A MATTER OF POLICY: UNITED STATES APPLICATION OF THE LAW OF ARMED CONFLICT

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INTRODUCTION

To what extent does the law of armed conflict (LOAC)[1] apply to the United States military fighting in armed conflicts? Though the question seems straightforward enough, the answer is anything but. This article explains, in general, why the answer is imprecise and unsatisfying as applied to the most prevalent type of contemporary armed conflict, non-international.[2] More specifically, this article argues that the U.S.

persuasive but not substantively responsive.

The United States has been engaged in armed conflict since at least the al Qaeda terrorist network attacks of September 11, 2001.[3] The initial armed conflict was between the United States and Taliban controlled Afghanistan,

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1. The law of armed conflict, also known as international humanitarian law, refers to the rules governing the actual conduct of armed conduct (jus in bello) and not to the rules governing the resort to armed conflict (jus ad bellum). ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 1 (3d ed. 2000).

2. There are two categories of armed conflict, international (IAC) and non-international (NIAC). As discussed *infra*, the vast majority of the law of armed conflict or LOAC applies to IAC, yet NIACs are far more prevalent. Thus the kind of armed conflicts which most often occur have the least of applicable LOAC.

3. Arguments that an armed conflict between the United States and al Qaeda existed prior to 9/11 are outside the scope of this article.

where al Qaeda was then operating.[4] With a country, in international law terms, a state, on either side of the armed conflict, the result was an international armed conflict (IAC).[5] The existence of an IAC triggers the largest amount of the LOAC applicable as a matter of law.[6] The LOAC applicable to and in an IAC as a matter of law includes all four of the 1949 Geneva Conventions[7] (totaling over 200 pages) and a series of eighteen Hague Conventions from 1899 and 1907.[8] In short, IACs trigger the application of the largest amount of the LOAC.

But the IAC in Afghanistan ended in late 2001 when a new, anti-Taliban, interim Afghan government assumed control of the country.[9] Of course the

or NIAC.[12] There is very little LOAC that applies as a matter of law to all NIACs - but one article of the 1949 Geneva Conventions, which deals with [13] And while those provisions (known as common article three), in requiring humane treatment of vulnerable persons, are significant, they comprise but one article.[14]

Thus when an armed conflict transitions from international to non-international, a legal lacuna or gap is created. There are essentially three possible responses when confronting this gap: (1) do nothing; (2) apply customary international law (CIL);[15] and/or (3) apply the more robust law governing IACs as a matter of policy. This article explores these options as applied to the United States, focusing on option 3, the U.S. application of IAC law to NIACs as a matter of policy.

Applying LOAC as a matter of policy when that law would otherwise be inapplicable appears to be largely *how* the U.S. has answered the question asked at the outset. But *what* the answer is, which specific LOAC provisions the U.S. is applying, remains elusive, both to external observers and worse, to the members of the U.S. armed forces fighting in the armed conflicts. And this is despite, indeed illustrated by, numerous statements by different parts of the executive branch, under different Presidents, about applying LOAC as a matter of policy.

For example, John Bellinger, the former legal adviser at the Department of State (DoS) during the Bush Administration, claimed that the U.S. [16] His successor as DoS legal

12. Regardless of how many states are on one side, if they are not opposed by another state the armed conflict is a NIAC. *See generally* SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL CONFLICT (2012).

13. Third Geneva Cona nBTf5.04 TfG 0.h,as

337 J

Iraq.[29] The international nature of these conflicts was short lived, as the U.S. and its coalition partners toppled Taliban-ruled Afghanistan in roughly twelve weeks and [30]

Armed conflict most certainly continued, but in a non-international form the U.S. and other countries partnered with the new interim governments of Afghanistan and Iraq to fight insurgencies comprised of non-state actors.[31] These conflicts were (and remain) NIACs.[32] But as described

namely Common Article Three, applied.[36] In essence the U.S. government argued for *less* law.[37]

The U.S. advanced this argument in litigation involving Osama Bin [38] Afghan forces captured Hamdan in Afghanistan in the fall of 2001 and turned him over to the U.S., which then transported Hamdan to Guantanamo.[39] At issue in the litigation was whether for a writ of habeas corpus in U.S. federal court.[40] Through the petition, Hamdan challenged the authority of a U.S. military commission to prosecute him for conspiracy and providing material support for terrorism.[41]

As part of its argument, the U.S. government claimed that no portion of the Geneva Conventions applied as a matter of law to the armed conflict in Afghanistan against al Qaeda.[42] There were both reasonable and unreasonable aspects to this claim. The reasonable portion of the argument was that the armed conflict with al Qaeda could not be an IAC because al Qaeda is not a state nor a high contracting party to the Geneva Conventions.[43] As a result, the only portion of the Geneva Conventions which could potentially apply as a matter of law was Common Article Three.[44] Where the even Common Article Three applied.[45]

36. THE WHITE HOUSE, HUMANE TREATMENT OF AL QAEDA AND TALIBAN DETAINEES (2002) [hereinafter White House memo] (claiming that neither the 1949 Geneva Conventions governing IAC nor Common Article 3 governing NIAC were applicable in the U.S. s armed conflict against al Qaeda and the Taliban).

