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FACULTY COMMENT

WEAPONS REGULATION, MILITARY NECESSITY AND LEGAL STANDARDS: ARE CONTEMPORARY DEPARTMENT OF DEFENSE "PRACTICES" INCONSISTENT WITH LEGAL NORMS?

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Editors Note:

On January 18, 1974, Leonard Niederlehner, Acting General Counsel of the Department of Defense, responded to Representative Donald M. Fraser's letter of November 14, 1973, concerning the "appropriateness under international law of the M-16 rifle."[1] In that response, which addressed itself to the propriety of the M-16, Mr. Niederlehner cited as authority paragraph 4 of Article 23 of the 1907 Hague Convention No. IV., which provides, in part, that it is forbidden "to employ arms, projectiles, or materials calculated to cause unnecessary suffering . . . ." The following article is a comment on Mr. Niederlehner's interpretation of that language.

Pentagon representatives have recently made statements about the law and legal criteria utilized for decisions concerning the legality of weapon systems or their actual use in a particular context which do not adequately reflect previous U.S. or international legal standards. Whether there has been an inadvertent use of ambiguous words, a deliberate attempt to shift the standard, or something in between these two poles of subjectivity, is not known.

What is readily discoverable, however, is that recent Pentagon statements to the House Subcommittee on International Organizations and Movements are inconsistent with a complete map of U.S. and international legal policies as reflected in the authoritative U.S. Army Field Manual, *The Law of Land Warfare*.[2] And what is at stake in this inquiry is not merely the inconsistency, but the dangers to a proper serving of legal policy through use of the phrases disclosed below. On the one hand, there is a danger that acceptance of these phrases will contribute to a wider use of violence, death and destruction. And on the other, there is a danger that certain phrases may push the subjective standard of criminal culpability to an extreme

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1. Department of Defense, OSD Corres. 17018. Pertinent excerpts of Mr. Niederlehner's letter can be found in Rovine, *Contemporary Practice of the United States Relating To International Law*, 68 AM. J. INT'L L. 504, 528-30 (1974).

2. U.S. DEPT. OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE (1956) [hereinafter cited as FM 27-10].

level of specific intent to do something which is unnecessary—an intent which has never been the threshold and which, if adopted as the level of criminal culpability, could substantially thwart efforts to discipline soldiers or sanction violations of the law.

Here, several statements and implications contained in Mr. Niederlehner's letter to Representative Fraser, Chairperson of the House Subcommittee, about the "appropriateness under international law of the M-16 rifle"[3] are used as a focus. There is no attempt to refute Mr. Niederlehner's conclusions about the legality, *per se*, of the M-16, since no detailed analysis of relevant legal policies and ballistics and medical effects has been completed by the Department of Defense.[4] His letter is merely used as a widely publicized example of recent Pentagon thinking about weapons regulation, and comments on his actual or inferable misstatements of law are offered to avoid a public confusion in regard to actual U.S. and international legal standards.

The first discrepancy involves subjective standards and criminal culpability. Mr. Niederlehner states that the phrase "calculated to cause," as contained in the English version of Article 23(e) of the Annex to the Hague Convention No. IV (1907), will place within the content of the prohibition of the use of weapons which cause "unnecessary suffering" some "element of intent."[5] This is an erroneous interpretation if, by that, Mr. Niederlehner means to create some new "element of intent" beyond an intent to do an act which causes unncessary death, destruction, injury or suffering in a circumstance where one of "reasonable" make-up could reasonably foresee that such an act could cause such a death or injurious outcome.

It is by no means clear what Mr. Niederlehner actually meant. He qualifies his requirement of an "element of intent" with the following language: "such that members of the Armed Forces cannot justify the use of weapons inconsistent with attaining a legitimate military objective."[6] But even this language is insufficient for clarity. One does not know whether he subscribes to a *mens rea* standard of the "calculated to cause" or "inconsistent with" variety.[7] This writer feels that something in between the two is the proper test, and it hinges upon the proverbial "reasonable man" and the actual condi-

3. See Rovine, *supra* note 1, at 528-30.

4. In regard to possible illegality *see* INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), REPORT ON THE WORK OF EXPERTS ON WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS (1973) [hereinafter cited as ICRC REPORT OF EXPERTS].

