VII

Afghanistan and the Nature of Conflict

Charles Garraway*

Introduction

The story is told of a traveler in the west of Ireland. Thoroughly lost, he stopped beside a field and asked the farmhand working there how to get to Limerick. The answer was somewhat disconcerting: “Well, if I was you, sir, I wouldn’t start from here!” There have been times over the last seven years when that phrase has come to mind. Decisions have been made and consequences have followed—none more so perhaps than in the relationship between the “war on terror” and the law of armed conflict/laws of war. Much of this uncertainty arose out of the initial conflict in Afghanistan in 2001. While it may not be possible to change the start point, it may help to look back and try to ascertain why we are where we are. Perhaps then, we will be in a better position to plan that route to Limerick.

The End of the Beginning

Our story has to start somewhere and where better than in the White House and with a presidential decision. On February 7, 2002, President Bush issued his memorandum on the subject of humane treatment of al Qaeda and Taliban detainees. In paragraph 1, he stated:

* Visiting Professor, King’s College London; Associate Fellow, Chatham House; and Visiting Fellow, Human Rights Centre, University of Essex.

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
Afghanistan and the Nature of Conflict

Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving “High Contracting Parties,” which can only be states. Moreover, it assumes the existence of “regular” armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

Although this memorandum was not released to the public until some time later, its effect upon the debates on both the classification of conflicts and the application of the laws of war has been immense. No study of Afghanistan, or of any other conflict since 2002 in which the United States has been involved, can take place without considering the effect of this memorandum. Indeed so pivotal has it become to many of the arguments that now rage over the US position on law of war issues that it should be read in full:

SUBJECT: Humane Treatment of Taliban and al Qaeda Detainees

1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving “High Contracting Parties,” which can only be states. Moreover, it assumes the existence of “regular” armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

2. Pursuant to my authority as commander in chief and chief executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the attorney general in his letter of February 1, 2002, I hereby determine as follows:

a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan.
Charles Garraway

or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.

b. I accept the legal conclusion of the attorney general and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise the authority in this or future conflicts.

c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."

d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

3. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

4. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.

5. I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

6. I hereby direct the Secretary of State to communicate my determinations in an appropriate manner to our allies, and other countries and international organizations cooperating in the war against terrorism of global reach.

/s/ George W. Bush
Afghanistan and the Nature of Conflict

 Learned treatises have been written on almost every part of this memorandum, in particular on the issue of the application of what the President refers to as “Geneva” law. However, for the purposes of this article, it is necessary to go back beyond the application of the law to the facts. It is the issue of classification of the conflict itself that raises challenges to the existing legal framework. Was the situation in Afghanistan, and also in the wider context of worldwide terrorism emanating in part at least from that country, a “new paradigm,” removing it from the framework of law that had been painstakingly constructed over the previous 150 years? Or was it a mutation of an existing structure and well capable of accommodation within the current framework?

In order to attempt to answer these questions, it is necessary to examine the current framework and also to examine the legal debate that raged within the Bush administration. This memorandum was not the product of a “Eureka moment” in the Oval Office but the result of a need for a decision by the President following conflicting legal advice from within the administration itself. As with the memorandum itself, much of the debate revolves around classified material, in terms both of evidence and of the written advice itself. There have been leaks and much of the advice given, in particular by the Department of Justice, is now in the public domain. Greenberg and Dratel have sought to bring these together in their compilation The Torture Papers: The Road to Abu Ghraib. At a later date, some of the State Department advice also came into the public domain. However, it is clear that the full picture remains locked in the corridors of power and it is unlikely that it will emerge for some time to come. In the meantime, scholars and others must make do with what we have.

The History

The factual history is comparatively straightforward. On September 11, 2001, terrorists hijacked four airliners in US airspace and used them as missiles to attack targets in New York (the World Trade Center) and Washington (the Pentagon). One airliner was brought down short of its target when passengers fought to regain control of the aircraft. Within days, it was apparent that these attacks were instigated by al Qaeda, operating primarily out of Afghanistan. Afghanistan at the time was a lawless State. Its location had made it a battleground for the power struggles between the British Empire and Russia in the nineteenth century. Although never fully colonized, it had not regained full independence until after the First World War, in 1919, but even then its history was not a happy one. Since 1973, there had been a series of bloody coups, culminating in a Soviet invasion after Mohammed Daoud was murdered in 1978. The Soviet forces were themselves forced to
withdraw in 1989 and in 1996 the Taliban movement claimed control of the country and imposed a rigid Shari’a regime. Despite having territorial control of most of the country, the Taliban regime was not recognized by the vast majority of the nations of the world and the “officially recognized” government was the Northern Alliance, which remained in control of a small enclave in the north of the country. The Taliban had provided support, refuge and facilities for the al Qaeda network, whose leader, Osama Bin Laden, a Saudi national, had been driven out of previous sanctuaries, including Sudan.

