United States Department of State

Washington, D.C. 20520

January 11, 2002

UNCLASSIFIED
MEMORANDUM

TO: John C. Yoo
Deputy Assistant Attorney General
Office of the Legal Counsel
United States Department of Justice

FROM: William H. Taft, IV WHT
Legal Adviser

SUBJECT: Your Draft Memorandum of January 9

I attach a draft memorandum commenting on the draft you sent me earlier in the week. While we have not been able in two days to do as thorough a job as I would like in reviewing your draft, I am forwarding these comments to you in draft form now for your consideration. They suggest that both the most important factual assumptions on which your draft is based and its legal analysis are seriously flawed.

Our concerns with your draft are focussed on its consideration of the status of detainees who were members of the Taliban Militia as a practical matter. Under the Geneva Conventions, these persons would be entitled to have their status determined individually. We find untenable the draft memorandum's conclusion that this is unnecessary because (1) Afghanistan ceased to be a party to the Conventions, (2) the President may suspend the operation of the Conventions with respect to Afghanistan, and (3) customary international law does not bind the United States. As a matter of international law, the draft comments show, all three premises are wrong.

The draft memorandum badly confuses the distinction between states and governments in the operation of the law of treaties. Its conclusion that "failed states" cease to be parties to treaties they have joined is without support. Its argument that Afghanistan became a "failed state" and thus was no longer bound by treaties to which it had been a party is contrary to the official position of the United States, the United Nations and all other states that have

considered the issue. The memorandum's assertion that the President may suspend the United States' obligations under the Geneva Conventions is legally flawed and procedurally impossible at this stage. The memorandum fails to address the question of whether customary international law is binding on the United States as a matter of international law. (As John Marshall was fond of saying, to ask the question is to answer it.)

John, I understand you have long been convinced that treaties and customary international law have from time to time been cited inappropriately to circumscribe the President's constitutional authority or pre-empt the Congress's exercise of legislative power. I also understand your desire to identify legal authority establishing the right of the United States to treat the members of the Taliban Militia in the way it thinks best, if such authority exists. I share your feelings in both of these respects. I do not, however, believe that on the basis of your draft memorandum I can advise either the President or the Secretary of State that the obligations of the United States under the Geneva Conventions have lapsed with regard to Afghanistan or that the United States is not bound to carry out its obligations under the Conventions as a matter of international law. That may mean, of course, that we must determine specifically whether individual members of the Taliban Militia in our custody are entitled to POW status, and it may be that some are actually entitled to it. In previous conflicts, the United States has dealt with tens of thousands of detainees without repudiating its obligations under the Conventions. I have no doubt we can do so here, where a relative handful of persons is involved. Only the utmost confidence in our legal arguments could, it seems to me, justify deviating from the United States unbroken record of compliance with the Geneva Conventions in our conduct of military operations over the past fifty years. Your draft acknowledges that several of its conclusions are close questions. The attached draft comments will, I expect, show you that they are actually incorrect as well as incomplete. We should talk.

Attachment:
As stated.

cc: Secretary of State
Judge Gonzalez

DRAFT
January 11, 2002

This provides our comments on the OLC Draft Memorandum for William J. Haynes II, General Counsel, Department of Defense, Concerning the Application of Treaties and Laws to Al Qaeda and Taliban Detainees. We look forward to discussing our views further.

Our comments are grouped into four sections. First, we set out in a general way some implications of the line of analysis presented in the draft opinion. Second, we discuss various difficulties inherent in the draft's conclusions themselves, in particular the questions of the existence of Afghanistan as a State and the continuity of treaty obligations. We also consider cases when the Convention was previously applied, including cases in which full compliance was not possible, and the consequences of such non-compliance. Most importantly, we address the analysis of the Geneva Convention obligations to Taliban forces. Third, we consider the draft memorandum's discussion of whether the applicability of the Geneva Conventions may be suspended. Fourth, we consider the draft memorandum's conclusion on the continued applicability of customary international law in the event the Geneva Conventions are determined to be inapplicable. Finally, we include in an appendix a summary of potential reactions to the conclusions that neither the Geneva Conventions nor customary law is applicable.

International law does not support key conclusions in the Draft Memorandum, including those concerning Afghanistan's existence as a State, the continuity of treaty obligations, the applicability of Geneva Convention III ("GPW") to Taliban forces and the applicability of customary international law.

Treaty relations between Afghanistan and other nations continue to apply. The issue of recognition of the Taliban government and its effectiveness in performing governmental functions is entirely separate from the question of statehood and whether a state remains a treaty partner. Specifically, the United States and the international community have continued to recognize Afghanistan as a State with international treaty obligations. Indeed, Afghanistan has remained a member of the United Nations at all times. Afghanistan is today and has been at all relevant times a Party to the Geneva Conventions. Even if, as the draft opinion suggests, the Convention is now in force but was not in effect under the Taliban regime, the U.S. is today subject to the obligations applicable under the GPW.

The Geneva Conventions are applicable by their terms to the Taliban forces. The GPW is intended to apply in the broadest set of circumstances, with "recognition" of the adversary not a prerequisite to its application. Article 4(A)(3) of GPW specifically applies to "members of the regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." The Taliban qualify as a "government or authority" and, as a category, Taliban forces could meet factual tests of "regular armed forces." In cases of doubt as to specific individuals associated with the Taliban, Article 5 of the Prisoners of War Convention requires that protection be

provided until their status has been determined by a competent tribunal. Finally, the suggestion in the draft opinion that the President might suspend the Geneva Conventions is contrary to international law and procedurally unavailable.

Contrary to the conclusions of the draft opinion, customary international law creates rights for, and obligations on, the United States. The U.S. relies on customary international law in key areas, including law of war, immunities, treaty interpretation, law of the sea, and expropriation. The breach of customary international law obligations could subject the United States to adverse international consequences and reduce our ability to conform the behavior of other countries to international standards. Even where U.S. law trumps a particular international law for domestic purposes, it does not, without more, relieve the U.S. of its international obligations.

Consequences of the Memorandum's Conclusions

If the analysis and conclusions of this draft opinion were accepted, a number of the consequences could be very significant, and therefore should be noted:

- If neither the Geneva Conventions nor the customary international law of war applied, the legal basis for military commissions would be undermined.

- If law obligation applied, U.S. forces would also no longer enjoy the rights of belligerents; they would become subject to prosecution for such common crimes as murder and willful destruction of property.

- The conclusion that the Geneva Conventions do not apply could presumably be the basis for actions that otherwise would violate the Convention, including conduct that would constitute a grave breach.[1] This raises a risk of future criminal prosecution for U.S. civilian and military leadership and their advisers, by other parties to the Geneva Conventions (in view of the Convention obligations with respect to finding and prosecuting violations).

- For the first time, the United States would deny the applicability of the Geneva Conventions to opposing forces in an armed conflict involving U.S. forces. This would be contrary to consistent U.S. practice aimed at promoting the widest possible application of those conventions.

- If Afghanistan is determined not to be a party to the Geneva Conventions because it is a "failed State" or if the United States could suspend its treaty obligations with Afghanistan under the Geneva Conventions, either

[1] The grave breaches specified in article 130 of Geneva Convention III include depriving the prisoner of war "the rights of fair and regular trial prescribed in the Convention." Other potential breaches that would not constitute grave breaches are "acts contrary to the provisions of the present Convention." GPW III, Article 129, 3rd para.

prospectively or for some identified period of time, Afghanistan would have no effective treaty relationship with the United States under those Conventions for the same period. The implications of such a legal approach include:

- The United States would have no basis to complain of violations of the Geneva Conventions committed against U.S. or coalition forces who continue to conduct operations in Afghanistan, notwithstanding the fact that hostilities may be ongoing.

- Afghanistan would also not be a party to any other treaty that was open only to States. It would have no obligations vis-à-vis the United States under the Nuclear Non-Proliferation Treaty; it would not be a member of the IMF or World Bank for purposes of finance or assistance; it would ceased to be a member of the United Nations and no longer have obligations under the Charter.

- If Afghanistan had at some point ceased to exist as a State, numerous other questions would arise that are neither addressed nor considered in the draft – e.g., diplomatic relations and the status of our Embassy, ownership of assets, liability for claims, loans and debts, and so forth. One must also consider the implications of the fact that the position taken in the opinion is contrary to the legal position consistently taken by the United States on the status of Afghanistan, from 1996 until today.

- If the United States is precluded from maintaining mutual treaty obligations with a "failed State", this would have far-reaching implications for the conduct of U.S. foreign policy toward other States with questionable governing regimes.

Comments on the Draft Opinion

I. The Continuing Applicability of Treaty Relations

The Draft Opinion sets forth two basic arguments with respect to the continuing applicability of treaty relations.

First, it argues that Afghanistan ceased to be a party to the Geneva Conventions because it ceased to be a State. If Afghanistan is a non-party, the U.S. did not have any obligations vis-à-vis Afghanistan under the Treaty. Recognizing that Afghanistan is at present undoubtedly a State, the opinion argues that even if Afghanistan's Party status is "restored," the U.S. is still not bound to follow the Geneva Conventions because the President can determine that Afghanistan has not yet "returned to the status of a state party to the Convention" (p. 24), and because the jurisdictional provisions of the Convention remain inapplicable even if it is.

Second, it argues that, even if Afghanistan is viewed as having remained a party to the Geneva Conventions, the President can now determine that the obligations of the United States owed to Afghanistan under the Conventions were or are suspended, and that such a determination would be valid under international law.[2]

While the first argument makes a number of valid points about the constitutional role and legal authority of the President under domestic law, it is confused and inaccurate in a number of other respects. The concept of "failed State" has been developed as a historical and political analytic tool, not as a legal concept. A failed State does not thereby cease to be a State, nor does it cease to be a party to relevant Conventions.

Specifically, neither the United States nor any other country has viewed Afghanistan at any point as ceasing to be a State. Neither the United States nor any other State has viewed it as ceasing to be a party to international agreements. The fact that the United States did not recognize the Taliban as the government of Afghanistan is completely irrelevant.

Since Afghanistan never ceased to be a party, there is no question whether its party status is now fully or partially "restored," nor is there even such a concept of losing and restoring party status in treaty law. As the opinion repeatedly fails to recognize, the ability, inability, or even unwillingness of a State to perform international treaty obligations is a question entirely separate from the question of its status. Afghanistan has continued to be a State and a party to the Geneva Conventions during the relevant period.

A. Afghanistan Has Continued to Be a State and a Party to the Geneva Conventions.

[2] Draft Opinion at 28-32.

1. In General, a "failed State" Does Not Cease to Be a State and Remains a Party to Relevant Conventions.

The concept of "failed State" has recently gained currency in both academic and popular writing, but it is not a legal concept. Some argue that the normal international law rules governing outside intervention in internal affairs should be different in the case of a "failed State."[3] Nonetheless, contrary to the suggestion in the draft opinion, a "failed State" is still understood to be a State, and it does not cease to be a party to relevant Conventions.[4]

According to the Draft Opinion, Afghanistan was not a State under the Taliban because it failed "some, and perhaps all, of the ordinary tests of statehood."[5] This is inaccurate. The non-recognition of the Taliban was a foreign policy judgment; the Taliban did ultimately effectively control as much as 90% of the territory, it exercised the functions of a government, and it was generally treated by the international community as a *de facto* governing authority. Even if the Draft Opinion factual analysis were accurate, however, the conclusion that a "failed State" is not a State rests on a misunderstanding and misapplication of the criteria for statehood. It is also contrary to U.S. and international practice.

