U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

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MEMORANDUM FOR THE FILES

From: Howard C. Nielson, Jr.
Deputy Assistant Attorney General

Re: Whether Persons Captured and Detained in Afghanistan are "Protected Persons" under the Fourth Geneva Convention

In May and June of 2004, we advised Pat Sullivan and David Nahmias of the Criminal Division that persons captured and detained in Afghanistan do not qualify for "protected person" status under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365 ("GC," the "Fourth Convention," or the "Convention"). This memorandum memorializes our analysis and conclusions.

Like the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364 ("GPW" or the "Third Convention"), GC applies "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties," art. 2(1) (or between powers that accept and apply its provisions, art. 2(3)), and to "cases of partial or total occupation of the territory of a High Contracting Party," art. 2(2).[1] The President has previously determined that GPW applies to the armed conflict between the United States and the Taliban because Afghanistan is a High Contracting Party to that Convention. Memorandum from President George W. Bush to the Vice President, the Secretary of State, *et al*, *Re: Humane Treatment of al Qaeda and Taliban Detainees* ¶ 2(b) (Feb. 7, 2002). Because GC applies to the same conflicts and occupations as GPW, and because

[1] The full text of Common article 2 provides:

> 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.
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> 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.
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> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties 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.

Afghanistan is a party to both Conventions, *see* 2 Peter H. Rohn, *World Treaty Index* 556, 558 (2d ed. 1983), the President's determination necessarily entails the conclusion that GC applies to that conflict as well.

Even though GC applies to the armed conflict with the Taliban, we conclude that "protected person" status is not available to persons captured and detained in Afghanistan. Part I of this memorandum explains that "protected person" status under GC is available in only two contexts: (1) during a covered conflict, certain aliens (primarily enemy aliens) in the home territory of a party to a conflict are protected against actions of the government of that territory; and (2) during a covered occupation, a somewhat broader class of persons in occupied territory is protected against actions of the occupying power. Part II concludes that no part of Afghanistan is occupied territory or the home territory of the United States and, therefore, that persons captured and detained by the United States in Afghanistan are not eligible for "protected person" status.[2] As we explain, however, although this means such persons do not benefit from the provisions of GC relating to "protected persons," it does not follow that such persons are unprotected by international or domestic United States law.

I.

It is widely recognized that GC addresses "the obligations of the parties to furnish humanitarian treatment to two broad classes of civilians: enemy aliens present within the home territory of a belligerent, and civilian persons found in territory which it occupies in the course of military operations." S. Exec. Rep. No. 84-9, at 2 (1955) (Senate Foreign Relations Committee Report relating to GC ratification). As the Commentary by the International Committee for the Red Cross explains, "there are two main classes of protected person: (1) *enemy nationals* within the national territory of each of the Parties to the conflict and (2) *the whole population* of occupied territories (excluding nationals of the Occupying Power)." Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War at 46 (Jean S. Pictet, ed. 1958) (emphasis in original); *see also* 2B *Final Record of the Diplomatic Conference of Geneva of 1949*, at 408 (statement of Mr. Wershof (Canada), (explaining that central GC provisions govern "what a government does to protected persons in its territory; for instance, what the Canadian Government should do to aliens *in Canada* in time of war, or what an Occupying Power should do to the people of an occupied territory.") (emphasis added) ("Final Record"); Maj. Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities*

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[2] In addition to his determination regarding the armed conflict with the Taliban, the President also concluded that GPW does not apply to the armed conflict of the United States with al Qaeda "in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva." Memorandum from President George W. Bush to the Vice President, the Secretary of State, *et al*, *Re: Humane Treatment of al Qaeda and Taliban Detainees* ¶ 2(a) (Feb. 7, 2002); *see also* Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 9-10 (Jan. 22, 2002). Because we conclude that "protected person" status is not available to any individual captured and detained in Afghanistan, it is unnecessary to consider separately GC's application to persons associated with al Qaeda who are captured and detained in Afghanistan. *Cf.* Memorandum for Alberto R. Gonzales, Counsel to the President, from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, *Re: "Protected Persons" in Occupied Iraq* (Mar. 18, 2004) ("Protected Persons Memorandum") (analyzing GC's application to al Qaeda operatives in occupied Iraq, where "protected person" status was available).

(Law of the Hague), in *International Dimensions of Humanitarian Law* at 106 (explaining that GC "for the most part confined its protection to those civilians who lived in areas occupied by the adversary or who were within the domestic territory of the adversary"). Conversely, GC is not designed to protect civilians from the dangers of warfare "to which they may be exposed in their own territory," Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War* 52 (2001), and, accordingly, it does not confer "protected person" benefits on "enemy aliens in non-occupied enemy territory." Frits Kalshoven, *The Position of Guerilla Fighters Under the Law of War*, 11 Mil. L. & L. of War Rev. 55, 70 (1972). *See generally* Memorandum for William J. Haynes, General Counsel, Department of Defense, from William H. Taft, IV, Legal Adviser, Department of State, *Re: 1949 Geneva Conventions: The President's Decisions Under International Law* 88 (Mar. 22, 2002) (explaining that "it is widely recognized that only individuals who fall into enemy hands in occupied territory or the enemy's territory are protected persons for purposes of [GC]").

As we explain below, these conclusions follow from GC's text, structure, and negotiating record. We first address GC's text and structure, concluding: (A) that "protected person" status is subject to territorial limits, and applies only to persons in the hands of an occupying power in occupied territory or to persons in the hands of a party to the conflict in "the territory of a Party to the conflict"; and (B) that for purposes of GC, "territory of a Party to the conflict" means the *home* territory of the party to the conflict in whose hands a person finds himself but does not include territory belonging to its enemies. We then turn to the negotiating record (C), which confirms that "protected person" status is available only to persons in the hands of an occupying power in occupied territory or to persons in the hands of a party to a conflict in that party's home territory.

A.

"[W]e begin with the text of the treaty and the context in which the written words are used." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991) (internal quotation marks and citations omitted). *See also* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").[3] Article 4 of GC provides that "protected persons" are "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." Art. 4(1). Article 4 then excludes from "protected person" status "Nationals of a State which is not bound by the Convention" (¶ 2), "Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, . . . while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are" (¶ 2), and persons protected by any of the other three Geneva Conventions (¶ 4).[4]

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[3] Although the United States is not a party to this Vienna Convention and is thus not bound by it, Article 31(1)'s emphasis on textual analysis reflects international interpretive practice. *See* Rudolf Bernhardt, "Interpretation in International Law," *in* 2 Encyclopedia of Public International Law 1416, 1420 (1995) ("According to the prevailing opinion, the starting point in any treaty interpretation is the treaty text and the normal or ordinary meaning of its terms.").

[4] The full text of GC article 4 provides:

Considered in isolation, article 4 might be read (subject to its specific exclusions) to confer "protected person" status on any person anywhere who finds himself in the custody of a foreign government at any time when that government is engaged in a covered conflict or occupation. On this reading, for example, nationals of countries other than the United States and its cobelligerents (allies) who find themselves in U.S. custody *anywhere in the world* during the period of the United States conflict with the Taliban might be "protected persons." *See* GC art. 4(2). However, "in treaty interpretation as in statutory interpretation, particular provisions may not be divorced from the document as a whole and read in isolation." *In re Commissioner's Subpoenas*, 325 F.3d 1287, 1296 (11th Cir. 2003). And when article 4(1) is read in light of other provisions of GC, as well as the Convention's overall structure, it is clear that "protected person" status is available only in occupied territory or in the "territory of a Party to the conflict." *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999) (adopting the construction of a treaty provision that was "most faithful" to the Treaty's "overall structure").

The most compelling indication of this limitation is that signatories' specific obligations relating to "protected persons" apply only in these two locations. This conclusion is clear from the text and structure of GC Part III, which sets forth these obligations. The first three sections of this Part are titled "Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories," "Aliens in the Territory of a Party to the Conflict," and "Occupied Territories," respectively. The provisions set forth in these sections plainly apply only in the territory of a party to the conflict (Sections I and II) or in occupied territory (Sections I and III). And although Part III's remaining two sections do not contain similar express territorial limitations in their titles, it is evident that they, too, apply only in these two locations. Thus, Section IV (title) ("Regulations for the Treatment of Internees") applies to persons interned "in accordance with the provisions of Articles 41, 42, 43, 68, and 78." GC, art. 79. These provisions, in turn, apply only to "aliens in the territory of a Party to the conflict," *see* GC, Part III, Section II (which includes articles 41, 42, and 43), or to persons in "occupied territories," *see* GC, Part III, Section III (which contains articles 68 and 78). Similarly, Section V (title) governs the "Information Bureaux and Central Agency," but, consistent with the other provisions of Part III, appears to require notification only of measures taken with respect to certain protected

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> Persons protected by the Convention are 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.
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> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.
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> The provisions of Part II are, however, wider in application, as defined in Article 13.
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> Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.

persons in the territory of a party to the conflict or in occupied territory.[5] In so circumscribing the obligations it imposes, Part III plainly reflects "the assumption that protected persons are *either* foreign civilians who are *in the territory of a party to the conflict* when hostilities break out *or* civilians who are in *occupied* territory." Allan Rosas, *The Legal Status of Prisoners of War* at 411 (1976).

