THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-399

August 2006

International and Operational Law

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The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for $45.00 each ($63.00 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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Issues may be cited as ARMY LAW., [date], at [page number].

International and Operational Law

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Book Review

Announcement

Hamdan, Fundamental Fairness, and the Significance of Additional Protocol II

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"He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."[1]

The Supreme Court has spoken, and the message was clear: the military commissions are not as "full and fair" as the government has been asserting since their inception. In a rejection of the course of action chosen by President George W. Bush to provide criminal sanction to al Qaeda operatives, the Court held that the procedural construct of the military commission violated both domestic constitutional limits on executive authority and the international law of war reflected in Common Article 3 of the four Geneva Conventions of 1949 (Common Article 3).[2] A plurality of the Court also concluded that the allegation of conspiracy to violate the law of war failed to properly state an offense because no such conspiracy offense has been recognized by international law.[3]

Much ink has already been spilled in response to this decision, characterized by many as "landmark."[4] A cursory review of editorials and internet blogs reveals that the post-decision commentary has focused on the following three primary areas: the scope of executive power, the "way ahead" for dealing with al Qaeda detainees, and the impact of the decision on the legal regulation of the conflict with al Qaeda.[5] The long term consequence of this decision is yet to be seen, but there seems little doubt that some cooperative endeavor between the President and Congress will redefine the paradigm related to the criminal sanction of individuals detained during the Global War on Terror.

Any such redefinition will invariably have to address the "fundamental guarantees" analysis of the *Hamdan* opinion. That analysis relied on Common Article 3,[6] and to a lesser extent Article 75 of Additional Protocol I,[7] to conclude that the procedures established for the military commissions were inconsistent with the minimally acceptable standards established by the law of war.[8] This conclusion was essential for the holding of the Court. Determining that the law of war established such minimal standards of procedural fairness led to the conclusion that these procedural standards were incorporated by Congress, through Article 21 of the Uniform Code of Military Justice (UCMJ),[9] to apply to military commissions empowered to adjudicate alleged law of war violations. According to Justice Anthony Kennedy's concurring opinion,

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[1] Thomas Paine, *Dissertations on First Principles of Government* (July 7, 1795), *in* JOSEPH LEWIS, INSPIRATION AND WISDOM FROM THE WRITINGS OF THOMAS PAINE (1954).

[2] *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2754-59 (2006).

[3] *Id*. at 2779-82.

[4] *See, e.g.*, Warren Richey, *Supreme Court Rejects Military Tribunals*, CHRISTIAN SCI. MONITOR, June 30, 2006; *A Supreme Court Conversation, Still "the Most Important Decision on Presidential Power,"* SLATE, June 30, 2006, http://www.slate.com/id/2144476/entry/0/.

[5] *See, e.g.*, Lionel Beehner, *The Impact of Hamdan v. Rumsfeld*, Council on Foreign Relations, June 29, 2006, http://www.cfr.org/publication/11025/impact_of_hamdan_v_rumsfeld.html; Human Rights First, *Hamdan v. Rumsfeld* Background Information on Legal Issues in the Case, http://www.humanrightsfirst.org/us_law/inthecourts/supreme_court_hamdan_bg.htm (last visited Aug. 9, 2006); John Yoo & Glen Sulmasy, Hamdan v. Rumsfeld: *The Supreme Court Manages to Overlook Centuries of U.S. History*, SAN DIEGO UNION TRIB, Aug. 6, 2006, *available at* http://www.signonsandiego.com/uniontrib/20060806/news_mz1e6sulmasy.html: *A Victory for Law, The Supreme Court Checks the Bush Administration's Attempt to Invent itsOwn Rules for War*, WASH. POST, June 30, 2006, at A26.

[6] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea art. 3, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War art. 3, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[7] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75 (4), Dec. 12, 1977, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

[8] *Hamdan*, 126 S. Ct. at 2796-97.

[9] 10 U.S.C.S. § 821 (LEXIS 2006); UCMJ art. 21 (2005).

> The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation's armed conflict with al Qaeda in Afghanistan and, as a result, to the use of a military commission to try Hamdan. That provision is Common Article 3 of the four Geneva Conventions of 1949. It prohibits, as relevant here, "[t]he 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." The provision is part of a treaty the United States has ratified and thus accepted as binding law. By Act of Congress, moreover, violations of Common Article 3 are considered "war crimes," punishable as federal offenses, when committed by or against United States nationals and military personnel. There should be no doubt, then, that Common Article 3 is part of the law of war as that term is used in § 821.[10]

The determination that the minimal standards established by the law of war are incorporated into Article 21, UCMJ, mandated analysis of two predicate issues. First, whether military operations conducted by the United States against al Qaeda were properly characterized as an "armed conflict" that triggered application of the law of war. Although many experts have questioned the legitimacy of characterizing the war on terror as an "armed conflict,"[11] the Court seemed to almost summarily accept this proposition without analysis.[12] Having thus decided to assess the legality of the military commissions through the lens of the law of war, the Court then addressed the subsequent predicate issue: whether the armed conflict fell under the regulatory umbrella of Common Article 3. The Court's answer to this question was, contrary to the assertion of the government, "yes."[13]

Analyzing the applicability of Common Article 3 to the armed conflict with al Qaeda was necessitated by the Bush administration's rejection of the long accepted Department of Defense presumption that the principles reflected in this article applied to all "armed conflicts." This determination was based on the fact that the armed conflict with al Qaeda was "international" in scope, and therefore Common Article 3—a treaty provision intended to apply to internal armed conflicts—was inapposite. Because this interpretation resulted in the inapplicability of Common Article 3 to Hamdan,[14] it placed the question of Common Article 3's applicability to the armed conflict with al Qaeda squarely before the Court. Only by resolving this issue could the Court reach the question of whether the military commission procedures complied with the law of war. For practitioners and scholars versed in the law of war, this aspect of the opinion was perhaps the most profound. For the first time in our nation's history, the Supreme Court analyzed the applicability of Common Article 3 to an ongoing armed conflict, rejected the narrow interpretation proffered by the Commander in Chief, and endorsed the broad application of the principle of humane treatment that has served as a cornerstone for Department of Defense law of war policy for decades.

The Court ultimately concluded that Common Article 3 did indeed apply to the armed conflict with al Qaeda, rejecting the government's "international scope" inapplicability theory. A plurality of the Court then proceeded to analyze the meaning of the Common Article 3 "regularly constituted court" mandate. In perhaps the most remarkable portion of the opinion, Justice John Paul Stevens, writing for the plurality, looked to Article 75 of Additional Protocol I to illuminate the meaning of this mandate. Article 75, "Fundamental Guarantees," was included in Additional Protocol I to ensure that no person affected by *international* armed conflict is left without humanitarian protection. It was motivated by the recognition that "gaps" existed between the categories of protections for victims of war established by the four Geneva Conventions of 1949.[15]

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[10] *Hamdan*, 126 S. Ct. at 2802 (Kennedy, J., concurring in part).

[11] *See, e.g.*, Christopher Greenwood, *International Law and the "War Against Terrorism,"* 78 INT'L AFFAIRS no. 2, at 301-18 (2002); *see also* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1 (Jan. 2004) (discussing the complex challenge of conflict categorization related military operations conducted against highly organized non-state groups with trans-national reach); Kirby Abott, *Terrorists: Combattants, Criminals, or . . . ?, in* THE MEASURES OF INTERNATIONAL LAW: EFFECTIVENESS, FAIRNESS, AND VALIDITY, PROCEEDINGS OF THE 31ST ANNUAL CONFERENCE OF THE CANADIAN COUNCIL ON INTERNATIONAL LAW, OTTAW, OCTOBER 24-26 (2002).

[12] *Hamdan*, 126 S. Ct. at 2795-96.

[13] *Id.* at 2795-97.

[14] *See* Memorandum, President of the United States, to Vice President, et al., subject: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf [hereinafter Humane Treatment Memorandum].

[15] *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 861-875 (1987) [hereinafter PROTOCOL COMMENTARY].

These gaps were the result of an odd anomaly—when the four Geneva Conventions were drafted, they did not include an express common "fundamental guarantee" article. Unlike the Hague Convention of 1907, the drafters of the Geneva Conventions chose not to include a "Martens Clause"–type general humanitarian protection provision in the preamble to the treaties. This was a break from past law of war codification efforts, which used such a provision to extend the general humanitarian purpose of these prior treaties to any person affected by a conflict not expressly covered by the provisions of these treaties.[16] As the International Committee of the Red Cross (ICRC) Commentary indicates, such a "purpose statement" was proposed by the ICRC during the drafting of the 1949 Conventions. The proposed purpose statement was clear: to emphasize the humanitarian principles that served as the foundation for all provisions in the treaties and to ensure ignorance of the law or "treaty aversion" would not deprive victims of war of this most basic protection.

> However carefully the texts were drawn up, and however clearly they were worded, it would not have been possible to expect every soldier and every civilian to know the details of the odd four hundred Articles of the Conventions, and to be able to understand and apply them. Such knowledge as that can be expected only of jurists and military and civilian authorities with special qualifications. But anyone of good faith is capable of applying with approximate accuracy what he is called upon to apply under one or other of the Conventions, provided he is acquainted with the basic principle involved. Accordingly the International Committee of the Red Cross proposed to the Powers assembled at Geneva the text of a Preamble, which was to be identical in each of the four Conventions. It read as follows:
>
> "Respect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual undertaking.
>
> Such a principle demands that, in time of war, all those not actively engaged in the hostilities and all those placed 'hors de combat' by reason of sickness, wounds, capture, or any other circumstance, shall be given due respect and have protection from the effects of war, and that those among them who are in suffering shall be succoured and tended without distinction of race, nationality, religious belief, political opinion or any other quality. . . . "[17]

This proposal was ultimately rejected, not based on any substantive objection to articulating the pervasive application of the principle of humanity to armed conflicts but because of disputes related to linking the statement of principles to divine origin.[18] As a result, even though the ICRC Commentary indicates that Common Article 3 served as an implicit statement of this underlying humanitarian principle,[19] the Geneva Conventions lacked an explicit application of this principle to all

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[16] Known as the "Martens Clause" in honor of Feodor Martens, the Russian diplomat responsible for first proposing the language in the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November /11 December 1868. *See* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 6 n.36 (1996). A similar version of this provision was included in the Preamble of the Hague Convention of 1899 and has also been replicated in subsequent law of war treaties. *See id.* at 7 n.37.

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

See Hague Convention No. IV Respecting the Laws and Customs of War on Land pmbl., Oct.18, 1907, 36 Stat. 2277, T.S. 539, *reprinted in* U.S. DEP'T OF THE ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956).

Although omitted from the Geneva Conventions of 1949, the Martens Clause subsequently reappeared in a somewhat modified form in Additional Protocol I to the Geneva Conventions:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.

See Additional Protocol I, *supra* note 7, art. 1.

[17] *See* 1 COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 21 (Jean S. Pictet ed., 1960).

[18] *Id.* at 22.

[19] According to the Commentary:

> The Preamble having been finally abandoned (apart from the dry introductory formula reproduced at the beginning of this Chapter), it may be asked why there should be so much to say on the subject. The answer is that, in spite of its not having been proclaimed at the head of the Conventions, the expression of the guiding principle underlying them has not been altogether discarded. The possible application of this principle to conflicts other than international wars was considered by the Conference in connection with what ultimately became articles 2 and 3 of the present Convention. The drafts submitted to the Conference provided for full application of the Conventions even in cases of civil war, colonial conflicts or wars of religion, which was admittedly going very far. The States, as it proved, were not prepared to bind themselves in advance by all the provisions of the Conventions in the case of their own nationals

persons affected by international armed conflicts. Instead, the articulation of the humane treatment mandate took the form of Common Article 3, which by its express terms applied only to non-international armed conflicts.[20]

Article 75 of Additional Protocol I is best understood as an express extension of the Common Article 3 humane treatment mandate to international armed conflicts.[21] Article 75 also expanded the non-exclusive list of requirements required to implement the humane treatment obligation. The basic purpose of Article 75 was clear: eliminate the Common Article 3 anomaly by dispelling any doubt about the application of this mandate to all persons affected by international armed conflicts. The ICRC Commentary to Additional Protocol I provides the following:

> A number of fundamental rules applicable to all persons defined in paragraph 1 are pronounced here. The other paragraphs of the article cover certain more restricted categories which are duly defined. This pronouncement is directly inspired by the text of common Article 3 of the Conventions which applies to conflicts not of an international character. . . . [22]

This inherent relationship between Common Article 3 and Article 75 explains why a plurality of the Court would look to Article 75 to illuminate the meaning of Common Article 3. What seemed even more significant to the plurality was the more extensive treatment by Article 75 of the "regularly constituted" tribunal aspect of the humane treatment mandate.[23] Article 75 amplifies extensively the meaning of a "humane" adjudication of alleged criminal misconduct, and in particular the right of a defendant to be present during the trial.[24]

> rebelling and launching a civil war; but they were nevertheless at one in recognizing the "indivisibility" of the principle underlying the Conventions. They agreed that in the case of non-international conflicts such as civil wars, a minimum of humanitarian provisions should be respected; and in defining that minimum they very naturally reverted to the essential elements of the draft Preambles, which had been so fully discussed and so strangely rejected . . . .

Id. at 23.

[20] *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[21] PROTOCOL COMMENTARY, *supra* note 15, at 861.

[22] *See id.* at 871-72.

[23] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2797-98 (2006).

[24] The exact terms of Article 75 are:

> 4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
>
> (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
>
> (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
>
> (c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
>
> (d) anyone charged with an offence is presumed innocent until proved guilty according to law;
>
> (e) anyone charged with an offence shall have the right to be tried in his presence;
>
> (f) no one shall be compelled to testify against himself or to confess guilt;
>
> (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
>
> (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
>
> (j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

Additional Protocol I, *supra* note 7, art. 75 (4).

It is critical to note that the plurality did not look to this provision as a source of binding treaty obligation, but instead concluded that Article 75 reflected principles *indisputably* part of customary international law.[25] These principles were then relied upon to define the content of the Common Article 3 "regularly constituted tribunal" requirement. According to Justice Stevens,

> Inextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal and whether they afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U. S. T., at 3320 (Art. 3, ¶ 1(d)). Like the phrase "regularly constituted court," this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I).[26]

Prior to U.S. military response to the attacks of 11 September 2001, characterizing Article 75 as a reflection of customary international law binding on the United States would have been relatively uncontroversial among legal experts responsible for advising U.S. military planners and commanders. Until the initiation of military operations related to the Global War on Terror, DOD legal experts accepted the proposition that Article 75, perhaps more than any other provision of Additional Protocol I, reflected principles of international law binding on the United States irrespective of President Ronald Reagan's rejection of Additional Protocol I.[27] The post-11 September 2001 legal determinations made by President Bush regarding the applicability of law of war provisions to the conflict with al Qaeda, however, radically altered this article of faith.[28] A much more textual approach prevailed when interpreting law of war treaty obligations.[29] As a result, President Reagan's rejection of Additional Protocol I led to a much more cautious approach to the status of provisions of Additional Protocol I vis-à-vis U.S. operations. When coupled with the anomaly created by the absence of a statement of underlying principles in the 1949 Geneva Conventions and the emphasis on the express limitation of Common Article 3 to non-international armed conflicts, this revised interpretation of Article 75 contributed to the conclusion that the armed conflict with al Qaeda was outside the scope of the legally mandated requirement to treat captured personnel humanely.

