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FOR ATTORNEY GENERAL ONLYLEGAL BACKGROUND

- The Geneva Conventions “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” and “to all cases of partial or total occupation of the territory of a High Contracting Party.”
  - The Conventions do not apply to our worldwide conflict with al Qaeda, which is not a “High Contracting Party.” See also *Hamdan v. Rumsfeld* (D.C. Cir. July 15, 2005).
  - The President has determined that the Conventions apply to our conflict with the Taliban because Afghanistan is a “High Contracting Party.”
  - The Conventions apply to our conflict with the former regime in Iraq because that conflict is between “High Contracting Parties” and, prior to June 28, 2004, because the United States occupied Iraq.
- The Third Geneva Convention (“GPW”) requires that notice be given of detentions of persons who qualify for prisoner of war status under GPW art. 4 (“POWs”).
  - Notice is not required for al Qaeda detainees because al Qaeda is not a party to the Conventions.
  - Notice is not required for Taliban detainees because the Taliban, as a group, do not meet the criteria set forth in GPW art. 4 for POW status.
  - Notice is required for detainees associated with the armed forces of the former Iraqi regime who satisfy the requirements set forth in GPW art. 4
- The Fourth Geneva Convention (“GC”) requires that notice be given of detentions of persons located in the territory of the detaining State or in occupied territory who satisfy the nationality and other requirements set forth in GC art. 4 (“protected persons”).
  - In United States territory, nationals of Afghanistan, Iraq, and countries that do not have normal diplomatic representation in the United States (e.g., Iran) may qualify for protected person status. Although the better view is that GTMO is not United States territory, litigation developments could call that conclusion into question.
  - Persons captured in Iraq before the end of occupation (June 28, 2004) who remain in detention retain protected person status if they satisfy the requirements of GC art. 4.
- United Nations Security Council Resolution 1546, which authorizes the multinational force (“MNF”) to detain where “necessary for imperative reasons of security” and incorporates a commitment “to act in accordance with” the Geneva Conventions, does not impose any notification obligation when the Geneva Conventions do not.

## GENERAL FRAMEWORK

- In most circumstances involving captures and detentions today, the Geneva Conventions do not impose notification requirements on the United States.
- The Third Geneva Convention ("GPW"), which would require notice for POWs, does not impose notification requirements in most circumstances relevant here.
  - Notice is not required for al Qaeda detainees because al Qaeda is not a party to GPW.
  - Notice is not required for Taliban detainees because they do not qualify for POW status.
  - Though probably not operationally significant, notice would be required for persons associated with the armed forces of the former Iraqi regime who qualify for POW status.
- The Fourth Geneva Convention ("GC") does not impose notification requirements in most circumstances because the occupation of Iraq ended on June 28, 2004.
  - Notice would be required for persons captured in Iraq before the end of occupation (June 28, 2004) who qualify for protected person status.
  - In U.S. territory, notice may be required for detainees who are nationals of Afghanistan, Iraq, or countries lacking normal diplomatic representation in the U.S.
- United Nations Security Council Resolution 1546 does not impose any notification obligation when the Geneva Conventions do not.

## CONCLUSIONS

- Except for some unusual situations, detention operations conducted pursuant to the Department of Defense's proposed policy would not require notification under the Conventions.
- For certain unusual categories of detainees, additional fact-dependent analysis would be necessary to determine whether notification is required:
  - Persons associated with the armed forces of the former Iraqi regime
  - Persons captured in Iraq before the end of occupation (June 28, 2004)
- If GC's restrictions for occupied territory still applied in Iraq, they would prohibit some conduct authorized under the proposed policy, such as forcible transfers or deportations of protected persons from Iraq.
- It is therefore important to review statements of senior Administration officials that may suggest that U.S. policy is to apply the substantive requirements of the Geneva Conventions. Adherence to such a policy might require notification and might place other substantive limitations on treatment of detainees.