



United States Department of State

Washington, D.C. 20520

June 13, 2016

Case No. F-2015-13137

Segment: DOJ-0002

Dror Ladin
American Civil Liberties Union Foundation
National Office
125 Broad Street, 18th Floor
New York, NY 10004

Dear Mr. Ladin:

I refer to your request letter dated August 14, 2015, regarding the release of certain material under the Freedom of Information Act (the "FOIA"), 5 U.S.C. § 552.

Of the relevant documents retrieved by the Central Intelligence Agency, one was considered to be of primary interest to the Department of State, and was therefore referred to us for appropriate action. We have determined that this document may be released with excisions. All released material is enclosed.

An enclosure explains the FOIA exemptions and other grounds for withholding material. Where we have made excisions, the applicable exemptions are marked on each document. All non-exempt material that is reasonably segregable from the exempt material has been released.

Please be advised that this completes our processing of your request. If you have any questions, your attorney may contact Assistant United States Attorney Tara LaMorte at (212) 637-2746. Please be sure to refer to the case number, F-2015-13137, and the civil action number, 15-cv-09317, in all correspondence about this case.

Sincerely,

Susan C. Weimer for

Eric F. Stein, Acting Co-Director
Office of Information Programs and Services

Enclosures: As stated.

The Freedom of Information Act (5 USC 552)

FOIA Exemptions

- (b)(1) Information specifically authorized by an executive order to be kept secret in the interest of national defense or foreign policy. Executive Order 13526 includes the following classification categories:

- 1.4(a) Military plans, systems, or operations
- 1.4(b) Foreign government information
- 1.4(c) Intelligence activities, sources or methods, or cryptology
- 1.4(d) Foreign relations or foreign activities of the US, including confidential sources
- 1.4(e) Scientific, technological, or economic matters relating to national security, including defense against transnational terrorism
- 1.4(f) U.S. Government programs for safeguarding nuclear materials or facilities
- 1.4(g) Vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to US national security, including defense against transnational terrorism
- 1.4(h) Weapons of mass destruction

- (b)(2) Related solely to the internal personnel rules and practices of an agency

- (b)(3) Specifically exempted from disclosure by statute (other than 5 USC 552), for example:

ARMSEXP	Arms Export Control Act, 50a USC 2411(c)
CIA PERS/ORG	Central Intelligence Agency Act of 1949, 50 USC 403(g)
EXPORT CONTROL	Export Administration Act of 1979, 50 USC App. Sec. 2411(c)
FS ACT	Foreign Service Act of 1980, 22 USC 4004
INA	Immigration and Nationality Act, 8 USC 1202(f), Sec. 222(f)
IRAN	Iran Claims Settlement Act, Public Law 99-99, Sec. 505

- (b)(4) Trade secrets and confidential commercial or financial information

- (b)(5) Interagency or intra-agency communications forming part of the deliberative process, attorney-client privilege, or attorney work product

- (b)(6) Personal privacy information

- (b)(7) Law enforcement information whose disclosure would:

- (A) interfere with enforcement proceedings
- (B) deprive a person of a fair trial
- (C) constitute an unwarranted invasion of personal privacy
- (D) disclose confidential sources
- (E) disclose investigation techniques
- (F) endanger life or physical safety of an individual

- (b)(8) Prepared by or for a government agency regulating or supervising financial institutions

- (b)(9) Geological and geophysical information and data, including maps, concerning wells

Other Grounds for Withholding

- NR Material not responsive to a FOIA request excised with the agreement of the requester

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

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February 9, 2007

Steven G. Bradbury
Acting Assistant Attorney General
Office of Legal Counsel
Department of Justice

Dear Steve:

I am writing to provide State Department reactions to the Office of Legal Counsel's draft opinion on "enhanced interrogation techniques" ("EITs"). As you will see from our comments, I have focused primarily on the Common Article 3 analysis contained on pages 46 through 70 of the draft opinion, given the State Department's role and expertise in interpreting treaties. But I have also offered comments on the other sections of the OLC analysis, to the extent that our research on the Common Article 3 section suggested different approaches there. In addition, in light of the fact that this opinion interprets the Geneva Conventions - treaties that directly impact the treatment provided by and to U.S. forces - I believe it is important for DOD to review this draft opinion.

