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## Hostile Protected Persons or “Extra-Conventional Persons:” How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders

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Paul E. Kantwill and Sean Watts

## Abstract

First, this Article reviews policymakers’ and commentators’ categorization of participants in Operation Enduring Freedom, the armed conflict in Afghanistan against al Qaeda and Taliban fighters. This Article concentrate specifically on the status of participants operating at the fringes of the categories of persons protected by the Geneva Conventions. It shows, for example, how al Qaeda and the Taliban fighters tested the bounds of the Conventions by employing methods of “warfare” which rendered them non-distinct and therefore made a determination of their status unclear. This Article demonstrates how policymakers and ultimately the U.S. President created a class of persons—so-called extra-conventional persons—who participated in hostilities yet failed to qualify for protection under any of the applicable Geneva Conventions. Second, this Article presents the training and education available to the judge advocates who faced these legal issues. it further presents perspectives on the law of war as it appeared from the resources, education, and training commonly available to deployed judge advocates. This Article ultimately concludes that international law and U.S. military doctrine classify many who participate in hostilities as “protected persons” under the Fourth Geneva Convention—a concept ultimately at odds with the determination made by U.S. policymakers. Third, and in concert with the two issues identified above, this Article describes the enormous challenges these issues created for U.S. military persons participating in Operation Iraqi Freedom. Specifically, it illustrates operational and legal challenges faced by military attorneys and the commanders they advised. It then explores legal issues that arose during the detention and occupation operations with respect to fighters associated with Saddam Fedayeen. Observing apparent similarities between Saddam Fedayeen and Taliban fighters earlier categorized as extra-conventional, this Article describes how, despite similarities in applicable law and attributes, judge advocates determined that these irregular fighters were protected persons under the Fourth Geneva Convention. It concludes that judge advocates dealt with these challenges responsibly, providing sound legal advice that balanced commanders’ mission requirements with the humanitarian spirit of the law of war.

# HOSTILE PROTECTED PERSONS OR “EXTRA-CONVENTIONAL PERSONS:”<sup>1</sup> HOW UNLAWFUL COMBATANTS IN THE WAR ON TERRORISM POSED EXTRAORDINARY CHALLENGES FOR MILITARY ATTORNEYS AND COMMANDERS

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1. We use the term “extra-conventional persons” to refer to classes of persons that policymakers and commentators have concluded do not fall within the enumerated categories of persons who enjoy protection under the law of war. See, e.g., Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323, 326-28 (1951); Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT’L L. 1025, 1028 (2004); Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. 367, 367-68 (2004). The term is borrowed primarily from human rights law writers who identify protections and rights not found in treaties or conventions, but rather grounded in so-called “extra-conventional” sources such as *ad hoc rapporteurs* and international commissions. See, e.g., Jose Ayala-Lasso, *Making Human Rights a Reality in the 21st Century*, 10 EMORY INT’L L. REV. 497, 498 (1996); Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT’L L. 95, 107 (2003). We are unaware of prior published use of this term to refer to unprotected persons in the context of armed conflict.

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## INTRODUCTION

The storm of controversy that has surrounded international legal issues associated with the Global War on Terrorism<sup>4</sup> has resulted in an uncommon phenomenon for Department of Defense (“DOD”) Judge Advocates. This group, long dedicated to selfless service in relative obscurity, now performs, and has had its past performance reviewed, in the spotlight of public attention. Exposure has ranged from reports of conflict between uniformed and civilian lawyers within the DOD<sup>5</sup> amid rumors of marginalization,<sup>6</sup> to the revelation that judge advocates had “left

Advocate General’s Legal Center and School. In preparing this Article, the Authors have relied entirely on publicly available sources. Readers should not infer from the Authors’ status in the armed forces reliance on any classified or limited access materials for production of this Article.

4. We use the phrase *Global War on Terrorism* (“GWOT”) merely to identify collectively a series of ongoing operations following the September 11, 2001 attacks on the United States. The phrase has generated controversy, especially over the use of the term “war,” which carries special meaning in a number of legal contexts. The U.S. Constitution, for instance, reserves declarations of war to the Congress. *See* U.S. CONST. art. I, § 8, cl. 11. The law of war itself reserves application of the majority of its provisions to “declared war” or “armed conflict” between States. *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31, 32 [hereinafter Geneva I]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 85, 86 [hereinafter Geneva II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135, 136 [hereinafter Geneva III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287, 288 [hereinafter Geneva IV]. Because military commissions derive their customary authority and practices from the law of war, they require war, or at least armed conflict, as a condition precedent to their employment. *See* 10 U.S.C. § 821 (2004); *see also* *United States v. Quirin*, 317 U.S. 1, 27 (1941).

5. *See* James V. Grimaldi, *Army’s JAG Corps Deals With Reality of War in Iraq*, WASH. POST, Nov. 17, 2003, at E1 (noting tension following Army General Counsel Steven Morello’s proposal to cut the size of the Army Judge Advocate General (“JAG”) Corps and order that Air Force military lawyers report through civilian Air Force General Counsel lawyers); *see also* Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2004, at A1 (noting disagreement between Pentagon civilian and uniformed lawyers over lawfulness of proposed interrogation techniques for use on detainees).

6. *See Iraqi Prisoner Abuse: Hearing Before the Sen. Armed Services Comm.*, 108th Cong. (2004) 48-51 (statement of Sen. Lindsey Graham (R-S.C.) during testimony of Gen. Taguba); *see also Frontline: Rumsfeld’s War: The Inside Story of the War Within the Pentagon* (PBS television broadcast, Oct. 26, 2004), available at <http://www.pbs.org/wgbh/pages/frontline/shows/pentagon/etc/script.html> (expressing the view that, in the early stages of the GWOT, uniformed lawyers and their advice had been brushed aside in favor of advice provided by civilian lawyers and political appointees).

the fold” to contact the New York Bar Association with concerns over legal positions developing in the Pentagon.<sup>7</sup>

The U.S. Congress has taken interest as well, questioning the Army Judge Advocate General and inquiring into the role of the Staff Judge Advocate advising the ranking commander in Iraq at the time of the Abu Ghraib detainee abuses.<sup>8</sup> Congress has also recently addressed the relationship between military lawyers and Pentagon leadership.<sup>9</sup> Attention, nearly all unsolicited, has focused greatly on a single issue: the status of persons captured and detained in the operating environments of the

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7. See Dana Priest & Dan Morgan, *Rumsfeld Defends Rules for Prison; Senators Question Interrogation Guidelines*, WASH. POST, May 13, 2004, at A1 (describing unsolicited visits by eight judge advocates to a senior representative of the New York State Bar Association to voice concerns over legal opinions rendered by political appointees concerning detainee treatment and interrogation practices).

8. See *Iraq Prisoner Abuse: Hearing Before Sen. Armed Services Comm.*, 108th Cong. 40-41 (2004) (statement of Col. Marc Warren), available at <http://www.washingtonpost.com/wp-dyn/articles/A39851-2004May19.html> (last visited Feb. 17, 2005) [hereinafter Warren Statement].

9. See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, 108th Cong. § 574, 118 Stat. 1811 (2004) (amending 10 U.S.C. §§ 3037, 5046, 5148, and 8037) [hereinafter Reagan NDAA 2005]. The Reagan NDAA 2005 prohibited DOD personnel from interfering with the ability of a military department JAG and the Staff Judge Advocate to the Commandant of the Marine Corps to give independent legal advice to the head of a military department or chief of a military service. *See id.* It also prohibited DOD personnel from interfering with the ability of judge advocates assigned to, attached to, or performing duty with military units to give independent legal advice to commanders. *See id.* This Section also directs the Secretary of Defense to establish a study to review the relationship between the legal elements of each of the military departments and to prepare a report recommending desirable statutory, regulatory, and policy changes to improve the effectiveness of those relationships and to enhance the legal support provided to the leadership in each military department. *See id.* In signing the Ronald Reagan National Defense Authorization Act for Fiscal Year 2005, President Bush, made a statement concerning Section 574:

The executive branch shall construe Section 574 in a manner consistent with: (1) the President's constitutional authorities to take care that the laws be faithfully executed, to supervise the unitary executive branch, and as Commander in Chief; (2) the statutory grant to the Secretary of Defense of authority, direction, and control over the Department of Defense (10 U.S.C. 113(b)); (3) the exercise of statutory authority by the Attorney General (28 U.S.C. 512 and 513) and the general counsel of the Department of Defense as its chief legal officer (10 U.S.C. 140) to render legal opinions that bind all civilian and military attorneys within the Department of Defense; and (4) the exercise of authority under the statutes (10 U.S.C. 3019, 5019, and 8019) by which the heads of the military departments may prescribe the functions of their respective general counsels.

Press Release, President's Statement on the Ronald Reagan National Defense Authorization Act, 2005 (Oct. 29, 2004), available at <http://www.whitehouse.gov/news/releases/2004/10/20041029-6.html>.

Global War on Terrorism, and various practitioners' views thereof.

The service of U.S. judge advocates dates to July 29, 1775. Their service is mandated by statute<sup>10</sup> and currently 1,494 judge advocates serve in the Army alone.<sup>11</sup> Judge advocates have long practiced many of the same legal disciplines as their civilian brethren. More than at any time in our military history, however, judge advocates focus increasingly on international law, particularly as it relates to modern military operations. This discipline, known in military circles as Operational Law, touches on all legal disciplines, but places special emphasis on legal issues related directly to war fighting.<sup>12</sup> Judge advocates are actively involved in the development, publication, and review of all services' military plans, orders, and doctrine.<sup>13</sup> For example, Army

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10. See 10 U.S.C. § 806, art. 6 (2004). Dealing with judge advocates and legal officers, Article 6 states in relevant part:

- (a) The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps. The Judge Advocate General or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice.
- (b) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the Judge Advocate General.

*Id.*

11. See Dep't of the Army, Personnel, Plans, and Training Office, *Shaping the Corps, Forging the Future*, Presentation at Fort Knox (Oct. 27, 2004) (on file with authors). The Air Force reports 1,284 active duty judge advocates. See Dep't of the Air Force, Headquarters Air Force Personnel Ctr., *Interactive Demographic Analysis System Report*, at <http://www.afpc.randolph.af.mil/sasdemog/> (last visited Feb. 10, 2005). The Department of the Navy reports 414 active duty marine judge advocates. See Report, Dep't of the Navy, Headquarters Marine Corps, Judge Advocate Support Branch, *Marine Corps Officer Military Occupational Specialty Status Report* (Nov. 23, 2004) (on file with authors).

12. The Army's controlling field manual for legal operations defines "Operational Law" ("OPLAW") as "that body of domestic, foreign, and international law that directly affects the conduct of operations." DEP'T OF THE ARMY, FM 27-100, *LEGAL SUPPORT TO OPERATIONS* § 3.2 (Mar. 1, 2000) [hereinafter FM 27-100]. OPLAW calls on judge advocates to practice in each of the Army's core legal disciplines including military justice, international law, administrative law, civil law, claims, and legal assistance. See *id.* § 3.1.

13. See DEP'T OF DEFENSE, DIRECTIVE NO. 5100.77, *DODD LAW OF WAR PROGRAM* § 5.8.6 (Dec. 9, 1998) [hereinafter DODD 5100.77]. As its title suggests, the DOD Di-

judge advocates, are assigned to all brigade-sized units and deploy with them wherever those units are assigned.<sup>14</sup> At this writing, more than 200 Army judge advocates are deployed worldwide;<sup>15</sup> the vast majority are in Afghanistan and Iraq, with notable numbers in Bosnia, Kosovo, South Korea, and other austere environments.

While judge advocates' roles and functions are by now well established, the aforementioned public attention has highlighted the challenges they face in discharging their duties. To illustrate these challenges, we will focus on the legal issues that have arisen regarding persons detained by U.S. armed forces during the Global War on Terrorism. First, we will review policy-makers' and commentators' categorization of participants in Operation Enduring Freedom, the armed conflict in Afghanistan against al Qaeda and Taliban fighters. We will concentrate specifically on the status of participants operating at the fringes of the categories of persons protected by the Geneva Conventions. We will show, for example, how al Qaeda and the Taliban fighters tested the bounds of the Conventions by employing methods of "warfare" which rendered them non-distinct<sup>16</sup> and therefore

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rective establishes and assigns responsibilities for the U.S. armed forces' law of war program. *See id.* § 1.1. Among other accomplishments, the directive guarantees judge advocate review of all military plans, operations orders, policies, and rules of engagement. *See id.* § 5.8.6.

14. In the current Army structure, brigades are composed of between 3,000 and 5,000 soldiers. *See Force Structure*, SOLDIERS, Jan. 2004, at 27, available at <http://www.army.mil/soldiers/jan2004/pdfs/forcestructure.pdf>. For a discussion of judge advocates' roles in armed conflict, see James E. Baker, *LBJ's Ghost: A Contextual Approach to Targeting Decisions and the Commander in Chief*, 4 U. CHI. J. INT'L L. 407 (2003); Capt. M. Scott Holcomb, *View From the Frontlines*, 4 U. CHI. J. INT'L L. 561 (2003); Rear Adm. Michael F. Lohr & Cmdr. Steve Gallotta, *Legal Support in War: The Role of Military Lawyers*, 4 U. CHI. J. INT'L L. 465 (2003).

15. *See* Report, Dep't of the Army, Personnel, Plans, and Training Office, Deployed Judge Advocate and Paralegal Personnel (Nov. 9, 2004) (on file with authors). Deployed alongside these judge advocates are more than 270 active duty paralegals. *See id.*

16. Scholars, lawyers, and soldiers widely regard *distinction* as the most fundamental principle of the law of war. Although long-recognized, the modern expression of the principle is found in Protocol I to the Geneva Conventions. Titled the "Basic rule," Article 48 requires that belligerents "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives . . ." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 48, 1125 U.N.T.S. 3, 25 [hereinafter Protocol I]. Although the United States is not a party to Protocol I, it regards many of its provisions, including Article 48, to be reflective of customary international law and therefore binding on its armed forces. *See* Michael J. Matheson, *Session*

made a determination of their status unclear. We will demonstrate how policymakers and ultimately the U.S. President created a class of persons — so-called extra-conventional persons — who participated in hostilities yet failed to qualify for protection under any of the applicable Geneva Conventions.

Second, we will present the training and education available to the judge advocates who faced these legal issues. We further present perspectives on the law of war as it appeared from the resources, education, and training commonly available to deployed judge advocates. We ultimately conclude that international law and U.S. military doctrine classify many who participate in hostilities as “protected persons”<sup>17</sup> under the Fourth Geneva Convention — a concept ultimately at odds with the determination made by U.S. policymakers.

We employ the term “hostile protected persons” to distinguish participants from the broader categories of “protected persons” as well as from “unlawful combatants.” This is not to say that the Authors or those judge advocates serving with deployed forces reject flatly or dismiss the categorization of those participants as “unlawful combatants” or extra-conventional persons. Indeed, we admit that a colorable argument may be and was advanced for that proposition. We argue, however, that the state of international law, particularly as it is advanced in the relevant Department of the Army Field Manual, leads us, and led other uniformed attorneys, to the conclusion that it was appropriate to label such participants “protected persons.”

Third, and in concert with the two issues identified above, we will describe the enormous challenges these issues created for U.S. military persons participating in Operation Iraqi Freedom.

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*One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention*, 2 AM. U. J. INT'L L. & POL'Y 419, 425 (1987).

17. Article 4 of the Fourth Geneva Convention defines “protected persons” as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” Geneva IV, *supra* note 4, art. 4. Article 4 does not cover nationals of States not bound by the Conventions, nationals of neutral States in the territory of one of the belligerent States, or persons covered by the First, Second, or Third Geneva Conventions. *See id.* Notably, unlawful combatants are not mentioned among those excluded from coverage. *See id.* For a detailed explanation of “protected persons” under the Fourth Geneva Convention, see *infra* text accompanying notes 192-196.



Specifically, we will illustrate operational and legal challenges faced by military attorneys and the commanders they advised. We will then explore legal issues that arose during the detention and occupation operations with respect to fighters associated with Saddam Fedayeen.<sup>18</sup> Observing apparent similarities between Saddam Fedayeen and Taliban fighters earlier categorized as extra-conventional, we will describe how, despite similarities in applicable law and attributes, judge advocates determined that these irregular fighters were protected persons under the Fourth Geneva Convention. We conclude that judge advocates dealt with these challenges responsibly, providing sound legal advice that balanced commanders' mission requirements with the humanitarian spirit of the law of war.

### I. EXISTING POLICY AND SCHOLARSHIP ON UNLAWFUL COMBATANTS' STATUS UNDER THE LAW OF WAR

In order to consider the ultimate policy determinations concerning the status of participants in Operation Iraqi Freedom, we will look first to Operation Enduring Freedom in Afghanistan and examine the status ascribed by policymakers to the participants in that conflict. For our purposes, relevant operational activity began in early October 2001, when U.S. Special Forces in Afghanistan, operating with Afghan Northern Alliance forces, began rounding up large numbers of Taliban fighters and other persons participating in hostilities.<sup>19</sup> From the release of inter-agency legal documents contemporaneous to operations in Af-

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18. Originally a paramilitary organization led by Saddam Hussein's son Uday, the Saddam Fedayeen (translated as "Men of Sacrifice") evolved into a brutal, domestic unit of regime enforcers. See GlobalSecurity.org, *Saddam's Martyrs ["Men of Sacrifice"]*: Fedayeen Saddam, at <http://www.globalsecurity.org/intell/world/iraq/fedayeen.htm> (last visited Feb. 12, 2005). The unit, totaling between 18,000 and 40,000 members, reported directly to the Presidential Palace for its orders. See *id.* Following the U.S. invasion of Iraq in 2003, U.S. commanders attributed irregular attacks on U.S. troops to Saddam Fedayeen militias. See Steven Lee Meyers, *In the Field; Third Infantry Division: Discovering Doubt and Death on Drive Toward Baghdad*, N.Y. TIMES, Apr. 13, 2003, at A1. After the declared end of major combat operations in May 2003, U.S. commanders traced persistent insurgent-style attacks on U.S. troops and facilities to former Saddam Fedayeen. See Douglas Jehl, *U.S. Forces Girding for Raids by Iraqis*, N.Y. TIMES, July 12, 2003, at A1.

