

The Uniform Code of Military Justice applicable to U.S. troops worldwide does not expressly criminalize “torture,” but several offenses recognized under it can be used to punish acts of torture or abuse. They include cruelty, maltreatment, assault, as well as manslaughter or murder in cases in which the alleged abuse resulted in death. Although several low ranking soldiers have been investigated under the UCMJ, in many cases the punishments are not commensurate with the graveness of the crimes. (For example, soldiers have received written reprimands for murder and non-judicial punishments for abuse). Explicitly criminalizing torture as defined by Article 1 of the Convention in the UCMJ would act as a deterrent by sending a clear message that torture will not be punished under the guise of a lesser offense.

The U.S. Report notes that the government enacted the Military Extraterritorial Jurisdiction Act (“MEJA”), 18 U.S.C. §§ 3261-3267, which is applicable to civilians, contractors or subcontractors not only of the Department of Defense, but also of “any other Federal agency or any provisional authority.”³⁹⁴ Offenses are punishable by more than one year imprisonment if committed in the “special maritime and territorial jurisdiction of the United States.”³⁹⁵ Originally enacted in 2000, MEJA was amended in 2004 to include contractors hired by other government agencies. This jurisdictional amendment followed revelations in the press that contractors working for the CIA and other contractors, although directly supporting military operations in Iraq, were employed by the Department of the Interior and could not be prosecuted in U.S. courts under the 2000 version of the law.³⁹⁶

MEJA limits coverage of acts “to the extent such employment relates to supporting the mission of the Department of Defense.”³⁹⁷ The law is not clear as to what is meant by “mission.” The law also does not expand jurisdiction over contractors who operate beyond traditional U.S. military bases. For instance, the United States could argue that jurisdiction does not extend to U.S. secret detention facilities overseas or vessels under U.S. control.

L. Failure to Adequately Educate and Train Government Officials (Article 10)

The Convention Against Torture requires states to ensure that education and information regarding torture and cruel, inhuman or degrading treatment or punishment are “fully

³⁹⁴ 18 U.S.C. § 3267(1)(A).

³⁹⁵ 18 U.S.C. § 3261(1)(A). MEJA creates no new substantive offenses, but incorporates a range of existing federal criminal offenses that may be used to prosecute defense contractors and others who commit crimes outside U.S. territory. Federal crimes subject to MEJA prosecution include: arson, certain aggravated assaults (simple assaults are punishable by imprisonment for one year or less and would not be included), theft (over \$1000 in value), homicide, kidnapping, damage to real or personal property, selling obscene material, robbery and certain sexual abuse or exploitation of minors offenses. 10 U.S.C. §§ 893, 897, 918-919, 929, 928, 934.

³⁹⁶ Renae Merle and Ellen McCarthy, *6 Employees from CACI International, Titan Referred for Prosecution*, WASH. POST, Aug. 26, 2004; Scott Shane, *Some US Prison Contractors May Avoid Charges*, BALTIMORE SUN, May 24, 2004; Renae Merle and Ellen McCarthy, *Contractors and the Law; Prison Abuse Cases Renew Debate*, WASH. POST, Aug. 27, 2004.

³⁹⁷ 18 U.S.C. § 3627(1)(A).

included” in the training of any government agent involved in the custody, interrogation or treatment of any detainee. The government’s own investigations into abuse in Iraq and Afghanistan as well as documents produced through the ACLU FOIA litigation identify inadequate training of U.S. personnel which contributed to the abuse of detainees.

Debate on Interrogation Policies Found on Computers in Prisons

Gen. Paul Kern of the U.S. Army, who oversaw the Fay-Jones investigation, testified to the U.S. Congress that the debate on interrogation policies within official circles “found its way into the hard drives of the computers that we found in [Abu Ghraib] prisons... [T]hose policies were being debated while we were asking soldiers to conduct interrogations. And so they were seeking to find the limits of their authority... We need to be clear and crisp in our delivery of orders to these people so that they know what the rules are.”³⁹⁸

An investigation undertaken by the Army Inspector Gen. Paul Mikolashek into training and prison procedures in Iraq and Afghanistan also found that troops did not receive adequate training. For instance the report states:

- Troops received “ambiguous guidance from command on the treatment of detainees”;³⁹⁹
- Established interrogation policies were “not clear and contained ambiguity”;⁴⁰⁰
- “Interrogations were conducted . . . in some forward locations, by leaders and Soldiers [sic] with no training in military interrogation tactics, techniques and procedures”;⁴⁰¹
- “To satisfy the need to acquire intelligence as soon as possible following capture, some officers and non-commissioned officers (NCOs) with no training in interrogation techniques began conducting their own interrogation sessions”;⁴⁰²
- “The medical personnel interviewed stated that they did not receive any specific training in detainee operations.”⁴⁰³
- “To offset the shortage of interrogators, contractors were employed, however, 35% (11 of 31) of contract interrogators lacked formal training in military interrogation policies and techniques.”⁴⁰⁴

³⁹⁸ Gen. Kern Statement, *supra* note 188.

³⁹⁹ Dep’t of Army, *The Inspector General Detainee Operations Inspection*, July 21, 2004 (“Mikolashek Report”) at 19, available at <http://www.washingtonpost.com/wp-srv/world/iraq/abughraib/detainee-report.pdf>.

⁴⁰⁰ *Id.* at 40.

⁴⁰¹ *Id.* at 33.

⁴⁰² *Id.* at 35.

⁴⁰³ *Id.* at 76.

⁴⁰⁴ *Id.* at 87.

Government documents produced to the ACLU show that soldiers and private contractors were inadequately trained on what constitutes humane treatment and that there was confusion among soldiers as to what laws to apply regarding detainee treatment.

