Changes to the Department of Defense Law of War Program

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Introduction

On 9 May 2006, Deputy Secretary of Defense Gordon England signed *Department of Defense Directive* (*DODD*) *2311.01E*,[1] marking another chapter in the long and distinguished history of the Department of Defense (DOD) Law of War Program. In the modern era,[2] the Program was established in 1974 and renewed in 1979 and 1998.[3] The latest version yields several notable changes, addressing the types of operations during which the U.S. military will apply the law of war, as well as clarifying reporting requirements for violations of the law of war.

"Comply with the Law of War"

The 1998 version of the DOD Law of War Program, *DODD 5100.77*, stated that heads of DOD components would "[e]nsure that the members of their DoD components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations."[4] In the 1990s,

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[1] U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM (9 May 2006) [hereinafter DOD DIR. 2311.01E].

[2] The United States has long had a policy of compliance with the law of war. The first modern codification of the law of war is generally recognized as the Lieber Code, promulgated for Union forces during the U.S. Civil War. *See* U.S. War Dep't., Gen. Orders No. 100, Instructions for the Government of Armies of the United States in the Field (24 Apr. 1863), *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (Dietrich Shindler & Jiri Toman eds., 3d ed. 1988). The U.S. Army's current law of war manual, *Field Manual (FM) 27-10*, published in 1956, superseded the 1940 version. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 1 (18 July 1956) (C, 15 July 1976) [hereinafter FM 27-10].

[3] *See* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998) [hereinafter DOD DIR. 5100.77]; U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979) [hereinafter DOD DIR. 5100.77 (1979)]; U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (5 Nov. 1974) [hereinafter DOD DIR. 5100.77 (1974)]. Issued in the wake of Vietnam and My Lai, the 1974 version of the DOD Law of War Program was preceded by *Military Assistance Command—Vietnam (MACV) Directive 20-4*, which had been updated in 1968. *Department of Defense Directive* 5100.77 (1974), however, made several significant advances. In addition to establishing a uniform, DOD-wide policy, *DODD 5100.77 (1974)* mandated extensive law of war training. It also required that judge advocates be involved in the development and review of operations plans and established the Army as the lead organization in the implementation of the Law of War Program. *See* FREDERIC L. BORCH, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959-1975, at 34-35, 121 (2003); FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 30-31, 54 (2001).

[4] DOD DIR. 5100.77, *supra* note 3, para. 5.3.1. The then-current implementing instruction contained similar language. To aid in an understanding of the development of the current policy, the following excerpts are provided:

> The Armed Forces of the United States will comply with the law of war during all armed conflicts, however such conflicts are characterized, and, unless otherwise directed by competent authorities, the US Armed Forces will comply with the principles and spirit of the law of war during all other operations.

CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (25 Mar. 2002) (current as of 28 Mar. 2005) (pending revision) [hereinafter JCS INSTR. 5810.01B].

> "Heads of DOD Components shall . . . [e]nsure that the members of their DOD components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations."

DOD DIR. 5100.77, *supra* note 3, para. 5.3.1.

> "The Armed Forces of the United States will comply with the law of war during all armed conflicts; however, [sic] such conflicts are characterized and, unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations."

CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01A, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM para. 5a (27 Aug. 1999) [hereinafter JCS INSTR. 5810.01A].

> The Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized, and unless otherwise directed by competent authorities, will apply law of war principles during all operations that are categorized as Military Operations Other Than War.

CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM para. 4a (12 Aug. 1996) [hereinafter JCS INSTR. 5810.01].

U.S. forces were heavily engaged in operations that did no qualify as armed conflict.[5] The requirement that forces would nonetheless comply with the principles and spirit of the law of war caused much consternation among practicing judge advocates.[6] During this time, well-intentioned practitioners struggled to determine the true meaning of *DODD 5100.77*, paragraph 5.3.D. Indeed, members of the International and Operational Law Department at The Judge Advocate General's Legal Center and School (TJAGLCS) published a series of notes in *The Army Lawyer* attempting to resolve the precise parameters, and resulting restrictions, of the principles and spirit of the law of war.[7] In the past year, while discussing this language with students at TJAGLCS, the author has observed students reach the following two conclusions: first, that the "principles and spirit" language can serve as useful ammunition in the fight to promote increased application of the law of war and second, that language can also serve to justify nearly any deviation from what would be binding international law were the law strictly applied.

The newest edition of the Law of War Program removes any ambiguity stating, "Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[8] Thus, this source of angst for judge advocates has been removed.

Yet even if judge advocates no longer struggle to determine the principles and spirit of the law of war, an honest reading of the Program may still raise eyebrows: *What* exactly is the law of war, and *how* is it applied?[9] According to *DODD 2311.01E*, the law of war is

> [t]hat part of international law that regulates the conduct of armed hostilities. It is often called the "law of armed conflict." The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.[10]

Before attempting to define the parameters of the law of war for the purposes of *DODD 2311.01E*, one must first explore the classic organization of the law of war, which can be categorized in two different ways. First, the law of war consists of both the *jus ad bellum*, which regulates decisions to wage war, and the *jus in bello*, which regulates the conduct of war.[11] Further, both the *jus ad bellum* and the *jus in bello* include customary international law and codified, or conventional, law. The distinction between customary international law and conventional law, however, is not always clear. Treaties may be written to codify existing practice; also, treaty provisions may themselves over time become customary international law. The Law of War Program's applicability to *jus ad bellum* is of much less importance to judge advocates, as decisions to wage war or

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[5] For example, Operation Just Cause (the invasion of Panama) was not considered international armed conflict, and thus did not trigger the full body of the law of war. INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, 54TH JUDGE ADVOCATE OFFICER GRADUATE COURSE DESKBOOK M-11 (Nov. 2005) (citing Memorandum, W. Hays Parks, to the Judge Advocate General of the Army (10 Jan. 1990)). *But see* United States v. Noriega, 808 F. Supp. 791, 795 (S.D. Fla. 1992) (finding that the invasion of Panama was "armed conflict" within the meaning of Common Article 2. Noriega later abandoned his claims under the Geneva Conventions, rendering the issue moot. United States v. Noriega, 117 F.3d 1206, (11th Cir. 1997)). Similarly, operations in Somalia (Operation Restore Hope), Haiti (Operation Uphold Democracy), and Bosnia-Herzegovina (Operation Joint Endeavor) were not considered to be international armed conflicts. *See* CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994-95: LESSONS LEARNED FOR JUDGE ADVOCATES 46, 53-54 (11 Dec. 1995). *Cf.* Parks, *infra* note 7, at 9. For a further discussion of international armed conflict, see *infra* p. 4.