In addition to prescribing rules governing internment, GC Part III, Section IV also prohibits internment of protected persons "except in accordance with the provisions of Articles 41, 42, 43, 68 and 78." GC art. 79. As noted above, these provisions apply only in the "territory of a party to the conflict" or in "occupied territory." If "protected person" status under article 4 were available to persons located outside the "territory of a Party to the conflict" or "occupied territories," it would follow that during a covered armed conflict or occupation, article 79 would bar a signatory state from taking into custody, outside the "territory of a Party to the conflict" or "occupied territory," any foreign national who did not fall within the exclusions set forth in article 4. For example, article 79 would prohibit a signatory state from detaining spies or unlawful combatants captured outside the territory of a party to the conflict or occupied territory unless they were nationals of the detaining state, its cobelligerents, or a country that is not a party to the Geneva Conventions (we are aware of only two—the Marshall Islands and Nauru). It is doubtful that article 79 was intended to impose such sweeping restrictions on nations' traditional authority, under the law of war, to detain enemy combatants during hostilities. *See, e.g., Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004) (plurality opinion) ("The capture and detention of

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[5] Article 136's notification obligations apply only to "protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned." GC art. 136. Yet GC envisions or authorizes the detention or internment of "protected persons" only in the territory of a party to the conflict or in occupied territory. *See, e.g.*, GC art. 5 ("Where *in occupied territory* an individual protected person is *detained* as a spy or saboteur . . . .") (emphasis added); art. 37 ("Protected persons who are confined pending proceedings or serving a sentence involving loss of liberty, shall during their confinement be humanely treated.") (applies to "aliens in the territory of a Party to the conflict"); art. 49 ("The *Occupying Power shall not detain* protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.") (emphasis added) (applies in occupied territory); article 76 ("Protected persons accused of offences shall be *detained in the occupied country*, and if convicted they shall serve their sentences therein.") (emphasis added); art. 79 ("The Parties to the conflict shall not intern protected persons, except in accordance with the provisions of Articles 41, 42, 43, 68, and 78."); art. 41 ("Should the Power in whose hands protected persons may be consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43") (applies to "aliens in the territory of a Party to the conflict"); art. 42 ("The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.") (applies to "aliens in the territory of a Party to the conflict"); art. 43 ("Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.") (applies to "aliens in the territory of a Party to the conflict"); art. 68 ("Protected persons who commit an offence which is solely intended to harm the *Occupying Power*, but which does not constitute an attempt on the life or limb of members of *the occupying forces or administration*, nor a grave collective danger, nor seriously damage the property of the *occupying forces or administration or the installations used by them*, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed. Furthermore, internment or imprisonment shall, for such offences, be the only measure adopted for depriving protected persons of liberty.") (emphases added) (applies in "occupied territories"); art. 78 ("If the *Occupying Power* considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.") (emphasis added) (applies in occupied territory).

lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.') (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)). The more natural inference is that article 79 reflects an understanding that "protected person" status is available only in the territory of a party to the conflict or occupied territory and that it was intended to limit detentions in those locations to those types of detention set forth in the provisions it enumerates.

Furthermore, article 5 withdraws certain protections from "protected persons" who engage in hostile activities, including unlawful combatants such as spies and saboteurs. Yet this provision withdraws these protections (in different ways) only "in the territory of a Party to the conflict" (¶ 1) or "in occupied territory" (¶ 2).[6] If "protected person" status were available anywhere, it is difficult to imagine why article 5 would address the scope of protections for unlawful combatants *only* in these two locations. Again, the more natural inference is that article 5 addresses the treatment of unlawful combatants solely in "the territory of a Party to the conflict" and "occupied territory" because these are the only locations where "protected person" status is available. As one leading commentator has explained, "the failure of Article 5 to refer to areas where fighting is in progress outside occupied territory or the territory of the detaining state suggests that both Articles 4 and 5 were directed to the protection of inhabitants of occupied areas and of the mass of enemy aliens on enemy territory and that unlawful belligerents in the zone of operations were not taken into account in connexion with the two articles." Maj. Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 328 (1951).

Similarly, article 6 governs when GC shall begin to apply in the case of a covered conflict or occupation and also when "application of the present Convention shall cease." Yet this provision addresses termination of the Convention only "[i]n the territory of Parties to the conflict" (¶ 2) and "[i]n the case of occupied territory" (¶ 3). Accordingly, were "protected person" status available in areas other than these, GC would provide no guidance as to when this status would cease to be available in such areas once triggered by a covered conflict or occupation. Indeed, article 6's silence might be understood to suggest that, once triggered, "protected person" status would be permanently available outside the territory of a party to the

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[6] The full text of GC article 5 provides:

> Where, in the territory of a Party to the conflict, the latter 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 shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.
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> Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.
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> In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

conflict or occupied territory. It seems far more likely that article 6 was drafted to address the only locations where "protected person" status applies.

More fundamentally, in limiting protected person status to those who find themselves, "in the case of a *conflict* or *occupation*, in the hands of a *Party to the conflict* or *Occupying Power*," article 4 reflects an exclusive dichotomy that runs throughout the Convention. Thus, article 2 governs whether GC's principal provisions apply in cases of (1) "declared *war* or . . . any other armed *conflict*" (¶ 1), on the one hand, or (2) "partial or total *occupation*" (¶ 2) (emphasis added), on the other. Article 6 specifies that "the Convention shall apply from the outset of any *conflict* or *occupation* mentioned in Article 2" (¶ 1) and governs when "the application of the present Convention shall cease" "[i]n the *territory of Parties to the conflict*" (¶ 2), and, separately, "[i]n the case of *occupied territory*," (¶ 3) (emphases added). Part III (title) ("Status and Treatment of Protected Persons"), in turn, confers various protections on "Aliens in the *Territory of a Party to the Conflict*" (Section II, title), on persons in "*Occupied Territories*" (Section III, title), or both, *see, e.g.*, Part III, Section I (title) ("Provisions Common to the *Territories of the Parties to the Conflict* and to *Occupied Territories*") (emphases added). Finally, article 5 withdraws certain protections from persons suspected of hostile activities in either "the *territory of a Party to the Conflict*" (¶ 1) or in "*occupied territory*" (¶ 2).

Reading these parallel provisions together, and applying the settled interpretive principle that "all parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole," *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921), we conclude that GC establishes a bifurcated framework governing conflicts, on the one hand, and occupations, on the other. In the case of conflicts, article 2 establishes that GC applies to all cases of "armed conflict" between signatories (¶ 1) or powers that accept and apply its provisions (¶ 3). Article 6 then establishes that the Convention applies in "the territory of Parties to the conflict" "from the outset" of the "conflict" (¶ 2) until "the general close of military operations" (¶ 2). Article 4, in turn, addresses *who* may claim "protected person" status—persons who, subject to various nationality restrictions, "find themselves, in case of a conflict . . . , in the hands of a Party to the conflict." Part III (especially sections I and II) next establishes *where* such persons may claim this status—"in the territory of a Party to the conflict"—and details the benefits this status entails. Finally, article 5(1) withdraws certain benefits from "protected persons" who take part in hostilities "in the territory of a Party to the conflict." Conversely, in the case of occupation, article 2(2) establishes whether GC applies; article 6 establishes when application of the Convention starts (¶ 1) and ends (¶ 3); article 4 indicates who may claim "protected person" status (those who "find themselves, in case of . . . occupation in the hands of [the] Occupying Power"); Part III (especially sections I and III) establishes where this status is available (in "occupied territories") and what it entails; and article 5(2) withdraws certain benefits from "protected persons" who engage in hostilities in "occupied territory." GC's structure thus makes clear that, in the case of a covered conflict, "protected person" status is available (subject to article 4's nationality restrictions) to persons finding themselves in the hands of a party to the conflict "in the territory of a Party to the conflict." Conversely, in the case of a covered occupation, "protected person" status is available (again subject to article 4's nationality

restrictions) to those finding themselves in the hands of an occupying power in "occupied territories."[7] In no event, however, is it available anywhere other than these locations.[8]

B.

To say that "protected person" status is available to persons finding themselves "in the hands of a Party to the conflict" in "the territory of a party to the conflict," however, does not fully resolve the status of persons captured by a party to the conflict in territory belonging to its enemy. Considered in isolation, the phrase "territory of the party to the conflict" might be read in either of two ways. First, it might be limited to the home territory of the party to the conflict in whose hands a person finds himself. On this view, "protected person" status would be available to persons finding themselves in the hands of a party to the conflict only in territory belonging to that party (e.g., the United States) and not in territory belonging to the opposing

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[7] Some situations will trigger GC's application under article 2(1) as well as 2(2). For example, United States operations in Iraq have involved both an "armed conflict" and, prior to June 28, 2004, an "occupation" of that country. Such situations would trigger both GC's provisions relating to armed conflicts and also its provisions relating to occupations. These provisions would apply, however, in different places (the territory of a party to the conflict and occupied territory, respectively).

[8] Despite the ICRC Commentary's acknowledgement that the "two main classes of protected person" consist of "(1) *enemy nationals* within the national territory of each of the Parties to the conflict and (2) *the whole population* of occupied territories (excluding nationals of the Occupying Power)," 4 Pictet, *Commentary* at 46, the Commentary later asserts without analysis that "[e]very 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 Convention, a civilian covered by the Fourth 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 51. Some international tribunals have taken the same position. *See, e.g., Prosecutor v. Delalic*, Case No. IT-96-21-T, Trial Judgment ¶ 271 (ICTY Nov. 16, 1998) ("[T]here is no gap between the Third and the Fourth Geneva Conventions."). This "no gaps" theory is demonstrably wrong. Many non-prisoners of war "in enemy hands" will indisputably fail to qualify for "protected person" status under GC, including nationals of a detaining power, its cobelligerents, States not bound by the Convention, and (in the territory of a belligerent) neutrals. *See* GC art. 4. Indeed, the ICRC has itself acknowledged the existence of gaps in the protections afforded by the Third and Fourth Geneva Conventions to persons in enemy hands. For example, during the negotiations of GPW, the ICRC supported a proposal that would have provided "a minimum standard of protection for any other category of persons who are captured or detained as the result of an armed conflict and whose protection is not specifically provided for in any other Convention." 1 *Final Record* at 74. The ICRC's delegate argued that this provision was necessary because some "irregular belligerents were not actually protected" by either GPW or GC. 2A *Final Record* at 433. See *infra* n. 20. Similarly, the ICRC has explained that it proposed article 75 to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), June 8, 1977, 1125 U.N.T.S. 4, because it believed "a minimum of protection should be granted in time of armed conflict to any person who was, for one reason or another, unable to claim a particular status, such as that of prisoner of war, civilian internee in accordance with the fourth Convention, wounded, sick or shipwrecked." ICRC, *Commentary on the Additional Protocols of 8 June 1977*, at 864. Although the U.S. Army Field Manual 27-10 on the Law of Land Warfare also embraces a "no gaps" theory, *see* FM 27-10 ¶¶ 73, 247b (1956), the State Department has indicated that "it also appears that the position taken by the U.S. Army in its 1956 Field Manual was made on the basis of the desire and operational need to provide clear guidance to troops in the field to eliminate gaps in practice, rather than on the basis that such a result was legally compelled." *See* Memorandum for William J. Haynes, General Counsel, Department of Defense, from William H. Taft, IV, Legal Adviser, Department of State, *Re: 1949 Geneva Conventions: The President's Decisions Under International Law* 86 (Mar. 22, 2002). We recognize that the position taken by the Field Manual may reflect important policy and operational considerations. But we agree with the State Department that the position goes beyond that which is required by the Geneva Conventions.

party (or parties) to the conflict (e.g., Afghanistan). Alternatively, the phrase might be read to include any territory belonging to any party of the conflict, so that "protected person" status would be available to persons finding themselves in the hands of a party not only in its home territory, but in territory belonging to its enemy as well. As we explain below, however, GC's text and structure make clear that the former reading is correct.

