

THE STRANGE CASE OF HIWA ABDUL RAHMAN RASHUL (PART 1)

[Today Emptywheel has a special treat in the form of a guest post from one of our very longtime commenters, William Ockham. Marcy alluded to this right before she left. WO really drilled deep into this story and has produced a great article. As the title suggests, there will also be a Part II that will delve into the implications. Give WO some love and participation in comments, and in light of the special nature of this post, please stay on topic for this one; if there are other issues, please feel free to use the previous post on the Bates Contempt Decision for those. Thank you. – bmaz]

In June 2004, Hiwa Abdul Rahman Rashul had his 15 minutes of fame when Secretary of Defense Donald Rumsfeld answered questions at a press conference about the detainee known to American soldiers only as Triple X, the first ghost detainee transferred from CIA custody to the U.S. military. Rashul was suspected of being a member of Ansar al-Islam, a violent Kurdish Sunni Islamist movement opposed to the dominant Kurdish groups of northeastern Iraq. The real story of Hiwa Abdul Rahman Rashul wasn't his terrorist past or his time as a ghost detainee of the DOD, but his treatment by the CIA in between.

Part 1: Did the DOJ cover up what its own OLC ruled was a war crime committed by the CIA?

The Office of Legal Counsel in the Bush

Administration's Department of Justice has had a notoriously broad view of the Executive Branch's ability to define our obligations under the Geneva Conventions. But if the OLC under Goldsmith and Bradbury decided that the CIA had engaged in a grave breach of the Geneva Conventions (and even John Yoo agreed), and the CIA OIG had made a criminal referral to the DOJ, wouldn't you expect a prosecution? Recently released CIA documents suggest that such a referral was made, but no prosecution occurred. Perhaps the very public complicity of Donald Rumsfeld, Alberto Gonzales, and George Tenet played a role in the decision not to prosecute. But I'm getting ahead of myself. First, I want to make it clear that I'm using the term 'war crime' in the very narrow sense of a violation of U.S.C. § 2441.

The Crime

Return with me now to those thrilling days of yester-year, that is, the summer of 2003. Dana Priest (in a story from October 2004) and Jane Mayer (The Dark Side) are our narrators. Mayer's account (in **bold**) appears to derive directly from Jack Goldsmith:

Hiwa Abdul Rahman Rashul, a suspected member of the Iraqi Al-Ansar [sic] 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.

As he [Jack Goldsmith] awaited Senate confirmation in the summer of 2003, he received an urgent phone call from Patrick Philbin... Senior officials had to know right away if it was legal to move Iraqi terror suspects outside the country for interrogation... He was obliged to say he really wasn't sure what the answer was.

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. [Mayer reports that the call from Gonzales came within the first two hours of Goldsmith's first day on the job and that he was given until the end of the week to answer the question.]

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.

Therein lies the tale. The U.S., as the Occupying Power of Iraq, was forbidden from transferring "protected persons" to locations outside of Iraq by Article 49 of GC-IV. Article 147 declares violations of Article 49 as 'grave breaches'. Any grave breach of the GC-IV committed by a U.S. national is a violation of the 1996 War Crimes Act (U.S.C 2441). These violations, unlike violations of Common Article 3, were not affected by the limitations and retroactive immunity provisions of the Military Commissions Act and the Detainee Treatment Act.

The Cover-up

What happened when Rashul was returned to Iraq only made things worse for the U.S. When the existence of 'ghost detainees' in Iraq came to light in the aftermath of Abu Ghraib, Rashul's story came out and the U. S. government chose to respond publicly. In the words of Donald Rumsfeld, speaking publicly on June 16, 2004:

I was requested by the Director of Central Intelligence to take custody of an Iraqi national who was believed to be a high-ranking member of Ansar al-Islam. And we did so. We were asked to not immediately register the individual. And we did that... And we're in the process of registering him with the ICRC at the present time.