[6] *See, e.g.*, Major Timothy P. Bulman, *A Dangerous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Operations Other Than War*, 159 MIL. L. REV. 152 (1999).

[7] Major Geoffrey S. Corn, International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., June 1998, at 17; Major Geoffrey S. Corn, International and Operational Law Note, *Principle 1: Military Necessity*, ARMY LAW., July 1998, at 72; Major Geoffrey S. Corn, International and Operational Law Note, *Principle 2: Distinction*, ARMY LAW., Aug. 1998, at 35; Major Geoffrey S. Corn, International and Operational Law Note, *Principle 3: Endeavor to Prevent or Minimize Harm to Civilians*, ARMY LAW., Oct. 1998, at 54; Major Geoffrey S. Corn, International and Operational Law Note, *Principle 4: Preventing Unnecessary Suffering*, ARMY LAW., Nov. 1998, at 22; Major Geoffrey S. Corn, International and Operational Law Note, *Principle 5: Protecting the Force from Unlawful Belligerents*, ARMY LAW., Feb., 1999, at 21; Major Larry D. Youngner, Jr., USAF, International and Operational Law Note, *Principle 6: Protection of Cultural Property During Expeditionary Operations Other Than War*, ARMY LAW., Mar. 1999, at 25; Major Geoffrey S. Corn, International and Operational Law Note, *Principle 7: Distinction Part II*, ARMY LAW., June 1999, at 35; Major Maxwell, Major Smidt, and Major Geoffrey S. Corn, International and Operational Law Note, *Non-Governmental Organizations and the Military*, ARMY LAW., Nov. 1999, at 17. *But see* W. Hays Parks, *Rules of Conduct During Operations Other Than War: the Law of War Does Apply*, 6 AMER. DIPLOMACY, No. 2 (2001), *available at* http://www.unc.edu/depts/diplomat/archives_roll/2001_07-09/hum_intervention/hum_08_parks.html.

[8] DOD DIR. 2311.01E, *supra* note 1, para. 4.1.

[9] *Cf.* Parks, *supra* note 7, at 1.

[10] DOD DIR. 2311.01E, *supra* note 1, para. 3.1. Identical or substantially similar language is contained in *DODD. 5100.77* and *JCS Instr. 5810.01B*.

[11] John Norton Moore, *Development of the International Law of Conflict Management, in* JOHN NORTON MOORE AND ROBERT F. TURNER, NATIONAL SECURITY LAW 29 (2d ed. 2005).

deploy forces are reserved to civilian policy makers. It is instead the *jus in bello* that forms the mainstay of military legal practice.

In an attempt to explore the meaning of "the law of war," this note will consider both conventional and customary law. To simplify the analysis, this note will explore their ramifications separately, first addressing the application of conventional law, and only then considering the implications of customary law. In the modern era, the *jus in bello* is embodied in multiple sources of conventional law. Nearly all nations are party to the four Geneva Conventions of 1949,[12] which were enhanced by Additional Protocols I and II in 1977[13] and Additional Protocol III in 2005.[14] Referred to as the Geneva Tradition, these and prior treaties[15] have provided protections for the victims of war. The so-called Hague Tradition,[16] on the other hand, regulates the means and methods of warfare.[17] What all these treaties have in common, however, is a trigger for application of the substance of the treaties, a trigger that invariably is some version of the term "armed conflict." For example, article 2 common to the four Geneva Conventions (Common Article 2) triggers the substantive application of each of these treaties during international armed conflict; and article 3 common to the four Geneva Conventions (Common Article 3) operates as a "mini-convention,"[18] containing both a trigger and substantive rules for applicable during internal armed conflict. Protocols I and II contain their own triggers, which are the same, with some amplification, as the triggers contained in Common Articles

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[12] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GCI]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GCII]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII]; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV]. Of 192 members of the United Nations, all are party to the four Geneva Conventions of 1949 (as of 29 August 2006). International Committee of the Red Cross, International Humanitarian Law, http://www.icrc.org/ihl.nsf/CONVPRES?OpenView (last visited Aug. 29, 2006) The Holy See and the Cook Islands are signatories to the Conventions but not members of the United Nations. *Compare id.*, *with* United Nations, List of Member States, http://www.un.org/Overview/unmember.html (last visited Aug. 21, 2006). All four Geneva Conventions include a Common Article 2 and 3.

[13] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609. The United States is party to neither Protocol I nor Protocol II. As of 19 July 2006, 165 nations are state parties to Protocol I, while 160 are state parties to Protocol II. International Committee of the Red Cross, International Humanitarian Law, http://www.icrc.org/ihl.nsf/CONVPRES?OpenView (last visited Aug. 21, 2006).

[14] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, 8 Dec. 2005, [hereinafter Protocol III], *available at* http://www.icrc.org/ihl.nsf/FULL/615 (creating the "red crystal" as a distinctive emblem akin to the red cross or red crescent). Fifty-four nations are signatories to Protocol III. The United States signed Protocol III on 8 December 2005 and the President transmitted Protocol III to the Senate for advice and consent on 19 June 2006.

[15] *See, e.g.*, Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, August 22, 1864, 22 Stat. 940, 1 Bevans 7; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 6, 1906, 35 Stat. 1885, 1 Bevans 516; Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 LNTS 343.

[16] *See, e.g.*, Hague Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297 (1868-69); Hague Declaration IV (1) to Prohibit, for the Term of Five Years, The Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature, Jul. 29, 1899, 32 Stat. 1839; Hague Declaration IV (2) Concerning Asphyxiating Gases, Jul. 29, 1899, *reprinted in* 1 Am. J. Int'l L. Supp. 157 (1907); Hague Declaration IV (3) concerning Expanding Bullets, Jul. 29, 1899, *reprinted in* 1 Am. J. Int'l L. 155 (Supp. 1907); Convention (II) with Respect to the Laws and Customs of War on Land, Jul. 29, 1899, 32 Stat. 1803; Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

[17] The distinction between the Geneva and Hague Traditions is not always clear. For example, Protocols I and II address both the protection of the victims of war and the means and methods of warfare. Conventions regulating the use of land mines regulate the means of warfare, but do so to protect civilian, as opposed to military, victims of war. *See* Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Oct. 10, 1980, 1342 U.N.T.S. 168, as amended, May 3, 1996, 35 I.L.M. 1206 (1996) [hereinafter Amended Protocol II to the CCW]; Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 [hereinafter Ottawa Convention].

