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. government's primary response of claiming to apply LOAC as a matter of policy when and where that law wouldn't otherwise apply is superficially 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 fighting didn't stop, the Taliban merely dispersed from cities to rural and remote sections of Afghanistan and across the border in Pakistan.[10] But the characterization of the armed conflict changed, and with it, the applicable LOAC.

Beginning in 2002 and continuing until today, the U.S. and other countries, are allied with the government of Afghanistan in fighting the Taliban and associated forces.[11] This conflict, pitting a number of states against non-state actors is, by definition, a non-international armed conflict

4. *See generally* Bruno Greg, *U.S. War in Afghanistan*, COUNCIL ON FOREIGN RELATIONS (Jan. 2017), http://www.cfr.org/afghanistan/us-war-afghanistan/p20018.

5. *See* ICRC, HOW IS THE TERM "ARMED CONFLICT" DEFINED IN INTERNATIONAL HUMANITARIAN LAW? (2008).

6. *See* Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (stating that "the present convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more high contracting parties, even if the state of war is not recognized by one of them.") [hereinafter Third Geneva Convention]. And of course both the U.S. and Afghanistan, like every country in the world, have either signed and ratified or acceded to the 1949 Geneva Conventions.

7. The 1949 Geneva Conventions deal with the wounded and sick in armed forces in the field (GC I). *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (wounded, sick and shipwrecked members of the armed forces at sea); *see* Third Geneva Convention, *supra* note 6, 6 U.S.T. 3316, 75 U.N.T.S. 135 (prisoners of war); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287 (protection of civilians). International armed conflict also triggers the application of additional protocol I (AP I) to the 1949 Geneva Conventions for those states which have agreed to be bound by it. In the case of the U.S. and Afghanistan in 2001, neither were states parties to AP I.

8. Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, U.S.T.S. 403, 32 Stat. 1803, 1 Bevans 247.

9. *See* Jens David Ohlin, *The Nature and Scope of the War in Afghanistan*, OPINIO JURIS (May 28, 2015 11:49 AM), http://opiniojuris.org/2015/05/28/the-nature-and-scope-of-the-war-in-afghanistan.

10. *Id*.

11. *Id*.

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 armed conflict "not of an international character."[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. "draw[s] from the laws of war" for guidance.[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 Convention, *supra* note 6, 6 U.S.T. 3316, 75 U.N.T.S. 135. Additional Protocol II (AP II) to the 1949 Geneva Conventions applies to NIACs, but only binds states parties. The comparison between the size of AP I, which applies to IAC, and AP II, which applies to NIAC, is striking. AP I is some 82 pages long; AP II is 10 pages. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

14. Article 3 of the 1949 Geneva Conventions is known as Common Article Three as it is the same in all four of the 1949 Conventions. *The Geneva Conventions of 1949 and their Additional Protocols*, ICRC (Nov. 29, 2010), https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm. Common Article 3 requires that those no longer actively participating in hostilities, the wounded and the sick be humanely treated and cared for. *Id.* The article also prohibits cruel, inhumane and degrading treatment and torture. *Id.*

15. Customary international law consists "of rules that come from a general practice accepted as law and exist independent of treaty law." *Customary International Humanitarian Law*, ICRC (Oct. 29, 2010), https://www.icrc.org/en/document/customary-international-humanitarian-law-0.

16. John L. Bellinger III, Legal Advisor, U.S. Dep't of State, Legal Issues in the War on Terrorism, Address Before the London School of Economics (Oct. 31, 2006), http://www.state.gov/s/l/2006/98861.htm.

advisor, Harold Koh, acknowledged that "international law informs the scope of our detention authority."[17] In similar fashion, the Department of Justice (DoJ) claims to "draw on the international laws of war."[18] And that "[p]rinciples derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has authorized for the current armed conflict."[19] President Obama has even joined the effort. In 2011, he issued an Executive Order on reviewing detention of individuals at Guantanamo Bay that defines law of war detention as "detention authorized by Congress under the AUMF, as informed by the laws of war."[20]

More recently, President Obama issued an Executive Order,[21] and a Report[22], describing U.S. policies as "consistent with the law of armed conflict."

