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'Wanted Dead or Alive': The Outlaw in Modern War

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ABSTRACT
This article examines a little noticed prohibition on outlawry contained in some military manuals on the laws of war and asks where it came from. It establishes that it is not contained in a treaty or in customary law but originated in the Lieber Code published in 1863 by the U.S. Government. By following the development of the prohibition and other restrictions on the methods of combat, it identifies an overlap with treaty restrictions on perfidy but also that modern allusions to enemies as outlaws 'Wanted Dead or Alive' continue in some concerning ways.

Introduction

> I want him – hell, I want – I want justice, and there's an old poster out West…'Wanted: Dead or Alive'[1]

President Bush called for the bringing in of Osama bin Laden 'Dead or Alive' in an interview following the 9/11 attacks and the US coalition's military deployment to Afghanistan. President Trump has also said something similar about the operation that resulted in the death of the ISIS leader al-Baghdadi in October 2019, and in the following year there were reports that Russia had offered bounties for the killing of US and British troops in Afghanistan.[2] This article considers the implications of such

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[1]President George W. Bush in an interview with CNN on 21 December 2001 cited in Gary D. Solis, *The International Law of Armed Conflict*, (Cambridge: Cambridge University Press, 2016), p. 48.
[2]In a speech by President Trump to police chiefs in Chicago as reported by CBS News 29 October 2019, the President said 'I would say all the time, they would walk into my office, "sir we killed this leader at a level, this leader at…" I said I never heard of him, I want al-Baghdadi, that's the only one I know now, I want al-Baghdadi, get him, and they got him'; Charlie Savage, Eric Schmitt and Michael Schwirtz, 'Russia Secretly

statements in the light of a little discussed prohibition against outlawry contained in a number of national military manuals on the laws of war.[3] The prohibition seems at first sight an old-fashioned concept. In ordinary usage, an outlaw is defined as a person who has broken the law and has evaded or escaped from custody but historically it could also mean a person who, having done so, could be killed rather than captured.[4] More generally, the term may invoke images of Robin Hood or President Bush's cowboys in the Wild West rather than soldiers and the practice of modern warfare. The concept of outlawry in warfare is troubling too in that it seems to cut across established ideas of the soldier as a public enemy, that is a person who fights for his or her country and may be targeted as a combatant but, if captured, is entitled to be treated as a prisoner of war.[5] How then did the prohibition come about and why is it of concern today?

The article is divided into four parts. It begins by explaining the various prohibitions against outlawry and where they may be found. It then traces the origin of the prohibition to a section entitled 'Assassination' in the Lieber Code - a military code produced in the American Civil War. The third part examines the history of the prohibition as the laws of war were developed and the final part considers why the prohibition has been overlooked in treaties and sources of customary law and whether its relative invisibility is a cause for concern.

The Prohibition on Outlawry

The laws of war are part of international law and are drawn from a limited number of sources, in particular treaties and customary law.[6] When considering outlawry and the sources of the laws of war, the first observation is then that there is no express prohibition on outlawry in an international treaty (which includes the 1907 Hague Convention IV and the 1949 Geneva Conventions) in which states have agreed to the rules comprised in the laws of war. The existence of a rule under customary law is

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Offered Afghan Militants Bounties to Kill U.S. Troops, Intelligence Says', *New York Times*, 26 June 2020; Guardian staff, 'Outrage mounts over report Russia offered bounties to Afghanistan militants for killing US soldiers', *The Guardian*, 27 June 2020.

[3]This article generally uses the term 'laws of war' rather than the related but distinguishable terms 'the law of armed conflict' and 'international humanitarian law' as it is historically more accurate for much of the period covered. However, for these purposes, the distinctions between the terms are not significant.

[4]See, for example, the Oxford Reference on-line definition of an Outlaw: 'A person who has broken the law, especially one who remains at large or is a fugitive'. It then refers to David Hey (ed.), *The Oxford Dictionary of Local and Family History*, (Oxford: Oxford University Press, 2009) which adds the historical element of killing with impunity.

[5]Solis, *The Law of Armed Conflict*, p. 47.

[6]Statute of the International Court of Justice, 26 June 1945, 33 UNTS 993, Art. 38.

more difficult to determine as it may be recorded in judgments of international courts and other tribunals, or cited in military manuals or other works. Rules of customary international law arise from the existence of a practice among states showing the performance or prohibition of acts covered by the rule and *opinio juris* – that is the belief of a state that what is being done (or not done) is required as a matter of law. Once established, customary rules are binding on all states. In 2005 the International Committee of the Red Cross (ICRC) published the results of its Customary International Humanitarian Law Study (the ICRC Customary Law Study) that sought to establish what are the customary rules of international humanitarian law – the laws of war as they are called here.[7] The ICRC also publishes an on-line database that contains details of military manuals and lists military practice by some 192 states and former states which was used as part of the materials in the study.[8] There are 161 rules recorded by the ICRC in its Customary Law Study but the prohibition on outlawry is not one of them.[9] It is mentioned in the notes to Rule 65: 'Perfidy. Killing, injuring or capturing an adversary by resort to perfidy is prohibited' under cross-references to the older version of the rule against perfidy known as 'treacherous killing'. The notes, which the ICRC has said do not have the status of customary law, indicate that there are versions of the prohibition on outlawry recorded in the military manuals of Australia, Britain, Canada, New Zealand, Switzerland, and the United States.[10] The overlap between the various manuals is perhaps not surprising as military lawyers from the Commonwealth countries cooperate with each other and with the US on matters of military law.[11] By contrast, the prohibition does not appear in the

[7]International Committee of the Red Cross, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005).

