



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

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MEMORANDUM FOR THE FILES

FROM: Jack Goldsmith

RE: Voluntary Departure from Occupied Territory

This memorandum records advice we gave the Department of Defense last fall regarding whether article 49 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 ("GC") would prohibit the voluntary relocation of a "protected person" from occupied Iraq. We advised that article 49 did not preclude such a voluntary relocation.

Question Presented: Whether article 49 of GC would preclude the voluntary relocation of a "protected person" from occupied Iraq?

Analysis: Article 49 of GC states in part that "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive." Iraq is an occupied country to which GC applies, and the individual detainee in question here is a "protected person" under that Convention.¹ Consequently, if the proposed relocation were a "deportation," it would *prima facie* be prohibited by article 49(1). (The proposed voluntary relocation plainly would not constitute a "forcible transfer" so we need consider only "deportation" here.)² Furthermore, article 8 of GC states that "[p]rotected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention," so a "protected person" could not consent to a violation of the protections granted him under article 49. If, however, the proposed relocation is not a "deportation" within the meaning of article 49(1), then that provision poses no barrier to that action. We have concluded that the proposed action does not constitute the "deportation" of the individual in question.

First, "deportation," as used in article 49(1), is a term of art in the international law of armed conflicts, and inherent within its definition is force or the threat of force. Indeed, this

¹ Further, we construe article 49 to apply to "individual" as well as "mass" deportations. *Accord Affo v. Commander IDF (West Bank)*, 83 I.L.R. 122, 143 (Israel High Ct. 1990); *id.* at 188 (Bach, J., concurring in judgment and dissenting in part) (finding "no room to doubt, that the Article applies not only to mass deportations but to the deportation of individuals as well").

² As we explain below, the drafters inserted the word "forcible" before "transfers" for the precise purpose of permitting voluntary relocations. Jean S. Pictet, ed., *Commentary on the Geneva IV Convention Relative to the Protection of Civilian Persons in Time of War* 279 (1958).

explains why the drafters specified “forcible transfers” but not “forcible deportations”: the latter term would be redundant; deportation is, by definition, forcible. As Professor Yoram Dinstein has written, “Article 49 of the Convention distinguishes between deportation and evacuation. Deportation is the *forcible* transfer of civilians – on an individual or collective basis – from the occupied territory to the territory of the occupying State or to another State (whether it is occupied or not).” (Emphasis added). Yoram Dinstein, *The Laws of War* 225 (1983), *quoted in Affo*, 83 I.L.R. at 192 (Bach, J., concurring in judgment and dissenting in part); *see also* Kurt René Radley, *The Palestinian Refugees: The Right to Return in International Law*, 72 Am. J. Int’l L. 586, 598 (1978) (“Article 49 forbids the *forced* and permanent removal of persons from territory to which they are native.”) (emphasis added); Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* 144 (1995) (“Article 49 comes into play whenever people are *forcibly* moved from their ordinary residences.”) (emphasis added).

Article 49(1) represents a codification of the customary international law of armed conflict as it stood at the time the Convention was drafted. *See, e.g.*, Alfred M. de Zayas, *International Law and Mass Population Transfers*, 16 Harv. Int’l L.J. 207, 210 (1975) (asserting that article 49(1) “merely codif[ies] the prohibition of deportations of civilians from occupied territories which in fact already existed in the laws and customs of war”). And in that body of law the meaning of “deportation,” as a term of art inherently involving the use or threat of force, has been relatively consistent over time.

The prohibition on deportation had been embodied in the laws of war as early as 1863, when article 23 of the Lieber Code provided that, under the civilized norms of warfare, “[p]rivate citizens are no longer murdered, enslaved, or carried off to distant parts.” Francis Lieber, “Instructions for the Government of Armies of the United States in the Field,” art. 23 (1863) (issued as General Order No. 100 (1863)) (emphases added) (“Lieber Code”); *see also* Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int’l L. 239, 245 (2000) (noting that article 23 of the Lieber Code “anticipat[ed] the prohibition on deportations in the Fourth Geneva Convention”).³ The idea of force or coercion is obviously present in the Lieber Code’s prohibition of carrying off citizens to distant parts.

“Deportation” appears to have had the same connotation at the time GC was negotiated. Thus the ICRC Commentary begins its discussion of Article 49 by observing that “[t]here is doubtless no need to give an account here of the painful recollections called forth by the ‘deportations’ of the Second World War, for they are still present in everyone’s memory. It will suffice to mention that millions of human beings were *torn from their homes*, separated from their families and *deported* from their country, usually under inhumane conditions.” Pictet, *Commentary*, *supra*, at 278 (emphases added); *see also* 1 *Trials of Major War Criminals Before the International Military Tribunal* 51 (1946) (indicting the principal defendants with the war crime of “Germanization of Occupied Territories” (Count 3(J)), specifying that they had, *inter*

³ Issued for the Union Army during the Civil War, the Lieber Code “was the first instance in western history in which the government of a sovereign nation established formal guidelines for its army’s conduct toward its enemies.” Richard Shelly Hartigan, *Lieber’s Code and the Law of War* 1-2 (1983). It “has had a major influence on the drafting of . . . such treaties as . . . the Geneva Conventions and, of course, on the formation of customary law,” Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 49 n.131 (1989), and remains “a benchmark for the conduct of an army toward an enemy army and population,” Hartigan, *supra*, at 1.

alia, “forcibly deported inhabitants who were predominantly non-German and introduced thousands of German colonists”) (emphasis added); *United States v. Milch*, 2 Trials of War Criminals Before the Nuernberg Military Tribunals 353, 790 (1946-1949) (prosecutor’s description of the crime of “deportation” as involving “people who had been *uprooted from their homes* in occupied territory”) (emphasis added).