On October 7, 2001, following advice on his authority under the US Constitution to conduct military operations “against terrorists and nations supporting them” President Bush, in conjunction with other allies, launched military attacks against both al Qaeda and Taliban targets in Afghanistan. In the letter sent by the Representative of the United States of America, John Negroponte, to the President of the Security Council, the United States invoked “its inherent right of individual and collective self-defense following armed attacks that were carried out against the United States on September 11, 2001.” After describing the background to the 9/11 attacks, the letter went on to say:

The attacks on September 11, 2001, and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.

While this made clear the connection drawn by the administration between al Qaeda and the Taliban, the letter also contained a slightly more ominous phrase: “We may find that our self-defense requires further actions with respect to other organizations and other States.”

The “war on terror” had begun.

The Laws of War

The history of the laws of war had developed in treaty terms since the middle part of the nineteenth century. The laws had developed amid the Westphalian structure, where States were the principal subject of international law. International law governed relations between States and did not generally concern itself with activities within States, which were reserved to the jurisdiction of the States themselves.
Afghanistan and the Nature of Conflict

War was an activity conducted between States and, as a result, the laws of war only applied to such wars.

That does not mean that there was nothing that happened that today would be classified as “terrorism.” However, much of this was inevitably internal and thus considered beyond the boundaries of international law. Occasionally such matters spread across borders and indeed one of the best-known principles in international law, that of self-defense in the *ius ad bellum*, the Caroline case, arose out of cross-border raids by irregulars. This led to the famous exchange of correspondence between Lord Ashburton, representing the United Kingdom, and the Secretary of War for the United States, Daniel Webster. It is perhaps interesting that one of the lesser-known parts of that particular incident was the fate of one Alexander McLeod, who was arrested and detained by the US authorities for his alleged participation in the destruction of the Caroline. He was tried, and acquitted, in New York and indeed it was his detention that led to the exchange of diplomatic correspondence.

As a matter of practice, terrorism had normally been considered a matter of law enforcement—at times extraterritorial. It was dealt with by domestic law rather than international law and certainly not by the laws of war.

In 1949, the text of the four Geneva Conventions of that year extended the laws of war beyond the traditional inter-State conflict. Conflicts were divided into two types. The first were described in Common Article 2 as follows:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

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.

This requires an “armed conflict” between “two or more High Contracting Parties.” As only States can be High Contracting Parties, this means inter-State conflicts. However, Article 3 Common to the four Conventions covered new ground:
Charles Garraway

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed “hors de combat” by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.11

The key elements governing the application of this particular “mini-convention” are as follows: (1) “an armed conflict,” (2) “not of an international character” and (3) “occurring in the territory of one of the High Contracting Parties.” Clearly this excluded any armed conflict that fell within the confines of Common Article 2, a conflict between two or more High Contracting Parties. However, the term
“armed conflict” remained undefined and it was unclear as to the status of a conflict primarily “occurring in the territory of one of the High Contracting Parties” when it crossed over international borders. It should be noted that the original intention of the International Committee of the Red Cross (ICRC) was that the whole of the Conventions should apply to non-international armed conflicts. Common Article 3 therefore was an irreducible minimum so far as it was concerned. Attempts were indeed made to define what was meant by “armed conflict” but these were abandoned and it was the view of the ICRC that this “wise” decision meant that the term should be interpreted “as widely as possible.” This meant avoiding the application of any threshold test.

Similarly, although the geographic restriction was designed to catch civil wars, there does not appear to have been any intention to exclude conflicts with cross-border elements. Few conflicts are contained entirely within the boundaries of one territory and it has generally been considered sufficient if the conflict is centered within the territory of a High Contracting Party, even if it does have certain cross-border features. Many rebel groups operate from “safe havens” on the other side of international borders. Those who argued consistently that Northern Ireland amounted to a Common Article 3 conflict during the “Troubles” of the late twentieth century would hardly have been amused to be told that the fact that elements of the Irish Republican Army operated from across the border in the Irish Republic excluded the application of Common Article 3.