[8] ICRC Customary Law Database, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/home. Accessed 6 September 2023.

[9]Whether military manuals are a conclusive source of customary law was disputed in correspondence between US Government lawyers and the ICRC in relation to the methodology of the ICRC's *Customary International Humanitarian Law Study* (2005). See Dennis Mandsager, 'U.S. Joint letter from John Bellinger III, Legal Adviser, U.S. Department of State, and William J. Haynes, General Counsel, U.S. Department of Defense to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study', *International Legal Materials*, Vol. 46, Iss. 3, (May 2007), pp. 511-531.

[10]Despite the position taken by the ICRC, one leading practitioner has suggested that the notes to Rule 65 would justify in themselves making rules against assassination and outlawry – see William J. Fenrick, 'Methods of Land Warfare' in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict,* (London: Routledge, 2016), p. 261.

[11]Chatham House, Meeting Summary, 'The US and the Laws of War', Summary of the International Law Discussion Group meeting held at Chatham House on

current German manual that, along with the British and US manuals, is one of the most highly regarded.[12]

The UK Manual of the Law of Armed Conflict, the official publication by the British Government on the subject (the British Manual), contains the most comprehensive version of the prohibition on outlawry. In a section entitled 'Outlawry' it states:

> 5.14 The proscription or outlawing or the putting of a price on the head of an enemy individual or any offer for an enemy 'dead or alive' is prohibited.
>
> 5.14.1 The prohibition extends to offers of rewards for the killing or wounding of all enemies, or of a class of enemy persons, such as officers. On the other hand, offers of rewards for the capture unharmed of enemy personnel generally or of particular enemy personnel would be lawful.[13]

As can be seen, there are four different prohibitions grouped together under this provision: outlawry (as a specific term); proscription; putting a price on an enemy's head; and offers for an enemy 'dead or alive'. Since the publication of the ICRC Customary Law Study in 2005, the United States has produced a new military manual on the laws of war (the US Manual) and the provisions on outlawry in it were changed from the version noted by the ICRC.[14] The current US Manual contains a section entitled 'Prohibition on Offering Rewards for Enemy Persons Dead or Alive' with a footnote referring to the previous edition of US Manual as authority for the provision.[15] However, it omits a reference to assassination and 'outlawry' as a specific term that were contained in the previous version and was current when President Bush made his comment on bin Laden.[16]

Monday, 21 February 2011, p. 5, https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il210211summary.pdf. Accessed 7 June 2023). The speaker at the meeting was W. Hays Parks.

[12]Bundeswehr, Grp DvZentraleBw, *Humanitaïres Völkerrecht in bewaffneten Konflikten – Handbuch* [International Humanitarian Law in Armed Conflict – Manual], ZDv15/2, 2013.

[13]UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, (Oxford: Oxford University Press, 2004), p. 62.

[14]US Office of General Counsel, Department of Defense, *Department of Defense Law of War Manual*, (Department of Defense, June 2015). It was updated again in 2016.

[15]*Ibid*., p. 310.

[16]The prohibition on assassination was contained in the previous editions of the US Manual (1956 and 1976 revision), §31 and the British Manual - UK Ministry of Defence, *Manual of Military Law, Part III – The Law of War on Land*, (London: Her Majesty's

There is no further definition of the term 'outlawry' or proscription given in the military manuals. What is meant by 'outlawry' is considered further below but proscription is more straightforward. It can be traced back to the Roman practice of listing the names of persons who were deprived of their rights and for whom rewards would be given for their return, dead or alive.[17] It seems to overlap, therefore, with the other parts of the prohibition and some military manuals only contain rules that prohibit the putting of a price on the head of an enemy individual or any offer for an enemy 'dead or alive'.

A survey of texts on the laws of war also shows little evidence of a specific rule against outlawry or its variants as it is not mentioned in the overwhelming majority of texts reviewed, including some of the leading textbooks on the subject.[18] However, it has been noted in a number of books and articles which have focussed on perfidy, a connection which will be considered further below.[19] The prohibition against outlawry as stated in the 2004 British Manual is not attributed to a particular treaty or other source of law but, by tracing the provision back through earlier editions, it can be seen to derive from two sources. The first is General Orders, No. 100, 'Instructions for the Government of Armies of the United States in the Field', published by the US War Department in 1863 which is widely accepted as the first modern code of the laws of

Stationary Office, 1958), §115. It was also omitted from the current British Manual when it was updated in 2004.

[17]Luca Gervasoni, *Assassination in Times of Armed Conflict: A Clash of Theory and Practice*, (PhD Thesis, University of Milan – Bicocca, 2016), p. 229.

[18]The current texts that were found to contain the rule are Solis, *The Law of Armed Conflict*, p. 48; A.P.V. Rogers, *Law on the Battlefield,* (Manchester: Manchester University Press, 2004), p. 46; and Fenwick, 'Methods', p. 261. Examples of leading textbooks that did not contain it included: Ingrid Detter, *The Law of War,* (London: Ashgate Publishing, 2013); Dieter Fleck (ed.), *The Handbook of International Humanitarian Law,* (Oxford: Oxford University Press, 2013); and Leslie C. Green, *The contemporary law of armed conflict,* (Manchester: Manchester University Press, 2008).

