W. W. Kulski has summarized for American scholars.[6] The series began with Eugene A. Korovin's renewed effort after the war to bring about a reconsideration of the nature of international law and of the problem presented in his view that law must to a Marxist be class law, and that international law must therefore be classifiable either as "bourgeois" or "socialist" or something in between, since it is espoused by bourgeois and socialist states in their relationships. This series of articles had ended with an editorial discarding the attempt to find the true nature of international law and a recommendation that Soviet writers settle down to the more practical work of exploring the function of the various rules of international law so that the U.S.S.R. might apply them to its advantage.

If Pashukanis' view is again to receive favor, there will be less philosophical writing about the nature of international law and more attention to its practical details and their application to the specific problems with which Soviet foreign policy-makers have to deal. Soviet authors may become pragmatists in their attitude toward international law and retreat from the spinning of fine theories. Such a position would facilitate the Soviet campaign for "co-existence" between the "socialist" and other camps, for attention could be centered on single problems and there would be no need to talk about the fundamental problem of the conflict between states of differing economic systems. This policy would be in accord with Nikita Khrushchev's declaration at the 20th Communist Party Congress in 1956 that there need no longer be consideration of the inevitability of war between the capitalist and socialist camps.

No one who has sampled the large body of Soviet literature since Lenin will conclude from the new approach that Soviet policy-makers have cast from their minds their hope and expectation eventually of spreading the Soviet system throughout the world, yet under the new policy there may be less said about the "conflict" than there has been in the years since Pashukanis' death.

JOHN N. HAZARD

THE NEW U. S. ARMY FIELD MANUAL ON THE LAW OF LAND WARFARE

The times of ignoring the laws of war are over: new treaties have been concluded concerning the laws of war, there is a considerable literature, and states are again issuing Instructions to their armed forces on the laws of war and neutrality. The United States has recently published new Instructions on the Law of Naval Warfare [1] and now a Field Manual on the Law of Land Warfare.[2]

The Manual is, generally speaking, restricted to the conduct of warfare on land and to relationships between belligerent and neutral states; but

[6] Kulski, "The Soviet Interpretation of International Law," 49 A.J.I.L. 518 (1955).

[1] U. S. Department of the Navy, Law of Naval Warfare (September, 1955).

[2] U. S. Department of the Army, Army Field Manual: The Law of Land Warfare (July 18, 1956, 236 pp.). It supersedes the Field Manual of Oct. 1, 1940, including C 1, Nov. 15, 1944. The new Manual consists of 552 paragraphs, arranged in nine chapters (further cited as Manual).

it also governs naval forces operating on land.[3] The Manual is in every point, and particularly with regard to fundamental problems, in harmony with the Law of Naval Warfare. Although the Manual is an official publication of the U. S. Army, its provisions are neither statute nor treaty and should not be considered binding upon courts and tribunals applying the laws of war, although such provisions are of evidentiary value.[4]

The Manual is based on the firm conviction that there *are* laws of war, binding upon states and individuals. Their purpose is to protect both combatants and noncombatants from unnecessary suffering, to safeguard certain fundamental human rights of persons who fall into the hands of the enemy, and to facilitate the restoration of peace. Laws of war are prohibitory; they place limits on the exercise of belligerent power, they are pervaded with the principles of humanity and chivalry. Hence, as the Manual lays down clearly,[5] military necessity, where not expressly foreseen in the laws of war, is no defense for acts forbidden by the customary and conventional laws of war, because the latter have been developed and framed with consideration for the concept of military necessity.[6] The laws of war have their sources in custom and treaties. The Manual, by incorporating Hague Conventions III, IV (with the Hague Regulations on the Laws and Customs of War on Land), IX and X,[7] proves that these conventions are still the law. The four Geneva Conventions of August 12, 1949,[8] are fully incorporated.[9] The Manual states[10] that the customary

[3] Law of Naval Warfare, sec. 240.

[4] Manual, par. 1. In the same sense, Law of Naval Warfare, sec. 110.

[5] Manual, par. 3.