First, the phrase "territory of a party to the conflict" clearly cannot include *occupied* enemy territory, even though in almost all occupations, the occupied power (the power whose territory is occupied) is also a "party to the conflict."[9] Reading "territory of a party to the conflict" to include "occupied territory" in such circumstances would destroy the careful distinctions GC draws between the rules that apply to covered conflicts and those that apply to covered occupations. For example, the termination of GC's application would be subject to potentially conflicting provisions if occupied enemy territory were included as the "territory of a Party to the conflict." *Compare* GC art. 6(2) ("*[i]n the territory of Parties to the conflict*, the application of the present convention shall cease *on the general close of military operations*") (emphasis added), *with* art. 6(3) (providing generally that "*[i]n the case of occupied territory*, the application of the present Convention shall cease *one year after the general close of military operations*" but that certain provisions shall continue to apply "for the duration of the occupation") (emphasis added). Furthermore, reading the "territory of a Party to the conflict" to include occupied enemy territory would effectively eliminate the distinction article 5 draws between these two locations with respect to the treatment afforded to persons suspected of activities hostile to the security of a detaining power. Article 5(2) provides that in "occupied territory," a "protected person" who is "detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power" does not forfeit all GC protections. Rather, such persons forfeit only their "rights of communication," and they do so only when "absolute military necessity so requires." GC art. 5(2). By contrast, article 5(1) provides that "in the territory of a Party to the conflict," a "protected person" who is "definitely suspected of or engaged in activities hostile to the security of the State" forfeits all "rights and privileges under the present Convention as would, if exercised in favour of such individual person, be prejudicial to the security of such State." GC art. 5(1). If "territory of a party to the conflict" included occupied enemy territory, the sweeping forfeiture provisions of article 5(1) would entirely subsume the more limited provisions of article 5(2), and occupying powers could potentially strip "protected persons" suspected of engaging in hostile activities in occupied enemy territory not only of their "rights of communication" but of nearly *all* rights under the Convention.[10] Similarly, article 4(2) withdraws protected person status from nationals of neutral states who find themselves in "*the territory of a belligerent State*" (a phrase GC uses synonymously with "the territory of a party to the conflict"[11]). Reading "the territory of a

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[9] The only possible exception would be those rare instances, such as Germany's occupation of the Sudetenland prior to World War II, in which territories were "occupied without hostilities, the Government of the occupied country considering that armed resistance was useless." 4 Pictet, *Commentary* at 21.

[10] Pursuant to article 5(3), such persons must "nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention."

[11] GC's negotiating record reveals that the delegates regarded the phrase "territory of a belligerent State" as synonymous with "territory of a party to the conflict." A proposed draft of what became article 5 began: "Where in the territory of a belligerent, the Power concerned is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State . . . ." 3 *Final Record* at 100. The drafters

belligerent State" to include the occupied territory of a party to the conflict would in most cases exclude nationals of neutral states from "protected person" status in occupied territory as well. Furthermore, since "protected person" status is available only in occupied territory or the territory of a party to the conflict, reading the "the territory of a belligerent state" to include the occupied territory of a party to the conflict would render article 4(2)'s use of this phrase practically meaningless, and nationals of neutral states would ordinarily be ineligible for "protected person" status *anywhere in the world*. Under well settled interpretive principles, however, "[t]his phrase, like all the other words of the treaty, is to be given a meaning, if reasonably possible, and rules of construction may not be resorted to render it meaningless or inoperative." *Factor v. Laubenheimer*, 290 U.S. 276, 303-04 (1933).

What is more, reading the "territory of a party to the conflict" to include occupied enemy territory would require an occupying power to comply with the provisions of *both* Sections II and III of Part III in occupied territory. *See* Part III, Section II, title ("Aliens in the Territory of a Party to the Conflict"); Part III, Section III, title ("Occupied Territories"). Because these two sections would provide conflicting guidance on the same matters, it is almost certain GC's drafters did not intend this result. For example, article 49(1) (which applies in "Occupied Territories") prohibits "forcible transfers, as well as deportations" of "protected persons" from "occupied territory" in almost all circumstances. The provisions for "territory of a Party to the conflict," by contrast, envision considerably more latitude in removing "protected persons." *See, e.g.*, art. GC 45(3) ("Protected persons *may be transferred* by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention.") (emphasis added); art. 45(5) ("The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law."). Including occupied enemy territory within the meaning of "territory of a party to the conflict" would also render practically meaningless the provision for "occupied territories" in Section I of Part III, *see* Part III, Section I, title ("Provisions Common to the Territories of the Parties to the Conflict *and to* Occupied Territories") (emphasis added), contrary to established rules for interpreting treaties, *see Factor*, 290 U.S. at 303-04. By contrast, reading "territory of a Party to the conflict" to be limited to the party's *home* territory avoids all of these incongruous consequences.

There are other textual indications that the "territory of a Party to the conflict" means the home territory of the party in whose hands a person finds himself. For example, article 5(1) appears to use the phrase "territory of a Party to the conflict" to refer to the home territory of a party, withdrawing protections from persons "definitely suspected of or engaged in activities hostile to the security of the *State*," if those protections would be "prejudicial to the security *of such State*." (Emphases added). This provision's references to the security of the "State," rather, than, say, the security "of the party," strongly suggest that the provision is directed toward accommodating the security interests of home governments in their domestic territory, not the interests of foreign invading powers. Consistent with this view, a leading commentator describes

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later replaced "territory of a belligerent" with "territory of a Party to the conflict." Although article 5 was hotly debated throughout the Convention, none of the delegates reacted in any manner suggesting that this change in language altered the meaning of the article. Accordingly, this Office has previously concluded that GC uses the two phrases synonymously. *See Protected Persons Memorandum* at 10-12.

article 5 as applying only in "occupied territory or the *territory of the detaining state*." Maj. Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 328 (1951).[12]

Furthermore, Part III, Section II, the principal section of GC addressing signatories' obligations relating to "protected persons" in "the territory of a party to the conflict" addresses governmental actions that would typically occur in a state's domestic territory, rather than foreign enemy territory, and compliance with many of Section II's provisions would be almost impossible for a signatory state in enemy territory, or any other area where it is not the sovereign. Article 39, for example, states that "[p]rotected persons who, as a result of the war, have lost their gainful employment, shall be granted the opportunity to find paid employment." This requirement is hardly capable of enforcement by a signatory state in territory where the enemy is sovereign. Similarly, article 35 provides that "[a]ll protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State." A signatory state would ordinarily have little or no power to allow "protected persons" to leave *enemy* territory (as opposed to its home territory) during the conflict, and the reference to the "national interests of the State" is most naturally read to refer to the interests of the home government in whose territory the "protected persons" find themselves, not to the interests of a foreign sovereign.

Other obligations imposed on a party to a conflict by Section II appear to contemplate that "protected persons" will comprise a discrete and potentially disfavored group within the "territory of a party to the conflict" and that most residents of such territory will be the party's own nationals. For example, article 40 provides that "[p]rotected persons may be compelled to work only to the same extent as *nationals* of the Party to the conflict *in whose territory they are*." (Emphasis added). This provision would make little sense if it encompassed the actions of a signatory state in *enemy* territory, as there is little danger that a Party to the conflict would favor the nationals of an enemy country over aliens in the enemy's territory. If the "territory of a Party to the conflict" is instead limited to the *home* territory of the party to the conflict in whose hands a protected person finds himself, then article 40 guards against the far more likely scenario that a signatory State would prefer its own nationals at the expense of aliens in its home territory when conscripting labor for the war effort. Other provisions in this Section, which require parity of treatment among "protected persons" and a party's own nationals in "the territory of a Party to

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[12] Another commentator likewise acknowledges these territorial limits on article 5 but argues that "territory of a party to the conflict" should be read more broadly in other provisions of GC. *See* Derek Jinks, *The Declining Significance of POW Status*, 45 Harv. Int'l L. J. 367, 388, 397, 420 (2004). Thus, this commentator recognizes that article 5 "is subject to severe territorial restrictions. Indeed, the text suggests that it applies only in occupied territory *and the territory of the detaining state*. That is, it does not expressly authorize derogations in non-occupied, enemy territory or in the territory of a co-belligerent." *Id.* at 388 (Emphasis added). But he simultaneously asserts that "[a]lthough conventional wisdom suggests that [GC's] protections . . . are subject to . . . territorial restrictions (Baxter's reading of the Convention), these restrictions, in fact, are illusory, overstated, and, in some respects, inconsequential." *Id.* at 397. We are, however, reluctant to read the same phrase to mean different things in different provisions of the treaty. *See Air France v. Saks*, 470 U.S. 392, 398 (1985) (explaining that where drafters wish to convey the same meaning in different provisions, they "logically would [use] the same word in each article"). Furthermore, Jinks does not address the numerous textual and structural indications that parties' specific obligations relating to "protected persons" apply only in "the territory of a Party to the conflict" or in "occupied territories." *See supra* at 4-8.

the conflict," likewise appear to reflect the assumption that the "territory of a Party to the conflict" will be the home territory of the party in whose hands the "protected persons" find themselves. For example, article 38(4) requires that if protected persons "reside in an area particularly exposed to the dangers of war, they shall be authorized to move from that area to the same extent as the nationals of the State concerned." (Emphasis added). Similarly, article 38(5) provides that "[c]hildren under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned." These and other similar provisions in Section II would make little sense if "territory of a Party to the conflict" were construed to include enemy territory.