[19]Recent articles which associate outlawry with perfidy include: Rain Liivoja, 'Chivalry without a Horse: Military Honour and the Modern Law of Armed Conflict' in Rain Liivoja and Andres Saumets (eds), *The Law of Armed Conflict: Historical and Contemporary Perspectives,* (Tartu University Press, 2012), pp. 89-90; Sean Watts, 'Law-of-War Perfidy', *Military Law Review*, Vol. 219 (March, 2014), pp. 106-175, p. 171; Manuel Galvis Martínez, 'Betrayal in War: Rules and Trends on Seeking Collaboration under IHL', *Journal of Conflict and Security Law*, Volume 25, Issue 1, Spring 2020, pp. 81–99, pp. 89-91.

war (General Order 100).[20] The order is often referred to as the 'Lieber Code' after Dr Francis Lieber who produced the main draft of the code prior to its review and publication by the US Government. The second source is a book on the laws of war which was produced at the request of the British War Office by Col. J. E. Edmunds and Professor Lassa Oppenheim in 1912.[21]

Origins of the Prohibition on Outlawry

General Order 100 contains an article on outlawry under the heading 'Assassination':

> Art 148. The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.

The association between assassination and outlawry is the subject of some controversy, particularly in the United States where assassination by US state agents is prohibited by a US Presidential Order.[22] W. Hays Parks, a former US Army lawyer and chair of the US Department of Defense working group on the 2015 US Manual, tried to distinguish between assassination and lawful killing in war by suggesting that the scope of assassination that is prohibited for military purposes is limited to the prohibition on outlawry.[23] Hays Park's interpretation relies on the title of the section in which the article appears but, if the origin of the prohibition in the Lieber Code is examined, the meaning of it becomes clearer. Lieber had suggested the writing of a code of the laws of war to General Halleck, the Commanding General of the Union Army, and in December 1862 he was appointed to an Army board that was instructed to draw up a code. In February 1863 he produced a printed draft and submitted it to the board for review. In the draft code, there was a fuller section containing two

[20]US War Department, Adjutant General's Office, *General Orders, No. 100*, 'Instructions for the Government of Armies of the United States, in the Field', (Washington: GPO, 1863).

[21]Col. J.E. Edmonds and L. Oppenheim, *Land Warfare*, (London: HMSO, 1912).

[22]The ban was first issued by U.S. President Gerald Ford as Executive Order 11905 on 19 February 1976 and has since been reissued.

[23]W. Hays Parks, 'Memorandum of Law: Executive Order 12333 and Assassination', *The Army Lawyer*, Department of the Army Pamphlet 27-50-204, December 1989, pp. 4-9, p. 5.

articles. The first article was very similar to the final version but the second article offered a further explanation for the prohibition:

> ASSASSINATION.
>
> Art 96...
>
> Art 97. The American people, as all civilized nations, look with horror upon rewards for the assassination of any enemies, as relapses into the disgraceful courses of savage times.
>
> The assassination of a prisoner of war, is a murder of the blackest kind, and if it takes place, in consequence of a reward or not, and remains unpunished by the hostile government, the Law of War authorizes the most impressive retaliation, so that the repetition of a crime most dangerous to civilization, may be prevented, and a downward course into barbarity may be arrested.[24]

This section was, however, edited – presumably by the Board as Lieber had made no changes to it – so that the first article was supplemented by a final sentence that 'Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism' and the second article was deleted.[25] The second article made it clearer, however, that it was the summary killing without trial of captured soldiers for crimes that they were alleged to have committed that was abhorrent and it appears that Lieber uses the word 'assassination' as a descriptive word that also contains a sense of moral repugnance before categorising the practice legally as the crime of murder. The wording of Article 148 of General Order 100 then indicates that it was the proclaiming of outlaws and their killing without trial that was offensive. Article 148 is also notable for its strong condemnatory tone and its origins appear to be based in the context of the outlawing of several Union Generals for a number of alleged breaches of the laws of war.[26] Among their 'crimes', from the

[24]Francis Lieber, *A Code for the Government of Armies in the Field*, (New York: 1863 – reprinted by Amazon, 2018), p. 32.

[25]The Huntington Library, San Marino, California (*HEH*), The Francis Lieber Papers, LI 182A, 'Inter-leaved copy of "A Code for the Government of Armies in the Field" marked-up with comments by Lieber (undated, circa March 1863)', p. 23. There is a further draft in the collection of Lieber's papers but Articles 96 and 97 are the same as cited above except for their numbering and the replacement of the word 'disgraceful' with 'dark' in the third line of Article 97. Access to documents in The Francis Lieber Papers was kindly made available to the author by The Huntington Library.

[26]John Fabian Witt, *Lincoln's Code,* (New York: Free Press, 2013), p. 244.

perspective of the Confederacy, was the recruitment and arming of black soldiers.[27] This was viewed as an incitement to servile insurrection in the Confederacy and the procedure by which they were outlawed was, in each case, a proclamation of the Confederate President, Jefferson Davis.

Despite the condemnatory language of the article in General Order 100, Lieber was not always consistent in his approach to outlaws. In a letter to General Halleck following a Union Army operation to secure the Mississippi River in August 1863, he expressed his expectation that there would be 'prowling assassins along the banks, firing on passengers from behind the levees' and said that 'these lawless prowlers…must be treated as out-laws'.[28] Although General Order 100 had been published three months earlier, he did not refer to it and based this view on his earlier paper entitled 'Guerilla Parties Considered with Reference to the Laws and Usages of War' which he had written in 1862 to advise the Union Army on how to treat Confederate soldiers or civilians carrying out irregular warfare.[29] In the paper he had distinguished between 'Guerrillas' and 'irregulars'. He argued that guerrillas who engaged in a fair fight in open warfare should be treated in the same way as 'free corps' and 'partisans' and made prisoners of war if captured. However, irregulars operating near the lines or against the occupying army were, he said, like bushwackers, assassins, brigands and spies, and could not expect to be treated as combatants. He pronounced that death was the acknowledged punishment for a brigand but left the actual treatment and punishment of irregulars for the US Government to decide. General Order 100 had then provided that 'armed prowlers' were not entitled to be treated as prisoners of war but did not go so far as to prescribe the death penalty as it did in certain other cases, such as troops who gave no quarter to the enemy.[30] In his letter, however, Lieber seems to be implying that the prowlers could be denied quarter or, if captured, executed for their crimes rather than being proclaimed as outlaws by the authorities.