The discussion of the "tests" of statehood in relation to Afghanistan concern the question of whether there is a government in control of the territory and capable of engaging in foreign relations. There has been no question about the boundaries of Afghanistan; neighboring countries have not sought to extend their borders into Afghanistan, nor has there been any change in the delineation of Afghanistan in authoritative United States maps.

Essentially, the Draft Opinion's argument turns on the premise that an existing State must continue to have a recognized, effective government or else cease to be a State. No such principle, however, exists in international law. To the contrary, it is well-established in international law and U.S. practice that the absence of a recognized government, or a government in control of territory, does not render an existing State "stateless."[6]

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[3] Far from arguing that "failed States" should no longer be participants in treaty regimes, the literature views the continued application of treaty regimes as particularly important with respect to failed States, to ensure protection of the population. *See, e.g.*, Ruth Gordon, "Saving Failed States: Sometimes a Neocolonialist Notion," 12 Am. U. J. Int'l L.& Policy 903 (1997); Oscar Schachter, "The Decline of the Nation-State and Its Implications for International Law," 36 Colum. J. Transnat'l L. 7 (1997); Jennifer Moore, "From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents," 31 Colum. Hum. Rts. L.Rev. 81 (1999).

[4] For example, Oscar Schachter, whose article is referenced in the draft opinion, states: "The term "failed states" has come to be used for these cases [where government and civil order have virtually disappeared, including Liberia, Somalia, and Afghanistan] and others like them. The United Nations has continued to treat them as member states, entitled in principle to 'sovereign equality,'...." Schachter, at 18.

[5] Draft Opinion at 22.

[6] "There are therefore four conditions which must obtain for the existence of a state. . . . But once a state is established, temporary interruption of the effectiveness of its government, as in a civil war or as a result of

The "statehood" criteria to which the Draft Opinion refers are those applied to determine whether to recognize a new State in the first instance; their application with respect to the extinction of an existing State is an entirely different question. Once a State comes into being, the question becomes not one of recognition, but rather a question of extinction.[7] There is a very strong presumption in international law against extinction of a State, even after a lengthy period of internal anarchy (e.g., China, Somalia).[8]

We are aware of no instance in which a well-established existing State has ceased to exist, either in the view of the United States or in the view of the international community, on the grounds of internal conflict and absence of a single effective or recognized government.[9] Nor do occupation and annexation by an external power, if nonconsensual, normally affect the continuing existence of a State. To the contrary, there are many examples of States continuing with only ineffective governments-in-exile or no recognized government at all. It is well-established that internal conflict and revolution, even if prolonged, do not affect the continuity of the existence of a State. In World War II, for example, France, the Netherlands, and Belgium did not cease to be States when they were overrun by Germany and the only independent "governments" were in exile. The United States never accepted the incorporation of Estonia, Latvia and Lithuania by the Soviet Union, and continued to recognize their existence as States. Neither the United States nor any other country that did not recognize any government in Cambodia under the Hun Sen regime took the position that Cambodia itself was not a State.

Nor is there any practice or authority that a State without a single effective, recognized internal government somehow ceases to be a party to treaties or other international obligations. The United States has taken the position that treaty relations can survive even in the effective absence of a country. In the case of the Baltics, for example, the view of the United States was that not only did the Baltic States themselves continue to exist, but also that all treaties with the Baltics continued to exist as treaties in force, although temporarily incapable of performance by the Baltic States party.

2. Specifically, the United States and the International Community Have Continued to Recognize Afghanistan as a State with International Treaty Obligations

belligerent occupation, is not inconsistent with the continued existence of the state." Jennings and Watts, I Oppenheim's International Law, §34, 120, 122 (1992).

[7] *Id.*, at 206-208.

[8] *See generally*, James Crawford, The Creation of States in International Law, pp. 405-412 and 417-420.

[9] "Of these four elements needed before a community may be regarded as a state, some may at times exist only to a diminished extent, or may even be temporarily absent, without the community necessarily ceasing to be a state. Thus the existence of a civil war may affect the continued effective existence of a government, or relations with other states may affect the degree to which sovereignty is retained, while the state nevertheless continues to exist." Jennings and Watts, *supra*, §34, at 123 (footnotes omitted). Even in cases of dissolution, annexation, and merger, moreover, despite the change in statehood there may be continuation of treaty relations (e.g., the U.S.S.R., Czechoslovakia, the United Arab Republic).

The United States Position. The official United States position before, during and after the emergence of the Taliban was that Afghanistan constituted a State.[10]

The United States never broke diplomatic relations with Afghanistan. On January 30, 1997, the Department of State issued guidance for issuance of diplomatic visas to Afghans, prefaced by the following statement: "While the United States maintains diplomatic relations with the Islamic State of Afghanistan, the USG does not recognize any central government in Afghanistan." In August 1997, the U.S. "suspended operations" of the Afghan embassy in Washington. The U.S. did not, however, suspend operations at the sole consulate of Afghanistan in the United States, in New York. The consulate continued to have a consular officer accredited to the United States.

When the United States recently opened a Liaison Office in Kabul prior to the existence of a recognized government, we viewed the opening of the Liaison Office as the restaffing of a continuing diplomatic mission to the country of Afghanistan. We also took the position that the mission enjoyed the rights and privileges of a diplomatic mission under the Vienna Convention on Diplomatic Relations, based on Afghanistan's continuing as a party to that multilateral treaty. This position had concrete practical consequences, such as the continuing protection of the U.S. mission and personnel.

Our practice consistently demonstrated a clear distinction between non-recognition of the Taliban as a government and continuing recognition of Afghanistan as a State. Even with respect to statutory certifications, for example, the United States distinguished between statutes that required certifications as to "States" or "Countries" and those that required certifications as to "Governments." Thus, for example, we determined that Afghanistan was a major illicit drug producing and drug transit country which had not cooperated fully with the United States with respect to efforts against drugs. The Statement of Explanation provides, inter alia, that "In 1999 Afghanistan cultivated a larger opium poppy crop and harvested more opium gum than any other country....." (Presidential Determination No. 2000-16 of February 29, 2000, 65 Federal Register 15797-98, March 23, 2000.) On the other hand, we did not consider Afghanistan to meet the criterion for the terrorism list that "the government of that Country has repeatedly provided support for acts of international terrorism" because there was no recognized government. (§6(j) of the Export Administration Act.)

Our position with respect to the continuation of treaties is also a matter of record. The U.S. Government publication Treaties in Force has continuously listed Afghanistan as a party to all bilateral and multilateral treaties, including specifically the Geneva Conventions. This is not mere inertia, as the publication does include notes where changes in sovereignty and status have raised questions regarding treaty applicability.[11]

[10] Indeed, the United States maintained a similar position during the period of Soviet occupation of Afghanistan in the 1980s; notwithstanding Soviet control of Afghanistan and its government, the United States continued to consider Afghanistan to be a State.

[11] *See, for example*, the note with respect to the Union of Soviet Socialist Republics, Treaties In Force, January 2000, at 297.

As the above brief indication of U.S. official policy and practice indicates, the recognition of governments and States poses complex questions with implications for a very wide range of legal and policy questions. They are deeply intertwined with the conduct of foreign policy and even the day-to-day administration of international relations, such as the issuance of visas.[12] As such, these questions are ones on which the Department of State possesses a particular knowledge and expertise. The Department has created the record of the U.S. government's official relations with Afghanistan in recent years. A determination that for some period of time Afghanistan ceased to exist would be inconsistent with that record.

The International Position. The international community as a whole continued to recognize Afghanistan as a State. Afghanistan never ceased to be a member of the United Nations, for example, although membership is only open to States. Moreover, Afghanistan continued to be actively represented at the United Nations. As the Draft Opinion itself notes, "the overwhelming majority of States and the United Nations recognized exiled President Burhanuddin Rabbani and his government as the country's legal authorities." (Footnote 57, p. 22.) Such recognition necessarily of the government of a country presumes the existence of the country itself.

The UN Security Council has also indicated that the Taliban and other parties to the Afghan conflict were bound to comply with the Geneva Conventions. In UNSC Resolution 1193 (1998), the Security Council reaffirmed that:

> All parties to the conflict [in Afghanistan] are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949 . . .

UNSC Resolution 1214, also concerning the conflict in Afghanistan, uses essentially the same language in a preambular clause. The parties referred to in these instances are the Taliban and those forces fighting against the Taliban. These Resolutions, in which the United States joined consensus, describe "obligations" to adhere to the Geneva Conventions. The Security Council could not have issued a resolution containing such a clause if it had not been convinced that there was a proper legal basis to apply international law obligations to the parties to the conflict within Afghanistan. Evidently, the Council - and the United States – did not believe that Afghanistan was a "failed State" where the Geneva Conventions had become inapplicable. Nor does the ICRC. Their database, which reflects the authoritative records of the Swiss Government as treaty depositary, lists Afghanistan as having enjoyed uninterrupted status as a party to the Conventions since it first joined in 1956.[13]

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*www.ICRC.ORG

[12] There are other implications as well, not discussed here, such as the implications for Afghani citizens who would be "stateless" in the absence of their State.

[13] www.icrc.org

B. The Geneva Convention Has Been in Force at All Relevant Times

The Draft Opinion agrees that at present Afghanistan is a State with a recognized government and addresses the question whether the Geneva Conventions are now in force. It concludes at page 24 that "even if Afghanistan now has a recognized government, it does not *necessarily* follow that its status as a party to the Conventions has been completely restored." There is, however, no basis for such a conclusion. Granting that Afghanistan is a party to the treaty today means that the treaty must henceforth govern U.S. conduct.[14]

Since Afghanistan never ceased to be a party, however, there is no question whether Afghanistan's party status is now fully or partially "restored." More fundamentally, there is no such concept of losing and "restoring" party status in treaty law. Once a State ceases to be a party to a treaty, it cannot automatically resume party status. Rather, it must join the treaty anew, typically by depositing an instrument of ratification or accession. If Afghanistan ceased to be a State and therefore ceased to be a party to treaties, it would not now be a party to any treaties whatsoever. That is to say, no treaties would be in force and Afghanistan would have to join every treaty anew. This would include, for example, the Non-Proliferation Treaty, the U.N. Charter, the governing instruments of the World Bank and other international financial institutions, and all other treaties and agreements that specify that all Parties must be States.

The discussion of "restoration" in the Draft Opinion illustrates a significant underlying analytic difficulty with the Draft Opinion, which is that the question whether an entity is a State and party to a treaty, on the one hand, is consistently confused with the very different and unrelated question whether it is able to perform relevant obligations. The Supreme Court cases cited in the Draft Opinion concern the latter, not the former question.[15]

We have no quarrel with, and indeed support, the view that the recognition of States and governments, and the determination of whether a State can perform its treaty obligations, are fundamentally and constitutionally Executive functions.[16] However, it

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[14] See, e.g., Vienna Convention on the Law of Treaties, Art. 26. Applying a treaty in force to the existing situation, i.e., to POWs now in custody, is not the same as giving it retroactive effect. Anthony Aust, Modern Treaty Law and Practice 142 (2000).