This revised approach to interpreting the status of provisions of Additional Protocol I is reflected by comparing treatment of this treaty in the law of war chapter of the *Operational Law Handbook*,[30] which is perhaps the most widely-relied upon reference for military legal practitioners supporting ongoing operations. The current version of the *Handbook* provides the following:

> 1977 Geneva Protocols (ref. (7)). Although the U.S. has not ratified [Additional Protocol I] and II, 155 nations have ratified [Additional Protocol] I. U.S. Commanders must be aware that many allied forces are under a legal obligation to comply with the Protocols. This difference in obligation has not proved to be a hindrance to U.S./allied or coalition operations since promulgation of AP I in 1977.[31]

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[25] *Hamdan*, 126 S. Ct. at 2756.

[26] *Id.*

[27] *See* Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protections of Victims of Non International Armed Conflicts, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III (1987) [hereinafter Letter of Transmittal].

[28] *See* Humane Treatment Memorandum, *supra* note 14 (announcing the President's determination that although the conflict against Afghanistan triggered the Geneva Conventions, captured Taliban forces were not entitled to prisoner of war status because they failed to meet the implied requirements imposed by the Convention on members of the regular armed forces).

[29] Perhaps the most compelling illustration of this textual analytical approach was reflected in the analysis provided by the Department of Justice Office of Legal Counsel to the President and the General Counsel for the Department of Defense on the applicability of the Geneva Conventions to individuals detained by U.S. forces during military operations. *See* Memorandum, Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees (22 Jan. 2002), *available at* http://washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf.

[30] Produced by the U.S. Army Judge Advocate General's Legal Center and School (TJAGLCS), International and Operational Law Department, and revised annually, the *Operational Law Handbook* is perhaps the most widely relied upon practitioners resource for legal issues associated with military operations and is regarded throughout the Department of Defense and other executive branch agencies as a concise (although not necessarily authoritative) summary of the law applicable to U.S. forces. INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, JA 422, OPERATIONAL LAW HANDBOOK (Aug. 2006) [hereinafter OPERATIONAL LAW HANDBOOK].

[31] *See id.* ch. 2, at 2.

Although this excerpt does not explicitly indicate a rejection of prior interpretations of obligation vis-à-vis Additional Protocol I, it clearly does not explicitly assert such an obligation. The full significance of this excerpt is only apparent when compared to the description of Additional Protocol I in prior editions of the *Operational Law Handbook*. For example, the 2003 edition states the following:

> 1977 Geneva Protocols (ref. (7)). Although the U.S. has not ratified [Geneva Protocol] I and II, judge advocates must be aware that approximately 150 nations have ratified the Protocols (thus most of the 185 member states of the [United Nations]). The Protocols will come into play in most international operations. U.S. Commanders must be aware that many allied forces are under a legal obligation to comply with the Protocols. *Furthermore, the U.S. considers many of the provisions of the Protocols to be applicable as customary international law.*[32]

Comparison of these two versions of the *Operational Law Handbook* is indicative of a general "rollback" by the executive branch of the treatment of Additional Protocol I provisions.[33] Numerous experts and government legal advisers have argued for years that many of these provisions, and in particular Article 75, reflect binding norms of customary international law. Unfortunately, opponents of this proposition have relied on the repudiation of Additional Protocol I by President Reagan. These opponents assert this repudiation is particularly relevant vis-à-vis the armed conflict with al Qaeda because it was motivated in large part by the U.S. concern that Additional Protocol I unjustifiably extended law of war protections to terrorist operatives.

Because only a plurality endorsed the interpretation of Article 75 as a reflection of customary international law, this aspect of the *Hamdan* opinion will very likely exacerbate the debate over the status of Additional Protocol I. Critics have already contrasted the plurality's reliance on Article 75 as a source of binding customary international law with President Reagan's rejection of the treaty to bolster their "judicial overreaching" condemnation of the decision.[34] These critics will no doubt draw inspiration from Justice Kennedy's criticism of the plurality's reliance on Article 75:

> There should be reluctance, furthermore, to reach un-necessarily the question whether, as the plurality seems to conclude, *ante*, at 70, Article 75 of Protocol I to the Geneva Conventions is binding law notwithstanding the earlier decision by our Government not to accede to the Protocol. For all these reasons, and without detracting from the importance of the right of presence, I would rely on other deficiencies noted here and in the opinion by the Court—deficiencies that relate to the structure and procedure of the commission and that inevitably will affect the proceedings—as the basis for finding the military commissions lack authorization under 10 U. S. C. § 836 and fail to be regularly constituted under Common Article 3 and § 821.[35]

By relying on an article from a treaty rejected by the United States, the customary nature of which has been subject to significant re-assessment by the executive branch, the plurality may have armed opponents of the fundamental guarantee aspect of the *Hamdan* opinion with a compelling, and perhaps unnecessary, basis to attack the ruling. It seems clear, however, that the purpose of citation to Article 75 was to identify a concise articulation of the content of the customary international law principle of humane treatment as it relates to the trial of detainees. This is the only viable explanation for citing a treaty that the United States has rejected and that is applicable by its terms exclusively to international armed conflicts—a category of armed conflict distinct from the type of conflict the Court concluded characterizes military operations against al Qaeda.

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[32] *Id.* at 5.

[33] The TJAGLCS International and Operational Law Department teaches, however, that the United States views much of Additional Protocol I and almost all of Additional Protocol II as reflective of customary international law. Also, the Department's *Law of War Documentary Supplement* includes both a summary of Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L & POL'Y 419 (1987) and Memorandum, W. Hays Parks, LCDR Michael F. Lohr, Dennis Yoder, and William Anderson, to Assistant General Counsel (International), OSD, subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (8 May 1986). *See* INT'L & OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 385-87, 388-90 (2005).

[34] During the post-*Hamdan* episode of the McLaughlin Group, Tony Blankley noted the invalidity of relying on Additional Protocol I in light of President Reagan's rejection of this treaty.

[35] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2809 (2006).

An additional articulation of the content of the principle of humane treatment the plurality did not consider is contained in Additional Protocol II.[36] This treaty provides a valuable indication of the meaning of humane treatment when analyzing the minimally required procedures associated with the criminal adjudication of a war crime allegation and is perhaps even more significant in relation to al Qaeda detainees than Article 75. This greater significance is the result of three principal considerations: the relationship between Common Article 3 and Additional Protocol II; the longstanding executive branch position on Additional Protocol II; and the specific articulation of fundamental guarantees in Article 6 of Additional Protocol II that are analogous to those guarantees reflected in Article 75.

Before considering Additional Protocol II, however, it is necessary to address the express limit on its scope of application. This limit provides the most obvious retort to the argument that Additional Protocol II is relevant to the analysis of legal issues associated with the armed conflict between the United States and al Qaeda. Article 1 of Additional Protocol II establishes conditions for the treaty's application that are more restrictive than Common Article 3.

> This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of 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.[37]

Application of the treaty, therefore, is by its terms limited to situations where a dissident group actually controls a portion of the territory of the government it is challenging, a condition obviously not satisfied by al Qaeda. The drafters of the treaty, however, also acknowledged that Common Article 3 applied to a broader category of non-international armed conflicts, hence the qualification that nothing in Additional Protocol II modifies the existing conditions of Common Article 3 application. This point is emphasized by the ICRC Commentary, which indicates "the Protocol only applies to conflicts of a certain degree of intensity and does not have exactly the same field of application as common Article 3, *which applies in all situations of non-international armed conflict.*"[38] Thus, as a preliminary matter, Additional Protocol II supports by implication the application of Common Article 3 to non-international armed conflicts that *do not* satisfy the strict "territory" requirement of Additional Protocol II's scope provision. Although not relied on in the *Hamdan* opinion, this more restrictive scope provision of Protocol II actually bolsters the Court's decision to reject the government's "international scope" inapplicability theory for Common Article 3.

This scope also obviously disables any assertion that the armed conflict with al Qaeda is regulated by Additional Protocol II as a matter of treaty obligation. It does not, however, undermine the value of this treaty as an additional source of authority for understanding the content of the customary international law norm of humane treatment applicable to all armed conflicts. Because the Court treated the conflict between the United States and al Qaeda as a non-international armed conflict, the principles reflected in this treaty, which were developed to enhance humanitarian protections during internal armed conflicts (at the time of drafting the most common type of non-international armed conflict and the area believed to be most needy of additional regulation), are arguably even more significant than their international armed conflict counterparts. Furthermore, the reaction by the United States to this treaty only serves to enhance this significance, a reaction that was markedly different from the reaction to Additional Protocol I.

Unlike Additional Protocol I, Additional Protocol II is immune from the "U.S. rejection" attack relied on by opponents of the application of Article 75 to the Global War on Terror. This immunity is significant not only because it impacts the analysis of the principles reflected in this treaty, but also because with respect to providing content to the principle of humane treatment, the provisions of Additional Protocol II are virtually identical to Article 75, Additional Protocol I. Drafted at the same time as Additional Protocol I, Additional Protocol II expanded upon the minimal humanitarian regulation of non-international armed conflicts previously provided exclusively by Common Article 3. As the ICRC Commentary notes, this was the entire purpose for the treaty. "[I]n order to reinforce and increase the protection granted to victims of non-

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[36] 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 [hereinafter Additional Protocol II].

[37] *Id.* art. 1 (1).

[38] *See* PROTOCOL COMMENTARY, *supra* note 15, at 1348 (emphasis added).

international armed conflict—the 'raison d'être' of Protocol II—it develops and supplements the brief rules contained in common Article 3. . . ."[39]

The United States was a strong proponent of this expansion of non-international armed conflict humanitarian regulation, a position that has never been abandoned. In fact, in the same transmittal document used by President Reagan in 1986 to reject Additional Protocol I, Additional Protocol II was submitted to the Senate for advice and consent to allow the President to ratify the treaty. The significance of this action by President Reagan is twofold. First, unlike Additional Protocol I, the President's action reflected the executive branch's willingness to accept and become a party to Additional Protocol II. Second, the transmittal to the Senate included the U.S. reaction to the more restricted scope of Additional Protocol II compared to Common Article 3. This reaction indicates that the United States supported a much broader application of the principle of humane treatment reflected in Common Article 3 and supplemented by the provisions of Additional Protocol II. When President Reagan submitted the treaty to the Senate for advice and consent,[40] he indicated that the United States considered the scope restriction unjustified and would therefore assert coextensive application of the Protocol with Common Article 3.[41] According to the Letter of Transmittal:

> The final text of Additional Protocol II did not meet all the desires of the United States and other western delegations. In particular, the Protocol only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations. This is a narrower scope than we would have desired, and has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerilla operations over a wide area. We are therefore recommending that the U.S. ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions (and only such conflicts) which will include all non-international armed conflicts as traditionally defined (but not internal disturbances, riots and sporadic acts of violence).[42]

While this language refers to "traditionally defined" non-international armed conflicts, it also reflects U.S. opposition to narrowly defining the scope of application of the humanitarian protections reflected in Common Article 3 and Additional Protocol II. The intent seemed apparent—exclude only "non-conflict" internal matters from this scope of application, but ensure anything crossing the threshold of armed conflict is subject to humanitarian regulation. While it is unlikely that the executive branch experts who formulated this position contemplated the type of transnational armed conflict exemplified by the current conflict with al Qaeda, there is little basis to infer from the President's reaction to Additional Protocol II that such a conflict would have been regarded as beyond the scope of humanitarian regulation. On the contrary, the objection to the treaty's restrictive scope of application when compared to the broad scope of Common Article 3 suggests the opposite conclusion.

It is well known that the Senate has yet to grant the advice and consent to Additional Protocol II requested by President Reagan. It is less well known that President Reagan was not the only President to seek this advice and consent to bind the United States to the Protocol. In 1999, President Clinton also requested advice and consent for ratifying this treaty.[43] This effort also reflects the executive branch's desire for expansive application of humanitarian regulation to all armed conflicts.

> Because the United States traditionally has held a leadership position in matters relating to the law of war, our ratification would help give Protocol II the visibility and respect it deserves and would enhance efforts to further ameliorate the suffering of war's victims--especially, in this case, victims of internal armed conflicts. I therefore recommend that the Senate renew its consideration of Protocol II Additional and give its advice and consent to ratification, subject to the understandings and reservations that are described fully in the report attached to the original January 29, 1987, transmittal message to the Senate.[44]

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[39] *Id.* at 1350 (noting ICRC Commentary).

[40] Additional Protocol II, *supra* note 36.

[41] Letter of Transmittal, *supra* note 27.

[42] *Id.*

[43] *See* Letter of Transmittal from President William Clinton, to the Senate for Ratification of the Hague Convention for the Protection of Cultural Property in the Event of Armed conflict (The Convention) and for Accession, the Hague Protocol, Concluded on May 14, 1954, and entered into force on August 7, 1956 with Accompanying Report from the Department of State on the Convention and the Hague Protocol, S. Treaty Doc. No. 106-1, 106th Cong., 1st Sess., at III (1999).

[44] *Id.*

What is significant about these manifestations of support for Additional Protocol II by both Presidents Reagan and Clinton is that they indicate support for a broad application of the principle of humane treatment implemented by this treaty. The fact that neither ratification effort expressly endorsed application of the treaty to a "transnational" non-international armed conflict, such as the conflict with al Qaeda, seems far less significant than the continuing executive effort to maximize application of the humane treatment mandate to armed conflicts. In fact, it is not surprising that these efforts emphasized application to all *internal* armed conflicts, because at the time of both efforts non-international armed conflicts were exclusively of the *internal* variety. Within this historical context, the effort to ensure maximum application of the humanitarian protections reflected in Additional Protocol II supports the conclusion that the principle of humane treatment articulated by this treaty should be understood to apply to *all* armed conflicts, regardless of whether they fall under the express terms of Common Article 3 or Common Article 2. At a minimum, these ratification efforts support the conclusion that the United States views Additional Protocol II as applying coextensively with Common Article 3, and therefore a determination that an armed conflict that falls under the umbrella of Common Article 3 should justify consideration of the provisions of Additional Protocol II to illuminate the humanitarian protections applicable during such a conflict.

Reliance upon Additional Protocol II as a source of the definition for the principle of humane treatment points to the same conclusion as the analysis of Article 75. Like Additional Protocol I, Additional Protocol II also includes "fundamental guarantee" provisions that address the implementation of the humane treatment mandate vis-à-vis criminal adjudications. Unlike Additional Protocol I, Additional Protocol II affords protections to individuals subject to prosecution in a distinct article, Article 6, titled "Penal Prosecutions," which establishes the following requirements:

> 1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.
>
> 2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:
>
> (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
>
> (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
>
> (c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
>
> (d) anyone charged with an offence is presumed innocent until proved guilty according to law;
>
> (e) anyone charged with an offence shall have the right to be tried in his presence;
>
> (f) no one shall be compelled to testify against himself or to confess guilt.
>
> 3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.
>
> 4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.
>
> 5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.[45]

[45] Additional Protocol II, *supra* note 36, art. 6.

This provision is virtually identical to Article 75 of Additional Protocol I.[46] Both Article 75 and Article 6 of Additional Protocol II include the provision relied upon by the *Hamdan* plurality opinion to reinforce the conclusion that the procedures of the military commission violated the customary law of war—the right of the defendant to be present at his trial. What seems particularly compelling about the inclusion of "Article 75" type trial guarantees in Additional Protocol II is that this treaty was developed to apply to internal challenges to the authority of a government. Because such conflicts represent perhaps the most significant challenge to the sovereign authority of the State, the imposition of these procedural protections for a defendant is a powerful indication that they are central to the concept of humane treatment. It is also an indication that the States that negotiated Additional Protocol II did not believe affording these protections would compromise the ability to hold individuals accountable for violations of the law of war. Had there been significant concern for such compromise, it is unlikely States would have accepted the imposition of these requirements to purely internal conflicts.