There are very few other references to outlawry in a proclamatory sense in America before, during or after the Civil War other than the outlawing by the Union of Confederate guerrillas such as Quantrill's Raiders, a Confederate guerrilla force led by William Quantrill operating around Missouri and Kansas, in 1862.[31] When the term

[27]*Ibid*.
[28]HEH, The Francis Lieber Papers, LI 1808, 'Letter from Dr. Francis Lieber to General Halleck', 2 August 1863.
[29]Francis Lieber, *Guerilla Parties Considered with Reference to the Laws and Usages of War,* (Washington, 1862).
[30]*General Order 100*, 1863, Arts 84 and 66 respectively.
[31]Graham Seal, *The Outlaw Legend: A Cultural Tradition in Britain, America and Australia*, (Cambridge: Cambridge University Press, 1996), p. 85.

'outlawry' is used in relation to the United States, it generally has a more descriptive sense of a person who is living outside of the law by robbery and murder, such as Jesse James. He had been part of Quantrill's Raiders and carried out a series of robberies and murders after the Civil War. A reward was offered for him and he was shot and killed by another gang-member, but his killer was pardoned for murder by the Governor of Missouri.[32] The legal distinction is not surprising given that the Fifth Amendment to the US Constitution requires due process of law and had its origins in England in Magna Carta. Magna Carta had provided that 'No free man shall be arrested…or outlawed or exiled or in any way victimised, neither will we attack him or send anyone to attack him, except by the lawful judgement of his peers or by the law of the land'.[33] This article of Magna Carta is perhaps one of its most famous and seems to have been directed against arbitrary action by the Crown.[34] As the law developed, particular stress was laid on the importance of the reference in Magna Carta to *lex terrae* – literally, 'the law of the land' or as later translated, 'due process of law'.[35] It does appear, however, that outlawry existed in America prior to the end of the Revolutionary War.[36] This may have been derived from English common law or Attainder, a legal process associated with outlawry, both of which were then prohibited by the US Constitution.

Outlawry & Development of the Laws of War

After General Order 100 was published, Lieber sought to have it distributed as widely as possible among academic acquaintances, politicians and diplomats in Europe as he promoted the idea that it should be used for other national codes. This coincided with a period of military expansion in Europe and General Order 100 was used as the basis for the attempts to formalise the laws of war that accompanied the expansion. In particular, Johann Bluntschli, a friend of Lieber's who was professor of law at the University of Heidelberg in Germany, used the code as a source for his own work on the laws of war, *Das moderne Kriegsrecht der civilisirten Staten* ('The Modern Law of War

[32]*Ibid*., pp. 80-92.
[33]J.C. Holt, *Magna Carta*, (Cambridge: Cambridge University Press, 1992), p. 461.
[34]*Ibid*., p. 327.
[35]Library of Congress, Constitution Annotated: Analysis and Interpretation of the U.S. Constitution, 'Constitution of the United States, Fifth Amendment', https://constitution.congress.gov/constitution/amendment-5/#:~:text=No%20person%20shall%20be%20held,the%20same%20offence%20to%20be. Accessed 7 June 2023).
[36]Capt. George L. Coil, 'War Crimes of the American Revolution', *Military Law Review*, Vol. 82 (1978), pp. 171-198, p. 185.

of Civilised States') which was published in 1866.[37] It was also used for a military code of the Prussian army in the Franco-Prussian War of 1870-71, and then for a draft of a treaty to govern the means and methods of land warfare put forward by the Russian delegation to the Brussels Conference in 1874.[38] Although the conference ended without a formal treaty, the Brussels Declaration that was issued at its end contained a draft set of regulations that contained three important articles on the methods of warfare – treacherous killing, the killing of prisoners and the giving of quarter, that were to form the basis of provisions on the conduct of hostilities in later treaties. There was, however, no express provision on assassination or outlawry. The draft regulations were in turn taken up by the Institute of International Law and used as the basis for a model code published in 1880 known as the Oxford Manual.[39] The manual was rather different in content from the Brussels Declaration but Article 8 contained a prohibition on treacherous killing and used as examples keeping assassins in pay or feigning to surrender. It made no mention of outlawry. It also met with no greater approval than the Brussels Declaration as it was rejected by the major European states and adopted only by Argentina.[40] A later international conference at The Hague in 1899, however, led to a treaty, Hague Convention II, that contained a set of regulations based on the Brussels Declaration (1899 Hague Convention II) and included a similar article on the methods of war:

> Article 23. Besides the prohibitions provided by special Conventions, it is especially prohibited -…
> (b) To kill or wound treacherously individuals belonging to the hostile nation or army;
> (c) To kill or wound an enemy who, having laid down arms, or having no longer means of defence, has surrendered at discretion;
> (d) To declare that no quarter will be given;[41]

There was no provision on outlawry. The new international treaty required states to produce their own 'Instructions' based on the regulations and this led to the

