

Office of the Judge Advocate General
International and Operational Law Division

International and Operational Law Practice Note

Common Article 3 and Its Application to Detention and Interrogation

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On 20 July 2007, President Bush signed Executive Order 13,440.¹ The Order, attached as an appendix to this note, “interprets the meaning and application of the text of Common Article 3 with respect to certain detentions and interrogations.”² The Order goes on to state that “Common Article 3 shall apply to a program of detention and interrogation operated by the Central Intelligence Agency.”³ Given the various government documents and statements concerning Common Article 3 (CA3) and its application to detention and interrogation, including the new executive order, it is important for judge advocates to be clear on the standard for detention and interrogation in the U.S. Army.

The Department of Defense (DOD) and the Army are committed to applying the domestic and international law standards outlined in the Detainee Treatment Act (DTA),⁴ the War Crimes Act (WCA),⁵ and the Military Commissions Act (MCA),⁶ including provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁷ and CA3 to the Geneva Conventions in DOD Detention and Interrogation Operations. Both the DOD and the Army have demonstrated this commitment by issuing a series of publications that make clear the standard of treatment for interrogations and detainees. These publications include the Army’s Field Manual (FM) 2-22.3,⁸ and DOD Directives 2310.01E⁹ and 2311.01E.¹⁰

The Human Intelligence FM, FM 2-22.3, as well as the draft Army Regulation (AR) on Detention Operations, AR 190-8, apply CA3 as the minimum acceptable humane treatment standard. In addition, both documents adopt, as a matter of DOD policy, the treatment standards contained in the Geneva Convention Relative to the Treatment of Prisoners of War (GPW)¹¹ and the Geneva Convention Relative to the Protection of Civilians (GCC)¹² for the vast majority of issues which arise in the context of detainee operations.

This policy is reinforced by the publication of DOD Directive 2311.01E, and its companion Chairman of the Joint Chiefs of Staff Instruction,¹³ on the DOD Law of War Program. Both policy documents require “[m]embers of DoD Components [to] comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”¹⁴ This is essential, so that Soldiers can train to and apply one standard, throughout the spectrum of conflict, no matter how the conflict is characterized. The endorsement of a single standard that does not change from one conflict to

¹ Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 24 2007).

² *Id.* sec. 3(a).

³ *Id.*

⁴ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2741.

⁵ War Crimes Act, 18 U.S.C. § 2441 (2006).

⁶ Military Commissions Act of 2006 § 3, 10 U.S.C. § 948a – 950w (2006).

⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., 93rd plen. mtg., U.N. Doc. A/RES/39/46 (Dec. 10, 1984), available at <http://www.un.org/documents/ga/res/39/a39r046.htm> (last visited Aug. 25, 2007).

⁸ See U.S. DEP’T OF ARMY, FIELD MANUAL 2-22.3 (FM 34-52), HUMAN INTELLIGENCE COLLECTOR OPERATIONS (Sept. 2006) [hereinafter FM 2-22.3].

⁹ U.S. DEP’T OF DEFENSE, DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM (5 Sept. 2006) [hereinafter DOD DIR. 2310.01E].

¹⁰ See U.S. DEP’T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM (9 May 2006) [hereinafter DOD DIR. 2311.01E].

¹¹ Convention (III) Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, reprinted in DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS 429-30 (2d ed. 1981).

¹² Convention (IV) Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, reprinted in SCHINDLER & TOMAN, *supra* note 11, at 501.

¹³ CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01C, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (31 Jan. 2007) [hereinafter CJCSI 5810.01C].

¹⁴ DOD DIR. 2311.01E, *supra* note 10, para 4.1; CJCSI 5810.01C, *supra* note 13, para. 4. 4.a(1).

another will allow the inclusion of training scenarios not only at home station, but throughout the entire training environment, including the combat training centers.

Department of Defense Directive 2310.01E, “The DOD Detainee Program” adopts the provisions of Common Article 3, preventing assaults, hostage taking, outrages upon personal dignity (including humiliating and degrading treatment of all kinds), and sleep deprivation.¹⁵ Further, para’s. 2.2, 4.1 and 4.2 provide that during all armed conflict, however characterized, DOD policy is to apply CA3, without regard to the detainee’s legal status.

In relation to the current conflict, as a result of *Rumsfeld v. Hamdan*,¹⁶ the treaty provisions of CA3 are now binding, as a matter of law, on the U.S. government in this conflict against Al Qaeda. That reinforces a long-held view of the U.S. military and the DOD that, as a matter of policy, the minimum standards articulated in CA3 would apply to all individuals captured on the battlefield. This standard was solidified by Deputy Secretary of Defense Gordon England’s policy memo of 7 July 2006 which confirmed that CA3 applies to treatment of detainees in DOD and requires all DOD personnel to “promptly review all relevant directives, regulations, policies, practices, and procedures under [their] purview to ensure they comply with the standards of Common Article 3.”¹⁷

Executive Order 13,440 is not applicable to the DOD and the Army for detention and interrogations; it does not provide the DOD standard. The DTA specifically prohibits the use of techniques other than those contained in FM 2-22.3.¹⁸ Further, in reviewing FM 2-22.3, Congress instructed the DOD to return to Congress before making any changes to the standards and procedures contained in that publication. Because current DOD directives prohibit use of non-DOD methods in DOD facilities,¹⁹ the DOD and the Army will continue to be able to take all measures necessary to prevent violations of the Geneva Conventions by DOD personnel or in DOD facilities, as required by domestic law and our treaty obligations.

Therefore, the standard remains clear for DOD and Army personnel. As a matter of law, CA3 is the minimum standard for all interrogations and treatment of detainees. As a matter of policy, the standards contained in GPW and GCC will be applied unless a specific demonstrated need to depart from that standard is approved by the appropriate commander. Judge advocates must play an important role in ensuring these standards are not only comprehensively taught, but clearly and effectively trained.

¹⁵ DOD DIR. 2310.01E, *supra* note 9.

¹⁶ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

¹⁷ Memorandum, Gordon England, Deputy, 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 (July 7, 2006), *available at* <http://www.fas.org/sgp/othergov/dod/geneva070606.pdf>.

¹⁸ FM 2-22.3, *supra* note 8.

¹⁹ U.S. DEP’T OF DEFENSE, DIR. 3115.09, DOD INTELLIGENCE INTERROGATIONS, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING para. 3.4.4.3 (Nov. 2005).