U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

*Washington, D.C. 20530*

March 19, 2004

**MEMORANDUM TO:**

William H. Taft, IV
General Counsel
Department of State

William J. Haynes, II
General Counsel
Department of Defense

John Bellinger
Legal Adviser for National Security

Scott Muller
General Counsel
Central Intelligence Agency

From: Jack Goldsmith
Assistant Attorney General
Office of Legal Counsel

Gentlemen:

Attached is a draft of an opinion, requested by Judge Gonzales, concerning the meaning of Article 49 of the Fourth Geneva Convention as it applies in occupied Iraq. I would appreciate any comments you may have at your earliest convenience. As always, it is important that you keep this draft opinion a very close hold. Thanks.

Attachment

cc: David Leitch

U.S. Department of Justice

Office of Legal Counsel

DRAFT

Office of the Assistant Attorney General

Washington, D.C. 20530

DRAFT 3/19/04

**MEMORANDUM FOR ALBERTO R. GONZALES, COUNSEL TO THE PRESIDENT**

*Re: Permissibility of Relocating Certain "Protected Persons" from Occupied Iraq*

Article 49 of the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("GC" or "Convention") prohibits "[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, . . . regardless of their motive."[1] This opinion elaborates on interim guidance provided in October 2003 concerning the permissibility under GC of relocating certain "protected persons" detained in occupied Iraq to places outside that country.[2] We now

[1] The entirety of article 49 is as follows:

> Individual 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.
>
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.
>
> The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.
>
> The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.
>
> The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.
>
> The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

[2] While GC confers certain protections on "the whole of the populations of the countries in conflict," GC, art. 13; *see also id.* Part II (Title) ("General Protections of Populations against Certain Consequences of War"), it

conclude that the United States may, consistent with article 49, (1) remove "protected persons" who are illegal aliens from Iraq pursuant to local immigration law; and (2) relocate "protected persons" (whether illegal aliens or not) from Iraq to another country to facilitate interrogation, for a brief but not indefinite period, so long as adjudicative proceedings have not been initiated against them.

## I. Removal of "Protected Persons" Who Are Illegal Aliens

We first consider whether removing a "protected person" who is an illegal alien from occupied territory constitutes a "deportation" or "forcible transfer" within the meaning of article 49(1)'s prohibition. We consider each term in turn.

We begin with "deportation." Under United States law, this term denotes the removal of an alien. *See, e.g.*, 8 U.S.C. 1227(a)(1)(B) ("Any alien who is present in the United States in violation of this chapter or any other law of the United States is deportable."). *Black's Law Dictionary* of 1951, two years after GC, confirms the point. It defines the term "[i]n American Law" as "[t]he removal or sending back of an alien to the country from which he came."[3] If this American law meaning of "deportation" were the meaning of the word in article 49, then that article would apply to the removal of "protected persons" who are illegal aliens from occupied territory.

But article 49(1) — or at least the core of it — 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, "deportation" is a term of art with a quite different meaning that appears to be derived from Roman law. *Black's Law Dictionary* carefully contrasts the American law meaning of "deportation" with its meaning under Roman law: "A perpetual banishment, depriving the banished of his rights *as a citizen*." *Black's Law Dictionary* 526 (4th ed. 1951) (emphasis added); *see also id.* at 525 ("Deportatio. Lat. In the civil law. A kind of banishment, where a condemned person was sent or carried away to some foreign country, usually to an island ... *and thus taken out of the number of Roman citizens.*") (emphasis added). Under this

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limits most of its protections to a narrower class of "protected persons," *id.*, art. 4. *See generally* Memorandum for Alberto R. Gonzales, Counsel to the President, *Re: "Protected Persons" in Occupied Iraq* (Mar. 18, 2004). Among GC's provisions whose benefits are generally restricted to "protected persons" are those included in Part III, including Article 49. *See* Part III (Title) ("Status and Treatment of Protected Persons"). *See also* Jean S. Pictet, *Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 278 (1958) (stating that article 49 "prohibits the forcible transfer or deportation from occupied territory *of protected persons*") (emphasis added); *id.* at 283 (describing "the meaning given them ["deportations" and "transfers"] in [article 49] paragraph 1, i.e., the compulsory movement of *protected persons* from occupied territory") (emphasis added).

[3] Black's Law Dictionary 526 (4th ed. 1951). Even in domestic Anglo-American law of that time, however, "deportation" was not strictly limited to the removal of aliens. *See, e.g., Co-Operative Comm. on Japanese Canadians v. Attorney-General for Canada*, 13 I.L.R. 23, 27 (Privy Council 1946) (sustaining deportation under Canadian war-related legislation of British and Canadian nationals; "deportation" is "not a word that is misused when applied to persons not aliens").

Roman law definition, a prohibition on deportation would not apply to the removal of illegal aliens. As shown below, the term "deportation" in the international law of armed conflict possessed this Roman meaning in the nineteenth century, through World Wars I and II, and at the time of GC's drafting.

As early as 1863, Article 23 of the Lieber Code stated that "[p]rivate *citizens* are no longer murdered, enslaved, or *carried off to distant parts.*" F. Lieber, "Instructions for the Government of Armies of the United States in the Field," art. 23 (1863) (emphases added).[4] While this provision does not itself use the term "deportation," it is widely recognized as a principal progenitor of the customary prohibition on deportations during wartime codified in article 49. *See, e.g.*, Jean-Marie Henckaerts, *Deportation and Transfer of Civilians in Time of War*, 26 Vand. J. Trans. L. 469, 482-83 (1993) (citing article 23 of the Lieber Code as support for the conclusion that article 49 embodied customary international law); Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians — A Case Study*, 40 B.C.L. Rev. 275, 305-06 (1998) (stating that "the United States had condemned the *deportation* of civilians in Lieber's Code") (emphasis added). Significantly, the Lieber Code's prohibition of carrying off *citizens* to distant parts reflects the Roman meaning of "deportation" described above.

Article 23 of the Lieber Code reflected the state of the customary laws of war during the Civil War, and from that time through World War I. Despite this rule, Germany deported 160,000 Belgians from the Belgian "Government General" and the Zone d'étape to Germany, during World War I. Germany's action was widely condemned as a violation of customary international law. *See, e.g.*, Myres S. McDougal and Florentino P. Felciano, *Law and Minimum World Public Order* 806 (1961); John H.E. Fried, *Transfer of Civilian Manpower From Occupied Territory*, 40 Am. J. Int'l L. 303, 308-11 (1946). For example, the United States State Department protested during the War that the deportation of Belgians violated "humane principles of international practice." *The Krupp Case*, 9 Trials of War Criminals Before the Nuernberg Military Tribunals 1, 1429-30 (1946-49). And after the War ended, the Responsibilities Commission of the 1919 Paris Peace Conference condemned "[d]eportation of civilians" as a violation of the laws and customs of war. *See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference*, 14 Am. J. Int'l L. 95, 114 (1920). While the condemnation, as sometimes articulated, was directed at the deportation of *inhabitants* of occupied territory, *see* International Law 345-46 (Hersh Lauterpacht ed., 6th ed. 1944) (stating, in light of "civilized world['s]" reaction to First World War deportation of Belgians and Germans, that "there is no right to deport *inhabitants* to the country of the occupant") (emphasis added), nothing in the historical record suggests that this term was intended or understood to include illegal aliens, that the

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[4] 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 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.

condemnation extended to the removal of such persons pursuant to local law, or that the customary law of war had evolved so significantly beyond the Lieber Code's prohibition.

Furthermore, article 49 was written against the background of World War II, and it is the particular atrocities of that war that most directly inform the text. In World War II, Nazi-occupied countries were treated as "vast reservoirs of manpower," and deportations of civilians for purposes of forced labor and slave labor "assumed staggering proportions."[5] The Nazis also employed mass deportations to resettle from areas conquered or annexed by Germany indigenous non-German populations, such as "over 100,000 French who were expelled from Alsace-Lorraine into Vichy France and over one million Poles who were deported from the western parts of occupied Poland (*Warthegau*) into the so-called Government-General of Poland." Alfred De Zayas, *The Right to One's Homeland, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia*, 6 Crim. L.F. 257, 264 (1995). These roundly and universally condemned atrocities explicitly informed the drafting of Article 49. *See, e.g.*, 2A *Final Record*, at 664 (summarizing statement of the Chairman, which "noted that the Committee was unanimous in its condemnation of the abominable practice of deportation .... He suggested that deportations should, in the same way as the taking of hostages, be solemnly prohibited in the Preamble"); Jean S. Pictet, *Commentary on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 278 (1958) ("There 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 .... The thought of the physical and mental suffering endured by these 'displaced persons', among whom there were a great many women, children, old people and sick, can only lead to thankfulness for the prohibition embodied in this paragraph, which is intended to forbid such hateful practices for all time.").

Here, again, however, there is no evidence that the outrage of the world extended to the removal of *illegal aliens* from occupied territory in accordance with local immigration law, and indeed there is no evidence that international law has ever disapproved of such removals. *Cf.* Awn Shawhat Al-Khasawneh, Special Rapporteur, *The Realization of Economic, Social and Cultural Rights: The human rights dimension of population transfer, including the implantation of settlers*, Progress report prepared for the Economic and Social Council, United Nations Commission on Human Rights, E/CN.4/Sub.2/1994/18, *available at* http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/e74e0cf, ¶ 51 (*citing* Guy Goodwin-Gill, *International Law and the Movement of Persons Between States* 262 (1978)) ("Among the grounds upon which the expulsion of aliens on an individual basis is justified in State practice are: entry in breach of law [and] breach of conditions of admission."). The ICRC's account illustrates the point. In summarizing the war-time events that were uppermost in the minds of the drafters as they framed article 49(1), the ICRC Commentary lamented, in particular, "that millions of human beings were torn *from their homes*, separated from their families and deported *from their country*, usually under inhumane conditions." Pictet, *supra*, at 278 (emphases added).

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[5] *See* Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order* 806 (1961). On June 30, 1943, the German Commissioner-General of Manpower declared that the number of foreign workers, including prisoners of war, engaged in the German war economy reached 12,100,000. *See id.*; *see also* John H.E. Fried, *Transfer of Civilian Manpower From Occupied Territory*, 40 Am. J. Int'l L. 303, 312-13 (1946); 1 Trial of the Major War Criminals Before the International Military Tribunal 244 (New York: AMS Press, 1971).

And in discussing pre-Convention customary law (including the Nuremberg Trials), the ICRC Commentary remarks that a "great many . . . decisions" by the Nuremberg "and other courts" have "stated that the deportation of *inhabitants* of occupied territory is contrary to the laws and customs of war." Pictet, *supra*, at 279 n.3 (emphasis added).[6]

Accordingly, we conclude that the word "deportations" in article 49 bears the term-of-art meaning that it bore in Roman times and in international law from the Lieber Code through World Wars I and II and right up to the drafting of GC: removal of a person from a country where he has a legal right to be. *Cf., e.g., Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (invoking the "well established" principle that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms"); *Air France v. Saks*, 470 U.S. 392, 399 (1985) (applying similar principles to treaty interpretation). Indeed, "deportation" continues to retain the same term-of-art meaning in the law of international armed conflict today. *See* Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, reprinted in 37 I.L.M. 999 (1998) article 7(2)(d) (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") (emphasis added); *Prosecutor v. Krnojelac*, Case No.: IT-97-25, Appeals Chamber Judgement, 17 Sept. 2003, Separate Opinion of Judge Schomburg ¶ 15 ("[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); *Prosecutor v. Blaskic*, Case No. IT-95-14, Trial Chamber Judgement, 3 Mar. 2000, ¶ 234 ("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). For all these reasons, it follows that article 49's prohibition on "deportations" does not bar the removal of "protected persons" who are illegal aliens from occupied territory pursuant to local immigration law.

Article 49 prohibits "forcible *transfers*" in addition to "deportations." We conclude that what has been said about the latter largely applies to the former. Passages from the ICRC Commentary and the negotiating record illustrate that the words "transfers" and "deportations" were used loosely and, at times, interchangeably to capture the atrocities practiced by the Nazis

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[6] Again, we do not understand the word "inhabitants" to include illegal aliens. During Nuremberg trials that addressed the crime of "deporting civilians," the terms "citizens" and "inhabitants" were used somewhat loosely and interchangeably. For example, in the trial of Field Marshal Erhard Milch, the indictment defined the crime of deportation to involve "citizens," the prosecutor described the crime to involve "people who had been uprooted from their homes in occupied territories," the three-Judge Tribunal convicted the defendant for the crime as charged, Judge Musmanno's concurring opinion described the crime as extending to the occupied territory's "inhabitants," and the concurring opinion of Judge Phillips described it as extending to the "population" of occupied territory. *United States v. Milch*, 2 Trials of War Criminals Before the Nuernberg Military Tribunals 353, 691-93, 790, 879, 866 (1946-1949). We have found no evidence that any of these formulations were intended or understood to reflect an extension of the customary prohibition of deportations to reach illegal aliens. *See also The RuSHA Case*, 4 Trial of War Criminals Before the Nuernberg Military Tribunals 1, 610 (1949) (defendants charged with "[e]vacuating enemy *populations* from *their native lands*") (emphases added).

and the Japanese in occupied territories. *See* 4 Pictet, *Commentary* at 278 ("There is doubtless no need to give an account here of the painful recollections called forth by the '*deportations*' of the Second World War. 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. These mass *transfers* took place for the greatest possible variety of reasons . . . .") (emphases added); 2A *Final Record*, at 664 (summarizing statement of Mr. Slamet (Netherlands) that "[i]n Indonesia, during the last war, numbers of women and children had been *transferred* to unhealthy climates and forced to build roads, and had died as a result") (emphasis added); *id.* at 664 (summarizing statement of Mr. Clattenburg (U.S.), which "quoted the case of part of the population of the little island of Wake who had been *transferred* to Japan") (emphasis added); *id.* at 664 (summarizing statement of the Chairman, which "noted that the Committee was unanimous in its condemnation of the abominable practice of *deportation*. . . . He suggested that *deportations* should, in the same way as the taking of hostages, be solemnly prohibited in the Preamble.") (emphasis added).

Furthermore, at least when used in connection with "deportations" as a term of art in the international law of armed conflict, "transfers" also appears to connote the relocation of an individual from an area where he is lawfully present. *See, e.g.*, Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, reprinted in 37 I.L.M. 999 (1998) article 7(2)(d) (defining "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); *Prosecutor v. Blaskic*, ¶ 234 ("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).

Consistent with GC's negotiating record and this more general term-of-art usage, many sources speak of article 49(1) — and implicitly acknowledge its limitation to those lawfully present in occupied territory — without making any distinction between "forcible transfers" and "deportations." *See, e.g.*, S.C. Res. 694 (1991) (Under GC, article 49, "Israel, the occupying power, must refrain from deporting any *Palestinian* civilian from the occupied territories" (emphasis added)); *Kasawari v. Minister of Defence*, HC 456/85, 39(3) Piskei Din 401, digested in 16 Israel Y.B. Hum. Rts. 330, 334 (1986) ("[w]hatever the interpretation of Article 49 may be, it is not applicable to the expulsion of a person who enters an area illegally after the commencement of its belligerent occupation."); 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 ("Article 49 comes into play whenever people are forcibly moved *from their ordinary residences*.") (emphasis added); *see also* Raymund T. Yingling and Robert W. Ginnane, *The Geneva Convention of 1949*, 46 Am. J. Int'l L. 393, 419 (1952) (article 49(1) serves the purpose of preventing a belligerent occupier from "buttress[ing] its home economy and war industry with the forced labor of *the inhabitants* of territory which it has occupied") (emphasis added).

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.

This conclusion comports with common sense. It would be surprising if the Convention were a welcome mat to occupied territory, granting all who enter in violation of local law an instant and (during occupation) irrevocable right to stay. *Cf. Affo v. Commander Israel Defence Force in the West Bank*, 83 I.L.M. 139, 153 (Isr. 1988) ("[O]ne should not view the content of Article 49 as anything but a reference to those arbitrary deportations of groups of nationals as were carried out during World War II for purposes of subjugation, extermination and for similarly cruel reasons. [One should reject an interpretation entailing that] a murderer who escaped to the occupied territory would have a safe haven, which would preclude his transfer to the authorized jurisdiction."). It is also consistent with the general presumption under customary international law, as reflected in Article 43 of the Regulations Respecting the Laws and Customs of War on Land, annexed to Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 42(1), 36 Stat. 2277, 1 Bevans 631 ("Hague Regulations"), that an occupying power should maintain and enforce the domestic laws of the country occupied.[7] Article 43 of the Hague Regulations provides: "The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." The exigencies of "public order and safety" will not often "absolutely prevent[]" enforcement of local immigration laws. To the contrary, enforcement of such laws will usually prove essential to maintaining the security of the occupied territory. And while the occupying power may be "absolutely prevented" from enforcing local law by a requirement of the Geneva Conventions, *see* Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, from Jay S. Bybee, Assistant Attorney General, *Re: Authority of the President Under Domestic and International Law To Make Fundamental Institutional Changes to the Government of Iraq* 15 (Apr. 14, 2003) ("*Fundamental Institutional Changes Memorandum*"), reading GC to require a suspension of

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[7] Although GC incorporates by reference the Hague Regulations when applied to relations between "Powers who are bound by" the IV Hague Convention, *see* article 154, Iraq is not a party to the Hague Convention, and therefore cannot be considered bound by that Convention as a matter of treaty law. The United States is likewise under no treaty-based obligation to apply the Hague Regulations to the occupation of Iraq because Iraq is not a "Contracting Power" under the IV Hague Regulations. *See* Hague Convention art. 2, 36 Stat. 2290 ("The provisions contained in the Regulations referred to in Article 1, as well as in the present convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention."); Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, from Jay S. Bybee, Assistant Attorney General, *Re: Authority of the President Under Domestic and International Law To Make Fundamental Institutional Changes to the Government of Iraq* 10 (Apr. 14, 2003) (stating that "the Hague Regulations do not expresaly govern the U.S. conflict with Iraq"). The Hague Regulations are, however, generally taken to be declaratory of customary international law, and the United States may choose to comply with them on that basis. *See generally id.* at 10; *see also United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003) ("Principles of customary international law reflect the practices and customs of States in the international arena that are applied in a consistent fashion and that are generally recognized by what used to be called 'civilized states.'") For present purposes, however, the point is that GC should, as a general matter, be read to be consistent with the principles reflected in the Hague Regulations, whether or not those Regulations apply in a particular case.

local immigration law would put great and unjustifiable strain on the duty of the occupying power to "insure ... public order and safety."[8]

