

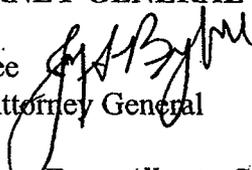


Office of the Assistant Attorney General

Washington, D.C. 20530

January 26, 2002

**MEMORANDUM FOR LARRY D. THOMPSON  
DEPUTY ATTORNEY GENERAL**

FROM: Jay S. Bybee   
Assistant Attorney General

RE: Memorandum From Alberto Gonzales to the President on the Application of the Geneva Convention to Al Qaeda and the Taliban

We have reviewed a memorandum dated January 25, 2002, from Alberto R. Gonzales to the President, *Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict With Al Qaeda and the Taliban*. We have three comments on the memorandum.

First, in the first bullet under the "Legal Background" section, the memorandum, having referred to OLC's opinion, states that the grounds for determining that the Geneva Convention (GPW) does not apply to the Taliban may include:

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 (e.g., was in widespread material breach of its international obligations).

We should note that the OLC opinion stated that the President could find that Afghanistan was a failed state and that such a finding would support a determination that GPW does not apply to the conflict in Afghanistan. OLC did not conclude that Afghanistan had committed a "material breach" of GPW. The Gonzales memo is careful to state that Afghanistan, as a "failed state" was in "material breach of *its international obligations*," not that Afghanistan breached GPW. We have no objection to the statement in the memorandum, but we would caution that any public statements should not be oversimplified to suggest that the Taliban breached the GPW and that its breach released us from our obligations.

Second, in the second main bullet on p. 2 ("Substantially reduces the threat of domestic criminal prosecution under the War Crimes Act"), we would suggest changing this language to "Substantially reduces the misapplication of the War Crimes Act."

Third, on p. 2, the next to last bullet ("Second, it is difficult to predict the needs an circumstances that could arise in the course of the war on terrorism.") does not seem to fit under

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the point under discussion: that the President determining that GPW does not apply to this conflict would preclude prosecutions under the War Crimes Act. The flexibility point has been appropriately made elsewhere in the memorandum.

Finally, we note a typographical error in the second sub-bullet on p. 2. The second sentence should read: "It also holds open options for future conflicts . . . ."