Drawing from, being informed by, and acting consistent with LOAC suggests a tangible connection to a body of law while actually saying nothing that binds or obligates the U.S government. Such statements are little more than verbal obfuscation. What does it mean to draw from or be informed by something in general, let alone when that something, here the LOAC, is itself unspecified?

Obviously the portion of the U.S. government most directly involved in and impacted by armed conflict is the Department of Defense (DoD). And the DoD has not only made similar, nebulous, statements concerning the policy application of LOAC, it has done so in a longer and more formal (and presumably more reflective) manner than the quotes listed above.[23] These

17. Harold Koh, Legal Advisor, U.S. Dep't of State, Keynote Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (March 25, 2010) https://www.state.gov/documents/organization/179305.pdf.

18. U.S. DEP'T OF JUST., PROGRESS REPORT APRIL 2009 (2009).

19. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees held at Guantanamo Bay at 1, *In re: Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (TFH) (D.D.C. Mar. 13, 2009).

20. Exec. Order No. 13567, 76 Fed. Reg. 13277, 13280 (Mar. 7, 2011). Similarly, after U.S. special operations forces killed Osama Bin Laden, the White House Press Secretary stated "[t]he operation was conducted in a manner fully consistent with the laws of war." Press Briefing by White House Press Secretary Jay Carney (May 4, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/05/04/press-briefing-press-secretary-jay-carney-542011.

21. *See* Exec. Order No. 13732, 81 Fed. Reg. 44483, 44486 (July 1, 2016).

22. *See* THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2016).

23. *See generally* DEP'T OF DEF., DIRECTIVE 2311.01E, DOD LAW OF WAR PROGRAM (2006) [hereinafter DoD Directive]; *see also* OFFICE OF THE GEN. COUNSEL, DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL (2015) [hereinafter DoD Manual].

statements, contained in a DoD Directive on its Law of War Program[24] and the recently released DoD Law of War Manual,[25] are discussed *infra*.[26]

There is political utility in the U.S. government's issuing self-laudatory statements about applying more law than the law itself requires. The U.S. government receives the benefits of being able to argue its applying more law than technically necessary and the positive perceptions such largess engenders. At the same time, the U.S. government does not incur much if any costs from statements which sound substantive but which are so vague as to be unverifiable and thus unassailable. But there are real, if hidden, costs that flow from that practice and the U.S. foregoing the opportunity to demonstrate how it generates respect for LOAC through its application as a matter of policy.[27]

In order to provide context to evaluate those costs, Part I of this article fleshes out the unhelpful, inverse nature of armed conflict frequency and applicable law. Having established the resulting legal gap, Part II then reviews the possible manners by which the U.S. could respond, by doing nothing, applying CIL, or by applying IAC law as a matter of policy to NIACs. Part II focuses on DoD's policy approach, exploring first the DoD Directive and then the Law of War Manual. Part III then explains the opportunity cost of the current U.S. approach of vague policy application of the LOAC. Part III first discuses the practical costs of degraded operational effectiveness and then highlights the moral or strategic cost through reference to prior U.S. practice whereby DoD meaningfully applied law as a matter of policy after the Korean and during the Vietnam wars. The article concludes with a call that DoD return to these prior policy positions and specify the LOAC it is applying as a matter of policy.

I. LAW AS A FUNCTION OF TYPE OF ARMED CONFLICT

The United States has been engaged in armed conflict for more than fifteen years, fighting in Afghanistan since 2001[28] and for over a decade in

24. DoD Directive, *supra* note 23.

25. DoD Manual, *supra* note 23.

26. *See infra* Part II.C.

27. *See Contemporary Challenges to IHL – Respect for IHL: Overview*, ICRC (Nov. 29, 2010), https://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/respect-ihl/overview-respect-for-ihl.htm (describing the obligation of all states parties to the Geneva Convention, including the U.S., as having to both respect and ensure respect for the Conventions per article 1).

28. *The War in Afghanistan: A Timeline*, CBS NEWS (Dec. 1, 2009), http://www.cbsnews.com/news/the-war-in-afghanistan-a-timeline.

