



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

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John A. Rizzo
Acting General Counsel
Central Intelligence Agency

Dear John:

You have asked for our opinion whether the conditions of confinement used by the Central Intelligence Agency ("CIA") in covert overseas facilities that it operates as part of its authorized program to capture and detain individuals who pose serious threats to the United States or who are planning terrorist attacks are consistent with common Article 3 of the 1949 Geneva Conventions. On Friday, June 30, 2006, I advised you orally that the conditions of confinement described herein are permitted by common Article 3. This letter memorializes and elaborates upon that advice.

Common Article 3, which appears in all four of the Geneva Conventions of 1949, applies in the "case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." *E.g.*, Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364 ("GPW"). It had been the longstanding position of the Executive Branch that the phrase "not of an international character" limited the applicability of common Article 3 to internal conflicts akin to a civil war and thus that the provision was not applicable to the global armed conflict against al Qaeda and its allies. *See* Memorandum of the President for the National Security Council, *Re: Humane Treatment of al Qaeda and Taliban Detainees* at 2 (Feb. 7, 2002) (accepting the legal conclusion of the Department of Justice that common Article 3 "does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflicts not of an international character'").

In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006), however, the Supreme Court, by a 5-3 vote, concluded instead that the "term 'conflict not of an international character' is used here in contradistinction to a conflict between nations." On that basis, the Court determined that common Article 3 does apply to the armed conflict between the United States and al Qaeda. *See id.* at 2795-97. The Supreme Court's decision means that the "minimum protection" afforded by common Article 3, *id.* at 2795, to "those placed *hors de combat* by sickness, wounds, detention,

or any other cause" now applies, as a matter of treaty law, to detainees held by the CIA in the Global War on Terror. GPW Art. 3. Where common Article 3 applies, the obligation to follow it is also enforced by statute, as the War Crimes Act provides that "any conduct" that "constitutes a violation" of common Article 3 is a federal crime, punishable in some circumstances by the death penalty. 18 U.S.C. § 2441 (2000).

Common Article 3 has been described as a "Convention in miniature." 3 ICRC, *Commentary: Geneva Convention Relative to the Treatment of Prisoners of War* 34 (Jean Pictet, ed. 1960) ("GPW Commentary"). It establishes a set of minimum standards applicable to the treatment of detainees held in non-international conflicts. The most important aspect of common Article 3 is its overarching requirement that detainees "shall in all circumstances be treated humanely, without any adverse distinction based on race, color, religion or faith, sex, birth or wealth, or any other similar criteria." 6 U.S.T. at 3318. This requirement of humane treatment is supplemented and focused by the enumeration of four more specific categories of acts that "are and shall remain prohibited at any time and in any place whatsoever." *Id.* Those forbidden acts are:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Id. As applied to the conditions of confinement used by the CIA, the prohibitions imposed by subparagraphs (a) and (c) are clearly the most relevant.

The five conditions you have asked us to consider are standard in the covert overseas facilities that the CIA uses to detain individuals [REDACTED]. You have advised us that those conditions are used to address the unique and significant security concerns associated with holding extremely dangerous terrorist-detainees in the kinds of covert facilities used by the CIA. The facilities in which the CIA houses these high-value detainees were not built as ordinary prisons, much less as high-security detention centers for violent and sophisticated terrorists. In order to keep their

¹ This letter is limited to evaluating the specific conditions of confinement discussed herein, as described to us by the CIA. We understand that the CIA is not currently using any interrogation practices at its overseas facilities that would raise questions under common Article 3.

location secret.

Those

limitations, in turn, require that special security measures be used inside the facilities to make up for the buildings' architectural shortcomings. It is in this unique context that the CIA has imposed the conditions of confinement described herein.