[6] In exactly the same sense, Josef L. Kunz, Kriegsrecht und Neutralitätsrecht 26–28 (Vienna, 1935).

[7] The texts of the Hague Conventions and Regulations referred to are reprinted in 2 A.J.I.L. Supp. 85, 90, 146, 153 (1908).

[8] French texts, Les Conventions de Genève du 12 août 1949 (2nd ed., Geneva, 1950); English texts in T.I.A.S. Nos. 3362, 3363, 3364, 3365; Department of State Publication 3938 (General Foreign Policy Series 34, August, 1950). On pp. 233–255 of the last-named publication are printed the reservations; the United States has made only one reservation, namely, with respect to Art. 68 of Convention IV (*ibid.* 239). The Geneva Conventions were ratified by the United States on July 6, 1955, and came into force for this country on February 2, 1956. The texts of the Convention on Prisoners of War and the Convention on Protection of Civilians are reprinted in 47 A.J.I.L. Supp. 119 (1953) and 50 *ibid.* 724 (1956), respectively.

The following Commentaries have, up to now, been published by the International Committee of the Red Cross: Jean S. Pictet, Commentaire à la première Convention de Genève de 1949 (Geneva, 1952); Jean de Preux, Etude sur la troisième Convention de Genève de 1949 (Geneva, 1954); La Convention de Genève relative à la protection des personnes civiles en temps de guerre (Geneva, 1956, 729 pp.). See also J. Verges, La 4e Convention de Genève de 1949, Exposé documentaire (Lyon, 1952); Frotin, La 4e Convention de Genève, Protection Civile (Paris, 1953); Ginnane and Yingling, "The Geneva Conventions of 1949," 46 A.J.I.L. 383 (1952); and Pictet, "The New Geneva Conventions for the Protection of War Victims," 45 *ibid.* 462 (1951).

[9] The Manual (par. 57) also incorporates the so-called "Roerich Pact" of April 15, 1935 (49 Stat. 3267, Treaty Series, No. 899; 30 A.J.I.L. Supp. 195 (1936)), although only the United States and a number of the American Republics are parties to this treaty. See the corresponding UNESCO treaty signed at Paris on Sept. 30, 1953.

[10] Manual, par. 7.

law of war, being part of the law of the United States, will be strictly observed by the United States; treaties must be observed by both military and civilian personnel with the same strict regard for both the letter and the spirit of the law which is required with respect to the Constitution and statutes. As treaty provisions "are in large part but formal and specific applications of general principles of the unwritten law," the treaty provisions quoted will be strictly observed and enforced by the United States forces without regard to whether they are legally binding upon this country.

It is fundamental that the laws of war, notwithstanding the prohibition of the use of force in the United Nations Charter, are fully reaffirmed. The application of the laws of war is, in conformity with Article 2 of all four Geneva Conventions of 1949, greatly expanded. They apply not only to declared wars, but to any other international armed conflict, and, in a restricted sense, to civil war, even when the insurgents are not recognized as a belligerent party. They apply particularly to the exercise of armed force pursuant to a recommendation, decision or call by the United Nations, to the exercise of the inherent right of individual and collective self-defense against armed attack, or in the performance of enforcement measures through a regional arrangement, and they apply equally to all belligerents.[11]

Equally clear is the standpoint of the Manual toward the law of neutrality. The latter plays, indeed, a very important rôle in the Geneva Conventions of 1949.[12] The Manual [13] states that, if a United Nations Member is called upon under Articles 42 and 43 of the Charter, it loses its neutrality only to the extent that it complies with the direction of the Security Council.[14] There is, therefore, room for classic neutrality and a "military commander in the field is obliged to respect the neutrality of third States." Chapter 9 [15] enumerates the rights and duties of neutral states, quoting Hague Convention V.

Some chapters of the Manual largely repeat the corresponding rules of the Geneva Conventions of 1949 in bold print. This is the case concerning Protecting Powers,[16] concerning the Wounded and Sick,[17] and concerning

[11] Manual, par. 8a. This corresponds perfectly with the practice of states in the Korean conflict and shows the untenability of the proposals for "discriminatory" laws of war; see this writer's "The Laws of War," 50 A.J.I.L. 313–337 (1956). The same idea is thus expressed in Law of Naval Warfare, sec. 200: "Distinction must be made between the resort to war and the conduct of war. Whether the resort to war is lawful or unlawful, the conduct of war is regulated by the laws of war."