[15] Clark v. Allen, 331 U.S. 503 (1947); Terlinden v. Ames, 184 U.S. 270 (1902); and the discussion in the Draft Opinion on pages 16 and 24.

[16] Although supporting a robust view of the President's constitutional authority, however, it must be noted that the discussion of constitutional authority in the Draft Opinion at pp. 14-16 is somewhat overstated. It is well established that the recognition of States and of governments is an Executive power. Nonetheless, it likely that neither the Congress nor the Supreme Court would agree that the President has plenary power over the interpretation of treaties and of international law. We endorse the conclusion that "the question whether a state is in a position to perform its treaty obligations is essentially a political question". (Terlinden v. Ames, 184 U.S. 270, 288 (1902). Questions of termination, breach, interpretation, and suspension, however, may implicate powers of Congress and the courts. Perkins v. Elg, 307 U.S. 327 (1939); Goldwater v. Carter, 444 U.S. 996 (1979).

remains true that the ability, inability, or even unwillingness[17] of a State to perform international treaty obligations is a question unrelated to the question of its status. There are numerous instances of temporary or even prolonged inability or unwillingness to fulfill treaty obligations by particular countries, including even the United States. The ineffectiveness of the Taliban and their lack of respect for fundamental norms of international behavior as well as international obligations have no bearing on whether Afghanistan has continued to be a State and a party to the Geneva Conventions.

As discussed also in connection with suspension, below, in the case of the Geneva Conventions the ability of the Taliban to respect treaty obligations does not justify a reciprocal suspension of compliance by the other party. Even if suspension were permissible, moreover, it is too late to announce a suspension for the period of Taliban control. Suspension is not automatic, nor is it retroactive, but it rather requires formal notification in advance.[18]

It follows that the Third Geneva Convention constitutes at present a treaty in force between the United States and Afghanistan. The Draft Opinion argues that this treaty is not now applicable, because Afghanistan was not a party "at the time of the conflict."[19] However, the normal rule is that treaties apply to the circumstances as they are at the time the treaty is in force, in accordance with its terms. Once an extradition treaty is in force, for example, the extradition obligation applies to all relevant individuals irrespective of when the crime was committed or when they were taken into custody. Moreover, as a factual matter it cannot be argued that there is no armed conflict at present; not only is the conflict still ongoing, but it is expected to continue for some time. Therefore, even under the interpretation adopted by the Draft Opinion, the most one could say is that some prisoners would be covered by the Convention and some would not, depending on whether they were captured before or after the United States recognized the interim government. This does not appear to be a particularly useful or workable conclusion.

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[17] *See, e.g.*, Draft Opinion at p. 21.
[18] *See infra.*
[19] Draft Opinion at p. 24.

II. The Application of the Geneva Conventions

The case is clear for applying the Third Geneva Convention (GPW) to the Taliban, and presumptively according the Taliban members Prisoner of War (POW) status and/or treatment consistent with the GPW, not only on the basis of the text and negotiating history of the Convention but also on the basis of sound practice and policy.

This section concludes that the GPW applies because the situation as between the United States and the Taliban is one of an armed conflict arising between two or more High Contracting Parties under Article 2. It first reviews the special status of the GPW under international law, the text of Article 2 and that recognition of a government or authority is not a prerequisite to application under Article 2. In this connection, we examine the Taliban's status as governing authority in Afghanistan, concluding that, even on the terms identified by the Draft Opinion at pp. 18 - 19, the Taliban had sufficient indicia of "authority" for purposes of being bound by the Geneva Conventions. The subsequent section shows that the GPW envisioned precisely a situation such as the Taliban military, whose members "profess allegiance to a government or an authority not recognized by the Detaining Power." GPW, Article 4(A)(3). It notes, however, that the conclusion that the GPW applies to the Taliban *category* does not necessarily lead to the result that *all Taliban soldiers* meet the requirements for POW status -- they should enjoy the protection of such status until special tribunals under Article 5 determine in individual circumstances that particular persons do not meet the requirements for POW status. Third, the section presents consistent U.S. practice in this area, with particular reference to the provision of POW status to Viet Cong units during the Vietnam War, and to other situations such as Haiti and Somalia.

A. The Applicability of the GPW to Taliban Soldiers

1. The Special Character of the Geneva Conventions

The GPW, like all other Geneva Conventions on the Protection of Victims of War, stands apart from other treaties in a number of respects. It was among the earliest treaties to extend its protections directly to individuals, whether combatants or civilians. The U.S. Senate Committee on Foreign Relations, when favorably reporting the Conventions out to the Senate for advice and consent to ratification, stated:

> "Our Nation has everything to gain and nothing to lose by being a party to the conventions now before the Senate, and by encouraging their most widespread adoption. . . . The practices which they bind nations to follow impose no burden upon us that we would not voluntarily assume in a future conflict without the injunctions of formal treaty obligations." *Geneva Conventions for the Protection of War Victims, Report of the Committee on Foreign Relations of the United States Senate*, 84th Congress, 1st Session, Executive Report No. 9, July 27, 1955, at 32.

The text of the GPW bears out the view that it applies in circumstances such as those in Afghanistan -- indeed, even in situations of occupation by a foreign power where the original governing authority has been displaced and no longer exercises governmental functions. GPW, Article 2, paragraph 2.

Article 1 of the GPW, common to all four Geneva Conventions of 1949, expresses the basic principle that it is to be applied broadly:

> "The High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances." GPW, Article 1.

The United States has embraced this principle, historically applying a liberal interpretation of the GPW when assessing its application in a given conflict.[20] The respected ICRC commentaries on the 1949 Geneva Conventions emphasize that "Article 1 is no mere empty form of words but has been deliberately invested with imperative force." Jean Pictet, *Commentaries on the Geneva Conventions of 1949*, Volume III, at 18 ("Pictet"). Pictet notes specifically the special character of the Geneva Conventions under international law:

> "By undertaking this obligation [of Article 1] at the very outset, the Contracting Parties drew attention to the fact that it is not merely an engagement concluded on a basis of reciprocity, binding each party to contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations 'vis-a-vis' itself and at the same time 'vis-a-vis' the others. The motive of the Convention is so essential for the maintenance of civilization itself that the need is felt for its assertion, as much out of respect for it on the part of the signatory State itself as in the expectation of such respect from all parties." Id. at 17-18.[21]

That said, Article 1 does not of itself provide for the application of the GPW in all circumstances *of armed conflict*. Article 2 provides for the scope of application in what is commonly referred to as international armed conflict. Rather, as described in the ICRC Commentaries to Additional Protocol I to the Geneva Conventions, the phrase "in all circumstances" mainly "prohibits all Parties from invoking any reason not to respect the [Convention] as a whole, whether the reason is of a legal or other nature." *ICRC Commentaries to Additional Protocol I*, page 37, paragraph 48.[22]

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[20] *See, e.g., Cumulative Digest of U.S. Practice in International Law 1981 - 1988*, pp. 3453-4.

[21] Treaty law refers to this kind of obligation as *erga omnes* -- owing obligations to the community as a whole.

[22] Article 1 does, however, set the Geneva Conventions apart from the default rule of international law under which certain countermeasures -- or reciprocal noncompliance with certain provisions of an agreement -- may be taken. Failures of one party to an armed conflict to implement its obligations under the GPW do not release the other party from its obligations under the GPW. *See, e.g.*, Article 60(5) of the Vienna Convention on the Law of Treaties (excluding suspension as an option in the event of a material breach of provisions relating to the protection of the human person contained in treaties of a humanitarian character).

2. Article 2 of the GPW Applies

The Draft Opinion asserts that "Afghanistan was in a condition of statelessness during the time of the conflict," and that therefore the "Taliban militia could not have been considered a government that was also a High Contracting Party to the Geneva Conventions." Draft Opinion at 22. This paper has already demonstrated that there is no concept of failed statehood under treaty law and that "failed States" remain parties, as a matter of international law, to the agreements they have joined. Under Article 2 of the GPW, it is also the case that the Taliban remained bound to uphold the obligations of Afghanistan as a "High Contracting Party."

Article 2 of the GPW provides for its scope of application as follows:

> "In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are 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." Article 2, GPW.

The first paragraph requires that the armed conflict "arise between two or more of the High Contracting Parties" to the GPW. As demonstrated above, Afghanistan remained a High Contracting Party by virtue of accepted principles of international law, a fact that is recognized by U.S., UN, International Committee of the Red Cross (ICRC) and other organizations' statements and documents.[23] That the ICRC, for instance, considered the Taliban bound to uphold Afghanistan's obligations under the Geneva Conventions is

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[23] A basic factual and legal flaw appears in the Draft Opinion on this point. The Draft Opinion notes that the Taliban were recognized as the legitimate government of Afghanistan by only three states: Pakistan, Saudi Arabia and the United Arab Emirates. Draft Opinion at 22. (The recognition was of the Taliban government, not the "militia" as so described by the Draft Opinion.) Yet at the same time, the Draft Opinion, as noted, asserts that Afghanistan was "stateless." However, one might imagine a situation in which one of those governments that had recognized the Taliban became engaged in an armed conflict with Afghanistan. Moreover, it is often the case that such governments would merely break diplomatic relations and not withdraw their recognition from the other. In such a situation, the GPW would continue to apply at least as between such parties. But according to the logic of the Draft Opinion, Afghanistan would be a High Contracting Party for the purposes of, e.g., Pakistan, but not for purposes of the United States. The illogic of this conclusion would emerge sharply if both Pakistan and the United States were engaged in armed conflict in Afghanistan.

demonstrated by the formal ICRC note delivered to them in early October calling on them to meet several enumerated obligations.[24]

3. The Recognition of the Adversary Is Not a Prerequisite to Application of the GPW

The Draft Opinion relies upon the fact that the United States, as well as most governments, did not accord the Taliban formal recognition as the government of Afghanistan. However, *the application of the Geneva Conventions does not depend upon the mutual recognition of the parties* -- either recognition of governments or statehood. *See generally* Allan Rosas, *The Legal Status of Prisoners of War* (1976), pp. 262 - 92 (hereinafter "Rosas"). The well-respected German military manual on the law of war provides:

> "It is irrelevant to the validity of international humanitarian law whether the States and Governments involved in the conflict recognize each other as States [citations to text omitted]." Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (1995), para. 206 at 45.[25]

The annotation to this provision notes the following:

> "The applicability of the rules of international humanitarian law is not dependent upon whether the parties to a conflict recognize one another. Throughout the Arab-Israel conflict, the Arab states have not recognized Israel as a state [citation, noting peace treaties with Egypt and Jordan, omitted], yet both sides in that conflict have accepted the applicability of international humanitarian law. *The question of whether the parties to an armed conflict are states is objective and not a matter to be determined by the subjective recognition policies of each party.*" C. Greenwood, *id.* at 45 (emphasis added).[26]

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[24] While the United States does not have a copy of the note provided to the Taliban, the ICRC also delivered such a note to the United States (as is their custom), at the same time informing us that they had done so with the Taliban. *See* Note of the ICRC delivered to the U.S. Mission to UN and Other International Organizations in Geneva, 28 September 2001.

