Third, the Taliban militia was unable to conduct normal foreign relations or to fulfill its international legal obligations. Indeed, the public record shows that the Taliban militia had become so subject to the domination and control of al Qaeda that it could not pursue independent policies with respect to the outside world.[53] Publicly known facts demonstrate that the Taliban was unwilling and perhaps unable to obey its international obligations and to conduct normal diplomatic relations. Thus, the Taliban has consistently refused to comply with United Nations Security Council Resolutions 1333 (2000) and 1267 (1999), which called on it to surrender Osama bin Laden to justice and to take other actions to abate terrorism based in Afghanistan.[54] Those resolutions also called on all States to deny permission for aircraft to take off or to land if they were owned or operated by or for the Taliban, and to freeze funds and other resources owned or controlled by the Taliban. The Taliban also reportedly refused or was unable to extradite bin Laden at the request of Saudi Arabia in September, 1998, despite close relations between the Saudi government and itself. As a result, the Saudi government expelled the Afghan *chargé d'affaires*.[55] The Taliban's continuing role in sheltering and supporting those believed to be responsible for the terrorist attacks of September 11, 2001 placed it in clear breach of international law, which required it to prevent the use of its territory as a launching pad for attacks against another Nation.[56]

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imposing a tax on its production and indirectly benefits from the processing and trafficking of such opium, and these substantial resources strengthen the Taliban's capacity to harbor terrorists"). The United States Government has amassed substantial evidence that Taliban has condoned and profited from narco-trafficking on a massive scale, with disastrous effects on neighboring countries. *See The Taliban, Terrorism, and Drug Trade*: Hearing Before the Subcomm. on Criminal Justice, Drug Policy and Human Resources of the House Comm. on Government Reform, 107th Cong. (2001) (testimony of William Bach, Director, Office of Asia, Africa, Europe, NIS Programs, Bureau of International Narcotics and Law Enforcement Affairs, Department of State; testimony of Asa Hutchinson, Administrator, Drug Enforcement Administration, U.S. Department of Justice). "The heroin explosion emanating from Afghanistan is now affecting the politics and economies of the entire region. It is crippling societies, distorting the economics of already fragile states and creating a new narco-elite which is at odds with the ever increasing poverty of the population." Rashid, *supra*, at 123; *see also* Goodson, *supra*, at 101-03; Peter Tomsen, *Untying the Afghan Knot*, 25 WTR Fletcher F. World Aff. 17, 18 (2001) ("Afghanistan is now the world's largest producer of opium."). Iran is estimated to have as many as three million drug addicts, largely as a result of Taliban's involvement in the drug trade. Rashid, *supra*, at 122, 203.

[53] *See, e.g.*, "2 U.S. Targets Bound by Fate," *The Washington Post* at A22 (Nov. 14, 2001) ("According to Thomas Gouttierre, an Afghan expert at the University of Nebraska and a former UN adviser, the so-called Afghan Arabs surrounding bin Laden were much more educated and articulate than the often illiterate Taliban and succeeded in convincing them that they were at the head of a world-wide Islamic renaissance. 'Al Qaeda ended up hijacking a large part of the Taliban movement,' he said, noting that [Taliban supreme religious leader Mohammed] Omar and bin Laden were 'very, very tight' by 1998."); "Bin Laden Paid Cash For Taliban," *The Washington Post* at A1 (Nov. 30, 2001) (reporting claims by former Taliban official of al Qaeda's corruption of Taliban officials).

[54] U.N. Security Council Resolution 1333 "strongly condemn[ed]" the Taliban for the "sheltering and training of terrorists and [the] planning of terrorist acts," and "deplor[ed] the fact that the Taliban continues to provide a safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations." U.N. Security Council Resolution 1214, ¶ 13 (1998) enjoined the Taliban to stop providing a sanctuary and training for terrorists. U.N. Security Council Resolution 1267, ¶ 2 (1999), stated that the Taliban's failure to comply with the Council's 1998 demand constituted a threat to the peace. *See* Sean D. Murphy, *Efforts to Obtain Custody of Osama Bin Laden*, 94 Am. J. Int'l L. 366 (2000).

[55] *See* Yossef Bodansky, *Bin Laden: The Man Who Declared War on America* 301-02 (2001).

