



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 8, 2004

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

This responds to your letter of May 28, 2004. We are pleased, as a matter of comity, to respond to your inquiries about the Department's views on legal issues related to wartime detentions.

Before turning to the governing legal principles bearing on your questions, we first want to reject categorically any suggestion that the Department of Justice has participated in developing policies that permit unlawful conduct. In particular, we take issue with the suggestion in your letter that "the Department of Justice may have assisted the Pentagon and the intelligence community in circumventing the law." Letter at 1. The Department has done no such thing. The Constitution and statutes enacted by Congress dictate the requirements of the law. Providing advice about the scope of particular legal prohibitions, particularly limits that Congress itself has set in the text of a statute, should not be portrayed as "circumventing" the law. Part of the Department's role is precisely to provide advice to the Executive Branch on the requirements of the law. That is why Congress enacted a law expressly stating that "[t]he head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department." 28 U.S.C. § 512.

We think the Department can best respond to your questions by outlining the major aspects of the legal framework relevant to the detention and treatment of enemy combatants. First, we describe certain legal rules whose application does not depend on the nature of the particular international armed conflict at issue. Second, we describe the legal principles whose scope does depend on the nature of the underlying armed conflict.

First, the following provisions apply regardless of the nature of the underlying conflict.

UCMJ. The Uniform Code of Military Justice (“UCMJ”) governs the actions of U.S. military personnel, whether in Iraq during time of war or elsewhere in the world. It expressly proscribes assault (art. 128), cruelty and maltreatment (art. 93), disobedience to orders and dereliction of duty (art. 92), maiming (art. 124), involuntary manslaughter (art. 119), and murder (art. 118).

Special Maritime and Territorial Jurisdiction. Many federal violent crimes, including assault (18 U.S.C. § 113), maiming (*id.* § 114), murder (*id.* § 1111), manslaughter (*id.* § 1112), and sexual abuse (*id.* § 2242), apply in the “special maritime and territorial jurisdiction” of the United States (*id.* § 7). The special maritime and territorial jurisdiction is defined to include “[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, . . . for the erection of a fort, magazine, arsenal, dockyard, or other needful building,” *id.* § 7(3), and “the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States,” 18 U.S.C. § 7(9). Courts have disagreed over the extent to which 18 U.S.C. § 7(3) extends the special maritime and territorial jurisdiction to military bases and related facilities overseas. Compare *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000) (special maritime and territorial jurisdiction does not extend to United States military installation overseas), with *United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000) (special maritime and territorial jurisdiction extends to air force base overseas). However, Congress added 18 U.S.C. § 7(9) in the USA PATRIOT Act in order to resolve the split in the courts and to make clear that the special maritime and territorial jurisdiction extends, *inter alia*, to permanent military bases, at least for certain persons. See H.R. Rep. No. 107-236, pt. 1, at 74 (2001).

MEJA. Under the Military Extraterritorial Jurisdiction Act (“MEJA”), 18 U.S.C. §§ 3261-3267, those employed by or accompanying United States Armed Forces, former members of the military no longer subject to the UCMJ, and members of the military who act with others may be prosecuted for certain acts committed “outside the United States” that would be a felony if committed within the “special maritime and territorial jurisdiction of the United States.” *Id.* § 3261(a). These crimes could include those listed above, such as assault (*id.* § 113), maiming (*id.* § 114), murder (*id.* § 1111), and manslaughter (*id.* § 1112).

Torture Statute. The federal torture statute makes it a crime for any person “outside the United States [to] commit[] or attempt[] to commit torture.” 18 U.S.C. § 2340A. The statute defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” *Id.* § 2340(1). Congress placed limiting

definitions on the terms of the statute. It defined "severe mental pain and suffering" as "the prolonged mental harm caused . . . or resulting from" specified acts, including the "intentional infliction or threatened infliction of severe physical pain or suffering" and the threat of imminent death, and the actual or threatened administration of mind-altering substances. *Id.* § 2340(2).

Congress limited the torture statute to conduct occurring "outside the United States." Congress also defined the "United States" to include the "special maritime and territorial jurisdiction of the United States," which, in turn, may include certain military bases and other areas overseas, at least for certain persons. *Id.* § 7(3) & 7(9). Because of the way Congress drafted the torture statute, therefore, its application to certain geographical areas, and to the conduct of particular persons in those areas, may vary depending on the circumstances at issue. This does not mean, of course, that there is no applicable law in those areas that would prohibit conduct amounting to torture. As explained above, other criminal laws apply in the special maritime and territorial jurisdiction.

