The Law of War after the DTA, *Hamdan* and the MCA

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"The rumors of [its] death are greatly exaggerated."[2]

During the early days of the Global War on Terrorism (GWOT), the Department of Justice's Office of Legal Counsel (OLC) provided a number of legal opinions regarding international law and the law of war (LOW), and its application to the current Long War against terrorism.[3] In Alberto Gonzales' memorandum to President Bush, dated 25 January, 2002, entitled "Decision re: Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban," then White House Legal Counsel Gonzales referred to the LOW as an "obsolete" and "quaint" anachronism, with the implication that it was unsuited to this new form of conflict.[4] But over the last year, the tide of opposition to application of international law standards has turned; in public statements and policy developments, the U.S. government has increasingly applied the LOW, as a matter of law and policy, in military operations. The rumors of the demise of the LOW have been greatly exaggerated.

Current efforts in public diplomacy have emphasized the continued vitality of international law and the LOW. In a very recent speech at The Hague, Netherlands, U.S. Department of State Legal Advisor John B. Bellinger III emphasized the continuing importance and influence of international law to the United States in confronting the deep and difficult problems facing the international community. According to Mr. Bellinger, the U.S. government has always recognized that "international law has a critical role in world affairs, and is vital to the resolution of conflicts and the coordination of cooperation."[5]

In addition, several recent developments in the law have reinvigorated the application of international law and the LOW to the war on terror. On 17 October 2006, President Bush signed into law the Military Commissions Act of 2006 (MCA).[6] The Act's purpose is to "establish[] procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commissions."[7] The MCA is the most recent measure in a line of governmental actions, including the Detainee Treatment Act (DTA)[8] and the Supreme Court's ruling in *Hamdan v. Rumsfeld*,[9] that speak to the application of the law of

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[2] Apologies to Mark Twain.

[3] *See* Draft Memorandum, John Yoo, Deputy Assistant Attorney General, U.S. Department of Justice & Robert J. Delahunty, Special Counsel, U.S. Department of Justice, to William J. Haynes II, General Counsel, U.S. Department of Defense, subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees, (Jan. 9, 2002), *available at http://www2.gwu.edu/%7Ensarchiv/NSAEBB/NSAEBB127/02.01.09.pdf* [hereinafter Yoo Draft Memorandum]. *See also* Memorandum, Jay Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to Alberto R. Gonzales, Counsel to the President, subject: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A, (Aug. 1, 2002), *available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf#search=%22bybee%20memo%20pdf%22. (The OLC is charged with developing legal positions for the Executive branch. These memoranda were prepared to establish the administration positions on the status of captured enemy combatants in the fight against the Taliban and Al Qaeda, as well as their treatment. They served the basis for the President's statement of 7 February 2002, which declared the Taliban and Al Qaeda as "enemy combatants," not entitled to treatment of prisoners of war, but nonetheless subject to "humane treatment, subject to requirements of military necessity.").

[4] Memorandum, Alberto R. Gonzales, White House Legal Counsel, to President George W. Bush, subject: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, at 2 (Jan 25, 2002).

[5] John B. Bellinger III, Legal Advisor, U.S. Dep't of State, Remarks at the Hague, Netherlands: The United States and International Law (June 6, 2007), *available at* http://www.state.gov/s/l/rls/86123.htm. *See also* William H. Taft, IV, *A View from the Top: American Perspectives on International Law After the Cold War*, 31 YALE J. INT'L L. 503 (Summer 2006).

[6] Military Commissions Act of 2006 § 3, 10 U.S.C. § 948b(a) (2006) [hereinafter MCA].