At the outset, I must express concern about the draft opinion's conclusion that the EITs in question are consistent with Common Article 3 of the Geneva Conventions. As I will explain below, the EITs that involve nudity and prolonged sleep deprivation would appear to be prohibited by Common Article 3. Further, the opinion does little to identify or analyze the safeguards that must, in my view, be in place to ensure that any of the remaining techniques can be administered in a manner that does not violate U.S. obligations under Common Article 3.

General Methodological Concerns: Rules of Treaty Interpretation

We have a basic disagreement about the methodology used by the draft opinion to give meaning to the prohibitions contained in Common Article 3. In particular, we believe that the opinion relies too heavily on U.S. law to guide our interpretation of treaty terms. The opinion cites but fails to apply with appropriate weight the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties ("VCLT"). The rules contained in Article 32 of the VCLT, which, while not binding, the United States consistently has applied in its treaty practice for decades, provide that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. One may

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take into account any subsequent practice in the application of the treaty that establishes the agreement of the parties regarding its interpretation – though, to our knowledge, no such practice exists related to CA3 – and one may have recourse to supplementary means of interpretation, but this has not been thought to include reference to similar terms in one party's domestic law.¹ A State may, of course, implement its treaty obligations in its domestic law, and this often requires efforts to interpret treaty language in a way that makes sense within that State's legal regime. But the general relevance of domestic law for interpreting a treaty is to show what a state party had in mind during treaty negotiations; to examine state practice under the treaty (if the domestic law does in fact represent state practice under the treaty); or to establish a general principle of law common to major legal systems, to fill in a gap in a treaty that contemplates the use of "background principles."

As I will explain in more detail below, the draft opinion fails to rely on these well-accepted norms of treaty interpretation, and in their place substitutes novel theories concerning the relevance of domestic law to support controversial conclusions about the meaning and applicability of Common Article 3. As a general matter, we do not believe that we can state unilaterally that paragraphs 1(a) and 1(c) of Common Article 3 prohibit only those activities prohibited by our Fifth Amendment. The opinion's effort to interpret Common Article 3 primarily by reference to U.S. domestic law is inconsistent with traditional U.S. treaty practice, is unlikely to be viewed as objective legal analysis, and, in our view, ultimately leads to incorrect conclusions.

Nudity and Sleep Deprivation

We are not prepared at this point to conclude that the nudity (or nudity in combination with extended sleep deprivation) techniques as described in the OLC draft analysis are consistent, under any circumstances, with the Common Article 3 obligation in paragraph 1(c) to prohibit "outrages upon personal dignity, in particular humiliating and degrading treatment" and with the requirement of humane treatment.

Outrages upon personal dignity. We disagree in several critical respects with the opinion's interpretation of the legal standard that flows from the prohibitions against committing "outrages upon personal dignity, in particular humiliating and degrading treatment" that are contained in paragraph 1(c) of Common Article 3.

First, we disagree with the weight the opinion places on interpreting this standard by turning to our "domestic legal tradition." As noted above, this interpretive approach is

¹ The draft opinion invokes the example of the Senate's decision to rely on U.S. constitutional standards to clarify the terms "cruel, inhuman, or degrading treatment" in the CAT. However, this decision resulted in a United States reservation to the CAT, thus altering actual U.S. legal obligations under that treaty. This is therefore not an example of treaty interpretation using terms from domestic law. The other example in the opinion, the Geneva Conventions themselves, conflates the concepts of flexibility in how a state should suppress violations the treaty and flexibility in what activity the state must suppress. In fact, the opinion includes a cite to the Commentaries stating that the form of the wording adopted in Common Article 3 describing the substantive prohibitions is "flexible and, at the same time, precise."

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inconsistent with traditional treaty interpretation rules. Nevertheless, the opinion relies heavily on our domestic legal tradition to conclude that the DTA's "shocks the conscience" standard is the appropriate contextual standard and treats that standard as a "substantial factor" in determining that the program is not a violation of paragraph 1(c). This interpretation essentially allows the opinion to assert that the behavior prohibited as "outrages upon personal dignity" is equivalent to the behavior prohibited by the DTA. We do not believe that the Congress endorsed such "equivalency" in the MCA. Indeed, we believe that the failure of the Administration to convince Congress to endorse an "equivalency" standard undermines our ability to rely on this approach today. Thus, we do not think that the MCA provides guidance about the meaning of "outrages upon personal dignity" as a matter of treaty law or U.S. law.

