On January 18, 2002, President George Bush (the decision is referenced[1] in the Gonzales Memo of 25 January, 2002) made a presidential decision that captured members of Al Quaeda and the Taliban were unprotected by the Geneva POW Convention. That decision was preceded by a Memorandum dated January 9, 2002, submitted to William J Haynes II, General Counsel to the Department of Defense, by the Department of Justice's Office of Legal Counsel (which provides legal counsel to the White House and other executive branch agencies) and written by Deputy Assistant Attorney General John Yoo and Special Counsel Robert J. Delahunty.

The Yoo Delahunty Memorandum of January 9, 2002

The Yoo/Delahunty Memorandum provided the analytical basis for all which followed regarding blanket rejection of applicability of the Third Geneva Convention to captured members of al Qaeda and the Taliban. Its validity is, accordingly, analyzed in some detail at the end of this discussion.

The Rumsfeld Order January 19, 2002

In a Memorandum dated 19 January, 2002, Secretary of Defense Donald Rumsfeld ordered the Chairman of the Joint Chiefs of Staff to inform combat commanders that "Al Quaeda and Taliban individuals...are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949." He ordered that "commanders should "...treat them humanely, and to the extent appropriate and consistent with military necessity, consistent with the Geneva Conventions of 1949." That order thus gives commanders permission to depart, where they deem it appropriate and a military necessity, from the provisions of the Geneva Conventions.

The Bybee Memorandum of 22 January, 2002

The Bybee Memo, Memorandum of 22 January, 2002 from Jay Bybee, Office of Legal Counsel 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 ,* follows the same structural pattern as the Yoo/Delahunty Memo, but with additional analysis of certain international law/ law of war issues. Parts of it are also discussed below in some detail.

The Alberto Gonzales Memo January 25, 2002

On January 25, 2002, White House Counsel Alberto Gonzales sent a Memorandum to

President Bush regarding a presidential decision on January 18, 2002, (the White House has issued an Order to that effect, dated February 7, 2002, see below) that captured members of the Taliban were not protected under the Geneva POW Convention ("GPW"), to which the legal advisor to the Secretary of State had objected. He advised that "there are reasonable grounds for you to conclude that GPW [the] does not apply ...to the conflict with the Taliban." Mr. Gonzales argued that grounds for the determination might include:

1) a determination that Afghanistan was a failed state "...because the Taliban did not exercise full control over the territory and people, was not recognized by the international community, and was not capable of fulfilling its international obligations" (see definition of statehood in Cpt. 1.3 and discussion in *Kadic v. Karadzic*, 70 F.3d 232, 244 to 245 (2nd Cir, 1995)) and/or

2) a "determination that the Taliban and its forces were, in fact, not a government but a militant, terrorist-like group."

Mr. Gonzales then identified what he believed were the ramifications of Mr. Bush's determination. On a positive note he felt they preserved flexibility stating that:

"The nature of [a "war" against terrorism] places a high premium on ...factors such as the ability to quickly obtain information from captured terrorists and their sponsors ... and the need to try terrorists for war crimes... [t]his new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners..." He also believed the determination "...eliminates any argument regarding the need for case-by-case determinations of POW status." The determination, Mr. Gonzales said, also reduced the threat of domestic prosecution under the War Crimes Act (18 U.S.C. 2441). His expressed concern was that certain GPW language such as "outrages upon personal dignity" and "inhuman treatment" are "undefined' and that it is difficult to predict with confidence what action might constitute violations, and that it would be "...difficult to predict the needs and circumstances that could arise in the course of the war on terrorism." He believed that a determination of inapplicability of the GPW would insulate against prosecution by future "prosecutors and independent counsels."

Mr. Gonzales then identified the counter arguments from the Secretary of State (See, Colin Powell Memo of January 26, 2002 pages 1,2,3,4,5) which included:

Past adherence by the United States to the GPW;

Possible limitations on invocation by the U.S. of the GPW in Afghanistan;

Likely widespread condemnation by allied nations;

Encouragement of potential enemies to find "loopholes" to not apply the GPW;

Discouraging turn-over of terrorists by other nations;

Undermining of U.S. military culture "which emphasizes maintaining the highest standards of conduct in combat..."