Indeed, “deportation” retains a similar connotation in the law of international armed conflict today. See, e.g., United Nations: Rome Statute of the International Criminal Court, adopted July 17, 1998, art. 7(2)(d), U.N. Doc. A/CONF.183/9, reprinted in 37 I.L.M. 999, 1005 (1998) (defining the “crime against humanity” of “deportation or forcible transfer of population” as “forced displacement of the persons concerned by *expulsion or other coercive acts* from the area in which they are lawfully present, without grounds permitted under international law”) (emphases added) (“Rome Statute”);⁴ *Prosecutor v. Krnojelac*, Case No. IT-97-25, ¶ 15 (Appeals Chamber, Int’l Crim. Trib. for the Former Yugoslavia, Sept. 17, 2003) (Separate Opinion of Judge Schomburg) (“[T]he *actus reus* of deportation is *forcibly removing or uprooting* individuals from the territory and the environment in which they are lawfully present.”) (emphasis added), available at <http://www.un.org/icty/krnjelac/appeal/judgement/krn-aj030917e.pdf>; *Prosecutor v. Blaskic*, Case No. IT-95-14, ¶ 234 (Trial Chamber, Int’l Crim. Trib. for the Former Yugoslavia, Mar. 3, 2000), reprinted in 122 I.L.R. 1, 88 (2002) (“The deportation or forcible transfer of civilians means *forced* displacement of the persons concerned by *expulsion or other coercive acts* from the area in which they are lawfully present, without grounds permitted under international law.”) (emphasis added; internal quotation marks omitted); cf. Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1978, S. Treaty Doc. No. 100-2, at 13 art. 17 (1987) (entitled “[p]rohibition on the *forced movement* of civilians”) (emphasis added); Yves Sandoz et al. eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 1472 (1987) (construing art. 17 of Protocol II not to “restrict the right of civilians . . . to go abroad.”). Merely *facilitating* the voluntary decision of a “protected person” to leave an occupied country and go abroad should by these standards not count as “deportation.”

Second, the International Red Cross Commentary on GC suggests that the drafters of the Convention intended to permit the voluntary relocation of “protected persons” to places outside an occupied country. The Commentary says, “[t]he Conference had particularly in mind the case of protected persons belonging to ethnic or political minorities who might have suffered discrimination or persecution on that account and might therefore wish to leave the country. In order to make due allowances for that legitimate desire the Conference decided to authorize voluntary transfers by implication, and only to prohibit ‘forcible’ transfers.” Pictet, *Commentary*, supra, at 279.⁵ Thus, voluntary relocation of a “protected person” outside the

⁴ The Rome Statute also defines, by reference to GC, the “war crime[.]” of “[u]nlawful deportation or transfer or unlawful confinement,” *id.* art. 8(2)(a)(vii), 37 I.L.M. at 1006, and, separately, the “war crime[.]” of “[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory” *id.* art. 8(2)(b)(viii), 37 I.L.M. at 1007.

⁵ Although the Commentary speaks of “transfers” rather than of “deportations,” it is plainly considering a situation in which a “protected person” is being enabled to relocate outside the occupied territory – which is the

occupied country would seem to be consistent with the drafters' intent. *Accord* Henckaerts, *supra*, at 144-45. Furthermore, article 48 of GC provides that "[p]rotected persons who are not nationals of the Power whose territory is occupied, may avail themselves of the right to leave [occupied] territory," subject to certain other provisions. This provision confirms that GC does not seek to preclude the voluntary departures of "protected persons" from occupied territory.

Third, if article 49 prohibited even fully *voluntary* relocations of "protected persons" outside an occupied territory, puzzling and indeed irrational consequences would appear to follow. For example, an Occupying Power could be required to force "protected persons" to remain within the territory, even if they desired to leave, or at least to avoid facilitating in any way those persons' departure, for fear of being charged with having "deported" them. For example, if a "protected person" within Iraq was in critical need of medical care that was obtainable only in Kuwait, U.S. occupying forces could not airlift that person to Kuwait for treatment, even if the "protected person" urgently sought them to do so.⁶

Based on these considerations, we advised that article 49 did not prohibit the proposed voluntary relocation. We further advised that prior to relocation, the occupying power should have the person to be relocated make clear in writing that he understood that he (a) was leaving occupied Iraq voluntarily, (b) was not being deported, and (c) could return to Iraq any time.

situation in this case. Indeed the passage's failure to mention "deportations" may reflect the understanding that the prohibition on "deportations" would not apply to voluntary relocations.

⁶ Article 49(2), permitting "evacuation" if "the security of the population or imperative military reasons so demand," would not seem to cover this type of emergency.