Setting aside - as we think we must - the "shocks the conscience" standard, what is the proper interpretation of paragraph 1(c)? We agree with the opinion's conclusions that "humiliating and degrading" treatment must rise to the level of an "outrage upon personal dignity" to be proscribed; we agree that some measure of contextual analysis may be appropriate in determining whether a particular act would be prohibited; and we agree that the acts covered by this prohibition must be, as Picot describes, those acts "which world opinion finds particularly revolting - acts which were committed frequently during the Second World War." All of these conclusions may safely be drawn through an interpretation of the plain meaning of the language in question, interpreted in light of the object and purpose of the Geneva Conventions, and taking into account the *travaux préparatoires*.

We further agree that the ICTY *Aleksovski* case cited in the draft opinion stands for the proposition that one should evaluate a reasonable person's reaction to the act in determining if it would be an "outrage." But the opinion fails to note that Dornmann's commentary on the Elements of War Crimes also discusses the need to take into account the cultural background of the victims "when assessing whether the conduct amounted to an outrage upon personal dignity. This qualification was considered important because often the extent of the degradation or humiliation experienced by the victims will depend upon their cultural background." In a World War II trial in an Australian military court, defendants were convicted of violating the 1929 Geneva Conventions for cutting off the hair and beards of Sikh Indians and of making them smoke cigarettes. Thus, the *Aleksovski* court recognized that both subjective and objective elements are relevant.²

Applying the "objective" standard from *Aleksovski*, we believe that nudity in any circumstances, and most certainly nudity combined with shackling a person in order to prevent sleep, would be viewed as inconsistent with paragraph 1(c) of Common Article 3. We believe that the reasonable person, as well as world opinion, would consider such acts to constitute humiliation and degradation of a level to be considered an outrage upon personal dignity. We believe that the world would find these acts particularly revolting. The public reaction to the images at Abu Ghraib of an individual standing naked with a sack over his head or of individual detainees naked in handcuffs was incredibly hostile

² ICTY, Judgment, *The Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-T, para 56.

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and a reliable indicator of public opinion. We have little reason to believe that the public reaction to an image of an individual standing in a detention facility wearing only a diaper, with his hands shackled in front of him, deeply fatigued, would be more favorable, even if this treatment (unlike the abuse at Abu Ghraib) occurred pursuant to a carefully regulated, limited program that existed for clear reasons.

Descriptions in the draft itself advance the conclusion that an objective person would find the technique of nudity to be an outrage upon personal dignity. The draft acknowledges that the purpose behind the use of nudity is to "cause embarrassment," "induce psychological discomfort," and to "exploit the detainee's fear of being seen naked." For an average person, there is little difference between doing an act to make an individual feel vulnerable and embarrassed, and doing an act to humiliate that individual.

Application of the "subjective" cultural background test of the *Aleksovski* case only deepens our concern, because it is highly likely that the subjects of these EITs will be Muslim males. It is our understanding that many Muslim men are particularly uncomfortable with nudity, even between men, and that it is highly disturbing for a Muslim man to have a woman see him naked, as might occur with these EITs. The draft opinion fails to discuss any potentially relevant cultural norms that would affect a court's assessment of the EITs.

In this connection, we note that the most recent draft of the OLC opinion now identifies in the section on the War Crimes Act a directly relevant congressional exchange suggesting bipartisan consensus among several Senators that nakedness and sleep deprivation would be grave breaches of Common Article 3 and thus criminal offenses. On September 28, Senator Kennedy sought to introduce an amendment that would have identified as criminal violations of Common Article 3 a number of specified techniques, including, *inter alia*, the use of stress positions, sleep deprivation, and the entire list of techniques prohibited in the recently-promulgated Army Field Manual on Interrogation (which includes forcing persons to be naked). Congressional Record, S10,378. Senator Warner strongly opposed this amendment, and successfully worked to defeat its introduction, but explained in so doing:

I don't want that rejection to be misconstrued by the world in any way as asserting that the techniques mentioned in the amendment are consistent with the Geneva Conventions or that they could legitimately be employed against our troops or anyone else The types of conduct described in the amendment, in my opinion, are in the category of grave breaches of Common Article 3 of the Geneva Conventions. These are clearly prohibited by the bill. Rather than listing specific techniques, Congress has exercised its proper constitutional role by defining such conduct in broad terms as a crime under the War Crimes Act. The techniques in Senator Kennedy's amendment are not consistent with the Common Article 3 and would strongly protest their use against our troops or any others.