[18] Howard S. Levie & Jack Grunawalt, *The Law of War and Neutrality*, *in* MOORE & TURNER, *supra* note 11, at 334.

2 and 3.[19] Protocol I addresses the law of war during international armed conflict, while Protocol II increases the protections applicable during internal armed conflict. Other law of war treaties contain similar triggers for application.[20]

With regard to *DODD 2311.01E*'s invocation of the law of war, one interpretation could be that the triggering requirements of law of war treaties have been removed.[21] No matter the type of conflict, U.S. forces must, as a matter of policy, always fulfill all substantive obligations of all law of war treaties to which the United States is a party. This interpretation, however, may not be entirely sufficient. The definition of the law of war contained in *DODD 2311.01E* only references international law *binding* on the United States. If law is not binding, it is not, for purposes of *DODD 2311.01E*, "law of war," and the directive does not require its application. This is logical because *DODD 2311.01E* policy cannot be read to require U.S. forces to comply with treaties to which the United States is not a party.[22] But does the policy go farther? Law of war treaties contain triggering requirements, but individual substantive provisions may also contain qualifying language. For example, application of the Geneva Convention Relative to the Treatment of Prisoners of War is triggered by Common Article 2, but nearly all the treaty's substantive provisions apply only to certain individuals (i.e., "prisoners of war")

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[19] Protocol I "shall apply in the situations referred to in Article 2" and further expands the application of Common Article 2 to "include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . . ." Protocol I, *supra* note 13, art. 1. Protocol II, while not modifying the scope or substance of Common Article 3, applies to a narrower set of circumstances than does Common Article 3:

> This protocol . . . shall apply to all armed conflicts which are not covered by [Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Protocol II, *supra* note 13, art. 1; COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1348-1352 (Yves Sandoz et al. eds., 1987). Though Protocol II's application is presumably narrower, the exact parameters of Common Article 3's application is a separate issue. *Cf.* discussion infra nn.29-37 and accompanying text.

[20] *See, e.g.*, Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict arts. 18, 19, May 14, 1954, 249 U.N.T.S. 215 (containing language similar to Common Articles 2 and 3); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects art. 1, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCW] (referring to Common Article 2 and Protocol I, art. 1(4)); Amended Protocol II to the CCW, *supra* note 17; Protocol on the Explosive Remnants of War (Protocol V) art. 1, Nov. 28, 2003, U.N. Doc. CCW/MSP/2003/3 (Protocol V to the CCW); CCW, *supra* Amendment to Art. 1 (Dec. 21, 2001), *available at* http://www.icrc.org/ihl.nsf/52d68d14de6160e0c12563da005fdb1b/af62e5065f4e9646c1256bb3003bae4f!OpenDocument (applying the CCW and its protocols to Common Article 2 and Common Article 3 conflicts; also, binding each party to a conflict occurring within the territory of a High Contracting Party) (transmitted to the Senate for advice and consent on 19 June 2006); *see also* Message from President George W. Bush, to the Senate of the United States (June 19, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/06/20060620-3.html. Previous law of war treaties were often vague in this regard, applying "in case of war," or otherwise silent on the matter. *See, e.g.*, Convention (II) with Respect to the Laws and Customs of War on Land, Jul. 29, 1899, 32 Stat. 1803; Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 LNTS 343; Convention Relative to the Treatment of Prisoners of War art. 1, July 27, 1929, 47 Stat. 2021, 118 LNTS 343. The 1949 Geneva Conventions attempted to address this perceived fault by setting a standard for application of the Conventions. *See* COMMENTARY, I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 28 (Jean S. Pictet ed., 1952) [hereinafter COMMENTARY].

[21] This interpretation appears to be endorsed by at least one senior judge advocate. Major General Daniel V. Wright, *Soldiers Already Know What Is Right*, ARMY, June 2006, at 26.

> [T]he law of war, including the Geneva Conventions, [apply] to all military operations as a matter of policy . . . [DoDD 5100.77] provides a single standard and allows us to train our soldiers and leaders to that standard. Where reasons of national security require an exception to that general policy, an appropriate command authority may grant exceptions for limited groups or operations (consistent with applicable law).

Id.: *see also* Geoffrey S. Corn, *Snipers in the Minaret—What Is the Rule? The Law of War and the Protection of Cultural Property: A Complex Equation*, ARMY LAW., July 2005, at 25 n.32. Referring to *DODD 5100.77*, Mr. Corn states the following:

> It is not uncommon for practitioners to assert that this policy mandate requires compliance with only the "principles and spirit" of the law of war. The plain language of the directive, however, renders this position patently erroneous. While following the principles and spirit of the law of war is without doubt required during all military operations, any operation that is considered by the United States to fall within the rubric of "armed conflict" triggers application of the law of war as if such application was required as a matter of law . . . The forthcoming revision to this directive will not in any way alter this conclusion, and will in fact elevate the requirement to comply with the law of war during all armed conflicts from a service component responsibility to an explicit statement of DOD policy.

Id.

[22] Similarly, *DODD 2311.01E* policy cannot be read to require U.S. forces to comply with principles of customary international law to which the United States has persistently objected.

as defined by Article 4.[23] Has *DODD 2311.01E* removed only the triggering requirement of Common Article 2, or does it also serve to remove other triggering or qualifying language?[24]

The directive's definition of the law of war as only *binding* law could also be interpreted to obviate the meaning of the requirement to "comply with the law of war during all armed conflicts . . . and in all other operations."[25] If only *binding* law comprises the law of war, and law only becomes binding when law of war treaties are triggered; then, in the context of operations other than armed conflicts, there is no binding law, and the directive's mandate to comply with the law of war can be read away. This reading would eliminate the application of the body or substance of the assorted laws of war, making it easy to "comply with the law of war."