[7] *Id.*

[8] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680.

armed conflict in the GWOT. Though these measures engender discussions on far broader topics than the LOW (such as separation of powers), the principles and procedures shaped by these actions have potentially far-reaching impact on the LOW in U.S. military operations.[10]

There are four particular aspects of recent events that have potentially profound impacts on the LOW. First, the Supreme Court's ruling in *Hamdan*[11] discounts the idea of a "no law" zone by holding that Common Article 3 (CA3)[12] of the 1949 Geneva Conventions applies to all conflicts that are not between states, as referred to in Common Article 2 (CA2).[13] Second, the amendment to the War Crimes Act (WCA) details the particular acts under CA3 that are "serious crimes," and will be prosecuted as violations of that Act.[14] Third, the establishment of humane treatment as the minimum standard for treatment of detainees on the battlefield by the DTA and *Hamdan* clarifies what some had argued was an unclear area of the law. Finally, the publication of Department of Defense Directive (DOD Dir.) 2311.01E reinforces the proposition that the primary standard of conduct for military operations is established by the law of armed conflict applied to international armed conflicts, including customary international law, in all military operations.[15]

The Supreme Court's decision in *Hamdan*, the DTA, the MCA, and the publication of the DOD Dir. 2311.01E on the LOW Program have all reinforced the proposition that the military is guided by an immutable set of legal principles that establish the rules of conduct for our profession. Collectively they have reinforced two bedrock principles of the LOW: (1) that minimum standards of conduct of civilized peoples are set by CA3; and (2) that U.S. military conduct on the battlefield is guided, as a matter of policy, by the law applicable to international armed conflict in any armed conflict or military operation, no matter how characterized. This article discusses each of these four aspects of recent events, briefly outlining the issue prior to governmental action and then analyzing the effects of the governmental action, both on domestic law and on the LOW.

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[9] *See* Hamdam v. Rumsfeld, 126 S. Ct. 2749 (2006).

[10] The LOW is also known as the law of armed conflict and international humanitarian law.

[11] *Hamdan*, 126 S. Ct. 2749.

[12] The provision is referred to as "common" article 3 because it is found identically in each of the four Geneva Conventions. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I], *reprinted in* DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS 373, 376 (3d ed. 1988); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II], *reprinted in* SCHINDLER & TOMAN, *supra*, at 404; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III), *reprinted in* SCHINDLER & TOMAN, *supra*, at 429-30; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287 [hereinafter GC IV], *reprinted in* SCHINDLER & TOMAN, *supra*, at 501.

The text of Common Article 3 states:

> Art 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Id.

[13] GC I, *supra* note 12, art. 2; GC II, *supra* note 12, art. 2; GC III, *supra* note 12, art. 2; GC IV, *supra* note 12, art. 2.

[14] War Crimes Act, 18 U.S.C. § 2441 (LEXIS 2007) [hereinafter WCA].

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

A "No Law Zone"?

In the years leading up to and following the adoption of the Geneva Conventions, government officials and academics debated the application of the LOW, including the Geneva Conventions, to the entire spectrum of conflict,[16] as a matter of law. To whom does the LOW apply and in what circumstances? Are there circumstances where the LOW does not apply? Does the LOW even apply to "non-state actors," like Al Qaeda? The terms of CA2 and CA3 to the Geneva Conventions have invited considerable debate concerning their coverage. Common Article 2 clearly established the application of the Conventions to international armed conflict—that is an armed conflict between two states, or "high contracting parties." And in international armed conflicts, the provisions of the entire Geneva Conventions apply to the individuals protected by the conventions, including the sick and wounded, prisoners of war, and civilians. The debate on the application of CA3 was more diffuse, however.

The two most difficult issues debated during the Geneva Conventions were the application of the LOW to "partisans" and the treatment of "civil wars."[17] Article 4 to Geneva Convention III set the standard to obtain prisoner of war (POW) status for militias and irregular forces that are answerable to the government of a high contacting party.[18] The only mention in the Conventions of "irregular combatants" of any other form, however, is in Article 5 of Geneva Convention IV, which authorizes derogations from the Civilians Convention for the security requirements of an occupying power in detaining spies, saboteurs, and other security threats.[19] The arguable gap between lawful and unlawful combatants has been the subject of academic debate, over the years.[20] As early as 1951, Richard Baxter argued that unprivileged belligerents received no protections under the Conventions but were "virtually at the power of the enemy."[21] Professor Yoram Dinstein, of Tel Aviv University, posited that "unlawful combatants" are subject to the law of the capturing state, not the law of armed conflict.[22] And the U.S. position has been that human rights law, including the Constitution, does not govern the treatment of detainees abroad.[23] The result was a gap in the law, a "no law zone," where irregular belligerents, or unlawful combatants reside.