To be sure, the nature and location of these facilities, which prevent more elaborate and conspicuous external security measures, is due to a choice that the United States made to hold these persons secretly. As explained below, however, such secret detention is a condition expressly countenanced by the Conventions themselves for the detention of some persons. And accomplishing such secret detention has required increasingly discreet methods given the advances in intelligence technology since 1949. There is some evidence that common Article 3 establishes certain "minimum" requirements for the treatment of detainees that cannot be loosened by sole reference to the purpose of the condition of confinement. *See, e.g.,* GPW Art. 3(1) (providing that "the following acts [subsections (a)-(d)] are and shall remain prohibited at any time and any place whatsoever"); 3 Pictet, *Commentary*, at 140 ("The requirements of humane treatment and the prohibition of certain acts inconsistent with it are general and absolute in character."). That does not mean, however, that the purpose underlying the conditions is irrelevant to evaluating the nature of its prohibitions. Rather, some specific prohibitions in common Article 3 specifying the overarching requirement of humane treatment, however, may very well turn on an evaluation of necessity and purpose. *See* GPW Art. 3(1)(a) (prohibiting "cruel treatment"); *see also Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (holding the "unnecessary and wanton infliction of pain" to be "cruel" under the Eighth Amendment). As explained below, we believe the conditions of confinement imposed in these secret detention facilities meet those minimum standards of treatment. And we make reference to the challenges posed by the secret and unfortified nature of these facilities to underscore that the United States is not imposing wantonly whatever discomfort that these conditions might cause.

Before specifically evaluating each of the conditions of confinement under common Article 3, we offer some general observations on the scope of that provision. In doing so, we begin with the text of the treaty. *See Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 534 (1987). There are other resources relevant here, including Pictet's Commentaries, which were prepared on behalf of the International Committee of the Red Cross shortly after the treaties were signed and on which the Supreme Court relied in *Hamdan* in its interpretation of common Article 3. In addition, the Supreme Court has held that the decisions of foreign tribunals charged with adjudicating disputes between signatories should be given "respectful consideration." *Sanchez-Llamas v. Oregon*, slip op. at 21 (June 28, 2006); *see also Breard v. Greene*, 523 U.S. 371, 375 (1998). While not a tribunal given authority by the treaty to resolve such disputes, the International Criminal Tribunal for the former Yugoslavia ("ICTY") has adjudicated war crimes prosecutions under common Article 3, and we address

certain decisions of that tribunal below.²

First, common Article 3's overarching requirement of "humane" treatment clearly would forbid housing detainees in conditions of confinement that are inhumane. That term suggests conditions that are "not worthy of or conforming to the needs of human beings." *Webster's Third New International Dictionary* 1163 (1967) (defining "inhuman"). Conditions that fail to satisfy the basic needs of all human beings—to food and water, to shelter from extremes of heat or cold, to reasonable protections from disease and infection—are thus obvious candidates for violating common Article 3. This focus on the basic necessities of life in the requirement of humane treatment is further emphasized by GPW Article 20, which includes its own humane treatment requirement for prisoners of war under transport and explicates that requirement with minimum standards of food, clothing, and shelter. There is no indication, however, that the CIA's facilities fall short on this score. To the contrary, we understand that all CIA detainees are given adequate food and water. The cells in which those detainees live are kept at normal temperatures and are clean, hygienic, and protected from the elements. In addition, you have informed us, and we consider it significant for purposes of common Article 3, that the CIA provides regular medical care to all detainees in its custody. Please take careful note that to the extent these basic obligations are included in common Article 3, they are binding as a matter of domestic criminal law through the additional basis of the War Crimes Act, 18 U.S.C. § 2441.

Second, the text, structure, and purpose of common Article 3 suggest that its strictures are aimed at treatment that rises to a certain level of gravity and severity. After all, the provision "reflects the fundamental humanitarian principles which underlie international humanitarian law." *Prosecutor v. Delalic*, ICTY-96-21-A (App.) (Feb. 20, 2001) ¶ 143. It protects against treatment that is widely, if not universally, condemned as inconsistent with basic human values. *See id.* (observing that common Article 3 incorporates the "most universally recognised humanitarian principles"); *GPW Commentary* at 35 (common Article 3 "at least ensures the application of the rules of humanity which are recognized as essential by civilized nations"). Only conduct that is sufficiently severe can properly be characterized as warranting and receiving such widespread condemnation. This severity requirement is illustrated by the specific examples that common Article 3 gives of acts that are "prohibited at any time and in any place," particularly those found in subparagraphs (a) and (c). As the ICRC Commentaries explain, "[i]tems (a) and (c) concern acts which world public opinion finds particularly revolting—acts which were committed frequently during the Second World War." *Id.* at 39.