In response, Mr. Gonzales says, *inter alia*, "...even if the GPW is not applicable, we can still bring war crimes charges against anyone who mistreats U.S. personnel." He adds that, "...the argument based on military culture fails to recognize that our military remains bound to apply the principles of GPW because that is what you have directed them to do." (Emphasis added). In light of subsequent events, that last sentence is of particular interest.

The Bush Order February 7, 2002

On February 7, 2002, President Bush signed an Order, (pdf copy) accepting the reasoning of the Yoo and Gonzales memos, and validating the order issued by Secretary Rumsfeld on January, 19, 2002.

From the sequence of events, and discussion by White House Counsel, it appears fairly clear that the decision by Mr. Bush, and the subsequent orders from Mssr.s Bush and Rumsfeld, were based on the Yoo/Delahunty Memorandum of 9 January, 2002. A close analysis of that document is accordingly appropriate.

The Yoo/Delahunty Memo January 9, 2002

This Memorandum is written in four parts. The first examines the 18 U.S.C. Section 2441, the War Crimes Act, and some of the treaties it implicates. The second part examines whether members al Qaeda can claim protection of the Geneva Conventions and concludes they can not. The third portion examines application of those treaties to members of the Taliban. It concludes nonapplicability because 1) it says "the Taliban was not a government and Afghanistan was not...a functioning State", 2) "the President has the constitutional authority to suspend our treaties with Afghanistan pending restoration of a legitimate government", and 3) "it appears...that the Taliban militia may have been ...intertwined with Al Qaeda" and thus on the same legal footing. Finally, the fourth part concludes that customary international law does not bind the President or restrict the actions of the United States military [under a constitutional analysis].

Although the Memorandum is questionable on many grounds, both factual and legal, a close analysis is for this casebook, both too extensive and unnecessary. An article more closely analyzing the international law/law of war aspects of the Memorandum is forthcoming. For the present the reader should note the following:

1) As long as there is a genuine issue of fact or law regarding the status of captured individual combatants who are members of the Taliban or Al Qaeda, the Third Geneva Convention of 1949 must apply, until properly otherwise determined. Article 5 of that Convention provides, in part, that "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." (Emphasis added).

2) The key to whether there exists any genuine issue of fact or law resides in the Yoo/Delahunty Memo which is the authoritative basis for all the actions which follows. Leaving aside the American constitutional arguments which present no bar to a delict in

international law (see,e.g. the Dostler Case) [2], the argument for nonapplicability of Geneva III rests on the argument that as a matter of fact and law the Taliban did not constitute a de facto government. The short answer is that while the position is certainly arguable, it is also very reasonably arguable that the Taliban were the de facto government. They controlled a substantial geographic territory and population, enacted and enforced laws and mandates, carried on relatively complex military operations, appointed persons to governmental posts and received diplomatic recognition from several nations. The core validity of that point is admitted, albeit inadvertently, in the following quote from the 22 January, 2002, Memorandum from Jay Bybee to Alberto Gonzales and William Haynes:

Whether the Geneva Conventions apply to the detention and trial of members of the Taliban presents a more difficult legal question. Afghanistan has been a party to all four Geneva Conventions since September, 1956. Some might argue that this requires application of the Geneva Conventions to the present conflict with respect to the Taliban militia...Nevertheless, we conclude that the President has more than ample grounds to find that our treaty obligations under Geneva III toward Afghanistan were suspended during the period of the conflict... the weight of informed opinion indicates that, for the period in question, Afghanistan was a "failed state" whose territory had been held by a violent militia or faction rather than by a government....Second, there appears to be developing evidence that the Taliban leadership had become closely intertwined with, if not utterly dependent upon, al Qaeda. This would have rendered the Taliban more akin to a terrorist organization.

Memorandum of 22 January, 2002 from Jay Bybee, Office of legal Counsel 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* at pp 10-11. (Emphasis added).

> We want to make clear that this Office does not have access to all of the facts related to the activities of the Taliban militia and al Qaeda in Afghanistan. Nevertheless, the available facts in the public record would support the conclusion that Afghanistan was a failed state...Indeed, there are good reasons to doubt whether any of the conditions were met.

Ib at 16.

