

# Gonzales and the Geneva Conventions

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As White House Counsel, Alberto Gonzales was at the center of policy discussions after September 11, 2001 about the applicability of the Geneva Conventions to the wars in Afghanistan, Iraq, and in what the Administration termed “the war on terror.” His views on executive power and U.S. treaty obligations led to significant departures by the Bush Administration from rules and procedures of the Geneva Conventions governing the detention and treatment of people captured in Afghanistan, Iraq and elsewhere. As Attorney General, Gonzales will be charged with ensuring that the fight against terrorism is conducted in compliance with the laws of the land. The burden should be on Gonzales to explain his views on whether U.S. treaty obligations – including those under the Geneva Conventions – constitute part of this law and must be upheld.

The Geneva Conventions of 1949, signed and ratified by the United States, codify the laws of war and apply to all international armed conflicts; they serve as the main instruments of

international humanitarian law to protect those caught up in war. Under the Conventions, there are two broad categories of persons who can be detained lawfully by an occupying power: (1) prisoners of war, and (2) civilians. The Conventions that cover these two categories – commonly known as the Third and Fourth Geneva Conventions, respectively – set out the terms of detention of each category of individuals, the protections to be accorded during their detention, and the circumstances under which they are to be released.<sup>1</sup>

## Gonzales’ Legal Opinions on the Applicability of the Geneva Conventions Raise Serious Concerns

At the heart of the analysis below is Gonzales’ advice in a memorandum to the President dated January 25, 2002 that the Geneva Conventions are inapplicable to captured members of Al Qaeda, and that members of the Taliban could be denied prisoner-of-war

status under the Third Convention. Although the January 25 memorandum is marked “draft,” we are unaware of any subsequent version of the memorandum refining – or in any way repudiating – its core findings. As the central legal statement of the White House on the Conventions, it had a significant impact on much that followed, including with regard to detainees transferred to Guantanamo Bay and those captured and detained in Iraq.

Gonzales’ legal advice to the President on the Geneva Conventions:

- Reverses longstanding U.S. policy and practice supporting application of the 1949 Conventions (and their predecessors);
- Undermines the Conventions’ protections for our own soldiers – a point central to the critique by Secretary of State Powell and his top legal officer – and undermines international cooperation on the laws of war;
- Implies that the United States may “need” to commit – and countenance – war crimes in its counterterrorism efforts, and so should avoid application of the Geneva Conventions to its actions because “grave breaches” of the Conventions would subject perpetrators to prosecution under U.S. law (Section 2441 of the War Crimes Act of 1996). Stating that “it is difficult to predict the needs and circumstances that could arise in the course of a “war on terrorism,” Gonzales’ memorandum suggests that a motive for concluding that the Conventions are inapplicable was to insulate U.S. personnel and leadership from criminal liability;
- Dismisses the risk that a determination of non-applicability of the Conventions to Afghanistan “could undermine U.S. military culture which emphasizes main-

taining the highest standards of conduct in combat”;

- Ignores the fact that the Third Geneva Convention permits detention in international armed conflict without filing criminal charges;<sup>2</sup> and
- Opens the door to broader departures from the Geneva Conventions by arguing that Convention parties that become “failed states” (the memorandum argues that Afghanistan under the Taliban is a “failed state”) are neither obligated nor protected by the Conventions during war. This view misstates and undermines the structure of humanitarian law protections, which are triggered by the application of either treaty or customary law to the territory of conflict, not on the basis of whether groups or individuals have signed or ratified Conventions that can only be signed and ratified by states.

## Gonzales’ Views on Geneva Conventions Led to Policy Confusion and Illegal Treatment of Detainees

### Afghanistan

U.S. detention policies relating to the war in Afghanistan have been shrouded in secrecy, prompting unclear and, at times, conflicting information about detainees’ legal status and rights.<sup>3</sup> Many of those captured in Afghanistan were removed to the U.S. Naval Base at Guantanamo Bay beginning in early 2002. By the time of those transfers, the Administration had already distanced itself from a policy of applying the Geneva Conventions to detainees captured in Afghanistan.