5. Rovine, *supra* note 1, at 529.

6. *Id.*

7. See also *id.* ("intentionally superfluous").

tions of decision.[8] What is clear, however, is that no higher subjective standard (i.e., commission of an act or adoption of a weapon system "calculated" to cause unnecessary injury or which is "intentionally superfluous") is contained in this prescription.

The French text of the 1907 Hague prohibition does not contain the word "calculated," and the French wording is the only authoritative wording.[9] The French text, moreover, retained the exact wording of the earlier 1899 Hague Convention No. II, Annex, Article 23(e) prohibition. The relevant language is as follows: ". . . of a nature to cause superfluous injury" (" . . . propres a causer des maux superflus"). Custom has also retained the original meaning and textwriters now merely refer to the principle of unnecessary suffering.[10] This writer feels, however, that although weapon illegality must substantially hinge upon effects, not upon subjectivities, a criminal prosecution for design, adoption or use of illegal weapons must address the common *mens rea* standard of culpability which is based upon a "reasonable man," foreseeability and actual circumstance. But Mr. Niederlehner is plainly wrong if it is his contention that Article 23(e) has been violated only when a weapon or conduct causes suffering or injury which is "intentionally superfluous."[11] Since he uses this language along with an exposition of the postulated "element of intent" theory, one must infer that it is his standard and, then, denounce it as unsupportable by proper legal analysis.

There is another misstatement of law implied in Mr. Niederlehner's letter. It is the implication that the Department of Defense now subscribes to the repudiated "Kriegsraison" theory of the German war criminals. At the outset it must be emphasized that it has never been an accepted international legal standard in modern times that armed forces can employ any form or intensity of violence which is consistent with or helpful in the attainment of a legitimate military objective. Such an approach is far too broad. It amounts to a military "benefit" test as opposed to a military "necessity" test,[12] and the military benefit or "Kriegsraison" theory was expressly repu-

8. *See* Paust, *The Nuclear Decision in World War II—Truman's Ending and Avoidance of War*, 8 INT'L LAW. 160 (1974).

9. See FM 27-10, *supra* note 2, at i.

10. See ICRC REPORT OF EXPERTS, *supra* note 4, at 14, para. 21; and *infra* note 11.

11. Rovine, *supra* note 1, at 529. For a contrary DOD/DA view *see* FM 27-10, *supra* note 2, at 3 (paras. 2a and 3a), 18 (paras. 34b and 36), 19-20 (para. 41) and 23-24 (para. 56); see also *id.* at 178 (para. 501) and 182 (para. 509).

12. *See* Paust, *supra* note 8, at 163-66, 168-69 n.31; Comment, 26 NAVAL WAR COLL. REV. 103 (1973); Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 149-53 (1972). *See also* the remarks of Aldrich in Proceedings of the American Society of International Law, 67 AM. J. INT'L L. 148 (1973); the remarks of Paust, *id.* at 162; the remarks of Rubin, *id.* at 165.

diated at Nuremberg in the *Von Leeb* case.[13] One could infer that Mr. Niederlehner adopts the military benefit test through use of the phrase "use of weapons inconsistent with attaining a legitimate military objective" by implying that he feels that any weapon usage which is merely consistent with attaining a legitimate military objective would be lawful. But it is not clear that he subscribes to such an implication, although, for clarity, such an implication must be emphatically denounced.

What is also disturbing, however, is that this sort of implication (of a new DOD "Kriegsraison" theory) seems consistent with recent statements made before the same Congressional body by Major General George Prugh, the Judge Advocate General, U.S. Army. General Prugh stated that "loss of life and damage to property must not be out of proportion to the military *advantage* to be gained" (emphasis added).[14] Actually, the rule is that loss of life must not be out of proportion to what is militarily "necessary" under the circumstances, and damage to property must not be out of proportion to what is "imperatively demanded by the necessities of war."[15] Although it is true that General Prugh's words reflect a partial reading of paragraph 41 of the U.S. Army Field Manual,[16] that paragraph also reiterates the "necessity" test through the phrase: "demanded by the exigencies of war," and paragraph 3 of the Army manual makes it clear that the military benefit or "advantage" test is not the legal standard. That paragraph states that the law of war "requires that belligerents refrain from employing *any kind or degree* of violence which is *not actually necessary* for military purposes . . ." (emphasis added). The same paragraph states that military necessity also involves the use of measures "which are *indispensable* for securing the complete submission of the enemy as soon as possible" (emphasis added). In regard to property, "[t]he measure of permissible devastation is found in the *strict necessities* of war."[17] It is clearly not enough that the measure is advantageous to, beneficial to or consistent with military needs. The test is "necessity," not "Kriegsraison."

