U.S. Department of Justice
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Olson
Tarr
Simms
Shanks
Williams
Retrieval
Sudol ✓

Office of the
Assistant Attorney General

Washington, D.C. 20530

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MEMORANDUM FOR MARK M. RICHARD
Deputy Assistant Attorney General
Criminal Division

Re: Treaty Obligations Governing Prisoners of War

This memorandum contains an enumeration of the international law ramifications which might arise from a proposal to condition repatriation of the Cuban citizens taken prisoner in Grenada on an agreement by the Government of Cuba also to accept the return of those Cuban citizens who arrived in the 1980 Freedom Flotilla and who are still being detained by the United States government. In the brief time available to us, we have identified the following treaty provisions that apply to treatment of individuals captured during an armed conflict. 1/

I. Geneva Convention Relative to the Treatment of Prisoners of War, T.I.A.S. 3364, 6 U.S.T. 3316 (1949). This Convention covers what may be generally considered military prisoners of war: members of the armed forces, militias, volunteer corps, and organized resistance movements attached to the enemy. Id. Art. 4(A)(1), (2). It also covers civilians who accompany the armed forces in a support capacity, such as aircraft crews, war correspondents, supply contractors and laborers. Id. Art. 4(A)(3)-(5). Finally, it also covers inhabitants who, on the approach of an army, spontaneously take up arms to resist. Id. §4(A)(6).

1. Art. 2: The Convention applies

> "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them .... Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations."

1/ The United States and Cuba are parties to both treaties discussed in this memorandum.

2. Arts. 109, 110:

"... Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel ...

The following shall be repatriated direct:

(1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished.

(2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished.

(3) Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.

The following may be accommodated in a neutral country:

(1) Wounded and sick whose recovery may be expected within one year of the date of the wound or the beginning of the illness, if treatment in a neutral country might increase the prospects of a more certain and speedy recovery.

(2) Prisoners of war whose mental or physical health, according to medical opinion, is seriously threatened by continued captivity, but whose accommodation in a neutral country might remove such a threat."

3. Art. 118:

"Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such

agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.

In either case, the measures adopted shall be brought to the knowledge of the prisoners of war.

The cost of repatriation of prisoners of war shall in all cases be equitably apportioned between the Detaining Power and the Power on which the prisoners depend. This apportionment shall be carried out on the following basis:

(a) If the two Powers are contiguous, the Power on which the prisoners of war depend shall bear the costs of repatriation from the frontiers of the Detaining Power.

(b) If the two Powers are not contiguous, the Detaining Power shall bear the costs of transport of prisoners of war over its own territory as far as its frontier or its port of embarkation nearest to the territory of the Power on which the prisoners of war depend. The Parties concerned shall agree between themselves as to the equitable apportionment of the remaining costs of the repatriation. The conclusion of this agreement shall in no circumstances justify any delay in the repatriation of the prisoners of war."

4. Art. 119: "Repatriation shall be effected in conditions similar to those laid down in Articles 46 to 48 inclusive of the present Convention for the transfer of prisoners of war ...." Art. 46 provides inter alia, that "The Detaining Power, when deciding upon the transfer of prisoners of war, shall take into account the interests of the prisoners themselves, more especially so as not to increase the difficulty of their repatriation." Art. 119 also states that "By agreement between the Parties to the conflict, commissions shall be established for the purpose of searching for dispersed prisoners of war and of assuring their repatriation with the least possible delay."

II. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, T.I.A.S. No. 3365, 6 U.S.T. 3516 (1949).

A. Certain provisions cover all civilians.

1. Art. 2: The Convention applies to "any armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them .... Although one of the Powers in the conflict may not be a party to the present Convention, the powers who are parties thereto shall remain bound by it in their mutual relations."

2. Art. 34 states that, "The taking of hostages is forbidden."

B. Section II of the Convention deals with aliens in the territory of a party to the conflict who are also "protected persons," as defined in Art. 4, i.e., individuals "who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

1. Art. 35:

> "All protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State. The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible. Those persons permitted to leave may provide themselves with the necessary funds for their journey and take with them a reasonable amount of their effects and articles of personal use.
>
> If any such person is refused permission to leave the territory, he shall be entitled to have such refusal reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.
>
> Upon request, representatives of the Protecting Power shall, unless reasons of security prevent it, or the persons concerned object, be furnished with

the reasons for refusal of any request for permission to leave the territory and be given, as expeditiously as possible, the names of all persons who have been denied permission to leave."

2. Civilians who do not leave the country under Art. 35's provisions may be interned "only if the security of the Detaining Power makes it absolutely necessary," id., Art. 42, or "for imperative reasons of security ...." Id., Art. 78.

3. Art. 43:

"Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case with a view to the favourable amendment of the initial decision, if circumstances permit."

4. Art. 46: "In so far as they have not been previously withdrawn, restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities."

5. Art. 132:

"Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.

The Parties to the conflict shall, moreover, endeavor during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time."

6. Art. 133: "Internment shall cease as soon as possible after the close of hostilities .... By agreement between the Detaining Power and the Powers concerned, committees may be set up after the close of hostilities, or of the occupation of territories, to search for dispersed internees."

7. Art. 134: "The High Contracting Parties shall endeavor, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation."

We are continuing to research this issue and will let you know if we discover additional sources of potential authority.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel