U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

January 26, 2002

MEMORANDUM FOR LARRY D. THOMPSON
DEPUTY ATTORNEY GENERAL

FROM: Jay S. Bybee
Assistant Attorney General

RE: *Memorandum From Alberto Gonzales to the President on the Application of the Geneva Convention to Al Qaeda and the Taliban*

We have reviewed a memorandum dated January 25, 2002, from Alberto R. Gonzales to the President, *Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict With Al Qaeda and the Taliban*. We have three comments on the memorandum.

First, in the first bullet under the "Legal Background" section, the memorandum, having referred to OLC's opinion, states that the grounds for determining that the Geneva Convention (GPW) does not apply to the Taliban may include:

> A determination that Afghanistan was a failed state because the Taliban did not exercise full control over the territory and people, was not recognized by the international community, and was not capable of fulfilling its international obligations (e.g., was in widespread material breach of its international obligations).

We should note that the OLC opinion stated that the President could find that Afghanistan was a failed state and that such a finding would support a determination that GPW does not apply to the conflict in Afghanistan. OLC did not conclude that Afghanistan had committed a "material breach" of GPW. The Gonzales memo is careful to state that Afghanistan, as a "failed state" was in "material breach of *its international obligations,*" not that Afghanistan breached GPW. We have no objection to the statement in the memorandum, but we would caution that any public statements should not be oversimplified to suggest that the Taliban breached the GPW and that its breach released us from our obligations.

Second, in the second main bullet on p. 2 ("Substantially reduces the threat of domestic criminal prosecution under the War Crimes Act"), we would suggest changing this language to "Substantially reduces the misapplication of the War Crimes Act."

Third, on p. 2, the next to last bullet ("Second, it is difficult to predict the needs an circumstances that could arise in the course of the war on terrorism.") does not seem to fit under

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the point under discussion: that the President determining that GPW does not apply to this conflict would preclude prosecutions under the War Crimes Act. The flexibility point has been appropriately made elsewhere in the memorandum.

Finally, we note a typographical error in the second sub-bullet on p. 2. The second sentence should read: "It also holds open options for future conflicts . . . ."

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July 16, 2004

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

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[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*

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[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/krnojelac/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

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[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.

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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.

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Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

February 4, 2005

Honorable William J. Haynes II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, D.C. 20101-1600

Re: Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (March 14, 2003) ("March 2003 Memorandum")

Dear Jim:

In December 2003, then-Assistant Attorney General Jack Goldsmith advised you that the March 2003 Memorandum was under review by this Office and should not be relied upon for any purpose. Assistant Attorney General Goldsmith specifically advised, however, that the 24 interrogation techniques approved by the Secretary of Defense for use with al Qaeda and Taliban detainees at Guantanamo Bay Naval Base were authorized for continued use as noted below. I understand that, since that time, the Department of Defense has not relied on the March 2003 Memorandum for any purpose. I also understand that, to the extent that the March 2003 Memorandum was relied on from March 2003 to December 2003, policies based on the substance of that Memorandum have been reviewed and, as appropriate, modified to exclude such reliance. This letter will confirm that this Office has formally withdrawn the March 2003 Memorandum.

The March 2003 Memorandum has been superseded by subsequent legal analyses. The attached Testimony of Patrick F. Philbin before the House Permanent Select Committee on Intelligence, July 14, 2004, reflects a determination by the Department of Justice that the 24 interrogation techniques approved by the Secretary of Defense mentioned above are lawful when used in accordance with the limitations and safeguards specified by the Secretary. This also accurately reflects Assistant Attorney General Goldsmith's oral advice in December 2003. In addition, as I have previously informed you, this Office has recently issued a revised interpretation of the federal criminal prohibition against torture, codified at 18 U.S.C. §§ 2340-2340A, which constitutes the authoritative opinion of this Office as to the requirements of that statute. See Memorandum for Deputy Attorney General James B. Comey from Daniel Levin,

Acting Assistant Attorney General, Office of Legal Counsel, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004) (copy attached).

Please let us know if we can be of further assistance.

Sincerely,

Daniel Levin
Acting Assistant Attorney General

Attachments