This dilemma becomes even more complicated by parsing the term "armed conflict." Within the scope of conventional law, the term has come to encompass both international armed conflict and internal armed conflict. A state of international armed conflict triggers the entire body of the law of war, as best exemplified by Common Article 2:[26]

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.[27]

Meanwhile, Common Article 3 contains its own trigger for the application of rules governing internal armed conflict—"[i]n case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."[28] In contrast to the relatively clear meaning of Common Article 2, Common Article 3 is subject to multiple interpretations. First, a simple reading of the article yields a simple result: "armed conflict not of an international character."[29] This phrase implies that within the overarching category of "armed conflict," there are those of an international character (invoking Common Article 2) and those not of an international character (invoking Common Article 3). This simple reading further leads to the conclusion that there is no gap between the two triggers and that any "armed conflict" will invoke either Common Article 2 or Common Article 3.[30]

A second interpretation of Common Article 3, which is based on the history of the article, is that it was designed to address the true "civil war;" that is, the faction or province located entirely within the borders of a nation that takes up arms against that nation. This reading is supported by the history behind the drafting of the convention, coming as it did on the heels of the Spanish Civil War.[31] As a current example of this view, consider the war on terror. One could conclude that

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[23] GCIII, *supra* note 12, art. 4.

[24] It seems appropriate to include a discussion of the seemingly benevolent statement "The Geneva Conventions apply." Often this remark is made with regard to detainees held as part of a particular conflict. So, does the statement mean that the Geneva Conventions apply to the conflict by the triggering of Common Article 2? Or does it also mean that the detainees are prisoners of war and entitled to the protections of the Third Convention. What if they are entitled to protections of the Fourth Convention? Finally, is it accurate to say "The Geneva Conventions apply" if the detainees are protected only by Common Article 3? Needless to say, it is imperative that judge advocates speak precisely and seek clarification from others who make this or similar statements.

[25] DOD DIR. 2311.01E, *supra* note 1, para. 4.1.

[26] The phrase "Common Article 2 triggers the entire body of the law of war" is often repeated and, while generally accurate, is not precisely correct. Technically speaking, and as discussed *supra* notes 19-20 and accompanying text, Common Article 2 triggers only the four Geneva Conventions of 1949 and other treaties that reference Common Article 2. Most law of war treaties—and almost all modern law of war treaties—are triggered by language similar to Common Article 2, or that would in any case be triggered by circumstances that would also satisfy Common Article 2.

[27] *See* note 12, art. 2, and accompanying text.

[28] *See* note 12, art. 3, and accompanying text.

[29] *Id.*

[30] *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) and discussion *infra* pages 6-7.

[31] *See* COMMENTARY, *supra* note 20, at 23, 40-41.

because the fight against al Qaeda spans the globe, it is of an international character even though it does not involve a direct conflict between two or more nations.[32] As such, the conflict could fall within a potential "gap" between Common Articles 2 and 3.

A third interpretation of Common Article 3 would apply the article's protections during all armed conflict, whether international or non-international. According to this view, and despite its clear application to conflicts "not of an international character," the substantive provisions of Common Article 3 "should be applied as widely as possible,"[33] including during Common Article 2 conflicts.[34]

The Commentaries to the Geneva Conventions of 1949 have been cited to support both the first and third interpretations. Referring to the Preamble to the Conventions, the Commentaries state, "[I]f these provisions represent (as they do) the minimum applicable in a non-international conflict, that minimum must *a fortiori* be applicable in an international conflict."[35] This portion of the preamble directly supports the notion that Common Article 3 applies in all armed conflicts. Later, while discussing Common Article 3, and in particular its field of application, the Commentaries enumerate certain conditions that would fulfill the clause.[36] Referring to those conditions, the Commentaries state the following:

> Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of the above conditions (which are not obligatory and are only mentioned as an indication)?

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[32] This appears to be the position of the U.S. government in the period after 11 September 2001 and during the litigation involving the military commissions. Acting on advice of the Department of Justice, the President determined that al Qaeda did not meet the requirements of either Common Article 2 or Common Article 3. Specifically, the conflict is not against another High Contracting Party, thus taking the conflict out of the scope of Common Article 2, but the conflict is international in scope, thus denying the application of Common Article 3. *See* Memorandum, George W. Bush, President of the United States, to the Vice President, et al., subject: Humane Treatment of Taliban and al Qaeda Detainees (7 Feb. 2002); *Hamdan*, 126 S. Ct. at 2795.

[33] *See* COMMENTARY, *supra* note 20, at 50.

[34] This approach has been applied by the International Court of Justice in the *Nicaragua* case, as well as by the International Criminal Tribunal for Yugoslavia in the *Tadic* decision. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para. 218 (June 27, 1986); Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (Oct. 2, 1995).

[35] COMMENTARY, *supra* note 20, at 23. Duplicate language is contained in the Commentaries to the Second, Third, and Fourth Conventions.

[36] *Id.* at 49-50.

> What is meant by "armed conflict not of an international character"?That was the burning question which arose again and again at the Diplomatic Conference. The expression was so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms—any form of anarchy, rebellion, or even plain banditry. For example, if a handful of individuals were to rise in rebellion against the State and attack a police station, would that suffice to bring into being an armed conflict within the meaning of the Article? In order to reply to questions of this sort, it was suggested that the term "conflict" should be defined or, which would come to the same thing, that a certain number of conditions for the application of the Convention should be enumerated. The idea was finally abandoned—wisely, we think. Nevertheless, these different conditions, although in no way obligatory, constitute convenient criteria, and we therefore think it well to give a list of those contained in the various amendments discussed; they are as follows:
>
> (1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
>
> (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
>
> (3) (a) That the de jure Government has recognized the insurgents as belligerents; or
>
> (b) that it has claimed for itself the rights of a belligerent; or
>
> (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
>
> (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
>
> (4) (a) That the insurgents have an organisation purporting to have the characteristics of a State.
>
> (b) That the insurgent civil authority exercises de facto authority over persons within a determinate territory.
>
> (c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.
>
> (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.
>
> The above criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection.

Id. (internal citation omitted).

> We do not subscribe to this view. We think, on the contrary, that the Article should be applied as widely as possible.[37]

In the Commentaries, the phrase "as widely as possible" is used in reference to minor incidents of armed strife not falling neatly into one of the categories of armed conflict listed in the Commentaries but that would still merit the title "armed conflict."[38] The phrase is used as part of a larger assumption that the conflict is internal to one nation. Though the Preamble to the Commentaries may be read to support the view that Common Article 3 applies during international armed conflict, this interpretation is unlikely.