[12] See Josef L. Kunz, "The Geneva Conventions of August 12, 1949," Law and Politics in the World Community 279–316, 368–373 (Berkeley, University of California Press, 1953).

[13] Par. 513.

[14] Law of Naval Warfare, sec. 232, states equally that there may not only be qualified neutrality, but classic neutrality: "The obligations of the member States, incompatible with neutrality, come into existence only if the Security Council fulfills the functions delegated to it by the Charter. If the Security Council is unable to fulfill its assigned functions, the members may, in case of a war, remain neutral and observe an attitude of strict impartiality."

[15] Pars. 512–552.

[16] Pars. 15–19.

[17] Ch. IV, pars. 208–245, embodying Geneva Convention II. This chapter deals also with the Red Cross Emblem.

Civilian Persons.[18] The same is true with regard to prisoners of war;[19] but here a number of interesting explanations with regard to certain points of the laws of war as currently interpreted can be seen. Paragraph 63 states that

> commando forces and airborne troops, although operating by highly trained methods of surprise and violent combat, are entitled, as long as they are members of the organized armed forces of the enemy and wear uniform, to be treated as prisoners of war upon capture, even if they operate singly.[20]

Under Article 5 of the Geneva Convention of 1949 concerning Prisoners of War, prisoners of war are under the protection of the convention "from the time they fall into the power of the enemy until their final release and repatriation." But the moment of the beginning of captivity has often presented difficult problems. The Manual[21] now defines the phrase "fall into the power of the enemy" as "having been captured by, or surrendered to members of the military forces, the civilian police, or local civilian defense organizations or enemy civilians who have taken him into custody." Also of interest is the attitude with regard to Article 118 of the Geneva Convention of 1949 on Prisoners of War concerning the release and repatriation of prisoners without delay after the cessation of active hostilities. This article, as is well known, led to considerable difficulties in the negotiations for an armistice in Korea and to an *ad hoc* settlement. Paragraph 199 states:

> A Detaining Power may, in its discretion, lawfully grant asylum to prisoners of war who do not desire to be repatriated.

But there is no doubt that Article 118 stands in need of revision.[22]

Of greatest interest is the treatment of the problem of spies, a topic which for a long time has needed clarification and revision. The Manual[23] gives the definition of spies according to Article 29 of the Hague Regulations of 1907, and according to Article 106 of the United States Uniform Code of Military Justice; where these two definitions are not in conflict, they will be applied and construed together; otherwise Article 106 governs American practice. The problem of espionage has long been somewhat like a legal puzzle.[24] Every writer has had to concede that the employment of spies by belligerents is perfectly lawful. But, it has been argued, "espionage has a twofold character": the employment of spies is lawful, but the spy is a war criminal,[25] an obviously untenable construction. This writer[26]

[18] Ch. V, pars. 246–350, incorporating Geneva Convention IV, apart from the rules dealing with civilian persons in belligerent-occupied territory.

[19] Ch. III, pars. 60–207, incorporating Geneva Convention III.

[20] This paragraph is taken textually from Oppenheim-Lauterpacht, International Law, Vol. II, p. 259 (7th ed., 1952).

[21] Par. 84b.

[22] See Josef L. Kunz, "Die Koreanische Kriegsgefangenenfrage," 4 Archiv des Völkerrechts 408–423 (1954).

[23] Par. 75.

[24] Julius Stone, Legal Controls of International Conflict 563 (New York, 1954).

[25] Thus, Oppenheim-Lauterpacht, *op. cit.* note 20 above, p. 422.