Indeed, Section II's title indicates that it applies only to "*Aliens* in the Territory of a Party to the Conflict." This limitation of Section II to aliens strongly suggests that "territory of a party to conflict" means the home territory of the party in whose hands a person finds himself, because in such territory, only aliens can qualify for protected person status. *See* GC art. 4(1) ("Persons protected by the Convention are those who . . . find themselves . . . in the hands of a Party to the conflict . . . *of which they are not nationals*.") (Emphasis added). Limiting Section II's protections to aliens makes no sense, however, if the "territory of a party to the conflict" were read to include enemy territory. Such an interpretation would subject the United States to Section II's requirements in Afghanistan, but only with respect to *non-Afghani* nationals. Moreover, because nationals of the United States, its co-belligerents, and neutral states[13] would already be excluded from "protected person" status under article 4, Section II on this reading would protect only stateless persons, nationals of the Taliban's co-belligerents that are parties to GC (if any), and nationals of states that lack normal diplomatic relations with the United States, such as Iran. We are aware of no rationale that would justify reading Section II so as to apply in enemy territory but only to such a narrow and incongruous group of persons.

By contrast, if "the territory of a Party to the conflict" is understood to mean the home territory of the party in whose hands the "protected persons" find themselves, Section II's limitation to aliens, and the nationality restrictions of article 4 that further limit GC's application in the territory of a party to the conflict primarily to *enemy* aliens, serve to focus this Section's protections on a well recognized class of persons who have traditionally been vulnerable to harsh treatment in times of war. *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763, 772 (1950) (noting the "disabilities this country lays upon the alien who becomes also an enemy" as well as "the experience of our citizens in some enemy lands"); William Blackstone, 1 *Commentaries on the Laws of England* 361 (1765) (explaining that "alien-enemies have no rights, no privileges, unless by the king's special favour, during the time of war"). It is this group of enemy aliens—those residing in the home territory of a hostile country—that Section II is most naturally understood to protect.

Some have suggested that even if Section II of Part III only governs the conduct of a party to a conflict in its own territory, Section I of Part III, entitled "Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories," applies in enemy territory

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[13] Nationals of neutral states are excluded from "protected person" status in "the territory of a belligerent state." GC art. 4(2). As we explained, *see supra* n. 11, this phrase is synonymous with "the territory of a party to the conflict."

as well.[14] Little analysis is offered in support of this view, and we think it is clearly wrong. The phrase "Territories of the Parties to the Conflict" in section I is most naturally read to mean the same thing as "Territory of the Party to the Conflict" in Section II (and as similar phrases in articles 4, 5, and 6, as discussed above). Particular words or phrases are ordinarily interpreted to have the same meaning throughout a treaty. *See Air France*, 470 U.S. at 398 (explaining that where drafters wish to convey the same meaning in different provisions, they "logically would [use] the same word in each article").[15] Furthermore, Section I immediately precedes Section II, which applies to "Aliens in the Territory of a Party to the Conflict," and Section III, which regulates "Occupied Territories." The natural inference, supported both by Part III's sequential structure and the phrase "Common to" in Section I's title, is that Section I contains provisions that the drafters determined should apply both to "Aliens in the Territory of a Party to the Conflict" and also in "Occupied Territories." Rather than listing these protections twice (once in Section II, and again in Section III), the drafters crafted Section I to avoid the need for redundant provisions. As one prominent commentator has explained, Part III "contains separate provisions on the treatment of aliens in the territory of a party to the conflict (Section II) and on protected persons in occupied territory (Section III), and a number of provisions common *to these two categories* (Sections I and IV)." Rosas, *supra*, at 411 (emphasis added); *see also* Kalshoven, *supra*, at 70 ("In the system of the Convention," common provisions of Part III, Section I extend "to aliens in the territory of a party to the conflict (Section II) and to protected persons in occupied territories (Section III), and not to enemy aliens in non-occupied enemy territory"); *cf.* 4 Pictet, *Commentary* at 216 ("In the territory of Parties to the conflict, *the protected persons within the meaning of Article 4 of the Convention are aliens*, and generally of enemy nationality.") (emphasis added).

C.

"Because a treaty ratified by the United States is not only the law of this land . . . but also an agreement among sovereign powers," *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996), its negotiation record and drafting history "may of course be consulted to elucidate a text that is ambiguous," *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989). *See also* Vienna Convention on the Law of Treaties, art. 32, 1155 U.N.T.S. at 340 (permitting recourse to "the preparatory work of the treaty and the circumstances of its conclusion" to "confirm" the ordinary meaning of the text or where textual analysis "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable"). The negotiating record confirms that "protected person" status is available only to persons who find themselves in the hands of a

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[14] *See, e.g.*, Maj. John Embry Parkerson, *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 Mil. L. Rev. 31, 77-78 (1991). Department of the Army Pamphlet 27-161-2 takes the even broader position that "[t]hese common articles are designed to prevent the physical mistreatment of protected persons no matter where they happen to be. Their protection is spelled out generally in Article 27." *Id.* at 77 n. 249. There is no textual support for disregarding the territorial limitations set forth in Part III, Section I's title, though there may be policy or operational reasons for doing so. *See supra* n. 8.

[15] We see no significance in Section I's use of the plural "*Territories* of the *Parties* to Conflict" (emphasis added), as opposed to Section II's use of the singular "*Territory* of a *Party* to the Conflict" (emphasis added). Section I's plural formulation serves to preserve the parallel structure in Section I's reference to "Territories of the Parties to the Conflict *and to Occupied Territories*" (emphasis added), the latter phrase being copied verbatim from Section III's title.

party to the conflict in that party's home territory or to persons who find themselves in the hands of an occupying power in occupied territory.

As discussed above, our conclusion that "protected person" status is available only in these two contexts is strongly supported by the structure of Part III of GC, which sets forth the benefits afforded "protected persons." The negotiating record confirms our interpretation of Part III's structure. In its report to the plenary assembly, the drafting committee emphasized:

> Part III constitutes the main portion of our Convention. Two situations presenting fundamental differences had to be dealt with: that of aliens in the territory of a belligerent State and that of the population—national or alien—resident in a country occupied by the enemy. Nevertheless, certain common principles govern both contingencies. The Convention is therefore divided into three Parts: common provisions—provisions relative to aliens in the territory of a party to the conflict—provisions concerning occupied territories.

See 2A *Final Record* at 821. The discussions of Part III also confirm that in the "territory of a party to the conflict," "protected person" status is available only to those who find themselves in the hands of the home party. Thus, Colonel Du Pasquier of Switzerland, the Rapporteur, described Part III, Section II as pertaining to "the duties of a Party to the conflict in regard to aliens residing in *its* territory." 2A *Final Record* at 699 (emphasis added). Similarly, Mr. Maresca of Italy referred to the provisions that apply in the "territory of a Party to the conflict," as "relat[ing] to the *national territory of* one Party to the conflict," and governing a party's treatment of "enemy aliens *in its own territory*." 2A *Final Record* at 656 (emphasis added). *Cf.* 2B *Final Record* at 387 (Mr. Sinclair of the United Kingdom) (twice referring to the territory of a party to the conflict as the "home territory of a belligerent" during the discussion of what became article 6 of GC).

The drafting history of article 4, which addresses who may claim "protected person" status, likewise supports our conclusions that "protected person" status is available only in occupied territory or the territory of a party to a conflict and that the "territory of a party to the conflict" means the home territory of the party in whose hands a person finds himself. As discussed above, article 4(2) provides that "[n]ationals of a neutral State who find themselves in the territory of a belligerent State . . . shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are." The Rapporteur, Colonel Du Pasquier of Switzerland, explained that this language was intended to draw

> a distinction between the position of neutrals in the home territory of belligerents and that of neutrals in occupied territory. In the former case, neutrals were protected by normal diplomatic representation; in the latter case, on the other hand, the diplomatic representatives concerned were only accredited to the Government of the occupied States, whereas authority rested with the Occupying Power. It followed that all neutrals in occupied territory must enjoy protection under the Convention, while neutrals in the home territory of a belligerent only

> required such protection if the State whose nationals they were had no normal diplomatic representation in the territory in question.

2A *Final Record* at 793 (emphasis added). The report of Committee III to the Plenary Assembly likewise explained that the language that became article 4(2) "drew a distinction between [neutrals] in the territory of a belligerent and those in an occupied country: in the first case, protected persons are only those whose home country is not represented diplomatically in the normal way; in the second case, on the contrary, all neutrals enjoy protection." 2A *Final Record* at 814. As is evident from these statements, it appears to have been generally understood that the effect of the language that became article 4(2) would be to confine "protected person" status for nationals of neutral states to occupied territory (or, in the absence of normal diplomatic representation, the home territory of the party to a conflict in whose hands a neutral national found himself). No one suggested that nationals of neutral states would be eligible for "protected person" status anywhere else. On the contrary, in describing those nationals of neutral states who would be eligible for "protected person" status under the Convention, Mr. Cashman of Ireland mentioned only "nationals of neutral countries who find themselves residents in the territory of a belligerent State where their countries of origin are not diplomatically represented or who find themselves living in occupied territory." 2B *Final Record* at 346. Similarly, Mr. Ginnane of the United States explained that in crafting what became article 4, "the Drafting Committee had taken as their basis the fundamental principle that the category of protected persons would include all those who, in time of conflict or of the occupation of the territory where they were, did not enjoy the protection of normal diplomatic representation," and that, "[a]pplying that principle, the Drafting Committee had distinguished between the cases of (a) enemy aliens in the home territory of belligerents or in occupied territory, (b) neutral aliens in occupied territory, and (c) neutral aliens in the home territory of belligerents." 2A *Final Record* at 794. Because article 4 explicitly addresses only the status of nationals of neutrals in the "territory of a belligerent State" (which, as discussed above, GC uses as a synonym to "the territory of a party to the conflict") and is otherwise silent as to where nationals of neutrals might be eligible for "protected person" status, the discussions surrounding this article provide powerful evidence that the negotiators understood that "protected person" status would not be available to persons who did not find themselves in the hands of a party to a conflict in its home territory, on the one hand, or in the hands an occupying power in occupied territory, on the other hand.[16]

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[16] Even the ICRC Commentary, which tends to indulge every assumption in favor of expanding the scope of "protected person" status, understands article 4(2) to limit "protected person" status to nationals of neutral states who find themselves in occupied territory (or, absent normal diplomatic representation, in the territory of a party to the conflict):

> Paragraph 2 also defines the position of nationals of neutral States; in occupied territory they are protected persons and the Convention is applicable to them; its application in this case does not depend on the existence or non-existence of normal diplomatic representation. In such a situation they may therefore be said to enjoy a dual status: their status as nationals of a neutral State, resulting from the relations maintained by their Government with the Government of the Occupying Power, and their status as protected persons.
>
> On the other hand, nationals of a neutral State in the territory of a Party to the conflict are only protected persons if their State has no normal diplomatic representation in the State in whose hands they are. This seems to be a legitimate distinction. In the territory of the belligerent States the position of neutrals is still