In early January 2002, Secretary of Defense Rumsfeld stated that the United States, as a matter of policy but not any legal obligation, would treat detainees from Afghanistan in a

manner “reasonably consistent with the Geneva Conventions” – without providing specifics; he also described an intent to “generally” follow the Conventions but only to “the extent they are appropriate.” The President, Secretary Rumsfeld, and other senior Administration officials early on cited those detained at Guantanamo Bay as “enemy combatants” or “unlawful combatants” – terms with unclear legal meanings and not used in either the Third or Fourth Geneva Convention;<sup>4</sup> indeed, Secretary Rumsfeld was explicit in stating on January 11 that “technically unlawful combatants do not have any rights under the Geneva Conventions.”<sup>5</sup>

At some point the Justice Department weighed in with what Gonzales in his January 25 memorandum termed a “formal legal opinion” concluding that the Third Geneva Convention on prisoners of war (GPW) did not apply to “the conflict with Al Qaeda,” and that there were “reasonable grounds” to conclude it also did not apply to the conflict with the Taliban. The Senate should uncover what role Gonzales, as the President’s chief legal advisor, played in this morass of policy and practice which the Schlesinger Report earlier this year described as “vague and lacking.”<sup>6</sup>

The exact sequence of developments in January 2002 remains unclear. In his January 25 memorandum, Gonzales states that a week before – on January 18 – he had advised the President about the Justice Department legal opinion with respect to both Al Qaeda and the Taliban, and that “I understand that you decided that that the GPW does not apply and, accordingly, that Al Qaeda and Taliban detainees are not prisoners of war under the GPW.” It adds that Secretary of State Powell “has requested that you reconsider that decision” and was of the view that the Convention applied to both Al Qaeda and Taliban detainees – or at least that they be afforded case-by-case review before being denied prisoner of war status.

The January 25 memorandum perhaps has become best known – and certainly most widely-quoted – for its language that the global “war on terrorism” “is a new kind of war” and that this “new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.”<sup>7</sup> But the language of the memorandum should not obscure Gonzales’ ultimate conclusion: that the Geneva Conventions do not apply to the war in Afghanistan

Gonzales’ conclusion that the two Geneva Conventions did not apply to Al Qaeda detainees, and that captured Taliban also did not merit POW status under the Third Geneva Convention, had direct, practical impact for U.S. detention policies and practices. The January 25 memorandum by Gonzales laid the foundation for subsequent Administration policy that the Geneva Conventions did not apply to those detainees – and that therefore the Conventions’ restrictions on cruel treatment did not afford such persons any legal protections.<sup>8</sup>

Gonzales’ memorandum provoked a quick and strong response – and call for an internal review – from the Department of State, with Secretary Colin Powell and the Department’s Legal Adviser William H. Taft IV raising concerns about the implications for U.S. forces of such a broad departure from the Conventions. (The memorandum indicates that Powell had sought reconsideration earlier – sometime between January 18 and 25; in any event, his concerns were laid out clearly in response to the Gonzales’ memorandum itself.) Powell responded to the January 25 memorandum with one of his own the following day, warning that “[i]t will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and will undermine the protections of the rule of law for our troops, both in this specific conflict and in general” – while also provoking a hostile international reaction “making military cooperation more difficult to sustain.” Taft set out his legal and policy con-

cerns in a February 2 memorandum directed to Gonzales, which stated in part: “A decision that the Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the Conventions in the event they are captured and weakens the protections afforded by the Conventions to our troops in future conflicts.”<sup>9</sup>

There is no public record of any subsequent memorandum issued in Gonzales’ name that superseded the January 25 “draft;” the upcoming confirmation hearings afford an opportunity to finally clarify what happened next. What *is* clear is that there soon followed a slight, but ultimately inconsequential, modification of position: the President (through his Press Secretary) announced on February 7 that the Conventions applied to captured members of the Taliban but not to Al Qaeda fighters, whether the latter were captured “in Afghanistan or elsewhere throughout the world.” While the President – based on the Gonzales’ analysis – affirmed his constitutional authority to suspend application of the Geneva Conventions with regard to Afghanistan, he added that “I decline to exercise that authority at this time.”<sup>10</sup> The President further concluded that the Taliban were not entitled to POW status under the Third Geneva Convention, based on Gonzales’ flawed argument about “failed states” and in contravention of U.S. Army regulations requiring individualized determinations of the status of prisoners.