- Confusion about whether Geneva Conventions were applicable: A Staff Sergeant with the 104th Military Battalion, 4th Infantry, responding to accusations that he improperly supervised an interrogator who assaulted an Iraqi prisoner, replied that comments made by senior leaders that detainees are not enemy prisoners of war under the Geneva Conventions “have caused a great deal of confusion as to the status of detainees.” “In hindsight,” he wrote, “it seems clear that, considering the seeming approval of these and other tactics by the senior command, it is a short jump of the imagination that allows actions such as those committed by [name redacted] to become not only tolerated but encouraged.”⁴⁰⁵
- Unaware whether actions were abuse: A soldier in Iraq failed to report an incident he witnessed of a detainee being made to lie on his back with his feet elevated in “chair position” against a wall, who was made to do squats and had water poured on his head, making it difficult for the detainee to breathe, because he “did not know what was abuse. Prior to the incident, [the chain of command] had never talk[ed] about what is abuse!”⁴⁰⁶
- Using techniques recollected from movies: Troops received no specific training on detainee operations before being sent into the field. The result was that “officers and NCO’s [non-commissioned officers] at point of capture engaged in interrogations using techniques they literally remembered from movies.”⁴⁰⁷
- Systemic lack of training in the treatment of detainees: One interrogator complained that soldiers conducting raids are not well trained in how detainees must be treated in accordance with the laws of war, and that he “had to go to SJA [Staff Judge Advocate] many times about detainees arriving at the cage badly beaten. Many beatings occurred after the detainees were zip-tied by some units in 4ID [4th Infantry Division].”⁴⁰⁸ As there was no clear guidance on how to treat detainees, procedures varied greatly from team to team often based on the “common sense” judgments made by individuals with little to no applicable experience. “There was no specific training on treatment of detainees; the MPs [Military Police] relied on their common knowledge in this area,” said a Platoon Leader.⁴⁰⁹

⁴⁰⁵ Annex B72-74, Memorandum for Commander, 104th Military Intelligence Battalion (Nov. 9, 2003). See also Josh White, *Soldiers’ ‘Wish Lists’ Of Detainee Tactics Cited*, WASH. POST, Apr. 19, 2005.

⁴⁰⁶ Annex B75-82, Interrogator Questionnaire.

⁴⁰⁷ Annex B49, Excerpt from Memorandum Re: 4th Infantry Division Detainee Operations Assessment Trip Report (full record available at <http://action.aclu.org/torturefoia/released/091505/15937.pdf>).

⁴⁰⁸ Annex B50, Excerpt from Memorandum Re: 4th Infantry Division Detainee Operations Assessment Trip Report (full record available at <http://action.aclu.org/torturefoia/released/091505/15937.pdf>).

⁴⁰⁹ Annex B218, Excerpt from Memorandum Re: 4th Infantry Division Detainee Operations Assessment Trip Report (full record available at <http://action.aclu.org/torturefoia/released/091505/15937.pdf>).

- No written standard operating procedures: In the investigation into a shooting death of a detainee in Forward Operating Base Ironhorse on September 11, 2003, the report describes an incident in which SPC [Redacted] who was guarding a section, shot and killed a detainee who was cuffed in isolation at FOB Ironhorse on 9/11/03. Medics had advised guards that detainees in isolation could get up and walk around in order to relieve discomfort, muscle, and joint pain. SPC said that he saw the detainee touching concertina wire. He did not give any verbal warning. SPC was described as overly aggressive and on occasion vulgar to the detainees. Findings: SPC was in violation. “There are insufficient instructions for guards in performing their duties. There are no written SOPs or post instructions for guards. . . .the combination of loaded weapons within the confines of the detention facility in addition to the inadequate number of guards on duty, created an environment conducive to the quick escalation for the use of deadly force.” Recommends an immediate criminal investigation.”⁴¹⁰

The U.S. Report notes that it gives “considerable importance” to educating and providing information regarding “the prohibition against torture and other abuses” to persons who are involved in the custody, interrogation, and treatment of persons arrested or detained.⁴¹¹ Neither the government’s report nor the Convention Against Torture is posted on the Department of Defense, the CIA, the Bureau of Prisons, the Department of Homeland Security’s websites.

The U.S. Report states that U.S. officials have “repeatedly condemned the use of torture,” but the administration has failed to condemn the practice of cruel, inhuman or degrading treatment by all government agencies and has actively sought to limit congressional attempts to ban such unlawful practices by all government agencies (see discussion on Detainee Treatment Act above).⁴¹²

The United States government’s wavering view on what it considers prohibited conduct against persons in U.S. custody is reflected in the views of the American public. A recent poll undertaken by Pew Research in 2005 found that 32% of Americans oppose the use of torture against terror suspects to gain important information.⁴¹³ The defense lawyer for Specialist Charles Graner, who was found guilty of abuse against detainees in Abu Ghraib prison, said there was nothing wrong with stripping the prisoners, whom he described as “hardened terrorists,” and stacking them into a pyramid to control them. “They did it in a safe manner so nobody would get hurt . . . If there was anything wrong, it was that they took a picture and they were smiling,” Mr. Womack said.⁴¹⁴

The United States government should engage in a nationwide public education program to condemn unlawful practices against all persons in custody.

⁴¹⁰ Annex B83-88, Report by AR 15-6 Investigating Officer on Shooting Death of Iraqi Detainee.

⁴¹¹ U.S. Report, *supra* note 1, ¶ 58.

⁴¹² *Id.*

⁴¹³ Pew Research Center, *Opinion Leaders Turn Cautious, Public Looks Homeward America’s Place in the World*, Nov. 17, 2005, available at <http://people-press.org/reports/display.php3?PageID=1019>.

⁴¹⁴ *Iraq Jail Abuse, “Leader” Guilty*, BBC NEWS, Jan. 15, 2005.