate for eastern Norway, District Attorney (public prosecutor) in Oslo, Head of the Legal Services of the Norwegian Armed Forces, and Prosecutor at the Office of the Director for Public Prosecutions with special responsibility for War Crimes. He has written "Håndbok i militær folkerett" (Handbook of military international law) and is for the time being president of the International Society for Military Law and the Law of War.

⁵ **Charles Garraway** was, for thirty years, an officer in the British Army Legal Services advising on international and operational law. During that time, he was for several years Editor of the draft UK Manual on the Law of Armed Conflict and remained on the editorial committee. Since retirement, he has held a number of academic appointments including the Stockton Chair of International Law at the United States Naval War College. He is currently an Associate Fellow of Chatham House, Visiting Professor at King's College, London, Visiting Fellow in the Department of Human Rights, University of Essex and a Commissioner on the International Humanitarian Fact Finding Commission, established under Article 90 of Additional Protocol I to the Geneva Conventions of 1949. He has written extensively in the fields of international humanitarian law and international criminal law.

⁶ **Hans-Peter Gasser**, LL.M. (Harvard), Dr. iur. (University of Zurich), former Senior Legal Advisor, International Committee of the Red Cross (ICRC), and former Editor of the International Review of the Red Cross.

⁷ **David Turns** is Senior Lecturer, Laws of Armed Conflict, UK Defence Academy. Previously, he was a full-time Lecturer in Law at the University of Liverpool (1994-2007); and a part-time Lecturer at the London School of Economics & Political Science (1990-1994), where he completed both his LL.B. (1987-1990) and LL.M. in International Law (1991-1992) degrees. He was called to the Bar of England and Wales by the Inner Temple in 1992 and also taught at Holborn College and Regent School of Law in London (1993-1994).

- 11:05 *The United Kingdom manual*, by Tony Rogers⁹ (Senior Fellow, Lauterpacht Centre for International Law, University of Cambridge).
- 11:25 *The Canadian manual*, by William J. Fenrick¹⁰ (former Senior Legal Advisor and Head of the Legal Advisory Section, Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia).
- 11:45 *The German manual*, by Wolff Heintschel von Heinegg¹¹ (Professor of Public Law, Europa-Universität Viadrina in Frankfurt (Oder), Germany).
- 12:05 *Military manuals and the challenge of multinational peace operations*, by Dieter Fleck¹² (former Director International Agreements and Policy, German Ministry of Defence).
- 12:25 *Discussion*
- 12:50 Lunch sandwiches served at the seminar premises

Session III: Scope and content of military manuals

- 13:20 *Remarks by session moderator*, Marja Lehto¹³ (Director, Ministry for Foreign Affairs of Finland).
- 13:25 *Addressing the realities, developments and controversies regarding the conduct of hostilities*, by Hays Parks¹⁴ (Office of the General Counsel, US Department of Defence).

⁸ **Peter Otken** is a Judge Advocate, Danish Judge Advocate General's Corps. He is a senior Military Prosecutor, primarily responsible for cases concerning members of the Danish armed forces deployed in international operations. He was formerly the Special Assistant to the Judge Advocate General for International Humanitarian Law and served as the Military Legal Advisor to Defence Command Denmark (1997-1999). He was deployed as Deputy Legal Advisor to HQ SFOR, Bosnia-Herzegovina (1998) and served as a member of the Danish delegation to the UN Preparatory Commission for the International Criminal Court (1999-2000). Since 1997, he has also taught public international law at the Faculty of Law, University of Copenhagen.

⁹ **Tony Rogers** is a Senior Fellow of the Lauterpacht Centre for International Law at the University of Cambridge where he is also a Yorke Distinguished Visiting Fellow of the Law Faculty. Formerly Director of Army Legal Services and a former Vice-President of the International Humanitarian Fact-Finding Commission, he is the author of the prize-winning book, *Law on the Battlefield* (Manchester, 2nd edition, 2004) and was the general editor of the Ministry of Defence Manual of the Law of Armed Conflict (Oxford, 2004).

¹⁰ **William J. Fenrick** was a Senior Legal Adviser in the Office of the Prosecutor (OTP) of the International Criminal Tribunal for the Former Yugoslavia (ICTY) from 1994 until the end of 2004. He was the head of the Legal Advisory Section and the Senior Adviser on Law of War Matters. At the ICTY, he has provided international law advice to the OTP and argued at the trial and appeal levels, particularly on matters related to conflict classification, command responsibility, and crimes committed in combat. He was also the main author of the Report to the Prosecutor on the 1999 NATO Bombing Campaign against Yugoslavia. Immediately prior to coming to the ICTY he was a member of the Security Council Resolution 780 Commission of Experts investigating war crimes allegations in the former Yugoslavia and, as such, he was responsible for legal matters and for on-site investigations. He was a military lawyer in the Canadian Forces from 1974 to 1994, specializing in law of war and operational law matters. He has published widely on law of war matters. He is a graduate of the Royal Military College of Canada (BA (Hons Hist) 1966), Carleton University (MA (Cdn Studies) 1968), Dalhousie University (LLB 1973), and George Washington University (LLM 1983). At present he is living in Halifax, Canada where he is teaching international criminal law and international humanitarian law at Dalhousie Law School.