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 Saddam Hussein's Iraq in less than six.[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 above, the change of conflict status from IAC to NIAC meant that with the exception of Common Article Three, none of the 1949 Geneva Conventions were legally operable.

The paucity of law applicable to NIACs created a profound regulatory gap. This problem is exacerbated because NIACs occur far more frequently than IACs.[33] Indeed estimates are that over the past 50 years, over 90% of the armed conflicts have been NIACs.[34]

Realistically, there are three possible responses to the dearth of LOAC applicable in NIAC as a matter of law: (1) do nothing, (2) apply customary international law (CIL), or (3) apply IAC law as a matter of policy.[35]

II. RESPONSE OPTIONS TO THE LACK OF LOAC APPLICABLE IN NIAC

A. Do Nothing

After the IAC portion of the U.S. armed conflicts in Afghanistan, and later Iraq, transitioned to NIAC, the U.S. confronted the challenge resulting from the precipitous drop off in LOAC applicable as a matter of law in a unique way. The U.S. argued that not even the limited amount of NIAC law,

29. *War in Iraq Begins*, HISTORY.COM (2009), http://www.history.com/this-day-in-history/war-in-iraq-begins; *see also* Jesse Singal et al., *Seven Years in Iraq: An Iraq War Timeline*, TIME (Mar. 19, 2010), http://content.time.com/time/specials/packages/0,28757,1967340,00.html. The U.S. military presence and role in Iraq has surged, ended, and is currently increasing. As of this writing in 2017, the U.S. has returned approximately 5000 troops to Iraq to advise and assist Iraq in its fight against ISIS. *See* Christopher Woolf, *A Confrontation with Iran Could be Deadly for American Troops in Iraq*, PRI (Feb. 2, 2017), https://www.pri.org/stories/2017-02-02/us-confrontation-iran-could-be-deadly-american-troops-iraq.

30. *The War in Afghanistan: A Timeline*, *supra* note 28. The discussion of global or transnational NIAC is not germane to this essay.

31. Ohlin, *supra* note 9.

32. *Id.*

33. ERIK MELANDER, ORGANIZED VIOLENCE IN THE WORLD 2015: AN ASSESSMENT BY THE UPPSALA CONFLICT DATA PROGRAM 3 (2015).

34. *Id.*

35. The role of human rights law during armed conflict is outside the scope of this article.

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 Laden's former driver, Salim Hamdan.[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 or not the Detainee Treatment Act of 2005 precluded Hamdan's petition 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 government's argument became unreasonable was in contending that not 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.

The government attempted to rigidly construe the scope of application of Common Article Three.[46] The article begins with "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."[47] While acknowledging the existence of an armed conflict not of an international character between the U.S. and al Qaeda, the U.S. claimed the conflict was not in the territory of *one* of the high contracting parties as specified.[48] Rather, the conflict was in the territory of several high contracting parties, at a minimum Afghanistan, Pakistan and Yemen.[49] Under this approach, not even Common Article Three would apply.

The U.S. Supreme Court disagreed with the U.S. government, ruling that Common Article Three applied to the U.S. when involved in any NIAC.[50] While the *Hamdan* case is important, the result was merely a return to the status quo ante of the legal gap, that when a conflict transitions from an IAC to a NIAC, the only LOAC which applies as a matter of law is Common Article Three.[51] Obviously the do nothing or, really, argue for less LOAC was not aimed at filling the gap. Employing customary international law could fill the gap, though the U.S. has not meaningfully employed this approach.

B. Customary International Law

One way to supplement NIAC law is by utilizing customary international law or CIL. The Statute of the International Court of Justice describes customary international law as "a general practice accepted as law."[52] The existence of CIL "requires the presence of two elements, namely State practice (usus) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (opinio juris sive necessitates)."[53]

As the International Committee of the Red Cross (ICRC) explains, CIL "is of crucial important in today's armed conflicts because it fills gaps left by

46. *Id*.

47. Third Geneva Convention, *supra* note 6, 6 U.S.T. 3316, 75 U.N.T.S. 135.

48. *Hamdan*, 548 U.S. at 629-30.

49. *Id*. at 684.

