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U.S. Department of Justice
Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

January 22, 2002

Memorandum for Alberto R. Gonzales
Counsel to the President,
and William J. Haynes II
General Counsel of the Department of Defense

RE: *Application of Treaties and Laws to al Qaeda and Taliban Detainees*

You have asked for our Office's views concerning the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan. In particular, you have asked whether certain treaties forming part of the laws of armed conflict apply to the conditions of detention and the procedures for trial of members of al Qaeda and the Taliban militia. We conclude that these treaties do not protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war. We further conclude that that President has sufficient grounds to find that these treaties do not protect members of the Taliban militia. This memorandum expresses no view as to whether the President should decide, as a matter of policy, that the U.S. Armed Forces should adhere to the standards of conduct in those treaties with respect to the treatment of prisoners.

We believe it most useful to structure the analysis of these questions by focusing on the War Crimes Act, 18 U.S.C. § 2441 (Supp. III 1997) ("WCA"). The WCA directly incorporates several provisions of international treaties governing the laws of war into the federal criminal code. Part I of this memorandum describes the WCA and the most relevant treaty that it incorporates: the Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva III").¹

Parts II and III of this memorandum discuss why other deviations from the text of Geneva III would not present either a violation of the treaty or of the WCA. Part II explains that al Qaeda detainees cannot claim the protections of Geneva III because the treaty does not apply to them. Al Qaeda is merely a violent political movement or organization and not a nation-State. As a result, it cannot be a state party to any treaty. Because of the novel nature of this conflict, moreover, a conflict with al Qaeda is not properly included in non-international forms of armed conflict to which some

¹ The four Geneva Conventions for the Protection of Victims of War, dated August 12, 1949, were ratified by the United States on July 14, 1955. These are the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3115 ("Geneva Convention I"); the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3219 ("Geneva Convention II"); the Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3517 ("Geneva Convention III"); and the Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3317 ("Geneva Convention IV").

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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.”¹⁰²

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. 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 [laws 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.”¹⁰³

It might be argued, however, that the United States has conceded that Geneva III applied, as a matter of law, in every conflict since World War II. The facts, as supplied by our research and by the Defense Department, demonstrate otherwise. Although the United States at times has declared in different wars that the United States would accord Geneva Convention III treatment to enemy prisoners, there are several examples where the United States clearly decided not to comply with Geneva III as a matter of law. Further, such a position confuses situations in which the United States said it would act *consistently* with the Geneva Conventions with those in which we admitted that enemy prisoners would receive POW status as a matter of law. Our conduct in Panama provides an important example. There, the United States never conceded that the forces of Manuel Noriega qualified as POWs under the Geneva Convention, but did provide for them as a policy matter as if they were POWs.

IV. Detention Conditions Under Geneva III

Even if the President decided not to suspend our Geneva III obligations toward Afghanistan, two reasons would justify some deviations from the requirements of Geneva III. This would be the case even if Taliban members legally were entitled to POW status. First, certain deviations concerning treatment can be justified on basic grounds of legal excuse concerning self-defense and feasibility. Second, the President could choose to find that none of the Taliban prisoners qualify as POWs under Article 4 of Geneva III, which generally defines the types of armed forces that may be considered POWs once captured. In the latter instance, Geneva III would apply and the Afghanistan conflict would fall within common Article 2’s jurisdiction. The President, however, would be interpreting the treaty in light of the facts on the ground to find that the Taliban militia categorically failed the test for POWs within Geneva III’s terms. We

¹⁰² Letter for the Hon. Richard L. Thornburgh, Attorney General, from Abraham D. Sofaer, Legal Adviser, State Department at 2 (Jan. 31, 1990).

¹⁰³ Quoted in Bialke, *supra*, at 56.

should be clear that we have no information that the conditions of treatment for Taliban prisoners currently violate Geneva III standards, but it is possible that some may argue that our GTMO facilities do not fully comply with all of the treaty's provisions.

A. Justified Deviations from Geneva Convention Requirements

We should make clear that as we understand the facts, the detainees currently are being treated in a manner consistent with common Article 3 of Geneva III. This means that they are housed in basic humane conditions, are not being physically mistreated, and are receiving adequate medical care. They have not yet been tried or punished by any U.S. court system. As a result, the current detention conditions in GTMO do not violate common Article 3, nor do they present a grave breach of Geneva III as defined in Article 130. For purposes of domestic law, therefore, the GTMO conditions do not constitute a violation of the WCA, which criminalizes only violations of common Article 3 or grave breaches of the Conventions.

That said, some may very well argue that detention conditions currently depart from Geneva III requirements. Nonetheless, not all of these deviations from Geneva III would amount to an outright violation of the treaty's requirements. Instead, some departures from the text can be justified by some basic doctrines of legal excuse. We believe that some deviations would not amount to a treaty violation, because they would be justified by the need for force protection. Nations have the right to take reasonable steps for the protection of the armed forces guarding prisoners. At the national level, no treaty can override a nation's inherent right to self-defense. Indeed, the United Nations Charter recognizes this fundamental principle. Article 51 of the U.N. Charter provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." As we have discussed in other opinions relating to the war on terrorism, the September 11 attacks on the Pentagon and the World Trade Center have triggered the United States' right to defend itself.¹⁰⁴ Our national right to self-defense must encompass the lesser included right to defend our own forces from prisoners who pose a threat to their lives and safety, just as the Nation has the authority to take measures in the field to protect the U.S. armed forces. Any Geneva III obligations, therefore, may be legally adjusted to take into account the needs of force protection.