[37]Johan Bluntschli, *Das moderne Kriegsrecht der civilisirten Staten* [The Modern Law of War of Civilised States], (Nördlingen: C.H. Beck, 1866), https://catalog.hathitrust.org/Record/011640428. Accessed 7 June 2023.
[38]Karma Nabulsi, *Traditions of War, Occupation, Resistance and the Law*, (Oxford: Oxford University Press, 1999), p. 5.
[39]D. Schindler and J. Toman (eds), *The Laws of Armed Conflicts*, (Dordrecht: Martinus Nihjoff Publishers, 1988), pp. 36-48.
[40]Nabulsi, *Traditions of War*, p. 9.
[41]Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899 (*1899 Hague Regulations*), Art. 23.

production of a series of important military manuals and other texts around the start of the twentieth century. It is these manuals that provide the main examples of the prohibition on outlawry. In 1904, at the request of the British War Office, Erskine Holland, professor of international law at Oxford University, produced a commentary on the 1899 Hague Convention II that included a provision on assassination and outlawry derived from Article 23(b). It stated:

> …it is especially prohibited:-
> Assassination.
> (b) To kill or wound treacherously individuals belonging to the hostile nation or army.
> This includes not only assassination of individuals, but also, by implication, any offer for an individual "dead or alive".[42]

Apart from the examples provided from the American Civil War, it is difficult to find examples of outlawry being used as state practice in war in the late nineteenth century when the laws of war were being codified. However, two cases of outlawry are recorded as having arisen in British colonial wars in Africa around the turn of the twentieth century. On 17 April 1906, Professor Holland, the author of the British War Office's commentary on the 1899 Hague Convention II, wrote to *The Times* newspaper in London in response to a news report of a proclamation made by the Natal Government in South Africa offering a reward for Bambaata, a Zulu tribal leader, 'dead or alive'. He commented that such a proclamation was contrary to the customs of warfare, whether against foreign enemies or rebels. He cited Article 23(b) of the 1899 Hague Regulations on the prohibition against treacherous killing and said that it reflected a well-established rule of the law of nations. He also mentioned another case in Sudan that had preceded the 1899 Hague Convention in which an offer had been made for a Dervish leader dead or alive but the offer had been cancelled and disavowed by the British Government.[43] After the publications, a question was asked in the House of Commons on 2 May 1906 about the declaration against Bambaata in Natal and Winston Churchill confirmed on behalf of the Government that the offer of £500 for him had been withdrawn by the Natal Government.[44]

The Hague Conference of 1899 was followed by another in 1907 and a similar treaty, 1907 Hague Convention IV, that attached another set of regulations (1907 Hague

[42]T.E. Holland, *The Laws and Customs of War on Land, as defined by the Hague Convention of 1899*, (London: Harrison and Sons, 1904), p. 29.
[43]T.E. Holland, *Letters to "The Times" upon War and Neutrality*, (London: Longmans, Green, and Co, 1914), p. 74.
[44]House of Commons, Record of Parliamentary Debates, Vol. 156, 26 Apr. – 10 May 1906, p. 551.

Regulations) that contained the same Article 23 as the 1899 Hague Convention II except for a small change to the rule against killing or wounding those that had surrendered.[45] J.M. Spraight, a leading writer at the time, said that the regulations represented the nearest approach to a complete code of the law of war at that time and, again, there was no reference to outlawry.[46] In compliance with another requirement to produce national regulations based on the treaty, further manuals were produced. The British War Office instructed Holland to produce another commentary and it contained the same prohibition on assassination as the 1904 commentary.[47] However, in 1912 the War Office published a new commentary by Col J.E. Edmonds and Professor Lassa Oppenheim. It contained the following provisions in a section entitled 'The Means of Carrying on War by Force, Section 1A – Killing and Disabling the Enemy Combatants':

> §46 Assassination. Assassination, and the killing and wounding by treachery of individuals belonging to the hostile nation or army, are not lawful acts of war, and the perpetrator of such an act has no claim to be treated as a combatant, but should be put on trial as a war criminal. Measures should be taken to prevent such an act from being successful in case information with regard to it is forthcoming.
>
> §47 Outlawry. As a consequence of the prohibition of assassination, the proscription, or outlawing of any enemy, or the putting a price on an enemy's head, or any offer for an enemy 'dead or alive' is not permitted.

It also contained provisions on 'Quarter' (§48) and 'Killing of surrendered combatants' (§50).[48] The 1912 commentary was then inserted wholesale as the chapter on the laws of war in the 1914 edition of the British Manual and is the other main source of the prohibition on outlawry.

In 1914 the US Army produced its first military manual, it was also its first official publication on the laws of war since the Lieber Code.[49] The manual was in a new form but nonetheless it stated that '[i]t will be found that everything vital contained in […the

[45]Convention IV (1907) respecting the Laws and Customs of War on Land, Annex to the Convention: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Art. 23.
[46]J.M. Spraight, *War Rights on Land*, (London: Macmillan and Co., Limited, 1911), pp. 6-8.
[47]T.E. Holland, *The Laws of War on Land*, (London: Clarendon Press, 1908), p. 43.
[48]Edmonds and Oppenheim, *Land Warfare*, p. 24.
[49]The Lieber Code was reissued by the U.S. War Department in 1898 in connection with the Spanish-American War and an insurrection in the Philippines.

Lieber Code] has been incorporated in this manual'.[50] It set out the rule against treacherous killing from Article 23(b) of the 1907 Hague Regulations and then added a provision précising the prohibition on outlawry in the Lieber Code and footnotes referring to its other sources as being the works by Holland and Oppenheim and a manual by Jacomet - a contemporary French writer.[51]

The 1914 British and American manuals mark the culmination of the international process prior to the First World War that established the substance of the prohibitions on outlawry. The British reissued their manual with minor amendments in 1929 and 1940. The US also updated their manual in 1940 with a revised section on assassination and outlawry that cited Article 23(b) of the 1907 Hague Regulations on treacherous killing as the basis of the prohibitions.

