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OSD Policy

**Summary Analysis of Applicability of Geneva Conventions to Conflicts
in the War on Terrorism**

- **Support for Geneva Conventions** – The USG favors the Geneva Conventions, upholds them steadfastly and has a greater practical interest than any other country in the world in respect for them.
- **Application to conflicts and states** – The Geneva Conventions apply to conflicts between states-parties to the Conventions.
- **Conventions apply to Taliban but not al Qaida** – Soon after 9/11, the President decided that the Conventions:
 - apply to the conflict with Afghanistan's Taliban regime, but
 - *not* to the global conflict with al Qaida.
- **Taliban not entitled to POW status** – Though the Conventions apply to the conflict with the Taliban, the President decided that the Taliban detainees are not entitled to POW status because they did not wear uniforms, comply with the laws of war and otherwise satisfy the conditions for such status.
 - Critics have argued that the USG should have given the Taliban and al Qaida the privileges of POW status anyway.
- **Incentive to comply with the laws of war** – The Conventions say that detainees are entitled to POW status only if they satisfy certain conditions:
 1. Operate in a chain of command.
 2. Wear uniforms.
 3. Carry arms openly.
 4. Comply with the laws of war.

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- These conditions aim chiefly to protect non-combatants.
- Favorable treatment for POWs is an incentive for proper behavior in war.
- The President decided properly that granting POW status to the Taliban and al Qaida, despite their failures to comply with the rules, would *not* have bolstered the Geneva Conventions.
- On the contrary, it would have undermined the incentive that the Conventions' framers built into the law to protect non-combatants and otherwise encourage proper behavior in war.
- **Unlawful combatants** – Detainees not entitled to POW status are nonetheless entitled to basic humane treatment as a matter of customary international law.
 - (Some legal scholars ascribe the basic humane treatment requirement not only to customary international law, but to the Geneva Conventions themselves.)
 - The Taliban and al Qaida detainees at Guantanamo get basic humane treatment.
 - In other words, the Taliban detainees are getting the treatment to which they are entitled under the Geneva Conventions.
 - And the al Qaida detainees are getting the treatment to which they would be entitled under the Conventions if the Conventions applied to their conflict with us.
- **Iraq** – From the outset, US policy has been unequivocal: The Geneva Conventions apply to the conflict in Iraq and all Iraqi detainees, military and civilian, are covered by them.
- **Respecting the Conventions** – So the USG position has been to uphold the Conventions and apply them properly throughout the war on terrorism, in Afghanistan, with al Qaida and in Iraq.

Conventional Warfare

By Douglas J. Feith

In the months following 9/11, the Bush administration asked itself how the laws of war apply to the war on terrorism. The question is not simple, for the Geneva Conventions say that they apply to conflicts between states-parties; but al Qaeda is a terrorist network and not a state, let alone a party to the Geneva Conventions.

Secretary of Defense Donald Rumsfeld asked his team how best to think this through. The joint chiefs chairman, Gen. Dick Myers, and I took the lead in advising the secretary. Gen. Myers, normally low-key, spoke out passionately on the subject. He described the Geneva Conventions as ingrained in U.S. military culture, and said that an American soldier's self-image is bound up with the Conventions. As we want our troops, if captured, treated according to the Conventions, we have to encourage respect for the law by our own example.

I shared those views. The general and I together briefed Secretary Rumsfeld on how the Geneva Conventions apply to the Taliban and al Qaeda. I drafted our point paper on Feb. 3, 2002.

Here is an unedited quotation of the key section of the Defense Department's interest in the Convention:

The Convention is a good treaty.

• One could quibble about details, but the Convention is a sensible document that requires its parties to treat prisoners of war the way we want our captured military personnel treated.

• U.S. armed forces are trained to treat captured enemy forces according to the Convention.

• This training is an essential element of U.S. military culture. It is morally important, crucial to U.S. morale.

• It is also practically important, for it makes U.S. forces the gold standard in the world, facili-

tating our winning cooperation from other countries.

U.S. forces are more likely to benefit from the Convention's protections if the Convention is applied universally.

• Highly dangerous if countries make application of Convention hinge on subjective or moral judgments as to the quality or decency of the enemy's government. (That's why it is dangerous to say that U.S. is not legally required to apply the Convention to the Taliban as the illegitimate government of a "failed state.")

A "pro-Convention" position reinforces (the U.S. government's) key themes in the war on terrorism.

• The essence of the Convention is the distinction between soldiers and civilians (i.e., between combatants and non-combatants).

• Terrorists are reprehensible precisely because they negate that distinction by purposefully targeting civilians.

• The Convention aims to protect civilians by requiring soldiers to wear uniforms and otherwise distinguish themselves from civilians.

• The Convention creates an incentive system for good behavior. The key incentive is that soldiers who play by the rules get POW status if they are captured.

• The U.S. can apply the Convention to the Taliban (and al Qaeda) detainees as a matter of policy without having to give them POW status because none of the detainees remaining in U.S. hands played by the rules.

In sum, U.S. public position on this issue should stress:

• Humane treatment for all detainees.

• U.S. is applying the Convention. All detainees are getting the treatment they are (or would be) entitled to under the Convention.

• U.S. supports the Convention and promotes universal respect for it.

• The Convention does not squarely address circumstances that we are confronting in this new global war against terrorism, but while we work through the legal questions, we are upholding the principle of universal applicability of the Convention.

A few days later, President Bush protected these important Defense Department and U.S. interests by determining that the Conventions apply by law (and not just by policy) to our conflict with the Taliban regime. But Taliban detainees are entitled only to basic humane treatment, for the Taliban failed to meet the Convention's conditions for POW status—e.g., wearing uniforms and complying with the laws of war. The Conventions do not apply to the conflict with al Qaeda. But al Qaeda detainees are entitled anyway to the same basic humane treatment, consistent with the Conventions' principles.

As to Iraq, the U.S. government has recognized from the outset that the Geneva Conventions apply by law and all Iraqi detainees are covered by them. All Iraqi military detainees have had POW status. As we all know from the horrible photos, some detainees in Iraq have been abused, but that mistreatment violated the Defense Department's policy as promulgated by the secretary.

We want the members of our armed forces, the American people and the world to know that U.S. policy is "pro" Geneva Conventions, and that the Defense Department's leadership has been and remains committed to applying them properly throughout the war on terrorism—in Afghanistan, with al Qaeda, in Iraq and around the world.

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