Another implication in Mr. Niederlehner's letter is that the prohibition of "dum-dum" bullets only applies to bullets which are not

13. *See also* II U.S. DEPT. OF THE ARMY, PAMPHLET NO. 27-161-2, INTERNATIONAL LAW 248 (1962), quoting from United States v. Von Leeb, XI TRIALS OF WAR CRIMINALS 541 (1948) and rejecting the "right to do anything that contributes to the winning of a war."

14. Statement of Major General Prugh, *Hearings Before the Subcomm. on Int'l. Organization and Movements of the Comm. on Foreign Affairs*, 93d Cong., 1st Sess., at 102 (1974).

15. See FM 27-10, *supra* note 2, at 3 (para. 3a), 19 (para. 41), 23 (para. 56) and 24 (para. 58).

16. *Id.* at 19.

17. *Id.* at 23 (para. 56) (emphasis added). See also *id.* at 24 (para. 58).

"fully jacketed."[18] Such an implication would also be clearly erroneous, since the very purpose of the customary 1899 Declaration on Expanding Bullets[19] was to prohibit certain effects of any bullet within the human body and not merely certain specific configurations of bullets.[20] That declaration prohibited "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."[21] The listing of partially-jacketed bullets and bullets pierced with incisions was merely illustrative. Moreover, it is clear that the proscribed effects can be caused by partial-jacketing, a flat top (bullet tip), cutting off of the tip of a bullet, scoring the surface of the jacket, a hollow-point, soft lead, a weak jacketing and/or a tremendous increase in velocity.[22] As the Army Field Manual sets forth, usage has established the illegality of "irregular-shaped bullets . . . and the scoring of the surface or the filing off of the ends of the hard cases of bullets."[23] More recent Army publications reiterate these prohibitions. Army Subject Schedule No. 27-1 states that these principles "have established the illegality of the use of irregular-shaped bullets such as dum-dum bullets. . ."[24] And Department of the Army Pamphlet No. 27-200 states:

> . . . irregular shaped bullets (dum-dum) and projectiles filled with glass are examples of weapons considered to be illegal *per se*; that is, they may never be used . . . Misuse of a legitimate weapon, such as cutting of the points of issued ammunition, is a violation of the law of war.[25]

An older United States Naval War Code (1900) had also declared that:

> it is forbidden . . . (2) To employ arms, projectiles, or materials calculated to cause unnecessary suffering. Entering especially into this category are . . . bullets with a hard envelope which does not cover the core entirely or is pierced with incisions.[26]

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18. See Rovine, *supra* note 1, at 529, "The M-16 projectile is fully-jacketed and does not, therefore, violate the prohibition on 'dum-dum' bullets."

19. Declaration on Expanding Bullets, Dec. IV, 3, July 29, 1899, Reprinted at 1 AM. J. INT'L L. 155 (Supp. 1907).

20. *See, e.g.*, Paust, *Does Your Police Force Use Illegal Weapons?—An Approach to Decision-Making About Weapons Regulations*, (forthcoming article); ICRC REPORT OF EXPERTS, *supra* note 4. *See also* Connecticut Civil Liberties Union News Release, July 26, 1974; *Controversy Swirls Over Use of Bullet*, The Middletown Press (Connecticut) Aug. 3, 1974, at 1; *The First DumDum Use Stirs Connecticut Controversy*, N.Y. Times, Sept. 26, 1974 at 33, col. 1.

21. Declaration, *supra* note 19.

22. See *supra* note 14; FM 27-10, *supra* note 2, at 18 (para. 34b); U.S. Dept. of the Army, Pamphlet No. 27-161-2, *supra* note 13, at 45.

23. FM 27-10, *supra* note 2, at para. 34.

24. The Geneva Conventions of 1949 and Hague Convention No. IV. of 1907, at 6 (1970) (unpublished material).

25. The Law of Land Warfare—A Self Instructional Text 5 (1972) (unpublished material).

26. See VI G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 455 (1943).

The U.S. position at the 1899 Hague Conference was that it should be forbidden to use "bullets inflicting wounds of useless cruelty, such as explosive bullets, and in general all kinds of bullets which exceed the limit necessary for placing a man *hors de combat* . . .",[27] but the U.S. position was not adopted by the Conference.[28] What was clearly adopted, however, was a focus on the effects of bullets within the human body rather than upon specific bullet configurations. Moreover, it is because of the basic prohibition of unnecessary suffering, cruelty, torture, unusual injury, aggravation of wounds beyond what is necessary, the rendering of death inevitable and other such outcomes that legal guidance in this matter must necessarily consider an interrelated set of norms that are generally referred to as human rights.