More specifically, the prohibition in subparagraph (a) on "violence to life and person" suggests that not all physical contact with detainees is banned; the word "violence" connotes "an

² The analysis set forth in this letter represents our best interpretation of common Article 3 based on a rigorous examination of the text, history, and structure of the Conventions, as well as other interpretive resources. As we have stressed on numerous occasions, however, there are vague terms in common Article 3 that the United States has had little or no opportunity previously to apply in an actual conflict, that are potentially malleable, and that could be interpreted by courts to reach different results.

exertion of physical force so as to injure or abuse." *Webster's Third New International Dictionary* 2554; *see also id.* (defining "violent" as "characterized by extreme force"). The text's examples of forbidden forms of violence only reinforce this meaning: "murder of all kinds, mutilation, cruel treatment and torture." This list suggests that, although the use of physical force certainly need not rise to the level of torture to be forbidden, it does need to be more than incidental or de minimis and must at least have the potential to cause a degree of actual harm to the detainee. *See, e.g., Delalic, supra*, ¶ 443 ("[C]ruel treatment is treatment which causes serious mental or physical suffering or constituted a serious attack upon human dignity, which is equivalent to the offense of inhuman treatment in the framework of the grave breaches of the Geneva Conventions."); *cf. Whitley v. Albers*, 475 U.S. 312, 319 (1986) (observing that the term "cruel" in the Eighth Amendment, requires "unnecessary or wanton infliction of pain"). What murder, mutilation, cruel treatment, and torture have in common is an element of depravity and viciousness; that common element suggests the kinds of force that common Article 3 seeks to prohibit. *See generally Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) ("The traditional canon of construction, *noscitur a sociis*, dictates that words grouped in a list should be given related meaning."). Also, the structure of the Geneva Conventions makes clear that violence necessary to effect detention is permitted. *See* GPW Art. 42 (permitting the use of force against prisoners of war attempting to escape).

Similarly, subparagraph (c)'s use of the phrase "outrages upon personal dignity" should be understood to mean a relatively significant form of ill-treatment. In this context, "outrage" appears to carry the meaning of "an act or condition that violates accepted standards." *Webster's Third* at 1603; *see also id.* (defining "outrageous" as conduct that "is so flagrantly bad that one's sense of decency or one's power to suffer or tolerate is violated" and giving as synonyms "monstrous, heinous, [and] atrocious"); *cf. Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court* 315-16 (2002) ("*Elements of War Crimes*") (observing that the *Cambridge International Dictionary of English* (1995) defines "outrage" as "shocking, morally unacceptable and usually violent action"). Under these definitions, to constitute an "outrage upon personal dignity" within the meaning of common Article 3, an act must violate some relatively clear and objective standard of behavior or acceptable treatment; it must be something that does not merely insult the dignity of the victim, but that does so in an obvious or particularly significant manner.

The fact that the basic prohibition of subparagraph (c) focuses on "outrages" also must inform any analysis of what is covered by that provision's prohibition of "humiliating and degrading treatment," suggesting that conduct must rise to a significant level of seriousness in order to be forbidden. Importantly, the text is clear that "humiliating and degrading treatment" is merely a subset of "outrages upon personal dignity." This text stands in contrast to provisions in other treaties, such as Article 16 of the Convention Against Torture, in which prohibitions on "degrading" treatment stand alone. As the ICTY has explained in addressing common Article 3:

[O]utrages upon personal dignity refer to acts which, without directly causing harm to the integrity and physical and mental well-being of persons, are aimed at humiliating and ridiculing them. . . . An outrage upon personal dignity is an act

which is animated by contempt for the human dignity of another person. The corollary is that the act must cause serious humiliation or degradation to the victim.

Prosecutor v. Aleksovski, ICTY-95-14/1, Trial Chamber I (June 25, 1999) ¶¶ 55-56. Similarly, in discussing an identical prohibition in Article 75 of Protocol I to the Geneva Conventions, the ICRC observed that it "refers to physical acts, which, without directly causing harm to the integrity and physical and mental well-being of persons, are aimed at humiliating and ridiculing them, or even forcing them to perform degrading acts." ICRC, *Commentary on Additional Protocols of 8 June 1977*, at 873 (1987) ("Additional Protocols Commentary"). In addition to being purposive, "outrages upon personal dignity" generally must be defined in relation to an objective standard of unacceptable behavior. Thus, according to ICTY, the subjective element of an outrage "must be tempered by objective factors; otherwise, unfairness to the accused would result because his/her culpability would depend not on the gravity of the act but wholly on the sensitivity of the victim. Consequently, an objective component to the *actus reus* is apposite: the humiliation to the victim must be so intense that the reasonable person would be outraged." *Aleksovski*, *supra*, ¶ 56 (emphasis added).