Gonzales’ arguments drew heavily from a memorandum by Jay S. Bybee, head of the Justice Department’s Office of Legal Counsel, addressed to Gonzales and Defense Department General Counsel William Haynes. (This 37-page OLC memorandum is dated January 22, though Gonzales says he told President Bush about the OLC’s legal opinion on January 18 and that the President made his determination of non-applicability of the Third Convention that same day – four days before the date of the Bybee memorandum that has

been made publicly available.) The argument detailed in the Bybee memorandum, and in turn the Gonzales’ “draft” to the President, was that the Taliban did not exercise full control over the territory and people of Afghanistan, was not recognized by the international community, and had not fulfilled its own international obligations – and that it was not a government but rather a “militant, terrorist group.”

This multi-part standard for what constitutes a “failed state” drew from both the Restatement (Third) on Foreign Relations Law and a State Department document. But neither of those was intended to be used to determine the applicability of the Geneva Conventions to a particular conflict. Gonzales, drawing on Bybee, applied the standard for whether Afghanistan was a “normal” functioning state to impose a sweeping constraint on application of the Geneva Conventions to individuals associated with the Taliban, not just those who were part of Al Qaeda.

## Iraq

Unlike Afghanistan, from the launch of the war in Iraq in March 2003 through the continuing occupation phase, the Bush Administration regularly stated that the Geneva Conventions apply to the conflict there.<sup>11</sup> So clear was the judgment that the Conventions would apply in Iraq that Gonzales noted the reason President Bush had not made a formal determination invoking the Conventions pre-invasion was “because it was automatic that Geneva would apply.”<sup>12</sup>

Yet despite the clarity in public statements about the Conventions’ applicability to Iraq, the Administration has created considerable uncertainty on the ground. Much of this confusion emanated from statements by Defense Department officials and memoranda generated by the Justice Department, but as White House Counsel, Gonzales played a role in creating uncertainty about whether the Con-

ventions' legal protections apply to detainees held in Iraq.

In April 2003, soon after the invasion, the Defense Department stated that it was holding detainees either as prisoners of war under the Third Geneva Convention, or as civilian internees under the Fourth Convention. One month later, the Department used the term "unlawful combatants" apparently as a new category of detainees; then in September 2003 it used the term "security detainees" to describe a separate category for Iraqi prisoners suspected of being involved in attacks on U.S. forces there.<sup>13</sup>

Gonzales later weighed in on the application of the Geneva Conventions to Iraq in another significant way, when he requested that the Justice Department prepare a memorandum concerning the meaning of Article 49 of the Fourth Geneva Convention – which broadly prohibits transfers of "protected persons from occupied territory" – as applied to Iraq. Jack Goldsmith III, successor to Bybee as head of the Office of Legal Counsel, responded with a "draft" memorandum dated March 19, 2004 to Gonzales and also sent to the top legal officials at the Departments of State and Defense, National Security Council, and Central Intelligence Agency.

The March 19 Goldsmith memorandum – made public in late 2004 – stated that it was elaborating on an October 2003 "interim guidance" about the permissibility under the Fourth Convention of such relocation of "protected persons." The Goldsmith memorandum concluded that the United States would be acting consistently with Article 49 were it to remove one set of "protected persons" – illegal aliens – from Iraq pursuant to local immigration law, and that in addition it could relocate both illegal aliens and other "protected persons" from Iraq to another country to "facilitate interrogation" – as long as (1) that was for a "brief but not indefinite period", and (2) adjudicative

proceedings had not been brought against such individuals.

