

# Secret Bush Prisoner Transfer a War Crime

by Edward Spannaus

In what many legal experts view as a serious war crime, the United States secretly transferred a number of prisoners out of Iraq over the past 18 months, so that they could be interrogated and tortured, out of the sight of any authority, including the International Red Cross. Information concerning the transfers remains highly classified, but according to information leaked to various publications, both Iraqi citizens and captured foreign fighters were taken out of Iraq to undisclosed locations for purposes of interrogation, which admittedly included torture in many, if not all, cases.

The practice was justified in a March 2004 memorandum drafted by the U.S. Department of Justice (DOJ), which tried to create a loophole in relevant provisions of the Geneva Conventions. But, realizing what weak ground the DOJ was on, the DOJ memo, submitted by Jack Goldsmith, then-head of the now-notorious Office of Legal Counsel (OLC), warned that the practice of secretly removing prisoners might constitute a “grave breach” of the Fourth Geneva Convention, and therefore would be a “war crime” under the U.S. War Crimes Act.

This was not the first time that Administration officials had been warned of their potential culpability. As we have reported a number of times, the January 25, 2002 memorandum sent to President Bush by his White House Counsel Alberto Gonzales—but actually drafted by Vice President Cheney’s legal counsel David Addington—warned that U.S. officials faced a danger of future prosecution under the War Crimes Act for their handling of prisoners taken in Afghanistan. The Administration tried to get around this by declaring that the Geneva Convention on the treatment of prisoners of war, did not apply to Taliban and Al Qaeda.

But Administration officials repeatedly stated, and even testified under oath, that the Geneva Conventions *did* apply to the war in Iraq. Now it turns out that to get around this, they had secretly carved out an exception to their stated policy, whereby certain prisoners captured in Iraq were taken to secret detention facilities, usually in other cooperating countries, in violation of international law and treaties.

## Nazi Precedents

U.S. military law requires the immediate registration of all prisoners, in accordance with the Geneva Conventions and other international agreements. The Defense Department’s Taguba Report on Abu Ghraib referenced the problem of

“ghost detainees,” as have subsequent reports. At a Sept. 9 Senate hearing, Gen. Paul Kern, the appointing officer for the Fay-Jones investigation, said that there were “dozens and perhaps up to 100” ghost detainees at Abu Ghraib alone, referring to unrecorded prisoners who were kept “off the books”.

The attempted purpose of the Goldsmith memo, is to get around Article 49 of the Fourth Geneva Convention, pertaining to the protection of civilian persons—including insurgents—in territory occupied due to war. Article 49 prohibits individual or mass transfers or deportations from occupied territory. But Goldsmith situates Article 49 in the post-war outrage against mass deportations carried out by the Nazis, and suggests that there is therefore no prohibition against the deportation of illegal aliens from occupied territory.

Goldsmith also refers to another section of the Fourth Geneva Convention, which bars removal of a person accused of an offense for pre-trial detention, or post-trial imprisonment. But, Goldsmith cheerfully notes, citing the Sixth Amendment to the U.S. Constitution, a person accused of a crime enjoys certain protections that a person not yet accused lacks, so, therefore, removing a person who is *not yet accused* falls outside the provisions of the Geneva Convention. So, he pretends, a temporary relocation of a detainee for purposes of “interrogation” does not violate international law.

But the 1949 Geneva Conventions were intended to cover both mass and individual transfers, says Professor Detlev Vagts, the Bemis Professor of International Law at Harvard Law School. Prof. Vagts told *EIR* that Article 49 was written in response both to the Nazis’ forced labor transfers, or “obligatory labor transfers,” and also to the “Night and Fog” *Nacht und Nebel* program of removal of resistance fighters in France and other occupied territories to Nazi concentration camps. As to Goldsmith’s argument that “illegals” are not protected, Vagts pointed out that, “in every likelihood, Anne Frank was an ‘illegal,’ ” since she probably hadn’t been to the police station to renew her residence permit.

In Professor Vagts’ judgment, the secret transfers of detainees from Iraq, constitute a clear violation of the Geneva Convention, and also a war crime under U.S. law.

Scott Horton, the chairman of the International Law Committee of the Association of the Bar of the City of New York, agrees, telling *EIR*: “I don’t think there’s any doubt that it’s a war crime.”

On Sept. 8, in light of the lack of serious progress in the ongoing investigations, a group of retired generals and admirals called for the creation of an independent commission to investigate the prison torture scandals. In the heat of the election campaigns, almost nothing was heard about the torture scandal, but now it is expected that renewed pressure will be put on Congress, even during the lame-duck session, to create an independent commission which can conduct a thorough and complete probe, and identify those senior Administration officials responsible for developing and justifying the torture policy.