19. See Michael R. Gordon, *Special Forces Hunt Al Qaeda on the Ground*, N.Y. TIMES, Nov. 15, 2001, at A1 (reporting on the more than 100 U.S. special forces operating in Afghanistan and the use of road blocks to capture Taliban and al Qaeda commanders); see also David Rohde, *Shadowy U.S. Military Presence in an Afghan Town*, N.Y. TIMES, Nov. 9, 2001, at B3 (discussing the first public reports of U.S. Army Special Forces operating

ghanistan, it is clear that the issue of these detainees' status under the law of war was raised early in the conflict and addressed at the highest levels of government. Policymakers were apparently asked to address the question of the status of Taliban and al Qaeda detainees' because of intense interest in their intelligence value and the uncertainties raised by the nature of the war on terrorism.

Specifically, lawyers for the DOD, Department of Justice ("DOJ"), and Department of State ("DOS"), as well as White House Counsel, considered whether al Qaeda and Taliban fighters seized in Afghanistan qualified for protection under the 1949 Geneva Conventions.<sup>20</sup> Ultimately, many of these documents laid the foundations for future legal analysis of related, and frankly unrelated, questions of detainee status in subsequent theaters of combat.

The groundwork for the executive branch determinations concerning al Qaeda and Taliban status was laid in a series of memoranda beginning in January 2002.<sup>21</sup> These opinions appear to have been part of an interagency, iterative process to form an administration policy concerning the United States' obligations under the Geneva Conventions. Interestingly, and perhaps troubling to those who had conducted the operation, the majority of these opinions were not produced, much less released, until well after major combat operations had diminished in Afghanistan.<sup>22</sup> Analysis in all three DOJ memoranda focused on the issue of policymakers' and commanders' potential exposure to prosecution under the War Crimes Act ("the Act")<sup>23</sup> for

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with Northern Alliance forces to coordinate attacks and guide U.S. air strikes on Taliban and al Qaeda targets).

20. See discussion *infra* pt. II.A. In addition to addressing the applicability of the Geneva Conventions, the legal opinions and memoranda associated with the issue of al Qaeda and Taliban status also addressed issues associated with domestic legislation such as the War Crimes Act. See Memorandum from John C. Yoo & Robert Delahunty to William J. Haynes II, Gen. Counsel to the DOD, Application of Treaties and Laws to al Qaeda and Taliban Detainees 3-6 (Dec. 28, 2001), available at <http://www.msnbc.msn.com/id/5025040/site/newsweek>. We will limit our discussion and analysis of these memoranda to points raised under relevant international law.

21. See *infra* notes 26-30 and accompanying text.

22. See, e.g., *infra* note 26 and accompanying text.

23. See 18 U.S.C. § 2441 (2004). The Act incorporates violations of the law of war into the U.S. criminal code. Among these are "grave breaches" of the 1949 Geneva Conventions and violations of humane treatment standards listed in Common Article 3 of the four Geneva Conventions. See *id.* For a discussion of the memoranda addressing

treatment of detainees and conduct of hostilities. The threshold issue of application of the Act depended greatly on determinations of whether the Third Geneva Convention of 1949 applied, as a matter of law, to the conflict in Afghanistan and whether enemy fighters seized in that campaign qualified for protection as prisoners of war.<sup>24</sup>

### A. Department of Justice Analysis

The first, and arguably most influential,<sup>25</sup> of the above-mentioned DOJ opinions, dated January 22, 2002, was entitled "Application of Treaties and Laws to al Qaeda and Taliban Detainees."<sup>26</sup> It made three main points, beginning with the status of al Qaeda under international law. The authors immediately emphasized that al Qaeda was not a State actor and as such, could not be a Party to the Geneva Conventions or other international treaties.<sup>27</sup> Al Qaeda members, the memorandum noted, were part of a "non-governmental terrorist organization,"<sup>28</sup> and therefore could not avail themselves of the Geneva Conventions' protections as the Conventions were not applicable to the conflict.<sup>29</sup> The memorandum further urged that because al Qaeda was a non-State actor and its members were mere criminals, there did

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applicability of the War Crimes Act and Geneva Conventions to U.S. operations in the war on terror, see *infra* note 75 and accompanying text.

24. See *infra* note 58 and accompanying text.

25. President Bush indicated that he relied heavily upon the January 22 Memorandum in his ultimate determinations concerning application of the law of war to operations associated with the GWOT and status of al Qaeda and Taliban fighters detained in Afghanistan and elsewhere. See Memorandum from President of the United States to Vice President, et al., 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 President Bush Memo]; see also *infra* text accompanying notes 82-90.

26. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the DOD, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), available at <http://washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf> [hereinafter Bybee Memo]. Recently, a portion of a January 9, 2002 Memorandum addressing the same issues was made available to the public. See Memorandum from John Yoo & Robert Delahunty to William J. Haynes II, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), available at <http://www.msnbc.msn.com/id/5025040/site/newsweek/>. This memorandum appears to be a draft of the January 22, 2002 Memorandum later staffed to the DOD. See *id.*

27. See Bybee Memo, *supra* note 26, at 9.

28. *Id.*

29. See *id.*

not exist a state of international armed conflict between the United States and al Qaeda sufficient to trigger the laws of armed conflict, including the protections of the Third Geneva Convention.<sup>30</sup>

Ordinarily, the threshold determination that the Conventions did not regulate U.S. armed forces' interactions with al Qaeda would preclude the need for further analysis of its members under the Conventions. The memorandum, nonetheless, next considered whether al Qaeda members would qualify under the Third Geneva Convention's Prisoner of War ("POW") qualification criteria.<sup>31</sup>

30. *See id.* at 9-10.

31. Article 4 of the Third Geneva Convention states in relevant part:

- A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
  - (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
    - (a) that of being commanded by a person responsible for his subordinates;
    - (b) that of having a fixed distinctive sign recognizable at a distance;
    - (c) that of carrying arms openly;
    - (d) that of conducting their operations in accordance with the laws and customs of war.
  - (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
  - (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
  - (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
  - (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Geneva III, *supra* note 4, art. 4.

In an apparent abundance of caution, the memorandum anticipated arguments that al Qaeda fighters might merit POW status under provisions reserved for non-traditional armed forces such as Articles 4(A)(2) and 4(A)(3) of the Third Geneva Convention.<sup>32</sup>

DOJ lawyers rejected these positions on three bases. First, they concluded that the Article 4 criteria did not operate independently of the Geneva Conventions' general State Party requirement. Article 4, they asserted, had no application independent of the Conventions' triggering mechanism in Article 2. They stated that Article 4 "cannot be read as an alternative, and a far more expansive, statement of the application of the Convention. It merely specifies, where there is a conflict covered by Article 2 of the Convention, who must be accorded POW status."<sup>33</sup> Second, the memorandum quickly concluded that as a group,<sup>34</sup> al Qaeda failed to fulfill the four conditions required for militia to qualify for POW status under the Third Geneva

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32. See Bybee Memo, *supra* note 26, at 9.

33. *Id.* at 9-10.

34. The Bybee Memorandum and subsequent Department of Justice ("DOJ") legal opinions that have applied the four criteria of Article 4(A)(2) of the Third Geneva Convention raise an issue frequently discussed by judge advocates at the Army Judge Advocate General's School. That is, should the four criteria that militia must satisfy to attain prisoner of war ("POW") status be applied to *groups* of militia, or are they intended to be part an individualized inquiry, applied separately to each detainee? See Geneva III, *supra* note 4, art. 5 (providing for tribunals to be conducted to determine whether detainees merit POW status in cases of doubt). Clearly, DOJ and ultimately the President, applied the criteria to al Qaeda and, more importantly, the Taliban as groups. See Bybee Memo, *supra* note 26, at 10, 30-31. Although the Bybee memorandum ultimately declined to advise whether the Taliban had satisfied the 4(A)(2) criteria (citing lack of evidence of battlefield conduct), the memorandum clearly anticipated conducting such an inquiry on a group basis once facts were available. See *id.*; see also YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 33-44 (2004) (addressing the POW qualification criteria in a recent text on *jus in bello*). Professor Dinstein first identifies seven, as opposed to the traditional four, cumulative criteria. See *id.* at 37-41. His additional criteria include organization in the form of embedded discipline, belonging to a Party to the conflict, and non-allegiance to the detaining power. See *id.* at 39-41. Considering their application, Professor Dinstein ponders whether his seven are criteria intended to be applied against individuals or instead against groups of which such individuals are members. See *id.* at 43. He concludes that criteria related to organization such as the first of the Article 4(A)(2) criteria and his own criteria of embedded discipline and belonging to a Party to the conflict are inquires that may only be directed against a group. That is, individuals cannot of their own accord develop organization or the international legal status of "party." See *id.* Dinstein explains, however, that the requirement of non-allegiance to the captor can only operate under an individualized inquiry. See *id.* He concludes that the remaining criteria — insignia, carrying arms openly, and adherence to

Convention.<sup>35</sup> Third, DOJ determined that al Qaeda members did not qualify under Article 4(A)(3), which grants POW status to “members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”<sup>36</sup> Revealing an argument later used to deny POW status to Taliban fighters, DOJ lawyers contended that the “members of regular armed forces” referred to in Article 4(A)(3) must nonetheless comply with the four POW eligibility criteria articulated in Article 4(A)(2).<sup>37</sup> Accordingly, the memorandum concluded that al Qaeda did not qualify under 4(A)(3) or any other provision of the Third Geneva Convention for protection as prisoners of war.

The January 22, 2002 DOJ Memorandum next considered the scope of protections under Common Article 3 of the Conventions.<sup>38</sup> Common Article 3, so called for its identical appearance in all four Geneva Conventions, provides a set of protections applicable to “armed conflict not of an international character.”<sup>39</sup> DOJ lawyers addressed arguments that the protections of Common Article 3, essentially a recital of fundamental minimums of humane and just treatment, covered al Qaeda members because their conflict with the United States did not rise to the level of an international armed conflict.<sup>40</sup> Adopting a strict, though historically supported, reading of Common Article 3, the memorandum rejected application of Common Article 3 to the conflict with al Qaeda.<sup>41</sup> DOJ lawyers reasoned that although the conflict with al Qaeda was not international in the sense that it was not between two State Parties, it was international in its scope and the nationalities of participants.<sup>42</sup> In fact, the memorandum labeled hostilities between the United States and al Qaeda “a conflict ‘of an international character’”<sup>43</sup> — a label, in fact, consistent with the administration’s slogan for the conflict,

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the law of war — are hybrids: they may be tested on an individual basis, but group behavior may be substituted for specific information of the individual. *See id.*

35. *See* Bybee Memo, *supra* note 26, at 10.

36. Geneva III, *supra* note 4, art. 4(A)(3).

37. *See infra* note 82 and accompanying text.

38. *See* Bybee Memo, *supra* note 26, at 5-9.

39. Geneva III, *supra* note 4, art. 3.

40. *See* Bybee Memo, *supra* note 26, at 10.

41. *See id.*

42. *See id.*

43. *Id.*

the Global War on Terrorism. Common Article 3, the memorandum argued, was originally drafted to cover only "civil wars" restricted to the territory of a single Party to the Conventions.<sup>44</sup> The memorandum went so far as to deny Common Article 3 coverage to civil wars with transnational aspects such as those involving insurgencies based in or operating from other States.<sup>45</sup> State practice and the drafting history of the Conventions, the memorandum argued, supported a limited application of Common Article 3 to conflicts occurring strictly within the borders of a single Party to the Conventions.<sup>46</sup>

Turning to the Taliban, the January 22, 2002 DOJ Memorandum admitted a thornier issue was at stake.<sup>47</sup> The Memorandum conceded that Afghanistan was a long-standing Party to the Geneva Conventions and the Conventions might arguably apply to U.S. operations against the Taliban militia as the *de facto* armed forces of Afghanistan.<sup>48</sup> Rejection of this position focused on Afghanistan's status as a non-functioning or failed State. The Memorandum noted that since displacing the preceding regime, the Taliban had not fully controlled the territory of Afghanistan,<sup>49</sup> failed to perform normal governmental functions,<sup>50</sup> was not capable of conducting inter-governmental relations with other States,<sup>51</sup> and had not achieved significant recognition within the international community.<sup>52</sup>

Considering the issue first under domestic law, DOJ lawyers found a strong case for suspending the application of the Conventions to the failed State of Afghanistan. The Memorandum argued that the U.S. President's constitutional authority to make treaties included an inherent power "to suspend treaty obligations because of a fundamental change in circumstances."<sup>53</sup>

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44. *See id.* at 6.

45. *See id.*

46. *See id.*

47. *See id.* at 10 ("Whether the Geneva Conventions apply to the detention and trial of members of the Taliban militia presents a more difficult legal question.").

48. *See id.* at 10-11, 15-20.

49. *See id.* at 16.

50. *See id.* at 17 (citing LARRY P. GOODSON, *AFGHANISTAN'S ENDLESS WAR: STATE FAILURE, REGIONAL POLITICS, AND THE RISE OF THE TALIBAN* 103-04, 115 (2001); *see also* AHMED RASHID, *TALIBAN: MILITANT ISLAM, OIL & FUNDAMENTALISM IN CENTRAL ASIA* 207-08, 212-13 (2001)).

51. *See id.* at 18.

52. *See id.* at 20.

53. *Id.* at 13 (citing, as an example, President Franklin D. Roosevelt's 1939 suspen-

As a matter of international law, however, DOJ lawyers conceded a closer question. While States had been permitted to terminate or withdraw from treaties in the face of breaches, the memorandum acknowledged special rules and practice with respect to humanitarian treaties.<sup>54</sup> Humanitarian treaties, like the Geneva Conventions, the Memorandum noted, represented State obligations not dependent on reciprocal observance and practice.<sup>55</sup> Such practices notwithstanding, and citing dissatisfaction and inadequacy of traditional remedies for material breaches of the law of war, DOJ lawyers deduced a right to suspend the Conventions when faced with "widespread violations . . . by others."<sup>56</sup>

Perhaps anticipating that the President might decline to suspend the Conventions, and almost certainly forecasting inter-agency disagreement over suspension of the Conventions, the memorandum addressed the Taliban fighters' status under the Third Geneva Convention. Admitting that the classification provisions of Article 4 of the Third Geneva Convention seemed to contemplate "a case-by-case determination of an individual's status," the Memorandum nonetheless asserted that the President was empowered to process Taliban members as a group and to categorically deny them POW status.<sup>57</sup> Such a determination, the DOJ argued, would eliminate the "doubt" prerequisite to prisoner classification tribunals convened under Article 5 of the Third Geneva Convention.<sup>58</sup> The Memorandum declined to ad-

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sion of the London Naval Treaty of 1936 in response to like suspension by other Parties and conditions of impossibility).

54. See Bybee Memo, *supra* note 26, at 23; see also Vienna Convention on the Law of Treaties, May 23, 1969, art. 60(5), 1155 U.N.T.S. 331 (noting that provisions contained in Article 60 permitting States to terminate or suspend treaties materially breached by other parties are not applicable to "treaties of a humanitarian character.")

55. See Bybee Memo, *supra* note 26, at 23-24 (citing G.I.A.D. DRAPER, *THE RED CROSS CONVENTIONS* 8 (1958)).

56. *Id.* at 24-25.

57. See *id.* at 30.

58. Article 5 of the Third Geneva Convention states that:

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any *doubt* arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.



wise the White House on Taliban fighters' prospects under the Article 4(A)(2) criteria explicitly applicable to militias, citing inadequate information concerning the Taliban's organization, conduct and appearance.<sup>59</sup>

Finally, the DOJ considered the possible application of customary international law to treatment of al Qaeda and Taliban detainees.<sup>60</sup> Noting a longstanding debate over the status of customary international law under the Constitution and among the laws of the land, the authors concluded that customary international law was not true federal law and did not, therefore, bind the executive.<sup>61</sup> The Memorandum added that customary international law, formed merely through the practice of States and a sense of legal obligation, did not undergo the formalities required of federal law. Absent such required process as legislative approval and executive signature, customary international law could at best only operate as general federal common law that did not bind the executive.<sup>62</sup> Citing the grave danger of interference with the President's powers as Commander in Chief, the memorandum asserted that no customary international law could limit the President, or for that matter the U.S. Armed Forces, in their treatment of al Qaeda or Taliban detainees.<sup>63</sup>

In summary, the DOJ January 22 Memorandum offered a highly flexible approach to the treatment of al Qaeda and Taliban detainees. The entire conflict with al Qaeda members, wherever fought, was determined to be outside the scope of the Geneva Conventions, while the Taliban's protections were ar-

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Geneva III, *supra* note 4, art. 5 (emphasis added).

59. See Bybee Memo, *supra* note 26, at 31.

60. Substantial portions of the law of war have achieved the status of customary international law. See *Trial of the Major War Criminals Before the International Military Tribunal (1945-1946)*, reprinted in 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 922, 960-61 (Leon Friedman ed., 1972) (recognizing the rules of land warfare expressed in the Hague Convention as customary international law). See generally JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005) (representing a nearly ten-year, three-volume effort by the International Committee of the Red Cross to identify provisions of the law of war that have achieved customary international law status); Theodor Meron, *The Geneva Conventions as Customary International Law*, 81 AM. J. INT'L L. 348 (1987).