However, regardless of these arguments, what was clear was the division of conflict into two separate categories. This division was confirmed by the adoption of the two Additional Protocols to the 1949 Geneva Conventions in 1977. The first applied primarily to international armed conflicts as defined by Common Article 2 and the second to non-international armed conflicts. However, Additional Protocol II adopted a much more restricted field of application and also introduced a threshold—a negative definition of what does not amount to an armed conflict. Article 1 reads:

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
Charles Garraway

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

The higher threshold rules out a number of low-intensity conflicts where territory is not held by the dissident armed forces and, equally importantly, where the conflict is between dissident armed groups themselves without any involvement of the national forces, if they exist. Thus “failed State” conflicts where the battles are between rival warlords would normally be excluded from the application of Additional Protocol II. However, that does not mean that Common Article 3 does not apply.

For our purposes, it is the lower threshold that is important. “[S]ituations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” are excluded “as not being armed conflicts.” Terrorism was generally deemed to fit within this exclusion. This is illustrated by the statement made by the United Kingdom on ratification of Additional Protocol I in 1998. It read: “It is the understanding of the United Kingdom that the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation” (emphasis added). This statement came from a nation that had been plagued by cross-border terrorism for a generation.

Back to the Future

The events of 9/11 undoubtedly caused a rift within the Bush administration. The language was all of “war” but what was not clear was whether this was seen as political rhetoric or legal analysis. The sheer scale of the atrocity undoubtedly contributed to this, but war against whom? The term “war on terrorism” cannot be taken as a legal description. “Terrorism” is a tactic and one cannot wage war against a tactic in any meaningful legal sense. The planning obviously focused on Afghanistan, where Osama Bin Laden was based, and the United States, with support from many parts of the world, prepared for war in Afghanistan.

It seems that, at this point, there was growing confusion between US constitutional law and international law. This may be because of the trend for both to be taught together in universities in the United States. On September 25, 2001, John Yoo wrote the memorandum opinion to Timothy Flanagan, Deputy Counsel to the President, already mentioned. In that memorandum, which runs to some twenty pages, there is only one reference in the main text to international law.
Afghanistan and the Nature of Conflict

That reference is in relation to declarations of war. It states: "Instead of serving as an authorization to begin hostilities, a declaration of war was only necessary to ‘perfect’ a conflict under international law.”

Apart from that isolated instance, the whole of the remainder of the memorandum deals with the position under US constitutional law. There is, however, one sentence which possibly sums up the change of opinion in the United States and also shows that such a change predates the presidency of George W. Bush. This sentence refers to the address to the nation delivered by President Clinton on August 20, 1998 in relation to the strike which he had ordered that day on Afghanistan and Sudan following the bombing of the US embassies in Kenya and Tanzania. The sentence reads: “Furthermore, in explaining why military action was necessary, the President noted that ‘law enforcement and diplomatic tools’ to combat terrorism had proved insufficient, and that ‘when our very national security is challenged . . . we must take extraordinary steps to protect the safety of our citizens.”18 Thus, it appears that, as early as 1998 under President Clinton, the United States was beginning to move away from treating terrorism as solely a matter of law enforcement. The “war on terror” had not arrived but the initial skirmishes were under way.

Hostilities

The legal debate took a backseat during the conduct of hostilities. While there was some discussion over the ius ad bellum issues, the campaign was conducted in accordance with the principles of the law of armed conflict. Regardless of whether there was one conflict or two, the Department of Defense directive provides that the armed forces should “comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.”19

However, the issue became live again when prisoners began to be captured. Were they prisoners of war under the Third Geneva Convention or were they not? Was there any distinction to be made between al Qaeda and the Taliban? If so, what was it and what were the legal grounds for making any distinction?

The Debate Continues

As has been mentioned earlier, not all the relevant documentation is in the public domain and therefore the discussion must inevitably be tentative. However, a number of documents have either been released or leaked and these in themselves make very interesting reading and go some way to explaining the decision made by President Bush on February 7, 2002.
On January 9, John Yoo circulated a draft memorandum prepared by him and Special Counsel Robert Delahunty addressed to the General Counsel of the Department of Defense, William J. Haynes. This memorandum, significantly, was based on the War Crimes Act, a domestic statute. It sought to argue two main propositions: (1) "[N]either the Geneva Conventions nor the [War Crimes Act] regulate the detention of al Qaeda prisoners captured during the Afghanistan conflict" and (2) the Geneva Conventions did not apply to "captured members of the Taliban militia." The simple argument was that neither al Qaeda nor Taliban fighters were entitled to prisoner of war status. Put in those terms, the statement, while controversial, would have fitted within the traditional law of war concept. However, it was not so much the propositions themselves but the arguments put forward to support them that were to cause controversy.