[56] *See* Robert F. Turner, *International Law and the Use of Force in Response to the World Trade Center and Pentagon Attacks*, available at http://jurist.law.pitt.edu/forumnew/34.htm (visited Oct. 25, 2001) ("If (as has been claimed by the US and UK governments) bin Laden masterminded the attacks on New York and Washington,

Fourth, the Taliban militia was not recognized as the legitimate government of Afghanistan by the United States or by any member of the international community except Pakistan. Neither the United States nor the United Nations ever recognized that the Taliban militia were a government. The only two other States that had maintained diplomatic relations with it before the current conflict began (Saudi Arabia and the United Arab Emirates) soon severed them.[57] Even Pakistan had withdrawn its recognition before the end of hostilities between the United States and the Taliban forces. This *universal* refusal to recognize the Taliban militia as a government demonstrates that other nations and the United Nations concur in our judgment that the Taliban militia was no government and that Afghanistan had ceased to operate as a Nation State.

Based on the foregoing, we conclude that the evidence supports the conclusion that Afghanistan, when largely controlled by the Taliban, failed some, and perhaps all, of the ordinary tests of statehood. Nor do we think that the military successes of the United States and the Northern Alliance change that outcome. Afghanistan *was* stateless for the relevant period of the conflict, even if after the Bonn Agreement it becomes a State recognized by the United Nations, the United States, and most other nations.[58] If Afghanistan was in a condition of statelessness during the time of the conflict, the Taliban militia could not have been considered a government that was also a High Contracting Party to the Geneva Conventions.

The conclusion that members of the Taliban militia are not entitled to the protections accorded to POWs under the Geneva Conventions receives further support from other arguments. As we have already suggested, there is substantial evidence that the Taliban and al Qaeda were so closely intertwined that the Taliban cannot be regarded as an independent actor, and therefore cannot stand on a higher footing under the Geneva Conventions than al Qaeda. Mullah Mohammed Omar, the spiritual leader of the Taliban, appears to have been particularly susceptible to the more sophisticated leadership of al Qaeda, who "introduced him to the world

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Afghanistan is in breach of its state responsibility to take reasonable measures to prevent its territory from being used to launch attacks against other states. The United States and its allies thus have a legal right to violate Afghanistan's territorial integrity to destroy bin Laden and related terrorist targets. If the Taliban elects to join forces with bin Laden, it, too, becomes a lawful target."); *see also* W. Michael Reisman, *International Legal Responses to Terrorism*, 22 Hous. J. Int'l L. 3, 40-42, 51-54 (1999).

[57] *See "A Look at the Taliban,"* Sept. 30, 2001, available at http://www.usatoday.com/news/world/2001/thetaliban.htm (visited Oct. 19, 2001). Indeed, Pakistan had been the only country in the world that maintained an embassy in Kabul; the overwhelming majority of States and the United Nations recognized exiled President Burhamuddin Rabbani and his government as the country's legal authorities. *See "Taliban tactics move to hostage ploy,"* Aug. 8, 2001, available at http://www.janes.com/regional_news/asia_pacific/news/jid/jid010808_1_n.shtml (visited Oct. 19, 2001).

[58] We do not think that the military successes of the United States and the Northern Alliance necessarily meant that Afghanistan's statehood was restored before the Bonn agreement, if only because the international community, including the United States, did not regard the Northern Alliance as constituting the government of Afghanistan. United Nations Security Council Resolution 1378, ¶ 1 (2001), available at http://www.yale.edu/lawweb/avalon/scpt_11/unsecres_1378.htm (visited Nov. 19, 2001), expressed "strong support for the efforts of the Afghan people to establish a new and transitional administration leading to the formation of a government" (emphasis added); see also id. ¶ 3 (affirming that the United Nations should play a central role in supporting Afghan efforts to establish a "new and transitional administration leading to the formation of a new government"). The plain implication of this Resolution, which reflects the views of the United States, is that Afghanistan after Taliban did not have a government at that time.

of Islamic radicalism, global jihad and hatred of the United States," who exercised great religious and ideological influence over him, and who furnished him with personal favors such as a bomb-proof house in Kandahar.[59] In particular, Omar, who was born into poverty and was virtually uneducated, seems to have worked closely with Osama bin Laden, who shared with Omar a vision of an international Islamic revolution.[60]