61. See Bybee Memo, *supra* note 26, at 33-34.

62. See *id.* at 34.

63. See *id.* at 35-36 ("[A]llowing the federal courts to rely upon international law to restrict the President's discretion to conduct war would raise deep structural problems [and] relying on customary international law here would undermine the President's control over foreign relations and his Commander in Chief authority.").

gued to be subject to suspension or at least categorically, and summarily, to be denied by the President. Customary international law would not operate in any binding sense as a legal limitation on the executive, although its provisions might continue to operate on the armed forces absent guidance to the contrary from the executive.

### B. *State Department Commentary*

That the conclusions drawn by the DOJ were not shared among all agencies of the executive is made apparent by DOS memoranda made publicly available in the summer of 2004. Two memoranda, one from the Secretary of State, Colin Powell,<sup>64</sup> and a second from the DOS Legal Advisor, William Howard Taft, IV,<sup>65</sup> apparently sought to provide counterpoints and alternatives to the January 22 DOJ memorandum and the White House Counsel memorandum. The authors styled each memorandum as a response to a DOJ or White House Counsel position intended to inform the President's decision.

The first, Secretary Powell's memorandum, by its subject line, indicated that the DOS received a draft decision memorandum for the President, dated January 25, 2002, in advance of his determination of al Qaeda and Taliban status. The decision memorandum, from White House Counsel Alberto Gonzales, indicated that the President had made some initial determinations on these matters on January 18, 2002, but that the Secretary of State had subsequently offered contrary advice and requested reconsideration.<sup>66</sup> Secretary Powell's January 26 memorandum identified two options available to the President and discussed the merits and costs of each.

The Memorandum considered first the advantages and disadvantages of determining that the Conventions did not apply to

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64. See Memorandum from Secretary of State Colin Powell, to Counsel to the President, Draft Decision Memorandum on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), available at <http://www.msnbc.msn.com/id/4999363/site/newsweek/> [hereinafter Powell Memo].

65. See Memorandum from William H. Taft, IV, to Counsel to the President, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002), available at <http://www.fas.org/sgp/othergov/taft.pdf> [hereinafter Taft Memo].

66. See Memorandum from Alberto Gonzales, White House Counsel, to President of the United States, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), available at <http://msnbc.msn.com/id/4999148/site/newsweek/> [hereinafter Gonzales Taliban Memo].

the conflict with al Qaeda and the Taliban under the theories offered by the DOJ memo. Among other advantages identified as common to both options, the Memorandum noted that declining to apply or suspending the Conventions altogether offered the administration maximum flexibility and minimum ambiguity. The Memorandum further observed that the first option would avoid the burden associated with individual case-by-case determinations of status under the Conventions.<sup>67</sup> The memorandum then identified a number of disadvantages that would result from not applying the Conventions: (1) a reversal in a longstanding U.S. policy of liberal application of the Conventions; (2) a negative international reaction, even among allies; (3) a hindrance of future efforts at terrorist suspect extradition; and (4) increased exposure to domestic and international legal challenges.<sup>68</sup> Importantly, the Memorandum noted that the Geneva Conventions offered a “more flexible and suitable legal framework” than alternative legal structures such as human rights law — an argument frequently made in favor of the law of war as the law of choice for regulating conduct in hostilities.<sup>69</sup>

The Memorandum then addressed a second option far more favorably: applying the Geneva Conventions to the conflict in Afghanistan generally, and making individual determinations concerning detainees’ POW status. Secretary Powell argued that this option would have several advantages: (1) it would offer flexibility comparable to that of the first option; (2) it would preserve U.S. credibility and moral authority for future actions in the Global War on Terrorism; and (3) importantly, it would place the United States in a position to insist on the protection of its own armed forces under the Geneva Conventions in all operations.<sup>70</sup> The Memorandum conceded that, if tribunals were conducted to determine individuals’ status under the Third Geneva Convention, some al Qaeda members might qualify for POW status. Powell added, however, that such findings

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67. See *supra* text accompanying note 58.

68. See Powell Memo, *supra* note 64, at 2-3.

69. Powell Memo, *supra* note 64, at 3. See Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, [1996] I.C.J. 95, ¶ 25, available at <http://www.icj-cij.org/icjwww/idecisions/isummaries/iunanaummary960708.htm> (last visited Mar. 8, 2005) (discussing the human rights/law of war debate, and law of war as *lex specialis*).

70. See Powell Memo, *supra* note 64, at 3-4; see also *infra* notes 163, 165-166 and accompanying text (addressing the U.S. reversal of decisions not to apply Geneva Conventions in the Syrian shoot down and Macedonian capture incidents).

would not affect their treatment significantly.<sup>71</sup> This opinion was likely founded on the DOD practice of treating all detainees in accordance with the principles of the Third Geneva Convention.<sup>72</sup>

An attachment to Secretary Powell's memorandum also announced disagreement with legal and factual matters asserted by the White House Counsel. The attachment found error and inconsistency in the finding that Afghanistan was a failed State and predicted international dissent over the finding that the President could suspend the Geneva Conventions. The attachment further purported to correct the assertion that the United States had declined to apply Common Article 3 of the Geneva Conventions to the 1989 conflict in Panama.<sup>73</sup> Finally, the attachment asserted, again, in apparent contravention of the decision memorandum, that the United States had never determined that the Third Geneva Convention did not apply to an armed conflict in which U.S. troops were engaged.<sup>74</sup>

The second DOS Memorandum, dated February 2, 2002, from Ambassador Taft, reemphasized many points raised in Sec-

71. See Powell Memo, *supra* note 64, at 4.

72. See DEP'T OF THE ARMY, REG. 190-8, ¶ 1-(5)(a)(1)-(2) (Oct. 1, 1997) [hereinafter AR 190-8]; see also DODD 5100.77, *supra* note 13, ¶ 5.3.1. At the time of this writing, Army Regulation 190-8 was under review by the U.S. Department of the Army, pursuant to determinations to assess the Department's internment, enemy POW, and detention policies, practices and procedures. See Memorandum from Acting Secretary of the Army, R. L. Brownlee, to Department of the Army Inspector General, Directive for Assessment of Detainee Operations (Feb. 10, 2004), in DEP'T OF THE ARMY, THE INSPECTOR GENERAL, DETAINEE OPERATIONS INSPECTION (Jul. 21, 2004), available at [http://www.globalsecurity.org/military/library/report/2004/daig\\_detainee-ops\\_21jul2004.pdf](http://www.globalsecurity.org/military/library/report/2004/daig_detainee-ops_21jul2004.pdf). The Department of the Army is the DOD Executive Agent for POW matters. See *id.*

73. See Comments on the Memorandum of January 25, 2002, attached to Powell Memo, *supra* note 64; see also *infra* note 162 and accompanying text.

74. See Powell Memo, *supra* note 64, at 5. The January 25, 2002 decision memorandum stated in relevant part:

The argument that the U.S. has never determined that [the Geneva Convention III on the Treatment of Prisoners of War ("]GPW[")] did not apply is incorrect. In at least one case (Panama in 1989) the U.S. determined that GPW did not apply even though it determined for policy reasons to adhere to the convention. More importantly, as noted above, this is a new type of warfare — one not contemplated in 1949 when the GPW was framed — and requires a new approach in our actions towards captured terrorists. Indeed, as the statement quoted from the administration of President George Bush makes clear, the U.S. will apply GPW "whenever hostilities occur *with regular foreign armed forces.*"

Gonzales Taliban Memo, *supra* note 66, at 3.

retary Powell's Memorandum. Taft's Memorandum expanded, however, the general DOS position concerning the conflict with Afghanistan.<sup>75</sup> The Memorandum derided attempts to bifurcate the conflict into one with al Qaeda and another with the Taliban.<sup>76</sup> Such a distinction, the Memorandum argued, was contrary to the structure of the Conventions.<sup>77</sup> Ambassador Taft argued that the Conventions were essentially an "all or nothing" proposition with respect to armed conflict.<sup>78</sup> Either the Conventions apply to a conflict, and all its participants fall under its provisions, or they do not apply, and no one involved can enjoy their protections or benefits.<sup>79</sup> Taft argued that determining that the Conventions applied to the conflict in Afghanistan would be consistent with years of U.S. policy, as well as with the views of "every other party to the Conventions," and U.N. Security Council Resolution 1193.<sup>80</sup>

In sum, the DOS offered a conflicting view of the President's obligations under international law. In addition to insisting on a more traditional and liberal application of the Conventions to armed conflict generally, the DOS offered a reading of the Third Geneva Convention's POW qualifications that suggested individual, case-by-case inquiries were appropriate to classify detainees captured in Afghanistan.

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75. See Taft Memo, *supra* note 65. Ambassador Taft's memorandum may also have been a response to a short letter Attorney General Ashcroft wrote to the President on February 1, 2002, arguing in favor of a Presidential determination that the Third Geneva Convention did not apply to the conflict in Afghanistan. See Letter from Attorney General John Ashcroft, to President of the United States (Feb. 1, 2002), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020201.pdf> [hereinafter Ashcroft Letter]. The Ashcroft Letter cited minimizing exposure to prosecution under the States War Crimes Act of 1996 as the most important reason to decline to apply the Conventions. See *id.* at 1 (citing 18 U.S.C. § 2441 (2004)).

76. See Taft Memo, *supra* note 65, at 2.

77. See *id.*

78. See *id.*

79. See Taft Memo, *supra* note 65, at 2.

80. See *id.* at 1. The U.N. Security Council adopted Resolution 1193 on August 28, 1998. See S.C. Res. 1193, U.N. SCOR, 52d sess., 391st mtg., at 1, U.N. Doc. S/RES/1193 (1998). Without invoking its powers under Chapters VI or VII of the U.N. Charter, the Council expressed a number of demands upon the Parties to the conflict in Taliban-controlled Afghanistan, including "foreign military personnel." *Id.* The Council affirmed that "all [P]arties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949." *Id.* at 3, ¶ 12.

C. *Presidential Determinations of February 7, 2002*

The White House Counsel appeared to have had the last word in the debate, memorialized in a February 7, 2002 memorandum to the President. With factual information and details on the Taliban's battlefield conduct and appearance available,<sup>81</sup> the White House Counsel offered a detailed analysis of the Taliban under the Third Geneva Convention's POW qualification criteria. The Taliban were found to lack three of the four necessary cumulative characteristics that give militia POW protection.<sup>82</sup> As such, the White House Counsel concluded, should the President decide to apply the Conventions to the conflict in Afghanistan, the Taliban would nonetheless be excluded from protection.<sup>83</sup>

Presented with the options and advice put forth in the DOJ, DOS, and White House Counsel memoranda, the President issued a memorandum on February 7, 2002, outlining the administration's ultimate position on the application and operation of the Geneva Conventions relative to the conflict in Afghanistan.<sup>84</sup>

81. Recall that the DOJ January 22 Memorandum had declined to analyze the Taliban under Article 4(A)(2) of the Third Geneva Convention as detailed information on their techniques, tactics and procedures was not available at the time. *See* Bybee Memo, *supra* note 26; *see also supra* text accompanying note 59.

82. *See* President Bush Memo, *supra* note 25, at 2; *see also* Bybee Memo, *supra* note 26, at 9-10 (explaining that based on DOD information, Taliban fighters did not qualify for POW status under any of the categories established by Article 4 of the Third Geneva Convention). Bybee's analysis found that the Taliban did not qualify as militia under Article 4(A)(2) because it failed to adhere to the four enumerated requirements. *See* Bybee Memo, *supra* note 26, at 10 (explaining article 4(A)(2) requirement that militia or volunteer fighters fulfill four requirements: (1) command by responsible individuals; (2) wearing insignia; (3) carrying arms openly; and (4) obeying the Laws of war). *See id.* Bybee next addressed the possibility that the Taliban qualified as the armed force of a Party to the Conventions under either Article 4(A)(1) or Article 4(A)(3). *See id.* (dismissing the possibility that the Taliban could actually be the armed forces of the State of Afghanistan and therefore automatically entitled to POW protections, and noting that the Article 4(A)(2) criteria for militia were derived from attributes long associated with, and expected of, regular armed forces). The Memorandum noted the appearance of these criteria in the 1907 Hague Regulations. *See id.* Simply stated, the Taliban were not the armed forces of the legitimate government of Afghanistan. *See id.* Thus, the memorandum concluded that a group serving as the armed force of a legitimate government would not be entitled to protections such as combatant immunity if it failed to meet the same kind of requirements (wearing uniforms, carrying arms openly, etc.) that applied to militias. *See id.*

83. *See* Bybee Memo, *supra* note 26 at 37.

84. *See* President Bush Memo, *supra* note 25. From memoranda immediately preceding the President's Memorandum, as well as from a recently unclassified January 19, 2002 memorandum from the Secretary of Defense to the Chairman of the Joint Chiefs

The points that the President's memorandum addressed are discussed below.

Citing the DOJ January 22 Memorandum<sup>85</sup> and Attorney General Ashcroft's letter of February 1,<sup>86</sup> for support, the President determined that the Geneva Conventions did not apply to the conflict with al Qaeda, as they were not a "High Contracting Party" to the treaty.<sup>87</sup> Rejecting the DOS argument that the Conventions must apply in total or not at all to a conflict, the President isolated for separate treatment the conflict with al Qaeda from the fight against the State of Afghanistan. The President noted that this determination would persist in all U.S. operations against al Qaeda in the future, no matter where conducted.<sup>88</sup>

The President also accepted the DOJ opinion concerning his authority to suspend the Geneva Conventions with respect to Afghanistan.<sup>89</sup> He declined, however, to exercise that authority. Reserving the right to do so in the future, and in an apparent change of course,<sup>90</sup> the President determined that the Conventions would apply to the conflict with the Taliban in Afghanistan.<sup>91</sup> Because, however, the Taliban did not meet the criteria of Article 4, Paragraph (a) (2) of the Third Geneva Convention (they neither carried arms openly, nor complied with the law of war, and failed to wear distinctive insignia), he found them to be unlawful combatants not entitled to POW status.<sup>92</sup> Hence, the President could assert that although he applied the full measure

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of Staff, it appears that the President made determinations prior to his February 7 memorandum. See Memorandum from Sec'y of Defense Donald Rumsfeld, to Chairman of the Joint Chiefs of Staff, Status of Taliban and Al Qaida (Jan. 19, 2002), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc1.pdf> [hereinafter Rumsfeld Memo]. These prior documents indicate that prior to January 19, 2002, the United States had determined that al Qaeda and Taliban detainees were not entitled to POW status under the 1949 Geneva Conventions. See Rumsfeld Memo, *supra*, at 1; see also Gonzales Taliban Memo, *supra* note 66, at 1.

85. See *supra* notes 26-46 and accompanying text.

86. See Ashcroft Letter, *supra* note 75.

87. See President Bush Memo, *supra* note 25, at 1.

88. See *id.* at 1-2.

89. See *id.*

90. See *supra* note 84 (discussing evidence that the President had made previous determinations concerning the Geneva Conventions and the conflict with Afghanistan on January 18, 2002).

91. See President Bush Memo, *supra* note 25, at 2.

92. See *id.*

of international law, Taliban fighters were not entitled to protection because of their conduct on the battlefield.

Finally, the President resolved the issue of application of Common Article 3 to the conflict. Again accepting DOJ analysis, the President determined that Common Article 3 protections applied to neither al Qaeda nor Taliban detainees.<sup>93</sup> Each conflict, with al Qaeda and against the Taliban, entailed international aspects that precluded application of Common Article 3. Citing the text of the Article, the President emphasized, “[C]ommon Article 3 applies only to ‘armed conflict not of an international character.’”<sup>94</sup>

Viewed from the perspective of judge advocates, this restricted reading of Common Article 3 is somewhat surprising. International courts, tribunals, and scholars have taken a progressively expansive view of the scope of conflicts covered by Common Article 3.<sup>95</sup> The expansion of the scope of Common Article 3 is largely credited to the very fundamental, and heretofore uncontroversial, protections afforded by Common Article 3.<sup>96</sup> Courts, and until recently States, had not mustered significant objections to the application of Common Article 3 to any conflict — international, civil or another classified conflict.

Indeed, the Army Judge Advocate General’s School (“JAG School”) had incorporated universal application of Common Article 3 into its instruction of the law of war to all judge advocates.<sup>97</sup> The School had given Common Article 3 special empha-

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93. *See id.*

94. *Id.*

95. *See, e.g.*, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 50 (Jean S. Pictet ed., 1958) [hereinafter GC IV COMMENTARY] (arguing that Common Article 3 should be applied “as widely as possible”); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1, 3 (2004) (“The immediate post-World War II recognition of a broader concept of armed conflict is also reflected in the term ‘armed conflict not of an international character’ found in common Article 3 of the 1949 Geneva Conventions.”).

96. Common Article 3 provides protection from, *inter alia*, hostage-taking, irregular trial proceedings, murder, mutilation, summary executions, and torture. *See* Geneva III, *supra* note 4, art. 3.

