

THE COMMON PLAN TO VIOLATE THE GENEVA CONVENTIONS

By Professor Jordan J. Paust *

If one focuses on the [January 25, 2002 Memorandum for the President](#) by White House Counsel Alberto R. Gonzales and President Bush's subsequent [decisions](#) and [authorizations](#), there is evidence of the initiation of a Common Plan to violate the 1949 Geneva Conventions.

Behind the Plan was a memorandum addressing possible war crime responsibility and designs for attempted avoidance of international criminal responsibility that was written by then DOJ OLC attorneys John Yoo and Robert Delahunty entitled "[Application of Treaties and Laws to Al Qaeda and Taliban Detainees](#)" written on [January 9, 2002](#) and "endorsed by top lawyers in the White House, the Pentagon and the vice president's office," according to the New York Times (Neil A. Lewis, "Justice Memos Explained How to Skip Prisoner Rights," NYT, May 21, 2004, at A10).

According to the Gonzales memo, the Common Plan involved at least those responsible for "the Department of Justice... formal legal opinion concluding... [with respect to] the [Geneva Convention III on the Treatment of Prisoners of War](#) (GPW)...that there are reasonable grounds for you to conclude that GPW does not apply with respect to the conflict with the Taliban. I understand that you decided that GPW does not apply..." adding: "OLC has further opined that you have the authority to determine that GPW does not apply to the Taliban... OLC's interpretation of this legal issue is definitive." According to the Yoo - Delahunty memo, when asked by General Counsel William Haynes about "the effect of international treaties... on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan... [and, i]n particular, ...whether the laws of armed conflict apply to the conditions of detention and the procedures for trial... [, w]e conclude that these treaties do not protect members of the al Qaeda organization... [and] do not apply to the Taliban..."

The Plan among White House Counsel Gonzales and President Bush (and evidently others in DOJ and DOD at the time) that is evidenced in the Gonzales memo was legally inept. The Plan openly admits the unavoidable fact that "the customary laws of war would still be available... Moreover, even if GPW is not applicable, we can still bring war crimes charges..." with respect to violations of the laws of war during the war in Afghanistan. Thus, the Plan recognizes that the customary laws of war apply to the war in Afghanistan but involves a design and decision to refuse to apply the 1949 Geneva Conventions despite the unavoidable facts: (1) that they apply to the war in Afghanistan, and (2) that they are treaty law that is also widely recognized as part of the customary laws of war that apply to the war in Afghanistan. As Secretary Colin Powell warned in his [memo of January 26, 2002](#), "The United States has never determined that the GPW did not apply to an armed conflict in which its forces have been engaged... the GPW was intended to cover all types of armed conflict and did not by its terms limit its application" (available at [here](#)). It was reported in early February 2002 that the White House changed its prior plan to not apply the Geneva Conventions to the war in Afghanistan that the US internationalized on October 7, 2001. The newer Plan attempted to erroneously deny any protections to members of al

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Qaeda captured in that war, but admit that the Geneva Conventions applied during the war. See [Paust, "Antiterrorism Military Commissions: Courting Illegality," 23 Mich. J. Int'l L. 1, 7 n.15 \(2001\)](#) [hereinafter "Antiterrorism"].

The Plan was to deny Geneva protections for the Taliban as well, claiming that they were all unlawful combatants and, as such, had no rights under the Geneva law -- which is also in error and in violation of the Conventions. See, e.g., [Paust, "Judicial Power To Determine the Status and Rights of Persons Detained Without Trial," 44 Harv. Int'l L.J. 503, 504 n.3 \(2003\)](#) [hereinafter "Judicial Power"]; "Antiterrorism," supra at 5-8 n.15.

The Plan attempted to rest on a supposed "high premium on other factors, such as the ability to quickly obtain information," supposed "military necessity," and a claim that a "new paradigm renders obsolete Geneva's strict limitations on questioning." However, none of these claims justify a Plan to violate the Geneva law.

[Common Article 1](#) of the Geneva Conventions requires the United States "to respect and to ensure respect for the" Conventions "in all circumstances." The Plan was to violate this duty.

[Common Article 3](#) requires that, "as a minimum," all persons taking no active part in the hostilities, regardless of their status, "shall in all circumstances be treated humanely" and shall enjoy listed minimum guarantees. The Plan was to violate these rights and duties.

No exceptions exist to the rights and prohibitions also contained, for example, in GPW Articles [13](#), [14](#), [16](#), [17](#), [130](#). No exceptions exist to the rights and prohibitions also contained, for example, in the [Geneva Convention Relative to the Protection of Civilian Persons in Time of War](#) (GC) Articles [8](#), [16](#), [27](#) (except for necessary measures of control and security as such), [29](#), [31](#), [32](#), [33](#), [43](#), [78](#), [147](#). The Plan was to violate these rights and duties.