[26] *Op. cit.* note 6 above, pp. 67–69.

as early as 1935 developed the theory that espionage is not an illegal but a "risky" act. Espionage is lawful under international law; but as it is particularly dangerous to the enemy, international law authorizes a belligerent as an exception to treat a spy caught *in flagranti,* not as a prisoner of war, but as punishable. It is not a question of punishment for a crime, but of a repressive measure against a dangerous although lawful act. This construction has been accepted by Walter Schätzel and Erik Castrén.[27] The Manual has now adopted the "risky" act theory. Paragraph 77 reads:

> Resort to that practice (employing spies) involves no offense against international law. Spies are punished, not as violators of the laws of war, but to render that method of obtaining information as dangerous, difficult and ineffective as possible.

As to sanctions for the violations of the laws of war [28] the Manual deals in detail with reprisals and recognizes crimes against peace and against humanity, but deals primarily with war crimes, defined as "violations of the laws of war by any person or persons, military or civilian." The Geneva Conventions of 1949 avoid the term "war crimes" and speak rather of "grave breaches." The Manual, among newest developments, states [29] that in some cases, "military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control." Such responsibility arises, of course, when such acts have been committed in pursuance of an order of the commander concerned. But he is also responsible if he has actual knowledge, or should have knowledge, and if he fails to take the necessary and reasonable steps to insure compliance with the laws of war or to punish violations thereof. The defense of superior orders [30] "does not lie unless the accused did not know and could not reasonably have been expected to know that the act ordered was unlawful." But superior orders may be considered in mitigation of punishment. To strike a correct balance it is added:

> In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal.[31]

It is most important to note that paragraph 506 of the Manual expressly states that the belligerents are under an obligation to take measures for

[27] Erik Castrén, The Present Law of War and Neutrality 154 (Helsinki, 1954).

[28] Ch. VIII, pars. 495–511. [29] Par. 501.

[30] Par. 509.

[31] This paragraph is taken from Oppenheim-Lauterpacht, *op. cit.* at 569. Law of Naval Warfare, sec. 330 b(1) adds: "If an act, though known to the person to be unlawful at the time of commission, is performed under duress, this circumstance may be taken into consideration either by way of defense or in mitigation of punishment."

the punishment of war crimes committed by all persons, including members of a belligerent's own armed forces.

Certain parts of the laws of warfare on land are particularly in need of revision, either because the treaty law of 1907 is incomplete or now inadequate, or because of new developments. These parts concern the non-hostile relations of belligerents, nearly every point of the law of belligerent occupation, and vital problems as to the actual conduct of war. A real revision of these parts of the law can, of course, only be brought about by international procedures of law-making and not by a Field Manual of one state. But the Manual gives the present status of these problems, either deduced from general principles of the laws of war, or from a consensus of nations, formed as a consequence of the two world wars, or at least expressing the attitude which the United States is now taking pending an international revision of the problem in question.

As to non-hostile relations of belligerents,[32] the Manual reprints the few rules of the Hague Regulations of 1907 concerning envoys to negotiate a truce, capitulations and armistices, and supplements them with many paragraphs summarizing the usage of nations. Paragraph 476 speaks of unconditional surrender as one "in which a body of troops gives itself up to the enemy without condition; it need not be effected on the basis of an instrument signed by both parties." But that is rather what Oppenheim-Lauterpacht[33] calls a "simple surrender" without capitulation; for capitulation is a convention stipulating special terms of surrender. Such simple surrenders by some soldiers or a man-of-war or a fortress have always occurred. But the new concept of "unconditional surrender" at the end of the second World War is something different and new. This new "unconditional surrender" terminates hostilities without any agreement—it is neither a capitulation nor an armistice—and may be followed by the assumption of supreme authority which also, in spite of continued occupation of the vanquished country, terminates the technical status of belligerent occupation.[34]

The problem of belligerent occupation is dealt with by the Manual in a detailed way.[35] It prints the corresponding norms of the 1907 Hague Regulations and of the Geneva Convention of 1949 on Protection of Civilians, which, in its own words, is supplementary to the Hague Regulations. Respect for human rights, the prohibition of deportations, transfers, evacuation, care for children, hygiene and public health, relief services of inhabitants, measures of security for the occupant, protection of civilian populations in occupied territory, prohibition of reprisals against protected civilians and against taking hostages are all incorporated. There

[32] Ch. VII, pars. 449–494.