First, starting from the War Crimes Act, Yoo and Delahunty began to examine the nature of conflict. They drew the usual distinction between Common Articles 2 and 3 to the Geneva Conventions but sought to narrow the application of Common Article 3, stating it "should not be read to include all forms of non-international armed conflict." Their argument was that, "in enacting the [War Crimes Act], Congress did not understand the scope of Common Article 3 to extend beyond civil wars to all other types of internal armed conflict." In their view Common Article 3 only applied to "large-scale conflicts between a State and an insurgent group," a similar threshold to that later incorporated into Additional Protocol II.

Second, they argued that "Al Qaeda’s status as a non-State actor renders it ineligible to claim the protections of the treaties specified by the [War Crimes Act]." The argumentation is confused as it is not made explicit whether the reason for this conclusion is the nature of al Qaeda or the nature of the conflict itself. There are elements of both arguments and certainly when discussing Common Articles 2 and 3, the memorandum states, "Our conflict with al Qaeda does not fit into either category."

Yoo and Delahunty then move to the "Taliban militia." They argue that, as a matter of constitutional law, "the Executive has the plenary authority to determine that Afghanistan ceased at relevant times to be an operating State and therefore that members of the Taliban militia were and are not protected by the Geneva Conventions." There follows detailed argument as to why Afghanistan was a "failed State" and a conclusion that "Afghanistan under the Taliban militia was in a condition of ‘statelessness,’ and therefore was not a High Contracting Party to the Geneva Conventions for at least that period of time."

A secondary argument was that, even if the Geneva Conventions did apply to Afghanistan, the members of the Taliban militia themselves did not fall within the category of prisoner of war, outlined in Article 4 of the Third Geneva Convention.
They argued that the Taliban “cannot even be considered ‘a government or authority’” for the purposes of Article 4A(3), which covers “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.” It was accepted that the United States had never recognized the Taliban regime as the government of Afghanistan.32

The memorandum continued with a review of previous US campaigns, arguing that wherever the Geneva Conventions had been applied—Korea, Vietnam, Panama, Somalia, Haiti and Bosnia—a distinction needed to be drawn between their application as a matter of law and their application as a matter of policy.33 It goes on to discuss whether, even if the Geneva Conventions were prima facie applicable, the President had the power to suspend their application either in whole or in part in relation to Afghanistan. They concluded that as a matter of constitutional law “the President may regard a treaty as suspended for several reasons.”34 They then justified such a course essentially on the basis that “Afghanistan under the Taliban could be held to have violated basic humanitarian duties under the Geneva Conventions and other norms of international law.”35 They agreed that there was no precedent for such a suspension by the United States but pointed out that after both the Korean War and the Persian Gulf War, the United States had deviated from the strict terms of the Convention by allowing voluntary repatriation of prisoners of war rather than the mandatory repatriation required by the letter of the law in Article 118 of the Third Geneva Convention.36

The position under international law was also considered but with a telling introduction:

We emphasize that the resolution of that question [whether the Geneva Conventions were applicable], however, has no bearing on domestic constitutional issues, or on the application of the [War Crimes Act]. Rather, these issues are worth consideration as a means of justifying the actions of the United States in the world of international politics.37

Their conclusion was that “it appears to be permissible, as a matter of both treaty law and of customary international law, to suspend performance of Geneva Convention obligations on a temporary basis.”38 The reference to customary international law was necessary as the United States is not party to the Vienna Convention on the Law of Treaties39 though, somewhat reluctantly, the memorandum accepted that “some lower courts have said that the Convention embodies the customary international law of treaties, and the State Department has at various times taken the same view.”40
The memorandum concludes with a general examination of customary international law. It comes to the firm conclusion that it does not amount to federal law, citing Chief Justice Marshall, who described customary international law as "a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded." However, somewhat unusually, the authors went on to hold that "the President can properly find the unprecedented conflict between the United States and transnational terrorist organizations a 'war' for the purposes of the customary or common laws of war." The purpose of this, however, was to subject al Qaeda and the Taliban to those laws rather than US forces to them. This is one of the few examples of the wider conflict against "transnational terrorist organizations" being mentioned.