More fundamentally, although the negotiators agreed to certain general provisions (set forth in Part II) designed to protect "against certain consequences of war," GC Part II, title, that would not be contingent on "protected person" status but would apply to "the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion," GC art. 13,[17] they repeatedly rejected, as beyond the Convention's proper scope, efforts to require parties to comply with GC's core obligations (which relate to "protected persons") outside their home territory or territory that they occupied. In particular, they rejected efforts to extend these obligations to a party's conduct in unoccupied enemy territory, where they believed belligerents' conduct should instead be governed by the established laws of war, including Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (the "Hague Convention") and the Regulations Respecting the Laws and Customs of War on Land, annexed to it (the "Hague Regulations"). *See, e.g.*, 2A *Final Record* at 650 (Mr. Wershof of Canada) (stating that "the present Conference was not concerned with the revision of the Hague Conventions, nor was it competent to draw up an integral code of the rules of war."); *id.* (Mr. Clattenburg of the United States) (stating that "the present Conference had not been convened to revise the laws and customs of war; its purpose was to ensure the protection of war victims.").[18]

> governed by any treaties concerning the legal status of aliens and their diplomatic representatives can take steps to protect them. In occupied territory, on the other hand, the diplomatic representatives of neutral States, even assuming that they remain there, are not accredited to the Occupying Power but only to the occupied Power. This makes it more difficult for them to make representations to the Occupying Power. In such cases diplomatic representations are usually made by the neutral State's diplomatic representatives in the occupying State, and not by those in the occupied territory. It should moreover be noted that the Occupying Power is not bound by the treaties concerning the legal status of aliens which may exist. The existence of such situations, often of a complicated nature, gave rise to the idea of granting neutral nationals in occupied territory the status of protected persons within the meaning of the Convention.

See 4 Pictet, *Commentary* at 48-49.

[17] These provisions address matters such as the establishment of hospitals and safety zones to shelter the wounded, the sick, children, young mothers, and the aged, *see* arts. 14-15; requirements that belligerent parties facilitate recovery of those killed or wounded, *see* arts. 16-17; and the protection of civilian hospitals and related items and personnel, *see* arts. 18-22. The fact that one benefits from these general provisions by belonging to the "populations of the countries in conflict" does not render one a "perso[n] protected by the Convention" as defined in article 4. *Compare* GC articles 4(1), (2), & (4) (defining and limiting class of "persons protected by the Convention," *with* article 4(3) ("The provisions of Part II are, however, wider in application, as defined in Article 13.").

[18] GC's negotiations were informed by, and in some sense represented a continuation of, earlier attempts to negotiate a civilians convention in Tokyo between the World Wars. As Mr. Wershof of Canada explained, the Tokyo draft, "which contained the germs of the Civilians Convention," was "limited to the protection of enemy aliens in a belligerent country or in occupied territory." 2A *Final Record* at 650; *accord* Draft International Convention on the Condition and Protection of Civilians of enemy nationality who are on territory belonging to or occupied by a belligerent art. 1 (Tokyo, 1934), (protecting only "national[s] of an enemy country in the territory of a belligerent, or in a territory occupied by the latter"), *available at* http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/b98a7002ab6384abc125641e004038f2?OpenDocument. As the material discussed in this section of the memorandum makes clear, many of GC's negotiators appear to have regarded the Tokyo draft as indicating (and limiting) the legitimate scope of their negotiations. Indeed, during the negotiations Mr. Wershof of Canada successfully proposed changing the title of the Convention from the "Convention *for* the Protection of Civilians in Time of War" to the "Convention *Relative* to the Protection of Civilians in Time of War" on the ground that "[t]his Convention is not a convention dealing with all aspects of the treatment of civilians in time of war. Ninety per cent

For example, GC article 32 (which is located within Section I of Part III and therefore applies in both "the Territories of the Parties to the conflict" and in "occupied territories," *see* Part III, Section I, title) prohibits parties to GC from "caus[ing] the physical suffering or extermination *of protected persons in their hands*." (Emphasis added.) This language was ultimately adopted instead of a Soviet proposal that would have prohibited, *inter alia,* "all other means of exterminating *the civilian population*." 2A *Final Record* at 645 (emphasis added). Throughout the protracted drafting history of article 32 (which involved a series of proposals and counterproposals), the Soviet Union and its allies objected to proposals that, like the final text of article 32, applied only to "protected persons" on the ground that a prohibition on extermination should extend to "the civilian population" in order to protect civilians located in unoccupied enemy territory. For example, "to illustrate his point," Mr. Morosov, the Soviet delegate, "recalled how, during the last war, German airmen had machinegunned women and children in the fields" and noted that a United States proposal limiting the prohibition to "protected persons in [the] power" of a signatory state would "exclud[e] such persons from protection." 2A *Final Record* at 647-48. Mr. Mevorah of Bulgaria raised the same objection to a subsequent proposal containing essentially the same language as that ultimately adopted: "Could a division which landed by parachute on enemy territory, be considered as occupying that territory? No! Certainly not, as the local authorities would still be there. What, then, should be the line of conduct of that division if the restricted text of the Drafting Committee was accepted?" 2A *Final Record* at 718. The Soviet delegate voted against the same proposal "because it did not meet the purpose of the Conference, namely, the protection of the civilian population." 2A *Final Record* at 719.

The United States and Canada opposed the Soviet proposal as beyond GC's scope. As Mr. Wershof of Canada explained, "Apart from Part II, our Convention is dealing with the question of what a government does to protected persons in its territory; for instance, what the Canadian Government should do to aliens in Canada in time of war, or what an Occupying Power should do to the people of an occupied territory." 2B *Final Record* at 408; *see also id.* (stating that GC should protect "aliens in the territory of a Party to the conflict, or the population of an occupied territory"). Mr. Ginnane of the United States likewise insisted that "with respect to a particular government," GC's prohibitions should "protec[t] aliens in its home territory and the inhabitants of any territory which that State may be occupying." 2B *Final Record* at 407. Mr. Clattenburg of the United States further explained that the Soviet proposal, which would apply to a party in unoccupied enemy territory, "could be interpreted as prohibiting methods of warfare long sanctioned by international law" and indicated that "[t]he United States could not accept such a drastic revision of the rules of war—however cleverly advanced as a humanitarian proposal" because "[t]he present Conference was neither a disarmament conference nor a conference to re-write the Hague Conventions." 2A *Final Record* at 716-717. He explained that an alternative proposal, which contained essentially the same language as that ultimately adopted, "although more modest, dealt, fully and adequately, with the real problem, namely, the protection of the inhabitants of an occupied territory and of aliens in the hands of a belligerent." *Id.*

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of the Convention is dealing with a very limited type of civilian, namely, protected persons who are certain categories of aliens."). 2B *Final Record* at 456.

Ultimately, these concerns carried the day. As the drafting committee's report explained, "the majority felt . . . that the words 'other means of exterminating the civilian population' by their very vagueness might be understood as authorizing encroachment on the IVth Hague Convention (Section II of the Laws and Customs of War) and on other international treaties governing means of combat,—a question entirely irrelevant to our Convention." 2A *Final Record* at 822 (Report of Committee III). *See also* 2B *Final Record* at 409 (Col. Du Pasquier of Switzerland, the Rapporteur) (explaining that article 32's final text was chosen "to show quite clearly that this Article did not constitute any encroachment upon the sphere of the Hague Regulations concerning the Laws and Customs of War"); 2A *Final Record* at 715 (Col. Du Pasquier) (explaining that the drafting committee's proposal, which was essentially identical to the language ultimately adopted "was more restricted than that proposed by the Delegation of the Union of Soviet Socialist Republics . . . and was adopted for the following reason: an article drafted in terms which were too general would appear to exceed the scope of Part III").[19]

The negotiating record reveals a similar debate regarding article 53 (which is located in Part III of Section III and therefore applies only in "occupied territories," *see* Part III, Section I, title), which prohibits "[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations . . . except where such destruction is rendered absolutely necessary by military operations." Once again, the Soviet Union and its allies sought to extend this provision to unoccupied enemy territory. Thus, in response to a proposal by the drafting committee containing essentially the same language that was ultimately adopted, Mr. Mevorah of Bulgaria raised the following objection:

> [W]hy confine such safeguards to occupied territory? Would military units operating in a territory not yet occupied (for example, commandos or partisans) be free to commit crimes which were forbidden to an army of occupation? If the Committee desired to meet the wishes of millions of the living who were resting their hopes on this Conference and of the millions of dead, they must not hesitate to make the protection accorded to civilian populations as comprehensive as possible.

2A *Final Record* at 720. Mr. Morosov, the Soviet delegate, echoed this view, recalling the destruction of Leningrad in World War II, and asking, "Should such useless destruction really be kept within limits only in occupied territories?" *Id.* Arguing that the proposal did not "affor[d] adequate protection to the civilian population," Mr. Morosov sought to expand the scope of the drafting committee's proposal. 2A *Final Record* at 721.

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[19] Contending that the draft Convention's "chief defect is that it does not contain sufficient safeguards for the protection of the civilian population against the most dangerous consequences of modern warfare," General Slavin of the Soviet Union later proposed a resolution condemning the use of atomic, bacteriological, and chemical weapons "as a means of mass extermination of the population." 2A *Final Record* at 761, 762. Mr. Harrison of the United States raised as a point of order the objection that the Soviet resolution "was outside the scope of the Conference's work." *Id.* at 805. The Chairman agreed with the point of order, and a majority of the delegates voted to sustain the Chairman's determination. *Id.*

Once again, the Soviet position was rejected as beyond the scope of the Convention. Mr. Sinclair of the United Kingdom responded that the concerns voiced by the Bulgarian and Soviet delegates "related to the laws of war and not to the draft Convention under consideration." 2A *Final Record* at 721. He maintained that "[t]here could be no question of revising the laws of war" and stated that although his country "yielded nothing to any other nation in condemning the terrible acts committed during the last war," it would not support "any wording to implement such condemnation" unless it was "within the legitimate scope of the Convention." *Id.* at 720-721. Col. Du Pasquier of Switzerland, the Rapporteur, added that Article 23 of the Hague Regulations (which applies during "hostilities," *see* Hague Regulations, Section II, title), already established that it was forbidden "to destroy or seize the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war," *id.* at 721 (quoting Hague Regulations, article 23(g)), and stated that the text of what is now article 4, "which defined the scope of the Civilians Convention" and was "of paramount importance . . . , did not cover the hostile acts referred to in Article 23 of the Hague Regulations," 2A *Final Record* at 721. He explained that "[t]he Drafting Committee had, however, felt that even if it was not possible to provide for the protection of property against bombardments or the acts of an invading army (*a matter which came within the scope of the rules of war and of the Regulations annexed to the Hague Convention*), it was necessary to arrange for the protection of property in an occupied territory." 2A *Final Record* at 719-20 (emphasis added).

