CHAPTER ONE

EXECUTIVE PLANS AND AUTHORIZATIONS TO VIOLATE INTERNATIONAL LAW CONCERNING TREATMENT AND INTERROGATION OF DETAINEES

A. INTRODUCTION

A common plan to violate customary and treaty-based international law concerning the treatment and interrogation of so-called terrorist and enemy combatant detainees and their supporters captured during the U.S. war in Afghanistan emerged within the Bush administration in 2002. The plan was developed within months after the United States had used massive military force in Afghanistan on October 7, 2001, against local members of al Qaeda and "military installations of the Taliban regime"[1] during the war in Afghanistan that is still ongoing. It was approved in January 2002 and led to high-level approval and use of unlawful interrogation tactics that year and in 2003 and 2004. A major part of the plan was to deny protections under the customary laws of war and treaties that require humane treatment of all persons who are detained during an armed conflict, regardless of their status and regardless of any claimed necessity to treat human beings inhumanely. The common plan and authorizations have criminal implications, as denials of protections under the laws of war are violations of the laws of war, which are war crimes.[2]

B. THE AFGHAN WAR, LAWS OF WAR, AND HUMAN RIGHTS

The October 7 Afghan war became an international armed conflict between U.S. combat forces and the Taliban regime, which had been a *de facto*

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government in control of some 90 percent of the territory of Afghanistan and had been recognized by a few states as the *de jure* government of Afghanistan.[3] The Taliban regime also had been involved in a belligerency with the Northern Alliance, an armed conflict to which the general laws of war applied even before U.S. entry into Afghanistan in October 2001.[4] Moreover, it was reported that during the belligerency thousands of members of the regular armed forces of Pakistan were involved in the armed conflict in support of the Taliban,[5] a circumstance that also had internationalized the armed conflict before to the U.S. intervention.

During an international armed conflict such as the war between the United States and the Taliban regime, all of the customary laws of war apply.[6] These also apply during a belligerency.[7] Customary laws of war include the rights and duties reflected in the 1949 Geneva Conventions,[8] which had been, and still are, treaties that are binding on the United States and Afghanistan and their nationals.[9] Common Article 1 of the Geneva Conventions expressly requires that all of the signatories respect and ensure respect for the Conventions "in all circumstances."[10] It is widely recognized that common Article 1, among other provisions, thereby assures that Geneva law is nonderogable, and that alleged necessity poses no exception[11] unless a particular article allows derogations on the basis of necessity.[12] Article 1 also provides that the duty to respect and to ensure respect for Geneva law is not based on reciprocal compliance by an enemy[13] but rests on a customary *obligatio erga omnes* (an obligation owing by and to all humankind)[14] as well as an express treaty-based obligation assumed by each signatory that is owing to every other signatory whether or not they are involved in a particular armed conflict.[15] Furthermore, Article 1 ensures that reprisals in response to enemy violations are not permissible.[16] Each recognition above assures that, indeed, as expressly mandated in Article 1, the rights and duties set forth in the Geneva Conventions must be observed "in all circumstances."

Common Article 3 of the 1949 Geneva Conventions is an example of the customary and treaty-based law of war[17] that provides certain rights and duties with respect to any person who is not taking an active part in hostilities, thus including any person detained whether or not such a person had previously engaged in hostilities and regardless of the person's status. Common Article 3 also happens to expressly require that all such persons "shall in all circumstances be treated humanely," thereby assuring

that humane treatment is required regardless of claimed necessity or other alleged excuses. Although common Article 3 was developed in 1949 to extend protections to certain persons during an insurgency or armed conflict not of an international character,[18] common Article 3 now provides a minimum set of customary rights and obligations during any international armed conflict.[19]

Under the Geneva Conventions, any person who is not a prisoner of war has rights under the Geneva Civilian Convention, and there is no gap in the reach of at least some forms of protection and rights of persons.[20] For example, as noted, common Article 3 assures that any person detained has certain rights "in all circumstances" and "at any time and in any place whatsoever," whether the detainee is a prisoner of war, unprivileged belligerent, terrorist, or noncombatant.[21] Such absolute rights include the right to be "treated humanely"; freedom from "violence to life and person";[22] freedom from "cruel treatment and torture";[23] freedom from "outrages upon personal dignity, in particular, humiliating and degrading treatment";[24] and minimum human rights to due process in case of trial.[25] Article 75 of Protocol I to the 1949 Geneva Conventions assures the same minimum guarantees to every person detained, regardless of status.[26] Although the United States has not ratified the Protocol, the then Legal Adviser to the U.S. Secretary of State had rightly noted that the customary "safety-net" of fundamental guarantees for all persons detained during an international armed conflict found "expression in Article 75 of Protocol I," which the United States regards "as an articulation of safeguards to which all persons in the hands of an enemy are entitled," and that even unprivileged belligerents or terrorists "are not 'outside the law'" and "do not forfeit their right to humane treatment – a right that belongs to all humankind, in war and in peace."[27]