What is of particular interest in this analysis is the emphasized language. It is that of argument, not fact, and what it seems to effectively admit is that there is indeed some doubt as to the status of the Taliban detainees. That, of course, triggers the requirements of Geneva Convention Article 5 for a competent tribunal to determine status, and mandates treatment as a POW until the tribunal is held. Indeed, Judge Bybee later discusses Article 5. See also, the references by Justice O'Connor in the plurality opinion in *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), to "the Taliban regime" and "the Taliban government," 124 S.Ct at 2635-2636, and her statement that "active combat operations against Taliban fighters apparently are ongoing in Afghanistan," id. at 2642, as well as Justice Souter's concurrence in which he points to the Government's Brief saying "the Geneva Convention applies to the Taliban detainees." Id at 2658.

"Should any doubt arise as to whether persons, having committed a belligerent act, and having fallen into the hands of the enemy," article 5 of Geneva III requires that these individuals "enjoy the protections" of the Convention until a tribunal has determined their status. As we understand it, as a matter of practice prisoners are presumed to have article 4 POW status until a tribunal determines otherwise. Although these provisions seem to contemplate a case-by-case determination of an individual detainee's status the President could determine categorically that all Taliban prisoners fall outside article 4. Under Article II of the Constitution, the President posesses the power to interpret treaties on behalf of the Nation.He could interpret Geneva III, in light of the known facts concerning the operation of the Taliban...to find that all of the Taliban forces do not fall within the legal definition of prisoners of war as defined by article 4. A presidential determination of this nature would eliminate any legal "doubt" as to the prisoners' status, as a matter of domestic law, and would therefore obviate the need for article 5 tribunals.

Ib at 30-31.

This argument presents an interesting question of domestic law as to whether a Commander in Chief can order a violation of international law by making a factual finding unsupported by independent evidence. Could one charged under the War Crimes Act (18 U.S.C. 2441) assert as a defense that as a matter of domestic law there was no grave breach, even though it was clearly a violation of international law? The answer to that proposition is beyond the scope of this discussion, although it appears questionable. What the argument does not do, however, for the same Dostler Case) reasons above discussed, is present any defense to charges by any other Geneva III signatory charged to prosecute perpetrators of grave breaches wherever they may be found.

3) No Article 5 tribunal (see, Army Regulation 190-8, Section 1-6) has been convened or held regarding any captured member of Al Qaeda[3] or the Taliban.

4) Accordingly, any such persons are protected by the Third Geneva Convention until a competent tribunal determines otherwise. It appears quite certain that such a determination if it did occur, would not operate retroactively to validate actions by captors which were otherwise violations of the rights of protected persons.

5) That protection is not merely procedural. As long as the Convention protects an individual, grave breaches of its provisions constitute a breach of both U.S. and international law.

6) Article 130 of the Convention provides that grave breaches include "... any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention."

Thus, the Bush Orders of January and February, 2002, denying Geneva Convention protection to captured members of the Taliban and Al Qaeda appears inherently flawed. Acts carried out in furtherance of those orders, if themselves violations, might, accordingly,

constitute war crimes.

1: "On January 18, I advised you that the department of Justice had issued a formal legal opinion concluding that the Geneva Convention III on the Treatment of Prisoners of War (GPWIII) does not apply to the conflict with al Qaeda. I also advised that the DOJ's opinion concludes 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 and accordingly that al Qaeda and Taliban detainees are not prisoners of war under the GPW." Gonzaelz Memo, 25 January, 2002.

2: Those arguments present a startling analogy to the arguments raised by defendants at the post World War II Nuremburg trials, and elsewhere, that, because they were required by national law to obey superior orders, they had an absolute defense against war crimes committed in carrying out those orders. That so called Nuremburg defense was, and has been since, roundly rejected. The point is, of course, that whatever their validity under U.S. national law, they present no defense to an otherwise valid charge of a war crime under international law.

3: The status of an al Qaeda detainee is, of course, problematical and fact driven. Often, it appears most closely analogous to pirates or common criminals. The problem arises if captured persons functioned, as alleged in the Yoo/Delahunty Memo, as an intertwined part of al Qaeda. Given the amorphous nature of al Qaeda, on any given day the individual's status might be as a Taliban fighter, an irregular militia supporter, a Taliban agent, a terrorist or a common criminal.