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[16] The "spectrum of conflict" is a term of art, referring to the full range of military operations, from international armed conflict, through peacekeeping operations, internal armed conflict, and internal disturbances where military forces may by employed.

[17] COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 49-50 (O. Uhler & H. Coursier eds. 1958), *available at* http://www.icrc.org/ihl.nsf/COM/375-590007?OpenDocument.

> During the preparatory work for the Conference, and even during the Conference itself, two schools of thought were observed. Some delegates considered that partisans should have to fulfill conditions even stricter than those laid down by the Hague Regulations in order to benefit by the provisions of the Convention. On the other hand, other experts or delegates held the view that resistance movements should be given more latitude. The problem was finally solved by the assimilation of resistance movements to militias and corps of volunteers "not forming part of the armed forces" of a Party to the conflict.

Id. *See generally* DIPLOMATIC CONFERENCE FOR THE ESTABLISHMENT OF THE INTERNATIONAL CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS, FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 (1949) [hereinafter TRAVAUX]. *See also* United States v. Wilhelm von Leeb et al. (The High Command Case), UNITED NATIONS WAR CRIMES COMMISSION, 12, LAW REPORTS OF TRIALS OF WAR CRIMINALS 462 (1948) (The partisan debate was informed by the delegates recent experience in World War II, where partisans were treated with impunity by Germans in Russia. The need to protect civilians in civil wars was apparent from the recent experience of the Spanish Civil War.).

[18] GC III, *supra* note 12,art. 4. Article 4 reads as follows:

> Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.

[19] GC IV, *supra* note 12, art. 5.

[20] *See generally* Official Statement, International Committee of the Red Cross, The Relevance of IHL in the Context of Terrorism (July 21, 2005), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705 ("Unlawful combatants" and "unprivileged belligerents" are used interchangeably in this article to designate individuals who are not entitled to combatant immunity; in other words, they are subject to criminal sanction for their warlike acts, unlike "lawful combatants.").

[21] Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 343 (1951).

[22] Yoram Dinstein, *The Distinction Between Unlawful Combatants and War Criminals*, *in* Y. DINSTEIN, INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOR OF SHABTAI ROSENNE 103, 112 (1989).

[23] Brief for Respondents Donald H. Rumsfeld, et al., at 43, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/05-184/05-184.mer.resp.pdf (Government respondents' reply brief in support of motion to dismiss for

Common Article 3's application was an equally complex question. When CA3 was initially discussed in the preparatory conference, the Swiss delegation offered CA3 [which had been originally developed as a preface to the Civilians Convention] as a compromise to settle the debate on how internal armed conflicts were to be regulated.[24] This appears to unite the two threads of the debate in Geneva, the "partisan" and "civil war" issues, by addressing minimum standards of treatment for all the victims of conflict, even those subject to "non-international armed conflict." In his authoritative *Commentaries* on the Geneva Conventions, Swiss author Jean Pictet cited CA3 as a minimum standard of conduct:

> [T]he scope of application of [CA3] must be as wide as possible . . . [CA3] merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the national legislation of the States in question, long before the Convention was signed. What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages? No Government can object to observing, in its dealings with enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, when dealing with common criminals.[25]

Statements by the U.S. delegation, however, reflect the belief of many delegates to the conference that CA3 was intended to apply only to "civil wars."[26] The U.S. delegation asserted such a position in committee discussions at Geneva and in documents prepared for the Senate ratification debate.[27] And when the Additional Protocols to the Geneva Conventions were negotiated in 1977, the threshold for a non-international armed conflict was set even higher.[28] Recently, the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) seemed to lower the standard, once again, applying non-international armed conflict rules to conflicts between armed groups or between armed groups and the armed forces within a state.[29]

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lack of jurisdiction contended that, "[a]s an alien enemy combatant detained outside the United States, petitioner does not enjoy the protections of [the U.S.] Constitution."); *see also* Matthew Waxman, Head of U.S. Delegation, Principal Deputy Director of Policy Planning, Department of State, Opening Statement to U.N. Human Rights Committee (July 17, 2006), *available at* http://www.usmission.ch/Press2006/0717Waxman.html (speaking on the extraterritorial application of human rights law, in this instance the ICCPR, the State Department has said:

> I[]t is the long-standing view of the United States that the [ICCPR human rights treaty] by its very terms does not apply outside of the territory of a State Party. . . . [T]he United States has a principled and long-held view that the [ICCPR human rights treaty] applies only to a State Party's territory.