Al Qaeda also provided substantial material assistance to the Taliban militia. It made large sums available to Taliban leaders, and supplied them with "a steady stream of guerrilla fighters to assist the Taliban in their continuing battles with the Northern Alliance."[61] Because the Taliban was not equipped to maintain control over Afghanistan in the face of armed opposition from other factions, the Taliban became increasingly dependent on the money, weapons, recruits, and well-trained soldiers provided to it by al Qaeda. Al Qaeda in turn depended on the Taliban to provide it with bases for training camps and a refuge from the United States. Over the course of his dealings with it, bin Laden "pumped tens of millions of dollars into the Taliban, provided it with his most elite Arab fighting forces, and integrated his Qaeda network into key portfolios within the Taliban government. . . . [T]he two [movements] had long since melded together as one, through money, combat, and a shared radical interpretation of Islam."[62] Further, both because al Qaeda was capable of mustering more formidable military forces than the Taliban at any given point, and because failure to protect bin Laden would have cost the Taliban the support of radical Islamists, it may well have been impossible for the Taliban to surrender bin Laden as directed by the United Nations, even if it had been willing to do.[63] In any event, by continuing to harbor bin Laden and al Qaeda and to assist them in material ways, the Taliban became complicit in its terrorist acts. Taking all these facts into account, together with other non-public information that may be available to the Executive, we think it fair to characterize the Taliban militia as functionally intertwined with al Qaeda, and therefore on the same footing as al Qaeda under the Geneva Conventions.

C. Implications Under the Geneva Conventions

Whether based on the view that Afghanistan was a failed State or on the view that Taliban was functionally indistinguishable from al Qaeda, the view that Afghanistan had ceased to be a party to the Geneva Conventions has two immediate ramifications. First, common Article 2 – and thus most of the substance of the Geneva Conventions – would not apply to the members of the Taliban militia, because that provision only applies to international wars between two State Parties to the Conventions. Second, even common Article 3's basic standards would not apply. This would be so, not only because the current conflict is not a non-international conflict subject to Article 3, but also because common Article 3 concerns only a non-international conflict that occurs "in the territory *of one of the High Contracting Parties*"

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[59] Murray Campbell, *Enigmatic Taliban cleric a poor leader*, The Globe and Mail, at A11 (Dec. 1, 2001).

[60] Indeed, there are press reports (which have also been denied) that a daughter of bin Laden married Omar, and a daughter of Omar married bin Laden.

[61] Michael Dobbs and Vernon Loeb, *supra* note 53.

[62] Michael Kranish and Indira A.R. Lakshmanan, *Partners in 'Jihad': Bin Laden Ties to Taliban: How Odd Alliances Marked Bin Laden's Path*, in *The Boston Globe* (Oct. 28, 2001), 2001 WL 3958881. This article contains especially detailed information about the close linkages between the two movements and their leaders.

[63] Peter McGrath and Gretel Kovach, *Bin Laden's Imprint: an expert on the radical leader says targeting the Saudi dissident won't eliminate his threat*, in *Newsweek* (Sept. 14, 2001), 2001 WL 24138958.

(emphasis added). If Afghanistan was not a High Contracting Party during the time of the conflict, then a non-international conflict within its territory does not fall within the terms of Article 3.

We have considered the argument that, even if our conclusions held during the period when Afghanistan was largely under the Taliban's control (and thus in a condition of statelessness), they have ceased to hold in light of the Bonn Agreement. Afghanistan now has an internationally recognized government, and on that basis it might be argued that it has resumed its status as a High Contracting Party under the Geneva Conventions. It could then be argued that the protections of those Conventions – including the protections for prisoners of war – *now* clothe the Taliban militia, even if they did not during the Taliban's ascendancy.

This reasoning would be mistaken. First, 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. Afghanistan still may not be in a position to fulfill its Convention responsibilities, and thus should not yet be accorded party status under the Conventions.[64] Thus, even though Germany had some form of government when the Supreme Court decided *Clark v. Allen* in 1947, the Court declared that whether Germany was "in a position to perform its treaty obligations"[65] was a political question, meaning that it remained open for the President to decide whether the treaty with Germany was in effect. We expect that the courts would properly recognize that it rests solely within the President's constitutional authority to determine whether Afghanistan has yet returned to the status of a state party to the Conventions.