[25] Paragraph 2 of Article 2 provides further textual evidence that the GPW is intended to apply in situations where the parties do not recognize the legitimacy of one another as governments or where one of the parties is not exercising territorial control or governmental authority. Paragraph 2 provides that the Convention applies "to all cases of partial or total occupation of the territory of a High Contracting Party." Occupation requires the displacement of one party's governing authority by the Occupying Power -- and often, in such situations, the Occupying Power may not recognize the legitimacy of the authority it displaces. Indeed, in the situation in the Middle East, Israel's position is that *no legitimate authority* preceded its occupation of the West Bank -- and in consequence, although Israel argues that the Geneva Conventions do not apply as a matter of law in the territories (a position we do not share), it administers the territories *as if* the Conventions were in force. The Draft Opinion's insistence on recognition as a standard in determining the applicability of the GPW is again shown to be misplaced in light of the textual requirement of application in the cases of occupation.

[26] See Rosas at 241, 243. Rosas adds: "Thus, neither the Arab states nor the United States have asserted that they would be freed from an obligation to apply humanitarian law in the Middle East and Vietnam [illegible]ts because they have not recognized Israel and the Democratic Republic of Vietnam respectively." [illegible]t 241.

British and other allies. The negotiators, however, "deliberately dropped the requirement that such armed forces should be fighting in conjunction with a State recognized as a regular belligerent." *Id.* at 64. The precise situation of the Free French was a motivating historical example but it was not the sole standard by which Article 4(A)(3) is to be assessed.[27]

Pictet suggests several points for distinguishing the "regular armed forces" under Article 4(A)(3). One feature of such forces is "the fact that *in the view of their adversary*, they are not operating or are no longer operating under the direct authority of a Party to the conflict in accordance with Article 2 of the Convention." Pictet at 63 (emphasis added). This is not to say that the state at issue is no longer a party to the Geneva Conventions or that the armed forces are no longer associated with a party to the conflict, but simply that the adversary does not recognize the authority to which the armed forces owe allegiance. Thus, U.S. non-recognition of the Taliban does not automatically exclude the Taliban soldiers from the scope and operation of the GPW.

Pictet makes two other points of direct relevance here: First, he suggests that recognition of the government or authority referred to in Article 4(A)(3) would be expected to come from third States, which would be "consistent with the spirit of the provision". *Id.* In this situation, only three states accorded the Taliban formal recognition, but Pictet and other sources do not suggest a numerical minima for purposes of recognition. Moreover, the international community acted *as if* the Taliban controlled Afghanistan and had a responsibility to adhere to Afghanistan's international obligations. This form of "recognition" should satisfy the concern described by Pictet. Second, Pictet notes that

> "this authority, which is not recognized by the adversary, should either consider itself as representing one of the High Contracting Parties, or declare that it accepts the obligations stipulated in the Convention and wishes to apply them." Pictet at 63.

We have no information concerning any Taliban declarations concerning application of the Convention. However, the Taliban did consider itself the representative government of Afghanistan, as indicated by its attempts to gain broader recognition from the international community (such as seeking the Afghanistan seat at the United Nations).

Rosas sums up the appropriate interpretation of Article 4(A)(3) and its relationship to the application of the GPW in this way:

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[27] As Professor Levie explains, "[t]he 1949 Diplomatic Conference was attempting to supply a rule which would cover situations which had caused numerous problems during World War II with its many 'governments-in-exile' and, not infrequently, with competing such governments. . . . As such problems multiplied, the ICRC addressed a note to all of the belligerent States . . . : 'The International Committee are of [the] opinion that the principles stated must be applied, irrespective of all juridical arguments as to the recognition of belligerent status of the authority to whom the combatants concerned belong.'" *Prisoners of War in International Armed Conflicts*, 59 International Law Studies at 59 (1977). This opinion "became the basis . . . for Article 4A(3) of the 1949 Convention." *Id.* at 60.

> "What seems to be necessary, however, is that *the authority can plausibly claim to represent the party to the conflict for the purposes of offering military resistance to another state*, [cite omitted], and that it *displays an organization at least resembling that of a provisional government*. [cite omitted] A *certain amount of organization and discipline* on the part of the authority also seems to be implied in the reference in the provision to 'regular armed forces'. [cite omitted] In practice, at least, it would seem that the authority must have been afforded some kind of recognition (although *not necessarily formal recognition as a government*) by third states. [cite omitted] If the party which the government or authority claims to represent is a High Contracting Party the Third Convention also binds the authority in question." Rosas at 255 (emphasis added).

The rationale for Article 4(A)(3) was, as described by Pictet, to avoid a situation where a party does not apply the GPW solely on political grounds, much as the Nazis did with respect to the Free French forces in World War II. As a result, Article 4(A)(3) provides for standards far less restrictive than one might identify for purposes of the formal recognition of statehood or governments, and it provides clear textual support for the application of the GPW in the situation of armed conflict between U.S. forces and Taliban forces in Afghanistan.

B. The Taliban Met the Criteria to Be Considered an "Authority" or a "Government" under Article 4(A)(3).

While recognition of the Taliban as the legitimate government of Afghanistan is, and was, unnecessary for the operation of the GPW, one may still wish to consider whether the Taliban could be said to be a "government or an authority" in any respect in Afghanistan. As just noted, the criteria for claiming "authority" are somewhat less restrictive than those that might be applicable to the recognition of states or governments generally. The Draft Opinion's criteria, however, are much more stringent than required under the GPW. Nonetheless, we will look to the criteria of the Draft Opinion to demonstrate that even under those overly strict criteria, the Taliban controlled the territory of Afghanistan and exercised governmental functions in such a way as to be a responsible authority under Article 4(A)(3).

While most of the world community did not recognize the *legitimacy* of the Taliban, the United States, the United Nations and many other governments and organizations treated the Taliban *de facto* as the prevailing authority in Afghanistan. Take, for instance, the prosecution of Operation Enduring Freedom itself. The Pentagon has treated the Taliban military, for purposes of the military campaign, as an opposing military force in control of forces, equipment, territory and other resources. Senior Pentagon officials referred to the "Taliban government."[28] When the U.S. Government reported to the UN Security Council that it had taken action in self-defense following the September 11 attacks, it referred to the "Taliban regime."[29]

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[28] *See, e.g.*, Briefing by Secretary of Defense Rumsfeld, September 25, 2001.

[29] *Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc. S/2001/946, 7 October 2001.

UN Security Council resolutions (supported by the United States) reflect a similar understanding of the *de facto* control and governance of Afghanistan by the Taliban. Security Council Resolution 1267 of October 15, 1999, determined that the "failure of Taliban authorities" to meet previous demands to hand over Usama bin Laden to appropriate states "constitute[d] a threat to international peace and security," and acting under the Chapter VII enforcement provisions of the UN Charter, demanded that the Taliban carry out various tasks that could only be associated with control and governance.[30] Indeed, the Security Council indicated that the Taliban and other parties to the Afghan conflict were bound to comply with the Geneva Conventions.[31]

We are advised by the Department's regional and intelligence experts that the Draft Opinion's portrayal of Afghanistan under Taliban rule is fundamentally inaccurate.

- There is no question that the Taliban, although not recognized by the United States and almost all other countries as the government of Afghanistan, did effectively control 90% of Afghanistan's territory, and did exercise the functions of a government therein, even though they may have done so in a manner incompatible with modern standards and sensibilities. The Taliban certainly thought of itself as the government. Indeed, they may have brought about the most effective central control in Afghan history -- albeit at a terrible cost to Afghanistan and its people.

- The Taliban's objective was to turn Afghanistan into an Islamic state based on their particular interpretation of Islamic law. The Taliban staffed and operated those institutions of government that comported with their pre-modern conception of what a government ought to do. They had foreign justice and education ministries, and ministry for the promotion of virtue and eradication of vice. The work of the ministries was coordinated through a Council of Ministers. Through these institutions the Taliban authorities issued legislative decrees on a wide variety of subjects, and worked to enforce them through often draconian means.

- The Taliban instituted and enforced a system of taxation based on the Islamic *ushra* principle. They appointed or confirmed regional governors, district leaders, mayors, and other regional and local officials.

- The Taliban maintained a functioning system of Islamic courts to deal with criminal cases and civil disputes in accordance with the principles of Islamic law as the Taliban conceived them. While we may and do find much of the Taliban's criminal law abhorrent, we have no basis on which to deny that it was in fact a system,

[30] For example, Security Council Resolution 1333 of 19 December 2000 demanded that the Taliban "cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps," etc. S/RES/1333 (2000), para. 1. The Security Council variously referred to the Taliban as "authorities" and as a "faction," suggesting at least some recognition that the Taliban controlled Afghanistan but remained involved in a civil war with other belligerents within its territory.

[31] See above at Part I.A.2.

however primitive by our standards, of law and procedure, and that generally speaking those procedures were followed in practice.

- The Taliban's initial success and popularity among the people of Afghanistan was precisely because the Taliban were able to impose law and order to the areas they controlled. They disarmed much of the population. They suppressed the patchwork of gangs and warlords that dominated the country following the Soviet withdrawal. They largely put an end to roadside kidnappings, extortion, robbery, rape and other crimes that had long plagued the Afghan people. And, when the international community demanded it of them, in 2000-2001 they declared, and enforced with great effectiveness, a ban on growing of opium poppies.

- The Taliban also were capable of carrying out, and did in fact carry out, relations with other countries and international organizations. Three countries (Pakistan, the UAE, and Saudi Arabia) maintained diplomatic relations with the Taliban, and the Taliban dealt on regular basis with special envoys, humanitarian personnel, and other UN officials. Taliban representatives also met with State Department and other U.S. Government officials.

- The Taliban respected, and asserted effective control over, borders with Pakistan, Iran, Tajikstan, Turkmenistan, Uzbekistan and China, maintaining a system of border troops, passport controls, and the like.

It should be stressed that the United States' refusal to recognize the Taliban as the government was not a conclusion that the Taliban was not in effective control of the great part of Afghanistan territory.