As with subparagraph (a), therefore, subparagraph (c) is properly understood as proscribing conduct of a particularly serious nature, conduct that is characterized by hostility to human dignity. The prohibition does not reach trivial slights or insults, but instead reaches only those that represent a more fundamental assault on the dignity of the victim. See, e.g., *id.* ¶ 37 ("The victims were not merely inconvenienced or made uncomfortable; what they had to endure, under the prevailing circumstances, were physical and psychological abuse and outrages that any human being would have experienced as such."). At the same time, however, it seems clear from the text that subparagraph (c) prohibits a broader range of conduct than does subparagraph (a). Subparagraph (a) is focused primarily, if not exclusively, on physical violence; the actions that it forbids are those that can be expected to impose some direct physical harm on the detainee. In contrast, the text of subparagraph (c) does not necessarily include an element of physical force; it reaches actions that assault the detainee's mental or psychological well-being, treatment that amounts to a significant attack on his dignity as a human being without necessarily causing him to suffer physically.

This element of intent and purpose also raises the relevance of context in applying subparagraph (c). Certain activities may well be intended solely to humiliate and to degrade in certain settings, but may be undertaken for a legitimate purpose in others. For example, a systematic practice of marching detainees blindfolded in public with the intent to humiliate may so evince a "hostility to human dignity" as to run afoul of common Article 3. In contrast, obstructing the vision of the detainee during transport, with no needless exposure to the public, for the purpose of maintaining the security of the facility would not trigger the same concerns under subparagraph (c).

With these basic principles in mind, we turn to an evaluation of each of the conditions of confinement used by the CIA in its covert overseas detention facilities.

1. We begin with the CIA's practice of blocking detainees' vision by covering their eyes with some opaque material.

Accordingly, detainees' vision is blocked only during those times when allowing them to see could permit them to gain information—such as their location, the layout of the facility

—that could compromise the security of the facility. Used in this way, blindfolding is less a general condition of confinement than a special security measure employed on the relatively infrequent occasions when the detainee is moved into or around the detention facility. We see nothing in common Article 3 that would forbid the CIA from taking this precaution. Blindfolding no doubt requires minimal physical contact, but it hardly involves "violence"; none of the methods the CIA uses to prevent detainees from seeing is painful or poses any risk of physical harm, and the detainees have no difficulty breathing freely while their vision is obstructed. Nor does this limited use of blindfolds amount to an "outrage[] upon personal dignity." Neither its purpose nor effect is to humiliate the detainees; rather, the aim is to ensure the security of the facilities. And the use of blindfolds is carefully limited in scope so that it directly serves that end. Moreover, the detainee is not needlessly exposed to other persons during this process, underscoring that the intent is not to humiliate. More generally, such blindfolding is not inhuman; although this may still not be enough to raise problems under common Article 3, this condition is not "sensory deprivation" aimed at weakening the detainees psychologically and undermining their sense of personality. Accordingly, we conclude that the use of non-injurious means of temporarily blocking detainees' vision when allowing them to see could jeopardize institutional security is consistent with common Article 3's requirement of humane treatment.

2. The CIA keeps the detainees isolated from the outside world and from one another. The detainees are housed

In addition, the detainees have no contact with the outside world, They are not, however, completely cut off from human contact. You have informed us that each detainee

Detainees also have access to gym equipment and physical exercise.

You also have indicated that detainees have access to books, music, and movies. These practices help relieve the strain of prolonged isolation by providing mental and intellectual stimulation to the detainees. We also note that each detainee receives psychological examination to ensure that he is suffering no adverse effects as a result of this aspect of his confinement. We do not conclude that these measures are necessary to satisfy common Article 3, but they do provide significant comfort that the CIA's detention condition does not approach common Article 3 limits.