Second, the jurisdictional provisions of the Conventions (common Articles 2 and 3) still remain inapplicable to the conflict between the United States and the Taliban militia. This is the case even assuming that, with the substantial cessation of that conflict, the status of Afghanistan as a party to the Conventions has been restored. Article 2 states that the Convention shall apply to all cases of declared war or other armed conflict between the High Contracting Parties. But there was no war or armed conflict between the United States and *Afghanistan* during the period before the Bonn Agreement if Afghanistan was stateless at that time. Nor, of course, is there a state of war or armed conflict between the United States and Afghanistan *now*. Likewise, Article 3 states that certain basic standards shall apply in the case of "an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The most natural reading of this provision is that the conflict must have occurred in the territory of a State that was a High Contracting Party *at the time of the conflict*. So understood, Article 3 would not apply to the conflict with the Taliban.[66] Because the jurisdictional provisions remain inapplicable even if Afghanistan's status as a Convention party has been restored, Taliban prisoners remain outside the protections of the Conventions. As a result, they do not, for example, fall under the definition of "prisoners of war" in Geneva Convention III, art. 4.

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[64] As one expert on Afghanistan has recently noted, "Afghanistan hasn't really had a credible central government since 1973, when the king was ousted. . . . They have been out of practice at seeing themselves as having a central authority of some kind." Kevin Whitelaw et al., *A Hunt in the Hills*, in *U.S. News & World Report* (Dec. 17, 2001), 2001 WL 30366330 (quoting Thomas Gouttierre of the University of Nebraska-Omaha).

[65] 331 U.S. at 514

[66] In addition, as we have noted, Article 3 is and was inapplicable because the conflict in Afghanistan is and was of an international character.

Furthermore, even apart from the question whether Afghanistan was or remains a failed state, there are specific reasons why Geneva Convention III, relating to POWs, would not apply to captured Taliban militia. First, Article 4 of Geneva Convention III enumerates particular categories of persons who are entitled to POW status. In our judgment, Taliban captives do not fall within any of these categories, including that of Article 4(A)(3), "Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." As we have discussed, the United Nations and almost all members of the world community, including the United States, refused to recognize the Taliban militia as the government of Afghanistan. Of the handful of States that did recognize it, all but Pakistan withdrew their recognition soon after the start of the conflict, and Pakistan later followed suit. Thus, the Taliban cannot even be considered "a government or authority" at all for purposes of this provision, since no other state in the world viewed the Taliban militia as qualifying as one. According the Taliban militia the status of the armed forces of a government, even when no other country in the world considered it as such, would be tantamount to allowing any political or violent movement to simply declare itself to be a government. Enjoyment of the rights and duties of a sovereign state should not be so easily accorded as by self-identification.

Second, even if a political group or movement could be considered to be "a government or authority" within the meaning of Article 4(A)(3), that group or movement would have to demonstrate that it considered itself bound by Geneva Convention III in order to be in a position to claim the Convention's benefits. Your Department, however, informs us that the Taliban militia failed to confirm its acceptance of the Geneva Conventions, did not fulfill its obligations, and it did not act consistently with the most fundamental obligations of the laws of war, such as the prohibition on using civilians to shield military forces.

Third, even if the Taliban considered themselves to be a party to Geneva Convention III, or even if they had stated publicly that they would comply with that Convention's provisions and in fact did so, Taliban captives would still have to meet other requirements of Article 4 to be entitled to POW status. For example, Article 4(A)(3) only covers "[m]embers of *regular armed forces*" (emphasis added). The Taliban militia, it seems, cannot be so characterized. To be sure, Article 4(A)(2) accords POW status to persons who are not in regular armed forces – *i.e.*, "[m]embers of other militias and members of other voluntary corps, including those of organized resistance movements." Nevertheless, Article 4 makes clear that these combatants are only afforded POW status if they meet certain conditions, including "that of being commanded by a person responsible for his subordinates," "that of having a fixed distinctive sign recognizable at a distance," and "that of conducting their operations in accordance with the laws and customs of war." Your Department advises us that the Taliban 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. Accordingly, we think that Taliban captives do not qualify for POW status either as members of regular armed forces or as combatants of other kinds covered by the Convention.[67]

D. Historical Application of the Geneva Conventions

[67] We refrain from discussing more specific facts here due to the sensitive operational nature of such information.