Finally, there exists the idea that the protections contained in Common Article 3 are so basic as to constitute fundamental human rights, applicable to all peoples, at all times, and at all places. This view is essentially an extension of those interpretations explained above. In time of armed conflict, Common Article 3 applies. At other times, human rights law affords protections that might overlap Common Article 3 protections. Accordingly, no trigger is needed or required, and the protections would be binding on all nations, at all times, regardless of whether or not a state of armed conflict exists. It is important to remember, if such a view is held, that the rule must still apply during armed conflict, a time during which a great many people may well be legitimately killed on the battlefield.[39] Indeed, the substantive protections of Common Article 3 apply only to those "taking no active part in hostilities . . . ."[40] The killing of combatants—and of course other traditional military combat actions—would be permissible.

Judge advocates do, however, have new guidance from the U.S. Supreme Court. In *Hamdan v. Rumsfeld*,[41] the Court endorsed the first interpretation, holding that Common Article 3 applies to the ongoing conflict between the United States and al Qaeda.[42] The government had argued that because the conflict with al Qaeda is "international in scope," Common Article 3 does not apply—essentially advocating that there is a gap between Common Articles 2 and 3.[43] The Court, however, concluded that the term "not of an international character" was used "in contradistinction to a conflict between nations,"[44] and that Common Article 3 applies to Mr. Hamdan.[45] Although the Court endorses the view that an operation characterized as armed conflict must fall under the purview of either Common Article 2 or Common Article 3, the Court does not appear to endorse—or at least leaves open—the idea that Common Article 3 applies as a floor of protections during all armed conflicts.[46]

Though the importance and limits of *Hamdan* are likely to be debated for years to come, the Office of the Secretary of Defense (OSD) has attempted to clarify several aspects of the decision. In a memorandum dated 7 July 2006,[47] the OSD reiterates that Common Article 3 applies to the conflict with Al Qaeda.[48] While asserting that all DOD orders, polices, directives, execute orders, and doctrine comply with the standards of Common Article 3, the memorandum further orders a review of all relevant directives, regulations, policies, practices, and procedures to ensure compliance with Common Article 3.[49] In doing so, the Office of the Secretary of Defense reinforces the requirement that DOD personnel adhere to these

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[37] *Id*. at 50.

[38] *See id.*

[39] Though well beyond the scope of this note, a discussion of the canon of *lex specialis* is in order. A traditional view would hold that during armed conflict, the field of human rights law is preempted; however, an emerging view sees the two as existing together, though perhaps in varying degrees depending on the type and nature of the conflict. *Cf.* Human Rights First, Testimony on the Complementary Application of International Human Rights and International Humanitarian Law to "War on Terror" Detention (14 Mar. 2006), http://www.ushrnetwork.org/pubs/HRF3-13-06.pdf.

[40] *See supra* note 12 and accompanying text (quoting Common Article 3).

[41] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

[42] *Id*. at 2794-96.

[43] *Id*. at 2795.

[44] *Id.* (citing Hamdan v. Rumsfeld, 415, F.3d 33, at 41 (2005)).

[45] It might be tempting to draw the conclusion that the Court has ruled that Common Article 3 applies to the overarching Global War on Terror, in addition to the world-wide fight against al Qaeda. Although the Court's ruling as to Mr. Hamdan is clear, and potentially covers other individuals captured in similar circumstances, the outer limits of the Court's holding have yet to be determined.

[46] *See Hamdan*, 126 S. Ct. at 2794-2796.

[47] Memorandum, Office of the Secretary of Defense, to Secretaries of the Military Departments et al., subject: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense (7 Jul. 2006) [hereinafter OSD Memo].

[48] *Id.* at 1.

[49] *Id.*

standards. The memorandum is careful to draw a distinct, if unstated, line between law and policy.[50] Perhaps to preserve flexibility for future operations and subsequent litigation, the memorandum is careful to limit the legal application of Common Article 3, pursuant to *Hamdan*, to the conflict with al Qaeda. As a matter of policy, the memorandum goes much further, applying Common Article 3 to all military operations, whether or not such operations meet the assorted legal standards for war, armed conflict, and the international or non-international character of the operation.[51] In this sense, the OSD directs the application of Common Article 3 well beyond what the Supreme Court would require.

Regardless of which approach is taken to Common Article 3, the problem under the Law of War Program remains. Imagine that the United States has detained certain individuals for the commission of violent acts against U.S. forces, and that, for simplicity's sake, only the Geneva Conventions of 1949 apply.[52] What, then, does *DODD 2311.01E* require?

Circumstance #1: United States forces are participating in a peacekeeping or humanitarian mission and are not engaged in armed conflict. Does the requirement to comply with the law of war during "all other operations" require U.S. forces to apply substantive provisions of the Geneva Conventions? If so, which ones? The Third Convention or the Fourth? Or both? Because neither Common Article 2 nor Common Article 3 is triggered, the Conventions are not, as a matter of law, binding—does *DODD 2311.01E* somehow require more? In other words, because the law of war does not legally apply, is the directive's mandate to comply with the law of war satisfied? Or can practitioners then say U.S. forces have complied with the law of war? Taking the analysis one step further, what if U.S. forces apply protections consistent with Common Article 3? Do U.S. forces then comply with the law of war sufficiently to satisfy the directive?

Circumstance #2: United States forces are engaged in traditional international armed conflict; Common Article 2 triggers the application of the Conventions. The captured enemy fighters, however, fail to meet the criteria of Article 4(a)(2) of the Third Convention. If U.S. forces treat the enemy fighters as protected persons under the Fourth Convention, have they complied with the directive or must they also grant protection under the Third Convention?

