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## **U.S. Action Bars Right of Some Captured in Iraq**

By Douglas Jehl  
New York Times

WASHINGTON, Oct. 25 - A new legal opinion by the Bush administration has concluded for the first time that some non-Iraqi prisoners captured by American forces in Iraq are not entitled to the protections of the Geneva Conventions, administration officials said Monday.

The opinion, reached in recent months, establishes an important exception to public assertions by the Bush administration since March 2003 that the Geneva Conventions applied comprehensively to prisoners taken in the conflict in Iraq, the officials said.

They said the opinion would essentially allow the military and the C.I.A. to treat at least a small number of non-Iraqi prisoners captured in Iraq in the same way as members of Al Qaeda and the Taliban captured in Afghanistan, Pakistan or elsewhere, for whom the United States has maintained that the Geneva Conventions do not apply.

The officials outlined the opinion on Monday in response to a report in The Washington Post over the weekend that the Central Intelligence Agency had secretly transferred a dozen non-Iraqi prisoners out of Iraq in the past 18 months, despite a provision in the conventions that bars civilians protected under the accords from being deported from occupied territories.

Since early 2002, the United States has moved hundreds of Qaeda and Taliban prisoners to the American base at Guantánamo Bay, Cuba. American officials have said prisoners captured in Iraq would not be moved to Guantánamo, but they declined to say Monday where any prisoners transferred out of Iraq were being sent.

The officials said the new opinion represented a consensus reached by lawyers from the State Department, the Justice Department, the Pentagon, the National Security Council and other agencies in discussions since March 2004, when the Justice Department circulated an initial draft memorandum on the issue. A government official said the opinion had been sought by the C.I.A. to establish the legality of its secret transfers of non-Iraqi prisoners, beginning in April 2003, for interrogation outside Iraq. The officials made clear that they were now describing the decision in order to publicly defend the legality of the C.I.A.'s newly disclosed actions.

The contents of the March 2004 draft memo were first reported on Sunday by The Washington Post, which said the C.I.A. had secretly transported as many as a dozen detainees out of Iraq for interrogation purposes in the past six months. On Monday, government officials said the March 2004 document had not been incorporated into the new legal opinion. They also said all of the prisoners the C.I.A. had transferred out of Iraq had been moved between April 2003 and March 2004, with none transferred in the past six months.

But the government officials said the new ruling could open the way for additional transfers on a broader scale, because the status of prisoners being held in Iraq is reviewed on a case-by-case basis. Under the administration opinion, the non-Iraqis who could be deemed exempt from Geneva Conventions would include suspected members of Al Qaeda or other terrorist organizations as well as other non-Iraqis believed to have traveled to the country after the invasion of March 2003 for the purpose of engaging in terrorism or joining in the insurgency.

The administration officials did not specify exactly how decisions about an individual's status under the Geneva Conventions would be made. But they said that the factors would include nationality, affiliation with terrorist organizations and activities inside Iraq, and that the decisions would be made by American government agencies who held the individuals in their custody.

As recently as May 2004, Defense Secretary Donald H. Rumsfeld reiterated in public testimony the administration's view that "everyone in Iraq who was a military person" as well as "the civilians or criminal elements" who were detained by the American authorities would be "treated subject to the Geneva Conventions."

At a hearing of the Senate Armed Services Committee on May 11, Stephen A. Cambone, the under secretary of defense for intelligence, was asked whether President Bush's previous designation of suspected Qaeda terrorists as unlawful combatants not protected by the conventions applied just to that group or to any terrorist organization. He responded, "My guess is that, depending on the circumstances, if we found ourselves in armed conflict with some other organization, the president would take that under advisement."

On Monday, a Justice Department official who outlined the new opinion said that in the administration's view, suspected members of Al Qaeda in Iraq were not protected under the Geneva Conventions.

A Defense Department spokesman did not immediately return a phone call asking for comment.