We conclude by addressing a point of considerable significance. To say that the specific provisions of the Geneva and Hague Conventions do not apply in the current conflict with the Taliban militia *as a legal requirement* is by no means to say that the principles of the law of armed conflict cannot be applied *as a matter of U.S. Government policy*. The President as Commander in Chief can determine as a matter of his judgment for the efficient prosecution of the military campaign that the policy of the United States will be to enforce customary standards of the law of war against the Taliban and to punish any transgressions against those standards. Thus, for example, even though Geneva Convention III may not apply, the United States may deem it a violation of the laws and usages of war for Taliban troops to torture any American prisoners whom they may happen to seize. The U.S. military thus could prosecute Taliban militiamen for war crimes for engaging in such conduct.[68] A decision to apply the principles of the Geneva Conventions or of others laws of war as a matter of policy, not law, would be fully consistent with the past practice of the United States.

United States practice in post-1949 conflicts reveals several instances in which our military forces have applied the Geneva Conventions as a matter of policy, without acknowledging any legal obligation to do so. These cases include the Wars in Korea and Vietnam and the interventions in Panama and Somalia.

Korea. The Korean War broke out on June 25, 1950, before any of the major State parties to the conflict (including the United States) had ratified the Geneva Conventions. Nonetheless, General Douglas MacArthur, the United Nations Commander in Korea, said that his forces would comply with the principles of the Geneva Conventions, including those relating to POWs. MacArthur stated: "My present instructions are to abide by the humanitarian principles of the 1949 Geneva Conventions, particularly common Article three. In addition, I have directed the forces under my command to abide by the detailed provisions of the prisoner-of-war convention, since I have the means at my disposal to assure compliance with this convention by all concerned and have fully accredited the ICRC delegates accordingly."[69]

Viet Nam. The United States through the State Department took the position that the Geneva Convention III "indisputably applies to the armed conflict in Viet Nam," and therefore that "American military personnel captured in the course of that armed conflict are entitled to be treated as prisoners of war."[70] We understand from the Defense Department that our military forces, as a matter of policy, decided at some point in the conflict to accord POW treatment (but not necessarily POW status) to Viet Cong members, despite the fact that they often did *not* meet the criteria for that status (set forth in Geneva Convention III, art. 4), *e.g.*, by not wearing uniforms or any other fixed distinctive signs visible at a distance.

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[68] The President could, of course, also determine that it will be the policy of the United States to require its own troops to adhere to standards of conduct recognized under customary international law, and could prosecute offenders for violations. As explained above, the President is not *bound* to follow these standards by law, but may direct the armed forces to adhere to them as a matter of policy.

[69] Quoted in Joseph P. Bialke, United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict, 50 A.F.L. Rev. 1, 63 n.235 (2001).

[70] *Entitlement of American Military Personnel Held by North Viet-Nam to Treatment as Prisoners of War Under the Geneva Convention of 1949 Relative to the Treatment of Prisoners of War*, July 13, 1966, *reprinted in* John Norton Moore, *Law and the Indo-China War* 635, 639 (1972).

Panama. The United States' intervention in Panama on December 20, 1989 came at the request and invitation of Panama's legitimately elected President, Guillermo Endara.[71] The United States had never recognized General Mañuel Noriega, the commander of the Panamanian Defense Force, as Panama's legitimate ruler. Thus, in the view of the executive branch, the conflict was between the Government of Panama assisted by the United States on the one side and insurgent forces loyal to General Noriega on the other. It was not an international armed conflict between the United States and Panama, another State. Accordingly, it was not, in the executive's judgment, an international armed conflict governed by common Article 2 of the Geneva Conventions.[72] Nonetheless, we understand that, as a matter of policy, all persons captured or detained by the United States in the intervention – including civilians and members of paramilitary forces as well as members of the Panamanian Defense Force – were *treated* consistently with the Geneva Convention III, until their precise status under that Convention was determined. A 1990 letter to the Attorney General from the Legal Adviser to the State Department said that "[i]t should be emphasized that the decision to extend basic prisoner of war protections to such persons was based on strong policy considerations, and was not necessarily based on any conclusion that the United States was obligated to do so as a matter of law."[73]

Interventions in Somalia, Haiti and Bosnia. There was considerable factual uncertainty whether the United Nations Operation in Somalia in late 1992 and early 1993 rose to the level of an "armed conflict" that could be subject to common Article 3 of the Geneva Conventions, particularly after the United Nations Task Force abandoned its previously neutral role and took military action against a Somali warlord, General Aideed. Similar questions have arisen in other peace operations, including those in Haiti and Bosnia. It appears that the U.S. military has decided, as a matter of policy, to conduct operations in such circumstances as if the Geneva Conventions applied, regardless of whether there is any legal requirement to do so. The U.S.

