U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

March 28, 2002

William H. Taft, IV
Legal Adviser
Department of State
Washington, DC

Dear Mr. Taft:

Thank you for sending me a copy of your March 22, 2002 memorandum, which I understand your office plans to use to explain the legal position of the United States in response to public inquiries. I appreciate your efforts to work through many of the issues presented by the current conflict that arise under the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War ("GPW").[1] We agree with much of your analysis justifying the President's decision of February 7, 2002, which found that neither members of the al Qaeda terrorist organization nor the Taliban militia were legally entitled to POW status. A few significant points of disagreement remain, however.

It appears from your March 22 memorandum that we agree in a number of areas. First, as we had found in our January 22, 2002 memorandum, members of al Qaeda cannot receive POW status because al Qaeda, as a non-state entity, cannot and has not signed GPW. Second, we agree that even if GPW is in force between the United States and Afghanistan under common article 2, the Taliban militia still must satisfy the four conditions for lawful belligerency articulated in Article 1 of the Annex to the 1907 Hague Condition (IV) Respecting the Laws and Customs of War on Land[2] and expressly incorporated by Article 4(A)(2) of GPW,[3] which we agree must apply to *all* armed forces, militia, and volunteer corps seeking POW status. Third, we agree that, as the plain text of GPW makes clear, the Article 4 determination of POW status is conducted by analyzing military organizations as a whole. The Article 5 tribunal procedure, by contrast, focuses on facts and circumstances presented by specific individuals.[4] Fourth, we agree

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1 6 U.S.T. 3316, T.I.A.S. 3364 (1949).

2 36 Stat. 2277, 2295-96 (1907).

3 That is, the Taliban militia must (1) "be[] commanded by a person responsible for his subordinates," (2) display "a fixed distinctive sign recognizable at a distance," (3) "carry[] arms openly," and (4) "conduct[] [its] operations in accordance with the laws and customs of war." 6 U.S.T. at 3320. *See also* 36 Stat. at 2295-96 (same).

4 Article 5 states: "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." 6 U.S.T. at 3324 (emphasis added). In other words, Articles 4 and 5 of GPW contemplate a two-prong test that individuals must satisfy in order to be deemed POWs. First, as your memo explains, one must "determine whether *groups* of combatants participating in [a] conflict [covered by GPW] are entitled to coverage. According to Article 4, groups of combatants are not covered unless they meet certain criteria and are the armed

that the Taliban militia, as a military organization, fails to satisfy the four conditions. It is not governed by a clear chain of command in which supervisors take responsibility for the actions of their subordinates by establishing a system of military discipline to enforce the laws of war. It does not identify itself with fixed, distinctive uniforms or insignia which enable others easily to distinguish Taliban fighters from non-combatants. And it does not generally conduct its operations in accordance with the laws of war. Fifth, we agree that the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("GCC") does not apply to unlawful combatants who fail to meet the requirements of GPW. Finally, we agree that the express terms of common Article 3 restrict its application to "armed conflict not of an international character" – that is, internal conflicts.

Your memorandum, however, makes several points with which we disagree and which we believe would not be appropriate to make publicly at this time. First, you argue that Afghanistan is not a failed state and therefore that GPW remains in force between the United States and Afghanistan. Given that the President has determined that GPW applies to the conflict, we see no need to publicly address the question of treaty suspension. Further, we believe that reaching out to make this argument at this time is unwise, because it would publicly foreclose the President's ability to use a failed state theory in the future with regard to Afghanistan or another country. We suggest that you delete this portion of the memorandum.