C. The Relevance of the Taliban Relationship with Al Qaeda

Resting on four newspaper articles, the Draft Opinion argues that the Taliban's relationship with Al Qaeda was of such closeness that "the Taliban cannot be regarded as an independent actor." Draft Opinion at 22. We appreciate the suggestion that "other non-public information... may be available to the Executive," *id. at 23.* The Legal Adviser's Office therefore consulted with our South Asia experts to determine whether such an assertion could be regarded as factually accurate. The experts believe that the relationship between the Taliban was not as the Draft Opinion describes it. Indeed, even the Pentagon's description of the Taliban-Al Qaeda relationship suggested an understanding of the distinction between the two.[32] The Taliban was not indistinguishable from al Qaida. The Taliban effectively formed a national army. Taliban troops generally fought skirmishes. Commanders often, though not always, led troops from their own tribes. The central government had jurisdiction over all these troops, though it was

[32] *See, e.g.*, Briefing by RADM Stufflebeem, October 17, 2001 ("Our strategy is to go after those elements of military power. That was a Taliban tank. It's in the Taliban military. The Taliban military is supporting their leadership, and their leadership is supporting al Qaeda. So we are systematically pulling away at those legs underneath the stool that the Taliban leadership counts on to be able to exert their influence and power.")

careful not to alienate local leaders. Other troops were led by individual commanders who did not bring their own troops. Taliban troops did not include foreigners. Arabs, Pakistanis, and others were kept separate from Taliban troops. In any case, the Taliban vastly outnumbered the Arabs and non-Afghans, who may have included 4000 soldiers to the Taliban's 45,000.

D. GPW Article 4(A)(3): How the GPW Would Apply to the Taliban

1. The Application of Article 4(A)(3) to the Taliban Soldiers as a Category Entitled to POW Status

As described above, Article 4 of the GPW provides for several categories of persons who would be entitled to the status of prisoner of war under the GPW. Under the circumstances where the United States did not recognize the Taliban as the legitimate government of Afghanistan, one would look to Article 4(A)(3) for its application. In particular, we are led to the conclusion that the Taliban soldiers as a category were "members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." Article 4(A)(3), GPW.

We have already explained why the Taliban should be considered a "government or an authority" for purposes of Article 4(A)(3). The Taliban military forces should also be considered "regular armed forces" for purposes of 4(A)(3). As Rosas points out, "regular armed forces" implies "[a] certain amount of organization and discipline." Rosas at 255. Pictet is more explicit, saying that it was understood during the GPW negotiations that such forces would "have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1) [of Article 4(A)]: they wear uniforms, they have an organized hierarchy and they know and respect the laws and customs of war." Pictet at 63. As a result the question becomes a factual one.[33]

The Draft Opinion provides no basis for a contrary conclusion. For instance, it merely states that the Department of Defense "advises us that the Taliban's militia's command structure *probably* did not meet the first of these requirements; that the evidence *strongly indicates* that the requirement of a distinctive uniform was not met; and that the requirement of conducting operations in accordance with the law and customs of armed conflict was not met." Draft Opinion at 25. Department of State experts suggest that the Taliban command structure differed from the kinds of structure we might find in our own armed forces, but we do not think the structure was such as to fall outside the bounds of Article 4(A)(3).[34] Similarly, our experts report that Taliban soldiers did wear uniforms and sought additional uniforms regularly, recognizing that resources were often

[33] It is well understood in the law of war that the commission of violations of the law of war by one, some or many members of an armed force do not thereby implicate the status of all of the members of such armed forces. Moreover, the display of distinctive insignia and the command structure of the armed force are also recognized in the same way – if some members do not meet these criteria, it does not prejudice the status of all members of the force.

[34] To say that this structure would fall outside Article 4(A)(3) would work to release less structured armed forces from their Geneva Convention obligations – a result we surely want to avoid in a context where asymetrical conflict is to be expected.

not available to purchase them. Moreover, the GPW requirement is not for a "distinctive uniform" but for a "distinctive sign," and our information indicates that the Taliban soldiers did wear distinctive black turbans. GPW, Article 4(A)(2). In any event, the available information does not enable us to reach a conclusion that such a requirement was not met. Finally, we agree that Taliban forces likely committed serious violations of the laws of armed conflict during the recent conflict, including the use of civilians to shield military objectives from attack. However, the commission of crimes by some members of the force is not sufficient to demonstrate that the Taliban forces generally may not be covered under Article 4(A)(3). Rather, the question in this respect is whether the Taliban forces were unable to implement the laws of war.[35] Further, there is no evidence to suggest that the Taliban provided central command level direction and guidance for forces to violate the laws of war. If there is factual evidence to support certain leaders providing instructions that would violate the laws of war or that the violations were so widespread and systematic that military leaders knew or should have known that the violations occurred, then appropriate action for violation of command responsibility can be taken against these commanders.[36]

Outside experts also have examined the Taliban military and assessed its infantry quality, armor, artillery, organization and other resources. One respected publication assessed that the Taliban "displayed an innovative approach to warfare characterized by the use of surprise, mobility, speed, impressive logistics support and an efficient command, control, communications and intelligence (C3I) network." *Jane's World Armies*, 8 October 2001. Such an analysis runs counter to the unsupported assertions in the Draft Opinion on the nature of the Taliban military and would rather support their falling within the category of "regular armed forces" under Article 4(A)(3).

2. Review by a Competent Tribunal in Cases of Doubt as to Whether a Person is Entitled to Status

A conclusion that the Taliban forces fall within the bounds of Article 4(A)(3) as "regular armed forces" does not mean that all Taliban soldiers would be entitled to POW status. Article 5 of the GPW provides:

> "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Article 5, GPW.

Under Article 5, the detaining authorities would be well within their authority, for example, to review for status determination any Taliban member about whom there is

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[35] For instance, one reason among many that the Al Qaeda forces may not be entitled to POW status is that their operations are *designed* to violate the laws of war -- most particularly, to target and attack civilian populations as such, civilians and civilian property. It is this kind of systematic violation which excludes organized forces from Article 4(A)(3).

[36] *See, e.g., Application of Yamashita*, 327 U.S. 1 (1946).

doubt as to his status. Indeed, consistent U.S. practice has been to set up tribunals in such situations.

A fairly recent example of the operation of Articles 4 and 5 of the GPW may be found in the Gulf War. During Operation Desert Storm in 1991, U.S. armed forces handled the detaining, interning, and transferring of 86,000 Iraqi detainees. Due to supply shortages, most of the camps were not complete when the first Iraqi POWs were captured. The four U.S. camps were built with chain link fencing, concertina wire, tents, guard towers, wash basins, latrines, generators, and water bladders. Article 5 hearings were conducted to determine the status of the detainees. At the end of the US custody of the Iraqi POWs, ICRC officials indicated that the treatment of the POWs by the U.S. forces was "the best compliance with the GPW in any conflict in history." (Conduct of the Persian Gulf War Final Report to Congress, Appendix L, 1992).

D. Common Article 3

Although our conclusion is that Article 2 applies and disposes of the question of Article 3 's application to the Taliban, we think it is nonetheless essential to point out why the Draft Opinion's arguments on the non-applicability of Common Article 3 are inaccurate.

Common Article 3 picks up where Common Article 2 leaves off -- that is, with armed conflicts not of an international character. Such conflicts are almost always, and typically so, internal armed conflicts, or civil wars. And indeed, the negotiators of the Geneva Conventions had internal conflicts in mind. Nonetheless, the negotiators did not choose the most available formulations, such as "internal armed conflicts" or "armed conflicts arising solely in the territory of one party." Their formulation indicates a readiness to ensure that all armed conflicts that were not international as between High Contracting Parties would be covered. The combination of Articles 2 and 3 was intended to cover *all armed conflicts*. This is evident also from the subsequent negotiation of Article 1(2) of Additional Protocol II which provides:

> This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and acts of a similar nature, as *not being armed conflicts*. (Emphasis added.)

It would be extremely difficult to defend a U.S. position premised on the notion that the conflict in Afghanistan is not an armed conflict of any sort as contemplated under the Geneva Conventions.

E. U.S. Practice under the GPW

The United States has consistently applied the GPW to armed conflicts. DoD Directive 2310.1 (August 18, 1994) provides that "The U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions." Indeed, we are aware of

no instance in which the United States has denied the applicability of the Geneva Conventions to either U.S. or opposing forces engaged in armed conflict. We have applied the Geneva Conventions whether we were defending a friendly State against a hostile aggressor (e.g., Vietnam, Kuwait), seeking to restore a legitimate government (e.g., Grenada, Panama, Haiti), or restoring order to a country without a government (e.g., Somalia).

- During the **Korean** conflict, even before the United States and other major states had ratified the Geneva Conventions, General MacArthur, the United Nations Commander in Korea, said that the UN forces would comply with the principles of the Geneva Conventions.

- During the **Vietnam** conflict, the United States applied the GPW to detainees until their final status was determined. Detainees were classified as POWs (i.e., given POW status) when determined to be qualified under one of several categories. These categories included Viet Cong Main Force and Local Force personnel, North Vietnamese Army personnel and certain irregulars engaged in belligerent acts (e.g., Guerillas, Self-Defense Forces and Secret Self-Defense Forces). HQ, Military Assistance Command, Vietnam, Directive Number 381-46, Annex A, December 27, 1967. 62 American Journal of International Law, pp. 766-768; Howard Levie, Documents on Prisoners of War, pp. 748-751 (1979). The U.S. took this step even though North Vietnam rejected the U.S. contention that captured U.S. airmen should be treated as POWs under the GPW on the basis that there had been no declaration of war by either nation.

- During the 1983 U.S. military operation in **Grenada** to protect American citizens, forestall further chaos, and assist in the restoration of democratic institutions, the U.S. military detained members of the Grenadan People's Revolutionary Army and Cuban nationals, who had been sent to the island to support the pro-Marxist regime. The detainees were screened, and those meeting the criteria of the Convention were accorded POW status in accordance with the GPW. The ICRC praised the U.S. efforts; Cuban government attempts to exploit the POW issue were unsuccessful due to "strict compliance with the Geneva Conventions by the United States". Army TJAG Memorandum for the Vice Chief of Staff of the Army, Nov. 4, 1983, quoted in 1981-1988 Cumulative Digest of the United States Practice in International Law, pp. 3452-3456.[37]

- During the 1989 Operation Just Cause in **Panama**, the United States provided members of the Panamanian Defense Forces, who were supporting the illegitimate government of Manuel Noriega, with the

[37] *See generally The Grenada Papers: The Inside Story of the Grenadian Revolution and the Making of a Totalitarian State*--as told in *Captured Documents* (Seabury and McDougall eds. 1984); Mark Adkin, *Urgent Fury: The Battle for Grenada* (1989) and Hugh O'Shaughnessy, *Grenada: Revolution, Invasion and Aftermath* (1984).

protections normally accorded to POWs until their final release and repatriation, even if they might not have been entitled to such protections under Article 4 of the GPW. In a letter to the Attorney General, the State Department's Legal Adviser indicated that "the United States policy to construe the Article 2 of the Geneva Convention III was based on our strong desire to promote respect for the laws of armed conflict and to secure maximum legal protection for captured members of the U.S. armed forces." The General Counsel for the Department of Defense concurred with the Legal Adviser's views. January 11, 1990 letter from State Department Legal Adviser to the Attorney General.[38]

- During the 1992 crisis in **Somalia**, U.S. armed forces and other countries participated in a humanitarian assistance operation to relieve the suffering of the Somalia people arising from hostilities between warring factions. A 1993 report to Congress noted that in mid-1992 humanitarian conditions were horrendous, warlords were fighting for control of the country, food supplies were used as a weapon of war, and a large number of Somalis had either died or were at risk of starvation. Despite these chaotic conditions, the United States determined that "the common Article 3 principles [of the Geneva Conventions] continue to apply to the situation in Somalia. Adherence to these principles is consistent with accomplishment of the humanitarian mission and defense of U.S./International forces as may be necessary." (92 STATE 41351, cleared by JCS/OSD)

- In 1994, United States airmen flew missions over **Bosnia** in support of UNPROFOR. "The Administration ... reviewed the issue of the status of members of the US Armed Forces who may be captured in connection with air strikes in Bosnia. The conflict in the former Yugoslavia has been generally regarded an international armed conflict, and it is thus the position of all relevant General Counsel (including State, DOD, JCS and DOJ) that such individuals would be entitled to prisoner of war status." (94 STATE 044536).