[33] *Op. cit.* 543, 545.

[34] In this sense "unconditional surrender" was only applied to Germany. All the other enemy states were also required to surrender unconditionally, but the same term had a different legal meaning. Thus Japan's unconditional surrender was preceded by negotiations in which the Allies accepted Japan's condition of the continuance of Japan's Emperor. In the case of Italy, notwithstanding her unconditional surrender, an ordinary armistice agreement was concluded.

[35] Ch. VI. pars. 351–448.

can be no doubt that the fourth Geneva Convention represents great progress, inspired by excesses, particularly by Germany as a belligerent occupant in the second World War. Yet many problems concerning the legal position of the belligerent occupant, his rights and duties, and the corresponding rights and duties of the civilian population stand in need of revision as a consequence of the change in the conduct of war, the enormous importance of economic warfare and the far-reaching change in general conditions. The Manual clearly distinguishes belligerent occupation from both mere invasion and conquest and subjugation. It reflects modern war conditions, if paragraph 352 states that "an invader may attack with naval or air forces or troops may push rapidly through a large portion of enemy territory without establishing that effective control which is essential to the status of occupation." For "occupation is invasion plus taking firm possession of enemy territory for the purpose of holding it."[36] Occupation presupposes legal effectiveness, which therefore must not only be established but also be maintained. It corresponds to experiences of the last war that military government can also be established over allied or neutral territory, recovered or liberated from the enemy, when that territory has not been made the subject of a civil affairs administration agreement.

As belligerent occupation does not transfer sovereignty, it is unlawful for a belligerent occupant to annex occupied territory or to create a new state therein while hostilities are still in progress.[37] In conformity also with experiences of the last war, paragraph 366 lays down as law that

> the restrictions placed upon a belligerent government cannot be avoided by a system of using a puppet government, central or local, to carry out acts which would be unlawful if performed directly by the occupant. Acts induced or compelled by the occupant are nonetheless its acts.

Difficulties appear, however, in the paragraphs dealing with the determination whether property is public or private,[38] and with the problem of currency and exchange controls.[39]

Julius Stone[40] has, in a detailed investigation of the present status of the law of belligerent occupation, directed attention to the fact that the corresponding rules of the Hague Regulations, even if their text stands,

[36] This definition is taken from Oppenheim-Lauterpacht, *op. cit.*, Vol. II, p. 434.

[37] Par. 358.

[38] "Under modern conditions, the distinction between public and private property is not always easy to draw. . . . It is often necessary to look beyond strict legal title and to ascertain the character of the property on the basis of the beneficial ownership thereof." (Par. 394.)

[39] The occupying Power is also "authorized to introduce its own currency or to issue special currency for use only in the occupied area, should the introduction or issuance of such currency become necessary. The occupant may also institute exchange controls, including clearing arrangements." But such measures must not be utilized to enrich the occupant or to circumvent restrictions; debasement of currency by fictitious valuations or exchange rates, as well as failure to take reasonable steps to prevent inflation, are violative of international law. (Par. 430.)

[40] *Op. cit.* 693–732.

are no longer adequate because they are based on nineteenth-century assumptions of a laissez-faire economy in the states of both the occupant and the occupied. With the great expansion of governmental functions and techniques, with such basic state functions as assuring minimum living standards or functions of currency, banking, debt, exchange, import and export control, with the shifting boundaries of public and private property, the rules based on entirely different conditions are out of harmony. He speaks, therefore, of "the twilight of occupation law" and concludes that

> before the law of belligerent occupation can emerge from this twilight, a rethinking is required going far beyond mere revision and which (despite its advances in other respects) the relevant Geneva Convention of 1949 has not provided.[41]

As to the rules concerning the actual conduct of hostilities,[42] the Manual strongly opposes those who would keep only the "humanitarian" laws of war and drop all rules concerning the actual conduct of war.[43] The right of belligerents to adopt means of injuring the enemy is *not* unlimited—a rule which remains the law. But there is no doubt that these norms, incomplete or antiquated as they are, are greatly in need of revision. For instance, the problem of the dividing line between permissible ruses of war and forbidden treachery is, as paragraph 50 states, sometimes indistinct. The Manual states that absolute good faith must be observed as a rule of conduct. It would, therefore,

> be an improper practice to secure an advantage of the enemy by deliberate lying or misleading conduct which involves a breach of faith, or when there is a moral obligation to speak the truth.