You have asked whether the Department of Justice takes the view that U.S. Government officials can avoid liability under the torture statute by colluding with officials from other governments to place an individual "formally" in the custody of another nation in order to have that individual tortured during interrogation so that the U.S. officials can obtain the fruits of the interrogation (Question 9). Letter at 4. The Department emphatically does not take that view. Rather, it is the established view of the Department that the torture statute criminalizes conspiracy to commit torture. 18 U.S.C. § 371. Furthermore, in some circumstances, a United States Government official who provides assistance for a foreign government's torture of a detainee and who shares the purpose of inflicting that torture could be guilty of aiding and abetting the crime. 18 U.S.C. § 2(a).

Second, the applicability of the following legal principles depends on the nature of the underlying conflict.

Geneva Conventions. The Geneva Conventions apply differently to the conflict with Iraq, on the one hand, and to the conflict with al Qaeda and the Taliban, on the other.

1. *Iraq*

Article 2 of the Geneva Conventions – an article that is worded identically in each of the four Geneva Conventions – specifies, in relevant part, that the Conventions "apply" in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties," art. 2(1), and in "cases of partial or total occupation of the territory of a High Contracting Party," art. 2(2). As the United States has always recognized and made clear, because the armed

conflict with Iraq is between two High Contracting Parties, and because the United States has occupied Iraq (the territory of a High Contracting Party), the Geneva Conventions govern the conflict with and occupation of Iraq.

As a result, captured members of the Iraqi armed forces are generally entitled to the prisoner-of-war protections of Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 ("GPW"). That Convention protects prisoners of war against "grave breaches," which include "wilful killing," "torture or inhuman treatment," or "wilfully causing great suffering or serious injury to body or health." In addition, because the United States is an occupying power in Iraq, the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 ("GC"), applies and protects Iraqi civilians against essentially the same "grave breaches" proscribed by GPW.

2. *Al Qaeda and the Taliban*

Limitations in the Geneva Conventions foreclose, by their terms, application of the protections of those Conventions to al Qaeda and Taliban fighters. GPW does not protect members of al Qaeda because, as the President has determined, al Qaeda "is not a state party to [the treaties]; it is a foreign terrorist group." White House Fact Sheet (Feb. 7, 2002). As the President also determined, although Afghanistan is a party to GPW, Taliban detainees are not entitled to the protections of GPW because they do not satisfy the four conditions for status as POWs under the treaty. Those conditions are: to be commanded by a person responsible for his subordinates, to have a distinctive sign recognizable at a distance, to carry arms openly, and to act in accordance with the laws of war. Because the Taliban failed to meet each of these standards, except the open carrying of arms, Taliban detainees do not qualify for POW status under GPW. The only court to address this issue has upheld the President's determination that members of the Taliban militia fail to qualify for POW status under GPW. *See United States v. Lindh*, 212 F. Supp. 2d 541, 556-558 (E.D. Va. 2002).

Despite the fact that the protections of the GPW do not apply to al Qaeda and Taliban fighters, the President early on announced the policy that the Department of Defense will treat al Qaeda and Taliban detainees "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949 [GPW]." White House Fact Sheet.

War Crimes Act. The War Crimes Act in pertinent part imposes criminal liability on any U.S. citizen or any member of the U.S. Armed Forces who commits a "grave breach" of the Geneva Conventions. 18 U.S.C. § 2441. As that description suggests, Congress made this crime dependent

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on the application of the Geneva Conventions. "Grave breaches" under the relevant treaties include "wilful killing," "torture or inhuman treatment," and "wilfully causing great suffering or serious injury to body or health." Congress deliberately crafted the War Crimes Act to fulfill our treaty obligations and thus limited it to situations where the treaties apply, and then only to grave breaches of the Conventions.

As a result of these limitations, the War Crimes Act is available only where the protections of the Geneva Conventions apply. Because the Conventions apply in Iraq, if there is conduct that constitutes a "grave breach" in Iraq, a prosecution under the War Crimes Act is a possibility. With respect to the Taliban and al Qaeda, however, the protections of the Conventions do not apply and as a result a prosecution under the War Crimes Act is not a possible option.

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Many of your questions ask for copies of memoranda in which the Department, specifically the Office of Legal Counsel, has provided confidential legal advice to other departments in the Executive Branch. As you know, it has been the longstanding practice of the Department not to disclose the requests for advice the Department receives from within the Executive Branch or the confidential legal advice that it has provided. Institutional interests in ensuring that other departments within the Executive Branch can receive confidential legal advice from the Department of Justice require that such advice, including in particular memoranda from the Office of Legal Counsel, be kept confidential.

Please do not hesitate to contact this office if we may be of further assistance.

Sincerely,



William E. Moschella
Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Chairman