Circumstance #3: United States forces are engaged in operations triggering the application of Common Article 3.[53] If U.S. forces provide the substantive protections of Common Article 3, have they complied with the law of war and satisfied the directive? Or does the requirement to comply with the law of war, during all armed conflicts, however characterized, require more? Would the answer change dependent upon how Common Article 3 is applied? If Common Article 3 applies according to its plain reading—such that all armed conflicts invoke either Common Article 2 or Common Article 3, but not both—it would seem superfluous to maintain the position that compliance with Common Article 3 fulfills the directive because the directive seems to have no purpose beyond what the law already requires. If, however, the view that there is a gap between Common Articles 2 and 3 is applied, or that Common Article 3 is the floor during all armed conflicts, the directive would seem to mandate treatment of all armed conflicts as falling within the scope of Common Article 2. Finally, exactly what provisions of the law of war are considered? Is the captured fighter entitled to combatant immunity for warlike acts (but not war crimes), as would not be the case under Common Article 3? If the United States wishes to try the captured fighter for the commission of war crimes (apart from mere warlike acts or hostilities), must the United States comply with Common Article 3's trial requirements or the more burdensome requirements of the Third or Fourth Convention invoked by Common Article 2?

Thus, whatever view of the directive's mandate is taken, problems under the law of war program remain. By requiring the application of the law of war during all operations, the directive seems to remove the trigger of Common Article 2.[54] Yet that conclusion is contradicted by the directive's restriction of the law of war to what would be binding international law on the United States. If the definition of the law of war—restricting the definition to binding law—is said to control, the mandate to apply the law of war during all operations is all but removed. Moreover, how might the OSD memorandum of 7 July 2006 impact the implementation of *DODD 2311.01E*? If *DODD 2311.01E* serves, as a matter of policy, to remove the trigger of Common Article 2, why then does the subsequent OSD memorandum only address the application of Common Article 3?

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[50] *See id.*

[51] *See id.*

[52] A similar analysis could be applied to other law of war treaties.

[53] Regardless of the theory of application of Common Article 3 to which one subscribes. For U.S. judge advocates, that standard is now set by *Hamdan*, though a broader scope could be envisioned.

[54] This seems to be the approach taken by Mr. Corn, then International Law Advisor, Office of the Judge Advocate General, International and Operational Law Division. *See* Corn, *supra* note 21, at 34; *see also* discussion *supra* note 20.

The definition of the law of war contained in *DODD 2311.01E* also references customary international law. However, defining what portion of the law of war is customary international law is quite challenging, both as to substance and as to application. As to substance, many provisions of the Geneva Conventions may be presumed to have become customary international law, some having been so considered prior to adoption of the conventions and others having attained that status in the years since.[55] The United States is not a party to the Geneva Conventions' Additional Protocols, yet presumably many of the Protocols' provisions have also attained the status of binding customary international law.[56]

As with treaty law, customary international law of war also contains triggering requirements. Those triggers, however, may vary. Portions of the 1949 Geneva Conventions and their Additional Protocols are binding customary international law; however, such law applies only upon satisfaction of Common Article 2. Yet presumably some rules of warfare, which may or may not be duplicated in the Conventions, may also be customary international law binding upon application of some other trigger—perhaps the conditions of "armed conflict," which may be the same as defined in Common Article 2 or Common Article 3, or perhaps merely upon existence of a "war." The condition of "armed conflict" or "war" sufficient to trigger a particular customary law of war principle, however, may or may not be the same as that of Common Article 2 or Common Article 3. Some rules of war may only be customary international law upon application of Common Article 2, and others may well have transcended Common Article 2 to become binding in Common Article 3 conflicts or even via some looser definition of "armed conflict" or "war."[57]

An Interpretative Solution

Having explored various interpretations of the new directive, what can practicing judge advocates at the tactical and operational levels do to implement the policy? Two realistic possibilities exist. First, Common Article 2 could be triggered for all military operations, determining that the broad scope of the law of war applied. Second, armed conflict could be found to exist for any military operation—triggering application of either Common Article 3 protections or more comprehensive and specific protections under Common Article 2. Remembering the application of customary international law, the difference, in the final analysis, may well be the same. Whichever approach is taken, clear communications with both higher and lower echelons of command must be maintained. Lower echelons can point out problems with implementation, and higher echelons can assist in making sure the former "get it right."[58] Legally, the safest, or most risk-averse,[59] approach will

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[55] Although it would be easy to assume that a treaty with 194 state parties has attained the status of customary international law, one must remember that signatures do not equate to state practice. For further discussion, and specifically of the difficulties inherent in determining which provisions have attained such status, see Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. No. 2 (Apr. 1987).

[56] Since the adoption of the Additional Protocols, judge advocates have striven to identify those provisions of the Additional Protocols that have attained the status of customary international law. For lack of a more definitive source, many have turned to the so-called "Matheson remarks." Mr. Michael Matheson, then U.S. Department of State Deputy Legal Advisor, spoke at the Sixth Annual American Red Cross – Washington College of Law Conference on International, Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions. His remarks were later published in the American University Journal of International Law and Policy and are often cited as to the U.S. position regarding Protocols I and II. *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L & POLICY 419 (1987). Although Mr. Matheson referenced the customary status of certain articles, usually in the negative, he primarily "[reviewed] the principles that we believe should be observed and in due course recognized as customary law, even if they have not already achieved that status and their relationship to the provisions of the Protocol." *Id.* at 422. Judge advocates have also relied on a memorandum written for the Assistant General Counsel in 1986. W. Hays Parks, et al., Memorandum for Mr. John H. McNeill, Assistant General Counsel (International), OSD, subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (8 May 1986). Judge advocates, however, should be cautious of overreliance on these documents as expressions of current U.S. policy. In the decades since these documents were drafted, three Presidents have led the United States through three wars (Iraq in 1991, Afghanistan in 2001-2002, and Iraq in 2003), several minor conflicts and operations (Panama, Haiti, Bosnia-Herzegovina, Kosovo), and the overarching aspects of the Global War on Terror in the post-11 September 2001 world. Given the developments in warfare and policy over the past twenty years, which principles have gained or lost stature or altered in scope of application cannot be clearly defined. It is difficult to conclude that the Matheson remarks and the 1986 DOD memo definitively represent the current state of the law (though it is difficult to imagine what in the 1986 memo may have changed). This reaching for definitive sources of law brings to mind the following comment by W. Hays Parks: "Lawyers stick to the safe anchor of treaties." Parks, *supra* note 7. Or, to coin a new phrase for the modern era, "If you can't find it on LEXIS or WESTLAW, there is no law." Customary international law is based on state practice; as such, it is as much an exercise in history as it is in legal research.

