

## 2. Admission of Coerced Testimony in Criminal Cases in the United States

In November 2005, a U.S. citizen, Ahmed Abu Ali, was convicted by a federal jury of nine counts of conspiracy to commit acts of terrorism, including plotting with al-Qaeda operatives to assassinate President Bush.<sup>387</sup> Abu Ali claimed that his confession was coerced during interrogation by Saudi Arabian security forces. Abu Ali had been living and studying in Saudi Arabia. According to Abu Ali, Saudi security forces arrested him on June 8, 2003. During the first three days of interrogation, he was punched, kicked in the stomach, struck with a hard object more than ten times, whipped while he was chained to the floor, and threatened with amputation or beheading. After three days of interrogation, he confessed to being a member of al-Qaeda. Abu Ali was interrogated for a month, held incommunicado in solitary confinement without judicial review. On July 8, 2003 Abu Ali received a visit from the U.S. embassy. Abu Ali confessed on July 24, 2003.<sup>388</sup>

During pre-trial proceedings, the defense sought to have Abu Ali's videotaped confession suppressed. The defense's motions were denied by the judge on the grounds that the U.S. government had shown by a "preponderance of evidence" that the statements made by Abu Ali were "voluntary" and not a result of "gross abuse" or "inherently coercive conditions," and thereby should be considered in the jury trial.<sup>389</sup>

During the jury trial, the defense was not permitted to submit evidence pertaining to Saudi Arabia's record on torture, including U.S. Department of State reports documenting the use of abuse and torture by Saudi security forces to coerce confessions. Conversely, the court admitted statements by Saudi Arabian officials that torture in general is prohibited and that Saudi forces do not engage in torture.

### K. Inadequacy of United States Laws Criminalizing Torture (Articles 4, 5)

U.S. statutes and regulations enacted following ratification of the treaty are limited to specific contexts such as refugee claims, extradition of foreign fugitives, criminalizing acts of torture committed by U.S. officials outside of U.S. territory, providing compensation to U.S. citizens tortured by a foreign nation, and providing a civil remedy non-citizens for torture violations.<sup>390</sup> The United States has yet to fully comply with its obligations under the Convention to adequately prevent U.S. officials and individuals

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<sup>387</sup> *U.S. Man Guilty of Bush Death Plot*, BBC WORLD SERVICE, Nov. 22, 2005.

<sup>388</sup> *United States v. Ahmed Omar Abu Ali*, 395 F.Supp.2d 338 (E.D. Va. Oct. 25, 2005).

<sup>389</sup> *Id.* at 341-42.

<sup>390</sup> *See, e.g.*, Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, Title XXII, § 1242(a) (1998) (prohibiting *refoulement*); Implementation of the Convention Against Torture, 8 C.F.R. § 208.18 (2004); Implementation of Torture Convention in Extradition Cases, 22 C.F.R. § 95 (2004); 18 U.S.C. § 2340 and 2340A (defining and prohibiting torture by U.S. officials overseas); Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (providing civil remedy for U.S. citizen); and Alien Tort Claims Act, 28 U.S.C. § 1350 (civil remedy for non-citizens).

acting with official consent from subjecting detainees to torture and cruel, inhuman or degrading treatment or punishment and to punish such conduct wherever it exists.

The United States cites 18 U.S.C. § 2340-2340A as a federal criminal law sufficient to ensure U.S. compliance with the Convention. This law criminalizes conduct by a U.S. national, or a foreign national present in the U.S. who acting with government authority commits or attempts to commit torture outside the United States. The U.S. told the Committee in 1998 that it did not enact a specific statute to prohibit torture within the United States out of deference to federal-state relations and because it determined that existing federal and state criminal laws were sufficient to cover any domestic act which would violate the Convention Against Torture.<sup>391</sup> The ACLU believes that the inapplicability of state criminal law to U.S. facilities abroad, and the lack of other federal criminal law comparable to section 2340A, creates serious gaps in the United States' obligation under the treaty to criminalize torture in any territory of the United States. These gaps have led to the government's selective interpretation on what laws are applicable extraterritorially.

For instance, the U.S. government argued in defending interrogation techniques used on Guantánamo detainees that 18 U.S.C. § 2340 “does not apply to the conduct of U.S. personnel at GTMO [Guantánamo]” because the United States is defined to include all jurisdictions of the United States, including the special maritime and territorial jurisdiction of the U.S.<sup>392</sup> At the same time the U.S. government argues that U.S. courts have no jurisdiction, and the U.S. Constitution, including the Fifth and Eighth Amendment, are inapplicable to Guantánamo detainees because Cuba has ultimate sovereignty over Guantánamo even though it is under U.S. control. The U.S. has also consistently maintained that the ICCPR is inapplicable outside the United States or its special maritime and territorial jurisdiction.<sup>393</sup> The Detainee Treatment Act closes the loophole regarding the U.S. administration's interpretation of the extraterritorial applicability of the Convention. It remains to be seen, however, whether the U.S. will in practice enforce the treaty extraterritorially given President Bush's signing statement that the law does not bind him as commander-in-chief to dictate actions to agencies under the executive branch in fighting terrorism (see discussion above).

Further, the ACLU believes that the definition of torture as defined under 18 U.S.C. § 2340A, which reflects United States' understanding of torture at the time of ratification of the Convention fails to comply with the treaty. As discussed above, § 2340A was specifically cited by the government to allow interrogation procedures which violated the treaty.

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<sup>391</sup> U.S. Dept. of State, *Initial Report of the United States of America to the U.N. Committee against Torture*, ¶ 178, U.N. Doc. CAT/C/28/Add/5 (1999).

<sup>392</sup> Dep't of Defense, *Working Group Report*, *supra* note 3, at 291.

<sup>393</sup> Dep't of State, *Second and Third Periodic Report of the United States to the U.N. Human Rights Committee Concerning the International Covenant of Civil and Political Rights*, ¶¶ 3, 130; Annex 1 (Oct. 21, 2005), available at <http://www.state.gov/g/drl/rls/55504.htm#art7>.

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.”<sup>394</sup> Offenses are punishable by more than one year imprisonment if committed in the “special maritime and territorial jurisdiction of the United States.”<sup>395</sup> 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.<sup>396</sup>

MEJA limits coverage of acts “to the extent such employment relates to supporting the mission of the Department of Defense.”<sup>397</sup> 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

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<sup>394</sup> 18 U.S.C. § 3267(1)(A).

<sup>395</sup> 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.

<sup>396</sup> 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.

<sup>397</sup> 18 U.S.C. § 3627(1)(A).