HOSTILE INTERROGATIONS: LEGAL CONSIDERATIONS FOR CIA OFFICERS

I. **U.S. federal law** makes it a crime for a U.S. citizen to torture someone both at home and abroad, even when directed to do so by superiors.

A. 18 U.S.C. §§ 2340 - 2340B implements the United Nations Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, and incorporates verbatim the definition of "torture" from that treaty; namely, the Convention defines torture as "an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering," where "severe mental suffering" is further defined as "the prolonged mental harm resulting from" either causing or threatening infliction of severe physical pain; the administration or threat of administration of mind-altering drugs; the threat of imminent death; or threatening to do the above to someone else.

B. Use of necessity as a defense to prosecution in a U.S. court

1. Israel's Supreme Court has recognized that government officials who are prosecuted for torture may use the affirmative defense of necessity—i.e., "for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from the particular state of things (circumstances), at the requisite timing, and absent alternative means for avoiding the harm."[3] That is, a government officer can avoid criminal prosecution if the torture was necessary to prevent a danger "certain to materialize" and when no other means of preventing the harm are available.

2. The ruling, however, specifically notes that although necessity can be used as a *post factum* defense, it cannot serve as a source of positive, *ab initio* authority for the systemic (even if rare) use of torture as a valid interrogation tool.

3. The U.S. Code does not contain a statutory necessity defense provision, but U.S. common law has recognized an analogous doctrine:

- State v. Marley, 509 P.2d 1095, 1097(1973): Defendants were charged with criminal trespass on the property of Honeywell Corporation in Honolulu. They argued that they were seeking to stop the Vietnam War and raised as one of their defenses the "necessity defense." The court stated:

> The "necessity defense" exonerates persons who commit a crime under the pressure of circumstances if the harm that would have

[3] H.C. 5100/94, 4054/95, 6536/95, 5188/96, 7563/97, 7628/97, 1043/99.

resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendant's breach of the law. Successful use of the "necessity defense" requires (a) that there is no third and legal alternative available, (b) that the harm to be prevented be imminent, and (c) that a direct, causal relationship be reasonable anticipated to exist between defendant's action and the avoidance of harm.

Although the Marley court decided the necessity defense was not available to these particular defendants, the standard they set out is the norm.

- In United States v. Seward, 687 F.2d 1270, 1275 (10th Cir. 1982) (en banc), *cert. denied*, 459 U.S. 1147 (1983), the court held that a defendant may successfully use a defense of necessity to excuse otherwise illegal acts if (1) there is no legal alternative to violating the law, (2) the harm to be prevented is imminent, and (3) a direct, causal relationship is reasonable anticipated to exist between defendant's action and the avoidance of harm. Under the defense of necessity, "one principle remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defense[] will fail," *Id.* at 1276, quoting United States v. Bailey, 444 U.S. 394 (1980). In proving that there were no legal alternatives available to assist him, a defendant must show he was "confronted with ... a crisis which did not permit a selection from among several solutions, some of which did not involve criminal acts." *Id.*

- See also United States v. Contento-Pachon, 723 F.2d 691, 695 n.2 (9th Cir. 1984) (defense of necessity available when person faced with a choice of two evils and must decide whether to commit a crime or an alternative act that constitutes a greater evil); United States v. Nolan, 700 F.2d 479, 484 (9th Cir.) (the necessity defense requires a showing that the defendant acted to prevent an imminent harm which no available options could similarly prevent).

- **In sum:** U.S. courts have not yet considered the necessity defense in the context of torture/murder/assault cases, primarily because in cases where one or two individuals were hurt out of necessity, this was treated as a *self-defense* analysis. *See* Tab 2, *supra*. It would, therefore, be a novel application of the necessity defense to avoid prosecution of U.S. officials who tortured to obtain information that saved many lives; however, if we follow the Israeli example, CIA could argue that the torture was necessary to prevent imminent, significant, physical harm to persons, where there is no other available means to prevent the harm.

(b)(5)

- A policy decision must be made with regard to U.S. use of torture in light of our obligations under international law, with consideration given to the circumstances and to international opinion on our current campaign against terrorism—states may be very unwilling to call the U.S. to task for torture when it resulted in saving thousands of lives.

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