The relationship between Article 6 and the principle of humane treatment reflected in Common Article 3—the principle integral to the opinion of the Court that the military commission procedures violated their constitutive law—simply bolsters the conclusion of the plurality. According to the ICRC Commentary discussion of Article 6,[47] humane treatment requires, *in all conflicts,* that criminal defendants be afforded basic procedural guarantees.

> The whole of Part II '(Humane treatment)' is aimed at ensuring respect for the elementary rights of the human person in non-international armed conflicts. *Judicial guarantees play a particularly important role, since every human being is entitled to a fair and regular trial, whatever the circumstances*; . . .
>
> The text repeats paragraph 1, sub-paragraph (1)(d) of Common Article 3, with a slight modification. *The term "regularly constituted court" is replaced by "a court offering the essential guarantees of independence and impartiality".* In fact, some experts argued that it was unlikely that a court could be "regularly constituted" under national law by an insurgent party. Bearing these remarks in mind, the ICRC proposed an equivalent formula taken from Article 84 of the Third Convention, which was accepted without opposition.
>
> This sentence reaffirms the principle that anyone accused of having committed an offence related to the conflict is entitled to a fair trial. *This right can only be effective if the judgment is given by "a court offering the essential guarantees of independence and impartiality".*[48]

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[46] The penal adjudication provision of Article 75 requires:

> 4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
>
> (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
>
> (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
>
> (c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
>
> (d) anyone charged with an offence is presumed innocent until proved guilty according to law;
>
> (e) anyone charged with an offence shall have the right to be tried in his presence;
>
> (f) no one shall be compelled to testify against himself or to confess guilt;
>
> (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
>
> (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
>
> (j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

See Additional Protocol I, *supra* note 7, art. 75.

[47] Additional Protocol II, *supra* note 36, art. 6.

[48] PROTOCOL COMMENTARY, *supra* note 15, at 1396-97 (emphasis added).

The language from the Commentary dispels any doubt that a regularly constituted tribunal is central to the concept of fundamentally fair justice and, accordingly, compliance with the principle of humane treatment. Of particular relevance is Article 6's apparent contemplation of the use of military commissions.

> Just like Common Article 3, Additional Protocol II leaves intact the right of the established authorities to prosecute, try and convict members of the armed forces and civilians who may have committed an offence related to the armed conflict; however, such a situation often entails the suspension of constitutional guarantees, the promulgation of special laws and the creation of special jurisdictions. Article 6 lays down some principles of universal application which every responsibly organized body must, and can, respect . . . .[49]

Thus, it seems that even when resort is made to "special" tribunals or jurisdictions to deal with violations of the law during an armed conflict (such as the creation of the military commissions), procedural legitimacy remains the sine qua non of compliance with the principle of humane treatment. Because Article 6 was obviously drafted with full knowledge of the need to accommodate the ability of governments to prosecute criminal misconduct associated with non-international armed conflicts and the reality that such prosecutorial efforts might involve the creation of "special" tribunals, its mandate seems particularly relevant in assessing the compliance of the military commission with the law of war. Both these considerations were obvious factors in the development of the military commission course of action and will most likely animate any government analysis of a "way ahead" to reconcile the *Hamdan* decision with the need to hold al Qaeda operatives accountable for violations of the law of war. Article 6 should serve as a compelling indication that these considerations cannot justify deviation from minimal procedural protections.

The *Hamdan* decision may have "shut down" the military commission, but it has not resolved the underlying issue of how to adjudicate alleged misconduct by members of trans-national terrorist organizations engaged in armed conflict with the United States. It is likely that this underlying issue will be the subject of continuing debate and analysis and, hopefully greater cooperation between the political branches of our government. It is essential that this process produce a legitimate reconciliation between the desire to provide swift justice for wrongdoers and the humane treatment obligation to provide a fundamentally fair process. Article 75 of Additional Protocol I is an important indication of the "process that is due" in accordance with the law of war. Article 6 of Additional Protocol II, however, also provides compelling insight into both the international and longstanding U.S. understanding of the process associated with a "humane" adjudication of criminal misconduct during non-international armed conflicts. Scope provision notwithstanding, proponents of the "fundamental guarantee" aspect of *Hamdan* should not overlook the principles reflected in this treaty; a treaty never rejected by the United States and intended to apply to the most distinctly "sovereign" of armed conflicts.

[49] *Id.*

Lasers Are Lawful as Non-Lethal Weapons

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Deployed Soldiers are often faced with the dilemma of how to warn vehicles approaching checkpoint or convoy operations, particularly at night, to avoid having to use deadly force. Lasers are a novel means for achieving that end. Consider, for example, Lieutenant General (LTG) Pete Chiarelli's remarks in a 19 May 2006 Department of Defense (DOD) news briefing:

> [W]hen you consider the alternative, which is a bullet, I honestly believe we can use [lasers]; we can use them effectively. We can use them in ways that don't necessarily even, quote, unquote, "light up" the individual, but provide a marker so individuals realize that they are approaching a danger point. And we will do everything possible to inform the Iraqi people of their use, so when they see them, they react appropriately.[1]

In LTG Chiarelli's estimation, "[lasers will] provide a very, very important additive to our way of helping Iraqis avoid situations where we have to apply deadly force."[2] In response to recent requests from Soldiers in the field, the Office of The Judge Advocate General, International and Operational Law Division (OTJAG-IO), issued several opinions on the use of lasers to warn or deter approaching vehicles or individuals. All of these opinions were coordinated with the DOD Law of War Working Group and accepted by the service representatives.[3]

The Requirement for a Legal Review

Various regulations require a review of the legality of all weapons that will be procured to meet a military requirement of the U.S. armed forces.[4] The United States is one of a handful of nations that has implemented the requirements of Article 36 of Additional Protocol I, which provides the following:

> In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.[5]

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[1] News Release, U.S. Department of Defense, *DOD News Briefing with Lt. Gen. Chiarelli from Iraq* (19 May 2006), http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=252 [hereinafter *DOD News Briefing with Lt. Gen. Chiarelli from Iraq*]. Lieutenant General Chiarelli is the Commander of Multi-National Corps Iraq.

[2] *Id*.

[3] The DOD Directive established the DOD Law of War Working Group, which includes service representatives, Joint Chiefs of Staff Legal Counsel, and DOD General Counsel representatives. *See* U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 5.1.3 (9 May 2006). Office of the Judge Advocate General, International and Operational Law Division opinions are not generally available to the public, as they are pre-decisional advice under Freedom of Information Act Exemption No. 5. *See* U.S. DEP'T OF ARMY, REG. 25-55, THE DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION ACT PROGRAM para. 3-200 (1 Nov. 1997).

[4] U.S. DEP'T OF DEFENSE, DIR 5000.1, THE DEFENSE ACQUISITION SYSTEM para. E1.1.15 (12 May 2003) [hereinafter DOD DIR. 5000.1]; U.S. DEP'T OF ARMY, REG. 27-53, REVIEW OF LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW para. 4.c (1 Jan. 1979) [hereinafter AR 27-53]; U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5711.8A, REVIEW OF LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW (29 Jan. 1988); U.S. DEP'T OF AIR FORCE, INSTR. 51-402, WEAPONS REVIEW (13 May 1994).

[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 36, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. The United States signed AP I on 12 December 1977, with declarations; however, the United States has not ratified AP I and is not likely to do so due to disagreements with several of its provisions regarding the definition of lawful combatants. Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protections of Victims of Non International Armed Conflicts, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III (1987). The United States, however, has agreed that certain of provisions of AP I constitute a codification of customary international law. *See* U.S. DEP'T OF STATE, CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, 1981-1988, at 3434-35 (1993). The United States approach to this requirement pre-dates AP I. The first DOD instruction outlining

The purpose of the legal review is to ensure that the intended use of the weapon, weapon system, or munition is consistent with customary international law and the international law obligations of the United States, including law of war treaties and arms control agreements to which the United States is a party. The definition of "weapons" includes, "[c]hemical weapons and all conventional arms, munitions, instruments, mechanisms, or devices which have an intended effect of injuring, destroying, or disabling enemy personnel, materiel, or property."[6] The definition of "weapons systems" provides for, "The weapon itself and those components required for its operation, but is limited to those components having a direct injuring or damaging effect on individuals or property (including all munitions, such as projectiles, small arms, mines, explosives, and all other devices that are physically destructive or injury producing)."[7]

Non-lethal weapons should also be reviewed to "ensure consistency with the obligations assumed by the U.S. government under all applicable treaties, with customary international law, and, in particular, the laws of war."[8] Non-lethal weapons are "explicitly designed and primarily employed so as to incapacitate personnel or materiel, while minimizing fatalities, permanent injury to personnel, and undesired damage to property and the environment."[9] Unlike conventional weapons, non-lethal weapons "employ means other than gross physical destruction to prevent the target from functioning."[10] In accordance with DOD directives and Army regulations, the laser devices and weapons systems recently reviewed for employment in theater were reviewed under the criteria of Article 36.

Laser Target Designator Reviews: Beamshot 2000 and Surefire Lasers

In the first opinion, which Multi-National Corps—Iraq (MNC-I) requested, OTJAG-IO reviewed the use of the Beamshot 2000 and Surefire Lasers as aiming or targeting devices, which are used to advise approaching vehicles or individuals that they are being targeted. The Beamshot "Greenbeam" 2000 consists of a Class 3a laser, 532 nanometer (nm) green laser diode, which is mounted on various weapon systems as an aiming device. It has a one-mile nighttime range and is visible in broad daylight with a dot size of 1.75 inches at 100 yards. The Surefire L72 Visible Red Laser Sight is also a Class 3a laser with a power of up to 5 milliwatts (mW) and a red light wavelength of 635 nm. Both lasers are classified as "eye-safe" and are not intended to be used to "dazzle" or otherwise disorient the individual being targeted.[11] The MNC-I intends to authorize use of the laser target designator to warn approaching persons or vehicles that they are being targeted.[12]

Effects

These lasers, under standard conditions of use, would not cause eye injury. Direct exposure of the eye, even momentary exposure through the ocular pupil, to a Class 3a continuous wave laser aiming device would appear very bright under low luminance conditions (e.g., dawn, dusk, or night). Exposure incidents of this nature usually result in rubbing of the eyes and concern about whether injury occurred because the laser appeared so bright. The aversion response, which includes head and eye movements, pupil constriction, and a blink and squint response, would limit the exposure of any one area of the retina and prevent eye injury.[13] Prolonged and deliberate staring into a Class 3a laser, where all five mW enter through the pupil for

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this approach was dated 1974. *See* U.S. DEP'T OF DEFENSE, INSTR. 5500.15, REVIEW OF LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW (16 Oct. 1974). In addition, the United States has participated in frequent discussions with the International Committee of the Red Cross and other nations to assist them in developing their own weapon review programs. *See also* INT'L COMM. OF THE RED CROSS, A GUIDE TO THE LEGAL REVIEW OF NEW WEAPONS, MEANS, AND METHODS OF WARFARE: MEASURES TO IMPLEMENT ARTICLE 36 OF ADDITIONAL PROTOCOL I OF 1977 (2006).

[6] AR 27-53, *supra* note 4, para. 3.a.

[7] *Id.* para. 3.b.

[8] U.S. DEP'T OF DEFENSE, DIR. 3000.3, POLICY FOR NON-LETHAL WEAPONS para. 5.6.2 (9 July 1996) [hereinafter DOD DIR. 3000.3].

[9] *Id.* para. 3.1.

[10] *Id.* para. 3.1.1.

[11] Dr. Bruce Stuck, Detachment Director of USAMRD/MCMR (the U.S. Army Medical Research Detachment-Walter Reed Army Institute of Research, a U.S. Army agency responsible for researching laser safety), provided an e-mail detailing the parameters for eye-safe lasers (under 5 mW of power). According to Dr. Stuck, exposure to these lasers would not result in injury without prolonged exposure (about five seconds). See below for a detailed description of the effects. E-mail from Dr. Bruce Struck, Detachment Director of USAMRD/MCMR, to author (5 Dec. 2005) (on file with author).

[12] *See DOD News Briefing with Lt. Gen. Chiarelli from Iraq*, *supra* note 1. United States Army Sergeant Brendan Woolworth tried the Beamshot 2000 on a vehicle approaching his convoy in Iraq in February 2006. "He pulled off to the side of the road and stopped," Woolworth said. "He got the message. It looked like he just hadn't been paying attention." James Rainey, *A Safer Weapon, With Risks*, L.A. TIMES, May 18, 2006, at 1. *See also* E-mail from MNC-I Operational Law Attorney, subject: Request for Laser Use (Dec. 2, 2005) (on file with author); Memorandum, C3, Coalition Forces Land Component Command, subject: Use of Lasers for Traffic Control onConvoy Routes (6 Nov. 2005) (on file with author).

[13] Lund, et al., *Transient Visual Effects*, Walter Reed Army Institute of Research, U.S. Army Medical Research Detachment, Brooks AFB, Texas (1999).

approximately five seconds, could result in minimal retinal injury or maculopathy (temporary spots or obscured vision). In addition, direct, intra-beam exposure to low powered lasers (like the Class 3a) appears bright and will disrupt ocular performance, particularly of vision-critical tasks like driving a vehicle. These are temporary effects that have more impact in low-light conditions since the effect is exacerbated by the difference between the laser light and ambient light.[14]

Analysis

As long as the aiming devices are not used to subject individuals to "dazzling" effects, they will not be considered weapons under the provisions of *Army Regulation* (*AR*) *27-53*. "Dazzling" effects refer to temporary incapacitation of individuals by flash blindness and glare.[15] "Dazzler" lasers are designed for this purpose; in contrast, laser target designators can only produce such effects through significantly prolonged exposure, which contradicts laser target designators' standard conditions of use. This intended use is reflective in the "dazzler" laser's Class 3b label, compared to the Class 3a label for laser target designators. Paragraph 3(a) of *AR 27-53* defines weapons as "devices which have an intended effect of injuring, destroying, or disabling enemy personnel, materiel, or property."[16] Likewise, the non-lethal weapons directive defines non-lethal weapons as being "explicitly designed and primarily employed so as to incapacitate personnel or materiel."[17] The intended use of the Beamshot 2000 and Surefire Lasers, even considering potential collateral effects or unintended consequences, does not meet these definitions of a weapon and accordingly, does not require a legal review under either set of directives.

Even if laser target designators were considered weapons, Beamshot 2000 and Surefire Lasers are not prohibited by the Blinding Laser Protocol, Protocol IV to the 1980 Convention on Conventional Weapons (CCW), which prohibits laser weapons that are "specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision."[18] Although the United States is a party to the CCW, it is not a party to Protocol IV.[19] The U.S. government has, nonetheless, implemented its own proscription on use or transfer of laser weapons "specifically designed to cause permanent blindness."[20] Neither of the lasers described above are designed to cause permanent blindness nor will they inflict such an injury during normally usage.

"Dazzler" Laser Reviews: XADS PD/G-105, MiniGreen, GBD III, HELIOS, and GHOST Laser Systems

The second set of lasers that OTJAG-IO reviewed are intended to be deployed by the Rapid Equipping Force, an Army element established by the Army Chief of Staff to quickly respond to field requirements and provide innovative or improved equipment to Soldiers in the field. "Dazzler" lasers are intended to temporarily disorient individuals, including drivers of approaching vehicles, and deter them from approaching U.S. military or coalition forces. Because they are intended to be

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[14] Stamper, et al., *Human Pupil and Eyelid Response to Intense Laser Light: Implications for Protection*, *in* PERCEPTUAL & MOTOR SKILLS 775-82 (2002).