Congressional Record, S10,390. Senator Levin, who spoke in support of Senator Kennedy's amendment following Senator Warner's statement, indicated that he was in

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"complete agreement" with Senator Warner that "each of these practices is a grave breach of Common Article 3" and that "these practices are unlawful today and they will continue to be unlawful if this bill is enacted into law." *Id.* at S10,384.

The OLC draft opinion concludes that, in view of another set of comments by legislators stating that the MCA prescribed only general standards, not specific techniques, this aspect of the legislative history is not particularly illuminating. We do not read the two sets of statements as necessarily inconsistent: it is possible for legislators to agree that the MCA does not list particular techniques that are or are not acceptable, and also for some of those legislators to conclude that certain techniques nevertheless would not be permissible under the legal standards contained in the law. In any event, we believe that the comments made by Senators Levin and Warner might suggest that these Senators believed that the acts listed in the Kennedy Amendment constitute "cruel and inhuman treatment" or "serious bodily injury," because those Senators construed the acts as "grave breaches" (which, in the MCA, does not include "outrages upon personal dignity").³

Humane treatment. We are concerned that the draft opinion's discussion of what constitutes "humane treatment" may construe that requirement too narrowly. In particular, the Commentary to Article 27 of the Fourth Geneva Convention, which requires High Contracting Parties to treat protected persons humanely at all times, states:

What constitutes humane treatment follows logically from the principles explained in [paragraph 1 of Article 27 - "respect for their persons, their honor, . . . their religious convictions and practices, and their manners and customs"], and is further confirmed by the list of what is incompatible with it. In this connection the paragraph under discussion mentions as an example . . . any act of violence or intimidation inspired not by military requirements or a legitimate desire for security, but by a systematic scorn for human values (insults, exposing people to public curiosity, etc.). . . . The requirement of humane treatment and the prohibition of certain acts incompatible with it are general and absolute in character. . . . They are valid 'in all circumstances' and 'at all times', and apply, for example, to cases where a protected person is the legitimate object of strict measures, since the dictates of humanity and measures of security or repression, even when they are severe, are not necessarily incompatible.

Pictet, Commentary to GC IV at 204-05. While this discussion does not provide detailed guidance about what constitutes humane treatment, it does suggest that the requirements

³ We note in this regard the tension between discussions on page 22 and page 45 of the draft. In describing the CIT offense and the imposition of "serious mental pain and suffering" including the threat of applying procedures calculated to disrupt profoundly the personality, the opinion concludes that the detainee's uncertainty about what might come next does not constitute a threat. But on page 45, the opinion describes the CIA's goal as creating uncertainty about whether the United States will treat them harshly - which seems to be the essence of a threat. We recommend that the opinion clarify this apparent tension.

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exceed the provision of the basic necessities of life and the prohibitions found elsewhere in Common Article 3.

A statement in the Report on U.S. Practice, submitted to the ICRC in 1997 as it developed its Customary International Humanitarian Law Study, further supports this conclusion. Three U.S. persons (all former government officials) prepared the U.S. report. One served as an Air Force JAG for twenty years; one was a Lt. Colonel in the Army; and one now serves as a judge on the ICTY. The submission stated, "It is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II." (ICRC Study, Volume II at 2139, para 1239). While this does not necessarily represent the current Administration's views, we are likely to face criticism that we are now interpreting humane treatment more narrowly.⁴

I am especially concerned about the opinion's conclusions that the use of extended periods of sleep deprivation, and the techniques used to achieve that sleep deprivation, constitute "humane treatment." As we understand it, the detainee will be forced to stand, shackled, for prolonged periods of time, in a position the opinion acknowledges will produce muscle stress. Although the detainee is not allowed to hang by his wrists from the chains, he may periodically collapse from exhaustion and be pulled awake by his shackles. I think it is unlikely that forcing a detainee to stay awake for up to 96 hours at a time under these conditions would be viewed as humane, and as not humiliating and degrading.

