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Memo Lets CIA Take Detainees Out of Iraq

Practice Is Called Serious Breach of Geneva Conventions

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At the request of the CIA, the Justice Department drafted a confidential memo that authorizes the agency to transfer detainees out of Iraq for interrogation -- a practice that international legal specialists say contravenes the Geneva Conventions.

One intelligence official familiar with the operation said the CIA has used the March draft memo as legal support for secretly transporting as many as a dozen detainees out of Iraq in the last six months. The agency has concealed the detainees from the International Committee of the Red Cross and other authorities, the official said.

The draft opinion, written by the Justice Department's Office of Legal Counsel and dated March 19, 2004, refers to both Iraqi citizens and foreigners in Iraq, who the memo says are protected by the treaty. It permits the CIA to take Iraqis out of the country to be interrogated for a "brief but not indefinite period." It also says the CIA can permanently remove persons deemed to be "illegal aliens" under "local immigration law."

Some specialists in international law say the opinion amounts to a reinterpretation of one of the most basic rights of Article 49 of the Fourth Geneva Convention, which protects civilians during wartime and occupation, including insurgents who were not part of Iraq's military.

The treaty prohibits the "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory . . . regardless of their motive."

The 1949 treaty notes that a violation of this particular provision constitutes a "grave breach" of the accord, and thus a "war crime" under U.S. federal law, according to a footnote in the Justice Department draft. "For these reasons," the footnote reads, "we recommend that any contemplated relocations of 'protected persons' from Iraq to facilitate interrogation be carefully evaluated for compliance with Article 49 on a case by case basis." It says that even persons removed from Iraq retain the treaty's protections, which would include humane treatment and access to international monitors.

During the war in Afghanistan, the administration ruled that al Qaeda fighters were not considered "protected persons" under the convention. Many of them were transferred out of the country to the naval base in Guantanamo Bay, Cuba, and elsewhere for interrogations. By contrast, the U.S. government deems former members of Saddam Hussein's Baath Party and military, as well as insurgents and other civilians in Iraq, to be protected by the Geneva Conventions.

International law experts contacted for this article described the legal reasoning contained in the Justice Department memo as unconventional and disturbing.

"The overall thrust of the Convention is to keep from moving people out of the country and out of the protection of the Convention," said former senior military attorney Scott Silliman, executive director of Duke University's Center on Law, Ethics and National Security. "The memorandum seeks to create a legal regime justifying conduct that the international community clearly considers in violation of international law and the Convention." Silliman reviewed the document at The Post's request.

The CIA, Justice Department and the author of the draft opinion, Jack L. Goldsmith, former director of the Office of Legal Counsel, declined to comment for this article.

CIA officials have not disclosed the identities or locations of its Iraq detainees to congressional oversight committees, the Defense Department or CIA investigators who are reviewing detention policy, according to two informed U.S. government officials and a confidential e-mail on the subject shown to The Washington Post.

White House officials disputed the notion that Goldsmith's interpretation of the treaty was unusual, although they did not explain why. "The Geneva Conventions are applicable to the conflict in Iraq, and our policy is to comply with the Geneva Conventions," White House spokesman Sean McCormick said.

The Office of Legal Counsel also wrote the Aug. 1, 2002, memo on torture that advised the CIA and White House that torturing al Qaeda terrorists in captivity abroad "may be justified," and that international laws against torture "may be unconstitutional if applied to interrogations" conducted in the war on terrorism. President Bush's aides repudiated that memo once it became public this June.

The Office of Legal Counsel writes legal opinions considered binding on federal agencies and departments. The March 19 document obtained by The Post is stamped "draft" and was not finalized, said one U.S. official involved in the legal deliberations. However, the memo was sent to the general counsels at the National Security Council, the CIA and the departments of State and Defense.

"The memo was a green light," an intelligence official said. "The CIA used the memo to remove other people from Iraq."

Since the Sept. 11, 2001, attacks, the CIA has used broad authority granted in a series of legal opinions and guidance from the Office of Legal Counsel and its own general counsel's office to transfer, interrogate and detain individuals suspected of terrorist activities at a series of undisclosed locations around the world.