A fundamental norm of human rights which is relevant to this sort of inquiry is Article 5 of the 1948 Universal Declaration of Human Rights.[29] It states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This prohibition applies in time of armed conflict or in time of relative peace—through all levels of human violence and circumstances of state or public need and military necessity. Moreover, the fundamental prohibition contained in Article 5 of the Universal Declaration significantly matches the legal policies that are articulated in Geneva law. Common Article 3 of the 1949 Geneva Conventions, applicable in time of an internal armed conflict, also prohibits summary execution (the denial of a right to a fair trial), inhumane treatment, murder, mutilation, torture, and cruel treatment.[30] To the extent that these policies are relevant in any given inquiry into the legality of a weapon system or weapon usage, they should be considered by legal decision-makers so as to maximize the serving of legal policy. And these legal policies are certainly going to be relevant in most cases. In regard to norms contained in the law of war, the author agrees with Mr. Niederlehner that these norms apply to "all weapons" and all bullets, and that the U.S. is bound by each of these norms.

On a related matter, I also feel that Mr. Niederlehner's letter about the effects of the U.S. M-16 and the Soviet AK-47 is unduly kind to the Soviet Union's position. It is alleged, prior to completion

27. This was General Crozier's amendment. See Davis, *Amelioration of the Rules of War on Land*, 2 AM. J. INT'L L. 75, 75-77 (1908). The U. S. and Great Britain also expressly intimated accession to the 1899 Declaration during the 1907 Hague Conference. See J. SPAIGHT, WAR RIGHTS ON LAND 79 (1911); A. HIGGINS, THE HAGUE PEACE CONFERENCES 495-97 (1909). See also *supra* note 18.

28. See U.S. DEPT. OF THE ARMY, PAMPHLET No. 27-161-2, *supra* note 13, at 44.

29. U.N. G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).

30. *See, e.g.*, 75 U.N.T.S. 287, 6 U.S.T 3516 (1955). See also J. BOND, THE RULES OF RIOT—INTERNAL CONFLICT AND THE LAW OF WAR (1974).

of comprehensive tests, that "the lethality—or wounding impact—of the [M-16] does not differ from weapons such as the Soviet Union's AK-47."[31] It is also stated that the "wounds inflicted" are "not substantially different." However, the International Committee of the Red Cross report of experts discloses the fact that although the muzzle velocity of the Soviet AK-47 projectile is slower than that of the U.S. M-16, the kinetic energy is much greater for the Soviet projectile.[32] Since the Soviet AK-47 projectile has almost 23 percent more energy for transfer to the human body, it seems that it can cause greater death, injury and suffering. Thus, it would seem to differ from the U.S. M-16 projectile in terms of effects within the human body. But actual tests may prove that although the Soviet AK-47 has more energy for transfer it actually transfers about the same amount of energy to the body as the M-16. We await further tests.

In conclusion, what should be stressed is that the test for permissibility or impermissibility in regard to a weapon system or a weapon usage hinges upon military "necessity" and not some "benefit," "advantage," "consistency" or "Kriegsraison" theory. Since I do not seriously believe that there has been a change in U.S. or DOD policy, or that Mr. Niederlehner's letter fairly expresses that policy, I continue to regard as violative of international law the employment of "any kind or degree of violence which is not actually necessary for military purposes . . ."[33]

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31. Rovine, *supra* note 1, at 529.

32. See ICRC REPORT OF EXPERTS, *supra* note 4, at 42 (Table III.1 Ballistic features). The muzzle velocity of the AK-47 is 720 m/sec., and that of the M-16 is 980 m/sec. But the kinetic energy for transfer to the body is 2100 for the AK-47 at point of release and 1700 for the M-16 at point of release; or 1600 for the AK-47 at 100 meters and 1300 for the M-16 at 100 meters. Thus, the AK-47 has over 23 percent more kinetic energy for transfer.

33. FM 27-10, *supra* note 2, at para. 3a.