Rumsfeld was being a little disingenuous about the process. Let's pick up Rashul's story as told by Edward T. Pound, writing for U.S. News and World Report:

Rashul was returned to Iraq on October 29 [2003]. On November 18, Lt. Gen. Ricardo Sanchez, the top U.S. commander in Iraq, issued a classified order directing guards with the 800th Military Police Brigade to hide Rashul. The order was coded "Flash Red," meaning, says one military source, that it was "hot." It says that Sanchez's command "accepts custody and detains Hiwa Abdul Rahman Rashul, a high-ranking Ansar al-Islam member." The order required extraordinary secrecy. Rashul's name could not be disclosed to the Red Cross or to a foreign government. It prohibited the Army from entering Rashul's name in any electronic prisoner database.

Other requirements of the order include:

Rashul will "remain segregated and isolated from the remainder of the detainee population. Under no circumstances will his presence be made known to the detainee population . . . "

"Only military personnel and debriefers will have access to the detainee. . . . Knowledge of the presence of this detainee will be strictly limited on a need-to-know basis."

"Any reports from interrogations or debriefings will contain only the minimum amount of source information . . . No source reference will be made to identify [Rashul's] status, membership in Ansar al-Islam, or other terrorist group."

Despite all this secrecy, Rashul has been interrogated only once—and then only briefly, a Pentagon official says.

Despite claims from administration officials that the CIA and DOD 'dropped the ball' by failing to register Rashul, it seems more likely that there was never any plan to register Rashul with ICRC and expose the fact that a grave breach of the Geneva Convention had occurred. Rumsfeld's statements (and those of his lackey Daniel Dell'Orto) implicate Rumsfeld and Tenet in a conspiracy to cover up this war crime. Unfortunately, Rashul's story seems to drop off the radar after June 2004 just as quickly as it burst on the scene the day before Rumsfeld's news conference. Even Dana Priest's story from October 2004 and Mayer's recent book don't deal with any fallout from this episode after June 2004.

The Consequences (or lack thereof)

We've been left wondering what, if anything, happened. Until now. Thanks to the FOIA efforts of the ACLU, the Center for Constitutional Justice, Amnesty International, and Washington Square Legal Services, the CIA has been forced to release over 100 documents, most of them heavily redacted, about its ghost detention system. In addition, the CIA has released a Vaughn index of 250 representative documents (out of 7000) that they are withholding. Even with just this tip of the information iceberg, it is possible to trace the course of an internal investigation into the CIA's ghost detention activities in Iraq and, more importantly, the OIG's actions in the Rashul case.

The first document I want to highlight is an email from an OIG employee to John Helgerson, the CIA's Inspector General (and a huge, redacted, CC list). [Side note: The CIA uses Lotus Notes, but when I quote from the emails I'll use a standard format rather than trying to reproduce the idiosyncratic Notes interface. Also, the sender's department is generally not redacted, even when the name is.]

Sent: 08/30/04 03:45 PM

From: [redacted] OIG

To: John L. Helgerson [other recipients redacted]

Cc: [Many recipients redacted]

Subject: Geneva Convention – Summary of relevant provisions


John, et al. – attached is a collection of provisions drawn from the Geneva Convention that governs treatment of civilians in occupied territories that I thought most relevant based upon my limited understanding of the INV [Investigation] Staff's current work. I have included text from each of the selected provisions and explanations I thought useful drawn largely from a commentary published by the International Committee of the Red Cross a few years after the Convention was developed. I have tried to keep the summary short, but it is still imposing, and it is intended to be a starting point for understanding, discussion, and further research on the meaning and reach of the various provisions. [redacted] has been involved in researching the Convention and the two of us shall continue to develop background material for the investigations. Please let me know if you have specific questions that require further insight.

[redacted]

[Attachment – MS Word Icon]

Geneva Convention IV Summary.doc

The attachment is exactly what it says. It is a thirteen-page document formatted as a table in landscape orientation. Both the email and attachment came from paper copies (i.e. they have handwritten markings). The attachment has only one marking. On the next to the last page, in the entry for Article 147, Grave Breaches, in the phrase "Unlawful deportation or transfer or unlawful confinement of a Protected Person", the second occurrence of the word "unlawful" is circled.

The next email I want to point out is also addressed to John Helgerson and sent 2 months later. It is probably by the same person as the first email, although the name is redacted on both.

Sent: 10/29/04 04:08 PM

From: [redacted] OIG

To: John L. Helgerson

Cc: [Many recipients redacted]

Subject: Geneva Convention Summary

John – At long last, I am sending you the attached memo in response to your request for a working summary relating the geneva convention to the matter of the ghost detainees. This may not look like much, but I have tried to keep it to bare minimum and avoid obscure Latin phrases, legal citations, etc. It may not stand up to scrutiny as more facts are developed, understanding increases, and the positions of OGC and the rest of the US Government become more clear. I

am sure that [redaction of approximately
½ of a line] will be able to expand on
and correct it, and to answer any
follow-on questions you may have as a
result. With that, and the soon-to-be-
completed draft of an employee review
policy, I will become a ghost employee.

[Attachment – MS Word
Icon]

[Attachment – MS Word Icon]

Geneva Convention

Summary.doc

Geneva

Convention IV Matrix.doc

The Geneva Convention IV Matrix.doc is virtually identical to the file that was attached to the August email and is numbered with the same document tracking number as this email.

Initially, I thought that the one page summary described in the email was missing, but it was included a few pages later in the document dump. All the issues raised by Rashul's treatment are covered and, as you can see in this image, the words 'individual' and 'mass transfers' are underlined in the sentence describing Article 49.



These two emails sent directly to Helgerson clearly indicate that the CIA IG is conducting a serious and consequential investigation. The synopsis of the Conventions is specific to the facts of Rashul's case.

The final piece of the puzzle is delivered by a CIA redactor's error. Two weeks after the second email to Helgerson, there was a heavily redacted email exchange between the CIA's Office of General Counsel (OGC), and lawyers in the Counter-Terrorism Center (CTC/LGL) and the Near East Division (NE/LGL). The exchange turns up a couple of different times within the document dump. The whole exchange would have been incomprehensible except for the fact that the subject of the email appears eight times and it

is only redacted seven times. The subject was 'Hiwa Crimes Referral'. Hiwa is an unusual name so there is no doubt that this email exchange refers to Hiwa Abdul Rahman Rashul. Here's the exchange, in chronological order:

11/10/04 05:28pm

From: [redacted] OGC

To: [redacted]

CC: [redacted]

Subject: Hiwa Crimes Referral

I have told the DCI and subsequently the DDO. I told them you would tell the CTC and NE management. I know that you will do it in a way that will be frank, realistic but not overly alarmist.

11/10/04 06:27pm (responding to the above)

From: [redacted] CTC/LGL

To: [redacted]

CC: [redacted]

[redacted] and I informed the D/CTC and DD/CTC.

11/11/04 10:49am (responding to initial email)

From: [redacted] NE/LGL

To: [redacted]

CC: [redacted]

Just want to sure that I have your okay to inform [redacted] of the matter. I think he is entitled to know, even though he is currently detailed outside the building.

11/12/04 08:07am (responding the request above)

From: [redacted] OGC

To: [redacted]

CC: [redacted]

OK.

There's no evidence that the DOJ ever took action on this referral even though it was important enough the CIA's legal staff felt the need to personally notify, in a frank but not overly alarmist way, the new DCI (Porter Goss had just started less than 3 weeks before the referral), the DDO (head of the CIA covert operations directorate), the management of the Counter-Terrorism Center, and the head of the Near East division (the unit responsible for Iraq, Afghanistan, etc.). There's also no declination of prosecution for this case, although the document dump includes one for another referral from the CIA OIG.

This leaves us with one very important question: On what basis did the DOJ refuse prosecution? This is as clear-cut a case of a war crime as you can possibly get. Rashul was an Iraqi national taken into the custody the 'Occupying Power' in Iraq. That makes him a 'protected person'. There are no exceptions. Even spies and saboteurs have to be treated as 'protected persons' until they receive an administrative hearing. 'Protected Persons' can not be transferred to another country. To do so is a 'grave breach' and therefore a war crime under U.S. law. Under the Geneva Conventions, we have a positive duty to prosecute this crime.

Next up in Part 2, we'll look at why this matters.