Second, there are a number of problems with the memorandum's discussion of GPW Article 5. Under Article 5, tribunals are required only when there is "any doubt" as to the status of a particular individual, and the protections of GPW are afforded to that individual until a tribunal determination is made. There can be no doubt whatsoever over the status of a particular individual, however, if his military organization does not fall within one of the categories enumerated in Article 4. In other words, in situations where a military organization falls within one of the categories of Article 4, but there is doubt as to whether a particular individual is an actual member of that organization or has otherwise engaged in conduct that brings him outside the tests of Article 4, an Article 5 tribunal might be appropriate. But the Article 5 tribunal requirement does not apply, by contrast, to combatants whose military organizations have been categorically denied Article 4 protection.[5]

The memorandum incorrectly suggests that the categorical denial of POW status to a military organization pursuant to the terms of Article 4 has the effect of making it merely more "difficult" for individual members of that organization to attain POW protection. It concludes that al Qaeda and Taliban detainees are currently in the Article 5 process, at that stage where they are being afforded the "protections" of GPW while awaiting the operation of a competent tribunal as to their status. We see no basis in GPW, however, to support the contention that an

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forces of a party, or militias and volunteer corps belonging to a party." Note to John Yoo from William H. Taft, IV, Legal Adviser, Department of State, Mar. 22, 2002, at 3 (emphasis added). Second, one must "determine the status of *individuals* by assessing whether they belong to a group that is entitled to coverage." *Id.* (emphasis added).

[5] *See Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War* 77 (Jean S. Pictet ed. 1960) ("Pictet") (Article 5 tribunal requirement "appl[ies] to deserters, and to persons who accompany the armed forces and have lost their identity card"); G.I.A.D. Draper, *Reflections on Law and Armed Conflicts* 204 (Michael A. Meyer & Hilaire McCoubrey eds. 1998) (explaining that purpose of Article 5 tribunal is "to determine whether" a detainee "belonged to an organised group . . . operating in an organised manner for genuine political objectives and belonging to a Party to the conflict").

individual can somehow obtain POW status other than through the express terms of Article 4. To the contrary, GPW clearly provides (as page 3 of your memorandum similarly explains) that, if a military organization does not fall within any of the categories of POW status articulated in Article 4, all members of that organization are ineligible for POW status. Under those circumstances, no Article 5 tribunal is required, and thus, no GPW protections need be afforded. We believe it simply incorrect as a matter of law, to suggest that Article 5 continues to have any role where the President has found that as organizations neither al Qaeda nor the Taliban would survive the Article 2-Article 4 analysis. Once the President determines – as he has here – that a military organization is ineligible for POW status under Article 4, no further analysis is necessary or warranted. On this point, we believe that your memorandum does not accurately state the President's February 7 decision.

The memorandum further states that the United States will "revisit its Article 4 determinations should any genuine doubt about status arise in individual cases." Once again, however, there is no need for any inquiry into the circumstances of particular individuals, when it is clear that the military organization as a whole cannot meet the requirements of Article 4.

The memorandum also concludes that the United States has satisfied the tribunal requirement of Article 5 because the President and his senior advisers have addressed the question. It further states that Article 5 requires only that we afford certain "protections" articulated in Part II of GPW to these individuals until there is a tribunal determination, and that we need not additionally provide the benefits and privileges articulated elsewhere in GPW.[6] But none of this analysis is necessary or relevant in the present circumstances, and, indeed, is inconsistent with the President's determination that the Taliban has failed to satisfy Article 4. Because, as the President has already determined, there is no doubt as to the POW status of any individual detainee due to the fact that neither the Taliban militia nor al Qaeda are military organizations eligible for POW protection under Article 4, there is no need to trigger *any* of the terms of Article 5.

Third, the memorandum states on page 74 that "[c]ommon Article 3, by its express terms, applies only in the case of armed conflict *not of an international character*," which "generally refers to civil wars." It concludes on page 75 that "the conflicts with al Qaida and the Taliban are not covered under common Article 3 because, as recognized by the United Nations and NATO, these conflicts are not internal." That much is certainly correct under the plain text of GPW. Yet on page 89, the memorandum seemingly contradicts itself, when it asserts that the position of the United States is that all combatants are *entitled*, "as a minimum, [to] the guarantees of article 3 common to the Geneva Conventions," and that the United States "is providing the fundamental guarantees of common Article 3" to the Guantanamo detainees. The apparent theory is that "[i]t is widely recognized internationally . . . that common Article 3