97. *See* INT’L & OPERATIONAL LAW DEP’T, U.S. ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, DEP’T OF THE ARMY, LAW OF WAR HANDBOOK 143-44 (2004) [hereinafter LOW HANDBOOK]; *see also* INT’L & OPERATIONAL LAW DEP’T, U.S. ARMY JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, DEP’T OF THE ARMY, 53D JUDGE ADVOCATE GRADUATE COURSE INT’L LAW DESKBOOK 1-6-7 (2004) [hereinafter JAG GRAD COURSE DESKBOOK]; INT’L & OPERATIONAL LAW DEP’T, U.S. ARMY JAG’S LEGAL CENTER &



sis in its instruction to new judge advocates, those occupying operational billets, as well as those pursuing their Master of Laws Degree in the year-long Graduate Course.<sup>98</sup> To many, liberal application of Common Article 3 was thought appropriate to address gaps in the Conventions' protections.<sup>99</sup> With its very fundamental guarantees of humane treatment, Common Article 3 was thought to operate as a "floor" of treatment for all persons in all conflicts.<sup>100</sup>

Ultimately, the President's determination concerning Common Article 3 may not prove to be the final word on the matter. On November 8, 2004, U.S. District Judge James Robertson ren-

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SCHOOL, DEP'T OF THE ARMY, 165TH JUDGE ADVOCATE OFFICER BASIC COURSE INT'L LAW DESKBOOK H-14-15 (2004) [hereinafter JAOBC DESKBOOK]. A review of editions of the above-cited JAG School publications dating to the Fall of 1998 reveals treatment of Common Article 3 consistent with the positions rejected by the DOJ memo.

98. See *infra* notes 113-19 and accompanying text (discussing curriculum of judge advocates and the Army Judge Advocate General's Legal Center and School).

99. Shortly after the Geneva Conventions came into force, many States and the International Committee of the Red Cross ("ICRC") perceived shortcomings and gaps in protections. By 1977, this led to a set of Additional Protocols to the Conventions. See Protocol I, *supra* note 16, art. 75 (incorporating fundamental humanitarian and due process guarantees for persons who did not benefit from the original Convention's protections). Common Article 3 purports to offer protection to persons "in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions . . ." *Id.* See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]. The United States has not ratified either Protocol to the Conventions and has persistently objected to the operation of several articles of Protocol I. See Matheson, *supra* note 16, at 425. The United States has not, to the Authors' knowledge, stated any objections to Article 75.

100. The Army JAG School Law of War Handbook observes that Common Article 3 "serves as a 'minimum yardstick of protection' in all conflicts, not just internal armed conflicts." LOW HANDBOOK, *supra* note 97, at 144 (quoting *Nicar. v. U.S.*, [1986] I.C.J. Rep. 14, ¶ 218, [1986] 25 I.L.M. 1023)). See JAG COURSE DESKBOOK, *supra* note 97, at 1-15 (citing *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, [1995] Int'l Crim. Trib. for Fmr. Yugoslavia, *reprinted in* [1996] 35 I.L.M. 32); see also GC IV COMMENTARY *supra* note 95, at 14 (referring to Article 3 as a "minimum requirement"). This apparent divergence in views between DOJ and some DOD departments is perhaps best explained by the January 22 Memorandum's methodology. The Memorandum frames its analysis under the offenses under the War Crimes Act. See Bybee Memo, *supra* note 26, at 1-4. DOJ lawyers' restrictive reading of Common Article 3 thus limits potential criminal exposure of policymakers and commanders under the Act. See *id.* Judge advocates had viewed Common Article 3 as working in conjunction with Article 75 of Protocol I, as well to fill the gaps of Geneva IV. With the maturation of much of Protocol I, Common Article 3 may no longer be needed as a gap-filler. Furthermore the evolution of fundamental human rights law makes the expansive reading of Common Article 3 no longer necessary.

dered a decision in *Hamdan v. Rumsfeld*,<sup>101</sup> a *habeas* action challenging the legality of military commissions established to try detainees held at the U.S. detention facility at Guantanamo Bay, Cuba. The plaintiff, a citizen of Yemen captured in Afghanistan, argued that Common Article 3, among other provisions of the 1949 Geneva Conventions, prohibited the conditions under which he was detained and to be tried.<sup>102</sup> The government countered with the strict reading of Common Article 3 adopted in the presidential determinations discussed above, emphasizing the international aspects of the conflict in which it had detained Hamdan.<sup>103</sup> Judge Robertson rejected the government's arguments, holding that it is "universally agreed" that the humanitarian norms of Common Article 3 applied to international as well as internal armed conflict.<sup>104</sup> The government has appealed the decision to the D.C. Circuit Court of Appeals, which is expected to hear the case in April 2005.<sup>105</sup>

Subsequent legal challenges notwithstanding, the President's February 7 determinations clearly constituted conclusive legal guidance for the DOD in its prosecution of the phases of the Global War on Terrorism that followed. While they adopted most of the DOJ and White House Counsel recommendations, the President's decisions simultaneously addressed at least one chief concern of the State Department, and presumably the

101. 344 F. Supp. 2d 152 (D.D.C. 2004).

102. *See id.* at 156.

103. *See id.* at 160-63 (distinguishing the U.S. conflict with al Qaeda from a conflict between the United States and Afghanistan, arguing that Hamden and al Qaeda do not pass the test to qualify for POW status, and asserting that Common Article 3 does not apply to international conflicts).

104. *See id.* at 162-63. Judge Robertson expressly declined to evaluate the military commissions' procedures against the rather general and ambiguous due process guarantee announced in Common Article 3. *See id.* at 165-66.

105. *See* United States Court of Appeals for the District of Columbia Circuit, 60-Day Sitting Calendar, at <http://pacer.cadc.uscourts.gov/common/courtrm/60day.html> (last visited Mar. 12, 2005). In unrelated litigation addressing *habeas corpus* petitions filed by detainees held at Guantanamo Bay, Cuba, a federal district court from the District of Columbia made similar determinations with respect to the Geneva Conventions. *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005). In *In re Guantanamo Detainee Cases*, Judge Joyce Hens Green held that the Geneva Conventions protected Taliban fighters detained at Guantanamo and constituted a self-executing cause of action supporting the detainees' *habeas* petitions. *See id.* at 479. Judge Green did not, however, address specifically Common Article 3 as it related to the detainees or its application to the international armed conflict with Afghanistan. The Government has appealed Judge Green's decision to the D.C. Court of Appeals.

DOD's concern: the legal status of U.S. forces in Afghanistan and in the Global War on Terrorism.

Interestingly, by applying the Geneva Conventions to the conflict, the United States appeared to have reserved for itself the best of two worlds — at least legally speaking. First, it sustained its tradition of liberally applying the Geneva Conventions to armed conflict. At the same time, however, by determining that the Taliban did not meet Geneva POW qualifications, the United States would not be restricted by the Third Geneva Convention in its treatment of Taliban detainees. Second, applying the Conventions to the conflict would preserve the United States' legal argument for insisting on POW status for its own armed forces as, presumably, U.S. forces would exercise great caution to ensure they met the POW qualifications at all times.<sup>106</sup>

It is significant that neither the aforementioned memorandum, nor any other publicly available, contemporaneous authority, addressed the potential application of the Fourth Geneva Convention. Attention at the time seemed to have focused exclusively on application of the Third Geneva Convention. Yet as mentioned previously, each of the four 1949 Geneva Conventions is triggered by the same criteria under Common Article 2.<sup>107</sup> Thus when the administration determined that it would ap-

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106. Some authors have explored whether U.S. armed forces carried this through with respect to distinctive insignia during Operation Enduring Freedom in Afghanistan. See, e.g., Maj. William H. Ferrell, III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94 (2003) (examining the direct relationship between POW status and the wearing of a distinctive sign); W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493 (2003).

107. Common Article 2 of the 1949 Geneva Conventions states in relevant part:

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 [P]arties 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.

Geneva I, *supra* note 4, art. 2; Geneva II, *supra* note 4, art. 2; Geneva III, *supra* note 4, art. 2; Geneva IV, *supra* note 4, art. 2.

ply “Geneva” to the conflict with the Taliban, as a matter of course, all four Geneva Conventions would clearly apply in their entirety.<sup>108</sup>

The failure to discuss the Fourth Geneva Convention thus raised a number of questions for judge advocates. First, should one infer that the administration regarded the Fourth Geneva Convention as inapposite to the conflict? That is, once bifurcated into separate conflicts against al Qaeda and the Taliban, did the administration determine that neither conflict implicated civilians protected under the Fourth Convention? Alternatively, did the administration’s assertion that the Geneva Conventions applied necessarily position these detainees under the Fourth Convention as civilians, though they might simultaneously be unlawful combatants? This position does not seem to be supported by subsequent analysis of lawful interrogation methods to be employed against these detainees. That is, had the administration regarded these persons as protected under the Fourth Convention, especially those meeting the nationality criteria of Article 4,<sup>109</sup> one might reasonably have expected analysis of the Fourth Geneva Convention in the so-called “Torture Memo” and other interrogation-related documents.<sup>110</sup> Or fi-

108. See President Bush Memo, *supra* note 25, at 2 (concluding that “the provisions of Geneva will apply to our present conflict with the Taliban.”).

109. See *infra* notes 192-200 and accompanying text.

110. Our review of the series of publicly available administration memoranda and legal reviews drafted in 2002 and associated with interrogation methods and counter-resistance techniques does not reveal any discussion or mention of the Fourth Geneva Convention. See Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, DOJ, to William J. Haynes, II, Gen. Counsel, DOD, Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan (Feb. 26, 2002), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.26.pdf>; Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, DOJ, to Alberto R. Gonzales, Counsel to the Pres., Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> [hereinafter Gonzales Torture Statute Memo]; Memorandum from William J. Haynes, II, Gen. Counsel, DOD, Counter-Resistance Techniques (Nov. 27, 2002), available at <http://www.defenselink.mil/releases/2004/nr20040622-0930.html> [hereinafter Haynes Counter-Resistance Memo]; Memorandum from Gen. James T. Hill, Commander, DOD, to the Chairman of the Joint Chiefs of Staff, Counter-Resistance Techniques (Oct. 25, 2002), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc4.pdf>; Memorandum from Maj. Gen. Michael B. Dunlavey, Commanding, DOD, to U.S. S. Command, Counter-Resistance Strategies (Oct. 11, 2002), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf>; Memorandum from Lt. Col. Diane Beaver, Staff Judge Advocate, DOD, to Commander, Joint Task

nally, had the administration merely overlooked the Fourth Convention altogether? That is, following their determination that Taliban fighters did not qualify for protection under the Third Geneva Convention, did the administration merely neglect to

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Force 170, Legal Review of Aggressive Interrogation Techniques (Oct. 11, 2002), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf> [hereinafter JTF 170 Legal Review]; Memorandum from Memorandum from Lt. Col. Diane Beaver, Staff Judge Advocate, DOD, to Commander, Joint Task Force 170, Legal Brief on Proposed Counter-Resistance Strategies (Oct. 11, 2002), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf> [hereinafter JTF 170 Legal Brief].

The first memorandum addressing the Fourth Geneva Convention appears to be the 2003 product of the Department of Defense Working Group. See DOD, Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Apr. 4, 2003), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf> [hereinafter Working Group Report]. The report anticipates that other governments might assert that detainees determined not to be entitled to POW status would be entitled to protection under the Fourth Geneva Convention. See *id.* at 58-61 (noting that the Fourth Convention may inform the views of other countries as they assess U.S. actions). The report notes: "Every person in enemy hands must have some status under international law; he is either a prisoner of war, and as such covered by the Third Geneva Convention, a civilian covered by the Fourth Geneva Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law." *Id.* at n.64 (quoting GC IV COMMENTARY, *supra* note 100, art. 4, ¶ 4). The report further explains that other States may object to the U.S. view that the Fourth Geneva Convention is inapplicable to unlawful combatants seized in the war on terror. See *id.* Addressing customary international law, however, the Working Group observes: "The Department of Justice has determined that [the Fourth Convention] applies only to civilians but does not apply to unlawful combatants." *Id.* at 61. Although the Working Group references this conclusion of the DOJ twice, neither instance includes a citation to a specific memorandum from DOJ. See *id.* at 4, 61. The possibility remains that such guidance to the Working Group from the DOJ has not been made publicly available. At any rate, an interview conducted by the authors with a military attorney assigned to Combined Joint Task Force 7 ("CJTF-7"), the headquarters for post conflict stability and support operations in Iraq, indicates that staff did not have access to either the Working Group Report's conclusions regarding the Fourth Geneva Convention or the DOJ bases for those conclusions. See Interview with Maj. Daniel Kazmier, Student, 53rd Judge Advocate Officer Graduate Course (Nov. 5, 2004) (on file with authors). Indeed, the staff products of the CJTF-7 legal staff appear to contradict the conclusion that the Fourth Geneva Convention did not apply to unlawful combatants in Iraq. See *infra* notes 242-49 and accompanying text.

To the Authors' knowledge, at present the only DOJ memorandum addressing the Fourth Convention that has been made public addresses Article 49 thereof in the context of transferring or deporting protected persons under the Fourth Convention in the context of belligerent occupation. See Draft Memorandum from Jack Goldsmith, Assistant Attorney General, Office of Legal Counsel, for Alberto Gonzales, Counsel to the President, Re: Permissibility of Relocating Certain "protected Persons from Occupied Iraq (Mar. 19, 2004) available at [http://library.uchastings.edu/library/Library%20Information/News%20and%20FAQ/doj\\_march\\_19.pdf](http://library.uchastings.edu/library/Library%20Information/News%20and%20FAQ/doj_march_19.pdf).

consider that they might be civilians for purposes of the law of war? As fighters failing to qualify for protection under the Third Geneva Convention, were the Taliban truly extra-conventional persons? And should judge advocates expect to classify and instruct commanders to treat other unlawful combatants similarly situated, as falling entirely outside the governance of the Geneva Conventions, including the Fourth? We will address these questions in the following section, focusing first on the resources and training available to judge advocates faced with this and similar dilemmas in Operation Iraqi Freedom. As a new phase in the Global War on Terrorism opened and judge advocates considered such questions in the absence of definitive guidance, they seemed to rely on their previous education and training.

## II. *THE JUDGE ADVOCATE EDUCATIONAL AND OPERATIONAL ENVIRONMENT*

On March 19, 2003, the United States launched a series of air and missile strikes against targets in Iraq as the opening shots of Operation Iraqi Freedom.<sup>111</sup> One day later, armored formations of the U.S. Army Third Infantry Division and First Marine Expeditionary Force crossed into Iraqi territory in an attack that would ultimately culminate on April 9th with the effective occupation of Baghdad.<sup>112</sup> Although the conflict would be touted as

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111. See David E. Sanger & John F. Burns, *Threats and Responses: The White House; Bush Orders Start of War on Iraq, Missiles Apparently Miss Hussein*, N.Y. TIMES, Mar. 20, 2003, at A1 (noting that "President Bush ordered the start of the war against Iraq on [March 19, 2003]"); see also Donald H. Rumsfeld, *The Price of War in Iraq*, N.Y. TIMES, Mar. 19, 2004, at A23 (noting the "one-year anniversary of the beginning of Operation Iraqi Freedom").

112. See Michael R. Gordon, *A Nation at War: Strategy; Push to Finish the Job*, N.Y. TIMES, Apr. 9, 2003, at A1 (noting that within days of starting the war, Army and Marine forces had moved into Iraqi territory); see also Rajiv Chandrasekaran & Thomas E. Ricks, *U.S. Airstrikes Open War on Iraq; Baghdad Hit in Early Morning as Ground Troops Prepare to Cross Border*, WASH. POST, Mar. 20, 2003, at A01 (detailing initial U.S. military operations in Iraq). The date of the beginning of the legal occupation of Iraq by the U.S.-led coalition is a subject of debate. The legal standard for commencement of an occupation is stated in the regulations annexed to the 1907 Hague Convention IV. Article 42 of these regulations states: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Hague Convention Respecting The Laws and Customs of War on Land, with Annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, art. 42 [hereinafter Hague IV]. At any rate, effort to isolate a single date on which occupation began may prove fruitless as well as irrelevant. As Article 42 above indicates, occupation law recognizes cases of partial occupation. See *id.*; see also

part of the Global War on Terrorism, would deploy many of the same units, and would unfold contemporaneously with the campaign in Afghanistan, Operation Iraqi Freedom proved to be a substantially different fight than the campaigns waged previously in the GWOT.

The distinction from previous operations was especially stark in legal terms. First, from the outset of the conflict, the Geneva Conventions clearly applied. The following section outlines the legal methodology available to judge advocates in this new phase of operations. This section presents first an orientation to the legal methodology employed by judge advocates when discerning relevant legal standards. Second, we analyze those provisions of the law of war immediately relevant to treatment of civilians and unlawful combatants.

#### A. *The Judge Advocate Professional Education and Training System*

##### 1. The United States Army Judge Advocate General's Legal Center and School

The Judge Advocate General's Legal Center and School ("JAG School") is located on the grounds of the University of Virginia in Charlottesville. It is charged with the mission to conduct a graduate legal education program culminating in the award of a Master of Laws degree for all Army judge advocates, judge advocates from other armed services, and Army civilian attorneys. The Center and School offers both resident and non-resident courses of study for judge advocates and attorneys employed by the federal government. In addition, the Center and School develops and provides legal training for other members of the Army Judge Advocate General's Corps ("JAG Corps") and senior Army commanders. It prescribes legal curricula for other Army schools and activities, supports the broader military legal community "by providing access to digital and written legal materials and other assistance, and develops doctrine for legal support to the Army."<sup>113</sup>

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Geneva IV, *supra* note 4, art. 2 ("The Conventions shall apply to all cases of *partial or total occupation* of the territory of a High Contracting Party") (emphasis added). Thus, an occupation might legitimately be understood to come into existence as a gradual or incremental process rather than on any single date or following a particular event or battle.