- In 1994, the U.S. Armed Forces carried out a military operation in **Haiti** under the authority of United Nations Security Council Resolution 940. This authorized all necessary means to facilitate the departure from Haiti of the military leadership, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti. In the Resolution, the UNSC expressed its concern for the "significant deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties, the desperate plight of Haitian

[38] *See generally Malcolm McConnell: Just Cause: The Real Story of America's High-Tech Invasion of Panama* (1991); Kevin Buckley, *Panama: The Whole Story* (1991); Thomal Donnelly et al, *Operation Just Cause: The Storming of Panama* (1991); and Ivan Musicant, *The Banana Wars: A History of United States Military Intervention in Latin America from the Spanish-American War to the Invasion of Panama* (1990).

refugees and the recent expulsion of the staff of the International Civilian Mission (MICIVIH). . . ." The U.S. Government reiterated in a diplomatic note to the ICRC, that "as is well known to the ICRC, the United States is a strong supporter of the 1949 Geneva Convention(s) ... and customary international law dealing with armed conflict, and in particular those provisions on the protection of prisoners of war and civilians." The note continued that, in the event of hostilities, "the United States will, upon engagement of forces, apply all of the provisions of the Geneva Conventions and the customary international law dealing with armed conflict." Regarding the transfer of POWs, the cable concluded that "captured members of the Haitian military will be initially detained by the U.S. Article 12 of the Third (POW) Geneva Convention of 1949 authorizes the U.S. to transfer any POWs to Haitian authorities once the requirements of the convention have been met." (94 STATE 252718, cleared by JCS/OSD/DOJ.)

- More recently, the United States applied the GPW during the conflict with **Yugoslavia** (FRY) in 1999. The Kosovo Liberation Army captured a Yugoslav Army Officer in April 1999 and turned him over to the Government of Albania. When Albania surrendered him to the United States, we acknowledged his status as a POW. As such, he was given treatment in accordance with the GPW. This was consistent with our position pertaining to the three U.S. soldiers detained by the FRY. In the latter case, it did not matter that the U.S. soldiers were captured in Macedonia; they still had POW status and were entitled to the protections of the GPW.

III. Suspension of or Deviation from Geneva Convention Obligations

A. Suspension of Geneva Convention Obligations

The Draft Opinion suggests at p. 28 that, even if Afghanistan has continued to be a party to the Geneva Conventions, "the President could still regard [them] as temporarily suspended during the current military action."

There are a number of difficulties with this analysis.

Under the law of the United States, the right of the President to suspend a treaty is viewed as a subsidiary right of his power to terminate treaties. While most treaties to which the United States is a party can be terminated or suspended by the United States, there are some limitations in treaties or in general principles of treaty law that constrain that power. Most treaties do not address the question of suspension. With respect to such treaties, the residual rules in the Vienna Convention, which are generally recognized as reflecting the operative rules of customary international law, would apply to the extent that they are not inconsistent with the provisions of the particular treaty..

The Draft Opinion recognizes that the relevant customary international law rule is embodied in Article 60 of the Vienna Convention on the Law of Treaties, which reads as follows in relevant part:

> **Termination or suspension of the operation of a treaty as a consequence of its breach**
>
> 2. A material breach of a multilateral treaty by one of the parties entitles
>
> . . .
>
> (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
>
> (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
>
> 3. A material breach of a treaty, for the purpose of this article, consists in:
>
> (a) a repudiation of the treaty not sanctioned by the present Convention; or
>
> (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
>
> . . .
>
> 5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

One difficulty with the Draft Opinion's analysis is that the President did not in fact suspend the Conventions, and cannot now do so retroactively. Suspension is not automatic. When a party fails to fulfill its obligations, the other party may or may not choose to suspend its own reciprocal performance.[39] In U.S. practice, suspension is exceedingly rare. The Vienna Convention on the Law of Treaties provides that a party must give written notice of the intention to suspend treaty obligations in advance.[40] The suspension is effective only during the period of suspension, and not retroactively.[41]

Another difficulty is the question whether the grounds for suspension in fact exist in this case. It is not clear from the Draft Opinion what Afghanistan's alleged breach is or how and when the United States was specifically affected by it. Yet both subparagraphs of Article 60(2) use the concept of entitlement to "invoke" the breach as a ground for suspending the treaty. It is also not clear that the United States has invoked the breach at the time it occurred.

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[39] Charlton v. Kelly, 229 U.S. 447 (1913).

[40] Articles 65 and 67.

[41] Article 72.

A third difficulty is the rule embodied in paragraph 5. That provides that provisions relating to the protection of the human person in a treaty of a "humanitarian character" cannot be suspended. The negotiating history of the Vienna Convention establishes that this rule was specifically intended to apply to the Geneva Conventions.[42] As noted in the most recent comprehensive discussion of treaty law and practice, the obligations of the Geneva Convention with respect to protection of persons are not based on reciprocity, and therefore lack of reciprocity is not considered as a ground for suspension:

> Article 60(5) makes it clear that Article 60(1)-(3) does not apply to breach of provisions in treaties relating to the protection of the human person . . . Although it was the Geneva Conventions of 1949 which were in mind the paragraph would equally apply to other conventions of a humanitarian character . . . since they create rights intended to protect *individuals irrespective of the conduct of the parties to each other*."[43]

This conclusion is reinforced by the terms of the Geneva Conventions themselves, which indicate that the obligations may not be terminated – and, derivatively, not suspended – during the course of a conflict. Article 142 of the GPW, which is a provision common to the four Conventions, provides for denunciation. However, "a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present Convention have been terminated."

Treaties to which the United States is a party are the law of the land. To the extent that they contain provisions limiting termination in certain circumstances, it may well be that the intention of the parties was also to limit suspension and that in those circumstances the President is not free to suspend. While the Draft Opinion invokes the maxim of *expressio unius est exclusio alterius*, a canon of construction for domestic legislation, there is a different maxim applicable to treaties: *ut res magis valeat quam pereat* ("that the thing may rather have effect than be destroyed"). In Techt v. Hughes, 229 N.Y. 222, 240-244 (1920) Judge Cardozo observed that there was general agreement that parties concluding treaties which regulate the conduct of hostilities intend them to continue during the conduct of hostilities.[44]

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[42] Except for paragraph 5 of Article 60, the text of the breach article had been generally agreed long before the Vienna Conference. At the Conference, the Government of Switzerland made the proposal that is embodied in paragraph 5. As pointed out in A. Aust, The Modern Law of Treaties, p. 238, it was the Geneva Conventions of 1949 that the Conference had in mind when adopting the Swiss amendment.

[43] Anthony Aust, Modern Treaty Law and Practice, at 238 (2000)(emphasis supplied).

[44] The necessity for continuity of international law protections during the course of hostilities is reflected in other treaties as well. The Vienna Convention on Diplomatic Relations, which is in force between Afghanistan and the United States, provides in article 44 that the receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities to leave at the earliest possible moment. Article 45 provides that even in cases of armed conflict, the receiving state must respect and protect the presence of the mission, together with its property and archives.

B. Deviation from the Strict Terms of the Treaty Regime

The Draft Opinion refers to a number of instances where a strict reading of United States practice has deviated from a strict reading of the requirements of the Geneva Conventions. These instances demonstrate that it is unnecessary either to determine that the United States' obligations under the Geneva Conventions are inapplicable or to comply literally with every provision without any deviation. Anticipating that compliance may be difficult or even impossible, it may be argued that a determination of inapplicability is to be preferred to less than perfect compliance. The continuing applicability of the GPW with respect to the treatment of Taliban detainees does not, however, mean that any failure to conform to every word in the Convention will be considered a breach of the party's treaty obligations. We will not address specific examples of the application of the GPW in concrete situations in this memo. The White House Counsel, the NSC Legal Adviser, the DOD General Counsel and the Legal Counsel to the Chairman of the Joint Staff are aware that we are prepared to consult with them on such questions as they arise.

As a general matter, we would note that practice under the Geneva Conventions demonstrates that compliance with such treaties as a factual matter is not always "to the T." In most cases, compliance with treaties is a matter of practical application – e.g., examining the ordinary meaning to be given the treaty terms, agreements among the parties as to the terms' meaning any subsequent practice of the parties in applying the treaty and any other relevant rules of international law.[45] However precise a text appears to be, the way in which it is actually applied by the parties indicates what they understand it to mean, provided the practice is consistent and is common to, or accepted by, all parties.[46] In some cases, it may even be acceptable to read an implied term into a treaty.[47] Even where the treaty term, as interpreted, is violated, Article 60 of the Vienna Convention on the Law of Treaties only provides remedies (i.e., termination or suspension) in the event of a "material breach" of the treaty.[48]

In this connection, the Draft Opinion's discussion of two occasions since 1949 -- the Korean War and the Persian Gulf War -- where U.S. practice "has deviated from the

[45] Vienna Convention on the Law of Treaties, Art. 31.

[46] See, e.g., Anthony Aust, The Modern Law of Treaties 194 (2000) (citing U.S.-France Air Service Arbitration 1962 (54 ILR 303).

[47] Vienna Convention on the Law of Treaties, Art. 31. One may take as an example the application of the Geneva Conventions by the United Kingdom during the Falklands/Malvinas War. At the end of that conflict in 1982, with winter approaching 13,000 Argentine soldiers surrendered to UK forces. The tent shelters Britain had sent by ship were lost in its sinking. GPW article 22(1) expressly prohibits "internment" of POWs other than in premises on land. Accordingly, as a matter of necessity they were detained on UK merchant ships used to repatriate them to Argentina before the cessation of active hostilities. *See* Martin Middlebrook, *Task Force: The Falklands War* (1982), at 247, 381, 385 (rev. ed. 1987). The ICRC viewed this practical solution favorably. *See* Sylvie-Stoyanka Junod, *Protection of the Victims of Armed Conflict: Falkland-Malvinas Islands* (1982); *International Humanitarian Law and Humanitarian Action*, at 31 (ICRC, 1984)

[48] See, e.g., Aust, *supra* , at 238-239, 300 (2000).

clear requirements of Article 118" of the GPW to repatriate POWs immediately upon the cessation of active hostilities is unsound. Draft Opinion at 30. The Draft Opinion noted further that POWs may "in no circumstances renounce in part or in entirety the rights secured to them" by the GPW. Article 7, GPW.[49] In fact, however, the negotiations of the GPW indicate that the customary law and practice of granting asylum to POWs (i.e., allowing them to renounce their right to immediate repatriation) was intended to be preserved by the GPW.[50] *See, e.g., Geneva Conventions for the Protection of War Victims, Report of the Committee on Foreign Relations of the United States Senate*, 84th Congress, 1st Session, Executive Report No. 9, July 27, 1955, at 23-24 (noting the view of the Executive Branch and the Committee that "nothing in the Geneva Conventions of 1949 . . . will compel the United States forcibly to repatriate prisoners of war who fear political persecution, personal injury, or death should they return to their homeland"). As a result, the non-repatriation of certain prisoners was not considered as a breach of a treaty by State Parties, notwithstanding the language of the GPW.