As the Legal Adviser to the U.S. Department of State has written with respect to "the right to humane treatment -- a right that belongs to all humankind, in war and in peace," "[i]t is a general principle...that inhumane treatment is cruel and unacceptable under any circumstance... More broadly, this customary law...found more expansive expression in [Article 75](#) of Additional Protocol I to the Geneva Conventions. While the United States has major objections to parts of Additional Protocol I, it does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." William H. Taft, IV, "The Law of Armed Conflict After 9/11: Some Salient Features," 28 Yale J. Int'l L. 319, 321-22 (2003); see also Paust, "War and Enemy Status After 9/11: Attacks on the Laws of War, in id. at 325-35; "Judicial Power," supra at 504-14; [Paust, Abuse of Iraqi Detainees at Abu Ghraib: Will Prosecution and Cashiering of a Few Soldiers Comply With International Law?](#) Any person who is not a prisoner of war and who is detained, regardless of status, is protected under common Article 3 of the Geneva Conventions as well as other relevant international laws. Most are also entitled to protections under the Geneva Civilian Convention. See, e.g., materials cited previously and [U.S. Dep't of Army Field Manual 27-10](#), The Law of Land Warfare 31, para. 73 (1956). Thus, basic Geneva rights and duties concerning humane treatment apply whether or not a person detained is a prisoner of war, unprivileged belligerent, terrorist, or ordinary civilian.

Under the United States Constitution, the President (and members of the Executive branch) is bound to faithfully execute the law, which includes treaty law and customary

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international law. See, e.g., [U.S. Const., art. II, Sec. 3](#); Paust, *International Law as Law of the United States* 169-73 (2ed. 2003), and cases and materials cited. Thus, the Plan to violate the Geneva Conventions is not only illegal but is also unconstitutional. This inquiry focuses on the Plan evidenced in the Gonzales 2002 memo and reports concerning the Yoo-Delahanty memo. It does not begin to address the criminal authorizations, orders, and other actions effectuating the Plan or other plans that involve patent violations of the laws of war, such as plans (1) to remove persons who are not PWs from occupied territory in Afghanistan or Iraq in violation of GC Articles [49](#) and [147](#), (war crimes and "grave breaches"), (2) to engage in forced disappearance of persons by refusing to disclose names and/or whereabouts of those detained without trial, (3) to offer rewards "dead or alive" (a war crime), (4) to deny persons who might face trials in military commissions at Guantanamo the minimum due process rights that are required under human rights law and the Geneva Conventions, and (5) to adopt "20" or other secret interrogation techniques which apparently include some that are patent per se violations of the laws of war and human rights and some that are highly problematic and can constitute violations in particular circumstances.

With respect to planned denials of Geneva protections for those being interrogated, it has also been reported that there is evidence of an effectuation of the Common Plan at Guantanamo through April 2003 when Secretary of State Donald Rumsfeld ended the use of certain illegal tactics but approved other secret harsh methods, claiming that the Geneva law did not apply to the detainees. See [Robert Burns, "Lawyers Opposed Questioning at Guantanamo," FindLaw\(AP\), May 21, 2004](#). See also [DOD Background Briefing, May 20, 2004](#) (Di Rita: "the president had determined that the conflict...with the Taliban, while it was subject to the Geneva Conventions, people picked up as Taliban would be considered" unprotected; and a DOD Working Group created by General Counsel William Haynes in January 2003, with DOJ input, approved secret harsh interrogation techniques, which Secretary Rumsfeld approved in April 2003). There were also September 2003 and October 12, 2003 memos by Lt. Gen. Ricardo Sanchez concerning approved and need-to-be approved interrogation techniques in Iraq. We are still learning more about the impermissible interrogation techniques. Readers will recall that war crimes can range from "all measures of intimidation" through "inhumane treatment" and "cruel" treatment to "torture" and that the United States has several statutory bases for prosecution of both military and civilian persons who are reasonably accused of dereliction of duty, complicity, perpetration of various crimes, and direct involvement in common plans to violate the Geneva Conventions and other international criminal proscriptions. See, e.g., Paust, *Abuse of Iraqi Detainees*, supra.

Clearly, it is important that President Bush carry out his promise to initiate prosecution of all who are reasonably accused of relevant international crimes and end criminal practices such as illegal transfers of detainees, forced disappearance, and illegal forms of interrogation.

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