113. See U.S. Army Judge Advocate General's Corps, at <http://www.JAGCNET.army.mil> (last visited Mar. 8, 2005) [hereinafter JAGCNET] (providing link to The

The JAG School mission statement includes, among other things, a mandate to educate “all Army judge advocates, judge advocates from the other armed services, and Army civilian attorneys; offer[ ] resident and nonresident courses of study for judge advocates and attorneys employed by the Federal Government; develop[ ] or provide[ ] legal training for other members of the Army Judge Advocate General’s Corps and senior Army commanders; prescribe[ ] legal curricula for other Army schools and activities; support[ ] the military legal community by providing access to digital and written legal materials and other assistance; and develop[ ] doctrine for legal support of the Army.”<sup>114</sup> The JAG School educates and trains more than 6,000 resident and non-resident students every year, using a combination of long and short course approaches, as well as web-based training modules, to accomplish the mission. Short courses of various types and durations, on a wide variety of subject matter, convene at the JAG School throughout the year.<sup>115</sup>

The crown jewel of the JAG School’s courses, though, is its longest resident course, the Judge Advocate Officer Graduate Course.<sup>116</sup> The purpose of the Graduate Course is to educate, develop, and inspire soldier-leader-lawyers for increasingly complex service across a broad spectrum of legal disciplines and in positions of greater responsibility. Attendees typically rank as

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Judge Advocate General’s Legal Center and School); *see also* Judge Advocate General’s Legal Center and School (“JAG School”), at <http://www.jagcnet.army.mil/JAGCNET-INTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (last visited Mar. 8, 2005) [hereinafter JAG School].

114. JAG School, *supra* note 113, at Mission Statement. *See* FM 27-100, *supra* note 12, at 2-5.

115. *See, e.g.*, JAG School, *supra* note 113, at Administrative and Civil Dep’t (“Multiple short courses are held on an annual basis.”).

116. *See id.* at Graduate Program. The JAG School offers a second resident course for military lawyers, the Judge Advocate Officer Basic Course (“JAOBC”). This course is 14 weeks in duration and is offered to all new attorneys entering the U.S. Army. It is conducted in two phases. Phase one is four weeks at Fort Lee, Virginia, and focuses new soldier-lawyers on field craft: judge advocates are trained in skills such as use of weapons, land navigation, and defense against biological, chemical, and nuclear attack. Phase two training is ten weeks at the School in Charlottesville, and concentrates on the practice of military law. *See id.* Upon completion of JA OBC, students move throughout the Army to operational assignments. *See id.* at Course Schedule (noting the duration of the phases); *see also id.* at Judge Advocate Officer Basic Course (describing the activities of each phase); Career Service Guide to the JAG Corps, Frequently Asked Questions, at <http://www.jagcnet.army.mil/JARO> (last visited Mar. 8, 2005) (noting that after the basic course, officers proceed to their duty assignments).



junior Majors or senior Captains. Upon completion of the rigorous ten-month course of study, students are awarded a Master of Laws degree in Military Law.<sup>117</sup> Graduates of this course typically move to operational assignments in positions of great responsibility as leaders of large legal organizations and advisors to operational commanders.

The International and Operational Law Department is one of four academic departments within the JAG School. Its primary mission is to train judge advocates of all armed services and other attorneys within the DOD and federal government in International and Operational Law, especially the law of war.<sup>118</sup> The Department fulfills its mission in the same manner described above — by providing instruction to resident and non-resident students in both long- and short-course formats. Long-course resident students, such as those in the Basic and Graduate Courses described above, receive a comprehensive course of instruction including academic lectures, seminar sessions, and practically-oriented exercises.<sup>119</sup>

Short-course students return to the School for education geared to present or follow-on assignments. This curriculum includes specialized courses on the Law of War, Intelligence Law, Domestic Operations Law, and Operational Law.<sup>120</sup> The Operational Law Course, a two-week program designed especially for judge advocates assigned to operational billets, provides refresher training on many aspects of traditional international law topics, with a special emphasis on the issues that operational judge advocates encounter in coalition, joint, and deployed envi-

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117. See JAG School, *supra* note 113, at Graduate Program. The school offers specialties in International and Operational Law, Contract and Fiscal Law, Administrative and Civil Law, and Criminal Law. See *id.*

118. See *id.*

119. See *id.* at Resident Course Descriptions. The Graduate Course, for example, studies an international law curriculum including core instruction of approximately 70 lecture hours, more than 20 seminar hours, and additional time set aside for practical exercise. See *id.* The core curriculum includes traditional international law topics such as the History and Framework of the Law of War, the Legal Basis for the Use of Force, International Agreements, Means and Methods of Warfare and the Law of Air, Sea, and Space. Study also includes extensive coverage of all four Geneva Conventions, Human Rights, Post Conflict Governance and Occupation Law, Intelligence Law, National Security Law, Domestic Operations, and Rules of Engagement. See *id.* at Graduate Program.

120. See *supra* note 12 and accompanying text; see also JAG School, *supra* note 113, at International and Operational Law Department.

ronments. All of the Department's courses are updated continuously to ensure timeliness and relevance, and where appropriate, they include the infusion of lessons learned from the Combat Training Centers<sup>121</sup> and real world operations.

Education and training are not limited to the school, however, as the International Law Department travels frequently to assist units and organizations with training needs. It is not uncommon, for example, for the Department to design and execute tailored training to specific commands, organizations, units or other governmental agencies.

## 2. The Combat Training Center Methodology

Since the late 1970s, the U.S. Army has employed the Combat Training Center ("CTC") Methodology to prepare its troops, leaders and units for the rigors of the modern battlefield.<sup>122</sup> The goal of the CTC Methodology is to provide Army units, leaders, and soldiers with thorough, rigorous, stressful, and especially realistic training in four Combat Training Centers worldwide.<sup>123</sup> The methodology incorporates three concepts to replicate realistic training conditions. The first is the concept of a training "box" — a training unit and its personnel are isolated within geographic boundaries—the conditions of which replicate the real world environment to the maximum extent possible.<sup>124</sup> Second, the CTC concept employs an "opposing force" — a force, usually of superior numbers, trained, equipped, and skilled in the doctrine, strategy and tactics of the contemplated enemy.<sup>125</sup> This opposing force, or "OPFOR" as it is known, engages the training unit in force-on-force maneuver with a view toward providing units and leaders with a realistic assessment of

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121. *See infra* note 123.

122. *See* Center for Law and Military Operations, In the Operations Center: A Judge Advocate's Guide to the Battle Command Training Program 16 (1996), available at <https://www.jagcnet.army.mil/eJAWS> (last visited Feb. 13, 2005) ("At least three innovative training ideas the Army worked on in the late 1970's crystallized at NTC, which was under development for several years before it welcomed the first training unit [established in October 1981].").

123. The four Combat Training centers are the National Training Center in Fort Irwin, California, the Combat Maneuver Training Center in Hohenfels, Germany, the Joint Readiness Training Center in Fort Polk, Louisiana, and the Battle Command Training Program at Fort Leavenworth, Kansas. *See id.* at 13-14, 265.

124. *See id.* at 16.

125. *See id.*

their war fighting abilities.<sup>126</sup> The third concept is the employment of an impartial and objective evaluation element. This element, known as the "Operations Group" or "Ops Group," consists of permanently-assigned personnel (called observer-controllers) who gather and analyze data on the training unit's performance with a view toward determining how the unit and its personnel have completed their wartime tasks.<sup>127</sup>

Recognizing that modern military operations have grown, and continue to grow increasingly complex and legally intense, the leadership of the Army JAG Corps has staffed, since 1995, each of the CTCs with at least one judge advocate observer-controller. These officers' mission is to insert legal scenarios into unit training and to evaluate the training unit's responses to them. Commensurate with this recognition, of course, is the realization that commanders, staffs, and soldiers operating in the contemporary operating environment benefit from the assignment of a judge advocate to their units.

Judge advocates, then, are assigned to every brigade-sized element (and sometimes to smaller maneuver units, depending on need).<sup>128</sup> These attorneys accompany their units on all missions—both real world and training. Units scheduled for deployment conduct Mission Rehearsal Exercises at one of the Training Centers. In contemplation of the Mission Rehearsal Exercise, exercise designers, including judge advocates assigned to the Training Center, fashion a realistic training scenario intended to prepare the unit for the mission ahead.

Units deploying to Kosovo, for example, entered a training environment that replicated the Balkans down to the minute detail. Exact cities and towns were replicated physically and filled with role players speaking the native language. Judge advocate observer-controllers inserted legal vignettes fashioned from the latest lessons learned taken from the Balkan theater of operations to create the most realistic and complete training possible.<sup>129</sup>

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126. *See id.*

127. *See id.* at 16-17.

128. *See* Center for Law and Military Operations, *GLAMO REPORT: Preparation Tips for the Deployment of a Brigade Operational Law Team (BOLT)*, 2001-JULY ARMY LAW. 51, 51 (2001).

129. *See generally* CENTER FOR LAW AND MILITARY OPERATIONS, *LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001: LESSONS LEARNED FOR JUDGE ADVOCATES* (2001),

The same remains true for Operation Enduring Freedom and Operation Iraqi Freedom: extensive training and preparation precede every unit's deployment into active theaters of operation. Mission Rehearsal Exercises, for example, are being conducted at all four training centers, and training units confront realistic training scenarios inclusive of legal lessons learned (such as Rules of Engagement and targeting issues) imported directly from Afghanistan and Iraq.<sup>130</sup>

### 3. Garrison Organizational Training and Supervisory Attorney Concepts

As noted previously, and as should be apparent throughout this Article, modern military operations are more legally intense than ever before. The operational tempo — or the rate at which units train and deploy — has increased similarly.<sup>131</sup> Both factors combine to place increased emphasis on JAG Corps leaders to ensure that their judge advocates know the law applicable to the area of operations and the mission the unit will perform. The Army JAG Corps has several internal mechanisms to ensure this is the case.

The first is the Staff Judge Advocate — the senior military attorney responsible for a particular legal organization — responsible as supervisory attorney and trainer for judge advocates under his command and control.<sup>132</sup> Certainly, the manner in which individual leaders discharge this responsibility varies with

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available at [https://www.jagcnet.army.mil/jagcnetintranet/databases/operational+law/clamo.nsf/\(DOCUMENTS\\_CATEGORIZED\)?OpenView&Count=1500&ExpandView&RestrictToCategory=public%20Documents](https://www.jagcnet.army.mil/jagcnetintranet/databases/operational+law/clamo.nsf/(DOCUMENTS_CATEGORIZED)?OpenView&Count=1500&ExpandView&RestrictToCategory=public%20Documents) (last visited Feb. 4, 2005) [hereinafter KO-SOVO LESSON LEARNED].

130. See generally CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, MAJOR COMBAT OPERATIONS 2001-2003 (2004), available at [https://www.jagcnet.army.mil/jagcnetintranet/databases/operational+law/clamo.nsf/\(DOCUMENTS\\_CATEGORIZED\)?OpenView&Count=1500&ExpandView&RestrictToCategory=Public%20Documents](https://www.jagcnet.army.mil/jagcnetintranet/databases/operational+law/clamo.nsf/(DOCUMENTS_CATEGORIZED)?OpenView&Count=1500&ExpandView&RestrictToCategory=Public%20Documents) (last visited Mar. 24, 2005) [hereinafter LESSONS LEARNED FROM AFGHANISTAN AND IRAQ].

131. See *Lessons Learned from Afghanistan and Iraq*, *supra* note 107, at 376; see also Maj. Jeffery D. Lippert, *Automatic Appeal Under UCMJ Article 66: Time for a Change*, 182 MIL. L. REV. 1, 1 (2004) (discussing the increasing burdens on each service's JAG Corps).

132. See U.S. DEP'T OF THE ARMY, REGULATION 27-1, JUDGE ADVOCATE LEGAL SERVICES 12-14 (Sept. 30, 1996), available at [http://www.army.mil/usapa/epubs/pdf/r27\\_1.pdf](http://www.army.mil/usapa/epubs/pdf/r27_1.pdf) (describing the designation and responsibilities of supervisory judge advocates); see also FM 27-100, *supra* note 12, at 2-10 to 2-11 (describing the role of Staff Judge Advocates).

individuals and circumstances. Common among most Army legal organizations, however, are established and regimented legal training and leader development programs. Such programs typically involve in-house instruction on legal or military topics of current or local interest. They normally go well beyond strictly legal topics, as the JAG Corps has long appreciated the importance of having their officers and legal personnel well-versed in the traditions of military service.

In addition to this in-house training, it is common for deploying units to engage in their own training prior to deployment to a training center for Mission Rehearsal Exercises or similar events. Members of the command's legal organization are nearly always involved in such activities and use such events to train not only legal personnel, but the rest of the command and staff of the organization. Legal personnel typically occupy space in the Tactical Operations Center, which the unit's command and staff uses as its headquarters. Judge advocates are, therefore, integrally involved in nearly every aspect of military operations.<sup>133</sup>

Another aspect of oversight and training is the Judge Advocate General's statutory obligation to visit judge advocates, wherever located, in the field to supervise the administration of their duties.<sup>134</sup> This responsibility is discharged personally by either the Judge Advocate General or the Assistant Judge Advocate General, who regularly visit every legal organization in the Army, whether deployed or in garrison. Such visits are taken seriously and feature comprehensive examination of the manner in which such organizations conduct the legal mission. Visits with senior tactical commanders are conducted with a view toward examining the nature and quality of legal services rendered to them. These "Article 6 visits" also include detailed analysis of local training programs.

#### 4. Legal Doctrine

Field Manual 27-100, Legal Support to Operations, is the Army's capstone legal doctrinal manual. It describes the missions and operations of JAGC organizations, units, and person-

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133. See FM 27-100, *supra* note 12, at 5-9 to 5-24 (describing the various aspects of military operations in which judge advocates participate).

134. See 10 U.S.C. § 806, art. 6(a) (2004).

nel supporting Army operations.<sup>135</sup> Given the legally intensive nature of modern operations, it is imperative that legal support to operations be integrated thoroughly into all aspects of operations to ensure compliance with law and policy and to provide responsive, quality legal services.

Army legal doctrine provides comprehensive guidance for legal training, organizational, and materiel development. It contains guidance for commanders, Staff Judge Advocates, staffs, and other JAG Corps personnel. It also implements Joint (other military services) and Army doctrine and incorporates lessons learned from recent operations.<sup>136</sup> The manual delineates roles and responsibilities within the JAG Corps and subordinate organizations and, perhaps most importantly, provides specific guidance on operational law and the core legal disciplines supporting Army operations: international law, military justice, administrative law, civil law, claims, and legal assistance.<sup>137</sup>

More importantly for our purposes, Army legal doctrine directly and specifically addresses the role of international law in all types of operations. It covers, for example, such topics as treatment of civilians, status of forces, rules of engagement, and international as well as interagency relationships.<sup>138</sup> It also addresses subjects like humanitarian assistance, Nation assistance, peace operations, and combating terrorism.<sup>139</sup>

The last doctrinal topic to consider is transformation; the process by which all military services, but especially the Army, are undergoing change in response to the contemporary operating environment. Much has been written and discussed about this subject. Doctrine is a critical element in establishing thoughtful and orderly transformation, as it provides concrete guidance and ensures that effective and comprehensive legal support will continue to be provided across the spectrum of operations.

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135. See *preface to FM 27-100, supra* note 12.

136. See *id.* at vii-ix.

137. See *id.* at 3-1.

138. See *id.* at 6-10 to 6-13.

139. See *id.* at 6-6 to 6-8.

### 5. The Center for Law and Military Operations and the Lessons Learned Methodology

The Army's JAG Corps has established The Center for Law and Military Operations ("CLAMO")<sup>140</sup> to examine military operations, extract legal lessons learned, and devise training strategies for addressing those issues.<sup>141</sup> The Center's mission is to capture lessons related by the legal personnel who actually served in theater and, when necessary to better understand the lesson, and to elaborate upon the underlying legal issue.<sup>142</sup> The lessons learned are imparted to CLAMO and other gathering organizations in a variety of ways.

Unit legal officers as well as individual judge advocates and paralegals have provided written "after-action reports." CLAMO personnel have traveled to units and conducted multi-day review conferences memorialized by recorded transcripts. CLAMO conducts video and audio taped interviews with legal personnel in theater as well as those passing through the JAG School for further training and education. In addition, CLAMO conducts scores of informal telephonic and in-person interviews and email exchanges with personnel involved in operations. Finally, CLAMO collects and archives numerous primary documents from the operations, ranging from legal annexes to complex planning and policy documents.<sup>143</sup>

These lessons are then used to devise training strategies that will prepare judge advocates to meet the myriad training and

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140. *See id.* at 2-5. The Center for Law and Military Operations ("CLAMO") is located at the Army Judge Advocate General's Legal Center and School and serves as a resource for operational lawyers. It seeks to fulfill its mission in five ways: first, it is the central repository within the JAGC for all-source data/information, memoranda, after-action materials and lessons learned pertaining to legal support to operations, international and domestic; second, it supports judge advocates by analyzing all data and information, developing lessons learned across all military disciplines, and by disseminating those lessons learned and other operational information to the Army, Marine Corps, and Joint communities through publications, instruction, training, and databases accessible to operational forces world-wide; third, it supports judge advocates in the field by responding to requests for assistance; fourth, it integrates lessons learned from operations and the Combat Training Centers into emerging doctrine and into the curricula of all relevant courses, workshops, orientations, and seminars conducted at the JAG Center and School; and fifth, in conjunction with the center and School, sponsors conferences and symposia on topics of interest to operational lawyers. *See id.* at 2-5 to 2-6.

141. *See id.* at 2-5.

142. *See* LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, *supra* note 130, at 2.

