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(b)(3) NatSecAct

November 2002

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MEMORANDUM FOR (b)(1)

SUBJECT: Legal Analysis of (b)(1) Personnel Participating in Interrogation at the CIA Detention Facility in (b)(1)

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**1. References.**

a. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (CIPW), also known as the Third Geneva Convention.

b. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by Unanimous Agreement of the United Nations General Assembly on December 10, 1984, and Signed by the United States on April 18, 1988.

c. Title 18, Chapter 113C, Torture (18 USCS § § 2340 *et seq.*) (2002).

d. DODD 2310.1, DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees (1 AUG 94)

e. AR 190-8:OPNAVINST 3461.6:AFJ 31-304/MCO 3461.1 (multi-service regulation for all services). Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1 OCT 97).

f. Department of the Army Field Manual 19-40, Enemy Prisoners of War, Civilian Detainees, and Detained Persons (27 FEB 76).

g. Department of the Army Field Manual 34-52, Intelligence: Interrogation (28 SEP 92) (b)(1)

h. (b)(1) message dated 240701Z JAN 02, subject:

(b)(1) Guidance for Detainee Handling".

**2. Summary.** This memorandum summarizes the legal authorities and constraints involved with detainee interrogation, particularly as it relates to a secret CIA facility in (b)(1) and a detainee there, Khidda al Najjar. By participating in the interrogation, we face a few risks. First, the CIA is apparently concealing the facility from the International Committee of the Red Cross (ICRC). Second, although the interrogation techniques used may not constitute "torture", they may rise to the level of cruel, inhuman or degrading treatment proscribed by international law and DOD guidance. Finally, if our role is discovered, we could face adverse action for being in an undisclosed facility without approval of (b)(1) particularly if there is media scrutiny.

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3. Background: (b)(1)

a. [redacted] is a CIA detention facility [redacted] (b)(1)  
The CIA station has one of its officers designated as the warden of the facility. He has little to no experience with interrogating or handling prisoners. The "care and feeding" of the prisoners is conducted [redacted] The CIA is (b)(1) apparently concealing the existence of the facility from the International Committee of the Red Cross (ICRC) (b)(1)

b. In October 2002, [redacted] personnel, as well as an interrogator from the (b)(1) [redacted] conducted interrogation of a detainee at [redacted] Rhidda al Najjar. (b)(1) Najjar was allegedly one of UBL's closest bodyguards; he currently claims to have been a tutor for UBL's children. He was arrested in Pakistan in June 2002. Initial interviews (b)(1) with him were completely unproductive as he demonstrated persistent resistance techniques. [redacted] turned him over to the CIA who held him initially (b)(1) in a detention facility [redacted] When the CIA recognized they could not control the environment suitably to force him to talk, they moved him to [redacted] (b)(1)

c. The CIA interrogation plan for Najjar includes several techniques, including isolation in total darkness; lowering the quality of his food; keeping him at an uncomfortable temperature (cold); music piped in 24 hours a day; and keeping him shackled and hooded. Najjar is monitored by OCIA medical personnel. CIA attorneys conducted a legal review of the interrogation plan and opined these techniques were legal.

d. In addition to the reviewed interrogation plan, CIA representatives at the facility employ a technique known as "hanging". "Hanging" involves handcuffing one or both wrists to an overhead horizontal bar. The detainee cannot lower his arms or lie down, but he can lean against the wall. Najjar was apparently left hanging for 22 hours each day for two consecutive days to "break" his resistance (this was successful). There are also indications at some time during the period leading up to his interrogation, he was put in a "diaper", and was only allowed to go to the bathroom in that diaper. This was not deemed to be physically harmful to him, just psychologically stressful (very embarrassing to him). As far as I could determine, these two techniques were not reviewed for legality by the CIA attorney.

4. Legal Issues Presented.

a. Does the deliberate concealment of the facility and the detainees from the ICRC violate customary international law?

b. Do the interrogation techniques employed or conditions of detention constitute torture?

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c. Do the interrogation techniques employed or the conditions of detention constitute "cruel, inhuman, or degrading treatment" (CIDT)?

d. Are military personnel required to report violations of international law committed by the CIA to higher authorities?

e. Are military personnel committing legal violations if they participate in interrogations that violate international law?

f. Are there other risks involved if task force military personnel participate in the interrogation?

**5. Status and Treatment of Detainees under U.S. Control.**

a. Under the law, there is a distinction between having prisoner of war "status" and having the prisoner of war protections or treatment

b. Status. The United States has determined that Al Qaeda and Taliban individuals under the control of the Department of Defense are not entitled to Prisoner of War status for purposes of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (CIPW).

c. Treatment. SECDEF guidance and DOD policy requires that we (DoD), to the full extent possible, treat all detainees humanely and consistent with the principles under the GCs. This is reflected throughout DoD and service regulations pertaining to interrogation and detention. These authorities apply to DoD personnel in respect of the status of the detainee.

(1) DODD 2310.1, para. 3.1, states: "The U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions." AR 190-8 reflects that guidance.

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(2) [Redacted] Guidance For Detainee Handling (ref. 8) requires forces to "treat them humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions of 1949." It is only applicable to detainees "under the control of the Department of Defense", so on its face it does not apply to Najjar, however, [Redacted] might question whether we met the intent or the "spirit" of the guidance if we failed to comply in interrogating Najjar.

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(3) [Redacted] is not under the custody of U.S. Armed Forces. Najjar is not under U.S. military control [Redacted] Since this is not a DOD facility, the OCA

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is not subject to DOD and DA regulations and [redacted] guidance. However, U S military personnel remain subject to those authorities if we participate in or run the interrogations. These requirements arguably extend to military personnel even if "detailed" to the CIA.