According to current and former agency officials, the CIA has a rendition policy that has permitted the agency to transfer an unknown number of suspected terrorists captured in one country into the hands of security services in other countries whose record of human rights abuse is well documented. These individuals, as well as those at CIA detention facilities, have no access to any recognized legal process or rights.

The scandal at Abu Ghraib, and the investigations and congressional hearings that followed, forced the disclosure of the Pentagon's behind-closed-doors debate and classified rules for detentions and interrogations at Guantanamo Bay and in Afghanistan and Iraq. Senior defense leaders have repeatedly been called to explain and defend their policies before Congress. But the CIA's policies and practices remain shrouded in secrecy.

The only public account of CIA detainee treatment comes from soldier testimony and Defense Department investigations of military conduct. For instance, Army Maj. Gen. Antonio M. Taguba's report on Abu Ghraib criticized the CIA practice of maintaining "ghost detainees" -- prisoners who were not officially registered and were moved around inside the prison to hide them from Red Cross teams. Taguba called the practice "deceptive, contrary to Army doctrine and in violation of international law."

Gen. Paul J. Kern, who oversaw another Army inquiry, told Congress that the number of CIA ghost detainees "is in the dozens, to perhaps up to 100."

The March 19, 2004, Justice Department memo by Goldsmith deals with a previously unknown class of people -- those removed from Iraq.

It is not clear why the CIA would feel the need to remove detainees from Iraq for interrogation. A U.S. government official who has been briefed on the CIA's detention practices said some detainees are probably taken to other countries because "that's where the agency has the people, expertise and interrogation facilities, where their people and programs are in place."

The origin of the Justice Department memo is directly related to the only publicly acknowledged ghost detainee, Hiwa Abdul Rahman Rashul, nicknamed "Triple X" by CIA and military officials.

Rashul, a suspected member of the Iraqi Al-Ansar terrorist group, was captured by Kurdish soldiers in June or July of 2003 and turned over to the CIA, which whisked him to Afghanistan for interrogation.

In October, White House counsel Alberto R. Gonzales asked the Office of Legal Counsel to write an opinion on "protected persons" in Iraq and rule on the status of Rashul, according to another U.S. government official involved in the deliberations.

Goldsmith, then head of the office, ruled that Rashul was a "protected person" under the Fourth Geneva Convention and therefore had to be brought back to Iraq, several intelligence and defense officials said.

The CIA was not happy with the decision, according to two intelligence officials. It promptly brought Rashul back and suspended any other transfers out of the country.

At the same time, when transferring Rashul back to Iraq, then-CIA Director George J. Tenet asked Defense Secretary Donald H. Rumsfeld not to give Rashul a prisoner number and to hide him from International Red Cross officials, according to an account provided by Rumsfeld during a June 17 Pentagon news conference. Rumsfeld complied.

As a "ghost detainee," Rashul became lost in the prison system for seven months.

Rumsfeld did not fully explain the reason he had complied with Tenet's request or under what legal authority he could have kept Rashul hidden for so long. "We know from our knowledge that [Tenet] has the authority to do this," he said.

Rashul, defense and intelligence officials noted, had not once been interrogated since he was returned to Iraq. His current status is unknown.

In the one-page October 2003 interim ruling that directed Rashul's return, Goldsmith also created a new category of persons in Iraq whom he said did not qualify for protection under the Geneva Conventions. They are non-Iraqis who are not members of the former Baath Party and who went to Iraq after the invasion.

After Goldsmith's ruling, the CIA and Gonzales asked the Office of Legal Counsel for a more complete legal opinion on "protected persons" in Iraq and on the legality of transferring people out of Iraq for interrogation. "That case started the CIA yammering to Justice to get a better memo," said one intelligence officer familiar with the interagency discussion.

Michael Byers, a professor and international law expert at the University of British Columbia, said that creating a legal justification for removing protected persons from Iraq "is extraordinarily disturbing."

"What they are doing is interpreting an exception into an all-encompassing right, in one of the most fundamental treaties in history," Byers said. The Geneva Convention "is as close as you get to protecting human rights in times of chaos. There's no ambiguity here."