In addition to fundamental *erga omnes* and customary rights and protections under common Article 3 of the Geneva Conventions and customary law reflected in Article 75 of Protocol I, there are several other articles in the Geneva Civilian Convention that provide rights and protections. Article 4 of the Geneva Civilian Convention assures that foreign persons outside the territory of the United States are entitled to protections in Parts II and III of the Convention.[28] Part II applies to "the whole of the populations of the countries in conflict"[29] and protections therein include the duty of parties to an armed conflict, "[a]s far as military considerations

allow . . . to assist . . . persons exposed to grave danger, and to protect them against . . . ill-treatment."[30] Within Part III of the Convention, one finds additional rights and guarantees relevant to the treatment and interrogation of persons. For example, Article 27 recognizes that "[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs"; it adds that "[t]hey shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity."[31] Article 31 requires that "[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."[32] Article 32 supplements the prohibitions by requiring that parties to the Convention are "prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands . . . [which] applies not only to murder, torture, corporal punishment, mutilation and . . . [other conduct], but also to any other measures of brutality whether applied by civilian or military agents."[33] Article 33 includes the recognition that "all measures of intimidation or of terrorism are prohibited."[34]

Customary and treaty-based human rights are also relevant to the treatment and interrogation of human beings, and human rights law continues to apply during war.[35] Human rights law provides basic rights for every human being and includes the fundamental and inalienable right to human dignity.[36] Some human rights are derogable under special tests in times of public emergency or other necessity,[37] but many human rights are nonderogable and are therefore absolute regardless of claims of necessity during war or other public emergency and regardless of any other putative excuse.[38] Certain human rights are also peremptory *jus cogens* that cannot be derogated from and that preempt any other laws.[39]

Thus, in every circumstance every human being has some forms of protection under human rights law. With respect to treatment and interrogation of human beings, customary and treaty-based human rights law that is nonderogable under all circumstances and is also part of peremptory rights and prohibitions (*jus cogens*) requires that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[40] As customary and peremptory rights and prohibitions *jus cogens*, the prohibitions of torture and cruel, inhuman, or degrading treatment apply

universally and without any limitations in allegedly valid reservations or understandings during ratification of a relevant treaty,[41] such as those attempted with respect to the International Covenant on Civil and Political Rights (ICCPR)[42] or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[43]

C. EXECUTIVE PLANS AND AUTHORIZATIONS

Despite such clear and absolute requirements under the laws of war and human rights law, the plan within the Bush administration to deny protections under international law that led to approval and use of illegal interrogation tactics rested on what White House Counsel Alberto Gonzales advised President Bush in January 2002 was a supposed "high premium on other factors, such as the ability to quickly obtain information,"[44] supposed "military necessity,"[45] and a claim that a supposedly "new paradigm renders obsolete Geneva's strict limitations on questioning."[46] However, none of these claims could possibly justify the plan to violate Geneva law and nonderogable human rights. Moreover, the Gonzales memo clearly placed the President on notice that the Geneva Conventions provide "strict limitations on questioning," but the President's subsequent decisions and authorizations, coupled with recommendations, decisions, authorizations, and orders of others within the administration and the military, set the common plan to deny Geneva protections and use illegal interrogation tactics in motion.

The 2002 Gonzales memo to the President addressed certain war crimes under one of two federal statutes that can be used to prosecute U.S. and foreign nationals for war crimes.[47] It expressly noted that a war crime includes "any violation of common Article 3 . . . (such as 'outrages against personal dignity')"[48] and rightly warned that "[s]ome of these provisions apply (if the GPW[49] applies) regardless of whether the individual being detained qualifies as a POW," a point that Legal Adviser to the Secretary of State William H. Taft IV had made two days earlier in a letter to John Yoo at the Office of Legal Counsel (OLC), Department of Justice (DOJ): "Even those terrorists captured in Afghanistan . . . are entitled to the fundamental humane treatment standards of Common Article 3 of the Geneva Conventions – the text, negotiating record, subsequent practice and legal opinion

confirm that Common Article 3 provides the minimal standards applicable in any armed conflict."[50]