6. **Concealment of the facility and the detainees from the ICRC.** Customary international law, as well as common articles 9-11 of the Geneva Conventions, formally recognizes the ICRC as a neutral humanitarian organization charged with the protection of prisoners of war. It is widely accepted in the international community that the ICRC has a special humanitarian role during armed conflict to protect EPWs and detainees, and it is standard practice for governments to not place limits on the times and number of ICRC visits to detention facilities. This is reflected in the [redacted] guidance (ref. 8), which denies access to all foreign governments and all NGOs except the ICRC. The ICRC gets regular access to the DoD detention facilities in the [redacted] if the facility is discovered, and [redacted] personnel are associated with it, there could be adverse consequences stemming from our activities, particularly if [redacted] is not aware of the facility's existence.

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7. **Torture.**

a. There is a distinct difference under the law between "torture" and "cruel, inhuman, or degrading treatment" (CIDT). While both are illegal under international law and the law of war, torture is considered much more serious. In my opinion, none of the interrogation techniques used by or observed by [redacted] personnel constitutes "torture"; however, another observer might disagree, at least sufficiently to generate discussion that could be viewed unfavorably for US military and [redacted] interests.

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b. Geneva Convention (GPW). As noted above, Al Qaida and Taliban detainees are not entitled to GPW status under the GPW, but detainees do have certain protections against torture.

(1) Common Article 3 of the Geneva Conventions guarantees to all persons protection against "cruel treatment and torture" and "outrages upon personal dignity, in particular, humiliating and degrading treatment". This Article is international law which applies regardless of whether a person has EPW status.

(2) In addition, as noted above, we are required by DOD policy to treat all detainees with the protections afforded to EPWs under the GCs to the full extent possible. With regard to torture, Article 17 of the GPW requires that: "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever." Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

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c. UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ref. 2).

(1) Under the UN Convention, which is international law, the term "torture" means "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession ... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

(2) In its analysis of the Convention, DOS, citing international human rights caselaw, gave further guidance on what constitutes "torture":

(a) "The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering."

(b) "The term "torture," in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain."

d. 18 USC § 2340, the federal code provision which implements the UN Convention as US law, defines "torture" as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control".

e. It is possible that the CIA "hanging" technique used in [redacted] could rise to the level of torture if applied in such a way and for such a period of time that it rises to the level of severe physical pain or suffering. To date, the technique has only been applied to produce sleep deprivation, and the detainee's arm was not hung in such a manner to produce extreme pain or permanent injury. OGA medical personnel supposedly checked Najjar periodically while he was "hanging".

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8. Cruel, inhuman or degrading treatment or punishment (CIDT).

a. International and federal law, as well as DoD and DA regulations and guidance, do not just proscribe torture. There is also a prohibition against "cruel, inhuman or degrading treatment or punishment".

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b. Under the UN Convention, the United States "understands the term 'cruel, inhuman or degrading treatment or punishment,' as used in Article 16 of the Convention, to mean the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States." DOS Comment to Convention.

c. Article 17 of the GPW requires that: "Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind"

d. AR 190-8, para. 1-5a(4) states: "The inhumane treatment of [I-PWs and detainees] is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ)." The regulation also prohibits "all cruel and degrading treatment." Para. 1-5b.

e. In order to analyze what specific interrogation techniques might be deemed cruel, inhuman, or degrading treatment, we require further caselaw analysis. I do not have the legal resources here to do that, without going to open sources on the Internet; however, the rear is researching this issue. It would also be necessary to have a detailed interrogation plan to review.

f. There is a possibility that a court would find that the "hanging" technique, applied for 22 hours a day for days in a row, constituted cruel treatment. It is also possible that a court might find that the diaper technique is degrading treatment. We are at risk as we get more "creative" and stray from standard interrogation techniques and procedures taught at DOD and DA schools and detailed in official interrogation manuals (e.g., FM 34-52, ref. ?).

9. **Requirement to report violations of international law to higher authorities.** Under DOD directives (ref. 4), we are required to report "suspected or alleged violations" of the Geneva Conventions "and other violations of the international law of war" promptly to the appropriate authorities.

10. **Risk to military personnel if they participate in interrogations that violate international law.** If military personnel violate international or federal law, then they are subject to prosecution. This would apply whether they were acting as [redacted] personnel or detailed to OGA. Detailing members to the CIA does not relieve them of their legal and professional obligations as members of the military. This is still a risk even if they merely observe the interrogation. If they were to violate DOD or service policy, without violating the law, then the command could determine what actions were appropriate in that situation

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11. **Are there other risks involved if task force military personnel participate in or observe interrogations?** The other risks here involve the political or media fall-out

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(b)(1) generated if higher headquarters, the ICRC, or the media discover this location and determine [redacted] personnel were involved. If [redacted] personnel are controlling the interrogations, or even participating in or observing them, then we could be blamed for the activities of other agencies. At a minimum, members of [redacted] who observe the interrogation would be called to account or testify in any investigation. (b)(1)

(b)(1) 12. **Recommended courses of action.** The CG has withheld the authority for [redacted] forces to participate in interrogations at [redacted]. If the CG approves going back in, I recommend briefing the interrogation plan to [redacted], perhaps in a PFOR to [redacted] in order to alert him to the risks involved and to seek permission. Also, I (b)(1)

(b)(1) recommend that the proposed interrogation techniques be analyzed by the commander and the legal advisor under the legal guidance detailed in this memorandum. As an alternative, given the importance of the detainees at [redacted] we could encourage the CIA through [redacted] and DOD channels to apply the appropriate resources to the facility to properly interrogate the detainees. This could include detail personnel from [redacted] (b)(1)

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