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[71] *See United States v. Noriega*, 117 F.3d 1206, 1211 (11th Cir. 1997), *cert. denied*, 523 U.S. 1040 (1998).

[72] *See* Jan E. Aldykiewicz and Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflict*, 167 Mil. L. Rev. 74, 77 n.6 (2001). In *United States v. Noriega*, 808 F. Supp. 791, 794 (S.D. Fla. 1992), the district court held that the United States' intervention in Panama in late 1989 was an international armed conflict under (common) Article 2 of the Geneva Convention III, and that General Noriega was entitled to POW status. To the extent that the holding assumed that the courts are free to determine whether a conflict is between the United States and another "State" regardless of the President's view whether the other party is a "State" or not, we disagree with it. By assuming the right to determine that the United States was engaged in an armed conflict with *Panama* – rather than with insurgent forces in rebellion against the recognized and legitimate Government of Panama – the district court impermissibly usurped the recognition power, a constitutional authority reserved to the President. The power to determine whether a foreign government is to be accorded recognition, and the related power to determine whether a condition of statelessness exists in a particular country, are exclusively executive. *See, e.g., Baker v. Carr*, 369 U.S. 186, 212 (1962) ("[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing.' . . . Similarly, recognition of belligerency abroad is an executive responsibility. . . .") (citation omitted); *Kennett v. Chambers*, 55 U.S. (14 How.) 38, 50-51 (1852) ("[T]he question whether [the Republic of] Texas [while in rebellion against Mexico] had or had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent state, the judicial tribunals . . . were bound to consider . . . Texas as a part of the Mexican territory."); *Mingtai Fire & Marine Ins. Co. v. United Parcel Service*, 177 F.3d 1142, 1145 (9th Cir.) ("[T]he Supreme Court has repeatedly held that the Constitution commits to the Executive branch alone the authority to recognize, and to withdraw recognition from, foreign regimes."), *cert. denied*, 528 U.S. 951 (1999).

[73] Letter for the Hon. Richard L. Thornburgh, Attorney General, from Abraham D. Sofaer, Legal Adviser, State Department at 2 (Jan. 31, 1990).

Army Operational Law Handbook, after noting that "[i]n peace operations, such as those in Somalia, Haiti, and Bosnia, the question frequently arises whether the [law of war] legally applies," states that it is "the position of the US, UN and NATO that their forces will apply the 'principles and spirit' of the [law of war] in these operations."[74]

E. *Suspension of The Geneva Conventions as to Afghanistan*

Even if Afghanistan under the Taliban were not deemed to have been a failed State, the President could still regard the Geneva Conventions as temporarily suspended during the current military action. As a constitutional matter, the President has the power to consider performance of some or all of the obligations of the United States under the Conventions suspended. Such a decision could be based on the finding that Afghanistan lacked the capacity to fulfil its treaty obligations or (if supported by the facts) on the finding that Afghanistan was in material breach of its obligations.

As the Nation's representative in foreign affairs, the President has a variety of constitutional powers with respect to treaties, including the powers to suspend them, withhold performance of them, contravene them or terminate them. The treaty power is fundamentally an executive power established in Article II of the Constitution, and therefore power over treaty matters after advice and consent by the Senate are within the President's plenary authority. We have recently treated these questions in detail, and rely upon that advice here.[75]

The courts have often acknowledged the President's constitutional powers with respect to treaties. Thus, it has long been accepted that the President may determine whether a treaty has lapsed because a foreign State has gained or lost its independence, or because it has undergone other changes in sovereignty.[76] Nonperformance of a particular treaty obligation may, in the President's judgment, justify withholding performance of one of the United States' treaty obligations, or contravening the treaty.[77] Further, the President may regard a treaty as suspended for several reasons. For example, he may determine that "the conditions essential to [the treaty's] continued effectiveness no longer pertain."[78] The President may also determine that a

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[74] *Quoted in* Bialke, *supra*, at 56.