Of course, even the broadest reading of article 49 would not work a complete suspension of local immigration law in Iraq. Rather, it would only suspend the provisions for deportation. Violators of Iraqi immigration law, however, are subject not only to deportation but also to imprisonment. *See* Iraqi Law No. 118 of 1978, article 24; *see also id.*, article 25. Under customary international law as reflected in article 43 of the Hague Regulations, then, the occupying power may be obliged to enforce Iraqi immigration law at least to the extent of imprisoning its transgressors. This requirement would flow not only from the obligation to "respect, unless absolutely prevented, the laws in force in the country," but also from the more general obligation to maintain "public order and safety" — which, whatever else it entails, would presumably include the arrest of law-breakers. *See* Iraqi Law No. 118 of 1978, article 25 ("The Director General [of Nationality] is vested with the penal authority under the Criminal Procedure Law which empowers him to detain the [illegal alien] in custody until he is deported or expelled from the territory of the Republic of Iraq."). The Convention itself makes this requirement explicit: "The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention." GC, art. 64. Under the broadest reading of the prohibitions in article 49(1), then, an occupier might be required to imprison illegal aliens, but forbidden from taking the milder step of escorting them to the border instead. It is doubtful that article 49's drafters intended such an implausible result.

In sum, historical context as well as common sense demonstrates that the terms "deportations" and "forcible transfers" in article 49 are terms of art that do not apply to the removal of "protected persons" in occupied territory who are present there in violation of current local law. We conclude, therefore, that the United States would not violate article 49(1) by removing "protected persons" who are illegal aliens from Iraq pursuant to local immigration law.[9]

## II. Temporary Transnational Relocation of "Protected Persons" to Facilitate Interrogation

We next consider whether GC permits the United States to relocate "protected persons" (whether illegal aliens or not) from Iraq to another country temporarily, to facilitate interrogation. Because GC makes special provision for "protected persons" who have been

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[8] It is true that one might reverse the point and argue that the power to change local immigration law under article 43 of the Hague Regulations amounts to a power to eviscerate article 49's prohibition on "deportations" and "forcible transfers." And indeed the custom and practice of occupying powers have at times included "extensive changes" to the laws of an occupied territory, *Fundamental Institutional Changes Memorandum* at 11. But this power does not amount to a power to eviscerate article 49, because those changes may only be imposed in accordance with certain "enumerated purposes," such as the occupying power's need to maintain order and security, *id.* at 13, or in order to protect rights guaranteed by the Convention, *id.* at 15. It follows that an occupying power could not, for example, change local immigration law to render all citizens of the occupied territory illegal aliens.

[9] We recommend that if the choice is made to pursue this course, careful records should be maintained confirming the illegal status of each alien who is removed under current domestic law.

"accused of offenses," we consider such persons first. We then consider "protected persons" who have not been so accused.

### A. "Protected Persons" Who Have Been Accused of an Offense

GC specifically provides that "[p]rotected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein." GC, art. 76(1). This provision is unambiguous: "protected persons" who have been "accused of offenses" may not be removed from occupied territory either for pretrial detention or for postconviction imprisonment.

We need not attempt to ascertain the precise meaning of "accused" in this context, for the following can be said with some confidence. Once adjudicative proceedings have been initiated against a person, that person has been "accused" within the meaning of Article 76. The initiation of such proceedings may take any form. *Cf. Brewer v. Williams*, 430 U.S. 386 (1977) (noting that certain criminal procedure protections are triggered by initiation of judicial proceedings, "'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment'"), *quoting Kirby v. Illinois*, 406 U.S. 682 (1972). On the other hand, mere suspicion of an offense would not constitute an accusation, nor would an interrogation based upon such suspicion. *Cf.* Wayne R. LaFave *et al.*, 3 Criminal Procedure, § 11.2(b) (1999) ("[The Supreme] Court [has] reaffirmed ... that a person does not become an accused for Sixth Amendment purposes simply because he has been detained by the government with the intention of filing charges against him"), *citing United States v. Gouveia*, 467 U.S. 180 (1984). Thus, if an occupying power merely detains a "protected person" for questioning — even if that person is strongly suspected of committing an offense — that person is not yet "accused" for purposes of article 76.[10]

In short, once adjudicative proceedings have been initiated against a "protected person," the person is "accused of an offense" for purposes of article 76, and may not be detained outside of occupied Iraq. But until that time, article 76 does not apply.