The C.I.A.'s transfer of the dozen non-Iraqi prisoners has not been publicly acknowledged, but it was described on Monday by government officials from several different agencies. Those officials said that each transfer had been approved by the Justice Department, but that the circumstances surrounding the prisoners were highly classified. They refused to identify the prisoners by name or nationality, to say where they were being held or to explain the reason for their removal.

It is possible that some of the prisoners transferred out of Iraq may have been handed over to friendly governments, like those of Egypt or Saudi Arabia, in a procedure known as rendition. Another possibility is that they were transferred to the secret American-run sites around the world that have been used since the Sept. 11 terror attacks to house the highest ranking Qaeda detainees, including Khalid Shaikh Mohammed, who is accused of being the mastermind of the attacks.

Such transfers have been used by American officials in the past three years in part to subject suspected members of Al Qaeda and the Taliban to interrogation practices harsher than those permitted under the Geneva Conventions or under American law. American officials have defended such practices, including a technique in which a prisoner is made to believe that he will drown, as essential to extract information that may be useful in preventing terrorist attacks.

Among those who had sought to call early attention to the C.I.A.'s transfer of prisoners from Iraq was an Army intelligence officer who served at Abu Ghraib prison outside Baghdad. The officer, Lt. Col. Steven L. Jordan, who has been accused of wrongdoing in connection with the abuse of prisoners at Abu Ghraib, told Army interrogators in March 2004 that the C.I.A.'s practice of not registering inmates at the prison was intended to smooth the way for their transfer to sites outside Iraq.

A White House spokesman, Sean McCormack, continued to assert Monday that "the Geneva Conventions are applicable to the conflict in Iraq, and our policy is to comply with the Geneva Conventions." But an administration official who described the new opinion said that although all Iraqis would be treated as protected by the Geneva Conventions, the government lawyers had concluded that "not everyone who might be in Iraq after the occupation began is a protected person" under the conventions.

Until now, the Bush administration has publicly acknowledged only one case in which the C.I.A. moved a prisoner from Iraq outside the country for interrogation, and that acknowledgement did not come until months after the prisoner, an Iraqi, was returned in the fall of 2003.

In that instance, intelligence officials said the Iraqi prisoner had been returned in compliance with an October 2003 legal opinion barring such transfers in cases involving Iraqis. But they have refused to comment on whether non-Iraqis might have been transferred.

The American officials said the C.I.A.'s moving of some non-Iraqis from Iraq had been authorized by the October 2003 memorandum, which was issued by the Office of Legal Counsel. They said it had been given support under the new legal opinion holding that some non-Iraqi prisoners were not protected by the Geneva Conventions. They said that the draft memorandum issued March 19, 2004, provided a narrower foundation for the practice, by holding that everyone in Iraq was a protected person, under the Geneva Conventions, but that the C.I.A. could nevertheless permanently remove persons deemed to be "illegal aliens" under "local immigration law."

The officials also disclosed for the first time that the C.I.A. had removed a second Iraqi from the country in 2003, and they said he had not been returned to Iraq until this spring. The officials described that episode as a mistake. In the past, the International Committee of the Red Cross, as well as a number of human rights advocates, have criticized the administration for applying the protections of the Geneva Conventions too narrowly. Article 49 of the Fourth Geneva Convention prohibits "the deportations of protected persons from occupied territory" no matter what the motive.

According to The Washington Post, which obtained a copy of the document, the March 19 memorandum includes a footnote recommending "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."

A Justice Department spokesman, Mark Corallo, said the March 19 document obtained by The Washington Post "was a draft and should be considered a draft." Mr. Corallo would not say whether a final opinion had been reached. "At the outset of the hostilities in Iraq, both the Defense Department and the agency were instructed by the Justice Department that the Geneva Conventions apply for Iraq," Mr. Corallo said.

Still, a Justice Department official said separately, "No matter what the provision is in the Geneva Convention, they are subject to legal interpretation."