[75] *See* Memorandum for John Bellinger, III, Senior Associate Counsel and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001); *see also* Memorandum for William Howard Taft, IV, Legal Adviser, Department of State, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: President's Constitutional Authority to Withdraw Treaties from the Senate* (Aug. 24, 2001).

[76] *See Kennett*, 55 U.S. at 47-48, 51; *Terlinden*, 184 U.S. at 288; *Saroop*, 109 F.3d at 171 (collecting cases). Alexander Hamilton argued in 1793 that the revolution in France had triggered the power (indeed, the duty) of the President to determine whether the pre-existing treaty of alliance with the King of France remained in effect. The President's constitutional powers, he said, "include[] that of judging, in the case of a Revolution of Government in a foreign Country, whether the new rulers are competent organs of the National Will and ought to be recognised or not: And where a treaty antecedently exists between the UStates and such nation that right involves the power of giving operation or not to such treaty." Alexander Hamilton, *Pacificus* No. 1 (1793), *reprinted in* 15 *The Papers of Alexander Hamilton* 33, 41 (Harold C. Syrett et al. eds, 1969).

[77] *See Taylor v. Morton*, 23 F. Cas. 784, 787 (C.C.D. Mass. 1855) (No. 13,799) (Curtis, Circuit Justice), *aff'd*, 67 U.S. (2 Black) 481 (1862).

[78] *See International Load Line Convention*, 40 Op. Att'y Gen. 119,124 (1941). Changed conditions have provided a basis on which Presidents have suspended treaties in the past. For example, in 1939, President Franklin Roosevelt

material breach of a treaty by a foreign government has rendered a treaty not merely voidable but void, as to that government.[79]

The President could justifiably exercise his constitutional authority over treaties by regarding the Geneva Conventions as suspended in relation to Afghanistan. The basis for such a determination would be a finding that under the Taliban militia, Afghanistan committed grave violations of international law and maintained close relationships with international terrorist organizations such as al Qaeda, which have attacked wholly civilian targets by surprise attack. As a result, Afghanistan under the Taliban could be held to have violated basic humanitarian duties under the Geneva Conventions and other norms of international law. Nonperformance of such basic duties could be taken to have demonstrated that Afghanistan could not be trusted to perform its commitments under the Conventions during the current conflict.[80] After the conflict, the President determine that relations under the Geneva Conventions with Afghanistan had been restored, once an Afghan government that was willing and able to execute the country's treaty obligations was securely established. Furthermore, if evidence of other material breaches of the Conventions by Afghanistan existed, that evidence could also furnish a basis for the President to decide to suspend performance of the United States' Convention obligations. A decision to regard the Geneva Conventions as suspended would not, of course, constitute a "denunciation" of the Conventions, for which procedures are prescribed in the Conventions.[81] The President need not regard the Conventions as suspended in their entirety, but only in part.[82]

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suspended the operation of the London Naval Treaty of 1936. "The war in Europe had caused several contracting parties to suspend the treaty, for the obvious reason that it was impossible to limit naval armaments. The notice of termination was therefore grounded on changed circumstances." David Gray Adler, *The Constitution and the Termination of Treaties*, 187 (1986).

[79] *See, e.g., Charlton v. Kelly*, 229 U.S. 447, 473 (1913); *Escobedo v. United States*, 623 F.2d 1098, 1106 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980).

[80] It is possible for the President to suspend a multilateral treaty as to one but not all of the parties to the treaty. In 1986, the United States suspended the performance of its obligations under the Security Treaty (ANZUS Pact), T.I.A.S. 2493, 3 U.S.T. 3420, entered into force April 29, 1952, as to New Zealand but not as to Australia. *See* Marian Nash (Leich), 1 *Cumulative Digest of United States Practice in International Law 1981-1988*, at 1279-81.