### B. "Protected Persons" Who Have Not Been Accused of an Offense

Finally, we consider whether Article 49(1)'s prohibition of "forcible transfers" and "deportations" bars the United States from temporarily relocating (and detaining) a "protected

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[10] Iraqi law appears to draw a similar distinction, treating someone as a "suspect" during an investigation and as an "accused" once he has been charged in an indictment or summoned or named in a criminal arrest warrant. *See, e.g.*, Statute of the Iraqi Special Tribunal, art. 18(b)-(d) (Dec. 10, 2003) (available at http://www.cpa-iraq.org/human_rights/Statute.htm) (using the term "suspect" to describe person under investigation and "accused" to describe someone charged in an indictment); Iraqi Law on Criminal Proceedings (Law Number 23 of 1971) ¶¶ 54, 56 (available at https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/85256a1c006ac77385256d34006030dc/Body/M2/Iraqi%2520Criminal%2520Procedure%2520Code%2520English.pdf?OpenElement) (referring to a complaint made against a "suspect" and questioning of "suspects" by examining magistrate during course of initial investigation); *id.* ¶¶ 87, 93 (providing for issuance of a summons to, or an arrest warrant for, an "accused"); *id.* ¶ 105 (referring to person subject to arrest warrant, or who may be arrested by someone who witnessed him committing an offense, as an "accused").

person" who has not been "accused of an offense" to a location outside of Iraq to facilitate interrogation.

It might be thought that the juxtaposition of the words "deportations" and "transfers" in article 49 reflects a dichotomy between permanent relocations, on the one hand, and temporary relocations, on the other. The word "deportation" does clearly connote permanence. *See Black's Law Dictionary* 526 (4th ed. 1951) (defining "deportation" in Roman law, as "[a] perpetual banishment"); *see also supra* Part I (concluding the meaning of "deportation" as a term of art in the international law of armed conflict flows from its meaning in Roman law). And the word "transfer," by contrast, does not necessarily have that same connotation. *See* XI Oxford English Dictionary 257 (1933) ("conveyance or removal from one place, person, etc. to another"). Were article 49 read in this manner, it would prohibit the United States from temporarily relocating a "protected person" from Iraq to facilitate interrogation.

While this dichotomy has some surface appeal, we ultimately reject it. The phrase "forcible transfers" and the word "deportations," when used as terms of art in the international law of armed conflict, *see supra* Part I, and especially when used in connection with each other, both convey a sense of *uprooting* from one's home. *See, e.g.*, Pictet, *supra*, at 278 (emphasis added) (recalling the "deportations" and "mass transfers" that had occurred during World War II, where "millions of human beings were *torn from their homes*, separated from their families and deported from their country, usually under inhumane conditions") (emphasis added); *United States v. Milch*, 2 Trials of War Criminals Before the Nuremberg 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); *Prosecutor v. Krnojelac*, Case No.: IT-97-25, Appeals Chamber Judgement, 17 Sept. 2003, Separate Opinion of Judge Schomburg ¶ 15 ("[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). The concept of uprooting from one's home clearly suggests *resettlement*, and while it may include not only permanent, but also extended or at least indefinite resettlement, it cannot reasonably be expanded to encompass mere temporary absence, for a brief and definite period, from one's still-established home. *Cf.* 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)); 2A *Final Record*, at 664 (summarizing statement of Mr. Slamet (Netherlands) that "[i]n Indonesia, during the last war, numbers of women and children had been transferred to unhealthy climates and forced to build roads, and had died as a result"); *id.* at 664 (summarizing statement of Mr. Clattenburg (U.S.), which "quoted the case of part of the population of the little island of Wake who had been transferred to Japan"); GC Art. 49(2) (carving out an exception to Article 49(1)'s prohibition of forcible transfers or deportations to allow evacuations, including transnational evacuations, required to protect the security of the population or by imperative military reasons, provided that "[p]ersons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased").[11]

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[11] For purposes of resolving the questions presented, we need not resolve the precise differences between "deportations" and "forcible transfers" under article 49. We presume that these concepts do not overlap entirely. *See Air France v. Saks*, 470 U.S. 392, 397-98 (1985) (where drafters use different terms in the same treaty, they are ordinarily presumed "to mean something different"). One possible distinction is that "deportation," unlike

This reading is confirmed by the Convention's structure. As we explain below, if the word "transfer" were read to embrace all temporary relocations, however brief, it would create a prohibition inconsistent with a duty imposed by another provision of the Convention, cause a different paragraph of article 49 to create an implausible result, and render two other provisions of GC entirely superfluous. These structural considerations confirm that article 49 uses the term "transfers," consistent with its connotations when used as a term of art in connection with "deportations" in the law of armed conflict, to refer to relocations involving uprooting and resettlement for a permanent, extended, or at least indefinite duration.

First, we consider article 49's relationship with article 24. Article 24 provides: "The Parties to the conflict shall facilitate the reception of ... children [who are under 15, who are orphaned or separated from their families as a result of the war] in a neutral country for the duration of the conflict with the consent of the Protecting Power." This provision appears in Part II of GC and therefore "cover[s] the whole of the populations of the countries in conflict," GC, article 13, including all individuals in occupied territory, *see* Pictet, *supra*, at 118-19, whether "protected persons" or not. At first glance, article 24's *duty* to relocate certain children — including those who are "protected persons" — to a neutral country might appear to be flatly inconsistent with article 49(1)'s categorical *prohibition* of "forcible transfers" and "deportations" of "protected persons." The relationship between articles 24 and 49(1) is easily understood, however, once it is recognized that the crux of article 49(1) is a prohibition on forcibly *uprooting people from their homes*. The children provided for in article 24 are precisely those who have been orphaned or separated from their homes already, by the war. Thus, relocating such children (even without their consent) does not implicate the central concerns of article 49(1).