The final paragraph sums up the whole memorandum. It states:

"We conclude that neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions in Guantanamo Bay, Cuba, or to trial by military commission of al Qaeda or Taliban prisoners. We also conclude that customary international law has no legal binding effect on either the President or the military because it is not federal law, as recognized by the Constitution. Nonetheless, we also believe that the President as Commander-in-Chief, has the constitutional authority to impose the customary laws of war on both the al Qaeda and Taliban groups and the U.S. Armed Forces."

It should be noted again that the main subject of this memorandum is detention conditions and the role of the military commissions. As such, the nature of the conflict or conflicts in themselves is a secondary consideration other than as it impacts on the main issue. There is thus no argument specifically on the issue of whether the conflict within Afghanistan itself was a single conflict governed by the laws relating to international armed conflict or whether it was bifurcated into a war against al Qaeda and a war against the Taliban. Indeed, the main purpose of the memorandum seems to be to argue that the laws relating to armed conflict did not apply at all.

The State Department Response

The draft memorandum had been copied to, inter alia, the State Department and brought a swift response from William H. Taft IV, the Legal Adviser. In a covering note to his memorandum in response to the Yoo/Delahunty draft, he said that he found "the most important factual assumptions on which your draft is based and
Afghanistan and the Nature of Conflict

its legal analysis are seriously flawed. Again, the main purpose of the response was to examine the issues relating to detention rather than the nature of the conflict. The comments were grouped into four sections. The first dealt with the continuing applicability of treaty relations and made the point that “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.” There followed detailed legal and factual argument including a specific reference to United Nations practice:

The UN Security Council [UNSC] 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 the 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.

The second section addresses application of the Geneva Conventions and states: “This section concludes that the [Third Geneva Convention] 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 should be noted that this refers solely to “the situation as between the United States and the Taliban.”

The section makes clear that, in the view of the State Department, Common Article 2 to the Geneva Conventions applied and that Afghanistan “remained a High Contracting Party by virtue of accepted principles of international law.” In its opinion, “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.” The State Department also resisted the Justice Department argument that the Taliban and al Qaeda were indistinguishable.
The memorandum then examined whether, on the basis that the Geneva Conventions applied, the Taliban still qualified under Article 4A of the Third Geneva Convention as prisoners of war. The conclusion was reached that, *prima facie*, they qualified as “regular armed forces” under Article 4A(3) but that in cases of doubt, the appropriate course would be to hold tribunals under Article 5 of the Third Geneva Convention. In this section, there is a very interesting footnote, which reads:

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).

This does not rule out judging al Qaeda by the standards of the Geneva Conventions but in order to do so, they would have to be applicable.

The section concludes by taking issue with some of the conclusions drawn in the Justice Department memorandum on US practice in previous military campaigns before taking further issue with the Justice Department position on the possibility of suspending obligations under the Geneva Conventions. As the State Department pointed out, the United States had not sought to invoke any breach at the time as grounds for suspension and it was somewhat late now.

The final section examined the position under customary international law and pointed out one basic tenet:

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.

The memorandum pointed out how often the United States invokes customary law in its relations with other States, outlining, somewhat mischievously, that “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.”

The memorandum concludes with an annex on possible consequences if the Bush administration were to decide against the application of the Geneva
Afghanistan and the Nature of Conflict

Conventions, both in domestic and international fora. It is a clear warning that any such action would not be without consequences.

As will be seen, the Taft memorandum bases itself on refuting the specific legal arguments put forward by the Justice Department. It does not deal with the classification of the conflict except when it is directly relevant to the subject matter. There is nothing in the memorandum that indicates that the author takes the view that there is a bifurcated conflict in Afghanistan rather than a single conflict that covers all the various participants. Such indications as there are tend toward the “single conflict” point of view though it may be that the author never considered that particular point as an issue.

The Justice Riposte

There followed a strong response from John Yoo and Robert Delahunty in which they effectively maintained their previous position. Interestingly, they commented, “Although we have similar bottom lines, we differ in reasoning on the way there.” Indeed the argument was not so much on the practical effect of any decision on whether or not al Qaeda or the Taliban should be granted prisoner of war status, but more on the legal reasoning that led to any such decision. The discussion on the conflict itself was limited though they did refer to “the unprecedented nature of our war with al Qaeda and the Taliban,” the singular being important here. The result was a new version of the Yoo/Delahunty memorandum, issued on January 22, 2002.