[57] One might argue that a policy to comply with the law of war during all operations creates the potential that such a policy might become customary international law. Bulman, *supra* note 6. However, *DODD 2311.01E* clearly states that the law of war consists only of that which is binding on the United States. It seems difficult to envision how a policy to adhere only to binding law could create a custom to adhere to non-binding law. Nevertheless, a foreign court or international tribunal could conceivably reach that conclusion.

[58] For example, a creative legal opinion by the Staff Judge Advocate for Joint Task Force 170 regarding aggressive interrogation techniques has been bitterly criticised. *See* Memorandum, Staff Judge Advocate, Joint Task Force 170, to Commander Joint Task Force 170, subject: Legal Brief on Proposed Counter-Resistance Strategies (11 Oct. 2002); Memorandum, General Counsel of the Navy, to Inspector General, Department of the Navy, subject: Statement for the Record: Office of the General Counsel Involvement in Interrogation Issues (7 July 2004). Nonetheless, that legal opinion was forwarded from Joint Task Force 170 to U.S. Southern Command and subsequently to the Secretary of Defense. Even if the aggressive interrogation techniques are

be to assume that Common Article 2 and similar triggers have been satisfied, to apply the law of war broadly, and to seek active involvement and consent from higher echelons of command when appropriate.[60]

A Practical Solution

This hand-wringing may strike some readers as much ado about nothing. Military leaders cannot expect Soldiers to make fine distinctions in the application of the law of war; instead, the U.S. military trains Soldiers on basic concepts they can and will apply across the conflict spectrum. Requirements for law of war training are set forth in the Army's capstone training regulation, *Army Regulation* (*AR*) *350-1, Army Training and Leader Development*,[61] which was recently updated in January 2006. *Army Regulation 350-1* continues to require all Soldiers be trained on ten basic law of war rules.[62] These "Soldier's Rules" are so basic they are useful during operations of any type. Regardless of how the "law of war" is applied, individual Soldiers can continue to successfully operate using these ten basic rules. It is at higher levels of command, and those levels at which legal advice is available, where decisions must be made as to *how* and *what part* of the law of war applies.[63] Though *AR 350-1* fails to provide specific legal guidance, it does provide a mechanism for action. *Army Regulation 350-1* sets forth the following three levels of training: Level A training, conducted during basic training and officer basic courses; Level B training, conducted in Modified Table of Organization and Equipment (MTOE)[64] units; and Level C training, conducted in the Army School System. Because Level A and C training is conducted in formal Army schools, Level B training remains the largest focus of judge advocates. In addition to reinforcing the Soldier's Rules, Level B training requires commanders to establish specific training objectives, use qualified instructors to conduct training in a structured manner ("qualified instructors" are judge advocates or certified paralegal noncommissioned officers),[65] design

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later determined to be unlawful at least judge advocates can take solace in the fact that everyone was wrong together. Memorandum, Commander, Joint Task Force 170, to Commander, United States Southern Command subject: Counter-Resistance Strategies (11 Oct. 2002); Memorandum, General Counsel of the Department of Defense, to the Secretary of Defense, subject: Counter-Resistance Techniques (27 Nov. 2002). Previously classified, the memoranda listed in this footnote are now commonly available on the Internet and elsewhere.

[59] Legal risk may or may not correspond to, or exist to the same degree as, physical or political (international or domestic) risk.

[60] *See* Wright, *supra* note 21, at 26. In an *Army Lawyer* article one year ago, Mr. Corn provided a template or methodology for application of this technique. *See* Corn, *supra* note 21, at 28, 40 (using the protection of cultural property to illustrate a variety of underlying considerations).

[61] U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. 4-18 (13 Jan. 2006) [hereinafter AR 350-1].

[62] *Id.* para. 4-18b.

> (1) Soldiers fight only enemy combatants.
>
> (2) Soldiers do not harm enemies who surrender. They disarm them and turn them over to their superior.
>
> (3) Soldiers do not kill or torture enemy prisoners of war.
>
> (4) Soldiers collect and care for the wounded, whether friend or foe.
>
> (5) Soldiers do not attack medical personnel, facilities, or equipment.
>
> (6) Soldiers destroy no more than the mission requires.
>
> (7) Soldiers treat civilians humanely.
>
> (8) Soldiers do not steal. Soldiers respect private property and possessions.
>
> (9) Soldiers should do their best to prevent violations of the law of war.
>
> (10) Soldiers report all violations of the law of war to their superior.

Id. Note that these ten principles—with the possible exception of principle nine—trace their roots at least as far back as the Lieber Code. *See* Parks, *supra* note 7, at 8.

[63] *Cf.* Parks, *supra* note 7, at 1, 7.

[64] Units are classified as either MTOE (modification table of organization and equipment) or TDA (table of distribution and allowances). Modified table of organization and equipment units are numbered and "constituted on the official rolls of the Army by the Chief of Military History." U.S. DEP'T OF ARMY, REG. 220-5, ARMY TRAINING AND LEADER DEVELOPMENT paras. 2-1, 2-3 (15 Apr. 2003). Table of distribution and allowance units may be "organized and designated by the head of an Army agency or by a MACOM [Major Command] commander" and are usually not numbered. *Id.* at 2-1, 2-4. Modified table of organization and equipment units are generally thought of as the deployable, warfighting units of the Army, whereas TDA units generally provide garrison or institutional support.

[65] AR 350-1, *supra* note 60, para. 4018c.

> Paralegal [noncommissioned officer] certification will be accomplished by one of two methods: graduation from the MOS 27D Basic Noncommissioned Officers Course (BNCOC) or a judge advocate supervised review of the LOW training package with the paralegal

training around current missions, and incorporate training into "unit training activities, field training exercises (FTX) and unit external evaluations (EXEVAL) at home stations, combat training centers,[66] and mobilization sites."[67] Nothing in *AR 350-1*, however, restricts Level B training to the Soldier's Rules. In addition to incorporating individual-level training into unit training activities, FTXs, and EXEVALs, judge advocates can also develop leader-level, complex problems that require the involvement of judge advocates at the unit and higher levels and the dissection of *DODD 2311.01E*. Collective training events can be used to force issues to higher headquarters for resolution or, at a minimum, exploration. While the exact application of the law of war may not always be clear, an effective unit training program, designed around current missions and expanded beyond the Soldier's Rules, may help flesh out the parameters of the law of war and raise unit-, mission-, and theater-specific issues for resolution.