Second, article 49(6) provides: "The Occupying Power shall not *deport or transfer* parts of its own civilian population into the territory it occupies." (Emphasis added). As the ICRC commentary explains, this provision was "intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political or racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race." Pictet, *supra*, at 283. This practice was often closely related to practices at which article 49(1) was directed — resettling the citizens of occupied countries out of occupied territory. As the International Military Tribunal concluded during the Nuremberg trial, the Nazis had undertaken a "gigantic program" that included three "interwoven and interrelated" aims: "to evacuate and resettle large areas of the conquered territories; to Germanize masses of the population of the conquered territories; and to utilize

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"transfer," perhaps technically entails not only uprooting and resettlement from an area where one is lawfully present but also denationalization or extinguishment of any rights in one's home country. *See Black's Law Dictionary* 526 (4th ed. 1951) (defining "deportation") ("A perpetual banishment, depriving the banished of his rights as a citizen."); *Id.* at 525 ("Deportation. Lat. In the civil law. A kind of banishment, where a condemned person was sent or carried away to some foreign country, usually to an island ... *and thus taken out the number of Roman citizens.*") (emphasis added); *cf.* 2A Final Record at 621 (observation of Mr. Castberg (Norway) regarding the plight of "ex-German Jews denationalized by the German Government who found themselves in territories subsequently occupied by the German Army"). While we need not embrace this distinction for purposes of this opinion, we note that it is fully consistent with our analysis and conclusions.

other masses of the population as slave labor within the Reich." *The RuSHA Case*, 4 Trials of War Criminals Before the Nuemberg Military Tribunals1, 125 (1949); *see also id.* at 610 (defendants charged with "[e]vacuating enemy populations from their native lands and resettling so-called 'ethnic Germans' (*Volksdeutsche*) on such lands").

Not only do articles 49(1) and 49(6) address related wartime practices, they both do so by prohibiting certain *transfers* and *deportations*. There is a strong presumption that the same words will bear the same meaning throughout the same treaty. *Cf., e.g., Air France v. Saks*, 470 U.S. 392, 398 (1985). This presumption is particularly strong when, as here, the words appear multiple times within the same article.

If "transfer" is understood throughout article 49 to entail — consistent with technical usage — permanent, extended, or at least indefinite resettlement, then the scope of article 49(6)'s prohibition closely corresponds to its intended purpose. By contrast, if "transfer" is understood throughout article 49 to mean any relocation, however brief, then article 49(6) would have a much broader scope and would prohibit an occupying power from placing any members of its civilian population in the occupied country even temporarily. While such a prohibition arguably might not extend to civilian adjuncts to the military occupation administration, it probably would at least extend to various employees of private contractors and non-governmental organizations. *Cf.* GC III, article 4(A)(4) (including as potential prisoners of war "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany"). Such a result is far removed from article 49(6)'s intended purpose and would work to the manifest disadvantage of the inhabitants of occupied territory. For these reasons, it seems very implausible that article 49(6)'s prohibition of deportations and transfers *into* occupied territory should be construed so expansively. *See Zicherman v. Korean Air Lines*, 516 U.S. 217, 221-222 (1996) (choosing from among different possible definitions of a treaty term the definition that avoided implausible results). It follows, therefore, that article 49(1)'s prohibition of forcible transfers and deportations *out of* occupied territory likewise should not be construed to extend to temporary transnational relocations of brief but not indefinite duration.[12]

Third, if article 49(1) banned all relocations out of occupied territory, no matter how brief, two different provisions of GC would be superfluous. Article 51 of GC, which makes provision for compelling the labor of "protected persons," provides: "The work shall be carried out only in occupied territory where the persons whose services have been requisitioned are." If article 49 forbade all relocations from occupied territory to another country, this portion of

[12] We note one significant textual difference between articles 49(1) and 49(6). While the former provision bars only *forcible* transfers (as well as deportations), the latter does not so limit the transfers that it prohibits. We do not read the absence of "forcible" from the latter provision to eliminate connotations of uprooting and resettlement, but rather to indicate that (unlike article 49(1)) article 49(6) prohibits voluntary as well as coercive resettlement. This interpretation is fully consistent with one of the principal purposes of article 49(6), as indicated by the ICRC Commentary quoted in the text — preventing an occupying power from colonizing occupied territory with its own civilian population. Colonization, of course, can be voluntary as well as forcible, but either way it entails uprooting and resettlement.