The plan to deny Geneva protections and to authorize illegal interrogation tactics would be furthered, Gonzales opined, by "[a]dhering to your determination that GPW does not apply."[51] The memo to the President further claimed that "[a] determination that GPW is not applicable to the Taliban would mean that . . . [the federal criminal statute addressed supposedly] would not apply to actions taken with respect to the Taliban."[52] The latter claim is not true in view of numerous judicial decisions throughout our history reviewing Executive decisions concerning the status of persons during war[53] and affirming constitutionally based judicial power ultimately to decide whether and how the laws of war, as relevant law, apply,[54] points documented in detail in Chapter Four. Nonetheless, the claim is evidence of an unprincipled plan to evade the reach of law and to take actions in violation of Geneva law while seeking to avoid criminal sanctions. All were on notice of what the application of Geneva law required.

As the Gonzales memo noted, the President had previously followed the White House Counsel's advice on January 18 as well as that set forth in a Department of Justice formal legal opinion and the President had decided, in error, that GPW did not apply during the war in Afghanistan.[55] The Gonzales memo noted that "the Legal Adviser to the Secretary of State has expressed a different view," but Gonzales pressed the plan to adhere "to your determination that GPW does not apply" precisely because among the "consequences of a decision to adhere . . . to your earlier determination that the GPW does not apply to the Taliban" would be the supposed avoidance of "Geneva's strict limitations on questioning" so as to enhance "the ability to quickly obtain information." Another supposed consequence would be the avoidance of "foreclosing options for the future, particularly against nonstate actors." Most important, Gonzales supposed, a consequence of the determination would be a "[s]ubstantial reduc[tion] of the threat of domestic criminal prosecution [of U.S. personnel] under the War Crimes Act (18 U.S.C. 2441)" because it "would mean that Section 2441 would not apply to actions taken with respect to the Taliban," and the determination "would provide a solid defense to any future prosecution."[56] As noted above however, Geneva law clearly did apply and the President cannot foreclose judicial recognition of the reach and application of international law.

The day after Gonzales crafted his memo, an outraged Secretary of State Colin Powell sent a memo to the White House Counsel and the Assistant to

the President for National Security Affairs warning that "[t]he United States has never determined that the GPW did not apply to an armed conflict in which its forces have been engaged. . . . [T]he GPW was intended to cover all types of armed conflict and did not by its terms limit its application."[57] Such a warning was reiterated a week later in a memo by the Legal Adviser to the Department of State, William H. Taft IV, to White House Counsel Gonzales:

> The President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years. It is consistent with the advice of DOS lawyers and, as far as is known, the position of every other party to the Conventions. It is consistent with UN Security Council Resolution 1193 affirming 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."[58]

Attorney General John Ashcroft, however, had been opposed to similar advice from the National Security Council and had urged the President to deny applicability of the Geneva Conventions and their protections in an effort to avoid criminal sanctions because:

> 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.[59]

The President adhered to the erroneous decision until February 7, 2002 (four months after U.S. entry into the Afghan war), when the White House reversed itself and announced that the Geneva Conventions applied to the war in Afghanistan, but in a memorandum issued on that date the President authorized the denial of protections under common Article 3 of the Geneva Conventions to every member of al Qaeda and the Taliban.[60] This memorandum also authorized the denial of protections more generally by ordering that humane treatment be merely "in a manner consistent with the principles of Geneva" and then only "to the extent appropriate and

consistent with military necessity," despite the fact that (1) far more than the "principles" of Geneva law apply, (2) it is not "appropriate" to deny treatment required by Geneva law, and (3) alleged military necessity does not justify the denial of treatment required by Geneva law. The memorandum's language limiting protection "to the extent appropriate" is potentially one of the broadest putative excuses for violations of Geneva law. Necessarily, the President's memorandum of February 7, 2002, authorized and ordered the denial of treatment required by the Geneva Conventions and, therefore, necessarily authorized and ordered violations of the Geneva Conventions, which are war crimes.