Goldsmith's memorandum to Gonzales sheds light on his involvement in the "ghost detainee" program of secret detentions, described by Army Maj. Gen. Antonio Taguba in his report as "deceptive, contrary to Army doctrine and in violation of international law." The *Washington Post* has reported that Gonzales asked the Office of Legal Counsel in October 2003 to address the legality of the removal of at least one detainee, Hiwa Abdul Rahman Rashul (known as "Triple X" by government officials). Unhappy with the narrowness of that opinion, the CIA then urged Gonzales to obtain a broader legal opinion that would expand the number of people who could be moved secretly out of Iraq.<sup>14</sup> The March 2004 Goldsmith memorandum followed.<sup>15</sup>

The Goldsmith memorandum argues that the Fourth Convention, which the U.S. ratified and became the law of the United States in 1955, does not prohibit the removal of "protected persons" who are illegal aliens. Article 49 of the Fourth Convention, however, clearly states: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive." The Goldsmith memorandum goes to great lengths to deprive the article of any substantive meaning, contending that the provision only contemplates the deportation of inhabitants. Yet the International Committee of the Red Cross – the authoritative commentator on the Convention – views the prohibition as absolute and allowing for no exceptions.

The Goldsmith memorandum also argues that any protected person under the Convention, whether an Iraqi or not, may be transferred out of the country, so long as the military has not accused the individual of wrongdoing. Article 76 of the Fourth Convention provides that "protected persons accused of offenses shall

be detained in the occupied country.” The Goldsmith memorandum tries to evade this prohibition by concluding that the United States may remove a person from Iraq where the intent is only to interrogate that person for something short of an “indefinite” period – an approach that permits the U.S. military to simply designate all protected persons for interrogation and remove them from Iraq, and out of the sight of the ICRC, and any accountability.

Finally, the Goldsmith memorandum also ignores numerous provisions in the Fourth Convention and U.S. military regulations requiring a system that ensures an accounting of the detainees, including a system to notify families of those interned of the fact of their internment, their address, their state of health, and of changes to their condition. This applies to both combatant and civilian internees of any legal status, and applies both during international armed conflict and during periods of occupation. As both U.S. military and ICRC reports have made clear, the United States has failed to meet its obligations in this respect. Given that the Goldsmith memorandum has only recently come to light and not been scrutinized to date publicly, Gonzales should be asked about it – and his role in seeking OLC’s analysis.

## Questions for Gonzales on the Geneva Conventions

**1** What is the status of the memorandum dated January 25, 2002 from you as White House Counsel to the President concerning the “Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban?” It is marked “Draft;” was there a later, final version of the memorandum?

**2** Do you stand by the legal conclusions in your January 25 memorandum? Do they remain the views of the Administration today? Do the Geneva Conventions, in your view, apply to *any* of those detained in the Afghanistan conflict?

**3** What is your view of the concerns raised by Secretary of State Powell and State Department Legal Adviser Taft – both before you prepared your January 25 memorandum and in the days immediately afterwards? Your memorandum suggests that “on balance” you found them “unpersuasive” at the time, but were they reflected in any final analysis that you provided to the President? If not, why not?

**4** As Attorney General you would oversee the Office of Legal Counsel. Your January 25 memorandum states that “OLC’s interpretation of this legal issue is definitive.” But that interpretation does not prevent the President from reaching a different conclusion, does it? And in any event, OLC’s views are not definitive with respect to factual questions about whether a particular detainee should be entitled to prisoner of war status, are they?

**5** If the Administration’s overarching goal was to not have Taliban or Al Qaeda treated across the board as prisoners of war, couldn’t that have been accomplished in a more focused manner, through individualized Article 5 status review hearings – something that Secretary Powell had proposed, as you

note in your January 25 memorandum? Do you still believe it was necessary to broadly repudiate the Geneva Conventions' applicability to those captured in Afghanistan? What would have been wrong with individual hearings to determine whether POW status was appropriate – as had been done in numerous earlier conflicts?

**6** You spent a considerable portion of your January 25 memorandum noting how the conclusion that the Geneva Conventions did not apply to Al Qaeda or the Taliban “substantially reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441).” Could you explain why you were so concerned about application of a provision enacted in 1996 by the Congress to cover “grave breaches” of the Geneva Conventions? What did you mean there by the “needs and circumstances that could arise in the course of the war on terrorism” – would those be a justification for excusing any punishment for the most serious violations of the Conventions?