Remaining EITs and Need for Safeguards

We are also unable to concur that the remaining EITs would in all cases be consistent with the prohibitions contained in Common Article 3. We have not reviewed the underlying CIA documents that describe the program and establish the parameters and safeguards relevant to the use of the techniques in question. The draft OLC opinion does not identify an underlying CIA document that describes the program in question (although it refers to a CIA Office of Medical Services document entitled *Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation and Detention*) or describe in detail the specific safeguards that CIA would put in place to govern the application of the techniques. Past OLC opinions addressing DOD interrogation techniques have stressed the importance of procedural safeguards, including the need for safeguards that take into account factors such as the detainee's emotional and physical strengths and weaknesses and that require interrogators or doctors to assess whether a

⁴ Articles 4-6 of AP II provide, among other things, that:

- Persons not taking direct part in hostilities or who have ceased to take part in hostilities are entitled to respect for their person, honor, and convictions and religious practices;
- A State may not engage in "any form of indecent assault" against such persons, or threaten to commit any of the acts prohibited by Common Article 3;
- Those responsible for detention shall not endanger the physical or mental health and integrity of the detainees by any unjustified act or omission.

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detainee is medically and operationally suitable for interrogation, considering all techniques to be used in combination. While it may well be the case that individual techniques (apart from nudity and sleep deprivation), or some combination of those techniques, could be applied in a manner that is consistent with Common Article 3, it is imperative that OLC provide clear legal guidance on the safeguards necessary to ensure that techniques, when used individually or in combination, do not violate Common Article 3. Indeed, the ICTY in *Aleksovski* has noted that "the seriousness of an act and its consequences may arise either from the nature of the act per se or from the repetition of an act or from a combination of different acts which, taken individually, would not constitute a crime within Article 3 of the Statute."⁵ The current draft does not offer this level of analysis.

Practice of Treaty Partners and International Tribunals

I believe that the practice of our treaty partners and the decisions of international tribunals provide a clear indication that the world would disagree with the interpretations of Common Article 3 contained in the draft opinion.

Treaty partners. The discussion of the meaning of Common Article 3's terms fails to reflect that our treaty partners almost certainly would disagree with the conclusion that each of the EITs complies with Common Article 3. The view of our European treaty partners would flow both from relevant court cases (see discussion of *UK v. Ireland*, below), and from an increasing lack of tolerance in Europe and elsewhere for activities that might appear to contravene the individual dignity and humanity of an individual. This is, of course, one reason that the Administration and Congress, in the wake of *Hamdan*, sought to enact legislation that implemented U.S. obligations under CA3. However, we cannot ignore the treaty interpretations of our treaty partners in assessing what particular treaty terms mean.

The experience of the United Kingdom, our closest ally and a government keenly attuned to the need to combat terrorism aggressively, is instructive. The UK was, of course, the defendant in the 1972 *UK v. Ireland* case, based on its use of five aggressive interrogation techniques (including bread and water diets and deprivation of sleep) on IRA members. While that case was pending, the House of Commons appointed a three-person Committee of Privy Counsellors to consider the propriety of those interrogation techniques. The majority opinion explained that the techniques had played an important part in UK counter-insurgency operations in Palestine, Malaya, Kenya, Yemen, and Northern Ireland. With regard to the last group, it described that ordinary police interrogation had failed to reveal anything but a general picture of the IRA organization, but that the use of the five techniques led to information identifying an additional 700 IRA members; details of possible IRA operations, safe houses, and locations of wanted persons; and information identifying which individuals were responsible for 85 unsolved incidents. The opinion described the goal of the techniques as making "the detainee, from whom information is required, feel that he is in a hostile atmosphere, subject to

⁵ ICTY, Judgment, *The Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-T, para 57.

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strict discipline, and that he is completely isolated so that he fears what may happen next." The majority stated, "[W]e think that the application of these techniques, subject to proper safeguards, limiting the occasion on which and the degree to which they can be applied, would be in conformity with the Directive [which prohibited violations of Common Article 3]." Despite this conclusion, the Prime Minister stated that his government "decided that the techniques which the Committee examined will not be used in future as an aid to interrogation." Thus, despite their clear value to the UK in its efforts to defeat the IRA, the UK apparently has not used these techniques for thirty years.