Towards the end of the Second World War a more difficult case of would-be outlawry occurred when the British were considering how they should deal with the Nazi leaders after the war.[52] The British Cabinet had been considering how to deal with Nazi war crimes since 1942 and had held various discussions with the US and Russian Governments. In October 1943 the three Allies issued the Moscow Declaration which stated that, following any armistice, German officers and men and members of the Nazi Party who were responsible for atrocities would be sent back to the countries where the atrocities were committed to be judged and punished there. However, the Declaration reserved a separate category of major Nazi war criminals from this policy and stated that they would be punished by joint decision of the Allies.[53] Following the Moscow Declaration, the British War Cabinet met again to consider the treatment of the major war criminals.[54] The Cabinet members were provided with a memorandum from the Prime Minister, Winston Churchill, in which he suggested that a list of 50 to 100 major war criminals be drawn up by the thirty-two United Nations, a phrase that was used to refer to the states on the Allied side. They would then be declared 'world outlaws' and killed without trial on falling into the hands of the Armed Forces.[55] Some Cabinet members objected to this and no decision was made. The memorandum was subsequently redrafted several times for discussion but by April 1945 a decision was

[50]US War Department, *Rules of Land Warfare,* (Washington, 1914), p. 7.
[51]Lt Robert Jacomet, *Les Lois de La Guerre Continentale* [The Laws of Continental War], (Paris, 1913).
[52]Leon Friedman (ed.), *Law of War: A Documentary History*, Vol. 1, (New York: Random House, 1972), p. 778.
[53]The UK National Archives (hereinafter TNA), CAB 121/422, Cabinet Papers, 'Telegram From Moscow to Foreign Office', 29 October 1943; and CAB 66/42/46, 'Cabinet Papers, Memorandum', 9 November 1943.
[54]TNA, CAB 65/36, 'Cabinet Papers, War Cabinet Minutes', 10 November 1943.
[55]TNA, CAB 66/42/46, 'Cabinet Papers, Memorandum', 9 November 1943.

urgently required. The War Cabinet met on 12 April 1945 to discuss a further memorandum setting out a proposal developed by the Lord Chancellor, Lord Simon, in discussion with President Roosevelt's personal representative, Judge Rosenman.[56] Lord Simon proposed a documentary arraignment of the Nazi leaders following which they would be given the opportunity to appear before a tribunal but, if they refused to recognize the tribunal, 'extreme measures' would be taken against them. The discussion in Cabinet, however, returned to the position that the Nazi leaders should be treated as outlaws and executed if no ally wanted them. The Prime Minister said that he had wanted all Nations to declare them outlaws but it was too late for that.[57] He proposed that the Government should protect themselves by asking Parliament to pass an Act of Attainder which would declare that the Nazi leaders named in the Act were 'world outlaws' and would authorize the summary execution of those that came into British hands.[58] Attainder was originally an English common law procedure by which a person's title to land and goods were forfeit to the Crown and it took effect against outlaws.[59] A Bill of Attainder was a medieval law procedure which enabled Parliament to make judgment on a person without a trial in a court. It was used in 1660 against the regicides of King Charles I and last used in 1746 in an Act which attainted forty-seven men for their part in the Jacobite uprising.[60] The controversy over the procedure is then part of the background to the prohibition of Bills of Attainder in the US Constitution. Nonetheless, despite the lack of use of attainder for two centuries, the Cabinet approved the proposal to outlaw the Nazi leaders. However, after further discussion among the Allies at San Francisco in the following month, the British finally agreed to the holding of war crimes trials for them.[61] The Cabinet's decision is an interesting example as the Cabinet clearly knew that the summary killing of the Nazi leaders would be unlawful but there is no record of a discussion of the prohibition on outlawry under the laws of war.[62]

Following the Second World War, major revisions of the laws of war were agreed through the 1949 Geneva Conventions but, apart from two minor provisions, the Conventions do not deal with the law of combat itself as the 1907 Hague Regulations

[56]TNA, CAB 65/50/6, 'Cabinet Papers, War Cabinet Minutes – Conclusion', 12 April 1945.
[57]TNA, CAB 195/3/18, 'Cabinet Papers, Cabinet Secretary notes', 12 April 1945.
[58]TNA, CAB 65/50/6, 'Cabinet Papers, War Cabinet Minutes – Conclusion', 12 April 1945, p. 263.
[59]*Halsbury's Laws of England*, 5th edn, Vol. 79, (London: LexisNexis, 2015), §838n[1].
[60]*Ibid*., Vol. 24, §643.
[61]Friedman, *Law of War*, p. 778.
[62]The criminal procedure for outlawry was formally abolished in England in 1938 - T.R.F. Butler and M. Garsia, *Archbold's Pleading, Evidence & Practice in Criminal Cases*, 31st edn, (London: Sweet & Maxwell, 1943), p. 98.

had done.[63] One of their major changes, however, was to extend the coverage of the laws of war to 'conflicts not of an international character' through Article 3 of each Convention – the so-called 'Convention in miniature'.[64] Previously the international treaties on the laws of war had applied only to wars between states. Article 3 contained judicial guarantees for the fair trial of civilians and of combatants who are *hors de combat* who fall into the hands of an enemy, and these have subsequently been extended in the 1977 Additional Protocols to the 1949 Geneva Conventions. The 1949 Geneva Conventions once again necessitated a major updating of military manuals. The US Manual was revised in 1956 and the revisions dealt mainly with the updates for the 1949 Geneva Conventions. The article on assassination and outlawry was again based on reference to Article 23 of the Hague Regulations 1907 on treacherous killing.[65] The revised British Manual was produced in 1957 and contained a revised provision on assassination that characterized killings by enemy agents and partisans as unlawful assassination.[66] It also altered the reasoning behind the prohibition on outlawry from treacherous killing to the denial of quarter.[67]