[15] Information in this article about lasers, their types, uses, and effects, was obtained generally from the following sources: U.S. ARMY CENTER FOR HEALTH PROMOTION AND PREVENTATIVE MEDICINE, NON-IONIZING RADIATION PROTECTION STUDY NO. 25-MC-04ZU-06, LASER RADIATION HAZARD EVALUATION OF THE B.E. MEYERS & CO. INC., MINIGREEN LASER POINTER/DAZZLER, MODEL 532-M (4-6 Apr. 2006) (DRAFT); U.S. ARMY CENTER FOR HEALTH PROMOTION AND PREVENTIVE MEDICINE, NON-IONIZING RADIATION PROTECTION STUDY NO. 25-MC-04Y7-06, LASER RADIATION HAZARD EVALUATION OF THE PROTOTYPE HANDHELD OPTICAL SURVEILLANCE AND TARGETING LASER SYSTEM (21-23 Mar. 2006) (DRAFT); U.S. ARMY CENTER FOR HEALTH PROMOTION AND PREVENTATIVE MEDICINE, NON-IONIZING RADIATION PROTECTION STUDY NO. 25-MC-04G0-06, LASER RADIATION HAZARD EVALUATION OF THE PROOF OF PRINCIPLE LASER WARNING DEVICE—THE HELIOS (5 Dec. 2005); U.S. ARMY CENTER FOR HEALTH PROMOTION AND PREVENTATIVE MEDICINE, NON-IONIZING RADIATION PROTECTION STUDY NO. 25-MC-04JS-06, LASER RADIATION HAZARD EVALUATION OF THE B.F. MEYERS & CO. INC., GREEN BEAM DESIGNATOR, GBD III LASER, (Nov. 2005); U.S. ARMY CENTER FOR HEALTH PROMOTION AND PREVENTATIVE MEDICINE, NON-IONIZING RADIATION PROTECTION STUDY NO. 25-MC-04A1-05, LASER RADIATION HAZARD EVALUATION OF THE XTREME ALTERNATIVE DEFENSE SYSTEMS, LTD. (XADS), PHOTONIC DISRUPTER/GREEN (PD/G-105), (30 Aug. 2005).

[16] AR 27-53, *supra* note 4, para. 3(a).

[17] DOD DIR. 3000.3, *supra* note 8, para. 3.1.

[18] *See* Protocol IV on Blinding Laser Weapons art. 1, annexed to 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, Oct. 13, 1995, 35 I.L.M. 1218 (1996) [hereinafter Blinding Laser Protocol] (prohibiting the use or transfer of blinding laser weapons). The above treaty is also known as the 1980 Convention on Conventional Weapons.

[19] The President submitted Protocol IV to the United States Senate on 7 January 1997 for its advice and consent. Protocol IV on Blinding Laser Weapons, S. Treaty Doc. 105-1, 105th Congress, 1st Session (7 Jan. 1997). When Protocol IV was drafted, it contained no provision for signature by CCW parties. Senate action remains pending.

[20] Memorandum, Secretary of Defense, subject: DOD Policy on Blinding Lasers (17 Jan. 1997) [hereinafter DOD Policy on Blinding Lasers]. Several programs for stronger "blinding" lasers have actually been cancelled in adherence to Protocol IV. *See* News Release, U.S. Dep't of Defense, DOD Announces Policy on Blinding Lasers (12 Oct. 1995), http://www.defenselink.mil/releases/1995/b090195_bt482-95.html.

employed as non-lethal weapons, "dazzler" lasers are subject to review under the non-lethal weapons directive.[21] As with the above set of opinions on laser target designators, opinions on "dazzler" lasers were also reviewed by the other military services and the DOD Law of War Working Group.

Description and Mission

The XADS PD/G-105, MiniGreen, GBD III, HELIOS, and GHOST weapon systems are 532 nm lasers, which are intended for use by Soldiers as warning devices at checkpoints to determine an oncoming vehicle driver's intent.[22] All five systems are green laser devices that deliver a limited amount of force, at a distance, without causing injury. They are an easily transportable means to temporarily blind or disorient groups or individuals. The systems are designed to be used by operators with little or no technical background and can be hand-carried or mounted on individual- and crew-served weapons.[23] In most cases, only a few hours of training are required for new operators to be qualified to use the weapons. These weapon systems can be used as an alternative to lethal force to temporarily incapacitate, confuse, delay, or restrain an adversary in a variety of situations. They can be used as a discretionary or disorienting device on operational roadblocks and checkpoints and by mounted or dismounted patrols. Such lasers can also be used for stopping vehicles. Techniques, tactics, and procedures (TTP's) developed for the weapon systems suggest their use when:

- Lethal force is not appropriate;
- Lethal force is justified and available for back-up but lesser force may subdue the aggressor;
- Lethal force is justified but could cause collateral effects such as injury to bystanders or damage to property and the environment; or,
- Otherwise justified by unit SOP and/or Rules of Engagement.[24]

These weapon systems are intended to augment, but not replace, lethal weapons within the use of force continuum and are designed to deter and dissuade civilian vehicles from encroaching on a specified area or security zone established during convoy and vehicle checkpoint operations.[25] The asymmetric threat facing deployed Soldiers, including vehicle-borne improvised explosive devices (VBIED's), requires a non-standard, aggressive means of mitigating the threat while deterring innocent vehicle drivers and determining driver's intent at a safe distance. These "dazzlers" will help prevent the death of innocent civilians while providing Soldiers extended range and reaction time to destroy threat vehicles.

Effects

The XADS PD/G-105, MiniGreen, GBD III, HELIOS, and GHOST are Class 3b lasers with sufficient power (100, 75, 250, 465, and 120 mW, respectively) to cause ocular injury at short ranges (17, 18, 10, 10, and 8.2 meters, respectively, based on a 0.25-second unaided exposure) and temporary visual disorientation or flash-blindness at longer ranges. The hazard classification for a laser is based on the most restrictive Maximum Permissible Exposure (MPE) calculated. The MPE for a 0.25-second unintentional exposure to a 532 nm continuous wave laser is 2.6m W/cm.^{2} To classify a laser, an accessible emission limit (AEL) is calculated by multiplying the MPE by the area of the limiting aperture, based on the laser wavelength and 0.25-second exposure duration. The Class 3b laser upper limit is 500 mW.[26] The output (or AEL) of the XADS PD/G-105, MiniGreen, GBD III, HELIOS, and GHOST lasers are all under that limit [150 mW, 125 mW, 235 mW, 465 mW (with all seven lasers combined), and 120 mW (with two of four lasers combined), respectively]. All five weapons have a disorienting or flash-blinding effect on targeted personnel up to at least 200 meters in daylight and 370 meters at night. These effects are temporary and have more impact in low-light conditions since the effect is exacerbated by the greater difference between the laser light and ambient light.[27]

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[21] DOD DIR. 3000.3, *supra* note 8, para. 5.6.

[22] *See e.g.*, Memorandum, Department of the Army, Rapid Equipping Force, subject: Request for Legal Review, GBDIII Laser System (Feb. 7, 2006) (on file with author).

[23] Memorandum, Marine Corps Combat Development Command, subject: Concept of Employment for the B.E. Meyers Laser Dazzler, Model GBD-III C (undated). The Marine Corps is the executive agent for development of non-lethal weapons.

[24] *Id.*

[25] Presentation, U.S. Army Rapid Equipping Force, Laser Warning Device Techniques, Tactics and Procedures (18 Oct. 2005) (on file with author).

[26] *Id.*

[27] Stamper, et al., *supra* note 14, at 775-82.

These lasers, under standard conditions of use, would not cause eye injury. A momentary direct exposure of the eye, even momentary exposure through the ocular pupil, to a Class 3b continuous wave laser would appear very bright under low luminance conditions (e.g., dawn, dusk, or night). Exposure incidents of this nature are similar to laser target designators and usually result in rubbing of the eyes and concern about whether injury occurred because the laser appeared so bright. The aversion response, which includes head and eye movements, pupil constriction, and a blink and squint response, would limit the exposure of any one area of the retina and prevent eye injury.[28] Prolonged and deliberate staring into a Class 3b laser could result in retinal injury or maculopathy, but the danger of immediate or permanent injury is minimal outside the nominal ocular hazard distance (NOHD). The NOHD for enhanced vision (i.e., glasses, binoculars, and night vision devices) is 116 meters for the XADS PD/G-105, 120 meters for the MiniGreen, 69 meters for the GBD III, 95 meters for the HELIOS, and 56 meters for the GHOST.[29] These limitations are largely based on safety standards established by the American National Standards Institute, *American National Standard for Safe Use of Lasers*.[30] The most likely type of injury caused by this wavelength of laser is photochemical damage, causing cumulative retinal damage. The available research, however, indicates that initial eye damage lessens over time during healing. Based on the scientific data accumulated during tests of these and related systems in 2005, the standard conditions of use for these lasers will not cause permanent blindness to enhanced or un-enhanced vision.[31]

The main and intended effects of these systems are flash-blindness and glare. A subject will experience temporarily intense, non-injurious light in his eyes. In addition, direct, intra-beam exposure to these lasers appears bright and will disrupt ocular performance, particularly in vision-critical tasks like driving a vehicle. When correctly employed, "dazzlers" produce a temporary loss of clear sight by affecting the central field of vision, similar to other intense light sources, such as a bright photographic flash or an oncoming vehicle's high-beam headlights. An individual without enhanced vision who is illuminated or dazzled by the laser's beam would suffer no permanent injury when engaged at the distances provided in the systems' capabilities and limitations documents. That individual may experience some residual color images or visual spottiness lasting a matter of seconds. In general, the impairment effect will rapidly dissipate, with a minimum recovery time of one second.[32]

Law of Armed Conflict Considerations

In accordance with DOD and Army policy, the following three law of armed conflict issues must be addressed whenever any weapon is reviewed: (1) whether the weapon causes unnecessary suffering that is disproportionate to the military advantage reasonably expected to be gained from the use of the weapon; (2) whether the weapon may be controlled in such a manner that it is capable of being directed against a lawful target (i.e., it is not indiscriminate in its effect); and (3) whether there is a specific rule of law or treaty prohibiting the use of the weapon.

Unnecessary Suffering

The primary relevant treaty for the first issue is the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 18 October 1907.[33] Article 23(e) of its Annexed Regulations prohibits the employment of "arms, projectiles, or material calculated to cause unnecessary suffering."[34]

There is no agreed-upon definition for unnecessary suffering. Whether weapons or munitions cause unnecessary suffering is ascertained by determining whether the injury, including injuries resulting in death, to combatants is manifestly

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[28] Lund, et al., *supra* note 13.

[29] *See* sources cited *supra* note 25.

[30] AMERICAN NATIONAL STANDARDS INSTITUTE, AMERICAN NATIONAL STANDARD FOR SAFE USE OF LASERS, Z136.1-2000 (2000).

[31] *See* sources cited *supra* note 25; Memorandum, Department of Defense, Force Transformation Office, to DOD General Counsel, subject: Full-Spectrum Effects Platform/Sheriff; Request for Legal Review (26 Sept. 2005). The data in this paragraph is primarily derived from the DOD memorandum and its supporting studies regarding the HELIOS system and other Green Laser systems. The data in the studies was augmented by e-mail discussion with Dr. Stuck of the U.S. Army detachment responsible for laser safety, which is collocated with the Air Force Research Laboratory at Brooks AFB, TX. E-mail from Dr. Bruce Struck, Detachment Director of USAMRD/MCMR, to author (on file with author). In order to prevent misuse of the systems, the opinion recommended that maximum exposure times be calculated for each device at the intended ranges and briefed to the operators.

[32] *See generally* WILLIAM KOSNIK & PETER SMITH, FLASH BLINDNESS AND GLARE MODELING OF OPTICAL RADIATION (2003).

[33] *See* Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct.18, 1907, 36 Stat. 2277, T.S. 539, *reprinted in* U.S. DEP'T OF THE ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE (Dec. 1956).

[34] *Id.* art. 23(e).

disproportionate to the weapon's or munition's stated purpose(s)—its intended use(s)—and the military advantage reasonably expected to be gained from its use.[35] This balancing test cannot be conducted in isolation. A weapon or munition's effects must be weighed in light of comparable, lawful weapons or munitions in use on the modern battlefield.[36]

Lethal conventional weapons may destroy targets lawfully through blast, penetration, or fragmentation, and may kill or seriously injure enemy combatants or other persons posing a threat or potential threat to life or limb of U.S. forces. Non-lethal weapons employ means other than gross physical destruction to prevent the target from functioning.[37] Non-lethal weapons are to be employed to discourage, delay or prevent hostile actions, limit escalation, or take military action in situations where the use of lethal force is not the preferred action.[38] Non-lethal weapons are intended to provide an on-scene commander with additional means for accomplishing his mission, while providing effective alternative means for force protection. If necessary, non-lethal weapons may be used in conjunction with lethal weapon systems. There is no legal requirement to use non-lethal weapons where deadly force is warranted by the circumstances.[39]

Non-lethal refers to the intention of the user. Non-lethal weapons may be more accurately described as "less lethal," as they are not expected to have a zero probability of producing fatalities or permanent injuries.[40] Depending on the severity and type of injury, however, non-lethal weapons must still pass the unnecessary suffering test.

Discriminate Effects

A fundamental principle of the law of armed conflict is that combatants must be distinguished from noncombatants.[41] Only combatants and military objectives can be legitimately targeted.[42] Civilians are protected from indiscriminate attacks.[43] If a weapon cannot be controlled in such a manner that it is capable of being directed against a lawful target, then it fails the discriminate effects test.

Treaty Considerations

The United States is not party to any treaties that prohibit the possession or use of the XADS PD/G-105, MiniGreen, GBD III, HELIOS, or GHOST systems. Because these are laser-based systems, though, consideration of Protocol IV to the CCW and the DOD Policy on Blinding Lasers is appropriate. As stated previously, the United States is not a party to Protocol IV of the CCW, which prohibits the use and transfer of "laser weapon[s] specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to un-enhanced vision, that is to the naked eye or to the eye with corrective eyesight devices."[44] The United States has, nonetheless, implemented this proscription in the DOD Policy on Blinding Lasers, and the Secretary of Defense has extended the prohibition to laser weapons specifically designed to permanently blind either enhanced or un-enhanced vision.[45]

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[35] *See, e.g.*, AP I, *supra* note 5, arts. 35, 57. Article 35(2) states, "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering." *Id.* art 35(2).

[36] Law of armed conflict issues related to lawful targeting should be addressed at the time of employment and should be determined by the on-scene commander based upon current circumstances. These issues are not determinative of the lawfulness of a weapon. The commander authorizing a weapon's use should consider a weapon or munition's characteristics when innocent civilians are present in order to ensure consistency with mission rules of engagement and law of armed conflict proscriptions on the direction of attacks against civilians not taking an active part in hostilities, or who otherwise do not pose a threat to U.S. forces.

[37] DOD DIR. 3000.3, *supra* note 8, para. 3.

[38] *Id.* para. 4.

[39] *Id.*

[40] *Id.*

[41] *See, e.g.*, AP I, *supra* note 5, art. 48.

[42] *See generally id.* arts. 48-52.

[43] *Id.* art. 51.

[44] Blinding Laser Protocol, *supra* note 17, art. 1.

[45] DOD Policy on Blinding Lasers, *supra* note 19. The DOD policy on laser weapons was the foundation for Protocol IV, as recorded in W. Hays Parks, DAJA-IO *Memorandum of Law:* Travaux Preparatoires *and Legal Analysis of Blinding Laser Weapons Protocol*, ARMY LAW., June 1997, at 33-41.