Reporting Requirements

Fortunately, the new directive's changes with respect to reporting requirements will be much easier for judge advocates to implement. It continues to require reporting violations of the law of war, whether committed by friendly or enemy forces.[68] Structurally, both the old and new directives require reporting of "reportable incidents." The new directive, however, further defines "reportable incidents" in two respects. *Department of Defense Directive 5100.77* defined "reportable incidents" as "possible, suspected, or alleged violation[s] of the law of war." Though reasonable on its face, this definition proved to be extremely broad. An expansive reading of the old definition required reporting for any alleged or conceivable law of war violation, no matter how minor or dubious. To that end, *DODD 2311.01E* amends the definition of reportable incidents to those based on "credible information."[69] Further, the new directive explicitly requires the reporting of conduct that would constitute a violation of the law of war had it occurred in armed conflict.[70] This amendment fixes the shortcoming of the old directive where, despite the application of the principles and spirit of the law of war to operations other than war, there was no requirement to report egregious misconduct if the application of the law of war technically had not been triggered.[71]

Department of Defense Directive 2311.01E also applies reporting requirements to contractors.[72] Whereas *DODD 5100.77* required reporting by "military and civilian personnel assigned to or accompanying a DOD Component,"[73] the new directive adds contractors and subcontractors accompanying a DOD component to the list of those required to report law of war violations.[74] With regard to contractors, the reporting requirements will be included in contracts.[75]

[noncommissioned officer] and attendance by the judge advocate at the [noncommissioned officer's] first training session. Personnel serving in the rank of corporal can be certified.

Memorandum, The Judge Advocate General's Legal Center and School, to Command and Staff Judge Advocates, subject: Law of War Training, para. 4 (30 Sept. 2005) [hereinafter LOW Memo].

[66] The U.S. Army's Combat Training Centers include the Battle Command Training Program (BCTP), Fort Leavenworth, KS; the National Training Center (NTC), Fort Irwin, CA; the Joint Readiness Training Center, Fort Polk, LA; and the Joint Multinational Readiness Center (JMRC) (formerly CMTC), Hohenfels, Germany.

[67] AR 350-1, *supra* note 60, para. 4-18c. In an effort to assist judge advocates in completing the Level B mission, The Judge Advocate General's Legal Center and School produced a sample Level B training package, consisting of a PowerPoint presentation and realistic training scenarios. Training materials are available from the Center for Law and Military Operations at www.jagcnet.army.mil/clamo. Astute readers may note that the training package pre-dates the current version of *AR 350-1*; the training package was produced based on a Department of the Army message that went into effect prior to publication of *AR 350-1*. Naturally, the training package should be tailored to comply with *AR 350-1*'s mandate to establish specific training objectives and to design training around current missions and contingency plans.

[68] DOD DIR. 2311.01E, *supra* note 1, paras. 4.4, 4.5, 6.3.

[69] *Id.* para. 3.2.

[70] *Id.*

[71] DOD DIR. 5100.77, *supra* note 3, para. 3.2. To its credit, *DODD 5100.77* specifically included detainee abuse as a "reportable incident." *Id.* para. 2.2. Such a designation, however, still assumes a "violation of the law of war." *Id.* This perceived gap may well have been filled by the triggering of particular customary law of war principles, but such application is not clear. *See supra* notes 57-58 and accompanying text.

[72] DOD DIR. 2311.01E, *supra* note 1, paras. 4.2, 6.3.

[73] DOD DIR. 5100.77, *supra* note 3, para. 6.1.

[74] DOD DIR. 2311.01E, *supra* note 1, paras. 4.2, 6.3.

[75] *Id.* paras. 5.7.4, 6.3. *Cf.* U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. § 252.225-7040d (rev. 16 June 2006).

In addition to the changes regarding applicability and reporting, the directive makes several minor additions, none of which will affect the vast majority of practicing judge advocates. Primary staff responsibility has shifted from the Under Secretary of Defense for Policy to the DOD General Counsel,[76] a not insignificant change given the advisory role that attorneys usually fulfill. The Under Secretary of Defense for Intelligence and the Director, Defense Intelligence Agency, are both given specific reporting responsibilities regarding detainees. In the old directive, these agencies were not specifically addressed.[77] The new directive emphasizes the importance of detainee treatment in the context of intelligence operations.[78] Finally, the new directive appoints the Assistant Secretary of Defense for Legislative Affairs as the DOD Congressional liaison on matters relating to the law of war.[79]

Conclusion

The DOD Law of War Program traditionally has been implemented in the form of an Instruction from the Chairman of the Joint Chiefs of Staff. *Chief Joint Chief of Staff Instruction* (*CJCSI*) *5810.01B, Implementation of the DOD Law of War Program*, 25 March 2002 (current as of 28 March 2005)[80] is the most recent document in this trend. Judge advocates can expect to see a new version of this instruction in the near future. In the meantime, *DODD 2311.01E* provides a valuable new tool for judge advocates applying the law of war in turbulent times. By clarifying inconsistencies and addressing perceived gaps, the new DOD Law of War Program should simplify the analytical process judge advocates use when applying the law of war to the current operating environment. Until a new version of the *CJCSI* is available, judge advocates are encouraged to carefully apply the law of war, speak precisely, and actively engage their technical channels. Whether the new program leaves questions unanswered will, as with all new directives, policies, and regulations, remain to be seen.

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[76] DOD DIR. 2311.01E, *supra* note 1, para. 5.1.1.

[77] *See* DODD 5100.77, *supra* note 3, § 5.

[78] DOD Dir. 2311.01E, *supra* note 1, paras. 5.3, 5.4. *Army Regulation 350-1* also emphasizes proper detainee treatment. AR 350-1, *supra* note 60, para. 4-18c(3-4).

[79] DOD DIR. 2311.01E, *supra* note 1, para. 5.5. Under the old directive, the Assistant Secretary of Defense for Legislative Affairs presumably would have performed this role.

[80] CHIEF JOINT CHIEF OF STAFF INSTRUCTION (CJCSI) 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (25 Mar. 2002) (current as of 28 Mar. 2005). Prior versions include *CJCSI 5810.01A* (27 Aug. 1999) and *CJCSI 5810.01 (*12 Aug. 1996). *See supra* note 4.