Although it attracted less attention, a similar issue arose with respect to Article 28, which provides that "[t]he presence of a protected person may not be used to render certain points or areas immune from military operations." After Mr. Castberg of Norway urged the application of this provision not only "to the cases mentioned in the heading of Section I (Territories of the Parties to the Conflict and Occupied Territories), but also to the case of invasion," Mr. Maresca of Italy suggested that such application could be effected by modifying what is now Article 4 of the Convention, by "adding after the words 'in the case of a conflict or occupation' in the first sentence of the first paragraph, the words 'or of invasion.'" 2A *Final Record* at 640. Stating that it was undesirable to "run the risk of unexpected repercussions affecting the whole tenor of the Convention," General Schepers of the Netherlands cautioned that "[h]e considered it dangerous, to tamper with the general Articles at the beginning of the Convention because of their relation to the special provisions that followed." *Id.* It does not appear that further consideration was given to this proposal.

By the time the negotiations were concluded, the Soviet Union and its allies appear to have realized that their attempts to extend GC's core provisions to signatories' conduct in unoccupied enemy territory had failed. Although they acquiesced in the result, they registered their disappointment in formal declarations that they deposited with the Convention. For example, the Soviet Union deposited a declaration stating that

> Although the present Convention does not cover the civilian population in territory not occupied by the enemy and does not, therefore, completely meet humanitarian requirements the Soviet Delegation, recognizing that the said Convention makes satisfactory provision for the protection of the civilian population in occupied territory and in certain other cases, declares that it is

> authorized by the Government of the Union of Soviet Socialist Republic to sign the present Convention . . . .

6 U.S.T. at 3688. The Byelorussian Soviet Socialist Republic and the Ukranian Soviet Socialist Republic deposited substantially identical declarations. *See id.* at 3652-3654 (Byelorussia); *id.* at 3684 (Ukraine). Rumania likewise issued a formal declaration that

> The Government of the Rumanian People's Republic considers that this Convention does not completely meet humanitarian requirements, owing to the fact that it does not apply to the civilian population in territory not occupied by the enemy. Nevertheless, taking into consideration the fact that the Convention is intended to protect the interests of the civilian population in occupied territory, I am authorized by the Rumanian People's Government to sign the said Convention . . . .

See 6 U.S.T. at 3678 (Emphasis added).

GC's negotiating record thus confirms our conclusion that "protected person" status is available, subject to the nationality and other restrictions set forth in article 4, only to persons in the hands of a party to a covered conflict in that party's home territory or to those in the hands occupying power in occupied territory during a covered occupation.[20]

II.

It follows that persons captured and detained by the United States in Afghanistan could qualify for "protected person" status only if **(A)** Afghanistan is occupied territory and the United

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[20] The debates surrounding *GPW* (which was revised and debated at the same Diplomatic Conference as GC) also demonstrate that "protected person" status under GC would not be afforded persons captured and detained by a party to a conflict in unoccupied enemy territory. After the delegates rejected a draft provision of GPW that would have provided "a minimum standard of protection for any other category of persons who are captured or detained as the result of an armed conflict and whose protection is not specifically provided for in any other Convention," 1 *Final Record* at 74, Captain Mouton of the Netherlands proposed that GPW provide that "[s]hould any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy, [satisfy the requirements for prisoner of war status], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a military tribunal." 2B *Final Record* at 270; 3 *Final Record* at 63. He argued that because a belligerent who did not qualify for prisoner of war status could "be considered to be a *franc tireur* and be put against the wall and shot on the spot," the determination of prisoner of war status was "an important decision entailing life and death [that] should be left to a military tribunal" rather than a single local commander. 2B *Final Record* at 270-271. Mr. Morosov of the Soviet Union disputed Captain Mouton's claim that belligerents who failed to qualify for prisoner of war status could be summarily executed, asserting that "[i]f a person is not recognized as prisoner of war under the terms of Article 3, such a person would then be a civilian and would enjoy the full protection afforded by the Civilians Convention." 2B *Final Record* at 271. This statement drew a sharp response from Captain Mouton, who explained, "[t]hat persons who do not fall under [GPW] are automatically protected by other Conventions is certainly untrue. The Civilians Convention, for instance, deals only with civilians under certain circumstances; such as civilians in occupied country or civilians who are living in a belligerent country, but it certainly does not protect civilians who are in a battlefield, taking up arms against the adverse party." *Id.* No one, not even the Soviet delegate, challenged Captain Mouton's interpretation, and his proposal was adopted, with minor modifications (for example, the phrase "military tribunal" was changed to "competent tribunal"), as article 5(2) of GPW. *See* 2B *Final Record* at 271-72.

States is an occupying power there or **(B)** Afghanistan (or a relevant portion of it) is the home territory of the United States. We next consider and reject each of these possibilities. Accordingly, we conclude that persons captured and detained in Afghanistan are not "protected persons" under the Fourth Geneva Convention.

A.

Persons captured and detained by the United States in Afghanistan do not find themselves in "occupied territory." Although GC does not itself define "occupation" or "occupied territory," article 42 of the Hague Regulations provides that "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army" and that "[t]he occupation extends only to the territory where such authority has been established and can be exercised." This provision is generally accepted as reflecting the settled meaning of "occupation" and "occupied territory" in the customary law of war, *see, e.g.*, U.S. Army Field Manual 27-10 ¶ 351; *Prosecutor v. Dario Kordic and Mario Cerkez* (Trial Judgement), No. IT-95-14/2-T, ¶¶ 338-39 (ICTY 2001); Hans-Peter Gasser, *Protection of the Civilian Population*, in The Handbook of Humanitarian Law in Armed Conflicts 240-41, 243 (Dieter Fleck ed., 1995), and the negotiating record strongly suggests that the delegates understood the words "occupation" and "occupied territory" to have the same meaning when used in GC. In particular, during the negotiations of the provisions of article 6 governing when GC would start and cease to apply in "occupied territory" when triggered by covered "occupation[s]," the delegates repeatedly invoked the Hague Regulations. For example, Mr. Maresca of Italy stated that "[a]s far as occupation was concerned, [Article 6] referred to occupation as defined by the IVth Hague Convention," 2A *Final Record* at 625, and Mr. de Geouffre de la Pradelle of Monaco explained that "[t]he end of an occupation was defined by the Agreement attached to the IVth Hague Convention." *Id.* at 624. Indeed, Mr. Sinclair of the United Kingdom insisted that "any proposals in regard to the Article [6] that were inconsistent with the idea of occupation as defined in the Hague Regulations, would be regarded as unacceptable by the United Kingdom Delegation." *Id.* at 776. More generally, Mr. Sokirkin of the Soviet Union noted that "the words . . . 'occupation of territory' were well-defined ideas in international law," 2B *Final Record* at 75, and Mr. Sinclair of the United Kingdom indicated that Article 42 of the Hague Regulations reflected "generally accepted principles," 2A *Final Record* at 624. Consistent with the established meaning of "occupation" and "occupied territory" reflected in the Hague Regulations and the customary law of war, as well as GC's negotiating record, the Convention's references to "occupation" and "occupied territory" have generally been understood to refer to territory that is actually placed under the authority of a hostile army. *See, e.g., Cyprus v. Turkey*, 13 Eur. Comm'n H.R. 85 (1979) (decision on admissibility), *reprinted in* 62 I.L.R. 5, at 75 ¶ 21 (examining "whether Turkey's responsibility under the [Fourth Geneva] Convention is . . . engaged because persons or property in Cyprus have in the course of her military action come under her actual authority and responsibility at the material times"); Gerhard von Glahn, *The Occupation of Enemy Territory* 27 (1957) ("Conventional international law recognizes only one form of military occupation, . . . that is, the occupation of part or all of an enemy's territory in time of war; this is the type of occupation covered by the Hague Regulations and the Fourth Geneva Convention of 1949."). We believe that this understanding is clearly correct. It does not follow that GC's provisions related to "occupied territory" are limited to locations placed under formal military occupations like those that occurred after World War II, but it does follow that territory is not occupied simply because it is

attacked or even invaded by a hostile power; rather, the hostile power must establish and exercise authority over the territory. *See* U.S. Army Field Manual 27-10 ¶ 356 (explaining that by definition, occupation "must be both actual and effective, that is, the organized resistance must have been overcome and the force in possession must have taken measures to establish its authority").[21]

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[21] Despite the clear import of GC's negotiating record and the established meaning of "occupation" and "occupied territory" in the customary law of war, the ICRC Commentary asserts that any *invasion* of enemy territory is sufficient to constitute an "occupation" under GC:

> [T]he word "occupation," as used in the Article, has a wider meaning than it has in Article 42 of the Regulations annexed to the Fourth Hague Convention of 1907. So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 referred to above. . . . Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets.

4 Pictet, *Commentary* at 60. The ICRC offers no support for this sweeping and novel understanding of "occupation," and GC's negotiating record demonstrably refutes the ICRC's attempt to equate "occupation" with invasion. *See, e.g.*, 2A *Final Record* at 718 (statement of Mr. Mevorah of Bulgaria) ("Could a division which landed by parachute on enemy territory, be considered as occupying that territory? No! Certainly not, as the local authorities would still be there."); 2A *Final Record* at 719-720 (statement of Col. Du Pasquier of Switzerland) ("The Drafting Committee had, however, felt that even if it was not possible to provide for the protection of property against bombardments or the acts of an invading army (a matter which came within the scope of the rules of war and of the Regulations annexed to the Hague Convention), it was necessary to arrange for the protection of property in an occupied territory."); 2A *Final Record* at 649 (statement of Mr. de Geouffre de la Pradelle of Monaco) ("[A] distinction had to be drawn between the case of property in invaded territory during the course of active military operations, and that of property in occupied territory, where the enemy was acting as the authority responsible for the maintenance of law and order, irrespective of actual hostilities."). *See also supra* at 18-19.