In addition, the GPW, like the other Geneva Conventions, distinguishes between "grave breaches" of the Convention to which individual criminal responsibility attaches and other violations of the GPW. Grave breaches consist of:

> "[a]ny of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious bodily injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention." GPW, Article 130.

The United States is bound to respect all of the provisions of the Convention. As a matter of practice, however, States do not always so comply and, although responsibility attaches, the consequences for such noncompliance are typically questions associated with relations with our allies and public opinion. During the Gulf War, for instance, the United States did not set up specific Prisoner of War camps as required by the GPW, instead setting up "holding camps" from which detainees were transferred to the Saudis (under an agreement concluded in accordance with the GPW, article 12). As a result, the United States did not comply with its obligations on particular issues associated with the running of a POW camp, which it was arguably required to establish. In the end, the United States did not face substantial criticism for this course of action -- and has not faced such criticism for similar conduct in Haiti, Panama and Grenada.

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[49] As Pictet notes, the inalienable right to be repatriated was "based upon the general assumption that for the prisoner, repatriation constitutes a return to a normal situation and that, in almost every case, it is his own wish to be repatriated." Pictet Commentary on art. 118.

[50] The asylum concept was based in part upon the desire to avoid the recurrence of gross human rights violations and extrajudicial killings like those that occurred following WWII and the Korean War. *See* Pictet, at 512, 543-48; *see also* Howard S. Levie, *International Law Aspects of Repatriation of Prisoners of War During Hostilities: A Reply*, 67 Am. J. Int'l Law 694 (1973) (citing negotiations and UNGA resolutions, but rejecting the notion that "a norm of international law has evolved which prohibits the involuntary repatriation of prisoners under any circumstances").

Policymakers should be aware of two separate issues in particular:

- First, *criminal responsibility attaches* to the commission of grave breaches of the Convention, including by operation of fundamental principles of command responsibility. If a court or other U.S. body were to find that the GPW does apply, and that U.S. treatment of such persons fell below such standards as to be considered grave breaches, persons responsible may be held accountable.[51] No international criminal responsibility attaches, however, to other violations of the Convention. Such violations are on a par with a failure to observe any other international obligation.

- Second, the Geneva Conventions do not contain mandatory dispute settlement mechanisms such that another State could bring a claim against us under it. It is possible, even likely, that a decision not to apply the Geneva Convention would lead to such actions as a request for an advisory opinion from the International Court of Justice, proceedings in regional human rights forums, and other forms of extreme international and public opprobrium. Differing questions of interpretation and application of the Convention, on the other hand, are more typically matters of discussion among States, rarely rising to the level of formalized dispute.

If, as we believe, the GPW does apply, it is our assessment that international and domestic opinion would not look to each detail of the GPW to determine whether we are in compliance, but would rather look to fundamental compliance overall and to the nature and quality of alleged deviations before expressing a negative view. It is in this respect that careful attention to the grave breach provisions are particularly important, for as long as we can apply the other provisions -- we believe that public and international opinion will serve not to embarrass the United States but to bolster opinion on the conduct of the current war against terrorism. Even if the GPW did not apply at all, moreover, international opinion would likely look to international human rights norms, which in significant respects are more onerous, to judge our actions. As a general rule, it is preferable that the GPW standards apply in cases of hostilities, since these rules are designed for such situations.[52]

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[51] Note further that under GPW Article 131 "[n]o High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of" grave breaches.

[52] *See, for example*, the U.S. submissions in the Grenada Case before the Inter-American Commission, in which the United States took the position that in cases covered by international humanitarian law, international human rights standards did not apply.

IV. Customary International Law

The Draft Opinion states at page 34 that "any customary international law of armed conflict in no way binds, as a legal matter, the President or the U.S. Armed Forces concerning the detention or trial of members of Al Qaeda and the Taliban." It states at page 38 that "[a]s non-federal law, . . . customary international law cannot bind the President or the executive branch, in any legally meaningful way, in its conduct of the war in Afghanistan." In fact, however, customary international law creates obligations binding on the United States under international law and potentially under domestic law. Were the President, as contemplated by the Draft Opinion, to act lawfully under federal law in a manner that would be inconsistent with the obligations of the United States under customary international law, that action would, notwithstanding its lawfulness under U.S domestic law, constitute a breach of an international legal obligation of the United States. That breach would subject the United States to adverse international consequences in political and legal fora and potentially in the domestic courts of foreign countries.

It is well-established that customary international law creates obligations on States. The International Court of Justice has recognized this principle on many occasions. *See, e.g., Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 46, para. 86 ("breach of an international legal obligation arising out of a treaty or a general rule of law"). Article 38 of the Statute of the Court, to which the United States is a party, states that the Court shall apply "international custom, as evidence of a general practice accepted as law" in deciding cases before it.

The United States has long accepted that customary international law imposes binding obligations as a matter of international law. In domestic as well as international fora, we often invoke customary international law in articulating the rights and obligations of States, including the United States. We frequently appeal to customary international law in the following areas, among others:

- Law of War : the United States has frequently addressed the binding character of customary international law in this context. The Department of the Army Field Manual on the Law of Land Warfare, FM 27-10 (July 1956) provides at paragraph 7c as follows: "*Force of Customary Law*. The unwritten or customary law of war is binding upon all nations. It will be strictly observed by United States forces, subject only to such exceptions as shall have been directed by competent authority by way of legitimate reprisals for illegal conduct of the enemy (see par. 497). The customary law of war is part of the law of the United States and, insofar as it is not inconsistent with any treaty to which this country is a party or with a controlling executive or legislative act, is binding upon the United States, citizens of the United States, and other persons serving this country." *See also* Department of Defense Directive Number 5100.77 (December 9, 1998) para 3.1 ("The law of war encompasses all international law for the conduct of hostilities binding on the United States or its

individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.")

- With respect to Additional Protocol I of 1977 to the 1949 Geneva Conventions, which the United States has not ratified, U.S. officials have taken the position that "the United States will consider itself legally bound by the rules contained in Protocol I only to the extent that they reflect customary international law, either now or as it may develop in the future." Remarks of Michael J. Matheson, Deputy Legal Adviser, U.S. Department of State, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U.J. Int'l L. & Pol'y 419, 420 (1987).

- We have taken consistent positions with regard to customary international law in U.S. courts. In its Statement of Interest before the U.S. Court of Appeals for the Second Circuit in Kadic v. Karadzic, (No. 94-9069) at p. 5, for example, the United States argued (and the Court of Appeals ultimately agreed) that "[c]ustomary international law does not bind exclusively state actors. ... [A]cts committed by non-state actors may indeed violate international law." The United States noted that:

  (a) among the alleged violations at issue in this civil suit were genocide, war crimes, and crimes against humanity in violation of customary international law;

  (b) the United States had "officially asserted" to the International Criminal Tribunal for the Former Yugoslavia that "proscription of these crimes has long since acquired the status of customary international law, binding on all states, and such crimes have already been the subject of international prosecutions by the Nuremberg and Tokyo Tribunals" (quoting the Submission of the Government of the United States to the International Criminal Tribunal for the Former Yugoslavia in respect of the Tadic case);

- In November 1986, Herbert Okun, Deputy Permanent Representative of the United States to the United Nations, stated in a speech to the General Assembly of the United Nations that: "We are all aware of the number and scope of violations of international humanitarian law being carried out in Afghanistan by the Soviet Union or its puppets. These include, but by no means are limited to: The 1949 Geneva Conventions and customary international law designed to protect civilians." Department of State Bulletin, January 1987, p. 84.

- It should also be noted that under Section 4 of the President's Military Order, any individual subject to that order may be tried by military commission "for any and all offenses triable by military commission." Military commissions have jurisdiction to try individuals for offenses against the law of nations "of which the law of war is a part," *Application of Yamashita*, 327 U.S. 1, 7 (1946), *accord, Ex part Quirin*, 317 U.S. 1, 11 (1942). The Counsel to the President recently

indicated that persons to be tried by military commission "must be chargeable with offenses against the international laws of war." *Martial Justice, Full and Fair* by Alberto R. Gonzales, New York Times, November 30, 2001. We are concerned that arguments by the United States to the effect that customary international law is not binding will be used by defendants before military commissions (or in proceedings in federal court) to argue that the commissions cannot properly try them for crimes under international law. Although we can imagine distinctions that might be offered, our attempts to gain convictions before military commissions may be undermined by arguments which call into question the very corpus of law under which offenses are prosecuted.

- Immunities: the United States relies upon customary international law to provide the President and his family with immunity from prosecution and legal process when he travels abroad, by virtue of the doctrine of head of State immunity, which is entirely a matter of customary international law. Historically, it has also relied upon customary law with respect to the immunities of diplomatic and consular agents and representatives. *See, e.g.*, U.S. Statement of Interest filed in Begum v. Saleh, 99 Civ. 11834 (S.D.N.Y. filed March 31, 2000)(referring to the UN Headquarters Agreement and the Convention on Privileges and Immunities of the United Nations, the United States submitted: "The privileges and immunities to which diplomats accredited to the United States were entitled were, at the time the above treaties were negotiated, governed by customary international law. Customary international law had for centuries recognized that the absolute independence and security of diplomatic envoys was essential to fulfillment of their critical role in international relations, and that full diplomatic immunity was a necessary guarantor of that independence.") *See also* 767 Third Avenue Associates v. Permanent Mission of the Republic of Zaire, 988 F.2d 295, 299-300 (2d Cir.), cert. denied, 510 U.S. 819 (1993).

- Treaties: as the Draft Opinion notes at pages 31-32, the law applicable to the interpretation and implementation of treaties is considered customary international law. A State's obligation to comply with its treaty obligations, for example, originally derives from a customary international law obligation.

- The Law of the Sea: the United States has consistently asserted in its interactions with other States that customary international law governs in respect of (among many others matters) the definition of the continental shelf, the determination of baselines for purposes of measuring the breadth of the territorial sea and other maritime zones and the right of innocent passage through the territorial sea of coastal States. The United States has claimed for itself, for example, rights in its Exclusive Economic Zone on the basis that "international law recognizes that, in a zone beyond its territory and adjacent to its territorial sea, known as the Exclusive Economic Zone, a coastal State may assert certain sovereign rights over the natural resources and related jurisdictions." (Proclamation 5030, Exclusive Economic Zone of the United States of America, March 10, 1983). The United States regularly protests other countries' refusals to comply with customary international law-based freedom of navigation rules. Without asserting its rights under customary international law, for example, the

The fact that the internationally wrongful act may have been lawful under the internal law of a State has no bearing on the lawfulness of the act under international law. *See, e.g.*, ILC draft Article 3 ("The characterization of act of State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law") and the Commentary accompanying that Article (at 74). *See, e.g., Treatment of Polish Nationals, 1932. P.C.I.J., Series A/B, No. 44*, p.4, pp. 25-5 ("according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted . . . [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. . . . The application of the Danzig Constitution may . . . result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law . . . . However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City.").