50. *Id.* at 631.

51. Third Geneva Convention, *supra* note 6, art. 3.

52. Statute of the International Court of Justice art. 38, ¶ 1(b).

53. *Assessment of Customary International Law*, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin#Fn_16_10. As the ICRC notes, "[t]he exact meaning of these two elements has been the subject of much academic writing." *Id*.

treaty law in both international and non-international conflicts and so strengthens the protection offered to victims."[54]

While all countries acknowledge CIL's existence, beyond a limited 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 might properly be considered CIL, the U.S. disagreed with the ICRC's 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 RIGHTS 543 (Dinah Shelton ed., 2013) (Jus Cogens norms include genocide, slavery, crimes against humanity, torture, piracy and racial discrimination).

56. *Id.* at 547.

57. *See* Emily Crawford, *Unequal before the Law: The Case for the Elimination of the Distinction Between International and Non-international Armed Conflicts*, 20 LEIDEN J. INT'L L. 441, 457 (2007).

58. The U.S. is not just coy about what it considers CIL, it's contradictory. In 1987, the Deputy Legal Adviser at the Department of State claimed that the U.S. considered Article 75 of Additional Protocol One as CIL. *See* Sandra L. Hodgkinson, *Detention Operations: A Strategic View, in* U.S. MILITARY OPERATIONS: LAW, POLICY & PRACTICE 275, 281 (Geoffrey Corn et al. eds., 2015). "This position was refuted during the early years of the War on Terror but later quasi-reinstated in 2011." *Id*.

59. John B. Bellinger & Jim J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443, 444 (2007).

C. Department of Defense Policy

1. DoD Directive on the Law of War Program

In 2006, DoD issued a directive to "update the policies and responsibilities ensuring DoD compliance with the law of war obligations of the United States."[60] The directive defined the law of war as:

> That 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.[61]

The directive then announced that it is DoD policy that "[m]embers 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."[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 applying more law than required.[63]

The 2006 version revised and reissued the directive which had been previously published in 1998.[64] The 1998 and 2006 memos share an identical definition of the law of war.[65] However, the 1998 memo policy was much more limited in scope, announcing only that "the law of war obligations of the United States are observed and enforced by the DoD Components."[66] Such language is superfluous as what it means is the U.S. is bound by that

60. DOD Directive, *supra* note 23, ¶ 1.1.

61. *Id.* ¶ 3.1.

62. *Id.* ¶ 4.1.

63. A contrary reading of the directive might conclude otherwise, that in applying "applicable" customary international law, the Directive means that which is customary law in IAC would apply in IAC and that which is customary law in NIAC would apply in NIAC. This reading is unpersuasive as it requires parsing IAC from NIAC when the directive states that the law of armed conflict as defined by the directive applies however the conflict is characterized.

64. DEP'T OF DEF., DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM (1998) [hereinafter 1998 Directive]. The 1998 version revised the 1979 version of the DoD's Law of War Program directive. *Id.* at 1.

65. *Compare* 1998 Directive, *supra* note 64, ¶ 3.1, *with* DOD Directive, *supra* note 23, ¶ 3.1.

66. 1998 Directive, *supra* note 64, ¶ 4.1.

law to which it has agreed to be bound.[67] This is, of course, the case regardless of a policy memo.[68] Under this policy the U.S. would apply no more, or less, law than is required. Thus IAC rules control in IAC and NIAC rules, aka Common Article Three, controls in NIAC, but there would be no legal co-mingling.

Thus the DoD modified the directive governing its law of war program between 1998 and 2006 in a way that suggests an expansive increase in the LOAC applicable to all members of the DoD in all military operations.[69] But for the directive to actually yield that result, one would have to know what specific portions of the LOAC are included. Similarly, without knowing what rules the DoD or the U.S. government claim are CIL, instructing DoD members to comply with CIL is essentially devoid of meaning. While that amorphous status quo continues to this day, the DoD had an opportunity to clarify its policy position in the DoD Law of War Manual.