¹¹ **Wolff Heintschel von Heinegg** is Professor of Public Law, especially public international law, European law and foreign constitutional law at the Europa-Universität Viadrina in Frankfurt (Oder), Germany. Since October 2004, he has been the dean of the law faculty of the Europa-Universität and, since 2007, a member of the Council of the International Institute of Humanitarian Law in San Remo, Italy. Previously, he served as Professor of Public International Law at the University of Augsburg. In the academic year 2003/2004 he was the Charles H. Stockton Professor of International Law at the U.S. Naval War College. He had been a Visiting Professor at the Universities of Kaliningrad (Russia), Almaty (Kazakhstan), Santiago de Cuba (Cuba) and Nice (France). He was the Rapporteur of the International Law Association Committee on Maritime Neutrality and was the Vice-President of the German Society of Military Law and the Law of War. Professor Heintschel von Heinegg was among a group of international lawyers and naval experts who produced the San Remo Manual on International Law Applicable to Armed Conflicts at Sea. In 2002, he published the German Navy's Commander's Handbook on the Law of Naval Operations. Professor Heintschel von Heinegg is a member of several groups of experts working on the current state and progressive development of international humanitarian law. He is a widely published author of articles and books on public international law and German constitutional law. For more detailed information see: <http://voelkerrecht.euv-frankfurt-o.de>.

¹² **Dieter Fleck**, formerly Director International Agreements & Policy of the German Ministry of Defence, is the editor of *The Handbook of International Humanitarian Law* (2nd ed., Oxford 2008) and Honorary President of the International Society for Military Law and the Law of War.

¹³ **Marja Lehto** is the head of the Unit for Public International Law at the Finnish Ministry for Foreign Affairs. She has been intensely involved in the elaboration and implementation of the EU Guidelines on the Promotion of International Humanitarian Law. From 1995 to 2000 she was stationed at the Finnish Permanent Mission to the UN in New York and participated, *inter alia*, in the negotiations on the Rome Statute of the International Criminal Court as well as the subsequent negotiations on the Elements of Crimes. She has also participated in the negotiations on a number of anti-terrorist conventions and chairs the Council of Europe Committee of Experts on Terrorism since 2006.

- 13:45 ***Incorporating international human rights law***, by Louise Doswald-Beck¹⁵ (Professor of International Law, Graduate Institute of International Studies, Geneva).
- 14:05 ***Incorporating international criminal law***, by Roberta Arnold¹⁶ (Specialist officer within the Swiss Military of Justice, candidate examining magistrate of Military Tribunal 8 (Southern Switzerland)).
- 14:25 ***Military manuals, an ICRC perspective***, by François Sénéchaud¹⁷ (Head, Unit for the Relations with Armed and Security Forces, International Committee of the Red Cross).
- 14:45 *Discussion*
- 15:10 Coffee break

Session IV: A Nordic military manual?

¹⁴ **Hays Parks** is with the Office of the General Counsel, US Department of Defence. He entered federal service as a commissioned officer in the Marine Corps. His initial service was as a reconnaissance officer. He served in the Republic of Viet Nam (1968-1969) as an infantry officer and senior prosecuting attorney for the First Marine Division. Subsequent assignments included service as a congressional liaison officer for the Secretary of the Navy. In 1979 Mr. Parks resigned his regular commission to accept his present position as Special Assistant to The Judge Advocate General of the Army. In that capacity he provides politico-legal advice to the Army Staff on matters ranging from special operations to directed energy warfare. He was a legal adviser for the 1986 airstrike against terrorist-related targets in Libya, and had primary responsibility for the investigation of Iraqi war crimes during its 1990-1991 occupation of Kuwait. He has served as a United States representative for law of war negotiations in New York, Geneva, The Hague and Vienna. Mr. Parks occupied the Charles H. Stockton Chair of International Law at the Naval War College in 1984-1985. In 1987 he served as a staff member on the Presidential Commission established to examine alleged security breaches in the U.S. Embassy in Moscow. In 1989 he prepared the U.S. Government's legal opinion defining *assassination*. He has testified as an expert witness in cases against terrorists in the United States and Canada. A retired colonel in the Marine Corps Reserve, he earned Navy-Marine Corps, Canadian and British Parachutist wings, U.S. Army Master Parachutist wings, and 82nd Airborne Centurion wings during his military career. Mr. Parks has lectured on the law affecting military operations at the National, Army, Air Force and Naval War Colleges; the service staff colleges; and other service schools. An adjunct professor of international law at the American University School of Law, he has published articles in a variety of military and legal journals. In 2001 he became the sixth person in the history of the United States Special Operations Command to receive that command's top civilian award, the U.S. Special Operations Command Outstanding Civilian Service Medal.