The ICRC's attempt to equate "occupation" with "invasion" is also contrary to the settled understanding of these terms in the customary law of war. *See, e.g.*, U.S. Army Field Manual 27-10 ¶ 352 (distinguishing occupation from invasion and explaining that "[o]ccupation . . . is invasion plus taking firm possession of enemy territory for the purpose of holding it"); *id.* ¶ 355 (explaining that "occupation is a question of fact" that "presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded"); *MacLeod v. United States*, 229 U.S. 416, 425 (1913) ("[O]ccupation is not merely invasion, but is invasion plus possession of the enemy's country for the purpose of holding it temporarily at least."); *United States v. Wilhelm List et al*, in 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1230, 1243 (1950) ("The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of an established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order."); Gerhard von Glahn, *The Occupation of Enemy Territory* 28 (1957) ("Invasion as such does not ordinarily constitute occupation, although it precedes it and may coincide with it for a limited period of time. In other words, while invasion represents mere penetration of hostile territory, occupation implies the existence of a definite control over the area involved. In the former case, the invading forces have not yet solidified their control to the point that a thoroughly ordered administration can be said to have been established"); L. Oppenheim, *International Law* Vol. 2 (6th ed. 1944) 339-340 ("Now, it is certain that mere invasion is not occupation. Invasion is the marching or riding of troops—or the flying of a military air-vessel—into enemy country. Occupation is invasion plus taking possession of enemy country for the purpose of holding it, at any rate temporarily. The difference between mere invasion and occupation becomes apparent by the fact that an occupant sets up some kind of administration, whereas the mere invader does not."); Maj. Vaughn A. Ary, *Concluding Hostilities: Humanitarian Provisions in Cease-fire Agreements*, 148 Mil. L. Rev. 186, 203-204 (1995) ("An occupying power is a hostile army that establishes, and is capable of exercising, authority over the territory. The authority of the legitimate power must have 'in fact passed into the hands of the occupant.' It exists in situations where 'the invader has rendered the invaded government incapable of publicly exercising its authority,

It is our understanding that the United States is not, and has not been, an occupying power in Afghanistan or any portion of that country. Although the United States maintains a military presence in Afghanistan, our troops are there with the consent of the Karzai government, which exercises authority over the entire country. *See* American Embassy in Kabul, Note 202 (Sept. 26, 2002) (referring "to discussions between representatives of our two governments regarding issues related to United States military and civilian personnel of the United States Department of Defense who may be present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities"); Ministry of Foreign Affairs of Afghanistan, Doc. No. 93 (May 28, 2003) (referring "to the conclusion of an agreement for application of the provisions of the 1961 Vienna Convention to the civilian and military personnel of the United States Department of Defense present in Afghanistan for the useful campaign against terrorism, humanitarian assistance, and other activities"). The United States has never purported to administer the powers of government over any portion of Afghanistan, and has not established or exercised "authority" over that country. *See, e.g., United States v. Wilhelm List et al*, in 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1230, 1243 (1950) (explaining that "occupation . . . presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order"); L. Oppenheim, *International Law* Vol. 2 (6th ed. 1944) 339-340 ("The difference between mere invasion and occupation becomes apparent by the fact that an occupant sets up some kind of administration, whereas the mere invader does not."); Graber, *The Development of the Law of Belligerent Occupation, 1863-1914* at 68 (same); *see also supra* n. 21.

Furthermore in cases of occupation, although "there is no legal requirement to issue a proclamation, the United States policy is to issue a proclamation to notify the population and declare the area occupied." Maj. Vaughn A. Ary, *Concluding Hostilities: Humanitarian Provisions in Cease-fire Agreements*, 148 Mil. L. Rev. 186, 204 (1995); *see also* Army Field Manual 27-10, ¶ 357 ("[O]n account of the special relations established between the inhabitants of the occupied territory and the occupant by virtue of the presence of the occupying forces, the fact of military occupation, with the extent of territory affected, should be made known. The practice of the United States is to make this fact known by proclamation."). Far from issuing any sort of proclamation declaring Afghanistan to be occupied, the United States has repeatedly emphasized that it "has no aspiration to occupy or maintain any real estate in [Afghanistan]," Department of Defense News Briefing, Tuesday, October 9, 2001 (statement of Secretary of Defense Donald H. Rumsfeld), available at http://www.defenselink.mil/transcripts/2001/t10092001_t1009sd.html, and that "[o]ur mission in Afghanistan is one of liberation, not occupation," Remarks of Deputy Secretary of Defense Paul Wolfowitz, at the Brookings Institution, September 5, 2002, *available at* http://www.defenselink.mil/speeches/2002/s20020905-depsecdef.html; *see also U.S. Campaign on Schedule, Generals Say*, Washington Post, Monday, November 5, 2001 (General Franks stating that "the U.S. objective in Afghanistan

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and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded.' . . . Although occupation is normally preceded by an invasion, invasion does not equate to occupation. The invader also must take 'firm possession of the enemy territory for the purpose of holding it.'") (internal citation omitted).

was not the occupation of key strategic points or other territory but the application of constant pressure on the Taliban and the al Qaeda network").

The United States Armed Forces did establish a military base of operations in Afghanistan at the Kandahar airport on December 14, 2001. *See Marines Sweep Into Airport at Kandahar*, Washington Post, Friday, December 14, 2001. By then, however, the Afghan factions had already agreed upon an interim government to lead their country, *see Afghan Factions Sign Accord; Pashtun Leader to Head Multi-Ethnic Interim Council*, Washington Post, Thursday, December 6, 2001, and President Bush sent a letter to Hamid Karzai, the President of the new Afghan government, expressing the United States intention to cooperate with his administration, shortly thereafter, *see Karzai Expected to Visit U.S. Next Month; Bush Extended Invitation to Afghan Leader to Discuss War and Rebuilding*, Washington Post, Thursday, January 3, 2002.[22] Indeed, some have argued that the local forces with which the United States cooperated before that time represented Afghanistan's *de jure* government. In the words of one commentator:

> The U.S. military battled the Taliban . . . with the assistance of the Northern Alliance, the armed wing of the *de jure* government, as well as other anti-Taliban Afghan forces. Once the Taliban was defeated, the United States continued to conduct military operations with the formal consent of the interim government, to which power was peacefully transferred in December 2001 by the former *de jure* government. The United States promptly extended formal recognition and full diplomatic relations to the Karzai government.

Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 Hastings Int'l & Comp. L. Rev. 303, 325 (2002). Thus, the United States military presence in Afghanistan has never been that of an occupying power. It has operated with the consent and cooperation of the Karzai government from that government's inception (and, before that time, with the forces of what was arguably the previous *de jure* government), and has continuously recognized that properly constituted Afghani authorities, and not the United States military, exercise authority over all of Afghanistan. See Davis Brown, *Use of Force Against Terrorism After September 11: State Responsibility, Self-Defense and Other Responses*, 11 Cardozo J. Int'l & Comp. L. 1, 49 n. 259 (2003) ("Afghanistan is not an 'occupied state' in this context, for coalition forces entered the country in self-defense and remain there with the consent of the new government.").

Significantly, although the U.N. Security Council has enacted 13 resolutions addressing the situation in Afghanistan since United States military operations began there in October 2001, none of the resolutions has suggested that Afghanistan is occupied territory or that the United States is an occupying power there. Nor has any suggested that the provisions of the Fourth Geneva Convention relating to occupied territory apply to United States actions in Afghanistan. To the contrary, the Security Council has repeatedly treated the presence of United States and coalition forces in Afghanistan as a cooperative endeavor with the domestic Afghan government. *See, e.g.*, SC Res. 1510 (13 October 2003) ("[r]ecognizing that the responsibility for providing

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[22] Karzai was sworn in as Afghanistan's interim President on December 22, 2001. *See Afghan Leader is Sworn In, Asking for Help to Rebuild*, New York Times, Sunday, December 23, 2001.

security and law and order throughout the country resides with the Afghans themselves," "welcoming the continuing cooperation of the Afghan Transitional Authority with the International Security Assistance Force," and calling "upon the International Security Assistance Force to continue to work in close consutation with the Afghan Transitional Authority and its successors"); SC Res. 1444 (27 Nov. 2002) ("[w]elcoming . . . the cooperation of the Afghan Transitional Authority with the International Security Assistance Force"); SC Res. 1413 (23 May 2002) ("[r]ecognizing that the responsibility for providing security and law and order thoughout the country resides with the Afghans themselves, and welcoming in this respect the cooperation of the Afghan Interim Authority with the International Security Assistance Force"); SC Res. 1386 (20 December 2001) ("[r]ecognizing that the responsibility for providing security and law and order throughout the country resides with the Afghans themselves"). *See also* SC Res. 1536 (26 March 2004); SC Res. 1471 (28 March 2003); SC Res. 1453 (24 December 2002); SC Res. 1419 (26 June 2002); SC Res. 1401 (28 March 2002); SC Res. 1390 (28 January 2002); SC Res. 1388 (15 January 2002); SC Res. 1383 (6 December 2001); SC Res. 1378 (14 November 2001). By contrast, during the recent occupation of Iraq, U.N. Security Council resolutions repeatedly characterized the United States and its coalition partners as occupying powers in Iraq and called upon them to comply with their obligations as occupying powers under the Fourth Geneva Convention there. *See, e.g.*, S.C. Res. 1546 (8 June 2004) ("[w]elcom[ing] that . . . by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty); S.C. Res. 1483 (22 May 2003) ("recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command" and calling upon them "to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907"); S.C. Res. 1472 (28 March 2003) ("[n]oting that under the provisions of Article 55 of the Fourth Geneva Convention . . . to the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population" and requesting "all parties concerned to strictly abide by their obligations under international law, in particular the Geneva Conventions and the Hague Regulations, including those relating to the essential civilian needs of the people of Iraq").

For all of these reasons we conclude that Afghanistan is not occupied territory and that the United States is not an occupying power there. It follows that persons captured and detained by the United States in Afghanistan do not find themselves in the hands of an occupying power in occupied territory.

B.