Analysis

The XADS PD/G-105, MiniGreen, GBD III, HELIOS, and GHOST systems use laser energy to dissuade individuals from approaching within a distance where resort to lethal force may be necessary. As described above, these laser systems are intended for use as non-lethal weapon systems. Non-lethal weapons, under standard conditions of use, are less lethal than conventional means available to a military commander. The risk of serious injury or loss of life to persons in range of a non-lethal weapon's effects is substantially less than it would be if a lawful, but lethal, weapon was employed. There appears to be no basis for concluding that the laser energy generated by either of these systems would cause superfluous injury or unnecessary suffering when used as designed and in accordance with approved TTP's.

The weapons are not indiscriminate; in fact, use of the weapons facilitates discrimination of targets and prevention of unnecessary civilian casualties. Determining the potential threat of oncoming vehicles has proven extremely difficult, and current methods of arm waving and flare firing to warn approaching vehicle drivers have had limited success. Soldiers need a means to determine the intent of an approaching vehicle operator at a sufficient range to wave-off innocent drivers, while also providing a margin of safe distance so that forces can determine hostile intent and engage and defeat the threat beyond the casualty radius of a VBIED. The XADS PD/G-105, MiniGreen, GBD III, HELIOS, and GHOST laser "dazzlers" will provide Soldiers the ability to communicate a visual signal to approaching vehicle driver's to stay back while concurrently assisting in the Soldier's determination of the driver's intent. Employment of laser dazzlers will provide a sufficient safe distance and time to neutralize a determined threat, minimizing the exposure of friendly forces and other individuals in the area. In doing so, laser dazzlers will both increase force protection and aid in the protection of innocent civilians. Use of laser dazzlers to warn or hail approaching vehicles will actually better enable Soldiers to fulfill their obligation to distinguish innocent civilians from combatants and military objectives. While all approaching vehicles may be duly warned with the visual signal provided by the dazzlers, only those vehicles that have failed to stop and have been determined to exhibit hostile intent will be engaged with the potentially lethal force of other weaponry.

Finally, the weapons do not violate the non-binding provisions of Protocol IV or the DOD Blinding Laser Policy. The negotiating record (or "*travaux preparatoires*") for Protocol IV[46] and the DOD policy establish that these systems are not prohibited. None of the discussed laser systems were "specifically designed" to cause permanent blindness, nor will standard circumstances of use inflict such injuries.

Conclusion

The law of armed conflict does not prohibit the acquisition, possession, use, or transfer of the XADS PD/G-105, MiniGreen, GBD III, HELIOS, or GHOST systems. There appear to be no legal impediments to the deployment and use of these non-lethal weapon systems. Rather, their use in the field, along with laser target designators—Beamshot 2000 and Surefire Lasers—will provide another lawful means of warning and deterring approaching vehicle drivers without resorting to the use of lethal force. The end result may be fewer unnecessary casualties in convoy and checkpoint operations.

[46] *See* Parks, *supra* note 45.

Recent Issues with the Use of MatchKing Bullets and White Phosphorous Weapons in Iraq

*Major R. Craig Burton**

Introduction

Recently, issues have arisen about the use of certain weapons in Operation Iraqi Freedom (OIF). This article discusses two of these weapons: MatchKing bullets and white phosphorous (WP). Though neither of these weapons is new, their continued use has sparked some debate as to their legality.

MatchKing Bullets

The validity of the continued use of MatchKing bullets by U.S. Soldiers in OIF was recently disputed. Until resolution of this dispute, Soldiers in Iraq believed they were required to use other, less accurate ammunition.[1]

In 1985, judge advocates (JAs) from the Army, Air Force, and Navy reviewed for compliance with the law of war MatchKing bullets, ammunition often used by military snipers.[2] The legal review discussed principally the Hague Declaration Concerning Expanding Bullets (The Hague Declaration)[3] as well as the basic principle of international law most applicable to the use of MatchKing bullets: unnecessary suffering.[4]

The Hague Declaration prohibits "the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope that does not entirely cover the core or is pierced with incisions."[5] While the United States has not ratified The Hague Declaration, the United States has taken the position that its military forces will abide by the principles of the Hague Declaration.[6] The underlying bases for the Hague Declaration's prohibition are taken from principles contained in Hague Convention IV**,** Respecting the Laws and Customs of War on Land, particularly the principle of unnecessary suffering.[7]

The principle of unnecessary suffering prohibits the use of "arms, projectiles, or material calculated to cause unnecessary suffering."[8] There is a mens rea element built into the prohibition. If the weapon is designed primarily to kill and not to make an individual suffer (although suffering will necessarily occur in the process), the weapon does not violate the

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[1] *See* Bill Gertz & Rowan Scarborough, *Inside the Ring, Sniper Punished*, WASH. TIMES, Jan. 27, 2006, at A06, *available at* http://www.gertzfile/gertzfile/ring012006.html.

[2] *See* Memorandum, W. Hays Parks, Colonel, USMCR, Special Assistant to The Judge Advocate General of the Army for Law of War Matters, to Commander, United States Army Special Operations Command, subject: Sniper Use of Open-Tip Ammunition (Sept. 23, 1985), *available at* http://www.thegunzone.com/opentip-ammo.html [hereinafter Parks Memo].

[3] The Hague Declaration Concerning Expanding Bullets, July 29, 1899, 1 AM. J. INT'L L. 157-59 (Supp.) [hereinafter The Hague Declaration].

[4] Hague Convention IV**,** Respecting the Laws and Customs of War on Land art. 23e, Oct. 18, 1907, 36 Stat. 2277, T. S. 539 (entered into force Jan 26, 1910) [hereinafter Hague Convention], *reprinted in* INT'L & OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT (2006) [hereinafter 2006 DOC. SUPP.]; *see also* Parks Memo, *supra* note 2, sec. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I**)** art. 35(2), June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* 2006 DOC. SUPP., *supra*. The United States has not ratified Protocol I but does acknowledge certain paragraphs reflect customary international law and are therefore binding upon the United States and its military forces. *See* Parks Memo, *supra* note 2, sec. 3; *see also* Memorandum, Office of the Secretary of Defense, to Mr. John H. McNeill, Assistant General Counsel (International), subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications(May 8, 1986), *reprinted in* INT'L & OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT (2005) [hereinafter 2005 DOC. SUPP.]; Michael J. Matheson**,** *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L. & POL'Y 419, 427-28 (Jan. 22, 1987), *reprinted in* 2006 DOC. SUPP., *supra*.

[5] The Hague Declaration, *supra* note 3.

[6] *See* Parks Memo, *supra* note 2.

[7] *See supra* note 4 and accompanying text.

[8] Hague Convention, *supra* note 4, art. 23e.

prohibition against unnecessary suffering, as long as the weapon is used in accordance with its intended design. Thus, the principle of unnecessary suffering requires a balancing between the military's need for the weapon and the weapon's effects on the intended target. The suffering caused by the weapon may not be unnecessary or excessive in relation to the military benefit derived from its use.[9]

MatchKing bullets, which are commonly referred to as "open-tip" bullets, are often confused with hollow-point ammunition that is designed to flatten upon impact.[10] Open-tip bullets, however, are designed primarily for accuracy and not to flatten upon impact.[11] In fact, open-tip bullets are not recommended for hunting because they do not flatten upon impact and kill their target quickly enough.[12]

Because the design of the open-tip bullet does not force the bullet to expand and flatten upon impact with soft tissue, it violates neither The Hague Declaration nor the principle of unnecessary suffering. United States forces use open-tip bullets to kill a target, not to injure unnecessarily. "The military necessity for its use – its ability to offer maximum accuracy at very long ranges – is complemented by the high degree of discriminate fire it offers in the hands of a trained sniper."[13] Not only do open-tip bullets comply with the principle of unnecessary suffering, but the sniper's ability to discriminate between civilians and combatants on the battlefield is enhanced due to the open-tip bullet's accuracy. Accordingly, U.S. snipers may lawfully use open-tip bullets in combat.

Perhaps the most important lesson learned from the dispute and temporary impediment to military snipers was that if a Soldier questions a JA about the validity of a weapon's use in combat, the first determination the JA must make is whether the weapon was issued through standard supply channels. If the answer to that inquiry is affirmative, JAs should assume that the weapon is lawful. Each weapon, including a weapon's ammunition, is reviewed for compliance with the law of war before being issued to U.S. troops.[14] If weapons are not obtained through standard supply channels, JAs have reason to worry and question their use. If questions or concerns persist, a JA should contact the International and Operational Law Division, Office of the Judge Advocate General (OTJAG) for further guidance.

WP

The use of WP by the U.S. military in Fallujah, Iraq in 2005[15] led to numerous articles and media presentations on the appropriateness of its use.[16] Many of the articles concluded that the United States violated international law by using WP against civilians or military targets.[17] In their attempts to condemn the U.S. military's use of WP, the articles seem to have misquoted or misinterpreted international law.

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[9] Parks Memo, *supra* note 2, sec. 3.

[10] *Id.* sec. 4. Open-tip bullets, as the name suggests, have a slight aperture at the point of the metal jacket, but the bullet's core is often not affected. A hollow-point bullet's core is actually bored into or "hollowed," which allows the bullet to flatten upon impact. A hollow-point bullet may be an open-tip bullet as well, but not necessarily. Thus, not all open-tip bullets are hollow-points and not all hollow-points are open-tip bullets. *See* Corbin, Bullet Designs, http://www.corbins.com/design.htm (last visited Aug. 2, 2006) (giving a technical description of the fabrication of different types of bullets).

[11] Parks Memo, *supra* note 2, sec. 4.

[12] *Id.*

[13] *Id.* sec. 7.

[14] U.S. DEP'T OF DEFENSE, DIR. 5000.1, THE DEFENSE ACQUISITION SYSTEM para. E1.1.15 (12 May 2003).

[15] Reynolds, *infra* note 22 (referring to the use of WP to flush combatants out of hiding into the open where they could be more easily killed); *see also* Captain James T. Cobb, First Lieutenant Christopher A. LaCour, & Sergeant First Class William H. Hight, *TF 2-2 in FSE, AAR: Indirect Fires in the Battle of Fallujah*, FIELD ARTILLERY, Mar.-Apr. 2005, at 26 (discussing the physical and psychological effects of the use of WP).

[16] *See, e.g.*, George Monbiot, *Comment and Debate: Behind the Phosphorus Clouds Are War Crimes Within War Crimes*, GUARDIAN, Nov. 22, 2005, at 31; Scott Shane, *Defense of Phosphorus Use Turns into Damage Control*, N.Y. TIMES, Nov. 21, 2005, at 14; *U.S. Admits Iraq Phosphorus Attacks*, AUSTRALIAN, Nov. 18, 2005, at 9.

[17] *See* articles cited *supra* note 16.

Concerns regarding the use of WP in combat come from the following two main treaty sources: the Chemical Weapons Convention (CWC)[18] and Protocol III of the Convention on Certain Conventional Weapons (CCW).[19] The United States is a party to the CWC but has not ratified the applicable protocol of the CCW.[20]

CWC

If WP were a chemical weapon, then its use, in some circumstances, may be prohibited by the CWC. The CWC classifies chemical weapons as the following: "[m]unitions and devices, specifically designed to cause death or other harm through the toxic properties of . . . toxic chemicals . . . which would be released as a result of the employment of such munitions and devices."[21] White phosphorus, on the other hand, is not deployed for its toxic effects, but rather for its thermal effects. It is primarily used as a smoke screen or an illuminant.[22] Based upon that use and the purpose behind the CWC, the Organisation for the Prohibition of Chemical Weapons, the treaty-implementing body of the CWC, states:

> Incendiary agents such as napalm and phosphorus are not considered to be C[hemical] W[eapon] agents since they achieve their effect mainly through thermal energy. Certain types of smoke screen may be poisonous in extremely high concentrations but, nonetheless, smoke ammunition is not classed as a chemical weapon since the poisonous effect is not the reason for their use.[23]

White phosphorus, even when not used as a smoke screen or as an illuminant, is used for its thermal effects (i.e., to burn or deprive the enemy of oxygen). Therefore, in spite of the obvious fact that WP is a chemical, it is not classified as a chemical weapon under the CWC and the Convention's prohibitions do not apply to its use.

CCW

The CCW primarily prohibits the use of incendiaries against or in concentrations of civilians.[24] The CCW defines an incendiary as "any weapon or munition which is *primarily designed* to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target."[25] "Incendiary weapons do not include: (i) Munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signaling systems."[26] Even though WP is primarily designed to be used as a smoke screen or illuminant,[27] it has been used for other purposes, such as in Fallujah where it was used to flush combatants out of hiding.

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[18] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800 (1993) [hereinafter CWC].

[19] 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, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCW].

[20] *United Nations Multilateral Treaties Deposited with the Secretary-General*: Status as at 31 December 2005, U.N. Doc. ST/LEG/SER.E/23.

[21] CWC, *supra* note 18, art. II(1)(b).

[22] *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 3-11.9, POTENTIAL MILITARY CHEMICAL /BIOLOGICAL AGENTS AND COMPOUNDS tbl. III-18 (Jan. 2005) (showing the chemical properties of phosphorus and its primary use as a smoke screen); Kathleen Hennrikus, *Answers About White Phosphorus*, BOSTON GLOBE, Nov. 17, 2005, *available at* http://www.boston.com/news/nation/articles/2005/11/17/answers_about_white_phosphorus/; Paul Reynolds, *White Phosphorus: Weapon on the Edge*, BBC NEWS Nov. 16, 2005, *available at* http://news.bbc.co.uk./1/hi/world/americas/4442988.stm (quoting Peter Kaiser, a spokesman for the Organisation for the Prohibition of Chemical Weapons (OPCW), the treaty-implementing body of the Chemical Weapons Convention, on the lawful use of white phosphorus); GlobalSecurity.org, Legal Status of Incendiary Weapons, http://globalsecurity.org/military/systems/munitions/incendiary-legal.htm (last visited Aug. 2, 2006). *But see* U.S. DEP'T OF ARMY, FIELD MANUAL 3-50, SMOKE OPERATIONS app. G, at 96 (4 Dec. 1990) (stating that phosphorus smoke is "excellent for harassing enemy personnel and starting fires").

[23] Organisation for the Prohibition of Chemical Weapons, Chemical Warfare Agents, http://www.opcw.org/resp/html/cwagents.html (last visited Aug. 2, 2006). In spite of the use of the term "incendiary agent" in the quote (in the context of discussing chemical weapons), white phosphorus may not be an incendiary agent (used as a term of art) as defined by the CCW, discussed *infra*.

[24] *See* Convention on Indiscriminate Weapons, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) art. 2, Oct. 10, 1980, 19 I.L.M. 1534 (1980) [hereinafter Protocol III].

[25] *Id.* art. 1, para. 1 (emphasis added).

[26] *Id.* art. 1, para. 1(b).

[27] *See supra* note 22.

Therefore, one may argue that because WP is primarily designed to be used as a smoke screen, it does not meet the definition of an "incendiary" under the CCW.[28] If WP is not an incendiary weapon, then the CCW does not prohibit its use.

Even if WP were classified as an incendiary weapon under the definition supplied by the CCW, the use of the weapon is not per se unlawful. Again, the CCW prohibits the use of incendiary weapons in proximity to or against civilians.[29] Other uses of incendiary weapons are not prohibited by the CCW. Therefore, if the United States were a party to the CCW and WP were considered an incendiary weapon, the United States would still be able to use WP against combatants who are not among concentrations of civilians.

In addition to the CWC and the CCW, the principle of unnecessary suffering must still be considered. The use of WP would be unlawful, even against combatants, were it used specifically to cause suffering rather than for a recognized, valid purpose. The mere fact that WP may cause a combatant to suffer, however, does not mean that WP causes unnecessary suffering when considered in light of the military benefit to be gained from its use.

