War Crime Prosecutions: What White House Fears

by Edward Spannaus

When White House Counsel Alberto Gonzales warned President Bush in a Jan. 25, 2002 memo, that the President and other members of his Administration might be liable to prosecution for war crimes as a consequence of U.S. treatment of detainees in Afghanistan, he had good reason to do so. The United States is a signator to a number of international conventions and treaties which prohibit the sort of treatment which has been so graphically exposed at the Abu Ghraib prison in Iraq, and which is known to have been practiced more widely—in Afghanistan, likely at Guantanamo, and most certainly at undisclosed offshore detention and interrogation facilities operated under secret programs established by Defense Secretary Donald Rumsfeld.

Gonzales, who was brought to Washington from Texas by Bush, urged that the Third Geneva Convention, concerning the treatment of prisoners of war, should not apply to the war in Afghanistan. Gonzales argued that a directive declaring this, from the President, among other things, "Substantially reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441)."

"Punishments for violations of Section 2441 include the death penalty," Gonzales cautioned, and he urged that the best—but certainly not guaranteed—strategy for avoiding this, would be to declare that the Third Geneva Convention does not apply to the Taliban and Al-Qaeda, and then hope that this would mean that the War Crimes Act "would not apply to actions taken [by the U.S.] with respect to the Taliban."

While Gonzales was clearly not worried about the current Justice Department under Attorney General John Ashcroft—after all, he was taking most of his arguments from them—he was alarmed about what might happen under a different administration, warning that "it is difficult to predict the motives of prosecutors and independent counsels who may in the future decide to pursue unwarranted charges based on Section 2441." Therefore, he surmised, a determination by Bush that the Geneva Convention does not apply, "would provide a solid defense to any future prosecution."

As one expert in military law told *EIR,* it is clear that this memorandum was never intended to see the light of day. But, in the present climate of internecine, cover-your-back warfare in the Bush Administration, this memo, and many more, have been leaked right and left.

Cheney's Imperial Policy

Disregard for international treaties and law goes hand-in-hand with the "new Roman Empire" conception of the U.S. role in the world after the end of the Cold War, expressed most clearly in the draft Defense Policy Guidance prepared for then-Defense Secretary Dick Cheney by Paul Wolfowitz, Lewis Libby, and others in 1991. That soon-to-be rejected draft called for the United States to emerge as a global hegemon, by preventing the rise of any rival superpower or rival bloc of nations. The mid-1990s Project for New American Century likewise clearly outlined the policy direction that the Bush-Cheney Adminstration would take, facilitated in this respect by the shock of 9/11.

The legal/ideological underpinnings for this doctrine were churned out of the misnamed Federalist Society and right-wing legal think-tanks. Disdain for the United Nations and international treaties has long been a hallmark of this crowd. The principal legal architect, in the Bush Administration, of the notion of scuttling the Geneva accords and international law, appears to have been John Yoo, Assistant Attorney General in charge of the Justice Department's Office of Legal Counsel, and a long-time Federalist Society activist. Solicitor General Ted Olson, who has defended the Administration's "enemy combatant" detention policies in the courts, has been a top Federalist Society official, as are many others in Ashcroft's Justice Department.

The first to raise the alarm about the War Crimes Act was Yoo. In the weeks following 9/11, Yoo was apparently one busy fellow: In addition to playing a principal role in drafting the USA/Patriot Act, he was also writing memos on "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them." Yoo was also one of the architects of the plan to use military tribunals to try suspected terrorists; the original blueprint coming out of the Justice and Defense Departments—and the Office of the Vice President—was strongly opposed by military lawyers. Even before 9/11, Yoo was marshalling arguments as to how the Bush Administration could withdraw from international agreements such as the ABM treaty.

Yoo pulled together all the arguments for ignoring international treaties and laws with respect to the war in Afghanistan, in a 42-page memorandum dated Jan. 9, 2002, addressed to Defense Department General Counsel William Haynes, and entitled "Application of Treaties and Laws to al-Qaeda and Taliban Detainees." In actuality, Yoo's memo constitutes a defense lawyer's brief against future war-crimes charges; indeed, its discussion of the War Crimes Act begins on the very first page.

Yoo's memo, as did Gonzales's memo a few weeks later, centered much of its discussion on the Geneva Conventions, particularly the Third Convention concerning the treatment of prisoners of war, and the Fourth, concerning the obligations of an occupying power, and what is known as "Common Article 3."