We first address whether the incommunicado nature of the detention, whereby the detainees are not allowed to communicate with the outside world, is proscribed by common

Article 3. Examining the overall structure of the Geneva Conventions makes clear that common Article 3 does not give detainees an absolute right of communication that would forbid detention of the sort used by the CIA in its covert facilities. As described above, common Article 3 sets a minimum level of treatment; its protections are thus clearly less robust than those afforded to other categories of privileged persons whose treatment is regulated by the Geneva Conventions, in particular, prisoners of war (protected by the Third Convention) and "protected persons" (protected by the Fourth Convention). Indeed, the provisions of the Conventions dealing with POWs and protected persons demonstrate that the drafters knew how to afford communication rights to individuals held in detention: For example, Article 71 of the Third Convention requires that POWs "shall be allowed to send and receive letters and cards." Article 107 of the Fourth Convention gives the same right to protected persons who have been interned. Moreover, other provisions in the Geneva Conventions expressly allow for access to detention facilities by representatives of the International Committee of the Red Cross and other state parties, and by family members for particular protected groups. See GPW Art. 126 (permitting ICRC and state party representatives to visit prisoner of war detention facilities); GCIV Art. 76 (allowing visits by ICRC representatives to protected persons); GCIV Art. 116 (allowing detained protected persons to receive visitors). In contrast, persons protected only by common Article 3 do not share this express right of communication or to inspection by or notification to international bodies.

Even more important to our analysis is the fact that Article 5 of the Fourth Convention specifically provides that where in occupied territory "an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention." See generally 4 ICRC, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 57 (Jean Pictet, ed. 1958) (observing that the rights of communication "obviously refer to [the detained person's] relations with the outside world"). The fact that the Fourth Convention allows protected persons, who are afforded a panoply of rights and protections that go well beyond the "minimum" that common Article 3 provides, to be stripped of their otherwise expressly protected right to communicate with the outside world where "absolute military security so requires" is powerful evidence that common Article 3 was not meant to confer on individuals ineligible for any specially protected status under the Geneva Conventions a protection against incommunicado detention. Such a reading of common Article 3 would upset the structural integrity of the Conventions. That approach also would be textually unsound. For, immediately after allowing protected persons held as spies or saboteurs to be stripped of their express right to communicate, Article 5 insists that such persons "shall nevertheless be treated with humanity." This proviso clearly illustrates that the Conventions do not view incommunicado detention as incompatible with the obligation of humane treatment that undergirds common Article 3. We therefore conclude that detainees may be prohibited from communicating with the outside world without rendering their treatment inhumane.

Nor do we perceive a basis for a blanket conclusion that not allowing detainees to interact or speak with one another violates common Article 3. In considering whether such isolation is

consistent with the requirement of humane treatment, it is appropriate to look to cases evaluating isolation under the Eighth Amendment of the Constitution. After all, like common Article 3, the Eighth Amendment has been held to require "humane conditions of confinement." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); cf. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."). Conditions that our own courts have consistently found to be humane with regard to ordinary prisoners are thus likely to meet the comparable standard imposed by common Article 3 and applicable to unlawful combatants.

Accordingly, it is of great significance that the federal courts have generally held that holding prisoners in solitary confinement, with little or no personal contact with their fellow inmates, does not constitute "cruel and unusual punishment" in violation of the Eighth Amendment. See *Novack v. Beto*, 453 F.2d 661, 665 (5th Cir. 1972) (noting the "long line of cases, to which we have found no exception, holding that solitary confinement is not itself constitutionally objectionable"); cf. *Hutto v. Finney*, 437 U.S. 678, 686 (1978) (observing that it is "perfectly obvious that every decision to remove a particular inmate from the general prison population for an indeterminate period could not be characterized as cruel and unusual"). In *Jackson v. Meachum*, 699 F.2d 578, 581 (1st Cir. 1983), for instance, the First Circuit held that even "very extended indefinite segregated confinement in a facility that provides satisfactory shelter, clothing, food, exercise, sanitation, lighting, heat, bedding, medical and psychiatric attention, and personal safety, but virtually no communication or association with fellow inmates" is not cruel and unusual. Our courts also have rejected claims that isolation becomes unconstitutionally cruel or inhumane merely because of its indefinite or extended nature, though they have noted that the temporal element may be a factor. See *In re Long Term Administrative Segregation of Inmates Designated as Five Percenters*, 174 F.3d 464, 472 (4th Cir. 1999); *Sweet v. South Carolina Dep't of Corrections*, 529 F.2d 854, 861 (4th Cir. 1975). The cases illustrate that isolating detainees and limiting their ability to communicate with other detainees, even if psychologically taxing, is not inherently inhumane. Indeed, as Knut Dörmann, a leading commentator on international humanitarian law, has observed, "[s]olitary confinement, or segregation, of persons in detention, is not itself inhumane treatment. It is permissible for reasons of security or discipline or to protect the segregated prisoner from other prisoners or *vice versa*." *Elements of War Crimes* 68 (further suggesting that such measures should be evaluated on a case-by-case basis).

Nevertheless, we recognize the strain that extended isolation may exact, particularly if that isolation is not relieved by giving detainees access to other forms of mental stimulation, such as books, writing materials, games, and music. We understand that all detainees currently have access to such materials. We further understand that some of these detainees have been subject to this condition for a few years. However, we do not believe that the duration of the isolation exceeds the strictures of common Article 3. We view it as important that the isolation imposed is tailored to security and intelligence purposes—that is, preventing the coordination of attacks on facility personnel or false stories among co-conspirators. But we think that, at least at present, the CIA's practice of keeping detainees in solitary confinement in which they are unable to see or talk with other detainees is not forbidden by common Article 3.

3. The CIA plays white noise in the walkways of the detention facilities to prevent the detainees from being able to communicate with each other while they are being moved within the facility. Significantly, the noise is not piped directly into the detainees' cells, although it is possible that the detainees are able to hear some of that noise in their cells, as the walls that separate the walkway from the cells are not soundproof. Nevertheless, we can safely assume that the noise level in the cells is considerably lower than the level in the walkways; recent measurements indicated that the noise level in the cells was in the range of 56-58 dB, compared with a range of 68-72 dB in the walkways. The volume in the cells is thus comparable to that of normal conversation. There is no risk of hearing damage or loss even from 24-hour-a-day exposure to sound at that level. We also understand that the CIA has observed the noise to have no effect on the detainees' ability to sleep.

Used in this very limited way you have described, white noise does not violate common Article 3. There is nothing inhumane about the incidental exposure of detainees to noise that is no louder than the level of ordinary conversation and that is certainly not loud enough to cause physical harm or to interfere with sleep. Being exposed to such relatively insignificant noise levels can in no way be described as an act of violence. Nor does it represent an "outrage upon personal dignity" within the meaning of common Article 3. Neither the purpose nor effect of the white noise is to "cause serious humiliation or degradation" to the detainees, *Aleikovski, supra*, ¶ 56; instead, the noise, much like temporary blindfolding, is simply a limited measure aimed at protecting the security of the detention facility by preventing the detainees from communicating with each other. It cannot be characterized as an affront to human dignity.

4. The CIA also keeps the detainees' cells illuminated 24-hours-a-day. This condition of confinement allows CIA staff to monitor the detainees at all times [REDACTED]. In evaluating this condition, we find it significant that the light is not unusually bright and that it has not been observed to interfere with the detainees' ability to sleep normally. Indeed, if they wish, the detainees are permitted to cover their eyes with the blankets in their cells (or with eyeshades) in order to block out the light while they are sleeping. Although this practice presents a closer issue than some of the other conditions of confinement used by the CIA, we ultimately believe that it is consistent with common Article 3.

The full-time illumination of the detainees' cells is not inherently inhumane; it is not used in a manner that impairs the basic human needs of the detainees. Nor is the security surveillance that the illumination makes possible inhumane or otherwise contrary to common Article 3. To be sure, we recognize that being monitored around the clock [REDACTED] could result in some degree of humiliation. But the very nature of detention, which common Article 3 certainly does not forbid, is such that one must surrender a certain degree of privacy along with one's personal freedom. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 537 (1979) (observing that "[l]oss of freedom of choice and privacy are inherent incidents of confinement"). This inescapable fact must inform any analysis of the sorts of humiliations and degradations forbidden by common Article 3. And where, as here, the surveillance is not undertaken gratuitously, with the purpose and effect of stripping detainees of their human dignity, but

instead for entirely legitimate security reasons, we think that it does not represent an "outrage upon personal dignity" within the meaning of common Article 3. (It is significant in this regard