In 1977 Additional Protocols I and II to the 1949 Geneva Conventions reaffirmed and supplemented the Conventions with measures intended to reinforce their application in international and non-international armed conflicts.[68] The Additional Protocols are also the last general treaties to have covered the conduct of hostilities. Again, there was no mention of outlawry and none in the 1998 Rome Convention which sets out the categories of war crime that are within the jurisdiction of the International Criminal Court. However, the rule against treacherous killing was updated, expanded and renamed in Article 37 of Additional Protocol I as a prohibition on perfidy. Apparently, the word 'Perfidy' was thought more modern or more appropriate than 'treacherous killing. This was not a new idea as it had been objected to in the negotiations over the 1899 Hague Convention II but the English word 'treachery' had been kept as it was the equivalent of the German *Meuchelmord* ('murder by

[63]Michael A. Meyer and Hilaire McCoubrey (eds), *Reflections on Law and Armed Conflicts. The Selected Works on the Laws of War by the Late Professor Colonel G.I.A.D. Draper OBE,* (London: Kluwer Law International, 1998), p. 88.
[64]David Turns, 'The Law of Armed Conflict' in Malcolm Evans (ed.), *International Law* (Oxford: Oxford University Press, 2014), p. 845. The reference is quoting Jean Pictet.
[65]US Manual, 1956, §31.
[66]British Manual, 1958, §115.
[67]*Ibid*., §116.
[68]Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3 and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

treachery').[69] The article on perfidy sets out a non-exhaustive list of examples of perfidy that have a common requirement for a breach of good faith.[70] However, outlawry is not among them. The United Kingdom ratified the Additional Protocols in 1998 and the British Manual was fully revised in a 'comprehensive' tri-service update published in 2004 which encompassed the changes. It contains the provision on outlawry set out previously and a paragraph stating that there is no rule against assassination.[71] The United States is not a party to the 1977 Additional Protocols and so did not have to revise its manual to reflect them but it did produce a new multi-service manual in 2015. This removed the prohibition on assassination and outlawry as a specific term whilst maintaining the prohibition on putting a price on an enemy's head or declaring an enemy wanted 'dead or alive'.

In the case of potential modern examples, the reference to Osama bin Laden being 'Wanted: Dead or Alive' has already been mentioned. During operations in Iraq, there were also reports on the BBC on 8 April 2003 that rewards of £3,000 were being offered for the killing of British soldiers.[72] A more difficult issue arises from the packs of 'Iraqi Most Wanted Playing Cards' issued in 2003 by US Central Command, copies of which are still widely available on the internet.[73] Each card has a photograph of the wanted person with their name and position together with a playing card suit and value – for example Saddam Hussain was described as the President and appeared on the Ace of Spades. However, the playing cards and other offers of rewards for information would not appear to breach the prohibition against outlawry unless the use of the term 'Wanted' within its context were thought to carry an inherent implication that it meant 'Wanted: Dead or Alive'.[74] Currently, the US Government is still offering large rewards for information leading to the location of various alleged members of al-Qaeda, ISIS and other groups that are 'Wanted' – a phrase which the *Express* online news in Britain has indeed interpreted as 'Wanted: Dead or Alive' although the offers do not say that.[75]

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[69]Joseph R. Baker and Henry G. Crocker, *The Law of Land Warfare concerning The Rights and Duties of Belligerents as Existing on August 1, 1914,* (Washington: GPO, 1919), p. 124.

[70]Nils Melzer, *Targeted Killing in International Law,* (Oxford: Oxford University Press, 2008), p. 372.

[71]British Manual, 2004, p. 62.

[72]Rogers has suggested that this is either to be seen as a case of assassination or more likely outlawry - Rogers, *Law on the Battlefield*, p. 46.

[73]https://www.awm.gov.au/collection/C1013029. Accessed 7 September 2023.

[74]Martínez considers the issue of offering economic rewards for killing combatants more generally in his article, 'Betrayal in War', pp. 96-97.

[75]www.rewardsforjustice.net. Accessed 7 September 2023, and Tom Batchelor and Alix Culbertson, 'Wanted DEAD or alive: The FOUR men we need to STOP to put

Current Status of Prohibition on Outlawry

As has been seen, references to the prohibition on outlawry have been somewhat scarce in the laws of war: it has not been included expressly in any international treaty or in the ICRC's extensive Study on Customary International Humanitarian Law, but it has been referred to consistently in some military manuals, and in some academic writing as being caught within the meaning of treacherous killing. In more modern academic writing, it has also been seen as an example of perfidy. There may be a number of reasons for this absence from treaties and the ICRC's study some of which may be historical or technical matters of law but they do, nonetheless, give some cause for concern.

The history of the development of the laws of war on the conduct of hostilities show a remarkable continuity from the publication of General Order 100 in 1863 to the Hague Regulations of 1899 and 1907. This arose from the use of General Order 100 as the basis for the draft code considered at the Brussels Conference in 1874 and the Oxford Manual published in 1880. The draft code for the Brussels Conference was then re-used as the basis for the Hague Regulations in 1899 and the 1899 Hague Regulations for the 1907 Hague Regulations. Nonetheless, the prohibition on outlawry contained in General Order 100 was not included in any of these. There was a general concern that provisions that were known at the time which were not included in the treaties might be tainted by their omission and considered as not being binding. This was in part the reason for the inclusion of the so-called Martens clause in the treaties which was intended to keep open the argument that there was customary law beyond that codified by the treaties. It is now widely accepted that this is the case even if some of the individual content of it included in the ICRC's study is disputed.[76]

There does not seem to be any record of why the prohibition on outlawry was not included in the draft code discussed at Brussels in 1874 and the later version adopted

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an end to ISIS', *Express*, London, 30 November 2015, https://www.express.co.uk/news/world/599387/World-most-wanted-terrorists-seven-men-50m-bounty. Accessed 7 September 2023.