However, there had been a development in that, on January 18, the President, acting as Commander in Chief, had directed that al Qaeda and Taliban individuals under the control of the Department of Defense were not entitled to prisoner of war status. This was communicated by a memorandum to the Chairman of the Joint Chiefs of Staff from the Secretary of Defense.

Although the Yoo/Delahunty memorandum had been restructured, there was little change to the main arguments. There was reference to “a conflict with al Qaeda,” stating that it “is not properly included in non-international forms of armed conflict” and later that it “does not fall within Article 2” of the Geneva Conventions. “It is not an international war between nation-States because al Qaeda is not a State. Nor is this conflict a civil war under Article 3 because it is a conflict of ‘an international character.’” This last quote is in a section dealing with the application of the War Crimes Act and associated treaties to al Qaeda.

When the memorandum turns to discussing the application of the Geneva Conventions to the Taliban militia, it refers to “the present conflict with respect to the Taliban militia.” Later on, in discussing the possible suspension of the Geneva
Conventions, the authors talk of the suspension of the Conventions "as applied to the Taliban militia in the current war in Afghanistan."62 Later still, when discussing the possible status of Taliban prisoners under Article 4 of the Third Geneva Convention, there is reference to the need, if the Geneva Conventions are to apply, for "the Afghanistan conflict" to be qualified as an international armed conflict.63 This is followed up with a telling sentence: "At this point in time, we cannot predict what consequences this acceptance of jurisdiction would have for future stages in the war on terrorism."64

An overall study of the memorandum leaves the reader with a sense that, as a result of the confused debate on the application of the law, the issue of whether Afghanistan was one conflict or two was not really considered. At some stages, there is indeed reference to "a conflict with al Qaeda" but in others there seems to be an indication that the conflict in Afghanistan was homogeneous though the application of the law might differ in respect to al Qaeda and Taliban detainees. Part of this confusion seems to arise from the uncertainty as to whether al Qaeda was a party to the conflict (which seems to be the view taken) or whether it was merely a participant in a conflict. The issue of how many conflicts were coexisting was not directly addressed.

The Final Arguments

The Justice Department riposte led to a strong response from the State Department. On January 23, William Taft wrote to Judge Gonzales, Counsel to the President, attaching a further memorandum which he had sent that day to John Yoo.65 This in fact referred to a second draft of the original Yoo/Delahunt memorandum though it actually followed the dispatch of the final version. In it, Taft made his position clear. He stated:

As you know from our previous comments, our view is that, as a matter of international law, the Third Geneva Convention applies to the armed conflict in Afghanistan because it "arises between" two High Contracting Parties to the Convention under common Article 2. The legal status of both al Qaeda and Taliban detainees must therefore be assessed under the Third Convention.66

This is as close as it is possible to get to a clear statement that Afghanistan was a single conflict and could not be bifurcated between al Qaeda and the Taliban. He then went on to deal with the application of that Convention, confirming that al Qaeda members were not entitled to prisoner of war status, though invoking Common Article 3 as providing "minimal standards applicable in any armed conflict."67
Afghanistan and the Nature of Conflict

On January 25, 2002, Judge Gonzales prepared a draft memorandum for the President entitled “Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban.”68 The title itself is interesting as, though the memorandum allies itself almost entirely with the positions being taken by the Justice Department—and indeed affirms that its interpretation on legal issues of this sort is “definitive”—the heading refers to “the [c]onflict with Al Qaeda and the Taliban.” This use of the singular seems to confirm that the issue of bifurcation simply was not considered.

The draft memorandum brought a swift response from the Secretary of State, Colin Powell, who himself wrote to Judge Gonzales.69 In this he said:

I hope that the final memorandum will make clear that the President’s choice is between

Option 1: Determine that the Geneva Convention on the treatment of Prisoners of War (GPW) does not apply to the conflict on “failed State” or some other grounds. Announce this position publicly. Treat all detainees consistent with the principles of the GPW;

and

Option 2: Determine that the Geneva Convention does apply to the conflict in Afghanistan, but that members of al Qaeda as a group and the Taliban individually or as a group are not entitled to Prisoner of War status under the Convention. Announce this position publicly. Treat all detainees consistent with the principles of the GPW.70

There followed three pages of argument, as well as a page of comment on the Gonzales draft memorandum, but it seems clear that, in the view of the Secretary of State, there was only one conflict and the debate was only as to how al Qaeda and the Taliban should be treated within whatever legal regime was deemed to apply to that conflict. If the Secretary of State had considered that there was an issue as to whether the “conflict in Afghanistan” was one or bifurcated, it might be reasonable to expect that there would be some argument on the point in his letter. There is none.

