

HASSAN GHUL AND GOLDSMITH'S EXCEPTION TO THE GENEVA CONVENTION'S PROTECTED PERSON RULE

According to the May 30, 2005 CAT memo, the CIA wrote Jack Goldsmith with what appears to be a description of Hassan Ghul on March 12, 2004.

Intelligence indicated that prior to his capture, [redacted] "perform[ed] critical facilitation and finance activities for al-Qa'ida," including "transporting people, funds, and documents." Fax for Jack L. Goldsmith, III, Assistant Attorney General, Office of Legal Counsel, from [redacted], Assistant General Counsel, Central Intelligence Agency (March 12, 2004).

On March 18, 2004, Goldsmith finalized a memo finding that non-Iraqi members of al Qaeda need not be afforded protected status under the Geneva Convention.

We conclude that the following persons, if captured in occupied Iraq, are not "protected persons" within the meaning of GC article 4: U.S. nationals, nationals of a State not bound by the Convention, nationals of a co-belligerent State, and operatives of the al Qaeda terrorist organization who are not Iraqi nationals or permanent residents of Iraq.

The following day, Goldsmith drafted—but did not finalize—a memo finding that in some cases the US—as the occupying power—could transfer

"protected persons" out of Iraq (but probably shouldn't).

We conclude, accordingly, that article 49(1)'s prohibition on "forcible transfers," like its prohibition on "deportations," does not extend to the removal, pursuant to local immigration law, of "protected persons" who are illegal aliens.

[snip]

...we conclude that it is permissible to relocate "protected persons" who have not been accused of an offense from Iraq to another country, for a brief but not indefinite period, for purposes of interrogation.¹⁴

[snip]

14. While we conclude that GC does not prohibit temporary relocations of "protected persons" from occupied territory for a brief but not indefinite period, neither technical usage nor the Convention provides clear or precise guidance regarding exactly how long a "protected person" may be held outside occupied territory without running afoul of Article 49. Furthermore, violations of Article 49 may constitute "[g]rave breaches" of the Convention, art. 147, and thus "war crimes" under federal criminal law.

Now, we cannot be sure of the connection—nor can we be completely certain that the reference in the CAT memo pertains to Ghul (though it accords with the known details about him), but it appears these memos were at least partly an exercise in figuring out a way remove Ghul from Iraq to what ended up being one of CIA's black sites.

The detail is important for two reasons. It seems to date Ghul's CIA custody to at least

March 2004. More importantly, it provides one possible explanation for why Ghul—unlike a number of other High Value Detainees—remains disappeared. Goldsmith would argue, I think, that Ghul fell under his exception for Al Qaeda operatives. Yet he seems quite aware of the legal dangers of an occupying power rendering someone to be tortured. And after SCOTUS ruled in Hamdan that the Geneva Convention does apply to al Qaeda, that risk became even greater.