**7** Your memorandum, while disavowing application of the Third Geneva Convention to Taliban detainees, apparently tries to provide some reassurance about U.S. treatment of detainees more broadly – saying that the U.S. will still be “constrained” by applicable military regulations as well as “applicable treaty obligations.” Which obligations does this include? The Fourth Geneva Convention? Common Article 3? The Convention Against Torture? The International Covenant on Civil and Political Rights? Could you elaborate on what you meant there, as well as by “minimum standards of treatment universally recognized by the nations of the world?”

**8** You close your memorandum by noting that “our military remains bound to apply the principles of GPW [the Third Geneva Convention] because that is what you have directed them to do.” What “principles” were you referring to here? Wouldn't you concede

that a decision to explicitly not apply the Conventions to detainees from Afghanistan might at least create some confusion about whether its “principles” nevertheless applied?

**9** Late last year, you requested that the Justice Department's Office of Legal Counsel prepare a memorandum on the applicability of Article 49 of the Fourth Geneva Convention – and specifically whether that provision barred the removal of certain detainees from Iraq to other locations. As you know, concerns have been raised – including by Army Maj. Gen. Taguba in his report on Abu Ghraib – about the policy of holding so-called “ghost detainees” in secret locations, and denying the Red Cross access to them. On October 24 the *Washington Post* reported that a U.S. intelligence official said that the CIA has used the Justice Department's memorandum “as legal support for secretly transporting as many as a dozen detainees out of Iraq in the last six months” – concealing them from the Red Cross and others. Can you discuss the rationale for asking OLC for that memorandum – what was the reason their advice was sought at that time? And how was that advice utilized?

**10** Do you agree with the legal analysis in the memorandum that Assistant Attorney General Jack Goldsmith sent to you in March of this year on Article 49? How does it square with the explicit language of that provision indicating that transfers from occupied territory to any other country “are prohibited, regardless of their motive?” In light of the concerns raised by Maj. Gen. Taguba and many others about a program of secretly transferring “ghost detainees” from Iraq, would you now be prepared to reevaluate the conclusions reached in that March 19 memorandum?

**11** Do you support the 9/11 Commission's recommendation that all U.S. Armed Forces and other government agencies engaged in detention and interrogation should observe Geneva Convention protections for all combatants and civilians? Do you support the further recommendation that the United States should publicly affirm our binding obligation to prohibit violence, cruel treatment, torture, or any other outrages upon personal dignity, including humiliating and degrading treatment, of those in U.S. custody – citing the language of Geneva Common Article 3?

## Section Notes

<sup>1</sup> Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

<sup>2</sup> Both the Third and Fourth Conventions allow for detention without criminal charge in international armed conflict. As for non-international armed conflict, neither Common Article 3 nor Additional Protocol II, nor applicable customary international law prohibit it, but authorization must come from domestic, not international law.

<sup>3</sup> See Human Rights First, *Ending Secret Detentions*, June 2004, at 4-5, 9-10 [hereinafter *Ending Secret Detentions*, available at [http://humanrightsfirst.org/us\\_law/PDF/EndingSecretDetentions\\_web.pdf](http://humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf) (accessed Nov. 28, 2004)].