2. DoD Law of War Manual

In 2015, after controversial delays,[70] the DoD issued the long awaited Law of War Manual [DoD manual].[71] The manual is a 1200 page policy document whose purpose was to "provide information on the law of war to DoD personnel responsible for implementing the law of war and executing military operations."[72] Unfortunately, the manual fails to achieve its stated purpose and nowhere more so than in the area of clarifying what LOAC applies as a matter of policy in a NIAC.

The LOAC governing detention in IAC is well developed and there is considerable state practice.[73] The Third Geneva Convention[74] is devoted to prisoners of war and a significant portion of the Fourth Convention[75] explains when and how countries may inter civilians during armed conflict. Yet the

67. Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L.J. 1762, 1813 (2009).

68. 1998 Directive, *supra* note 64, ¶ 4.1.

69. DoD Directive, *supra* note 23.

70. W. Hays Parks, Update on the DoD Law of War Manual, remarks delivered to the ABA 22nd Annual Review of the Field of National Security Law (Nov. 30, 2012), https://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2012/12/Parks.Manual.pdf.

71. *See generally* DoD Manual, *supra* note 23.

72. DoD Manual, *supra* note 23.

73. *See generally* ICRC, STATES PARTY TO THE FOLLOWING INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES AS OF 19-JAN-2017 (2017).

74. Third Geneva Convention, *supra* note 6, 6 U.S.T. 3316, 75 U.N.T.S. 135.

75. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3518, 75 U.N.T.S. 135.

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 policy in NIAC, the manual is vague. For example, the manual states that "it may be appropriate to apply the principles of the [Geneva Conventions], even when the relevant provisions do not apply as a matter of law."[77] Similarly the manual claims that "in some instances it may be appropriate to implement measures during detention of persons during non-international armed conflict by analogy to the internment of POWs during international armed conflict or by analogy to the internment of protected persons in occupied territory."[78] Yet the manual does not clarify which specific principles or measures from IAC apply as a matter of policy in NIAC.

Nor does the manual clarify what the 2006 directive means by its reference to CIL. The manual acknowledges that "many of the rules applicable to non-international armed conflict are found in customary international law."[79] Rather than list what those rules might be, even as a matter of policy, the manual provides guidelines which "may be helpful in assessing" the CIL applicable to NIAC.[80] Providing multiple interpretative guidelines and directing the reader to assess which CIL rule may apply is not particularly helpful, certainly not to those who conduct military operations. And worse, reasonable military legal advisors might well apply those guidelines differently, problematically yielding different answers as to applicable CIL.

So why have directives and manuals which are so vague as to not provide functionally useful information to the purported target audience? One answer is that the lack of specificity is most certainly knowing and intended.[81] The vagueness preserves flexibility and proves defensibly useful—it's impossible to critique the manner by which the U.S. has followed or complied with the law the U.S. is applying as a matter of policy when no one knows what the law is. But there are opportunity costs, both practical and strategic, to this

76. The manual's repetition of the Third Convention includes providing a breakdown of how many Swiss francs different ranked POWs should receive in advance pay (despite no country ever having implemented such an advance pay plan) and listing the antiquated requirement of access to telegraph systems). *See* DoD Manual, *supra* note 23, at ¶¶ 9.18.3 to 9.18.3.1.

77. *Id.* ¶ 8.1.4.4.

78. *Id.* ¶ 17.2.2.3.

79. *Id.* ¶ 17.1.3.2.

80. *Id.*

81. One unfortunate possibility is that the manual signals an effort by DoD to return to the minimalist legal approach reflected in the 1998 directive whereby the U.S. applies only that international law it has agreed to be bound by. *See* 1998 Directive, *supra* note 64. While the minimum may be all that is legally required, it's hardly an inspiring approach.

approach. And this is demonstrated not by comparison to some other countries' policies, but DoD's own past policies which meaningfully applied otherwise not applicable LOAC

III. OPPORTUNITY COST

A. Practical

One reason DoD should be seeking to be more specific about what law it is applying as a matter of policy is that it facilitates operational effectiveness. Simply put, the U.S. military needs to know the legal rules under which it is operating. When that is known, the military plans and executes missions accordingly. When it is unknown or ambiguous, there is hesitancy and delays in the conduct of operations. And in the absence of clear guidance, there is a real risk that different units will reach different conclusions as to the operable legal constraints, yielding unacceptable disparity and lack of uniformity within the same area of operations.