*Id.*at 2.

[24] 2B TRAVAUX, *supra* note 16, at 335.

[25] 1 JEAN S. PICTET, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 36 (ICRC 1960), *available at* http://www.icrc.org/ihl.nsf/COM/375-590006?OpenDocument. *See also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 218 (June 27), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=66&case=70&code=nus&p3=90 (The ICJ in Nicaragua said "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international armed conflicts. . . .").

[26] 2B TRAVAUX, *supra* note 15, at 12.

[27] Memorandum for Record, Lieutenant Colonel Robert F. Grubb, Army Int'l Affairs Division, DOD Geneva Conventions Working Group, subject: Analysis of the Geneva Conventions 3-2 (1955) (memorandum prepared by the DOD Geneva Conventions Working Group in anticipation of Senate hearings) (on file with author).

[28] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609,, *available at* http://www.icrc.org/ihl.nsf/FULL/475 ?OpenDocument. Article 1 of Additional Protocol states:

> This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (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.

Id.

[29] Prosecutor v. Du[Ko Tadi], Case Nos. IT-94-1-A, IT-94-1-A*bis*, Judgement in Sentencing Appeals (Jan. 26, 2000), *available at* http://www.un.org/icty/

The Bush Administration adopted the most conservative approach to the "civil war" and "unlawful combatant" issues and consistently asserted that CA3 did not apply to detainees in the GWOT.[30] Rather than adopting CA3 as a "minimum yardstick," the President's declaration of 7 February 2002 said neither CA3 nor CA2 applied to the War on Terror.[31] He was supported by his advisors in this matter, who regarded notions such as the application of customary international law to "not bind the President, or restrict the actions of the United States military."[32] Additionally, the President's advisors felt that any possible attempt by Congress to restrict the executive's authority by subjecting U.S. forces to the Geneva Conventions, including CA3 and CA2, would be a possible infringement of the President's Commander in Chief duties.[33]

This issue of the application of CA3 to illegal combatants came to a head as the Supreme Court was hearing the arguments in *Hamdan*, as evidenced by the court submissions,[34] as well as the DC Circuit opinion.[35] How the Court viewed the potential "no law zone" would have a significant effect on Hamdan's treatment and the resolution of the case.

The Impact of *Hamdan*

With the decision in *Hamdan*, it is now clear that CA3's coverage is broad enough to cover unlawful combatants in the GWOT and that a "no law zone" does not exist. The Supreme Court held:

> The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being "international in scope," does not qualify as a "'conflict not of an international character.'" 415 F.3d at 41. That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. So much is demonstrated by the "fundamental logic [of] the Convention's provisions on its application." *Id.*, at 44 (Williams, J., concurring). Common Article 2 provides that "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." 6 U.S.T., at 3318 (Art. 2, P 1). High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-a-vis one another even if one party to the conflict is a nonsignatory "Power," and must so abide vis-a-vis the nonsignatory if "the latter accepts and applies" those terms. *Ibid.* (Art. 2, P 3). Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning. See, *e.g.*, J. Bentham, Introduction to the Principles of Morals and Legislation 6, 296 (J. Burns & H. Hart eds. 1970) (using the term "international law" as a "new

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tadic/appeal/judgement/tad-asj000126e.pdf. *See* Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66 (Spring 2005) (providing an in-depth discussion of this issue). *See also* Major Julie Long, *What Remedy for Abused Iraqi Detainees?*, 187 MIL L. REV. 43, 60 (Spring 2006) (Regarding CA3 triggers Long states,

> Pursuant to Common Article 3 of the Geneva Conventions, when armed conflict not of an international nature occurs in the territory of a High Contracting Party, such as Iraq, only the provisions of Common Article 3 apply. Accordingly, even if the United States is no longer fighting an international armed conflict in or occupying Iraq, the United States must afford the protections contained in Common Article 3 to any detainees under its control.