[76]The first formulation of the Martens clause is in the Preamble to the 1899 Hague Convention II. It states that '[u]ntil a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience'. Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899. Preamble.

at The Hague in 1899. It might be possible to speculate, however, on a legal reason for this. General Order 100 has always been seen as something of a hybrid in its application to war and civil wars. It was said by Leiber to reflect the existing laws of war but there were some provisions that were clearly the creature of the American Civil War and the prohibition may have been seen as one of them.[77] In the late nineteenth century, the laws of war applied to war between states and did not apply to civil wars until they reached a status called belligerency. It could be argued that 'outlawry' in the strict sense of the term is, by its legal nature, a concept that can apply only to civil war. This is because outlawry as a legal concept is an exception to the law of a State created by a sovereign body that has the power to do so. In the case of England, this was originally the Crown and later Parliament but there is no sovereign body in the international system that has the power to create an exception to the laws of war. It may be, therefore, that outlawry was considered to be a matter for States and technically as a legal matter outside of the scope of the laws of war as they existed at that time.

If the exclusion was deliberate, it would not, however, account for the recurring appearance of the consideration of outlawry in the British and US military manuals. In their case, though, the justification for the inclusion of outlawry changed from manual to manual and from edition to edition. In the early British Manuals it was attributed to the prohibition on treacherous killing but the sources for the first British Manual also included General Order 100. The first US Manual to be produced then included in its sources both General Order 100 and the British Manual. After the Second World War, the justification in the British Manual changed to being based on the prohibition on the order that no quarter be given. The prohibition on treacherous killing has now largely been replaced by a prohibition on perfidy and modern writers have attributed the prohibition on outlawry to it. The concern with this trend is that it perpetuates the invisibility of the probation on outlawry and increases reliance on the military manuals that still include it. As has been seen, the prohibition on assassination has now disappeared from the British Manual and the US Manual and the reference to the term 'outlawry' has been removed from the US Manual even though the prohibitions of putting a price on an enemy's head remains.

Outside of military manuals, increasingly the persistence of the prohibition on outlawry relies on an understanding of the prohibition of perfidy and this could be problematic for two reasons. First, the essence of perfidy is that 'there is a deliberate claim to legal protection for hostile purposes'.[78] This can be seen in the examples of perfidy that include feigning surrender or falsely using protected symbols such as the

[77]For example, Lieber added Section X to the draft code specifically to deal with civil wars and it includes Article 157 which concerns treachery in the United States.
[78]Liivoja, 'Chivalry without a horse', p. 87.

Red Cross or Red Crescent, and it is not obvious that this is the case with outlawry. In some ways, it is the opposite where it involves a declaration that an enemy is not to be given lawful protection upon surrender or capture. This then becomes more serious if, as one writer put it, 'few legal advisers would interpret perfidy wider than the codified protection'.[79] It might even be argued that the absence of outlawry from the ICRC Customary Law Study and the limited sources for it in military manuals are grounds for it not being considered to be customary law. This would, however, probably be a step too far as it is difficult to see how outlawry as such would not fall within one of the existing protections against not giving quarter, perfidy or treacherous killing, or the provisions requiring a fair trial. In that case, the concern really lies around the allusion to the outlaw 'Wanted Dead or Alive', whether deliberate or not, and that the relative invisibility of the prohibition can and perhaps does lead to inadvertent references or misunderstandings.

Conclusions

The prohibition on outlawry is then the product of the Lieber Code. Its origins lay in the particular circumstances of the American Civil War and the outlawing of several Union Generals by proclamation of the Confederate President, Jefferson Davis. Outside of the Lieber Code, outlawry appeared in military manuals by association with the prohibitions against treacherous killing contained in the regulations attached to 1899 Hague Convention II and the 1907 Hague Convention IV. These were expressed to include the prohibition of outlawry or proscription as such, putting a price on a person's head or declaring then 'Wanted: Dead or Alive'. However, the prohibitions themselves were not adopted by any treaty. In particular, the prohibition in the Lieber Code was known at the time of the 1899 and 1907 Hague Conventions but was not included in their respective regulations and it was also not included in the 1949 Geneva Conventions, or their 1977 Additional Protocols, when, in each case, the states involved were seeking to agree which rules did exist as a matter of international law. Furthermore, the prohibition was not identified as customary law in the ICRC Customary Law Study in 2005. However, this does not mean that acts that would be the consequence of outlawry are lawful as they may breach the particular prohibitions that exist against perfidy, the declaring of no quarter and the killing of prisoners of war or the procedural guarantees embedded in the 1949 Geneva Conventions and customary law. In other words, the law may address some aspects of outlawry if the modern rules are examined closely enough but it leaves other aspects more ambiguous, particularly the prohibitions on putting a price on a person's head and declaring a person 'Wanted: Dead or Alive'. By including these, the approach of the UK Manual and the US Manual is an important reminder of what is required in practice and helps to avoid any uncertainty or misunderstanding, such as that from the British press over the Iraqi Playing Cards.

[79]Watts, 'Law of War Perfidy', p. 160.