The right to national self-defense is further augmented by the individual right to self-defense as a justification for modifications to Geneva III based on the need for force protection. Under domestic law, self-defense serves as a legal defense even to the taking of a human life. "[S]elf defense is . . . embodied in our jurisprudence as a consideration totally eliminating any criminal taint. . . . It is difficult to the point of impossibility to imagine a right in any state to abolish self defense altogether. . . ."¹⁰⁵ As the U.S. Court of Appeals for the District of Columbia Circuit has observed, "[m]ore

¹⁰⁴ Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* at 22-33 (Nov. 6, 2001); Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States* at 2-3 (Oct. 17, 2001).

¹⁰⁵ *Griffin v. Mortin*, 785 F.2d 1172, 1186-87 & n.37 (4th Cir. 1986), *aff'd by an equally divided court*, 795 F.2d 22 (4th Cir. 1986) (en banc), *cert. denied*, 480 U.S. 919 (1987).

than two centuries ago, Blackstone, best known of the expositors of the English common law, taught that 'all homicide is malicious, and of course, amounts to murder, unless . . . excused on the account of accident or self-preservation. . . . ' Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone's time. . . ."¹⁰⁶ Both the Supreme Court and this Office have opined that the use of force by law enforcement or the military is constitutional, even if it results in the loss of life, if necessary to protect the lives and safety of officers or innocent third parties.¹⁰⁷ Thus, as a matter of domestic law, the United States armed forces can modify their Geneva III obligations to take into account the needs of military necessity to protect their individual members.

Other deviations from Geneva III, which do not involve force protection, may still be justified as a domestic legal matter on the ground that immediate compliance is infeasible. Certain conditions, we have been informed, are only temporary until the Defense Department can construct permanent facilities that will be in compliance with Geneva. We believe that no treaty breach would exist under such circumstances. The State Department has informed us that state practice under the Convention allows nations a period of reasonable time to satisfy their affirmative obligations for treatment of POWs, particularly during the early stages of a conflict.¹⁰⁸ An analogy can be drawn here to a similar legal doctrine in administrative law. For example, it is a well-established principle that, where a statutory mandate fails to specify a particular deadline for agency action, a federal agency's duty to comply with that mandate is lawfully discharged, as long as it is satisfied within a reasonable time. The Administrative Procedure Act expressly provides that a "reviewing court shall . . . compel agency action unlawfully withheld or *unreasonably* delayed." 5 U.S.C. § 706 (emphasis added). Courts have recognized accordingly that a federal agency has a reasonable time to discharge its obligations.¹⁰⁹ Thus, "if an agency has no concrete deadline establishing a date by which it must act, . . . a court must compel only action that is delayed unreasonably. . . . [W]hen an agency is required to act – either by organic statute or by the APA – within an expeditious, prompt, or reasonable time, § 706 leaves in the courts the discretion to decide whether agency delay is unreasonable."¹¹⁰

¹⁰⁶ *United States v. Peterson*, 483 F.2d 1222, 1228–29 (D.C. Cir.) (footnote omitted), *cert denied*, 414 U.S. 1007 (1973).

¹⁰⁷ See *Tennessee v. Garner*, 471 U.S. 1, 7, 11 (1985) (Fourth Amendment "seizure" caused by use of force subject to reasonableness analysis); Memorandum to Files, from Robert Delahunty, Special Counsel, Office of Legal Counsel, *Re: Use of Deadly Force Against Civil Aircraft Threatening to Attack 1996 Summer Olympic Games* (Aug. 19, 1996); *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 164 (1994) ("[A] USG officer or employee may use deadly force against civil aircraft without violating [a criminal statute] if he or she reasonably believes that the aircraft poses a threat of serious physical harm . . . to another person.").

¹⁰⁸ During the India-Pakistan conflicts between 1965 and 1971, prisoners were able to correspond with their families, but there were "some difficulties in getting lists of all military prisoners" – "[e]specially at the beginning of the conflict." Allan Rosas, *The Legal Status of Prisoners of War* at 186 (1976). Similarly, during the 1967 War in the Middle East, Israeli authorities delayed access to Arab prisoners on the grounds that "all facilities would be granted as soon as the prisoners were transferred to the camp at Atlith. . . . In the meantime, delegates had the opportunity to see some of the prisoners at the transit camp at EI Quantara and Kusseima." *Id.* at 203 (citation omitted). Although Israel was technically obliged under the Convention to provide access to Arab POWs, immediate compliance with that obligation was infeasible.

¹⁰⁹ *Sierra Club v. Thomas*, 828 F.2d 783, 794 (D. C. Cir. 1987).

¹¹⁰ *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999).

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from Patrick F. Philbin, Deputy Military Commissions to Try Ter- es, Counsel to the President and m John C. Yoo, Deputy Assistant f Legal Counsel, *Re: Authority for States* at 2–3 (Oct. 17, 2001). , aff'd by an equally divided court, 7).

Conclusion

For the foregoing reasons, we conclude that neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions of al Qaeda prisoners. We also conclude that the President has the plenary constitutional power to suspend our treaty obligations toward Afghanistan during the period of the conflict. He may exercise that discretion on the basis that Afghanistan was a failed State. Even if he chose not to, he could interpret Geneva III to find that members of the Taliban militia failed to qualify as POWs under the terms of the treaty. We also conclude that customary international law has no binding legal effect on either the President or the military because it is not federal law, as recognized by the Constitution.

We should make clear that in reaching a decision to suspend our treaty obligations or to construe Geneva III to conclude that members of the Taliban militia are not POWs, the President need not make any specific finding. Rather, he need only authorize or approve policies that would be consistent with the understanding that al Qaeda and Taliban prisoners are not POWs under Geneva III.

Please let us know if we can provide further assistance.

Jay S. Bybee
Assistant Attorney General

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