Id.

[30] *See generally* David E. Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 GEO. J. INT'L L. 61 (Fall 2005).

[31] Memorandum, President George W. Bush, to Vice President et al., subject: Humane Treatment of al Qaeda and Taliban Detainees (7 Feb. 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf.

[32] Yoo Draft Memorandum, *supra* note 3, at 2.

[33] *Id*. at 11.

[34] *See* Brief for Respondents Donald H. Rumsfeld, et al., at 43, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184).

[35] *See* Hamdan v. Rumsfeld, 415 F.3d 33, 39 (D.C. Cir. 2005), *rev'd* 126 S. Ct. 2749 (2006) (stating that "the 1949 Geneva Convention cannot be judicially enforced.").

> though not inexpressive appellation" meaning "betwixt nation and nation"; defining "international" to include "mutual transactions between sovereigns as such"); Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949, p. 1351 (1987) ("[A] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other").[36]

As a result of this holding, every armed conflict that U.S. armed forces are involved in invokes the protections of CA3. A "no law" zone where people can be excluded from receiving humane treatment does not exist. Rather, the reach of international law covers all persons on the battlefield during an armed conflict. Even in this strange but deadly war against terrorism, that isn't against another state but crosses multiple international boundaries, there is international law that guarantees all persons will be treated humanely.

Serious Crimes under the War Crimes Act

As a result of the ruling in *Hamdan*, President Bush sought legislation from Congress to authorize military commissions for unlawful combatants in the GWOT. Congress responded with the MCA.[37] In passing the MCA, Congress amended the WCA. When initially enacted in 1996, the WCA did not criminalize any violation of Common Article 3.[38] It was amended in 1997 to include all violations of CA3 as a war crime.[39] This blanket coverage was, at least in part, in response to a request by the DOD.[40] This coverage was too broad for fair and meaningful application, because not all violations of CA3 will be criminal in nature. Some of the more serious crimes, such as murder, mutilation, and torture, are clearly criminal and should be treated as war crimes.[41] Other violations, such as some forms of cruel treatment or humiliating and degrading treatment may not deserve to be considered a war crime but should be dealt with in other ways.

This rationale is similar to that established to deal with grave breaches of the Geneva Conventions. Articles 129 of the GPW[42] and 146 of the GCC[43] establish a bifurcated system for responding to violations of the LOW. In the case of grave

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[36] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795-96 (2006).

[37] MCA, *supra* note 6.

[38] Prior to the enactment of the MCA, 18 U.S.C. § 2441 read:

> **(a) Offense.—** Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
> **(b) Circumstances.—** The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).
> **(c) Definition.—** As used in this section the term "war crime" means any conduct—
> **(1)** defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
> **(2)** prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
> **(3)** which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or
> **(4)** of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

Id.

[39] WCA *supra* note 14, a*vailable at* http://140.147.249.9/cgi-bin/cpquery/?&dbname=cp105&id=cp105yTZnE&refer=&r_n=hr204.105&item=&sel=TOC_2780&.

[40] Letter, from Judith Miller, Dep't of Def. Gen. Counsel, to Honorable Bill McCollum, Committee on the Judiciary, House of Representatives (May 22, 1996).

[41] Mr. John Bellinger, State Department Briefing (Oct. 19, 2006), *available in* LEXIS, News File.

[42] Article 129 of GC III states:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed,

breaches, signatories accepted the obligation to pass laws that criminalized violations, search for alleged offenders, and prosecute alleged offenders or turn them over to another country that will prosecute them.[44] For non-grave breaches, the obligation is "to take measures necessary for the suppression of all acts contrary to the provisions of the present Convention."[45]

The MCA establishes a similar system, which criminalizes as war crimes the serious crimes from CA3 and allows other violations of CA3 to be remedied through suppression, retraining, non-judicial punishment, or some other appropriate method.[46] While much of the publicity over the MCA focused on the establishment of military commissions, the amendment of the WCA and the bifurcation of serious crimes and other violations will almost certainly have a broader impact on military operations and have a greater effect on LOW compliance and appropriate treatment of detainees.