143. *See id.*

legal challenges that face them across the spectrum of operations. The lessons are the subject of extensive *Lessons Learned Handbooks*<sup>144</sup> which are distributed to the force. They are then incorporated into the curriculum taught in the International and Operational Law Department as well as other JAG School Departments.

For our purposes, CLAMO's 2004 work regarding major combat operations in Afghanistan and Iraq is the most relevant of such *Lessons Learned Handbooks*. All of 456 pages in length, this document, which is distributed worldwide and available to at the JAG Corps and CLAMO websites,<sup>145</sup> offers the most comprehensive look to date at legal issues that confronted judge advocates and commanders in both theaters of operations.

### B. *Judge Advocates' Experience with the Law of War*

One of the most persistent and prominent lessons learned from previous military operations is the need to determine the legal nature of the conflict. The *Kosovo Lessons Learned Handbook*, for example, cited the following principle lesson for judge advocates: "Agreement Must Be Reached on the Applicability of the Law of Armed Conflict Prior to Commencement of Operations."<sup>146</sup> That document further states that:

[B]oth prior to and during the early days of the air campaign, disagreement existed within U.S. and NATO political and legal circles over whether or not [the Law of Armed Conflict ("LOAC")] applied to Operation Allied Force. Because LOAC applies to international armed conflicts, the precise legal issue was whether Operation Allied Force constituted an international armed conflict. It also seems apparent that political concerns entered the calculation.<sup>147</sup>

Recent experience with the law of war points to three kinds of conflict, the first and most straightforward of which is international armed conflict. According to Common Article 2, the "Conventions shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of

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144. See, e.g., *KOSOVO LESSONS LEARNED*, *supra* note 129; *LESSONS LEARNED FROM AFGHANISTAN AND IRAQ*, *supra* note 130.

145. See generally *LESSONS LEARNED FROM AFGHANISTAN AND IRAQ*, *supra* note 130.

146. *KOSOVO LESSONS LEARNED*, *supra* note 129, at 46.

147. *Id.* at 46-47 (footnotes omitted).



the High Contracting Parties . . . .”<sup>148</sup> Prominent examples of Common Article 2 conflicts include World War II, Korea,<sup>149</sup> Vietnam,<sup>150</sup> the Falklands Islands Conflict,<sup>151</sup> and Operation Desert Storm.<sup>152</sup> Such conflicts are generally rather easy cases from the International Law perspective. A threshold determination that a conflict falls within Common Article 2 invokes the full measure of Geneva Convention protections and orients military practitioners to Field Manual 27-10, the Department of the Army “bible” on the Law of Land Warfare.<sup>153</sup>

In the early 1980s, however, new types of operations emerged. Then-termed Operations Other Than War, or “OOTW,” Military Operations Other Than War, or “MOOTW,”<sup>154</sup> and now often referred to as Stability and Sup-

148. Geneva IV, *supra* note 4, art. 2.

149. While few people argue whether or not the Korean War was a Common Article 2 conflict, there was a question of whether the Geneva Conventions would apply. The United States did not ratify the Conventions until 1955. However, by July 1950, North Korea, South Korea, and the United States all agreed to be bound its terms. *See Geneva Conventions in the Korean Hostilities*, 33 DEP’T ST. BULL., July 1955, at 69-73. Unfortunately, in practice, North Korea routinely abused and killed POWs in violation of the agreement and the terms of the Geneva Conventions. *See* SAMUEL C. OGLESBY, 92D CONG., COMMUNIST TREATMENT OF PRISONERS OF WAR: A HISTORICAL SURVEY, PREPARED FOR THE SEN. SUBCOMM. TO INVESTIGATE THE ADMINISTRATION OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITY LAWS OF THE COMM. ON THE JUDICIARY (1972) (discussing the general mistreatment of POWs at the hands of communist captors).

150. *See* LAW AND RESPONSIBILITY IN WARFARE: THE VIETNAM EXPERIENCE 13 (Peter D. Trooboff ed., 1975) (discussing whether the Vietnam conflict constituted an internal war, or an international armed conflict meeting the requirements of Common Article 2 of the Geneva Conventions). *See generally* THE VIETNAM WAR AND INTERNATIONAL LAW (Richard A. Falk, ed. 1968) (analyzing the international legal aspects of the Vietnam conflict).

151. *See* James F. Gravelle, *The Falkland (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain*, 107 MIL. L. REV. 5, 5-6 (1985); *see also* SYLVIE-STOYANKA JUNOD, PROTECTION OF THE VICTIMS OF THE ARMED CONFLICT FALKLAND-MALVINAS ISLANDS (1982).

152. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 1397-1419 (1994) [hereinafter CARTER & TRIMBLE] (providing copies of the U.N. Security Council Resolutions and U.S. documents authorizing the coalition’s actions); *see also* DOD, FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR (1992), available at <http://www.ndu.edu/library/epubs/cpgw.pdf> (last visited Feb. 13, 2005) [hereinafter DOD PERSIAN GULF REPORT]; U.S. NEWS AND WORLD REPORT, TRIUMPH WITHOUT VICTORY: THE UNREPORTED HISTORY OF THE PERSIAN GULF WAR (1992) (providing a comprehensive narrative of the conflict in the Persian Gulf).

153. *See* DEP’T OF THE ARMY, FM 27-10, LAW OF LAND WARFARE (July 18, 1956) [hereinafter FM 27-10].

154. *See* DOD, JOINT PUBLICATION 3-07, *Joint Doctrine for Military Operations Other Than War I-I* (Jun. 16, 1995), available at [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp3\\_07.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp3_07.pdf).

port Operations, or “SASO,”<sup>155</sup> these operations typically involve something other than attempts at military victory or occupation of military territory. The intent, rather, is to establish and maintain a safe and secure environment, usually pursuant either to consent by the Parties or a mandate from the United Nations in the form of a Security Council resolution.<sup>156</sup> Under such circumstances, the treaties and customary rules constituting the law of armed conflict do not strictly apply. Prominent examples of this type of conflict include Grenada<sup>157</sup> and Haiti.<sup>158</sup> While, strictly speaking, the full protections of the law of war do not apply to these operations, it is still, as a matter of practice, important that practitioners employ the “right conflict/right person” analysis.<sup>159</sup>

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155. See DEP’T OF THE ARMY, FIELD MANUAL 3-07, *Stability Operations and Support Operations* 1-1 (Feb. 20, 2003), available at [http://www.dtic.mil/doctrine/jel/service\\_pubs\\_fm3\\_07.pdf](http://www.dtic.mil/doctrine/jel/service_pubs_fm3_07.pdf) [hereinafter FM 3-07]. U.S. forces conduct stability operations and support operations to deter war, resolve conflict, promote peace, strengthen democratic processes, promote sustainable and responsive institutions and promote freedom from oppression, subversion, lawlessness, and insurgency. Stability operations promote and protect U.S. national interests by influencing the threat, political, and informational dimensions of the operational environment through a combination of peacetime developmental, cooperative activities and coercive actions in response to crises. Stability operations typically fall into 10 broad types that are neither discrete nor mutually exclusive, such as peace operations, overseas internal defense, security assistance and humanitarian and civic assistance. Support operations employ Army forces to assist civil authorities, foreign or domestic, as they prepare for or respond to crises and relieve suffering. See *id.* at 1-2 to 1-4. See generally DEP’T OF THE ARMY, FIELD MANUAL 3-0, OPERATIONS (Jun. 14, 2001), available at [http://www.dtic.mil/doctrine/service\\_publications\\_usarmy\\_pubs.htm](http://www.dtic.mil/doctrine/service_publications_usarmy_pubs.htm); DOD, JOINT PUBLICATION 3-07.3, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR PEACE OPERATIONS (Feb. 12, 1999), available at [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp3\\_07\\_3.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp3_07_3.pdf).

156. See FM 3-07, *supra* note 130, at 4-2.

157. See DEP’T OF STATE, 3 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW (1981-1988) 3454 (Marian Nash (Leich) ed., 1995) (excerpting a memorandum from U.S. Judge Advocate General Hugh J. Clausen: “No party to the hostilities in Grenada has suggested that a state of war exists”). Clausen’s memorandum insisted that the Geneva Conventions apply because “*de facto* hostilities [exist] on Grenada”. *Id.* See Memorandum, HQDA, DAJA-IA, Subject: Geneva Conventions Status of Enemy Personnel Captured During URGENT FURY (Nov. 4, 1983); see also JOHN NOR-TON MOORE, LAW AND THE GRENADA MISSION (1984).

158. See Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78-82 (1995) (“The agreement of September 18, 1994, negotiated in Port-au-Prince between President Jimmy Carter and General Raoul Cedras, and its acceptance by the Aristide government, led to the consent-based, nonviolent, hostilities-free entry of U.S. forces and their peaceful deployment. In such circumstances, the Geneva Conventions on the Protection of Victims of War . . . are not, strictly speaking, applicable.”).

159. See *infra* text accompanying notes 169-76.

A third type of operations is much harder to categorize. Falling into this category are operations such as Bosnia,<sup>160</sup> Macedonia,<sup>161</sup> Panama,<sup>162</sup> and Syria.<sup>163</sup> The conflict in Bosnia, for example, displayed characteristics of both international and internal armed conflict and was so considered, depending on the location and time of the combatant activities. In the *Prosecutor v. Dusko Tadic* opinion, the International Criminal Tribunal for the Former Yugoslavia determined that the conflict was internal for the purposes of that indictment, but found the conflict to be international for the purposes of the *Prosecutor v. Delalic* indictment.<sup>164</sup>

In the case of Macedonia, the debate about the characteri-

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160. See, e.g., CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN THE BALKANS 1995-1998: LESSONS LEARNED FOR JUDGE ADVOCATES 111-14 (Nov. 13, 1998).

161. See, e.g., KOSOVO LESSONS LEARNED, *supra* note 129, at 47.

162. See GENERAL ACCOUNTING OFFICE, PANAMA: ISSUES RELATING TO THE U.S. INVASION, REP. NO. NSIAD-91-174FS (1991), available at <http://161.203.16.4/d20t9/143716.pdf> (last visited Feb. 8, 2005) [hereinafter GAO PANAMA REPORT]. Initially, the official U.S. position was that Panama was not an Article 2 conflict. This argument was based primarily on the fact that the legitimate Government of Panama had invited the United States to help it reestablish control following Noriega's nullification of the free elections that resulted in Mr. Endara's election as President. See *id.*; see also Maj. Richard M. Whitaker, *Civilian Protection Law in Military Operations*, 1996-NOV ARMY LAW. 3, 32 (1996). To support this position, concurrent with the invasion, Mr. Endara was sworn in as President of Panama in the U.S. Southern Command Headquarters one hour before the invasion occurred; forces were already airborne en route. See GAO PANAMA REPORT *supra*, at 4 n.2; see also BOB WOODWARD, THE COMMANDERS 84, 182-83 (1991) (providing background and details on Operation Just Cause). See generally THOMAS DONNELLY ET AL., OPERATION JUST CAUSE: THE STORMING OF PANAMA (1991). After General Noriega's capture, he petitioned a U.S. federal court claiming POW status under the Geneva Conventions. See *United States v. Noriega*, 808 F. Supp. 791, 793 (S.D. Fla. 1992). While the United States argued that Noriega would be treated consistent with the Convention, it would not agree that he was, in fact, entitled to POW status. See *id.* at 794. However, the district court judge found that as a matter of law, the Panama operation was an Article 2 conflict and granted POW status to Noriega. See *id.* at 795-96. Noriega was ultimately tried, convicted, and sentenced in 1992 to 40 years on drug and racketeering charges. See David Margolick, *Judge Rules Noriega Is Prisoner of War*, N.Y. TIMES, Dec. 19, 1992, at A18; see also Larry King, *Noriega Pleads Case For Release*, USA TODAY, Apr. 22, 1996, at 2D.

163. In 1986, Syria shot down an American fighter plane. See Walter Gary Sharp, Sr., *Revoking an Aggressor's License to Kill Military Forces Serving the United Nations: Making Deterrence Personal*, 22 MD. J. INT'L L. & TRADE 1, 16 (1998). The United States initially asserted that the law of war had not been triggered as there was no international armed conflict between the United States and Syria. See *id.*

164. See *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, [1995] 35 I.L.M. 32, 43, ¶ 30; *Prosecutor v. Delalic*, Case No. IT-94-1-A-R77, [2001] 40 I.L.M. 630, 633-34, ¶¶ 8-15.

zation of the conflict proved more than academic when Yugoslav forces captured three U.S. soldiers conducting a security patrol along the border between the former Yugoslavia and the former Yugoslav republic of Macedonia on March 31, 1999, just one week after the air war had begun.<sup>165</sup> The relevant issue, of course, was the legal status of the soldiers. They could have been considered POW's, and therefore entitled to the protections of the Geneva Conventions. Or, they might have been "detainees" entitled to some lesser protections, or perhaps common criminals, afforded no protections at all.<sup>166</sup> The United States ultimately took the position that Operation Allied Force was an international armed conflict, and that the subject troops were POWs under the law of war.<sup>167</sup> The United States' failure to settle upon categorization from the outset, however, created confusion for both sides and proved more than a little unsettling — especially for the three soldiers involved.<sup>168</sup>

### C. *The JAG Corps Law of War Methodology*

#### 1. JAG Corps Application of the 1949 Geneva Conventions

Interpreting and applying the law of war remains judge advocates' core function during combat operations. As part of its mission to educate and train government attorneys for their participation in operations such as Operation Iraqi Freedom, the International Law Department at the Army JAG School has employed what we refer to as the "Right Kind of Conflict/Right Kind of Person" inquiry.<sup>169</sup> Students are taught to employ this methodology at the outset of operations to determine the individual status of participants/Parties to the conflict. It is conducted as a bifurcated analysis. The first part concerns the exact nature of the conflict: is it an armed conflict of an international nature — commonly referred to as a "Common Article 2 conflict?"<sup>170</sup> Or, is it something other than that, such as internal armed conflict, commonly termed a "Common Article 3 conflict?"<sup>171</sup>

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165. See, e.g., KOSOVO LESSONS LEARNED, *supra* note 129, at 47.

166. See *id.*

167. See *id.*

168. See *id.* nn.12-13.

169. See LOW HANDBOOK, *supra* note 97, at 81-90.

170. See *id.* at 81-84.

171. See *id.* at 84-86.

As the foregoing examples illustrate, the operative point is that the determination of whether or not a conflict rises to the level of Common Article 2 is a question of fact.<sup>172</sup> As was the case in the DOJ's and President's analysis of the conflict with al Qaeda, participation of opposing State Parties to the Geneva Conventions is the most important prerequisite to determining whether a conflict triggers the law of war.<sup>173</sup>

Once students have determined that State Parties to the Geneva Conventions are engaged in hostilities, we instruct them to scrutinize the nature of the conflict. That is, they must ask "Have hostilities risen to the level of 'armed conflict?'" "Armed conflict," is a term drawn directly from Common Article 2. It has long been understood to operate as a relatively low threshold. According to Jean Pictet's commentary to Article 2 of the Conventions:

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4.<sup>174</sup>

Some commentators assert that State practice since the adoption of the Conventions has raised the bar, so to speak, on what types of interstate hostilities qualify as armed conflict.<sup>175</sup> Currently,

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172. See *id.* at 83 (explaining how U.S. instruction on conditions triggering the law of war includes a study of the concept of recognized belligerency, although State practice in this area appears to be waning).

173. See Presidential Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism (Nov. 13, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/print/20011113-27.html> (clearly asserting the existence of "a state of armed conflict."). The order asserted two bases to support its characterization of the conflict: (1) that the scale of the attacks against the United States were of a magnitude consistent with armed conflict; and (2) the attacks required the use of U.S. Armed Forces. See *id.*

174. GV IC COMMENTARY, *supra* note 100.

175. See WALTER GARY SHARPE, SR., CYBERSPACE AND THE USE OF FORCE 66-67 (1999) (arguing that determining whether an armed conflict exists between States may now require inquiry into the scope, intensity, and duration of the conflict); see also Eric Talbot Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self Defense*, 38 STAN. J. INT'L L. 207 (2002); Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts On a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885 (1999).

our instruction to judge advocates retains the lower threshold suggested by Pictet, such that the law of war operates across an extremely broad range of interstate hostilities.<sup>176</sup>

It is therefore essential for operational judge advocates and military commanders to have answers to these questions at the earliest possible opportunity. The resolution of nearly all operational legal issues, including those related to treatment obligations, flow from these threshold determinations. It is noteworthy, however, that judge advocates at the operational and tactical levels rarely are charged with the responsibility to make such strategically relevant determinations. To the contrary, such determinations are normally made by policymakers, and then optimally, conveyed to judge advocates to advise commanders accordingly. In the case of Operation Iraqi Freedom, the administration signaled early that the operation would be considered an international armed conflict for the purposes of Article 2.<sup>177</sup> Following the onset of occupation, however, such policy determinations were not immediately forthcoming. In fact, even today, they remained classified.

Once hostilities satisfy the conflict prong of the “Right Conflict/Right Person” test, judge advocates examine the relevant participants to discern the applicable treatment standards offered by the law of war — the right person prong.<sup>178</sup> Analysis under this second prong typically involves gathering facts about a group or individual on the battlefield and applying those facts to definitions or qualifying criteria articulated under the Geneva Conventions.<sup>179</sup> As mentioned previously, analysis of the conflict in Afghanistan immediately led policymakers and their attorneys to consider how persons detained in that conflict would be categorized under the Third Geneva Convention. Yet as Section II of this Article identifies in closing, judge advocates were not privy to such guidance and interpretation concerning the

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176. See *supra* text accompanying notes 148-67 (discussing whether conflicts including Korea, Kosovo, Panama, and World War II triggered the law of war).