Where the international responsibility of a State for an internationally wrongful act is engaged, the State is under an international law obligation, *inter alia*, to cease its wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act. *See, e.g.*, ILC draft Articles 30 and 31 and the Commentaries accompanying those Articles (at 216, 223). *See also Factory at Chorzow, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 21 ("It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.").

Thus, irrespective of the conclusions of the Draft Opinion with respect to the status of customary international law as part of federal law,[53] it is clear that customary

[53] The Department of State is continuing to review the Draft Opinion with respect to this issue. We would note, however, that the Founding Fathers were in fact quite cognizant of the importance of compliance with customary international law ("the law of nations") and did in fact incorporate it by reference into the Constitution through the offenses clause. That it was not expressly included as a basis of jurisdiction for Article III courts is not dispositive. In its brief as amicus curiae before the U.S. Supreme Court in Boos v. Barry, No. 86-803 (1987) at pp. 20-21 (supporting respondents opposing the petition for a writ of certiorari), the United States stated that: "In the period immediately following the Declaration of Independence, the Continental Congress sought to assure the world that the 'law of nations [would be] strictly observed' by the United States (14 J. Continental Cong. 635 (1779)). . . . It was regarded as a matter 'of high importance to the peace of America that she observe the law of nations,' and it was anticipated that this would be 'perfectly and punctually done' by the new national government (The Federalist No. 3, at 43 (Jay) (C. Rossiter ed. 1961)." The Framers expressly included a reference to the "law of nations" in the offenses clause (U.S. CONST., Art. I, § 8, cl. 10) and also incorporated it directly into U.S. law through the Alien Tort Statute, enacted as part of the Judiciary Act of 1789, now codified at 28 U.S.C. 1350. Despite the continuing academic controversy (to which the Draft Opinion refers) about its status post-Erie and whether the President may choose in certain circumstances not to comply with it, customary international law is in fact recognized and continues to be applied by U.S. courts in a variety of circumstances.

international law creates international legal obligations for the United States for the breach of which the United States would be responsible as a matter of international law. The Draft Opinion does not address this "legally meaningful" aspect of U.S. compliance with relevant customary international law-based obligations.

Appendix A.

Fora in which U.S. determinations may be reviewed if it decides against GPW application

At several points the Draft Opinion notes the deference given by U.S. Courts to Presidential determinations in the conduct of foreign policy and the interpretation of treaties. The following is a catalogue of a number of ways in which the decisions related to detainees in our custody may be examined.

1. Domestic

U.S. Court Review. A decision not to afford GPW protections to Taliban prisoners may be scrutinized by U.S. federal courts. Although the writ of habeas corpus historically has not been available to enemy aliens captured and imprisoned outside U.S. territory, *see, e.g., Johnson v. Eisentrager*, 70 S. Ct. 936 (1950) (holding that German nationals, confined in Germany following conviction by military commission of having engaged in military activity against United States in China after surrender of Germany, had no right to writ of habeas corpus to test legality of their detention), the "doors of our courts have not been summarily closed upon these prisoners," *id.* at 945. Even those enemy prisoners without a right to habeas corpus historically have had their applications considered by the U.S. federal courts, including the Supreme Court. *Id.* As the Supreme Court recognized in *Eisentrager*, three different federal courts "provided [the prisoners'] counsel opportunity to advance every argument in their support and to show some reason in the petition why they should not be subject to the usual disabilities of non-resident enemy aliens." *Id.*

Civil Liability. The Alien Tort Claims Act ("ATCA") provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1993). Courts have recognized causes of action under the ATCA for violations of customary international human rights norms including, *inter alia*, genocide,[54] war crimes,[55] torture,[56] prolonged arbitrary detention,[57] and cruel, inhuman or degrading treatment.[58] The ATCA has, at times, been employed against persons acting under color

[54] *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).
[55] *Id.*
[56] *Filartiga v. Pena Irala*, 630 F.2d 876 (2d Cir. 1980).
[57] *Martinez v. City of Los Angeles*, 141 F.3d 1373 (6th Cir. 1998); *Alvarez-Machain v. Sosa*, 266 F.3d 1045 (9th Cir. 2001).
[58] *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996)(allowing former Ethiopian women prisoners to sue an official of former Ethiopian government official for arbitrary detention and torture, including cruel, inhuman, and degrading treatment and punishment in Ethiopia); *Paul v. Avril*, 901 F.Supp. 330 (S.D. Fla. 1994) (found that former military ruler of Haiti bears personal responsibility for systematic pattern of egregious human rights abuses during his military rule and therefore bears responsibility for torture and arbitrary detention committed by his military forces); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (found that former Guatemalan Minister of Defense could be liable for cruel inhuman and degrading

of U.S. law.[59] It remains an open question, however, whether an ATCA claim against a U.S. official would succeed.

2. International

Criminal Prosecution. Article 129 of GPW places each Party "under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, ... hand such persons over for trial" to another party. If we conclude that the GPW does not apply, and take actions arguably inconsistent with it, foreign prosecutors may investigate U.S. government officials to determine whether they committed grave breaches.

UN Commission on Human Rights. This Commission is the primary human rights body of the United Nations. It adopts resolutions on thematic matters involving human rights and it may adopt resolutions concerning the human rights performance of named countries. The latter is inevitably a highly charged exercise, as demonstrated by past annual U.S. efforts to have the Commission adopt resolutions condemning China and Cuba. This year, for the first time ever, the United States is not a member of the Commission, and the Administration has not yet decided whether we will be present as an observer. This year's session runs from March 18 to April 26 in Geneva. If our treatment of Taliban detainees does not comport with perceived international standards (e.g., the Geneva Conventions, the International Covenant on Civil and Political Rights), we can expect heavy criticism in the Commission and, perhaps, for the first time, a resolution naming and criticizing the United States directly.

ECOSOC and the UN General Assembly. Resolutions adopted by the Commission on Human Rights move through the UN system, first to the Economic and Social Council (ECOSOC), which reviews, adopts and forwards them to the General Assembly, which reviews and adopts them. At each stage there is debate. Thus, there will be two repetitions of whatever is produced by the Commission. ECOSOC meets in July; the General Assembly meets in the fall.

International Court of Justice – Advisory Opinions. Article 96 of the UN Charter authorizes "[t]he General Assembly or the Security Council [and other UN bodies to] request the International Court of Justice to give an advisory opinion on any legal question." On several occasions, the Court has provided guidance in advisory opinions on the application of an international treaty despite objections of a concerned party.[60]

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treatment, which included: witnessing the torture or severe mistreatment of an immediate relative; watching soldiers ransack their homes and threaten their families; being bombed from the air; and having a grenade thrown at them).

[59] See, e.g., *Jama v. U.S. I.N.S.*, 22 F.Supp. 353 (D.N.J. 1998) (allowing immigration detainees to bring claims under ACTA against private corrections contractor for cruel, inhuman or degrading treatment.)

[60] *See, e.g., Interpretation of Peace Treaties*, 1950 I.C.J. Reports 65; *Reservations to the Genocide Convention*, 1951 I.C.J. Reports 15.

The Court has also provided guidance on the scope and content of customary international law, even over the objections of States.[61]

Inter-American Court of Human Rights - Advisory Opinions. Article 64 of the American Convention on Human Rights allows for member states of the Organization of American States to request an advisory opinion from the Inter-American Court of Human Rights regarding the interpretation of the American Convention or "other treaties concerning the protection of human rights in the American states." While the decisions are not binding, many countries in the Americas that have accepted the jurisdiction of the Court consider them authoritative. If an advisory opinion were to be requested from the Court in regard to an interpretation of obligations of countries pursuant the Geneva Conventions, or more generally under international humanitarian law, it is probable that the Court would exercise its advisory jurisdiction over the matter.

OSCE. The United States has been an active participant in the Organization for Security and Cooperation and Europe (OSCE) since signing the Helsinki Final Act in 1976. Although OSCE documents do not create legal obligations, they do create political commitments that are subject to regular public scrutiny by OSCE institutions (such as the Office of Democratic Institutions and Human Rights ("ODIHR")) as well as by other participating states. The United States relies on the OSCE to achieve various political objectives within the region, particularly in Central Asia - objectives that will be hard to further if we are subject to increased criticism for running afoul of our OSCE commitments. On November 22, 2001, ODIHR requested information about the implications of the President's Military Order; we replied on December 1.

Inter-American Commission on Human Rights. Petitions may be submitted on behalf of individuals charging a violation of any of the rights enumerated in the American Declaration on the Rights and Duties of Man to the Inter-American Commission on Human Rights ("IACHR"). The IACHR is an organ of the Organization of American States, to which the United States is a party. If the IACHR finds the petition admissible, it may issue a Final Report with a decision on whether there has been a violation of the American Declaration and offer recommendations to the State. If the State does not take steps to implement the recommendations, the Report becomes public. Cases were brought against the United States with respect to elements of U.S. actions in Grenada and in Panama. Given its past rulings, the IAHCR will certainly consider complaints on behalf of the Taliban to be admissible; its rules concerning standing allow third parties to file petitions on behalf of Taliban members. The IACHR also will feel free to interpret and determine the applicability of the Geneva Conventions and other treaties.

UN Special Rapporteurs. The Commission on Human Rights appoints experts as Special Rapporteurs to examine selected areas. The Special Rapporteur on Summary and Arbitrary Executions and the Special Rapporteur on Torture regularly inquire about the status of particular individuals in the United States and request our assurances that our

[61] *See, e.g., Advisory Opinion, The Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Reports. That Advisory Opinion was requested by the General Assembly in Resolution 49/75K (1994), which was adopted by a vote of 78 - 43 (U.S.) - 38 (abstentions).

treatment of an individual comports with international standards. The United States consistently responds to these inquiries about individuals (many on death row or in prison) from Special Rapporteurs, providing assurances that it is conforming with international law in its treatment of those individuals. In mid-November the Department received an inquiry about the Military Order of November 13 from the Special Rapporteur on the Independence of Judges and Lawyers. We have not yet responded.

Inquiry Under Article 132 of the Geneva Convention Relative to the Treatment of Prisoners of War. Article 132 provides:

> At the request of a Party to the conflict, an enquiry shall be instituted in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.
>
> If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.
>
> Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

It is possible that a coalition partner could attempt to invoke this provision if we are holding one of their nationals.

Inquiries and Monitoring by Treaty Bodies. The United States is a party to the International Covenant on Civil and Political Rights ("ICCPR"), the Convention against Torture, and the Convention on the Elimination of Racial Discrimination. These treaties establish a regular reporting obligation for States Parties and a specialist body charged with the oversight of treaty performance by States. It is possible that if the United States appears to be acting in a manner inconsistent with its treaty obligations, the Human Rights Committee could request an immediate report from the United States on its compliance, followed by a public oral hearing.