¹⁵ **Louise Doswald-Beck** was appointed a Professor of the Graduate Institute of International Studies and Director of the University Centre for International Humanitarian Law (now the Geneva Academy of International Humanitarian Law and Human Rights) on 1 October 2003. Of British origin, she began her academic career in 1975 after being called to the Bar in London. She was a lecturer in international law at Exeter University and then at London University where she taught, inter alia, LLM courses on the law of armed conflict and the use of force and the international protection of human rights. Between 1987 and February 2001, she was a legal adviser at the International Committee of the Red Cross and became Head of the Legal Division in March 1998. During her period at the ICRC, she played a major role in negotiations that led to various international instruments such as: the Statute of the International Criminal Court and its Elements of Crimes, Protocols II (amended) and IV of the Convention on Certain Conventional Weapons, the Ottawa Convention on Anti-Personnel Landmines, Protocol II to the Hague Convention on Cultural Property and the San Remo Manual on armed conflicts at sea. Between March 2001 and August 2003, she was Secretary-General of the International Commission of Jurists, a non-governmental organisation that works for the protection of human rights through the rule of law. She has written extensively on subjects relating to the use of force, humanitarian law and human rights law, including the ICRC's study on customary international humanitarian law for which she was awarded by the Ciardi Prize at the time of the XVIIth Congress of the International Society for Military Law and the Law of War.

¹⁶ **Roberta Arnold**, Ph.D. (Bern, Hons.), LL.M. (Nottingham), is specialist officer (1stLt) and candidate examining magistrate, Military Tribunal 8, Swiss Military of Justice; independent legal adviser in international criminal law and international humanitarian law. She was formerly a legal adviser within the Staff of the Chief of the Swiss Armed Forces, Laws of Armed Conflict Section, Swiss Department of Defence (2003-2005).

¹⁷ **François Sénéchaud** is Head of the Unit for the Relations with Armed and Security Forces, International Committee of the Red Cross. A commissioned officer with the rank of major in the Swiss armed forces, he has a law degree from Lausanne University, Switzerland (1989), a certificate in international relations with specialisation in "security policy and disarmament", Graduate Institute of International Studies, Geneva, Switzerland (1991) and an MA in War Studies, King's College, London University, United Kingdom (1992). As a political analyst in the fields of security policy, disarmament and peace support operations with the Swiss General Staff (1992-1993), he was in charge of a study report entitled "The new environment of peace support operations" written on behalf of the Chief of the General Staff. From 2001 to 2002, Major Sénéchaud served as a scientific collaborator in the field of international law of armed conflicts. In that capacity, he drafted a new field manual entitled "Operational law for brigade commanders and their staff". He also has experience as a legal advisor to the commandant of a multinational brigade. For the ICRC, he served in various capacities such as filed delegate, head of office and head of sub-delegation in Croatia (1993), Bosnia (1994), Rwanda (1994-1995) and Peru (1995-1996). Between 1998 and 2000, Major Sénéchaud was based in Guatemala as an ICRC delegate to the armed and security forces of Central America, the Caribbean and the United States. His responsibilities included supporting national programmes for integrating the law of armed conflicts into the instruction of armed and security forces in the area.

15:30 *Arguments for and against a Nordic military manual*, by Göran Melander¹⁸ (Founder and former Director, Raoul Wallenberg Institute of Human Rights and Humanitarian Law; Professor Emeritus of Public International Law, Faculty of Law, University of Lund).

16:00 *Panel discussion*

Moderator: Ove Bring¹⁹ (Professor of International Law, Swedish National Defence College, Stockholm).

Panelists: Göran Melander
Gro Nystuen
Charles Garraway
William J. Fenrick
Dieter Fleck

16:50 *Conclusion and remarks on ways forward*, by Arne Willy Dahl.

¹⁸ **Göran Melander** is Founder and former Director, Raoul Wallenberg Institute of Human Rights and Humanitarian Law, and Professor Emeritus of Public International Law, Faculty of Law, University of Lund. He holds a doctor of laws degree from Lund University and was a member of the Committee on the Elimination of Discrimination against Women (2001-2004). He has extensive expertise and experience in the areas of human rights, humanitarian law and of refugee law, and has taught and acted as expert consultant on human rights issues in Africa, Asia, Europe and Latin America. An internationally acclaimed scholar of human rights and international law, Professor Melander is the author and editor of numerous books and articles and is active in a number of international human rights events and organizations.

¹⁹ **Ove Bring** is Professor of International Law, Swedish National Defence College, Stockholm. He is formerly special legal adviser of international law at the Swedish Ministry for Foreign Affairs. In that function he covered matters of diplomatic protection, UN peacekeeping and peace-enforcement, international humanitarian law and arms control law. In 1993 he was appointed professor of public international law at Uppsala University, and in 1997 he was appointed Carl Lindhagen professor of international law at Stockholm University. Since 2005 he is Head of the International Law Centre at the Swedish National Defence College (Stockholm). He is a member of the Executive Council of the International Law Association (London) and of the International Law Delegation of the Swedish Ministry for Foreign Affairs.