177. See, e.g., *Executive Branch Memoranda on Status and Permissible Treatment of Detainees*, 98 AM. J. INT'L L. 820, 828 (Sean Murphy ed., 2004) (noting that Major General Geoffrey Miller reported to Secretary of Defense Rumsfeld that the Geneva Conventions did apply to Iraq); Cdr. Gregory P. Noone et al., *Prisoners of War in the 21st Century: Issues in Modern Warfare*, 50 NAVAL L. REV. 1, 5 n.7 (2004) (noting that Geneva Conventions apply to U.S. actions in Iraq).

178. See LOW HANDBOOK, *supra* note 97, at 86-87.

179. See *id.*

Fourth Convention and how it applied to the broad spectrum of persons encountered, and in many instances detained, by U.S. and Coalition forces in Iraq.<sup>180</sup>

The Fourth Geneva Convention is perhaps the most complex of the four Geneva Conventions. A massive treaty, it is comprised of no less than 159 articles.<sup>181</sup> Unlike the first three Conventions, the 1949 Fourth Convention was a revolutionary development in the law of war. Each of the first three Conventions built upon protections adopted in previous Geneva Conventions.<sup>182</sup> These Conventions operated as refinements, offering years of State practice and editing to inform their interpretation — not so the Fourth.

Clearly a product of the unprecedented civilian toll exacted by World War II, the drafters of the Fourth Convention realized the “imperative necessity” of extending protections of the law of war to civilians.<sup>183</sup> Incorporating affirmative protections for civilians as victims of war, the Fourth Convention broke new ground for positive, or treaty-based, law of war. Although custodial treatment of civilians had received attention in prior law of war treaties, this coverage could be argued to have been collateral to protections intended primarily to benefit combatants.<sup>184</sup> The Army JAG School emphasizes the Fourth Convention’s categorization procedures over its substantive protections.<sup>185</sup> It is hoped

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180. See *infra* Pt. II.E.

181. See Geneva IV, *supra* note 4.

182. See Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, *translated and reprinted in* DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICT* 365 (1988) [hereinafter 1864 Convention]; Convention [No. III] for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, July 29, 1899, 32 Stat. 1827, 1 Bevans 263, *reprinted in* SCHINDLER & TOMAN, *supra*, at 385; Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 U.N.T.S. 343 (discussing the use of the term “custodial treatment” to distinguish attention civilians receive in the Hague Regulations with respect to targeting operations); see also 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex, Regulation Concerning the Laws and Customs of War on Land, Pmbl., 36 Stat. 2277, 205 Consol. T.S. 277, arts. 25-26 [hereinafter Hague IV].

183. See GC IV COMMENTARY, *supra* note 100, at 5.

184. See Geneva IV, *supra* note 4; see also 1864 Convention, *supra* note 182, art. 5 (“Inhabitants of the country who bring help to the wounded shall be respected and shall remain free.”). Thus, although civilians gained some protection under the Convention, they were only protected in a collateral or derivative sense by virtue of their support to wounded combatants.

185. See LOW HANDBOOK, *supra* note 97, at 146-48.

that by understanding how properly to classify persons under the Convention's definitional articles — answering the “right person” prong — the relatively straightforward substantive articles will present fewer interpretive challenges.

The organizational framework of the Fourth Convention assists greatly in its application. The Convention consists of four parts. The first is composed entirely of definitional articles and provisions for application and cessation of application of the Convention.<sup>186</sup> Part I includes the common articles found in all four Conventions. The remaining three parts lay out the protections reserved for specific groups of civilians.<sup>187</sup>

Part II, entitled “General Protection of Populations against Certain Consequences of War” offers the broadest set of protections available under the Fourth Convention. Article 13 defines its coverage, announcing that Part II “cover[s] the whole of the populations of the countries in conflict, without any distinction . . . .”<sup>188</sup> Although one might read “the whole populations of the countries” to cover only citizens of warring States, the commentary to Article 13 makes clear that coverage is broader. The commentary states: “The provisions in Part II . . . apply not only to protected persons, i.e., to enemy or other aliens and to neutrals, as defined in Article 4 but also to the belligerents’ own nationals; it is that which makes these provisions exceptional in character.”<sup>189</sup> As Pictet indicates, Part II protections are to be applied to the broadest range of civilians, including neutrals. Thus, even a State’s own nationals, a class previously not covered by the law of war, qualify for protection under Part II.

While the extent of Part II coverage, as Pictet observes, may be exceptional, its substantive protections are not. Part II pro-

186. See Geneva IV, *supra* note 4, pt. I.

187. See *id.* pts. II-IV.

188. See *id.* art. 13.

189. GC IV COMMENTARY, *supra* note 100, at 118. We, and our School’s publications and instructional material, make frequent reference to Pictet’s commentary on the Conventions. It is important, however, to emphasize that Pictet’s work, though detailed and widely respected, remains merely persuasive rather than authoritative. Pictet’s commentary was produced at the request of the sponsoring organization of the 1949 Geneva Conventions, the ICRC. See *id.* at 10-11. While the ICRC clearly holds a special status in relation to the Conventions, it is not a State party to the Conventions. As such, its statements on the meaning of the Conventions, again, while persuasive, do not carry the weight of international law, as would the binding statements of Parties to the Conventions.



tections, listed in Articles 14 through 26, essentially shield civilians from the immediate effects of hostilities. For instance, Articles 14 and 15 anticipate that Parties will establish protective zones to harbor civilians and medical treatment facilities from the effects of war.<sup>190</sup> Article 23 guarantees free passage of all “consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians.”<sup>191</sup> Missing from Part II coverage is any treatment arising from circumstances in which civilians find themselves in the custody of an enemy State or under that State’s control.

In fact, the Conventions limit such protections to a discreet class of persons — so called “protected persons.” Parts III and IV of the Convention, present a massive catalogue of treatment obligations toward protected persons. Yet as Pictet’s commentary notes above, the broad protective coverage of Part II exists in stark contrast with the restricted scope of the Conventions’ protections in Parts III and IV.

Article 4 defines protected persons. At first reading, Article 4 presents a confusing picture. Article 4 first defines whom it covers stating, “Persons protected by the Convention are those who, at any given moment, and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not Nationals.”<sup>192</sup> From this definition, it is at least clear that qualification as a protected person requires satisfaction of both nationality and geographic criteria. Put simply, protected persons must not be nationals of the State that exercises control over them. In fact, outside the context of occupation, they must be nationals of the enemy of the State that controls them.

Pictet’s commentary to Article 4 offers a helpful bifurcated analysis of Article 4.<sup>193</sup> The commentary separates protected persons who so qualify by virtue of their presence in enemy territory from those who qualify by virtue of their presence in occupied territory. The structure of Part III of the Fourth Convention, the substantive protections reserved for protected persons, mirrors and thus supports Pictet’s bifurcation. Section II of Part

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190. See Geneva IV, *supra* note 4, arts. 14-15.

191. *Id.* art. 23.

192. *Id.* art. 4.

193. See GC IV COMMENTARY, *supra* note 100, at 46.

III catalogs protections for persons who qualify for protected person status by virtue of their presence in the enemy territory. Section III lists protections for those who are protected persons by virtue of their presence in occupied territory. Section I lists a set of protections shared by both types of protected persons.

Helpfully, Article 4 also outlines whom it does not cover, including: (1) nationals of States not bound by the Conventions;<sup>194</sup> (2) nationals of “a neutral State . . . in the territory of one of a belligerent State”;<sup>195</sup> and (3) persons covered by either the First, Second, or Third Geneva Conventions.<sup>196</sup> Notably absent from the definition of protected person is any reference to so-called unlawful combatants. Perhaps more significantly, though Article 4 announces several categories of persons not regarded as protected persons; unlawful combatants are not mentioned among those excluded from coverage. This omission would be acute were it not for the provisions of Article 5.

Article 5 of the Fourth Geneva Convention permits Parties to derogate from, or suspend, treatment guaranteed to protected persons in limited instances.<sup>197</sup> Such derogations are reserved exclusively for so-called unlawful combatants. In parsing available derogations, the Fourth Geneva Convention again adopts a geographic bifurcation. The broadest range of derogations is reserved for treatment of alien protected persons. That is, protected persons found in enemy territory may expect to have any rights and privileges suspended, if exercise of those

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194. See Geneva IV, *supra* note 4, art. 4. For a list of member States, see Int'l Committee of the Red Cross, States Party to the Main Treaties, (Nov. 12, 2004), at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf). This exemption represents a minute category of persons: citizens of the Nauru. At present, all U.N. member States have ratified or acceded to the Geneva Conventions with the exception of the Nauru. See *id.*

195. Geneva IV, *supra* note 4, art. 4. Through this exclusion, the Fourth Convention presumes that neutrals receive adequate protection from arbitrary or inhumane treatment during armed conflict from their functioning diplomatic representatives.

196. The first three Geneva Conventions employ definitional articles outlining qualification criteria for their protections in a manner similar to Article 4 of the Fourth Geneva Convention. See Geneva II, *supra* note 4, art. 4. Mirroring coverage in Article 4 of the Third Geneva Convention, Article 13 of the First Geneva Convention delineates the bounds its protections for the wounded and sick. See, e.g., Geneva I, *supra* note 4, art. 13; Geneva II, *supra* note 4, art. 13. As we have seen above, the POW qualification criteria are found in Article 4 of the Third Geneva Convention. See *supra* notes 81-82 and accompanying text (discussing application of Article 4 in consideration of the Taliban regime).

197. See Geneva IV, *supra* note 4, art. 5.

rights and privileges would threaten the security of the host State.<sup>198</sup> Such derogations are not without limitations. The final Paragraph of Article 5 outlines a series on non-derogable treatment standards, including humane treatment and a right to a "fair and regular trial."<sup>199</sup> Article 5 further states that protections suspended under Article 5 shall be reinstated as soon as the security situation permits.<sup>200</sup>

In its second Paragraph, Article 5 reserves a much narrower right of derogation in the context of occupation.<sup>201</sup> In occupied territory, protections for unlawful combatants who otherwise qualify as protected persons may be suspended only with respect to rights of communication.<sup>202</sup> In addition to the humanitarian limitations of the third Paragraph of Article 5, these derogations may only be invoked "where absolute military security so requires . . . ."<sup>203</sup>

As commentators have remarked, the language of Article 4 and the structure of Article 5 and Part III of the Fourth Geneva Convention place them at odds with one another.<sup>204</sup> Simply put, in defining protected persons, Article 4 asks whether a person is in the hands of his Nation's enemy.<sup>205</sup> On its face, this definition carries no geographic criteria other than the exemptions clause, which does not relate to nationals of the belligerents to the conflict.<sup>206</sup> Yet the Article 5 derogation scheme only addresses hostile protected persons in two contexts: (1) as aliens in enemy territory; and (2) as nationals of or neutrals in occupied territory.<sup>207</sup> Article 5 does not address hostile protected persons in the hands of their Nation's enemy while in their own unoccupied territory.

The organizational framework of Part III of the Fourth Geneva Convention may be read to buttress the construct of Article 5. While Part III provides specific sections delineating protec-

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198. *See id.*

199. *Id.*

200. *See id.*

201. *See id.*

202. *See id.*

203. *Id.*

204. *See Callen, supra note 1, at 1062-65; see also Jinks, supra note 1, at 393-99.*

205. *See Geneva IV, supra note 4, art. 4.*

206. *See Geneva IV, supra note 4, art. 4; see also supra notes 194-96 and accompanying text (describing the qualification criteria in Article 4).*

207. *See Geneva IV, supra note 4, art. 5.*

tions for alien protected persons in enemy territory (Section II), protections for protected persons in occupied territory (Section III) and protections for both (Section I), Part III seems to overlook protections for hostile protected persons in their own territory.

To illustrate, consider an Afghan civilian under the control of U.S. armed forces in Afghanistan. Under Article 4, this person could easily be determined to be a protected person, as he would be "in the hands of a Party to the conflict."<sup>208</sup> Furthermore, he would not fall under any of the disqualifying criteria of Article 4.<sup>209</sup> Yet considering that he is not in enemy territory and that the U.S.-led Coalition has not been widely alleged to have occupied Afghanistan, which section of Part III protects him? Furthermore, if he commits acts hostile to the United States, which paragraph of Article 5 authorizes derogation from his protections to preserve the security of the U.S. forces detaining him?

While commentators have suggested answers,<sup>210</sup> the solution for judge advocates lies within Department of the Army Field Manual 27-10 ("FM 27-10"), the Army's law of war manual.<sup>211</sup> Because the most current version of FM 27-10 was published in July 1956, it does not offer commentary or analysis of subsequent law of war treaties, such as the 1977 Additional Protocols to the Geneva Conventions. With the expanding reach and acceptance of Protocol I and other recent law of war treaties, the utility of FM 27-10 is increasingly in question. However, with respect to the 1949 Conventions, FM 27-10 remains authoritative.

Addressing protected persons, FM 27-10 states: "[T]hose protected by [the Fourth Geneva Convention] include all persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war."<sup>212</sup> The following Paragraph is quick to explain the applicability, however, of the Article 5 derogations with respect to hostile protected persons.<sup>213</sup> Paragraph 248(a) reproduces Article 5 in its

208. *Id.*

209. *See supra* notes 194-96 and accompanying text.

210. *See Callen, supra* note 1, at 1028; *see also* Jinks, *supra* note 1, at 374-75.

211. *See* FM 27-10, *LAW OF LAND WARFARE, supra* note 128.

212. *Id.* at 98.

213. *See id.* at 99, ¶ 248.

entirety, including the derogation provisions for hostile protected persons in alien territory and those in occupied territory. Importantly, in commentary on Article 5, Paragraph 248(b) provides:

*Other area.* Where, in territories other than those mentioned in (a) above, a Party to the conflict is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person is similarly not entitled to claim such rights and privileges under [the Fourth Geneva Convention] as would, if exercised in favor of such individual person, be prejudicial to the security of such State.<sup>214</sup>

By its title, and its explanation thereof, Paragraphs 247 and 248(b) simultaneously resolve the issue of hostile civilians as protected persons, as well as hostile protected persons in their own territory for members of the DOD.<sup>215</sup> Admittedly, Paragraph 248 does not cite authority for reading a right to derogate into Article 5, but by reserving a right to derogate, the manual clearly indicates an initial determination that protected persons do exist in what otherwise is a statutory void.<sup>216</sup>

## 2. *The Department of Defense Law of War Program*

Difficulties experienced by judge advocates in interpreting and applying the law of war are frequently diffused, but admittedly sometimes complicated, by the DOD Law of War Program. Expressed in a pair of documents, the program includes directions to the component services of the DOD, instructing them how to implement and train students in the law of war. For judge advocates, the most important aspect of the program is the policy regarding application of the law of war. Department of Defense Directive ("DODD") 5100.77 charges the heads of its components to ensure that their members "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."<sup>217</sup> The implementing instruction of DODD 5100.77 repeats the charge qualifying, however, that

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214. *Id.*

215. *See id.* at 98-99, ¶¶ 247-48.

216. *See id.* at 99, ¶ 248.

217. DODD 5100.77, *supra* note 13.

observance of the law of war may, in such operations, may be suspended when “otherwise directed by competent authorities.”<sup>218</sup> Thus, the promise to apply the law of war broadly remains qualified by executive fiat.<sup>219</sup>

In our classrooms, judge advocates (including those new to the School and those returning with experience applying the Law of War Program), express frustration with the program’s ambiguity. Many find understanding or complying with the program difficult without a clear delineation<sup>1</sup> between what the United States regards as a “principle” or “spirit” and what does not so qualify. Other judge advocates have questioned, in writing, the utility and clarity of the program.<sup>220</sup>

#### D. *Guantanamo Bay Detainees*

Throughout this Article we have referred to the continual challenges that judge advocates faced with respect to categoriza-

218. U.S. DOD, Chairman of the Joint Chiefs of Staff Instruction 5810.01B, *Implementation of the DOD Law of War Program* (Mar. 25, 2002).

219. International law is replete with States’ assurances and promises to comply with their obligations under international humanitarian law. *See, e.g.*, S.C. Res. 1195, U.N. SCOR, 3925th mtg., U.N. Doc. S/RES/1195 (1998) [hereinafter S.C. Res. 1195]; S.C. Res. 1483, U.N. SCOR, 4761st mtg., U.N. Doc. S/RES/1483 (2003) [hereinafter S.C. Res. 1483]. Such statements often include explicit reference to the Geneva Conventions. *See* U.N. Res. 1195, *supra*; *see also* U.N. Res. 1483, *supra*. What these statements do not state clearly, or where they are liable to mislead, is that such promises do not guarantee application of the law of war at all. States’ obligations under the law of war, including the Geneva Conventions, include those laws’ built-in triggering mechanisms. *See* Geneva IV, *supra* note 4, art. 2. Absent a committed and unambiguous application of relevant portions of the Conventions to a conflict, the issue of their application remains unresolved by blanket statements of commitment. Thus, if a State agrees to abide by its obligations under the Geneva Conventions wholesale, that State is simultaneously issuing a caveat. That is, honoring its obligations would only include applying the Conventions provisions to conflicts and Parties to which that State itself views the Conventions applicable through the so-called triggering mechanisms of Common Article 2 and Article 1(4) of the Additional Protocols to the Conventions. Furthermore, the Conventions bring a second filter to their application under such a promise. Even when triggered, the Conventions apportion their most significant protections to very discreet groups of persons on the battlefield (e.g., prisoners of war, and protected persons). The effect of such statements and promises, therefore, is to provide precious little clarity or commitment, doing little to resolve the legal ambiguities faced by judge advocates.