Summary

White phosphorus may be used lawfully by the United States as long as it is not used in a manner calculated to cause unnecessary suffering. Its use does not violate any U.S. treaty obligations. It is not classified as a chemical weapon and, even if the United States were a party to the CCW, the United States would still be able to use WP as long as it did not do so against or in concentrations of civilians.

Just because a weapon is lawful, does not necessarily make it advisable. The "shake 'n bake"[30] method of using WP in Fallujah may have been effective, but the ramifications of its use, felt throughout the international community and in the United States, were great. That does not mean that WP should not have been used in Fallujah; however, it is our duty as JAs to not only inform the commander of the legality or illegality of the use of a given weapon, but also to inform the commander of the practical consequences of its use. Only then can the commander make a properly informed decision about what weapons to employ.

[28] *See also* W. Hays Parks, *The Protocol on Incendiary Weapons*, INTERNATIONAL REVIEW OF THE RED CROSS, Nov.– Dec. 1900, No. 279, at 544.

[29] *See* Protocol III, *supra* note 24.

[30] *See supra* note 15 and accompanying text.

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.

Book Review

LOST TRIUMPH: LEE'S REAL PLAN AT GETTYSBURG—AND WHY IT FAILED[1]

REVIEWED BY MAJOR JASON M. BELL[2]

> *[General Lee] said in a voice tremulous with emotion: "I never saw troops behave more magnificently than Pickett's division of Virginians did to-day [sic] in that grand charge upon the enemy. And if they had been supported as they were to have been—but for some reason not yet explained to me, were not—we would have held the position and the day would have been ours." After a moment's pause he added in a loud voice, in a tone almost of agony, "Too bad! Too bad! OH! TOO BAD!"*[3]

What was the expected support of which Confederate General Robert E. Lee spoke?[4] In *Lost Triumph*, Tom Carhart assaults the conventional wisdom surrounding Gettysburg and deconstructs the view that Confederate General George E. Pickett's tragic charge on day three of the battle was the sum total of Lee's tactical plan.[5] Carhart examines whether Lee foolishly threw Pickett's men to their death in a frontal assault of Union cannon on Cemetery Ridge or whether Lee had a more complex battle plan.[6] Was the horrific loss of life all Lee's fault? No, Carhart tells us, because General J.E.B. Stuart's cavalry failed to achieve a Napoleonic penetration, a *manoeuvre sur les derrières* (maneuver on the hindquarters), into the Union rear at Culp's Hill and Cemetery Ridge.[7]

Although not an entirely novel theory, Carhart's reasoned analysis provides insight into Lee's Gettysburg strategy on the third day of the battle.[8] Along the way, Carhart uncovers further revelations about General Stuart and the Union's infamous General George Custer. Carhart's new research and intuitive interpretation of reports, first hand accounts, and subsequent histories reveal a new understanding of Gettysburg. Compelling from the start, *Lost Triumph* not only breathes new life into familiar names but also demonstrates just how close the Confederate Army came to victory at Gettysburg.[9]

I. History as Precedent

Lost Triumph opens with an examination of Robert E. Lee, the Soldier. Through Carhart, himself a West Point graduate and Vietnam veteran,[10] the reader learns that Lee graduated second in the West Point class of 1829. Lee showed early prowess as a Soldier in Mexico. Serving as an engineer on General Winfield Scott's staff, Captain Lee's courageous reconnaissance up the Cerro Gordo Heights uncovered Santa Anna's flank and led to a U.S. victory over the Mexicans.[11] During the pre-Civil War years, Lee returned to West Point in 1852 to serve as Superintendent.[12] Carhart notes approvingly

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[1] TOM CARHART, LOST TRIUMPH: LEE'S REAL PLAN AT GETTYSBURG—AND WHY IT FAILED (2005).

[2] U.S. Army. Written while assigned as a student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] CARHART, *supra* note 1, at 260-261 (quoting GENERAL JOHN D. IMBODEN, THE CONFEDERATE RETREAT FROM GETTYSBURG, *reprinted in* 3 BATTLES AND LEADERS OF THE CIVIL WAR 421 (Robert U. Johnson & Clarence C. Buel eds., Book Sales 2000) (1887)). General Robert E. Lee, Commander of the Army of Northern Virginia, C.S.A., spoke these words to Cavalry Brigade Commander General John Imboden during a brief meeting in the early hours of 4 July 1863 near the crossroads of Gettysburg, Pennsylvania. *Id.* at 260. General Imboden served under General Lee but did not participate in the climactic battle of Gettysburg, which spanned the first three days of July 1863. *Id*. at 261. Normally reticent, General Lee is not often remembered for such dramatic episodes.

[4] *Id*.

[5] *See id.* at 2. Carhart cites no authority discussing this commonly accepted view.

[6] *Id.*

[7] *Id*. at 240.

[8] *Id.* at 23 (acknowledging that other historians have speculated, without supporting evidence, that Stuart sought Meade's rear position).

[9] For Southern apologists, see generally NEWT GINGRICH & WILLIAM FORSTCHEN, GETTYSBURG, A NOVEL OF THE CIVIL WAR (2003) (imagining a Confederate victory at Gettysburg).

[10] CARHART, *supra* note 1, at 9. Carhart is a twice wounded Vietnam veteran and member of the West Point Class of 1966. *See generally* RICK ATKINSON, THE LONG GRAY LINE: THE AMERICAN JOURNEY OF WEST POINT'S CLASS OF 1966 (1989).

[11] CARHART, *supra* note 1, at 7-9.

[12] *Id.* at 29.

that Lee, both as the Superintendent and as a cadet, was a student of the military art and the "Great Captains," particularly Napoleon.[13] As Superintendent, Lee supported the military instruction of cadets through the study of Napoleon's campaigns.[14]

Carhart next examines several renowned military engagements. His purpose is not simply a histiographic detour. Instead, Carhart seeks an understanding of Lee's mind to understand what objectives and tactics he might have pursued at Gettysburg.[15] Carhart examines the actions of several notable commanders—Hannibal at Cannae, King Frederick at Leuthen, and Napoleon at Austerlitz.[16] After cursory discussion, Carhart then spends a chapter discussing Napoleonic tactics, including the *manoeuvre sur les derrières* where Napoleon sent his reserve into the enemy rear area by way of a flanking attack.[17] Simplistic in conception, Napoleon deftly used this tactic to rip through a weakened enemy and topple the European powers arrayed against him.[18] Carhart leads the reader to believe that Lee would also move for the enemy's rear when seeking a decisive victory in battle.

Lee's quest for knowledge and subsequent application of the art of war and its principles is like the role of *stare decisis*—the role of precedent—in the American legal system.[19] Battles, like decisions from the highest court in a jurisdiction, serve as base points from which leaders cull tactics and principles.[20] Commanders then apply these principles of war in other battles and campaigns.[21] The principles of war, like caselaw, inform the commander's understanding of how to wage war. As Carhart aptly concludes, the battles of Cannae, Leuthen, and Austerlitz contained important lessons that Lee employed at Gettysburg.

II. Gettysburg

The climatic Civil War battle around the hamlet of Gettysburg, Pennsylvania spanned over the first three days of July 1863.[22] The green, pastoral fields that today mark the site belie the ferocious struggle that raged over the now hallowed ground of Little Round Top, the Peach Orchard, and Cemetery Ridge. By 5 July, Lee slipped his battered Army south, and a befuddled Union General George C. Meade found himself in control of the field with his Army of the Potomac largely intact.[23] Such an outcome was hardly expected. Lee had out-generaled Union forces since his assumption of command in 1862 but the untested Meade defeated Lee.[24] The South failed to achieve the decisive victory for which Lee yearned and the South desperately needed.[25]

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[13] *Id.* at 29-34.

[14] *Id.*

[15] *Id.* Carhart paints a picture of Lee as a student of the military art seeking the principles of war much like an engineer might pursue an understanding of static forces on a structure. Other notable military leaders, such as Ulysses S. Grant, neither pursued the study of war nor believed there was value in so doing. *See generally* AMERICAN MILITARY HISTORY 265 (Maurice Matloff et al. eds., 1988).

[16] CARHART, *supra* note 1, at 41-54. Each of these battles is described in Antoine Henri Jomini's classic military text on strategy *Précis de l'Art de la Guerre*, which was published in 1838 and taught at West Point since 1853. CARHART, *supra* note 1, at 35.

[17] *Id.* at 66.

[18] *See* RUSSELL F. WEIGLEY, THE AGE OF BATTLES: THE QUEST FOR DECISIVE WARFARE FROM BREITENFELD TO WATERLOO 386 (1991) (discussing the *manoeuvre sur les derrières* at Austerlitz).

[19] *Stare decisis* is Latin for "to stand by things decided." It is "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 790 (7th ed. 1999).

[20] *See generally* STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 28-29 (1985).

[21] This is not to imply that battlefield principle applies in a lockstep formulaic manner. A battle is fought just as a case is decided, based on its own unique facts and circumstances. Furthermore, military principles, like prior controlling legal decisions, often provide no clear answers to the situation at hand.

[22] CARHART, *supra* note 1, at 123. *See generally* CARL SMITH, GETTYSBURG 1863: HIGH TIDE OF THE CONFEDERACY (1998).

[23] CARHART, *supra* note 1, at 4. Meade assumed command of the Army of the Potomac on 28 June, only days prior to the battle of Gettysburg. *Id.* at 117.

[24] *Id.* Prior to the Civil War, Lee was widely regarded as the finest officer in the Union Army. Indeed, at the outbreak of hostilities, President Abraham Lincoln offered Lee command of the Union Army. Lee turned down the offer, resigned his commission, and returned to his native Virginia. *Id.* at 70.

[25] *Id.* at 107. Lee mounted an offensive into the North to destroy the Union Army, bring the North to the peace table, and gain support from Europe. He realized that the South could not win a prolonged battle against the resource and manpower rich North. *Id.*

Prior to the battle of Gettysburg, the North's stamina for war waned following their bitter defeat at Chancellorsville, but the South still faced the North's vast material resources.[26] Lee realized the cure for both ills was the total destruction of the Union Army and launched his second offensive into the North. Beginning on 23 June, Stuart wreaked havoc once again to the east of Gettysburg by conducting a reconnaissance foray around the Army of the Potomac.[27] On 1 July, just north of Gettysburg, Meade's cavalry under the command of Union General Don Carlos Buell, made contact with lead elements of Lee's III Corps commanded by General A.P. Hill.[28] It was an encounter of more happenstance than strategic foresight. During fierce action on the first of July, the Confederate Army made modest gains that drove the Union forces into a defensive line along Cemetery Ridge.[29] That evening Lee met with Confederate General James Longstreet and ordered him to attack on 2 July, over the latter's protestations.[30]

In describing the events of 2 July, Carhart takes pains to describe Stuart's return to Lee's headquarters at Seminary Ridge. Through an examination of the record, Carhart concludes that Lee was not disaffected with Stuart, as is commonly accepted, but is only speculation.[31] Carhart argues that Lee ordered Stuart to take his cavalry and conduct a *manoeuvre sur les derrières* into the Union rear via the Baltimore Pike.[32] Having set forth Lee's Napoleonic credentials, Carhart explains that Stuart's mission had to be a penetration of the Union rear and not simply flank security for Lee's left wing.[33]

Carhart makes several compelling arguments to substantiate Stuart's mission and objective on 3 July. First, Union cavalrymen spotted Confederate scouts conducting reconnaissance to the east beyond the Confederate left wing.[34] Second, there is no doctrinal justification for Stuart's large cavalry force to have been placed nearly two miles east of the Confederate left wing.[35] Carhart also supports his argument with other writings, concluding that the only logical explanation is that Stuart was conducting reconnaissance for a flanking attack on the third day of the battle.[36] The pieces in place, Carhart identifies three prongs to Lee's day-three battle plan—Longstreet's heavy attacks on the Union left wing, including Pickett's charge; Confederate General Richard "Baldy" Ewell's renewed attack on the Union right wing at Culp's Hil; and Stuart's cavalry force attacks into the Union rear.[37] Although the evidence for Lee's scheme of maneuver previously existed, Carhart's *Lost Triumph* sheds new light on Lee's ultimate purpose.[38] So why wasn't Lee successful?

Lee's plan, in line with Napoleonic tactics, involved coordinated attacks on the Union lines.[39] But war is an inherently disjointed endeavor. *Lost Triumph* details a series of miscues that forced Lee to modify his plan of attack, yet still rely on Stuart's attack from the east cavalry field into the enemy's rear on Cemetery Hill.[40] To coordinate the attack, four prearranged cannon shots from Stuart told Lee the route into the Union rear was clear.[41] Only after giving the signal did Stuart realize he had a large Union cavalry force to his south, commanded by Union General David Gregg, who had been

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[26] *Id.* at 107, 142.

[27] *Id*. at 141.

[28] *Id*. at 123.

[29] *Id.* at 124.

[30] *Id.* at 124-26.

[31] *Id.* at 142.

[32] *Id.* at 148.

[33] *Id.* at 148-50.

[34] *Id*. at 146.

[35] *Id*. at 150.

[36] *See, e.g.*, *id.* at 249.

[37] *Id*. at 163.

[38] *See id.* (noting that Lee's order to Stuart is in the OFFICIAL RECORDS, *infra* note 53).

[39] *Id*. at 181.

[40] *Id*. at 164-85.

[41] *Id*. at 205.

alerted to Stuart's intentions.[42] The ensuing fight was fierce as Stuart attempted to drive his cavalry force through Gregg's troops and into the Union rear.[43]

Carhart describes the ensuing battle in vivid detail. Numerically superior, the Confederate cavalry, some 4000 strong, formed in column and surged south to break through the Union force opposed at one point by only 400 cavalrymen led by Union General George A. Custer.[44] Custer rallied his Michigan cavalry with the fierce cry, "Come on, you Wolverines!" and charged headlong into the superior force.[45] Combining tactical audacity with sheer bravado, Custer put his men into line and subsequently disrupted the Confederate attack causing them to break ranks.[46] Once broken, the two forces engaged in fierce, close quarters battles. This singular act of courage by Custer prevented Stuart's *manoeuvre sur les derrières* and any hope for a decisive Confederate victory.

The Battle of Gettysburg is widely accepted as the "high-water mark" of the Confederacy's secessionary struggle and a failure in Lee's portfolio of otherwise superb generalship.[47] The battle on 3 July climaxed with Stuart's *manoeuvre sur les derrières* failing because of Custer's fierce resistance and General Pickett's division of 13,000 Confederates being crippled by attacking across a mile-long stretch of open field into the teeth of Union artillery.[48] General Lee's Army of Northern Virginia found herself bloodily repulsed.[49] On the morning of 4 July, the country awoke to the growing realization that Gettysburg was a massive defeat for the South.[50] But for the heroic acts of Custer, the reader is left with the tantalizing thought that if Stuart had successfully reached Cemetery Hill, Pickett's charge might have carried the day.

III. Conclusion

Carhart's *Lost Triumph* forges a new and more complex understanding of Lee's battle plan at Gettysburg, of Lee as a commander, and of Custer's officership. Carhart provides convincing evidence that Stuart's real mission on 3 July was to conduct a flanking attack into the rear of Union forces on Cemetery Ridge and Culp's Hill. Brick by brick, Carhart builds a wall of persuasive argument and makes headway in relieving Lee almost entirely of responsibility for the loss at Gettysburg. Carhart, however, disappoints readers by failing to note the account of Captain William E. Miller of the 3d Pennsylvania Cavalry:

> [Stuart's] avowed object was to strike the rear of the Federal army in cooperation with Pickett's grand attack upon its center. For this movement he succeeded in attaining a most commanding position, and, according to the surmise of Major H. B. McClellan, Stuart's adjutant-general, gave to Lee the preconcerted signal for the attack. The field of this cavalry fight was south of the Rummel buildings. To this field Stuart advanced his whole force, engaged in an obstinate and desperate struggle with the Federal cavalry, was driven back out of the field and forced to retire to his original position.[51]

By failing to acknowledge Miller's testimony, Carhart misses a persuasive ally.