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Foreign Tribunals. As a related matter, I believe that the opinion must discuss in greater detail the facts and conclusions of the Israeli Supreme Court and European Court of Human Rights cases that analyze the legality of similar interrogation techniques.⁶ To be sure, we are not subject to the same standards as those evaluated by the European Court or the Israeli Supreme Court, based on our differing treaty obligations, our interpretation of the CAT and other treaties to which the United States is a party, and different domestic laws. Nonetheless, we must recognize that other countries likely will judge our activities in relation to the standards identified in those cases or in relation to their interpretations of their treaty obligations. While it may be true that these decisions would not serve as controlling authority in interpreting a U.S. statute such as the DTA, it also is true that U.S. law is irrelevant in evaluating how foreign tribunals will interpret Common Article 3. These courts will assess Common Article 3 on its own terms, drawing from applicable case law that interprets the same or similar language.

With regard to the ECHR case, the draft opinion suggests that the UK presented the ECHR with no rationale for the use of techniques such as sleep deprivation. But, as described above, that is not correct — it is clear that the UK believed that it needed to use such techniques against members of the IRA, a terrorist group, to gather information that the UK had been unable to obtain using more limited interrogation techniques. This rationale is, of course, similar to our rationale for the need for BITs.

⁶ See *Ireland v. United Kingdom* (1980) 2 EHRR 24 (determining that techniques that included protracted standing, sleep deprivation, and reduction of food and drink constituted treatment in an "inhuman and degrading" manner); *Judgment Concerning the Legality of the General Security Service's Interrogation Methods*, 38 I.L.M. 1471 (Sup. Ct. of Israel 1999) (noting that Israel has a prohibition on the use of "brutal or inhuman" means during an investigation, in accordance with various treaties to which Israel is a party, and determining that certain stress positions and sleep deprivation were prohibited).

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I do not argue with the fact that the underlying legal standards that applied to the UK in that case (that is, the prohibition in the European Convention on Human Rights on "inhuman or degrading treatment or punishment") are slightly different than CA3's prohibition on "cruel treatment." But in interpreting their CA3 obligations, European allies will be influenced by the ECHR's interpretation of relevant terms. This includes the ECHR's description of "inhuman or degrading treatment" in the *UK v. Ireland* case, in which the ECHR stated at para. 167 that treatment is degrading when it is such as to arouse in a person "feelings of fear, anguish and inferiority capable of humiliating and debasing him" and "possibly breaking [his] physical or moral resistance." (OLC's draft opinion states that interrogators would use the sleep deprivation technique "primarily to weaken a detainee's resistance to interrogation.") Other relevant case law includes the interpretation by the European Commission of Human Rights of "degrading treatment" as treatment or punishment that "grossly humiliates [a victim] before others or drives him to act against his will or conscience." Both ECHR standards are notably lower than the "shocks the conscience" standard. Therefore, although the treaty containing the terms "inhuman or degrading" is not a law of war treaty, we think it is virtually certain that European countries would apply these standards in assessing equivalent terms in Common Article 3.

With regard to the Israel Supreme Court case, the current draft relies heavily on the fact that the Court concluded that the Israeli General Security Service was not authorized to use physical means of interrogation. But the Court only reached that issue after it had evaluated the various interrogation techniques and concluded that the techniques were not "reasonable." In assessing the "reasonableness" test, the Court discussed the reasonableness requirement as being "in perfect accord" with various international law treaties that prohibit the use of torture, cruel and inhuman treatment, and degrading treatment. With regard to those terms, the Court states, "These prohibitions are 'absolute.' There are no exceptions to them and there is no room for balancing." 38 LL.M. 1471 at para. 23. Thus, when the Court concludes that the technique of intentionally depriving an individual of sleep for a prolonged period of time to tire him out or "break" him is not within the scope of a "reasonable" interrogation, some may read the Court's opinion as shedding light on what activity constitutes cruel, inhuman, or degrading treatment, regardless of its conclusion that the GSS could not use physical means of interrogation unless those means are inherent to an interrogation and are fair and reasonable.