The intervention of the Secretary of State brought a riposte from the Attorney General, John Ashcroft, on February 1, 2002.71 In his letter to the President, he argues strongly for Option 1, stating that “this will provide the United States with the highest level of legal certainty available under American law.”72 At no point does he take issue with the statement by the Secretary of State that the conflict is singular. The purpose of his letter is made clear when he states:
Charles Garraway

[A] Presidential determination against treaty applicability would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees. The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States.73

William Taft, in a memorandum dated February 2, 2002,74 made one last despairing effort to repair what he apparently saw as an obvious departure by the United States from its traditional stance on the laws of war. He began by saying: "The paper should make clear that the issue for decision by the President is whether the Geneva Conventions apply to the conflict in Afghanistan in which U.S. armed forces are engaged."75 After arguing forcefully for the application of the Conventions, he continued tellingly: "It is not inconsistent with the DOJ [Department of Justice] opinion that the Conventions generally do not apply to our world-wide effort to combat terrorism and to bring al Qaeda members to justice."76 He concluded by saying:

The structure of the paper suggesting a distinction between our conflict with al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions. The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in that conflict — al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc. If the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protections as a matter of law.77

This is the first occasion that any argument is given on this specific issue. Attached to that memorandum are some notes entitled "Status of Legal Discussions."78 The notes clearly state that:

• DOJ lawyers have concluded as matter of law that our conflict with al Qaeda, regardless of where it is carried out, is not covered by GPW. Lawyers from DOD, WHC and OVP support that legal conclusion.

• DOJ, DOD, WHC, and OVP lawyers believe that this conclusion is desirable from a domestic law standpoint because it provides the best possible insulation from any misapplication of the War Crimes Act to the conflict with al Qaeda, whether in Afghanistan or elsewhere.

• DOJ, DOD, WHC, and OVP lawyers further believe that this conclusion is appropriate for policy reasons because it emphasizes that the worldwide conflict with al Qaeda is a new sort of conflict, one not covered by GPW or some other traditional rules of warfare.
Afghanistan and the Nature of Conflict

- DOS lawyers believe that GPW applies to our treatment of al Qaeda members captured in Afghanistan on the theory that GPW applies to the conflict in Afghanistan, not to particular individuals or groups.

- DOS lawyers believe this conclusion is desirable from a domestic and international law standpoint because it provides the best legal basis for our intended treatment of the detainees and strengthens the Geneva Convention protections of our forces in Afghanistan and other conflicts.

- DOS lawyers further believe this conclusion is appropriate for policy reasons because it emphasizes that even in a new sort of conflict the United States bases its conduct on its international treaty obligations and the rule of law, not just its policy preferences.

At last, the issue was out in the open after being the “elephant in the room” for so long. Five days later, President Bush issued his memorandum and the die was cast.

Conclusion

Why was the matter not dealt with in detail in any of the earlier documentation? Surely, if the State Department had realized that it was a live issue, it would have featured in the earlier correspondence. For example, the Secretary of State’s memorandum seems to have taken for granted that the conflict in Afghanistan was one entity and so, intriguingly, does the memorandum for the President, written by Judge Gonzales on January 25. However, it was clearly an issue—indeed perhaps the key issue—by the time that William Taft wrote on February 2.

Was this a sudden realization by the State Department or did the issue crystallize in those few days at the end of January 2002? In any event, it would seem that one of the most fundamental rulings that President Bush made was the least subject to legal discussion. A further irony is that it might not have been necessary. Had the President followed the advice of the State Department in respect to Afghanistan, the creation of the detention facility at Guantanamo Bay would still have happened. Members of al Qaeda would still have been denied prisoner of war status and it is likely that the vast majority of Taliban detainees would have been in the same position. The argument would have been on a different issue—whether there is a gap between the Third and Fourth Geneva Conventions where “unprivileged belligerents” are concerned. That is a case where the United States would have been on far stronger legal ground. Would it have had an effect on the worldwide effort to combat terrorism or would it have actually helped the United States in enabling it to lead the effort from the moral high ground? Unfortunately, we will never know.
Now we struggle to deal with the issues caused by that fateful decision both in relation to Afghanistan and elsewhere in the world. We are still struggling to get to Limerick but we have no choice but to start from here.