"Common Article 3" is a provision common to all four Geneva Conventions; it prohibits not only torture and other acts of violence, but also, "Outrages upon personal dignity; in particular, humiliating and degrading treatment." (With what has now been exposed about interrogation practices in Afghanistan and Iraq, it's clear why Administration officials would be so concerned to find a way to circumvent this provision.) This applies to *all* detainees, whether or not they are technically classified as prisoners of war.

Convention Against Torture

Yoo's memorandum consists of tortured legal arguments attempting to justify throwing out U.S. adherence to the Geneva Conventions and Common Article 3. Specifically, the Yoo memorandum attempts to show why neither Taliban nor al-Qaeda should be covered by Geneva. One argument was that Afghanistan under the Taliban was a "failed state," and therefore its previous status as a signator to the Geneva Conventions no longer applied. Despite this, Yoo still argued that the United States could prosecute Taliban militiamen, for example, for violations of the laws of war, even as the United States could claim *not* to be bound by these laws.

Yoo also reportedly authored another memorandum—not yet made public—putting an extremely narrow interpretation on the international Convention Against Torture (CAT), which the United States ratified in 1994. As part of the required implementation of the CAT treaty, Congress passed the Federal anti-torture statute, 18 U.S.C. 2340 and 2304A, which makes a violation of CAT's provisions a Federal crime. Torture is defined as the infliction of "severe physical or mental pain or suffering." A conspiracy provision in this statute ensures that it could be used to prosecute high officials who were responsible for establishing a policy of torture or ordering the carrying out of such a policy.

Scott Horton, the head of the international law section of the Association of the Bar of the City of New York, told PBS on May 21, a few days after the Administration's legal memos had been leaked and published, that the general reaction among lawyers and legal scholars to the memos "is largely one of shock."

Disaster Waiting To Happen

"I think no one really understood the breadth and scope of the rejection of the Geneva Conventions system that was being contemplated, particularly in the Department of Justice memorandum," Horton said. "In fact, when you read them, the first thing that comes to mind is this isn't a lofty statement of policy on the behalf of the United States. You get the impression very quickly that [this] is some very clever criminal defense lawyers trying to figure out how to weave and bob around the law and avoid its application."

In a discussion with *EIR,* Horton readily dismissed Yoo's arguments. He stated unequivocally that the Geneva Conventions cover *everything,* that there is no category of persons who are excluded from its application.

Horton had received two sets of visits from military JAG (Judge Advocate General) corps officers, in May and October 2003, who were alarmed at how the civilians in the Pentagon were treating interrogation questions. They told Horton that the way in which interrogations were being handled "is a disaster waiting to happen."

Back to January 2002. According to knowledgable sources, the Yoo memo went not only to DOD General Counsel Haynes, but also to White House Counsel Gonzales and Dick Cheney's General Counsel David Addington, all of whom agreed with it and approved it. What is known, is that Gonzales then presented Yoo's arguments to President Bush (and perhaps others) on Jan. 18, and Bush made a formal determination that the Third Geneva Convention did not apply to the conflict with Al-Qaeda and Taliban. According to Gonzales' Jan. 25 memorandum, Secretary of State Colin Powell strongly disagreed, and asked Bush to reconsider that decision. Powell urged that the President determine that the Third Geneva Convention did apply, but that individual Al-Qaeda fighters could be determined not to qualify for prisoner-of-war status—only after an individual hearing—which is a permissible procedure under the Convention.

Gonzales insisted that Bush reject Powell's arguments; central to Gonzales's case, as we noted above, was that rejection of the Geneva Convention might provide a legal defense in a future war-crimes prosecution of Bush Administration officials.

Two days after the Gonzales memorandum, and the day after Powell sent a memo to Bush opposing the course recommended by Gonzales, Cheney weighed in, appearing on two Sunday talk shows to argue against the application of the Geneva accords. He contended that the prisoners being detained at Guantanamo "are bad people," and that "we need to be able to interrogate them and extract from them whatever information they have."

In February 2002, President Bush made a slight compromise, proclaiming that the United States would adhere to the Geneva Conventions in the war in Afghanistan, but that Taliban and Al-Qaeda captives would not be given prisoner-of-war status. Apparently, some in the Administration believed this would still provide sufficient protection from war crimes prosecutions.

However, it is now known that the atrocious practices that have been revealed at Abu Ghraib, were first used by the same military intelligence interrogators in Afghanistan, and then brought into Iraq. Likewise, it was the commander of Guantanamo, Maj. Gen. Geoffrey Miller, who went to Abu Ghraib in August 2003, and directed that Abu Ghraib be "Gitmoized." Military Police and others handling prisoners, were never given any instructions about the Geneva Convention standards.

If Gonzales and other Administration officials were worried before, they should be shaking in their boots now.