[81] *See, e.g.*, Geneva Convention III, art. 142. The suspension of a treaty is distinct from the denunciation or termination of one. Suspension is generally a milder measure than termination, often being partial, temporary, or contingent upon circumstances that can be altered by the actions of the parties to the treaty. Moreover, at least in the United States, suspension of a treaty can be reversed by unilateral executive action, whereas termination, which annuls a treaty, and which is therefore more disruptive of international relationships, would require Senate consent to a new treaty in order to be undone. *See* Oliver J. Lissitzyn, *Treaties and Changed Circumstances (Rebus Sic Stantibus)*, 61 Am. J. Int'l L. 895, 916 (1967) ("It is difficult to see how a right of suspension would present greater dangers than a right of termination.").

[82] In general, the partial suspension of the provisions of a treaty (as distinct from both termination and complete suspension) is recognized as permissible under international law. Article 60 of the Vienna Convention explicitly permits the suspension of a treaty "in whole or in part." "[U]nder both treaty law and non-forcible reprisal law as a basis for responsive suspension it is clear that suspension may be only partial and need not suspend or terminate an agreement as a whole, in contrast, for example, with treaty withdrawal clauses." John Norton Moore, *Enhancing Compliance With International Law: A Neglected Remedy*, 39 Va. J. Int'l L. 881, 932 (1999). Although suspension of particular treaty provisions is recognized both in State practice and international law, we are not aware of any precedent for suspending a treaty as to *some*, but not *others*, of the persons otherwise protected by it. Thus, we can see no basis for suggesting that the President might suspend the Geneva Conventions as to the Taliban *leadership*, but not as to its rank and file members. However, the President could achieve the same outcome by suspending the Conventions, ordering the U.S. military to follow them purely as a matter of policy, and excepting the Taliban leadership from the coverage of this policy.

Although the United States has never, to our knowledge, suspended any provision of the Geneva Conventions, it is significant that on at least two occasions since 1949 – the Korean War and the Persian Gulf War – its practice has deviated from the clear requirements of Article 118 of Geneva Convention III. That Article prescribes the mandatory repatriation of POWs after the cessation of a covered conflict.[83] Although on both occasions the POWs themselves sought to avoid repatriation, Geneva Convention III provides that a POW may "in no circumstances renounce in part or in entirety" the right to repatriation. Moreover, the negotiating history of the Convention reveals that a proposal to make POW repatriation voluntary was considered and rejected, in large part on the ground that it would work to the detriment of the POWs.[84] Consequently, withholding of repatriation, even with the consent of the POWs, represented a deviation from the Convention's strict norms.

Korea. The Korean War broke out on June 25, 1950, before any of the major State parties to the conflict (including the United States) had ratified the Geneva Conventions. Nonetheless, the principle of repatriation of POWs had long been rooted in treaty and customary international law, including Article 20 of the Annex to Hague Convention IV, which states that "[a]fter the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible."[85] Large numbers of Chinese and North Korean POWs held by the United Nations did not wish to be repatriated, however, and special provisions for them (and for a small number of United Nations POWs in Communist hands) were made under the Armistice of July 27, 1953. "To supervise the repatriation, the armistice created a Neutral Nations Repatriation Commission, composed of representatives from Sweden, Switzerland, Poland, Czechoslovakia, and India. Within sixty days of signing the Armistice, prisoners who desired repatriation were to be directly repatriated in groups to the side to which they belonged at the time of their capture. Those prisoners not so repatriated were to be released to the Neutral Nations Repatriation Commission . . . for further disposition."[86] Altogether approximately 23,000 POWs refused repatriation. The majority (not quite 22,000) eventually went to Taiwan.[87]

The Persian Gulf War. At the cessation of hostilities in the Persian Gulf War, some 13,418 Iraqi POWs held by Allied forces were unwilling to be repatriated for fear of suffering punishment from their government for having surrendered. Notwithstanding the repatriation mandate of Geneva Convention III, the United States and its Allies executed an agreement with

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[83] Article 118 states in relevant part:

> Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.
>
> In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity the principle laid down in the foregoing paragraph.

[84] *See* Howard S. Levie, *The Korean Armistice Agreement and Its Aftermath*, 41 Naval L. Rev. 115, 125-27(1993).

[85] *See generally* 3 Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, ¶ 674 at 1858-59 (2d ed. 1945).

[86] David M. Morriss, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 Va. J. Int'l L. 801, 883 (1996).

[87] *Id.* at 885.