But the employment of spies, encouraging defection or insurrection among the enemy civilian population, corrupting enemy civilians or soldiers by bribes, or inducing the enemy's soldiers to desert, surrender or rebel are not prohibited.[44] Legitimate war ruses also include ambushes, dummy mines, and psychological warfare activities.[45] Use of national flags, insignia, and uniforms as a disguise is taken to be authorized, although to employ them during combat is certainly forbidden.[46] Devastation as an end in itself or as a separate measure of war is not sanctioned by the laws of war. The measure of permissible devastation is found in the strict necessities of war.[47] As to persons descending by parachute, it is laid down, in conformity with modern usage, that such persons, when they are trying to escape from a disabled aircraft, may not be fired upon.[48] Weapons employing fire, such as tracer ammunition, flame-throwers,

[41] *Ibid.* 732.

[42] Ch. II, pars. 20–59.

[43] See Kunz, "The Laws of War," *loc. cit.* (note 11 above) 321–325.

[44] Par. 49.

[45] Par. 51.

[46] Par. 54. Because Art. 23f of the Hague Regulations forbids only their "improper use."

[47] Manual, par. 56. Kunz, *op. cit.* (note 6 above) 84–85.

[48] Par. 30. Thus also Spaight, Air Power and War Rights (3rd ed., 1947); Oppenheim-Lauterpacht, *op. cit.* 521; and the proposed Hague Air Warfare Rules, 1923; doubtful: Erik Castrén, *op. cit.* 400.

napalm and other incendiary agents, against targets requiring their use are not violative of international law; but they must not be employed in such a way as to cause unnecessary suffering to individuals.[49] Paragraph 42 lays down that "there is no prohibition of general application against bombardment from the air of combatant troops, defended places, or other legitimate military objectives." As to gas and bacteriological warfare, paragraph 38 states that

> the United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare of toxic or non-toxic gases, of smoke or incendiary materials, or of bacteriological warfare. The Geneva Protocol of 1925 has not been ratified by the United States and is not binding on this country.[50]

Paragraph 35 states that

> the use of explosive atomic weapons, whether by air, sea, or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment.[51]

It is obvious that a restriction or prohibition of chemical, bacteriological, and atomic war is only possible by international agreement to which at least all militarily important states are parties. Negotiations for such agreement have been under way since the end of World War II, but, in a world which is lacking confidence, have not yet led to positive results.

JOSEF L. KUNZ

INTERNATIONAL PARLIAMENTARY LAW

There seems to be a tendency in the current literature on international law to introduce an abundant new terminology. The terminology suggests in many instances that the field should be broken up and studied under separate captions. Some of the labels parallel equivalents in the national legal system; thus we have references to "international administrative law" and "international constitutional law." One is familiar with the classifications of Professor Schwarzenberger, particularly his "international economic law."[1] There is also a well-known school which deals with "international penal law" or "international criminal law."[2] "International air law" was the subject of a round table in the 1956

[49] Par. 36.

[50] Par. 38 is restricted to this negative statement. Law of Naval Warfare, sec. 612, states that the U. S. is not a party to any treaty forbidding or restricting these methods of warfare and that it, therefore, "remains *doubtful* that, in the absence of a specific restriction established by treaty, a State legally is prohibited at present from resorting to their use." Footnote 8 adds that poisonous gases and bacteriological weapons may be used only if and when authorized by the President.

[51] In the same sense Law of Naval Warfare, sec. 613. Footnote 9 adds that nuclear weapons may be used by U. S. forces only if and when directed by the President.

[1] See Schwarzenberger, "The Province and Standards of International Economic Law," 2 International Law Quarterly 402 (1947).

[2] See Glaser, Introduction à l'Etude de Droit International Pénal (1954).