For example, in the area of detention, the U.S. military is extremely well versed in how to establish and operate facilities for both prisoners of war under the Third Geneva Convention and civilian internees under the Fourth Geneva Convention. One would think that DoD would effectuate policy decisions which play to the military's strengths. Meaningfully applying the Geneva Conventions as a matter of policy can do just that, it makes operable a large body of law with which the U.S. military is very familiar. But doing so without detailing which portions of the Geneva Conventions are applicable is functionally useless to and for the military. And while the opportunity cost in practical terms of not detailing the policy application of LOAC is significant, the cost in strategic terms may be even greater.

B. Strategic

To fully appreciate the opportunity costs of the U.S.'s current approach, it is important to consider previous instances where, unlike today, DoD meaningfully applied otherwise inapplicable LOAC as a matter of policy. After the Korean[82] and during the Vietnam wars,[83] DoD issued policy

82. *See* DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (1956) [hereinafter FM 27-10].

83. *See* LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT 232 (2013) (discussing Military Assistance Command Vietnam Directive 381-11).

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 seems determined to cede. Both of those positives outcomes are eroded if not eliminated by the current practice of announcing the application of LOAC as a matter of policy but never detailing to which portions of LOAC law the policy applies.

For example, the Army's Field Manual on the Law of Land Warfare first published in 1956, stated that "those protected by [Fourth Geneva Convention] also include all persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war."[85] What that statement means is that someone who, as a matter of law, did not qualify as a POW would be considered a civilian and receive the protections of the Fourth Geneva Convention. It also means being interned as a security threat under the terms of that same convention.[86] This is more than the Fourth Geneva Convention requires.[87]

84. In contrast, of course is President Bush's 2002 memorandum claiming that none of the Geneva Conventions applied to an armed conflict against al Qaeda. *See* White House Memo, *supra* note 36. As then Secretary of State Colin Powell cautioned the President, the memo would "reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the laws of war for our troops." COLIN L. POWELL, DRAFT DECISION MEMORANDUM FOR THE PRESIDENT ON THE APPLICABILITY OF THE GENEVA CONVENTION TO THE CONFLICT IN AFGHANISTAN 2 (2002).

85. FM 27-10, s*upra* note 82, ¶ 247.

86. Chris Jenks & Eric Talbot Jensen, *Indefinite Under the Laws of War*, 22 STAN. L & POL. REV. 41 (2011) (describing the application of the Fourth Geneva Convention internment and review procedures).

87. Under the Fourth Geneva Convention, where an individual who does not qualify for POW status engages in activities hostile to the security of the State, "such individual person shall not be entitled to claim such rights and privileges under the [Fourth Geneva Convention] as would, if exercised in the favour of such individual person, be prejudicial to the security of such State." Geneva Convention Relative to The Protection of Civilian Persons in Time of War, *supra* note 75, 6 U.S.T. at 3520, 3522, 75 U.N.T.S. at 290, 292. This means that the capturing State is not legally required to afford such individuals the full rights and privileges of the Fourth Geneva Convention. Article 5 does require that such persons be treated with humanity, and that they be granted the full rights and privileges "at the earliest date consistent with the security of State or occupying power." *Id.* But that reinforces that the only requirement under the Fourth Convention is that a State humanely treat civilians who engage in activities hostile to the State. By contrast, under FM 27-10, an individual who does not qualify for POW status would be entitled to the protection of the Fourth Geneva Convention. FM 27-10, s*upra* note 82, ¶ 247.

Absent this policy application of the Fourth Convention, the only LOAC that would apply as a matter of law is Common Article 3.[88] And as discussed *supra*, the Bush Administration argued that not even Common Article Three applied to members of al Qaeda and the Taliban.[89] In addition to the legal problems with this approach, it impliedly rejects FM 27-10's position that captured unprivileged belligerents should be considered and treated as a civilian. The purpose of FM 27-10 is "to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land and to relationships between belligerents and neutral States."[90] While it remains the Executive Branch's prerogative to establish DoD policy, that the White House, during war time, ignored or overruled forty-seven year old military guidance seems notable. And that the Executive Branch, under both Presidents Bush and Obama, has not clarified the resulting detention policy, and which parts of FM 27-10 remain valid, is unhelpful to the very military members conducting detention operations.