Notes

2. Id. at 134–35.
3. Supra note 1.
4. Memorandum Opinion from John Yoo to Timothy Flanagan, Deputy Counsel to the President, The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them (Sept. 25, 2001), reprinted in TORTURE PAPERS, supra note 1, at 3.
6. Id.
7. Id.
10. Geneva Conventions I–IV, supra note 9, at 198, 222, 244 and 301, respectively.
11. Geneva Conventions I–IV, supra note 9, at 198, 223, 245 and 302, respectively.
12. 1 COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 50 (Jean S. Pictet ed., 1952).
15. Letter from Christopher Hulse, Her Majesty's Ambassador to Switzerland, to the President of the Swiss Confederation statement (d) (Jan. 28, 1998), reprinted in DOCUMENTS ON THE LAWS OF WAR, supra note 9, at 510.
16. Supra note 4.
17. Id. at 7.
Afghanistan and the Nature of Conflict

18. Id. at 18.
20. Memorandum from John C. Yoo & Robert Delahunty to William J. Haynes II, General Counsel, Department of Defense, Re. Application of Treaties and Laws to an Qaeda and Taliban Detainees (Jan. 9, 2002), reprinted in TORTURE PAPERS, supra note 1, at 38 [hereinafter Yoo/Delahunty Memorandum].
23. Id. at 47.
24. Id.
25. Id. at 44.
26. supra note 14, and following text.
27. Yoo/Delahunty Memorandum, supra note 20, at 48.
28. Id. at 49.
29. Id. at 51.
30. Id. at 55.
32. Yoo/Delahunty Memorandum, supra note 20, at 61.
33. Id. at 62–64.
34. Id. at 65.
35. Id.
36. Geneva Convention III, supra note 9, art. 118.
37. Yoo/Delahunty Memorandum, supra note 20, at 67.
38. Id. at 69.
40. Yoo/Delahunty Memorandum, supra note 20, at 68.
41. Id. at 73, citing Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (1814).
42. Id. at 77.
43. Id. at 79.
44. Memorandum from William H. Taft IV, Legal Adviser, Department of State, to John C. Yoo, Deputy Assistant Attorney General, Office of the Legal Counsel, United States Department of Justice, Your Draft Memorandum of January 9, at 1 (Jan. 11, 2002), available at http://hei.unige.ch/%7EEdapham/hrdoc/docs/TaftMemo.pdf [hereinafter Taft Memorandum].
45. Id., attachment at 4.
46. Id. at 11.
47. Id. at 13.
48. Id. at 19.
49. Geneva Convention III, supra note 9, art. 5.
50. Taft Memorandum, supra note 44, attachment n.35, at 21.
51. Id. at 31.
52. Id. at 33.
54. Id. at 1.
55. Id. at 4.
57. Memorandum from the Secretary of Defense to Chairman of the Joint Chiefs of Staff, Status of Taliban and Al Qaeda (Jan. 19, 2002), reprinted in TORTURE PAPERS, supra note 1, at 80.
59. Id. at 90.
60. Id.
61. Id. at 91.
62. Id. at 104.
63. Id. at 111.
64. Id.
66. Id. at 1.
67. Id. at 2.
69. Memorandum from Colin L. Powell to Counsel to the President & Assistant to the President for National Security Affairs, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), reprinted in TORTURE PAPERS, supra note 1, at 122.
70. Id. (emphasis added).
71. Letter from John Ashcroft to the President (Feb. 1, 2002), reprinted in TORTURE PAPERS, supra note 1, at 126.
72. Id. at 127.
73. Id. at 126.
74. Memorandum from William H. Taft IV, Legal Adviser, Department of State, to Counsel to the President, Comments on Your Paper on the Geneva Conventions (Feb. 2, 2002), reprinted in TORTURE PAPERS, supra note 1, at 129.
75. Id.
76. Id.
77. Id.
78. Status of Legal Discussions re Application of Geneva Convention to Taliban and al Qaeda, in TORTURE PAPERS, supra note 1, at 130. The notes reference discussions among lawyers from the DOJ (Department of Justice), DOD (Department of Defense), WHC (the White House Counsel’s office) and OVP (Office of the Vice President).
79. Supra note 1.
80. Supra note 69.
Afghanistan and the Nature of Conflict

81. Supra note 68.
82. Supra note 74.