With respect to members of al Qaeda in particular, the White House announced at that time that members of al Qaeda "are not covered by the Geneva Convention" and will continue to be denied Geneva law protections, supposedly because al Qaeda "cannot be considered a state party to the Geneva Convention."[61] As noted soon thereafter, however:

> [t]he White House statement demonstrates remarkable ignorance of the nature and reach of treaties and customary international law. First, any member of al Qaeda who is a national of a state that has ratified the relevant treaties is protected by them. Nearly every state, including Saudi Arabia, is a signatory to these treaties. Second, the 1949 Geneva Conventions are part of customary international law that is universally applicable in times of armed conflict and, as such, protect all human beings according to their terms. Third, common Article 3 provides nonderogable protections and due process guarantees for every human being who is captured and, like common Article 1, assures their application in all circumstances. Also, international terrorism and terrorism in war are not new and clearly were contemplated during the drafting of the treaties.[62]

The Legal Adviser to the State Department had also aptly warned that the portion of the Gonzales memo:

> [s]uggesting 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.[63]

The plan involving White House Counsel Gonzales and President Bush evidenced in the Gonzales memo was legally inept for an additional reason. The memo openly admitted 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" against members of al Qaeda and the Taliban with respect to violations of the customary laws of war occurring during the war in Afghanistan.[64] Thus, the plan recognized that the customary laws of war apply to the war in Afghanistan and apply to members of al Qaeda and the Taliban, but the plan involved a design and decision to refuse to apply provisions of the Geneva Conventions that provide protections for such persons despite the unavoidable facts: (1) that as treaty law the Geneva protections also apply during the international armed conflict in Afghanistan; and (2) that Geneva protections are also widely recognized as constituting part of the customary laws of war that apply to international armed conflicts like the war in Afghanistan and, thus, to members of al Qaeda and the Taliban during and within that armed conflict.[65] Moreover, the Gonzales memo had paid no attention to similar protections and requirements under customary and treaty-based human rights law.

Behind the Gonzales-Bush plan was a memorandum written on January 9, 2002, that had also addressed possible war crime responsibility of U.S. nationals and designs for attempted avoidance of international and domestic criminal responsibility for interrogation tactics (that would later be approved) by claiming that Geneva law did not protect members of al Qaeda or the Taliban. The memo was written in the Office of Legal Counsel of the Department of Justice by John Yoo and Robert J. Delahunty for William J. Haynes II, General Counsel of the Department of Defense.[66] It was the DOJ memo that had been referred to in the Gonzales memo to President Bush and it was quickly "endorsed by top lawyers in the White House, the Pentagon and the vice president's office"[67] to further the common plan.

The Yoo-Delahunty memo had argued in support of denial of Geneva protections for members of al Qaeda that "the laws of armed conflict . . . [based in] 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."[68] As noted, however, protection of al Qaeda persons during an armed conflict does not depend on whether al Qaeda is a state actor or a party to law of war treaties.[69] The Yoo-Delahunty memo recognized that violations of common Article 3 of the Geneva Conventions are war

crimes,[70] but argued that the text and historic origins of common Article 3 support their preference that it only applies during a noninternational armed conflict.[71] As noted, however, common Article 3 is now part of customary international law that provides a set of rights and obligations during any international armed conflict.[72] Moreover, the same rights and obligations are mirrored in Article 75 of Protocol I, which the United States recognizes as customary international law applicable during international armed conflicts.[73] Yoo and Delahunty knew that their claim was completely contrary to developments in the customary laws of war recognized by the International Court of Justice and the International Criminal Tribunal for Former Yugoslavia,[74] but they thought that their reliance on a fifty-three-year-old text and "historical context" was preferable[75] despite the fact that it is well known that treaties are to be construed also in light of their object and purpose, subsequent practice, and developments and evolved meanings in customary international law.[76] Moreover, they did not address customary and treaty-based human rights law that provide the same fundamental rights and duties.

With respect to the Taliban, Yoo and Delahunty argued in support of denial of Geneva protections during the war in Afghanistan that Afghanistan "ceased . . . to be an operating State and therefore that members of the Taliban . . . were and are not protected by the Geneva Conventions."[77] Their ploy was hinged on a claim that Afghanistan had ceased to be a state and, thus presumably, had ceased to be a party to the Geneva Conventions. Therefore, U.S. citizens could supposedly ignore "the protections of the Geneva Conventions" and allegedly avoid criminal prosecution for future war crimes.[78] They confused the question of whether Afghanistan existed with the question of whether the Taliban government was a *de jure* or *de facto* government.[79] It did not suit their purpose that foreign states had recognized the Taliban government,[80] that the Taliban controlled some "90% of the country,"[81] that it had a government and could field an army in war, and that it was engaged in a war with the United States, so they downplayed or ignored such features of context. Incredibly, they also argued that even if the Geneva Conventions do not apply, the United States could prosecute members of the Taliban for war crimes, including, illogically, "grave violations of . . . basic humanitarian duties under the Geneva Conventions."[82] Of course, prosecution of members of the Taliban for war crimes is not legally possible if the laws of war do not apply to their actions, and if the laws of