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[42] *Id*. at 204, 208.

[43] *Id*. at 213-40.

[44] *Id*. at 210, 235.

[45] *Id*.

[46] *Id.* at 235-36.

[47] James M. McPherson, *Foreword* to LOST TRIUMPH, *supra* note 1 at xi. This would be Lee's last offensive into the North.

[48] *Id.* at 1-3.

[49] During Pickett's charge alone, some 6,500 Confederates were cut down in just over more than sixteen minutes. SMITH, *supra* note 22, at 104.

[50] Not only a numerical tragedy, the most significant impact was Lee's inability to remain on the offensive and achieve a decisive victory. "Confederate losses were 4637 killed, 12,391 wounded, and 846 missing or captured. Union losses were 3149 killed, 14,503 wounded, and 5161 missing or wounded." *Id*. at 113.

[51] WILLIAM E. MILLER, CAPTAIN, 3D PA CAVALRY, THE CAVALRY BATTLE NEAR GETTYSBURG, *reprinted in* 3 BATTLES AND LEADERS OF THE CIVIL WAR 406 (Robert U. Johnson & Clarence C. Buel eds., Book Sales 2000) (1887).

Carhart's comparative methodology in examining the battles of Cannae, Leuthen, and Austerlitz is instructive and powerful. The evidence strongly supports a portrait of Lee as a Napoleonic tactician. Early on, Carhart spends a scant twenty-six pages examining the roots of Lee's Civil War strategy, including passages devoted to the Napoleonic warfare. He later provides more analysis by comparing Lee's attempted *manoeuvre sur les derrières* to Napoleon's actions at Castiglione.[52] *Lost Triumph* ultimately explains why Lee ordered Longstreet's forces, including Pickett's division, against the Union left wing by persuasively revealing the three Napoleonic prongs of Lee's third-day battle plan.

For all its analytical strength, Carhart does not adequately criticize Lee for his shortcomings. For instance, while Napoleon chose the ground where he wanted to engage a numerically superior Allied force at Austerlitz, Carhart fails to comment on why Lee chose to tackle an entrenched Union force on Cemetery Ridge, especially in light of his freedom of maneuver.[53] History's hindsight shows that Lee's decision to stay and fight at Gettysburg was a tragic error. Furthermore, while Carhart's *Lost Triumph* deservedly calls attention to Custer's heroics, it is not clear whether the entire Union victory should be attributed to Custer's actions. These blemishes aside, Carhart supports his thesis with detailed research and useful maps. For example, Carhart explains away the layman's critique that Stuart's flanking mission is not specifically documented in Lee's after-action reports and misleadingly documented in the Civil War *Official Records*.[54] The reader is thus informed that Lee only rarely revealed his battle plans after Appomattox[55] and that Stuart was highly misleading in his written accounts.[56] Carhart's style is both readable and accessible. He provides in-depth coverage of the critical events on the east cavalry field at Gettysburg without losing the reader's attention.

Carhart's *Lost Triumph* signals a profound shift in the common assessment of the Battle of Gettysburg, the decisive engagement of the Civil War, in stature if not military significance. Both students and casual observes will find Carhart's prose highly entertaining and educational. Since military history offers few answers and raises many questions, *Lost Triumph* gets high marks for not sating the reader, but rather increasing the appetite for deeper scrutiny. Members of the military profession have perhaps a more compelling reason to examine *Lost Triumph*. Carhart's study demonstrates that military leaders should study epic battles such as Gettysburg to understand their precedents.[57] Carhart's analysis provides a fresh perspective as to why the tide turned against the Confederate Army in early July 1863. Whether the leader seeks a deeper understanding of Gettysburg or just wants to wile away a Sunday afternoon with a great tale of tragedy and heroism, *Lost Triumph* delivers with force and verve.

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[52] CARHART, *supra* note 1, at 156-58.

[53] *Id.* at 51.

[54] *Id.* at 197-99; 241 (discussing records contained in THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (Washington: Government Printing Office 1889) [hereinafter OFFICIAL RECORDS].

[55] *Id*. at 95.

[56] *Id*. at 197-202.

[57] *See generally* Colonel Thomas E. Gries, *A Perspective on Military History, in* A GUIDE TO THE USE AND STUDY OF MILITARY HISTORY 25 (John E. Jessup, Jr. & Robert W. Coakley eds., Center of Military History, U.S. Army 1979).

Announcement

Operational Law Handbook

The newest edition of the *Operational Law Handbook* (*Handbook*) is now available. The August 2006 *Handbook* is a "how to" guide for judge advocates practicing operational law. It provides references and describes tactics and techniques for the practice of operational law. The *Handbook* supports the doctrinal concepts and principles of *Field Manual 3-0* and *Field Manual 27-100* but is not a substitute for official references. Like operational law itself, the *Handbook* is a focused collection of diverse legal and practical information. The *Handbook* is not intended to provide "the school solution" to a particular problem but is designed to help judge advocates recognize, analyze, and resolve the problems they will encounter in the operational context. Similarly, the *Handbook* is not intended to represent official U.S. policy regarding the binding application of varied sources of law; however, the *Handbook* may reference source documents that do.

The *Handbook* is designed and written for judge advocates practicing operational law. The size and contents of the *Handbook* are controlled by this focus. Frequently, the authors were forced to strike a balance between the temptation to include more information and the need to retain the *Handbook* in its current size and configuration. The *Handbook* is made for the Soldiers, Marines, Airmen, Sailors, and Coast Guardsmen of the service judge advocate general's corps who serve alongside their clients in the operational context. Accordingly, the *Handbook* is compatible with current joint and combined doctrine.

The proponent for this publication is the International and Operational Law Department, The Judge Advocate General's Legal Center and School (TJAGLCS). Please send comments, suggestions, and work product from the field to TJAGLCS, International and Operational Law Department, Attention: MAJ John Rawcliffe, 600 Massie Road, Charlottesville, Virginia 22903-1781. To gain more detailed information or to discuss an issue with the author of a particular chapter or appendix, call MAJ Rawcliffe at DSN 521-3383; commercial (434) 971-3383; or e-mail john.rawcliffe@hqda.army.mil.

In recent years, the *Handbook* has been published in July or August and dated for the following year. For example, the 2005 edition was first published in August 2004. Beginning with this edition, the date of the *Handbook* will be the date of actual publication. Accordingly, the 2007 *Handbook* can be expected in August 2007.

The August 2006 *Handbook* is available on the Internet at www.jagcnet.army.mil in the Center for Law and Military Operations' database. The digital copies are particularly valuable research tools because they are fully searchable and contain many hypertext links to the various treaties, statutes, Department of Defense directives, instructions, manuals, Chairman of the Joint Chiefs of Staff instructions, joint publications, Army regulations, and field manuals that are referenced in the text.

Beginning with the August Operational Law Course, the International and Operational Law Department intends to issue the *Handbook* to the following courses:[1]

Operational Law Course
Judge Advocate Officer Basic Course (BOLC Phase III)
Judge Advocate Officer Graduate Course
Judge Advocate Officer Advanced Course
Staff Judge Advocate Course
Warrant Officer Basic and Advanced Courses
World-Wide Continuing Legal Education Course

The Center for Law and Military Operations will soon distribute copies to many Offices of the Staff Judge Advocate. To order additional copies of the August 2006 *Handbook*, please contact the Center for Law and Military Operations at DSN 521-3339 or commercial (434) 971 3339, or via e-mail at CLAMO@hqda.army.mil.

[1] Subject to potential funding constraints.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).
> Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (June 2006 - October 2007) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	55th Graduate Course	14 Aug 06 – 24 May 07
5-27-C22	56th Graduate Course	13 Aug 07 – 28 May 08
5-27-C20	171st JA Officer Basic Course	22 Oct – 3 Nov 06 (BOLC III) Ft. Lee
		3 Nov 06 – 31 Jan 07 (BOLC III) TJAGSA
5-27-C20	172d JA Officer Basic Course	4 – 16 Feb 07 (BOLC III) Ft. Lee
		16 Feb – 2 May 07 (BOLC III) TJAGSA
5-27-C20	173d JA Officer Basic Course	1 – 13 Jul 07 (BOLC III) Ft. Lee
		13 – Jul – 26 Sep 07 (BOLC III) TJAGSA **(Tentative)**
5F-F70	38th Methods of Instruction Course	26 – 27 Jul 07
5F-F1	194th Senior Officers Legal Orientation Course	13 – 17 Nov 06
5F-F1	195th Senior Officers Legal Orientation Course	29 Jan – 2 Feb 07
5F-F1	196th Senior Officers Legal Orientation Course	26 – 30 Mar 07
5F-F1	197th Senior Officers Legal Orientation Course	11 – 15 Jun 07

5F-F1	198th Senior Officers Legal Orientation Course	10 – 14 Sep 07
5F-F3	13th RC General Officers Legal Orientation Course	14 – 16 Feb 07
5F-F52	37th Staff Judge Advocate Course	4 – 8 Jun 07
5F-F52-S	10th Staff Judge Advocate Team Leadership Course	4 – 6 Jun 07
5F-F55	2007 JAOAC (Phase II)	7 – 19 Jan 07
5F-JAG	2007 JAG Annual CLE Workshop	1 – 5 Oct 07
JARC-181	2007 JA Professional Recruiting Seminar	17 – 20 Jul 07
NCO ACADEMY COURSES		
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	6 Nov – 8 Dec 06
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	28 Jan – 2 Mar 07
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	3 Apr – 4 May 07
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	3 Apr – 4 May 07
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	11 Jun – 13 Jul 07
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	13 Aug – 14 Sep 07
512-27D40 (Phase 2)	Paralegal Specialist ANCOC	6 Nov – 8 Dec 06
512-27D40 (Phase 2)	Paralegal Specialist ANCOC	28 Jan – 2 Mar 07
512-27D40 (Phase 2)	Paralegal Specialist ANCOC	11 Jun – 13 Jul 07
512-27D40 (Phase 2)	Paralegal Specialist ANCOC	13 Aug – 14 Sep 07
WARRANT OFFICER COURSES		
7A-270A1	18th Legal Administrators Course	5 – 9 Feb 07
7A-270A2	8th JA Warrant Officer Advanced Course	16 Jul – 3 Aug 07
7A-270A0	14th JA Warrant Officer Basic Course	29 May – 22 Jun 07
ENLISTED COURSES		
5F-F58	2007 Sergeants Major Symposium	5 – 9 Feb 07
512-27DC5	22d Court Reporter Course	29 Jan – 30 Mar 07
512-27DC5	23d Court Reporter Course	23 Apr – 22 Jun 07
512-27DC5	24th Court Reporter Course	30 Jul – 28 Sep 07
512-27DC6	7th Court Reporting Symposium	30 Oct – 3 Nov 06
512-27DC6	8th Court Reporting Symposium	29 Oct – 3 Nov 07

512-27D/20/30	18th Law for Paralegal NCOs Course	26 – 30 Mar 07
512-27D/40/50	16th Senior Paralegal Course	18 – 22 Jun 07
512-27D-CLNCO	9th Chief Paralegal/BCT NCO Course	5 – 9 Mar 07
ADMINISTRATIVE AND CIVIL LAW		
5F-F21	6th Advanced Law of Federal Employment Course	17 – 19 Oct 07
5F-F22	61st Law of Federal Employment Course	15 – 19 Oct 07
5F-F23	59th Legal Assistance Course	30 Oct – 3 Nov 06
5F-F23	60th Legal Assistance Course	7 – 11 May 07
5F-F23	61st Legal Assistance Course	29 Oct – 2 Nov 07
5F-F24	31st Admin Law for Military Installations Course	19 – 23 Mar 07
5F-F28	2006 Income Tax Course	11 – 15 Dec 06
5F-F29	25th Federal Litigation Course	30 Jul – 3 Aug 07
5F-F202	5th Ethics Counselors Course	16 – 20 Apr 07
5F-F23E	2007 USAREUR Legal Assistance CLE	22 – 26 Oct 07
5F-F24E	2007 USAREUR Administrative Law CLE	17 – 21 Sep 07
5F-F26E	2007 USAREUR Claims Course	15 – 19 Oct 07
5F-F28E	2006 USAREUR Income Tax CLE	4 – 8 Dec 06
5F-F28P	2007 PACOM Income Tax CLE	6 – 9 Nov 06
5F-F28H	2006 HAWAII Income Tax CLE	13 – 17 Nov 06

CONTRACT AND FISCAL LAW		
5F-F10	157th Contract Attorneys Course	5 – 13 Mar 07
	158th Contract Attorneys Course	23 Jul – 3 Aug 07
5F-F11	2006 Government Contract Law Symposium	5 – 8 Dec 06
5F-F12	76th Fiscal Law Course	30 Apr – 4 May 07
5F-F13	3d Operational Contracting Course	14 – 16 Mar 07
5F-F102	6th Contract Litigation Course	9 – 13 Apr 07
5F-F15E	2007 USAREUR Contract & Fiscal Law CLE	13 – 16 Feb 07
N/A	2007 Distance Learning Fiscal Law	6 – 9 Feb 07
5F-F14	Comptrollers Accreditation Fiscal Law Course (Washington, DC)	16 – 19 Jan 07

5F-F14	Comptrollers Accreditation Fiscal Law Course (Yuma, AZ)	22 – 26 Jan 07
5F-F14	Comptrollers Accreditation Fiscal Law Course (Ft. Monmouth, NJ)	5 – 8 Jun 07
CRIMINAL LAW		
5F-F33	50th Military Judge Course	23 Apr – 11 May 07
5F-F34	27th Criminal Law Advocacy Course	5 – 16 Feb 07
5F-F34	28th Criminal Law Advocacy Course	10 – 21 Sep 07
5F-F35	30th Criminal Law New Developments Course	6 – 9 Nov 06
5F-301	10th Advanced Advocacy Training	29 May – 1 Jun 07
5F-F35E	2007 USAREUR Criminal Law CLE	29 Jan – 2 Feb 07
INTERNATIONAL AND OPERATIONAL LAW		
5F-F42	3d Advanced Intelligence Law Course	27 – 29 Jun 07
	48th Operational Law Course	30 Jul – 10 Aug 07
5F-F42	87th Law of War Course	29 Jan – 2 Feb 07
5F-F42	88th Law of War Course	9 – 13 Jul 07
5F-F44	2d Information Operations Course	16 – 20 Jul 07
5F-F45	6th Domestic Operational Law Course	13 Nov – 17 Nov 06
5F-F45	7th Domestic Operational Law Course	29 Oct – 2 Nov 07
5F-F47	47th Operational Law Course	26 Feb – 9 Mar 07
5F-F47	48th Operational Law Course	30 Jul – 10 Aug 07

3. Naval Justice School and FY 2007 Course Schedule

Please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131, for information about the courses.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (010) Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	16 Oct – 15 Dec 06 22 Jan – 23 Mar 07 4 Jun – 3 Aug 07 13 Aug – 12 Oct 07
BOLT	BOLT (020) BOLT (020) BOLT (030) BOLT (030)	26 – 30 Mar 07 (USMC) 26 – 30 Mar 07 (NJS) 6 – 10 Aug 07 (USMC) 6 – 10 Aug 07 (NJS)
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	7 – 11 May 07 10 – 14 Sep 07