220. *See, e.g.*, Maj. Timothy 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). *But see* W. Hays Parks, *Rules of Conduct During Operations Other Than War: The Law of War Does Apply*, AM. DIPL. (2001), at <http://www.unc.edu/depts/diplomat/>.

tion of the participants. We have also alluded to the fact that because certain subjects remained unaddressed, conscientious military officers other than judge advocates often “borrowed” written products and policies from other theaters of operation in attempts to fill in gaps. For these reasons, consideration of policies developed at Guantanamo Bay and the legal analysis undergirding those policies is relevant for consideration.

The Guantanamo Bay detention facility ultimately held more than 600 detainees.<sup>221</sup> The question of how detainees would be interrogated was apparently unanswered for some time.<sup>222</sup> As noted earlier, the Army, and by extension the other services, had provided guidance on interrogation techniques for years. This guidance existed primarily in the form of Army Field Manual 34-52 (“FM 34-52”).<sup>223</sup> In effect since at least 1987, and adopted by the other services, FM 34-52 underwent substantial revision and legal review in 1992.<sup>224</sup> In essence, FM 34-52 prescribes specific approaches and techniques for the interrogation of prisoners of war. In addition, Army Regulation 190-8 provides for the treatment of captured, detained, and interned persons, directing humane treatment and setting strong prohibitions regarding certain activities.<sup>225</sup>

In the fall of 2002, as interrogations were conducted on detainees at Guantanamo Bay, it became apparent that many detainees offered more resistance to established approaches and techniques than had been anticipated. In response to this development, the Director of Intelligence Operations for Combined Joint Task Force 170, who was in charge of interrogation operations at the facility, authored a memorandum stating that many of the detainees had shown great resistance and that the command was seeking to employ more effective counter-resistance

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221. See Laura Parker, *Spy Case Was a “Life-altering Experience” For Airman*, USA TODAY, Oct. 18, 2004, at 2A.

222. See, e.g., K. Elizabeth Dahlstrom, *The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay*, 21 BERKELEY J. INT’L L. 662, 681-82 (2003) (describing differing views towards law covering interrogation of detainees at Guantanamo Bay).

223. See U.S. DEP’T OF THE ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION (May 8, 1987).

224. See U.S. DEP’T OF THE ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION (Sept. 28, 1992) [hereinafter FM 34-52].

225. See AR 190-8, *supra* note 63.

techniques.<sup>226</sup>

The request was forwarded to the Command Judge Advocate for legal review. In short, she determined that: (1) international law (and therefore the Geneva Conventions) did not apply to the situation; (2) military necessity required more stringent counter-measures; and (3) the requested counter-measures did not violate applicable federal law. Significantly, the Command Judge Advocate requested legal review of her determinations from higher headquarters.<sup>227</sup>

The Command Judge Advocate's legal analysis, a comprehensive document almost seven pages in length, was based upon several significant premises. The first was that the Geneva Conventions did not apply to these detainees. Indeed, she noted, the President had determined in his February 7, 2002 directive that detainees were not enemy prisoners of war.<sup>228</sup> Despite this determination, she noted that detainees "must be treated humanely and, subject to military necessity, in accordance with the principles of [the Geneva Conventions]."<sup>229</sup> Adopting the same line of reasoning, she noted that FM 34-52 was based upon the Geneva Conventions, and because the detainees were not POWs, the Conventions did not apply to them, so the regulation was not binding.<sup>230</sup> After a lengthy discussion of many bodies and facets of international law, she noted that "no international body of law directly applies."<sup>231</sup> Finally, she considered the application of domestic law extensively, concluding ultimately that "the proposed strategies [did] not violate applicable federal law."<sup>232</sup>

This legal review was forwarded to and endorsed by the command to the General Counsel of the DOD. On November 27, 2002, the General Counsel's command recommended, "as a matter of policy," that the Secretary of Defense authorize seventeen of the twenty techniques.<sup>233</sup> The Secretary of Defense did

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226. See Memorandum from Lt. Col. Jerald Phifer, J2, to Commander, JTF 170, Request for Approval of Counter-Resistance Strategies (Oct. 11, 2002), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf> [hereinafter J2 Interrogation Request].

227. See JTF 170 Legal Brief, *supra* note 110.

228. See *id.*

229. *Id.*

230. See *id.*

231. *Id.*

232. *Id.*

233. Haynes Counter-Resistance Memo, *supra* note 110.



so on December 2, 2002.<sup>234</sup>

Pursuant to the objections of uniformed attorneys, the Secretary of Defense rescinded the memorandum on January 15, 2002, specifically rescinding the authority for so-called category II and III techniques.<sup>235</sup> On that same date, he directed the DOD General Counsel to establish a working group within the DOD to assess the legal, policy, and operational issues relating to the interrogations of detainees held by the U.S. Armed Forces in the war on terrorism.<sup>236</sup> The Working Group, issued an extensive report on April 4, 2003, detailing legal, historical, policy and operational considerations, as well as specific findings, conclusions, and recommendations.<sup>237</sup>

To this point, it appears that the Fourth Geneva Convention, save Common Article 3, had yet to be considered in any substantive sense, at least in relation to the treatment of Guantanamo detainees. Certainly none of the guidance offered regarding detainee operations specifically addressed the Fourth Geneva Convention. First, one might have implied an unspoken determination that the Fourth Convention, though clearly triggered by the President's determination, was inapplicable. Such a reading would be reinforced by the driving motivation of the memoranda — protecting the policymakers and commanders from prosecution under the War Crimes Act.<sup>238</sup> In any event, where the administration had exhaustively analyzed and interpreted the Third Geneva Convention for purposes of operations in Afghanistan, the Fourth Geneva Convention was left largely untreated.

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234. See Final Report of the Independent Panel to Review DOD Detention Operations 7 (Aug. 2004), available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> [hereinafter Final Report 2004].

235. See Memorandum from Secretary of Defense to General Counsel, DOD, Detainee Interrogations (Jan. 15, 2003), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc6.pdf>. Category II and III techniques were proposed in the JTF-170 intelligence officer's request for approval of harsher techniques. See J2 Interrogation Request, *supra* note 226. In August 2004, the DOD released an independent investigation conducted by former Secretary of Defense, James Schlesinger. See Final Report 2004, *supra* note 187. Mr. Schlesinger noted that Secretary Rumsfeld revoked his earlier approval to use some of particularly harsh interrogation techniques. See *id.* at 35. The report states that the Navy General Counsel was concerned about the approved techniques. See *id.*

236. See Final Report 2004, *supra* note 187, at 35.

237. See Working Group Report, *supra* note 91.

238. See, e.g., Taft Memo, *supra* note 65, at 3; Ashcroft Letter, *supra* note 75.

E. *Addressing the Problem in Iraq*

Just as was the case with respect to Operation Enduring Freedom in Afghanistan and the detention operations of Coalition Joint Task Force 170 ("CJTF-170") at Guantanamo, examination of the initial phase of Operation Iraqi Freedom reveals little, if any, consideration of the Fourth Geneva Convention. Indeed, the Army JAG Corps' lessons-learned manual covering the major combat phases of Operation Iraqi Freedom gives scant attention to issues associated with the Fourth Geneva Convention.<sup>239</sup> Part and parcel with this failure was the DOD's perceived failure to plan for post conflict operations, after major combat operations had ended. This perceived failure earned DOD officials criticism from many circles.<sup>240</sup>

As early as the fall of 2002, judge advocates began to prepare for what they anticipated to be a belligerent occupation of Iraq. In preparation for this eventually, they set about acquiring as many legal resources and as much legal history as they could find: they went so far as to contact the JAG School Librarian in order to acquire documents related to World War II occupation experiences in Germany and Japan.<sup>241</sup> They included occupation issues in the military exercises preceding their deployment into the Iraqi theater and, based on assumptions that they would encounter common criminals and other detainees in addition to enemy prisoners of war, judge advocates wrote one of the first orders issued by the U.S. Army's Fifth U.S. Corps, establishing a detention system.<sup>242</sup>

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239. A CLAMO volume of lessons learned during the occupation and subsequent phases of operations in Iraq is in development at the time of writing. It is expected to be published by Summer 2005.

240. See, e.g., Michiko Kakutani, *Following a Paper Trail to the Roots of Torture*, N.Y. TIMES, Feb. 8, 2005, at 1; *Rice Takes Helm With Chance to Right Second-term Course*, USA TODAY, Jan. 19, 2005, at 10A; David E. Sanger & Richard W. Stevenson, *Bush Supporters Are Split On How to Pursue Iraq Plan*, N.Y. TIMES, May 13, 2004, at A11.

241. See Interview with Dan Lavinger, Librarian, The Army Judge Advocate General's Legal Center & School, in Charlottesville, Virginia (Nov. 23, 2004) (on file with authors). Mr. Lavinger recalls requests from several judge advocates, from separate commands and headquarters requesting archival materials related to occupation law, especially U.S. Army experience during World War II. See *id.* Mr. Lavinger recalls providing, among other sources, copies of Army Field Manual 27-5, Civil Affair Military Government, dated 1940. See *id.*

242. See Interview with Maj. Steve Cullen, The Army Judge Advocate General's Legal Center & School, Center for Law and Military Operations, in Charlottesville, Virginia (Nov. 23, 2004) (on file with authors). Maj. Cullen attended the United States

Among other provisions, this order specifically applied the Geneva Conventions, and borrowing from approaches previously used by U.S. judge advocates in Kosovo, also established a magistrate review requirement within twenty-one days of detention. This order grew eventually into a much more comprehensive effort that, in August 2003, established capture/detention cards, created Article 78, Geneva Convention IV review and appeal boards, produced internment orders, and implemented a criminal review board that effectively functioned as a provost court (by establishing maximum time served limits for administrative release). It appears that this was the first time that Article 78 boards and processes had ever been implemented.<sup>243</sup>

If actual combat operations with a high contracting Party to the Conventions were not enough to raise the prospect of application of the Fourth Geneva Convention, then a de facto occupation, coupled with the prospect of processing, detaining and interrogating thousands of Iraqi and other captured personnel, certainly brought the Fourth Convention to the fore. At this point, the questions raised by failure to address the Fourth Geneva Convention at policy levels, such as whether unlawful combatants should be regarded as extra-conventional persons became too large to ignore. They manifested themselves overtly within the context of detainee operations. Judge advocates, with no guidance from within the theater of operations or from outside, sought to provide the answers.

Since the majority of Fourth Geneva Convention-related issues manifested themselves in the area of detainee operations, judge advocates chose affirmatively to insert themselves into the process through attempts at the formulation of local policies regarding detainees. It is of paramount importance to note that, prior to judge advocates' involvement in policy formulation, there were no such policies in place. It is also important to note that they were not requested or tasked to formulate such poli-

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Army V Corps Office of the Staff Judge Advocate (OSJA) after action review in Heidelberg, Germany, on May 18, 2004. Among topics discussed and reviewed were V Corps preparations, prior to deployment to Iraq as Headquarters CJTF-7, to incorporate legal standards of the Fourth Geneva Convention into plans. *See id.* Specifically, the OSJA operational law attorney assigned to the Corps Plans Section, incorporated the Fourth Geneva Convention into pre-deployment exercise scenarios as well as operational plans. *See id.*

243. *See id.*

cies. Rather, they noted an absence of guidance and were therefore concerned that some limitations should be placed on prospective detention activities. Lastly, it appears that legal personnel in theater did not review or employ several of the more controversial documents, such as the "Gonzales Memo"<sup>244</sup> and the DOD Working Group Report.<sup>245</sup>

Perhaps more important than anything else, however, were the legal premises from which they began their efforts. From all available evidence, it was clear that judge advocates took the view from the outset of operations in Iraq that the nature of the conflict was international armed conflict and that the Third and Fourth Geneva Conventions were therefore applicable. Indeed, the senior military attorney for Combined Joint Task Force 7 in Iraq testified that, in his view, the totality of the Third and Fourth Geneva Conventions applied to occupation operations in Iraq.<sup>246</sup> As a consequence of this determination, individuals who failed to meet the criteria to be accorded POW status under Article 4 of the Third Geneva Convention remained protected persons under the Fourth Convention.

Because no preexisting policies or guidance reflected these views, judge advocates began to draft policies for their commanders and supported units. In a series of draft internal memoranda, judge advocates articulated clearly that operations were being conducted in a theater of war in which the Geneva Conventions were applicable.<sup>247</sup> The policies expressly advised that Coalition forces treat all persons under their control humanely, ensuring that the rights of protected persons were preserved.<sup>248</sup> Exhibiting an appreciation of the law regarding protected persons under the Fourth Geneva Convention, draft policies also contained language regarding derogations under Article 5 of the Fourth Convention, providing, in essence, that detainees who posed security risks to the Coalition may be regarded as having forfeited rights of communication.<sup>249</sup>

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244. See Gonzales Torture Statute Memo, *supra* note 110.

245. See Working Group Report, *supra* note 110.

246. See Warren Statement, *supra* note 8, at 4.

247. See *id.*

248. See *id.*

249. Reports indicate the many fighters encountered by coalition forces were not Iraqi nationals, but rather non-Iraqi fighters either in place at the time of invasion or who infiltrated to participate in combat. See Thomas E. Ricks, *Rebels Aided By Allies in Syria, U.S. Says; Baathists Reportedly Relay Money, Support*, WASH. POST, Dec. 8, 2004, at A01

By the time that these drafts were finally approved, the local policies bore little resemblance to public perceptions of their contents. As noted above, the policies, as approved, invoked specifically the application of the Geneva Conventions, going so far as to cite specific articles of the Fourth Geneva Convention. The policies opined exactly that detainees were protected persons under the purview of the Fourth Geneva Convention and discussed the possible use of derogations under Article 5.

Lastly, and perhaps a bit beyond the purview of this Paper, the policies attempted to set clear controls and limits on interrogation approaches and techniques — limiting approved techniques to those approved by Army Field Manuals (after extensive legal review at the highest levels long before the instant conflict) for use on prisoners of war, who receive the highest protections under international law. Ultimately, the policies employed from October 2003 through May 2004, were much more conservative in approach and protections than even the Field Manual, which, as noted above contemplated application to prisoners of war. They also installed unprecedented oversight and control measures.

In summary, though the concept of extra-conventional persons had clearly been introduced into the debate about the status of Parties in the Iraqi theater of operations, it is clear that military judge advocates either resisted the temptation to attach such a label to persons in the theater, or ignored it in favor of a more cautious approach under international law. That approach, the extension of the maximum protections under the circumstances, seems to have served them and the command well.

### CONCLUSION

The United States' recent wartime experience with the law of war has forged of a new generation of judge advocates. These officers, and their supporting paralegals, have gained an impres-

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(discussing fighters coming across Syrian border). During the subsequent occupation, analyzed purely under Article 4 of the Fourth Convention, such persons might meet the nationality criteria required for protected person status (e.g., as neutral nationals in occupied territory in the case of Jordanian citizens). Yet according such status to non-Iraqi fighters seems to strain a major goal of the Fourth Convention, namely, ensuring minimum treatment standards for persons caught up in conflict. Fighters infiltrating into Iraq, to the contrary, injected themselves into the conflict.

sive appreciation and level of understanding of the legal issues associated with military operations. Moreover, these judge advocates exhibit a clear understanding of the most complex international law issues.

At the same time, review of these recent operations has demonstrated disparate approaches to the law of war within the executive branch. We have shown that the Global War on Terrorism forced executive agencies and lawyers, many not historically associated with the law of war, to grapple with its complexities, quirks, and shortcomings. With respect to the conflict with the Taliban in Afghanistan, these officials determined that the United States would apply the Geneva Conventions. Yet employing the qualification criteria of the Third Geneva Convention, officials concluded that Taliban fighters did not qualify for protection as prisoners of war. Simultaneously, these officials either declined to consider, or more likely excluded, these same fighters from protection under the Fourth Geneva Convention, creating what we have termed “extra-conventional persons.”

We have shown that, subsequent to the above determinations, judge advocates, educated and trained to apply the law of war, faced challenges classifying similar fighters in another theater of conflict. In Operation Iraqi Freedom, judge advocates participated in a conflict to which, like Afghanistan, the Geneva Conventions were determined to apply as a matter of law. Moreover, as in Afghanistan, judge advocates encountered fighters that, because of their appearance and battlefield conduct would not qualify for protection under the Third Geneva Convention. Yet with the precedent for treatment of such unlawful combatants as “extra-conventional persons” laid by policymakers, we have shown that judge advocates declined to do so. To the contrary, judge advocates anticipated, consistent with longstanding doctrine, that failure to qualify as prisoners of war was not the end of the analysis under the Conventions. Rather, judge advocates analyzed these fighters under the Fourth Geneva Convention, determining those who met the definitional criteria of Article 4 to be protected persons. Judge advocates then employed derogations provided for by the Conventions and legal doctrine to balance the security needs of their commanders and units with the humanitarian spirit and provisions of the Conventions.

Judge advocates will likely continue to experience disconnects between policy and law. These disconnects may be inevita-

ble as the United States and its Coalition partners participate in non-traditional operations that test accepted international law precepts. We cannot speculate whether international law will change to comport with new threats or the asymmetric battlefield. If past practice is a portent of the future, such changes will be a long time in coming.

In this likely scenario, the decisions of policy makers will play similarly significant roles. If this is indeed the case, we are confident that judge advocates will continue to perform impressively. As we believe this piece has illustrated, their education and training prepared them well for the challenges they faced in Iraq and elsewhere and prepares them for the challenges they will certainly face in the future.