article 51 would be entirely superfluous. But "[t]his phrase, like all the other words of the treaty, is to be given a meaning, if reasonably possible, and rules of construction may not be resorted to to render it meaningless or inoperative." *Factor v. Laubenheimer*, 290 U.S. 276, 303-04 (1933). By contrast, if article 49(1) does not forbid brief transnational relocations, article 51 serves an important, independent purpose. While extended or indefinite relocations for purposes of forced labor might constitute "forcible transfers" and thus be prohibited under article 49(1) as well as article 51, at least some instances of briefly bringing an accused "protected person" across a border to engage in forced labor — on a daily basis, for example — would not fall within the scope of the prohibition of article 49 but would be barred by article 51.

Even more relevant to the issue at hand, article 76 of the Convention provides: "Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein." If article 49(1) forbade all relocations, however temporary, from occupied territory to another country, then this portion of article 76 too would be entirely superfluous. It follows, therefore, that briefly relocating accused "protected persons" outside of occupied territory for pre-trial detention and interrogation — though forbidden by article 76 — falls outside the scope of the prohibition of article 49(1). But if briefly relocating an accused "protected person" to a foreign country for detention and interrogation (though forbidden by article 76) is beyond the scope of article 49, then the otherwise indistinguishable act of briefly relocating a "protected person" who is *not* accused to a foreign country for detention and interrogation (which is *not* forbidden by article 76) must also fall outside the scope of article 49's prohibition.[13]

It might, at first, appear surprising that a different result obtains for accused persons than for those who are not (or are not yet) accused. But special procedural protections often attach to individuals, including suspected offenders, only after they are accused. *See, e.g.*, U.S. Const. amend. VI ("[i]n all criminal prosecutions, the *accused* shall enjoy" various procedural protections) (emphasis added); *United States v. Ash*, 413 U.S. 300, 320-21 (1973) (Stewart, J., concurring in judgment) ("[the initiation of] adversary judicial proceedings ... marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment [of the U.S. Constitution] are applicable"). "It is only at that time 'that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *United States v. Gouveia*, 467 U.S. 180, 189 (1984) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). And in this context, the distinction between those who are

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[13] We note that the ICRC Commentary appears to take the position that the portions of articles 51 and 76 discussed in the text are, in fact, superfluous: "[t]he provision [of article 76] under which any sentence of imprisonment must be served in the occupied territory itself is based on the fundamental principle forbidding deportations laid down in Article 49." Pictet, *supra* at 363; *see also id.* at 279 (asserting without analysis that Article 49(1)'s prohibition is "strengthened by other Articles in the cases in which its observance appeared to be least certain" and citing, *inter alia*, Articles 51(2) and 76(1)). We do not find this reasoning persuasive. Article 49 may well lay down a fundamental principle, but the scope of this principle must be ascertained by traditional rules of treaty interpretation, including the rule that each provision of a treaty "is to be given a meaning, if reasonably possible, and rules of construction may not be resorted to to render it meaningless or inoperative." *Factor*, 290 U.S. at 303-304.

and are not accused makes eminent sense: only after a person is accused must he be allowed to prepare his defense, and for this he may require access to resources that are available to him only in his native country.

Thus technical usage suggests, and GC's structure confirms, that Article 49(1)'s prohibition on "deportations" and "forcible transfers" does not extend to all transnational relocations. And, for the reasons we have explained, 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]

## III. Conclusion

Article 49 does not forbid the removal from occupied territory, pursuant to local immigration law, of "protected persons" who are illegal aliens. Nor does it preclude the temporary relocation of "protected persons" (whether illegal aliens or not) who have not been accused of an offense from occupied Iraq to another country, for a brief but not indefinite period, to facilitate interrogation.

Please let us know if we can provide further assistance.

Jack L. Goldsmith III
Assistant Attorney General

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[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, 18 U.S.C. § 2441. For these reasons, we recommend that any contemplated relocations of "protected persons" from Iraq to facilitate interrogation be carefully evaluated for compliance with Article 49 on a case-by-case basis. We will provide additional guidance as necessary to facilitate such evaluation.

Furthermore, although we have previously indicated that only those who "find themselves . . . in the hands of a Party to the conflict or Occupying Power" in "occupied territory" or the "territory of a party to the conflict" receive the benefits of "protected person" status, *Protected Persons Memorandum* at 5-6, this does not mean that a "protected person" who is captured in occupied territory and then temporarily relocated by the occupying power to a different location thereby forfeits the benefits of "protected person" status. On the contrary, we believe he would ordinarily retain these benefits. *Cf.* Art. 49(2) (providing that, in some circumstances, protected persons may be evacuated outside of occupied territory, but that such persons must be transferred back to their homes as soon as possible).