The Humane Treatment Standard

As briefly mentioned above, the recent passage of the DTA and decision in *Hamdan* have also focused the international law lens on CA3 and the standards of treatment for detainees. The DTA prohibits cruel, inhuman, or degrading treatment or punishment as defined by the 5th, 8th, and 14th Amendments' jurisprudence on cruel, unusual, and inhumane treatment or punishment.[47] This prohibition is sweeping and covers anyone "under the physical control of the United States Government."[48] In *Hamdan*, the Supreme Court provided additional affirmation of the humane treatment standard by applying CA3 to all non-international armed conflicts, including the GWOT.[49]

In conjunction with the DTA's and *Hamdan*'s establishment of a minimum standard of treatment for battlefield detainees, Deputy Secretary of Defense Gordon England instructed all military units to verify that "all DOD personnel adhere

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> such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

GC III, *supra* note 11, art. 129.

[43] Article 146 of GCC states:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

GC IV, *supra* note 12, art. 146.

[44] GC I, *supra* note 12, art. 50 (defining grave breaches); GC II, *supra* note 12, art.51; GC III, *supra* note 12. art. 130; GC IV, *supra* note 12, art.147.

[45] GC I, *supra* note 12, art. 49; GC II, *supra* note 12, art.50; GC III, *supra* note 12. art. 129; GC IV, *supra* note 12, art.146.

[46] MCA, *supra* note 6.

[47] Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742-44.

[48] *Id*.

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

to [Common Article 3]."[50] However, this was unnecessary as the military has consistently applied CA3 as the minimum humane treatment standard as a matter of law and policy.[51]

The standard of humane treatment has recently been confirmed in the promulgation of DOD Directive 2310.1E, *DOD Detainee Program*,[52] and Field Manual (FM) 2-22.3, *Human Intelligence Collector Operations*.[53] The DOD Dir. and the FM require all detainees to be treated consistent with the requirements of CA3.[54] They also reiterate the GC III standards for POWs, applying these standards to the interrogation of all detainees.[55] The DOD Dir. further enumerates specifically prohibited acts such as murder, torture, corporal punishment, mutilation, the taking of hostages, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment, in accordance with and as defined in U.S. law; threats or acts of violence, including rape, forced prostitution, assault and theft, public curiosity, bodily injury, and reprisals; being subjected to medical or scientific experiments; and protects against being subjected to sensory deprivation.[56]

The reiteration of the humane treatment standard, especially through the open publication of DOD directives and Army field manuals, sends a clear signal that the proper treatment of detainees is, as it has always been, a foundational principle of the modern LOW.

Department of Defense Directive 2311.01E

The requirement to apply the Geneva Conventions, as a matter of law, has been in a state of flux over the last several years. However, the application of the LOW, as a matter of policy, has stayed relatively constant.[57] The publication of DOD Dir. 2311.01E,[58] and its companion Chairman of the Joint Chiefs of Staff Instruction, on the DOD LOW Program,[59] has reaffirmed the intent of the U.S. military to apply the LOW across the conflict spectrum. Both policy documents require "[m]embers of DOD Components [to] comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[60] This approach provides the flexibility (through coordination with

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[50] Memorandum, Gordon England, Deputy Sec'y of Defense, Office of the Sec'y of Defense, to, Sec'ys of Military Dep'ts et al., subject: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense (7 July 2006), *available at* http://www.fas.org/sgp/othergov/dod/geneva070606.pdf.