Our conclusion should not be understood to suggest that concerns about security will negate common Article 3's prohibitions on inhumane treatment and outrages upon personal dignity. Cf. *GPW Commentary* at 140 ("The requirement of humane treatment and the prohibition of certain acts inconsistent with it are general and absolute in character."). Instead, the point, which is reflected in the international case law applying common Article 3, is that in determining whether certain forms of treatment are in fact sufficiently outrageous to warrant condemnation, one must consider the context in which that treatment is used and the reasons for which it was imposed. See, e.g., *Prosecutor v. Mucic*, ICTY 96-12 (Nov. 16, 1998), ¶ 514 (holding that whether treatment is inhumane is a "question of fact to be judged in all the circumstances of the particular case"); *Alelkovski*, *supra*, ¶ 57 ("An outrage upon personal dignity is an act which is *animated by* contempt for the human dignity of another person.") (emphasis added). Conduct, like the CIA's use of constant illumination, that is not characterized by a desire to humiliate or degrade, but that instead is carefully tailored to advance a specific and manifestly legitimate security objective; and does so without causing unnecessary hardship, will generally fall outside the proscriptions of subparagraph (c).

There is also support for this condition in other provisions of the Conventions. GPW Article 92 allows the detaining authority to subject even prisoners of war recaptured after an unsuccessful escape to "special surveillance." This term is not further defined, except to exclude surveillance that "affects the state of their health" or suppresses "safeguards granted them by the present Convention." In Pictet's *Commentary*, this "special surveillance" has been referred to as a "tightened guard." 3 Pictet, *Commentary*, at 452. Given that the illumination and the constant [REDACTED] do not threaten the health of CIA detainees, [REDACTED] unavailable at the time the Conventions were drafted, may very well constitute permissible "special surveillance" under Article 92. As explained above, the structure of the Conventions makes clear that treatment explicitly permitted in certain circumstances as to prisoners of war or protected persons cannot be understood to violate the minimum protections provided by common Article 3.

5. We next consider the practice of shackling detainees when they are being moved around the detention facilities or when CIA personnel are in the room with them. You have informed us that detainees are only shackled in situations where the CIA believes they might pose a threat to the facility or those who work there. Detainees thus are not shackled in their cells unless they have previously demonstrated that they are a threat while in their cells. Like blindfolding, therefore, shackling is less a general condition of the detainees' confinement than a particularized security measure limited in its scope and duration. Indeed, we understand that, at present, no detainee is shackled 24 hours per day. In addition, shackling is done in such a manner as not to restrict the flow of blood or cause any bodily harm to the detainees. While

shackled, detainees are able to walk comfortably. Used in this limited and carefully calibrated way, shackling does not violate common Article 3.

In setting minimum standards specifically intended to apply to those "placed *hors de combat* by . . . detention," common Article 3 plainly contemplates that detention may be effectuated by restricting the freedom of movement of detainees. That, after all, is inherent in the nature of detention. As such, common Article 3 cannot be read as proscribing the use of restraints, such as shackles, in all circumstances. Indeed, if using physical restraints were inherently inhumane, common Article 3 would effectively prohibit the involuntary detention of anyone covered by the provision, a result that the text clearly does not contemplate. At the same time, however, it seems obvious that shackles could be used in ways inconsistent with the general obligation of humane treatment. To restrain a detainee with shackles that injure the body or cut off the flow of blood could represent "violence to life and person," if the resulting suffering or physical harm were expected to be severe. Similarly, to keep a detainee in highly restrictive shackles around the clock, at least where no genuine security concern justifies such restraint, might well raise questions. Where no security rationale exists, and the purpose of the shackling is merely to humiliate the detainee or to break his spirit, additional common Article 3 considerations would be present. In evaluating the use of shackling, therefore, the task set by common Article 3 is to determine whether the restraints are being used legitimately and in ways that minimize the potential for injury or suffering.

Judged by these standards, the CIA's use of shackling, as a limited security measure, and as you have described it, is permissible. Critical to our analysis is the fact that the CIA carefully tailors its shackling regime to the danger posed by an individual detainee. The shackles are thus used only when the detainee is in a situation in which he might pose a threat (such as when he is being moved around the facility) or when his past conduct has clearly demonstrated his danger. Also significant is our understanding that, while shackled, detainees are able to move comfortably and that the shackles are fitted to avoid causing any bodily harm. These points illustrate that the shackling here is linked to genuine and legitimate concerns about institutional security, and is not imposed on detainees vindictively or in a way indifferent to their well-being. Indeed, our conclusion might well be different were detainees routinely shackled in such a way as to cause them physical pain or suffering without regard to the security risks they pose. But to shackle a demonstrably violent or escape-minded detainee while he is in close proximity to CIA personnel, where the shackles are merely a restraint and not a source of injury, is not inconsistent with the requirement of humane treatment.