The more recent conflicts in Iraq and Afghanistan were not the first meaningful opportunity for the U.S. to demonstrate its detention policy during armed conflict with non-state actors; the Vietnam War was. And while not ignoring any number of legal issues associated with the conduct of that war, the U.S. military developed a policy that provided more legal protection to captured enemy belligerents than the Geneva Conventions required and did so in a transparent and verifiable manner.[91]

During the Vietnam War, the U.S., in support of South Vietnam, fought both the North Vietnamese Army (NVA), which was entitled to POW status as a matter of law, as well as the Viet Cong and other organized groups which were not.[92] The U.S. military command, Military Assistance Command Vietnam, issued an instruction clarifying that while the Viet Cong did not qualify as POWs, they would be treated as such.[93] The result was that captured NVA were housed in a camp on one side of a road, and the Viet Cong and other groups housed in an identical camp on the other side of the road. The U.S. applied the Third Geneva Convention as a matter of a law in one camp and as matter of policy in the other.

88. While providing important protections, Common Article 3 is but one article. And the point of the article may be reduced to treating captured personnel humanely. That's of course a useful touchstone. But it pales in comparison to the detailed guidance the Fourth Geneva Convention provides.

89. *See* White House Memo, *supra* note 36, at 1.

90. FM 27-10, s*upra* note 82, ¶ 1.

91. *See* GEORGE PRUGH, LAW AT WAR: VIETNAM 1964-1973 at 112-117 (1975).

92. *Id*. at 25.

93. *See id*.

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:

> The MACV instruction . . . is a brilliant expression of a liberal and realistic attitude. . . . This text could very well be a most important one in the history of the humanitarian law, for it is the first time . . . that a government goes far beyond the requirements of the Geneva Convention in an official instruction to its armed forces. The dreams of today are the realities of tomorrow, and the day those definitions or similar ones will become embodied in an international treaty . . . will be a great one for man concerned about the protection of men who cannot protect themselves. . . . May it then be remembered that this light first shone in the darkness of this tragic war of Vietnam.[96]

Amidst the savagery and controversy of the Vietnam War, in the area of detainee treatment, the U.S occupied the moral high ground and was seen as such by outside observers. [97] But in the post 9/11 armed conflict, the U.S. abdicated that high ground by started making vague and thus unverifiable claims of detention policies informed by, or drawing from, the LOAC. Indeed, the current state of U.S. detention practice is such that a detainee at Guantanamo filed suit claiming, among other things, that the U.S. was not complying with seemingly basic provisions of the Geneva Conventions that the U.S. claims "informs" its detention practice.[98]

CONCLUSION

While there are advantages which flow from making self-congratulatory and non-specific claims of applying the LOAC, the U.S. is overlooking the costs in compromised military effectiveness and in perceptions of legitimacy. That the U.S. voluntarily ceded the moral high ground it staked out through

94. PRUGH, *supra* note 91, at 65-66.

95. This is not to say that policy applications are an all or nothing approach. The key is that there is transparency and specific details as to what provisions are being applied as a matter of policy.

96. PRUGH, *supra* note 91, at 66-67.

97. *Id*. at 68-69.

98. Abdullah v. Obama, 753 F.3d 193, 199 (D.C. Cir. 2014) (describing Abdullah's complaint, at least in part, as stemming from DoD's failure to comply with basic provisions of the Geneva Conventions, including posting of the conventions in the place of confinement).

the meaningful application of LOAC by policy for almost fifty years was needlessly unfortunate.

Should the U.S. seek to again provide world leadership in generating respect for LOAC by applying otherwise inapplicable law as a matter of policy it should detail what that law is and open its practices up to outside scrutiny. However, unless and until that point, mere statements about policies being informed by, or drawing from, the LOAC will continue to receive the weight and credit they deserve—none.