In view of the UK experience and these court cases, I request that the opinion include a sentence that states, "Notwithstanding the difference in legal standards, the State Department believes that it is highly likely that foreign courts and international tribunals would consider certain of these ETTs - at a minimum, nudity and prolonged

⁷ European Commission of Human Rights, *Greek Case*, YB of the Euro. Conv. on Hum. Rts., Vol. 12, p. 186. See also ECHR, *Hurtado v. Switzerland*, Publications of the European Court of Human Rights, Series A: Judgments and Decisions, vol. 280-A, p. 14 (finding humiliating and degrading treatment where the government prevented a detainee from changing his clothing for a day even though the applicant had defecated in his pants because of the shock of a run grenade).

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sleep deprivation -- to be violations of Common Article 3." This could mean that CIA personnel who administer EITs would be more likely to be sought for criminal process in foreign countries, as discussed below.

Contemporary context. The opinion invokes an interpretive tool to "reconcile the residual imprecision of Common Article 3 with its application to the novel conflict against al Qaeda. When treaty drafters purposely employ vague and ill-defined language, such language can reflect a decision to provide flexibility to state parties as they confront circumstances unforeseen at the time of the treaty's drafting." (See page 48.) We are unaware of a legal basis for this method of treaty interpretation. One cannot retroactively interpret the object and purpose of Common Article 3 as providing "flexibility and discretion for the Executive Branch to develop an effective CIA program" under that Article. Indeed, Ian Brownlie has referred to the "principle of contemporaneity" -- that is, "the language of the treaty must be interpreted in light of the rules of general international law in force at the time of its conclusion, and also in light of the contemporaneous meaning of terms."¹ This principle is in tension with the draft opinion's "contemporary circumstance" approach. The question about whether a situation falls within the terms of a treaty is separate from the question how to interpret that treaty's terms once a state (or its courts) decides that the situation does fall within the treaty's terms. Since the Supreme Court has concluded that the conflict with al Qaeda falls within the terms of Article 3, the imperfect fit of al Qaeda into that Article is no longer relevant in interpreting what that Article means.

To the extent that DOJ chooses to retain this interpretive method in its opinion, a reliance on contemporary circumstances cannot focus exclusively on the U.S. view of those circumstances. That is, the opinion fails to explain that contemporary views by treaty partners of the importance of Common Article 3 may have changed as well; certain behavior that might have been viewed in 1950 as consistent with Common Article 3 may be seen as inconsistent with that Article in 2007.

Legal Risks

We think it would be useful for the opinion to assess risks of civil or criminal liability in foreign tribunals. As noted above, we do not think foreign tribunals would agree with this opinion's conclusions about Common Article 3; and we do not think these tribunals would defer to U.S. interpretations of that provision. There have been increasing numbers of criminal investigations in European countries of U.S. officials for various activities, including alleged renditions. We therefore cannot say that the risk of criminal exposure overseas of U.S. officials involved in this program, including CIA officers, is insubstantial. Because foreign courts likely would view some of these EITs as violating Common Article 3 and as war crimes, and because a number of states have established broad jurisdiction over war crimes, we think it would be appropriate for the

¹ Ian Brownlie, *Principles of Public International Law* 629 (Oxford 1990).

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opinion to assess the possible criminal exposure of U.S. officials in foreign courts.⁹ Finally, we would recommend that the opinion assess the degree to which the U.S. Government might be susceptible to claims by other states for mistreating their nationals if those states believed that we had violated our obligations to them to treat their nationals in accordance with Common Article 3.

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In addition to these more specific concerns, I have an overarching concern about this opinion. While it does a careful job analyzing the precise meanings of relevant words and phrases, I am concerned that the opinion will appear to many readers to have missed the forest for the trees. Will the average American agree with the conclusion that a detainee, naked and shackled, is not being subject to humiliating and degrading treatment? At the broadest level, I believe that the opinion's careful parsing of statutory and treaty terms will not be considered the better interpretation of Common Article 3 but rather a work of advocacy to achieve a desired outcome.

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Please do not hesitate to contact me should you have any questions regarding our letter.

Sincerely,



John B. Bellinger, III

⁹ In light of our view of the applicability of the prohibitions contained in Common Article 3 to the EITs in question, and taking into consideration the concern that members of the U.S. community (including some U.S. senators) might not view as reasonable the interpretations contained in section IV of the draft opinion, we think it also be important for OLC to consider the risk to U.S. personnel in U.S. courts, in view of section 1004(a) of the DTA.

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(b)(3) NatSecAct