Nor do persons captured and detained by the United States in Afghanistan find themselves in the home territory of the United States. It is true that the United States has established military bases in Afghanistan and that certain offenses committed within these bases may fall within the special maritime and territorial jurisdiction of the United States. *See* 18 U.S.C. § 7(9) (West Supp. 2005) (defining the special maritime and territorial jurisdiction of the United States to include, *inter alia*, "the premises of United States diplomatic, consular, military or other United States Government missions or entities," but only "[w]ith respect to offenses

committed by or against a national of the United States").[23] United States *jurisdiction*, however, is not synonymous with United States *territory*. Although the United States generally exercises criminal jurisdiction (either at the federal or state level) over offenses committed within the territory of the United States, it also exercises extraterritorial jurisdiction in certain cases based on grounds such as the nationality of the victim or offender. Indeed, jurisdiction under section 7(9) of title 18, United States Code, which, subject to certain limitations, extends United States criminal jurisdiction to certain offenses committed by or against United States nationals at certain locations in Afghanistan, turns on nationality as well as location. The distinction between jurisdiction and territory is well known in international law. *See, e.g.,* International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 2(1), 6 I.L.M. 368, 369 (requiring state parties "to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant") (emphasis added); Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, art. 5(1), S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (requiring state parties to establish jurisdiction over acts of torture committed *inter alia*, in "territory under its jurisdiction," and, separately, "[w]hen the alleged offender is a national of that State"). *Cf.* J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 47-48 (1988) (explaining that the Convention Against Torture's drafters deliberately chose to limit certain obligations of each party to "territory under its jurisdiction" as opposed to "its territory," which some delegates thought too narrow, or to "within its jurisdiction," which some delegates thought too broad.). Especially in light of this well established distinction, we think it plain that a military facility located in the sovereign territory of Afghanistan is not the territory of the United States for purposes of GC simply because the United States Code may establish criminal jurisdiction over certain offenses committed by or against United States nationals at that facility. *Cf. United States v. Spelar*, 338 U.S. 217, 219 (1949) (holding that a claim relating to an alleged tort committed at a United States military facility located in Newfoundland arose "in a foreign country" for purposes of the Federal Tort Claims Act and stating that "[w]e know of no more accurate phrase in common English usage than 'foreign country' to denote territory subject to the sovereignty of another nation"). Indeed, section 7(9) expressly provides that "[n]othing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts." 18 U.S.C.A. § 7(9).

More fundamentally, the structure and negotiating history of GC suggests that "the territory of a Party to the conflict" for purposes of the Convention is limited to *sovereign* territory and does not extend to territory over which a country exercises temporary or *de facto* jurisdiction. As discussed above, GC draws careful and fundamental distinctions between "the territory of a Party to the conflict" and "occupied territory." *See supra* at 9-10. Yet occupied territory is a classic example of territory over which a nation is not sovereign but nevertheless exercises temporary or *de facto* jurisdiction. *See, e.g., Yoram Dinstein, Belligerent Occupation and Human Rights*, 8 Isr. Y.B. on Hum. Rts. 104, 106 (1978) ("In the course of the belligerent occupation, the occupant has only the right of possession or control (*imperium*) in the territory.

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[23] This provision does not apply to persons "described in section 3261(a) of this title." 18 U.S.C.A. § 7(9) (West Supp. 2005). Such persons are instead subject to federal criminal jurisdiction pursuant to the Military Extraterritorial Jurisdiction Act, 18 U.S.C.A. §§ 3261-3267 (2000 & West Supp. 2005), or the Uniform Code of Military Justice.

De jure sovereignty remains vested in the occupied State, though *de facto* authority passes into the hands of the occupant."); U.S. Army Field Manual 27-10 ¶ 353 ("Belligerent occupation in a foreign war, being based upon the possession of enemy territory, necessarily implies that the sovereignty of the occupied territory is not vested in the occupying power. Occupation is essentially provisional."); L. Oppenheim, *The Legal Relations Between an Occupying Power and the Inhabitants*, 33 L. Quarterly Rev. 363, 364 (1917) ("There is not an atom of sovereignty in the authority of the occupant. . . ."). Interpreting the "territory of a Party to the conflict" to extend beyond that party's sovereign territory to include territory subject to its temporary or *de facto* control would accordingly sweep occupied territory into the home territory of the occupying power, a result fundamentally incompatible with GC's basic structure. By contrast, reading the "territory of a Party to the conflict" to be limited to that party's sovereign territory avoids this incongruous result and is consistent with the understanding reflected in the negotiating record. *See, e.g.*, 2A *Final Record* at 656 (Mr. Maresca of Italy) (referring to the "territory of a Party to the conflict," as "national territory"); *Id.* at 644 (Mr. Haksar of India) (same). And if a party's exercise of jurisdiction based on *de facto* or temporary control of foreign *territory* does not implicate GC's provisions relating to a party's home territory, it follows *a fortiori* that a party's exercise of jurisdiction based on grounds such as nationality that are not related to territorial control do not implicate those provisions.

Accordingly, we conclude that no part of Afghanistan is within the home territory of the United States. It follows that persons captured and detained by the United States in Afghanistan do not find themselves in the hands of a party to a covered conflict in that party's home territory.[24]

* * *

Because persons captured and detained by the United States in Afghanistan find themselves neither in the hands of an occupying power in occupied territory, on the one hand, nor in the hands of a party to the conflict in that party's home territory, on the other hand, they are not protected persons under the Fourth Geneva Convention.

It does not follow, of course, that United States actions in Afghanistan are unconstrained by international or domestic United States law or that persons captured and detained in Afghanistan lack legal protection. To the contrary, Part II of the Fourth Geneva Convention confers protections on "the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion." Furthermore, GC explicitly recognizes that, apart from the provisions of the Convention, parties to armed conflicts are bound by "the principles of the law of nations, as they result from the

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[24] We note that the status under GC of the temporary military facilities operated by the United States in Afghanistan present a substantially easier question than does the status of the United States Naval base at Guantanamo Bay where, pursuant to a longstanding lease that cannot be terminated without United States consent, the United States "exercise[s] complete jurisdiction and control" but "recognizes the continuance of the ultimate sovereignty of the Republic of Cuba." Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418. *See generally Rasul v. Bush*, 124 S. Ct. 2686 (2004). In particular, factors that might lead a court to treat Guantanamo Bay as functionally equivalent to United States territory for at least some purposes, *see Rasul*, 124 S. Ct. at 2698 n. 15; *id.* at 2699-2701 (Kennedy, J., concurring in the judgment), do not appear applicable to United States facilities in Afghanistan.

usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience." GC, art. 158(4). Indeed, as the negotiating record discussed above makes clear, the territorial limits on those portions of GC relating to "protected persons" were intended to preserve the full application of the customary laws of war, including, in particular, the Hague Regulations, in unoccupied enemy territory. *See supra* at 16-19. Among other things, the Hague Regulations prohibit the "treacherous[]" killing or wounding of individuals belonging to the hostile nation or army, *see* Hague Regulations art. 23, the killing or wounding of "an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion," *id.*, the destruction or seizure of property not justified by military necessity, *see id.*, attacks on undefended buildings or towns, *see* Hague Regulations art. 25, targeting buildings that have been identified as dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, *see* Hague Regulations art. 27, and pillage, *see* Hague Regulations art. 28. Even where, as here, the Hague Regulations do not apply as a matter of treaty law,[25] they are "recognized by all civilized nations" and "regarded as being declaratory of the laws and customs of war." International Military Tribunal, *Trial of the Major War Criminals*, 14 November 1945-1 October 1946, at 254 (Nuremberg, 1947). United States domestic law also imposes important obligations on United States forces and personnel in Afghanistan. For example, the Uniform Code of Military Justice ("UCMJ") prohibits misconduct by members of United States Armed Forces in Afghanistan such as "cruelty and maltreatment," (article 93), "murder," (article 118), "rape and carnal knowledge," (article 120), "larceny and wrongful appropriation," (article 121), "robbery," (article 122), "maiming," (article 124), "assault," (article 128), and "conduct unbecoming an officer and a gentleman," (article 133). Federal criminal laws prohibit many similar offenses within the special maritime and territorial jurisdiction of the United States, and the Military Extraterritorial Jurisdiction Act ("MEJA"), 18 U.S.C.A. §§ 3261-3267 (2000 & West Supp. 2005), extends these laws beyond the "special maritime and territorial jurisdiction" for civilians employed by or accompanying United States Armed Forces. And even United States nationals who are not subject to the UCMJ or MEJA may be prosecuted for these offenses when committed within the special maritime and territorial jurisdiction, which, as discussed above, extends to misconduct by such persons at United States facilities in Afghanistan. Finally, federal criminal law prohibits torture by United States nationals in Afghanistan as in any other location outside the United States. *See* 18 U.S.C. § 2340A (2000) (prohibiting torture "outside the United States" and establishing jurisdiction over offenses committed, *inter alia*, by "a national of the United States"); 18 U.S.C.A. § 2340(3) (West Supp. 2005) (defining the "United States" as "the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States"). In short, our conclusion is only that the provisions of the

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[25] The Hague Regulations do not apply as a matter of treaty law "except between Contracting Powers, and then only if all the belligerents are parties to the Convention." *See* Hague Regulations, art. 2, 36 Stat. at 2290. *Cf. Protected Persons Memorandum* at 2 n. 2 (concluding that the Hague Regulations do not apply to the United States' conflict with and occupation of Iraq as a matter of treaty law because Iraq is not a party to the Hague Convention); Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, *Re: Authority of the President Under Domestic and International Law To Make Fundamental Institutional Changes to the Government of Iraq* at 10 (Apr. 14, 2003) (same). It is our understanding that Afghanistan is not a signatory to the Hague Regulations.

Fourth Geneva Convention relating to "protected persons" do not apply to persons captured and detained in Afghanistan.[26]

[26] Furthermore, our analysis should not be understood to imply that persons entitled to "protected person" status when captured (e.g., in the United States or, prior to the end of the recent occupation, in Iraq) would lose such status if relocated to Afghanistan. On the contrary, several provisions of GC suggest that "protected person" status is determined at the time a person falls into the hands of an occupying power or a party to the conflict and that subsequent relocations do not affect that status. *See, e.g.*, art. 45(3) ("Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with."); GC art. 49(2) ("[T]he Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased."); *cf.* GC art. 6(4) ("Protected persons whose release, repatriation or re-establishment may take place after [GC ceases to apply] shall meanwhile continue to benefit by the present Convention."). We do not attempt to resolve this issue here.