914L	Law of Naval Operations (Reservists) (010) Law of Naval Operations (Reservists) (020)	14 – 18 May 07 17 – 21 May 07
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	29 May – 8 Jun 07 6 – 17 Aug 07
850V	Law of Military Operations (010)	11 – 22 Jun 07
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	26 – 30 Mar 07 (San Diego) 16 – 20 Apr 07 (Norfolk)
748K	National Institute of Trial Advocacy (010)	23 – 27 Oct 06 (Camp Lejeune)
	National Institute of Trial Advocacy (020)	14 – 18 May 07 (San Diego)
0258	Senior Officer (010) Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060)	30 Oct – 3 Nov 06 (New Port) 8 – 12 Jan 07 (New Port) 12 – 16 Mar 07 (New Port) 7 – 11 May 07 (New Port) 23 – 27 Jul 07 (New Port) 24 – 28 Sep 07 (New Port)
4048	Estate Planning (010)	23 – 27 Jul 07
No CDP	Prosecuting Trial Enhancement Training (010)	22 – 26 Jan 07
7487	Family Law/Consumer Law (010)	16 – 20 Apr 07
7485	Litigating National Security (010)	5 – 7 Mar 07
748B	Naval Legal Service Command Senior Officer Leadership (010)	20 – 31 Aug 07
2205	Defense Trial Enhancement (010)	8 – 12 Jan 07
3938	Computer Crimes (010)	21 – 25 May 07 (Norfolk)
961D	Military Law Update Workshop (Officer) (010) Military Law Update Workshop (Officer) (020)	TBD TBD
961M	Effective Courtroom Communications (020)	26 – 30 Mar 07 (San Diego)
961J	Defending Complex Cases (010)	16 – 20 Jul 07
525N	Prosecuting Complex Cases (010)	9 – 13 Jul 07
2622	Senior Officer (Fleet) (010) Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050) Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110) Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	13 – 17 Nov 06 (Pensacola, FL) 11 – 15 Dec 06 (Pensacola, FL) 29 Jan – 2 Feb 07 (Yokosuka, Japan) 5 Feb – 9 Feb 07 (Okinawa, Japan) 12 – 16 Feb 07 (Pensacola, FL) 26 – 30 Mar 07 (Pensacola, FL) 2 – 6 Apr 07 (Quantico, VA) 9 – 13 Apr 07 (Camp Lejeune, NC) 23 – 27 Apr 07 (Pensacola, FL) 23 – 27 Apr 07 (Naples, Italy) 4 – 8 Jun 07 (Pensacola, FL) 9 – 13 Jul 07 (Pensacola, FL) 27 – 31 Aug 07 (Pensacola, FL)

961A	Continuing Legal Education (PACOM) (010) Continuing Legal Education (EUCOM) (020)	29 – 30 Jan 07 (Yokosuka, Japan) 23 – 24 Apr 07 (Naples, Italy)
7878	Legal Assistance Paralegal Course (010)	16 Apr – 20 Apr 07
3090	Legalman Course (010) Legalman Course (020)	16 Jan – 30 Mar 07 16 Apr – 29 Jun 07
846L	Senior Legalman Leadership Course (010)	23 – 27 Jul 07
049N	Reserve Legalman Course (Phase I) (010)	9 – 20 Apr 07
056L	Reserve Legalman Course (Phase II) (010)	23 Apr – 4 May 07
846M	Reserve Legalman Course (Phase III) (010)	7 – 18 May 07
5764	LN/Legal Specialist Mid Career Course (020)	17 – 28 Sep 07
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted (020)	TBD TBD
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	19 – 30 Mar 07 (Newport) 7 – 18 May 07 (Norfolk) 16 – 27 Jul 07 (San Diego)
4046	SJA Legalman (020)	29 May – 7 Jun 07 (Newport)
627S	Senior Enlisted Leadership Course (010) Senior Enlisted Leadership Course (020) Senior Enlisted Leadership Course (030) Senior Enlisted Leadership Course (040) Senior Enlisted Leadership Course (050) Senior Enlisted Leadership Course (060) Senior Enlisted Leadership Course (070) Senior Enlisted Leadership Course (080) Senior Enlisted Leadership Course (090) Senior Enlisted Leadership Course (100) Senior Enlisted Leadership Course (110) Senior Enlisted Leadership Course (120) Senior Enlisted Leadership Course (130) Senior Enlisted Leadership Course (140) Senior Enlisted Leadership Course (150) Senior Enlisted Leadership Course (160) Senior Enlisted Leadership Course (170) Senior Enlisted Leadership Course (180)	11 – 13 Oct 06 (Norfolk) 23 – 25 Oct 06 (San Diego) 8 – 10 Nov 06 (Norfolk) 10 – 12 Jan 07 (Mayport) 29 – 31 Jan 07 (Pendleton) 30 Jan – 1 Feb 07 (Yokosuka, Japan) 6 – 8 Feb 07 (Okinawa, Japan) 21 – 23 Feb 07 (Norfolk) 20 – 22 Mar 07 (San Diego) 28 – 30 Mar 07 (Norfolk) 25 – 27 Apr 07 (Norfolk) 24 – 26 Apr 07 (Bremerton) 1 – 3 May 07 (San Diego) 23 – 25 May 07 (Norfolk) 17 – 19 Jul 07 (San Diego) 18 – 20 Jul 07 (Great Lakes) 15 – 17 Aug 07 (Norfolk) 28 – 30 Aug 07 (Pendleton)
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	16 Oct – 3 Nov 06 27 Nov – 15 Dec 06 29 Jan – 16 Feb 07 5 – 23 Mar 07 30 Apr – 18 May 07 4 – 22 Jun 07 23 Jul – 10 Aug 07 10 – 28 Sep 07

0379	Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	4 – 15 Dec 06 22 Jan – 2 Feb 07 5 – 16 Mar 07 2 – 13 Apr 07 4 – 15 Jun 07 30 Jul – 10 Aug 07 10 – 21 Sep 07
3760	Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	13 – 17 Nov 06 8 – 12 Jan 07 (Mayport) 26 Feb – 2 Mar 07 2 – 6 Apr 07 25 – 29 Jun 07 16 – 20 Jul 07 (Great Lakes) 27 – 31 Aug 07
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalmen (030)	18 – 29 Jun 07
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	2 – 20 Oct 06 27 Nov – 15 Dec 06 8 – 26 Jan 07 26 Feb – 16 Mar 07 7 – 25 May 07 11 – 29 Jun 07 30 Jul – 17 Aug 07 10 – 28 Sep 07
947J	Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	2 – 13 Oct 06 6 – 17 Nov 06 27 Nov – 8 Dec 06 8 – 19 Jan 07 2 – 13 Apr 07 7 – 18 May 07 11 – 22 Jun 07 30 Jul – 10 Aug 07
3759	Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	30 Oct – 3 Nov 06 (San Diego) 29 Jan – 2 Feb 07 (Pendleton) 12 – 16 Feb 07 (San Diego) 2 – 6 Apr 07 (San Diego) 23 – 27 Apr 07 (Bremerton) 4 – 8 Jun 07 (San Diego) 20 – 24 Aug 07 (San Diego) 27 – 31 Aug 07 (Pendleton)
2205	CA Legal Assistance Course (010)	5 – 9 Feb 07 (San Diego)
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalmen (010)	26 Feb – 9 Mar 07

4. Air Force Judge Advocate General School Fiscal Year 2007 Course Schedule

Please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445, for information about attending the listed courses.

Air Force Judge Advocate General School Maxwell AFB, AL	
Course Title	**Dates**
Paralegal Apprentice Course, Class 07-01	2 Oct – 15 Nov 06
Judge Advocate Staff Officer Course, Class 07-A	10 Oct – 14 Dec 06
Paralegal Craftsman Course, Class 07-01	16 Oct – 21 Nov 06
Advanced Environmental Law Course, Class 07-A (Off-Site Wash DC Location)	30 – 31 Oct 06
Deployed Fiscal Law & Contingency Contracting Course, Class 07-A	28 Nov – 1 Dec 06
Paralegal Apprentice Course, Class 07-02	8 Jan – 21 Feb 07
Claims & Tort Litigation Course, Class 07-A	8 – 12 Jan 07
Air National Guard Annual Survey of the Law, Class 07-A & B (Off-Site)	19 – 20 Jan 07
Air Force Reserve Annual Survey of the Law, Class 07-A & B (Off-Site)	19 – 20 Jan 07
Computer Legal Issues Course, Class 07-A	22 – 26 Jan 07
Legal Aspects of Information Operations Law Course, Class 07-A	22 – 24 Jan 07
Trial & Defense Advocacy Course, Class 07-A	29 Jan – 9 Feb 07
Total Air Force Operations Law Course, Class 07-A	9 – 11 Feb 07
Homeland Defense Course, Class 07-A	12 – 16 Feb 07
Fiscal Law Course (DL), Class 07-A	12 – 16 Feb 07
Paralegal Craftsman Course, Class 07-02	13 Feb – 20 Mar 07
Judge Advocate Staff Officer Course, Class 07-B	20 Feb – 20 Apr 07
Paralegal Apprentice Course, Class 07-03	2 Mar – 13 Apr 07
Environmental Law Update Course (DL), Class 07-A	26 – 30 Mar 07
Paralegal Craftsman Course, Class 07-003	2 Apr – 4 May 07
Interservice Military Judges' Seminar, Class 07-A	10 – 13 Apr 07
Advanced Trial Advocacy Course, Class 07-A	23 – 27 Apr 07
Paralegal Apprentice Course, Class 07-04	22 Apr – 5 Jun 07
Environmental Law Course , Class 07-A	30 Apr – 4 May 07
Reserve Forces Judge Advocate Course, Class 07-A	7 – 11 May 07

Reserve Forces Paralegal Course, Class 07-A	7 – 18 May 07
Operations Law Course, Class 07-A	14 – 24 May 07
Military Justice Administration Course, Class 07-A	21 – 25 May 07
Accident Investigation Board Legal Advisors' Course, Class 07-A	4 – 8 Jun 07
Staff Judge Advocate Course, Class 07-A	11 – 22 Jun 07
Law Office Management Course, Class 07-A	11 – 22 Jun 07
Paralegal Apprentice Course, Class 07-05	18 Jun – 31 Jul 07
Advanced Labor & Employment Law Course, Class 07-A	25 – 29 Jun 07
Negotiation and Appropriate Dispute Resolution Course, Class 07-A	9 – 13 Jul 07
Judge Advocate Staff Officer Course, Class 07-C	16 Jul – 14 Sep 07
Paralegal Craftsman Course, Class 07-04	7 Aug – 11 Sep 07
Paralegal Apprentice Course, Class 07-06	13 Aug – 25 Sep 07
Reserve Forces Judge Advocate Course, Class 07-B	27 – 31 Aug 07
Trial & Defense Advocacy Course, Class 07-B	17 – 28 Sep 07
Legal Aspects of Sexual Assault Workshop, Class 07-A	25 – 27 Sep 07

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the March 2006 issue of *The Army Lawyer*.

6. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2007

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2006***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2007. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2007 JAOAC will be held in January 2007 and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2006). If the student receives notice of the need to re-do any examination or exercise after 1 October 2006, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2006 will not be cleared to attend the 2007 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions regarding attendance at Phase II (Residence Phase) or completion of Phase I writing exercises, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil.

For system or help desk issues regarding JAOAC or any on-line or correspondence course material, please contact the Distance Learning Department at jagc.training@hqda.army.mil or commercial telephone (434) 971-3153.

7. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually

New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October Completion Deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

* Military exempt (exemption must be declared with state).
**Must declare exemption.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2006-2007).

Date	Unit/Location	ATTRS Course Number	Topic	POC
17-20 Nov 06	12th LSO Columbia, SC	Course #: JAO-1 Class: 001	International & Operational Law Administrative & Civil Law/ Legal Assistance	LTC Jim Hardin (919) 219-3860 jim.hardinjr@us.army.mil
10-12 Nov 06	214th LSO Bloomington, MN		Cancelled due to funding	CPT Eric Teegarden (612) 239-3599 eric.teegarden@us.army.mil
18-19 Nov 06	77th RRC New York City, NY	Class: 002	Contract & Fiscal Law Administrative & Civil Law/ Legal Assistance	MAJ John P. Dupon (718) 352-5654 john.dupon@us.army.mil
27-28 Jan 07	70th RRC Seattle, WA	Class: 003	International & Operational Law Administrative & Civil Law/ Legal Assistance	MAJ Tom Quinlan (253) 565-5019 thomas.p.quinlan@us.army.mil SFC Victoria White (ATTRS Registration) Victoria.stephens@usar.army.mil
3-4 Feb 07	96th RRC/87th LSO Salt Lake City, UT	Class: 004	International & Operational Law Administrative & Civil Law/ Legal Assistance	SFC Matthew Neumann (801) 656-3600 matthew.neumann@usar.army.mil
24-25 Feb 07	17th LSO Miami/ Ft. Lauderdale, FL	Class: 005	International & Operational Law Contract & Fiscal Law	MSG Timothy Stewart (305) 779-4022 tim.stewart@us.army.mil
3-4 Mar 07	10th LSO Ft. Belvoir, VA	Class: 006	Contract & Fiscal Law Administrative & Civil Law/ Legal Assistance	MAJ Arthur Kaff (703) 588-6762 arthur.kaff@us.army.mil
10-11 Mar 07	63d RRC/78th LSO Anaheim, CA	Class: 007	Contract & Fiscal Law Criminal Law	MAJ DeEtte Loeffler (619) 241-6966 deette.loeffler@us.army.mil
20-22 Apr 07	90th RRC Tulsa, OK	Class: 008	Criminal Law Administrative & Civil Law/ Legal Assistance	LTC Baucum Fulk (501) 771-8765 baucum.fulk@us.army.mil
28-29 Apr 07	Indiana ARNG Indianapolis, IN	Class: 009	Contract & Fiscal Law Administrative & Civil Law/ Legal Assistance	LTC Brian Dickerson (317) 247-3491 brian.c.dickerson@in.ngb.army.mil
4-6 May 07	213th LSO Atlanta, GA	Class: 010	International & Operational Law Contract & Fiscal Law	LTC Robin Allen (404) 562-9583 allen.robin@epamail.epa.gov
19-20 May 07	139th LSO Nashville, TN	Class: 011	Contract & Fiscal Law Criminal Law	LTC Kymberly Haas (615) 256-3148 attorneykhaas@aol.com
19-20 May 07	91st LSO Oak Brook, IL	Class: 012	International & Operational Law Administrative & Civil Law/ Legal Assistance	CPT Bradley Olson (309) 782-3361 bradley.olson@us.army.mil
22-24 Jun 07	94th RRC Boston/Devins, MA	Class: 013	International & Operational Law Administrative & Civil Law/ Legal Assistance	CPT Susan Lynch (978) 784-3933 susan.lynch@usar.army.mil

2. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.
AD A301095	Government Contract Law Desk book, vol. 2, JA-501-2-95.
AD A265777	Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333	Servicemembers Civil Relief Act Guide, JA-260 (2006).
AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).
AD A326002	Wills Guide, JA-262 (1997).
AD A346757	Family Law Guide, JA 263 (1998).
AD A384376	Consumer Law Deskbook, JA 265 (2004).
AD A372624	Legal Assistance Worldwide Directory, JA-267 (1999).
AD A360700	Tax Information Series, JA 269 (2002).
AD A350513	Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).
AD A350514	Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

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(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site:

http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGLCS Publications available through the LAAWS XXI JAGCNet, see the March 2006, issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at Dottie.Evans@hqda.army.mil.

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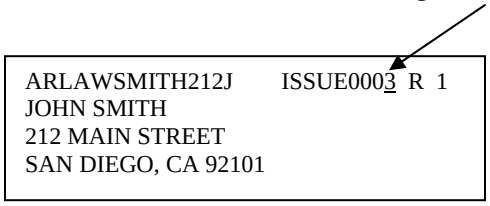

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