6. The next condition we consider is the CIA's practice of shaving the head and facial hair of each detainee with an electric razor when the detainee initially arrives at the detention facility. The shaving is not done as a punitive measure; its primary purpose is to prevent detainees from hiding small items in their hair or beards, as well as to ensure the hygiene of the detainees. Importantly, mandatory shaving only occurs upon arrival; once the detainee is situated in the facility, he is allowed to grow his hair and beard to whatever length he desires (within limits of hygiene and safety). Moreover, you have informed us that the CIA provides detainees with the option of shaving other parts of their bodies, in recognition of specific Islamic

practices. Although we recognize that facial hair has an important cultural and religious dimension, and that some might perceive being involuntary shorn of their hair and beard as degrading, we conclude that the very limited form of shaving that the CIA practices is consistent with common Article 3. Context is important here. The shaving is a one-time measure, performed at the moment when it most clearly and directly advances the CIA's interest in the security of its facilities. The fact that the CIA subsequently allows detainees to grow their hair and beards in a manner dictated by cultural or religious preferences illustrates that shaving is not used here as a form of humiliation or degradation, but instead as a bona fide security measure. The CIA does not shave detainees in order to take advantage of their cultural or religious sensitivities, or to exploit whatever psychological vulnerability that practice may create. To the contrary, the agency makes every effort, consistent with its overall security objectives, to accommodate their detainees' desires, if any, to grow their hair and thereby to *avoid* humiliating them. Used as described above, therefore, shaving is not "aimed at humiliating and ridiculing" the detainees, *Additional Protocols Commentary* at 873, and does not amount to the kind of outrageous or inhumane treatment forbidden by common Article 3. Nor does the incidental force needed to accomplish the shaving remotely rise to the level of "violence to . . . person" prohibited by subparagraph (a).

Finally, we discuss whether the use of these conditions in combination complies with common Article 3. To this point, we have discussed whether any one of these conditions would violate common Article 3. We understand, however, that the collective weight of these conditions may raise different questions. The detainee is isolated from companions of his choosing, confined to his cell for much of each day, under constant surveillance, and is never permitted a moment to rest in the darkness and privacy that most people seek during sleep. These are not conditions that humans strive for. But they do reflect the realities of detention, realities that the Geneva Conventions accommodate, where persons will have to sacrifice some measure of privacy and liberty while under detention. They also are justified by the extraordinarily dangerous nature of these detainees, and the risk that they will conspire to compromise the security of the detention facility.

The Third Geneva Convention strikes a different balance between security, on the one hand, and privacy and liberty, on the other, with regard to prisoners of war. That Convention also establishes a reciprocal arrangement between captor and detainee under which detainees, in exchange for these greater privileges, have an international law obligation to follow the reasonable rules of the facility. Al Qaeda detainees, who do not follow the laws of war, are not part of such a reciprocal arrangement. Common Article 3 rests on the premise that certain persons, not subject to the elaborate protections of the Third or Fourth Geneva Conventions, will have to be detained during the course of non-international armed conflicts, and we do not believe that conditions in CIA facilities fall below the minimum standards that common Article 3 mandates for such persons.

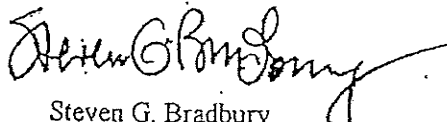
The detainees subject to the program are kept in sanitary conditions and are provided with the necessities of adequate food, clothing, shelter, and medical care. The CIA takes reasonable steps to mitigate the psychological strain of isolation through

[REDACTED] and other diversions in the form of books, music, videos, and games, short of interactions with their co-combatants. Other measures—obstructing vision and shackling—are limited to the times when detainees pose the greatest risk to the security of the facility and those who work there. We do not believe that the combination of these features falls below the “minimum standard” of humanity specified in common Article 3.

For the foregoing reasons, we conclude that none of the conditions of confinement used by the CIA at its covert, overseas detention facilities, as you have described those conditions to us, violates common Article 3.

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

Sincerely,



Steven G. Bradbury
Acting Assistant Attorney General