

Memorandum



To : Valerie Caproni

Date January 27, 2004

From : AGC [redacted] and
AGC [redacted]b6
b7cSubject: Legal Issues Surrounding
Interview/Interrogation of Saddam Hussein

Attorney Client Privileged Material

Issue

The following memorandum provides (1) legal guidance on whether Saddam Hussein must be advised of his legal rights, similar to Miranda warnings, prior to FBI interrogation, and (2) provides legal guidance on video taping the interviews.

Summary Conclusion

The answer to the question concerning "advice of rights" largely depends upon the purpose of the interrogation, the legal status of Hussein, and the potential forum or venue in which he may stand trial. Since the Secretary of Defense has granted Hussein Enemy Prisoner of War (EPW) status, his rights regarding detention and interrogation are governed by the Geneva III Convention (GIII), of August 12, 1949. Accordingly, all FBI interviews shall be conducted under the rules of GIII. The FBI interrogation team may advise Hussein that all interviews will be conducted in accordance with GIII, however, it is understood that the U.S. Army has the overall responsibility for complying with GIII in the care and custody of Hussein. Furthermore, the Counterterrorism Division at FBIHQ has advised that the primary mission of the FBI interrogation team is to interrogate Hussein for intelligence purposes with a subsidiary purpose to preserve, to the extent possible, the evidentiary value of such statements in a legal forum. Significantly, we are aware of no current intent to try Hussein in an United States court.

Accordingly, we conclude that the interrogation team is not legally obligated to advise Hussein of his legal rights, which

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are generally afforded criminal defendants in the United States under Miranda v. Arizona. This opinion is provided with two significant caveats. First, should the purpose of the interrogation of Hussein change or Hussein becomes the target of a potential prosecution in a United States court, our conclusion may also change. Second, if DOJ representatives or political entities with proper authority involved with Hussein's interrogation make a policy decision that "advice of rights" should be afforded, the FBI must follow that advice.

Discussion

A. Prisoner of War-

With regard to the interrogation of EPWs, GIII prohibits the use of coercion or physical and mental torture to secure information of any kind from EPWs. See GIII, Article 17. Additionally, EPWs who refuse to answer questions may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind. Id. Moreover, EPWs must also be provided with proper food, water, clothing, showers, sanitary conditions and medical attention during their detention. See id. at Articles 25-30.

However, until such time as Hussein is charged with a crime (GIII, Article 105) there is no provision in the Geneva Convention III for providing an EPW an advice of rights. Accordingly, we conclude that FBI interrogation for intelligence purposes may proceed without an advice of rights.

B. Enemy Combatant

A similar conclusion would be reached if Hussein were treated as an illegal Enemy Combatant (EC) facing a potential Military Tribunal similar to the detainees held at Guantanamo Bay, Cuba. Although the Presidential Order of November 2001 requires that ECs be treated humanely, ECs generally are not afforded the right to legal counsel, nor are they advised of legal rights prior to custodial interviews.

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C. Impact of Each Possible Legal Forum

1. Iraqi Judicial System

Current Iraqi law does not require Miranda-type warnings for custodial interrogations. A Tribunal created to prosecute Hussein was approved by the Iraqi Governing Council and signed into law by Ambassador Bremmer on December 10, 2003.

This statute creating the Tribunal lists the rights of accused individuals including: the presumption of innocence; the right to be advised of charges; the right to counsel; and the right against self incrimination. However, there is no authority under this statute, or any current Iraqi law of which we are aware, for providing an accused an advice of rights.

In addition, international law specific to the Arab world does not provide for an advice of rights. See Arab Charter on Human Rights, Article 7 ("The accused shall be presumed innocent until proven guilty at a lawful trial in which he has enjoyed the guarantees necessary for his defense"); Cairo Declaration on Human Rights in Islam ("It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or punish him.")

2. International Criminal Court

Potential charges such as Genocide or other Crimes against Humanity potentially may be brought before an International Court established in the Hague. Although international tribunals guarantee certain fundamental rights, there is no provision for the advice of rights prior to interrogation.

U.N. level international law governing such proceedings provides for basic due process rights for accused including, notification of charges, right to counsel during interrogation and trial, and the right against self incrimination.

Moreover, there is also the potential for the establishment of an ad hoc Nuremberg Model International Criminal Court to try Hussein for crimes against humanity. Since the rules

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governing such a Court have not been established, it would be mere speculation to address whether advice of rights would be required.

3. U.S. Judicial System

There is no indication that a trial of Hussein is contemplated in the United States. That factor, together with the primary intelligence purpose of the interrogation, weigh strongly in favor of our opinion that an advice of rights is not required by law. However, if these factors change, OGC would need to reassess that position.

Other Issues

Videotaping Interrogation

Videotaping, including surreptitious recording, of interviews is permitted by the MIOG with SAC approval, and DOJ/CTS has advised that it has no objection to video taping this interrogation. Army regulations implementing GIII would not present a bar under the current scenario because the regulations permit video taping of an EPW for internal administration and intelligence/counterintelligence purposes. As the primary purpose of the interrogation is for intelligence purposes, video taping would be permissible under GIII.

302 vs EC

The interviews should be documented in a classified transcript. For each interview, a 302 cover transmittal document shall be prepared documenting that the interview took place. The 302 should be classified but state that it is unclassified when the transcript is removed. No classified information should be placed in the 302. Any classified information, other than the transcript of interview, is to be transmitted in a classified EC.

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