<sup>4</sup> Indeed, in the course of the combat in Afghanistan and Iraq the Executive Branch introduced a number of other terms to cover different categories of detainees, including at least two additional sub-categories of “enemy combatants” – thus adding to the confusion about whether, and to whom, the Geneva Conventions might apply. See Human Rights First, *Getting to Ground Truth*, Sept. 2004 [hereinafter *Getting to Ground Truth*], at 7 n. 20-21 (accompanying text). In stark comparison, in its commentary on the Geneva Conventions the International Committee of the Red Cross has made clear that one is “either a prisoner of war and as such covered by the Third Convention, [or] a civilian covered by the Fourth Convention. There is no intermediate status; nobody in enemy hands can be outside the law.” ICRC *Commentary*, Fourth Geneva Convention, p. 51 (1958). All individuals (whether deemed enemy combatants or not) must fall within the protections of the Third or Fourth Geneva Convention or the customary provisions of Article 75 Protocol I. This critical point has been stated on more than one occasion by William H. Taft, IV, legal adviser to the State Department. See, e.g., William H. Taft, IV, *Symposium: Current Pressure on International Humanitarian Law: The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 320-23 (2003). Where an individual is found not to be a POW, the Fourth Convention offers numerous avenues for the United States in its treatment of such a detainee. One notable path is prosecution for participation in unlawful hostilities, though such participation does not remove one from the Convention’s protection. And Judge James Robertson, in his November 8, 2004 ruling in *Hamdan v. Rumsfeld* concerning the status of detainees at Guantanamo Bay, squarely rejected the effort to create a category outside the reach of the Conventions, finding that they applied “to all persons detained in Afghanistan during the hostilities there.” No. 04-1519 (JR) (D.D.C. Nov. 8, 2004), at 16, available at [http://www.humanrightsfirst.org/us\\_law/PDF/detainees/hamdan-order-110804.pdf](http://www.humanrightsfirst.org/us_law/PDF/detainees/hamdan-order-110804.pdf), accessed Nov. 28, 2004.

<sup>5</sup> See *Ending Secret Detentions*, *supra* note 3, at 20 n. 148.

<sup>6</sup> *Getting to Ground Truth*, *supra* note 4, at 7; final report of the Indep. Panel to review DOD Detention Operations, August 2004 [hereinafter Schlesinger Report], at 14 and 81.]

<sup>7</sup> Memorandum of Alberto Gonzales, White House General Counsel to President George W. Bush, *Re: Decision Re Application of the Geneva Convention on Prisoners of*

*War to the Conflict with Al Qaeda and the Taliban* (January 25, 2002) [hereinafter Gonzales Memorandum], at 2.

<sup>8</sup> One key example of a later document that borrows from the earlier analysis is the Defense Department Working Group Report on Detainee Interrogations in the Global War on Terrorism, a detailed report issued on April 4, 2003 to Secretary of Defense Rumsfeld and recommending a series of interrogation techniques for use with those designated as “unlawful combatants.” That report in turn provided a foundation for the order issued by the Secretary of Defense implementing 24 specific interrogation techniques at Guantanamo Bay and in Iraq.

<sup>9</sup> Memorandum from William H. Taft IV, Legal Adviser, Department of State, to Counsel to the President Alberto Gonzales, Feb. 2, 2002. Taft’s concerns were enunciated recently by Federal District Court Judge James Robertson in his decision in *Hamdan v. Rumsfeld* concerning a Guantanamo detainee: the Administration’s position “can only weaken the United States’ own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad.” *Hamdan*, *supra* note 4, at 21.

<sup>10</sup> Memorandum of President Bush, *Humane Treatment of Al Qaeda and Taliban Detainees*, Feb. 7, 2002.

<sup>11</sup> *Ending Secret Detentions*, *supra* note 3, note 146 and accompanying text. (quoting Defense Department officials on application of Geneva Conventions).

<sup>12</sup> Seymour M. Hersh, CHAIN OF COMMAND, at 5 (2004).

<sup>13</sup> See *Ending Secret Detentions*, *supra* note 3, at 11-13 (discussing these and other categories used to designate detainees capture in Iraq).

<sup>14</sup> Dana Priest, “Memorandum Lets CIA Take Detainees Out of Iraq,” WASH. POST, Oct. 24, 2004, at A1.

<sup>15</sup> Despite the Goldsmith memorandum’s distribution in “draft” form, one intelligence official described the memorandum as a “green light” for the CIA’s removing people from Iraq. *Id.* Government officials have acknowledged at least a dozen detainees were transferred out of Iraq on the strength of these legal opinions. Douglas Jehl, “U.S. Action Bars Rights of Some Captured in Iraq,” N.Y. TIMES, Oct. 25, 2004, at A1.