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[6] We are unsure whether your interpretation of Article 5 as distinguishing between "protections" versus "rights" and "privileges" is correct. While Part II of GPW is entitled "General Protection of Prisoners of War," the treaty itself does not identify any other sections as concerned specifically with "rights" or "privileges" as opposed to "protections." We recommend that if you choose to press this distinction, more persuasive and authoritative sources be employed than those cited in the memorandum.

reflects minimum customary international law standards for both internal and international armed conflicts," as your memorandum states on page 5.[7]

We are unaware, however, of any United States legal authority elevating common Article 3 to the status of binding customary international law, especially as applied to members of an international terrorist group. Indeed, it may be the case that the President wishes to develop new rules of customary international law that address the new circumstances created by the rise of powerful international terrorist organizations. If that is the case, we think it would not be prudent at this point to concede that common Article 3 constitutes customary international law, binding on the United States in its treatment of al Qaeda or Taliban detainees. In any event, customary international law cannot constitutionally limit the President's domestic constitutional authority to conduct military operations.[8]

Finally, the memorandum notes (on page 76 et seq.) that this conflict places the United States in "uncharted legal limbo." Accordingly, the memorandum concludes that we are invoking GPW "as a guide in this difficult time," and that the President "is applying [the] general principles" of GPW. In our view, it is not the provisions of GPW that are themselves ambiguous. To the contrary, GPW is quite clear. As both your March 22 memorandum and our office's prior correspondence recognize, GPW protections apply only to certain detainees who comply with the laws of war and otherwise meet the requirements of the Conventions. Moreover, the President has previously and correctly determined that the Taliban and al Qaeda detainees cannot meet those legal requirements. Use of terms such as "uncharted legal limbo" is therefore unhelpful. We think it more accurate to say that the United States believes strongly in the principles and protections of the Geneva Conventions, that the Taliban and al Qaeda detainees are not entitled *as a legal matter* to the protections afforded POWs under GPW, and that the President has ordered the military to treat the detainees humanely anyway, regardless of whether such treatment is legally required under GPW.

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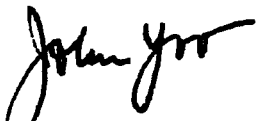
[7] In support of this proposition, page 5 of your memorandum quotes the Pictet commentary on GPW for the proposition that "common Article 3 simply demands respect for rules 'recognized as essential in all civilized countries, and embodied in the municipal law' of States." From what we are able to determine, the relevant passage in Pictet actually reads: "[Article 3] at least ensures the application of the rules of humanity which are recognized as essential by civilized nations and provides a legal basis for interventions . . . interventions which in the past were all too often refused on the ground that they represented intolerable interference in the internal affairs of a State." Pictet at 35. Presumably, had Pictet considered the provisions of Article 3 to reflect binding customary international law, their codification would not have been necessary to establish a "legal basis for interventions."

[8] *See, e.g., Authority of the Federal Bureau of Investigation To Override International Law In Extraterritorial Law Enforcement Activities*, 13 Op. Off. Legal Counsel 163, 168 (1989) ("It is well established that both political branches – the Congress and the Executive – have, within their respective spheres, the authority to override customary international law. Indeed, this inherent sovereign power has been recognized since the earliest days of the Republic."). *See also The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 145-56 (1812); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814); *The Paquete Habana*, 175 U.S. 677, 700 (1900); *The Chinese Exclusion Case*, 130 U.S. 581, 602 (1889); *Diggs v. Schultz*, 470 F.2d 461, 466 (D.C. Cir. 1972); *Tag v. Rogers*, 267 F.2d 664, 668 (D.C. Cir. 1959); *The Over The Top*, 5 F.2d 838, 842 (D. Conn. 1925); Louis Henkin, *Foreign Affairs and the Constitution* 221-22 (1972); Restatement (Third) of the Foreign Relations Law of the United States § 115(1)(b) (1987).

Sincerely,



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