[51] *See Hearing on the Future of Military Commissions to Try Enemy Combatants Before the Senate Armed Services Committee*, 109th Cong. (2006) (statement of Major General Scott C. Black, The Judge Advocate General, U.S. Army). *See also* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998) (stating: "5.3. The Heads of the DOD Components shall: 5.3.1. Ensure that the members of their DOD components comply with the LOW during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations;"). This directive was in effect at the beginning of the GWOT but has since been superseded by DOD Dir. 2311.01E, 9 May 2006. *See also* CHAIRMAN JOINT CHIEFS OF STAFF INSTR. 5810.01B, IMPLEMENTATION OF THE DOD LOW PROGRAM (25 Mar. 2002) ("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 U.S. Armed Forces will comply with the principles and spirit of the law of war during all other operations."). This instruction was in effect at the beginning of the GWOT but has since been superseded by JCSCI 5810.01C, 31 Jan. 2007. *Compare* DOD DIR. 2311.01E, s*upra* note 54

[52] *See* U.S. DEP'T OF DEFENSE, DIR. 2310.1E, DEPARTMENT OF DEFENSE DETAINEE PROGRAM (5 Sept. 2006) [hereinafter DOD DIR. 2310.1E].

[53] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3 (FM 34-52), HUMAN INTELLIGENCE COLLECTOR OPERATIONS (Sept. 2006) [hereinafter FM 22-22.3].

[54] DOD DIR. 2310.1E, *supra* note 54, para. 4.2; FM 22-22.3, supra note 55, p. vii.

[55] DOD DIR. 2310.1E, supra note 54, para. 4.2; FM 22-22.3, supra note 55, p. vii.

[56] *See generally* DOD DIR. 2310.1E, *supra* note 54.

[57] *See supra* note 53.

[58] DOD DIR. 2311.01E, *supra* note 15.

[59] CHAIRMAN JOINT CHIEFS OF STAFF INSTR. 5810.01C, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (31 Jan. 2007) [hereinafter JSCSI 5810.01C].

[60] DOD DIR. 2311.01E, *supra* note 15, para. 4.1; JSCSI 5810.01C, supra note 61, para. 4.a. The concern, or confusion, regarding the meaning of applying "the law of war during all armed conflicts, however such conflicts are characterized," is understandable. *See* Major John T. Rawcliffe, *Changes to the Department of Defense Law of War Program*, ARMY LAW., Aug. 2006, at 23. The intent behind the policy has been clarified in numerous DOD LOW Working Group sessions over the last two years, including drafting sessions for the forthcoming DOD LOW Manual. The authors endorse Major Rawcliffe's conclusion that practitioners should "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." *Id*. at 32.

higher headquarters for "exceptions to policy," if necessary) and the certainty (of a single training standard that can be applied in all military operations) that makes the DOD policy a lode star for the commanders and military attorneys to apply the LOW on the battlefield. It is also consistent with the general trend in U.S. treaty negotiations to extend the LOW for international armed conflicts into all armed conflicts, however characterized.[61]

Conclusion

In conclusion, there should be no doubt as to the commitment of the Army to abide by the appropriate laws and standards in all armed conflicts. *Hamdan*, the DTA, the MCA, and DOD Directive 2311.01E are all very public pronouncements on the commitment of the United States to abide by the law of armed conflict. The Supreme Court's discrediting the idea of a "no law" zone, the amendment to the WCA, the establishment of humane treatment as the minimum legal standard for treatment of detainees on the battlefield, and the publication of DOD Directive 2311.01E reinforce the foundational principles of conduct among Soldiers and the military's commitment to maintain the highest rules of conduct for our profession.

These actions reinforce the principle that CA3 is the minimum standard of conduct for treatment in armed conflicts and that U.S. military conduct during armed conflict or other military operations is guided, as a matter of policy, by the law applicable to international armed conflict. In addition, they provide clear standards that Judge Advocate General officers can teach and inject in training. It is through the training and subsequent internalization of these doctrines and principles that the true effect of *Hamdan*, the DTA, and the MCA on the LOW will be demonstrated.

[61] *See, e.g.*, Amendment to Article I of the 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 (CCW), Dec. 21, 2001, 19 I.L.M. 1823, *available at* http://www.ccwtreaty.com/KeyDocs/MainDocs/Amended-Article-1.pdf; *see also* Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II as amended on 3 May 1996) Annexed to the 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, Annex B, May 3, 1996, 1342 U.N.T.S. 168; 19 I.L.M. 1529, *available at* http://www.ccwtreaty.com/KeyDocs/MainDocs/Amended-Protocol-II-E.pdf.