37. *Id.* President Bush signed a memo which essentially claimed no LOAC applied less than a month after the U.S. began transporting detainees to the U.S. Naval Station at Guantanamo Bay, Cuba. What followed were a series of memorandums by various U.S. government officials authorizing enhanced interrogation techniques and are now referred to as the Torture Memos. One reason the U.S. government was interested in no LOAC applying was that as previously discussed, the LOAC contains prohibitions against cruel, inhumane, and degrading treatment, as well as torture. While arguments can be made about some enhanced interrogation techniques not qualifying as CIDT, it s beyond reasonable debate that certain techniques, notably waterboarding, most certainly did qualify. *See A Guide to the Memos on Torture*, N.Y. TIMES, http://www.nytimes.com/ref/international/24MEMO-GUIDE.html (last visited Mar. 15, 2017).

38. Hamdan v. Rumsfeld, 548 U.S. 557, 570 (2006).

39. *Id* at 566.

40. *Id*. at 572.

41. Hamdan filed his petition prior to the DTA s enactment. *Id*. at 572; *see also Hamdan Charge Sheet*, http://www.mc.mil/Portals/0/pdfs/Hamdan/Hamdan%20(AE001).pdf.

42. *Hamdan*, 548 U.S. at 628

43. *Id*. at 629.

44. *Id*.

45. *Id*. at 630.

344

treaty law in both international and non-international conflicts and so [54]

number of preemptory norms[55] there are varied understandings of what rules are or are not considered CIL.[56] This is unfortunate, as according to some estimates, 86% of IAC law may well be considered as CIL and thus applicable to NIAC on that basis.[57]

Countries, including the U.S., have not felt the need to detail what rules they consider as CIL.[58] And when the ICRC issued a study of what rules

methodology while still not disclosing what the U.S. considers CIL.[59]

Against the backdrop of minimal LOAC applying to NIACs as a matter of law and the minimal utility the U.S. has made of the other options, a discussion on filling the legal gap as a matter of policy may be properly undertaken.

54. *Customary International Humanitarian Law*, ICRC (Oct. 29, 2010), https://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/overview-customary-law.htm.

55. *See* Erika De Wet, *Jus Cogens and Obligations Erga Omnes*, *in* THE OXFORD HANDBOOK ON HUMAN RI.00000912 0 612 792 reW*nBT/F1 8.52 Tf1 0 0 1 138.02 330.89 Tm0 g0 4 00091,792 reW*nB36(a)-6(7q0.00000912 0 612 792BT/8g0 G[(-)] TJETQq0

C. Department of Defense Policy

1. DoD Directive on the Law of War Program

responsibilities ensuring DoD compliance with the law of war obligations of [60] The directive defined the law of war as:

> That part of international law that regulates the conduct of armed hostilities.
>
> 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.[61]

the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military [62]

Given the definition of the law of war, the application of the policy means that when the U.S. military is engaged in a NIAC the U.S. military will comply with the more robust law governing IAC as well as CIL. Such a policy is, or could be, profoundly significant. The United States military, as matter of policy, would be applying both black letter law and CIL which govern IAC, to a NIAC. Simply put, the U.S. would be applyi

manual needlessly includes a 132-page chapter on POWs in IAC, largely regurgitating the Third Convention.[76]

In terms of what portions of IAC law the U.S. applies as a matter of

guidance that belligerents not entitled to prisoner of war (POW) status would nonetheless be entitled to protection under the Geneva Conventions.[84]

These policies enabled the U.S. military to apply the more robust body of IAC of which it was more knowledgeable and experienced, the 1949 Geneva Conventions. And in the process, the U.S., in applying law it need not under the letter of that law, firmly occupied moral high ground, ground it

What was critically important was that application of the Third Geneva Convention as a matter of policy was identical to its application as a matter of law.[94] This allowed for the ICRC to inspect U.S. compliance with an obligation it had assumed as a matter of policy.[95] An ICRC representative had this to say concerning the policy implementing identical treatment conditions: