Use of Female Interrogators: The Analysis of Sexualized Interrogations that the Detainee Interrogation Working Group Did Not Conduct

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I. INTRODUCTION

"Women were given no rights. . . . It was a barbaric regime. . . . People are [now] free in that country."

-- George W. Bush
Hershey, Pennsylvania, April 19, 2004
(remarking upon freedom for the people of Afghanistan).

If there is anyone who has not seen the horrifying picture of Lynndie England smiling and pointing to the genitals of a male prisoner in Abu Ghraib,¹ he or she must have been living in a cave more remote than those in Afghanistan. It is a haunting image. According to the Bush and Obama administrations, the photo represents the work of a few rogue soldiers deserving of punishment.² Consequently, Lynndie England and her cohorts

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¹ Images of this photograph are easily available on the Internet. One need only enter Ms. England’s name and Abu Ghraib into a search engine like Google and the images are available from many sites. See Google Images Home Page, http://images.google.com, ("Lynndie England and Abu Ghraib").

² President Bush stated at the Pentagon on May 10, 2004, shortly after the Abu Ghraib photographs were revealed, that the incident was the work of a few. “I know how painful it is to see a small number dishonor the honorable cause in which so many are sacrificing. What took place in the Iraqi prison does not reflect the character of the more than 200,000 military personnel who have served in Iraq since the beginning of Operation Iraqi Freedom.” President George W. Bush, Statement at the Pentagon (May 10, 2004) (transcript available at http://www.nytimes.com/2004/05/10/politics/10CND-TEXT.html?pagewanted=all). This sentiment echoed comments by then Deputy Secretary of Defense Wolfowitz, who maintained that the “detainee abuse could be chalked up to the unauthorized acts of a ‘few bad apples.’” 111 Cong. Rec. S4504-06 (daily ed. Apr. 21, 2009) (statement of Sen. Levin). These sentiments were later echoed by President Barack Obama in explaining his opposition to the release of the remaining photographs of interrogation abuse documented at Abu Ghraib: “The publication of these photos would not add any additional benefit to our understanding of what was carried out in the past by a small number of individuals.” Jeff Zeleny & Thom Shanker, Obama Moves to Bar Release

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were charged and tried in military court, convicted and sent to prison.\(^3\) Unfortunately for all, that was not the end of the story.

In the years following the Abu Ghraib scandal, it has become apparent Lynndie England was punished for the crime of providing the world with photographic evidence of a de facto government policy of using sexuality as a weapon of war.\(^4\) Ms. England’s actions were not borne of whole cloth out of the sexually deviant minds of young soldiers bent on exploiting prisoners for their own amusement.\(^5\) Rather, these photographs embodied the arguably extreme end of the systematic work of the United States government to engage in sexually deviant exploitation of prisoners purportedly for the collective safety and well-being of the American public.\(^6\) Information released subsequent to the public discovery of the Abu Ghraib photographs made clear that Ms. England’s actions were consistent with widespread techniques for interrogation that the United States government employed in the global war on terrorism ("GWOT").\(^7\)

3. Ms. England was convicted by general court marshal of one count of conspiracy, four counts of maltreating detainees and one count of committing an indecent act. England was sentenced to three years in prison and received a dishonorable discharge. Mark Follman & Tracy Clark-Flory, Prosecutions and Convictions: A Look at Accountability to date for Abuses at Abu Ghraib and in the broader “War on Terror.” SALON, Mar. 14, 2006, http://www.salon.com/news/abu_ghraib/2006/03/14/prosecutions_convictions/index.html.

Charles Graner, England’s lover and also a guard at Abu Ghraib, was convicted by a general court-martial on five counts of assault, maltreatment and conspiracy. Graner received a ten-year prison sentence and a dishonorable discharge from the Army, and was reduced in rank to private. \textit{Id.}

4. The Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody specifically debunked the notion that England, Graner and company had acted on their own, finding: “The abuse of detainees in U.S. custody cannot simply be attributed to the actions of ‘a few bad apples’ acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.” S. COMM. ON ARMED SERVICES, 110TH CONG., REPORT ON INQUIRY INTO THE TREATMENT OF DETAINES IN U.S. CUSTODY xii (Comm. Print 2008) [hereinafter S. COMM. ON ARMED SERVICES].

5. \textit{Id.}

6. It is important to note at the outset that this Article is not suggesting that the individual soldiers should not have been held accountable for their actions even if evidence existed that they were acting under direct orders to engage in each of the actions documented in these horrific photographs. Rather this Article is exploring whether these pictures, in fact, revealed evidence of a policy of sexualized interrogations that may have violated a variety of legal norms.

7. The term “global war on terrorism” appears to have been first used by the U.S. government in December 2001 in a document produced by The Coalition Information Centers. \textit{THE COALITION INFORMATION CENTERS, THE GLOBAL WAR ON TERRORISM: THE FIRST 100 DAYS} (Dec. 20, 2001), \textit{available at} http://www3.cutr.usf.edu/security/documents%5CPresident%5CWar%20on%20Terror%20Report%20First%20100%20Days.pdf. The phrase has been commonly used since that time to refer to a large constellation of efforts, methods, and strategies used by the United States (and some allied nations) to combat terrorism and those alleged to support terrorism. This term has been phased out by the
The various techniques used during interrogations in the GWOT have been the subject of much debate. There are those who continue to assert this collection of interrogation methods, including such long-reviled techniques as waterboarding, do not amount to torture. There are also those, such as ex-Vice President Dick Cheney, who assert that whether the techniques used amount to torture is irrelevant, so long as they proved effective at getting detainees to talk. These questions are not the subject of this Article. Rather, this Article focuses on those techniques that specifically use gender and sexuality as tools of interrogation.

Many studies have examined various aspects of U.S. interrogation practices and policies in the GWOT. For example, executive branch departments of the U.S. government have commissioned some limited studies. However, scholars fault these government-sponsored studies for their limitations in scope, political motivations, or for their cautious criticisms. Arguably, more objective studies have been conducted by

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8. This debate continues with the still unresolved issue of whether criminal prosecutions should occur and whether those responsible for constructing the legal framework for such conduct should be held accountable. See Greg Miller & Josh Meyer, Criminal Investigation Into CIA Treatment of Detainees Expected, L.A. TIMES, Aug. 9, 2009, available at http://www.latimes.com/news/nationworld/nation/la-na-cia-interrogate92009aug09,0,34626.story (reporting Attorney General’s uncertainty regarding whether to appoint a special prosecutor to investigate CIA detainee interrogation methods).


12. See, e.g., PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, BROKEN LIVES: MEDICAL EVIDENCE OF TORTURE BY U.S. PERSONNEL AND ITS IMPACT (JUNE, 2008), http://brokenlives.info/?page_id=69 (documenting the detention and countless cruel interrogations of eleven men at the Guantanamo facility who were never charged with a crime or told why they were detained); The Rule of Law & the Global War on Terrorism: Detainees, Interrogations, and Military Commissions Symposium, 48 WASHBURN L.J. 563 (2009) [hereinafter PHR REPORT].


14. See, e.g., HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE? (Apr. 23, 2005), http://www.hrw.org/en/node/11765/section/6 ("None of the military probes was [sic] aimed
international organizations and NGOs.\textsuperscript{15} Academics have published numerous critical analyses.\textsuperscript{16} There is a well-developed and important body of scholarship concerning the pervasive nature of gender discrimination and the subjugation of women across many cultures\textsuperscript{17} and the nefarious role that military power has often played in this history.\textsuperscript{18} Feminist scholars and others have documented a compelling range of gender-based discrimination in the military context, ranging from unequal opportunities to systemic violence.\textsuperscript{19} However, none of these have delved deeply into questions regarding the legal implications of using gender and sexualized interrogations as tools in the GWOT.

At the outset, it is important to note the actions of the United States amounting to torture and other inhumane interrogation techniques, including those that involve the use of gender and sexuality as a tool of higher up the chain of command than Gen. Sanchez, the top U.S. soldier in Iraq. None of the investigations had the task of examining the role of the CIA or of civilian authorities.”); CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, ET AL., BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND ACCOUNTABILITY PROJECT 1 (Apr. 10, 2006), http://www.chrgj.org/docs/By_The_Numbers.pdf (“U.S. authorities have failed to investigate many allegations, or have investigated them inadequately. And numerous personnel implicated in abuses have not been prosecuted or punished.”) [hereinafter CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE].

15. See, e.g., Human Rights Watch, supra note 14 at 2 (finding that key top U.S. officials “made decisions and issued policies that facilitated serious and widespread violations of the law. The circumstances strongly suggest that they either knew or should have known that such violations took place as a result of their actions. There is also mounting data that, when presented with evidence that abuse was in fact taking place, they failed to act to stem the abuse.”); See generally PHR REPORT, supra note 12; INTERNATIONAL COMMITTEE OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN ‘HIGH VALUE’ DETAINEES IN CIA CUSTODY 26 (Feb. 2007), http://www.nybooks.com/icrc-report.pdf (noting that “allegations of ill-treatment of the detainees . . . while held in the CIA program . . . constituted torture. In addition, many other elements of the ill-treatment, either singly or in combination, constituted cruel inhuman or degrading treatment.”).


war, are an affront to the humanity of the detainee — the most vulnerable person in the interrogation scenario. This Article makes no attempt to diminish the egregious nature of these wrongs nor to place injurious conduct imposed upon interrogators on equal footing with the torture inflicted on people in U.S. custody. Rather, this Article focuses on methods conceived and developed by every level of military and civilian commanders that required the use of sexualized interrogation methods against detainees in U.S. custody. The specific use of sexualized interrogation tactics are abhorrent because they place the United States among those nations that exploit sexuality as a weapon of war.

This Article also focuses on an overlooked aspect of the U.S. policy: The manner in which the exploitation of female sexuality may violate international and domestic laws, even in instances where the female service member may have willingly participated in the activity. The concept of being a “willing participant” in sexual activity is itself problematic when that activity takes place in an employment context, and even more so, when that employment is within the military and under a strong chain of command.

Notably, it is difficult to say with certainty how frequently sexually exploitive interrogation practices have been used, as the U.S. government asserts that most information pertaining to these events is classified. However, a Physicians For Human Rights (“PHR”) Report on the “Medical Evidence of Torture by U.S. Personnel and its Impact” reveals that “sexual humiliation was reported by virtually all of the individuals evaluated by

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20. See e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICING: TURKEY (1999-2009), http://www.state.gov/g/drl/rls/hrrpt/ (choose year, “Europe and New Independent States” or “Europe and Eurasia,” “Turkey”) (noting Turkey’s use of stripping as evidence of torture); PHYSICIANS FOR HUMAN RIGHTS & HUMAN RIGHTS FIRST, LEAVE NO MARK: ENHANCED INTERROGATION TECHNIQUES AND THE RISK FOR CRIMINALITY 28 (Aug. 2007), http://www.humanrightsfirst.info/pdf/07801-etn-leave-no-marks.pdf (“The U.S. State Department has repeatedly criticized other governments, for example Egypt and Turkey for subjecting detainees to torture by forcing them to strip in front of the opposite sex, subjecting them to sexual insults, or threatening them with rape.”).

21. Scholars have examined the effects of gender and hierarchical situations, such as the structure of the military, on the capability of a woman subordinate in the chain of command to truly consent to sexual activity as ordered by a superior. See, e.g., Catharine A. MacKinnon, Prostitution and Civil Rights, 1 MICH. J. GENDER & L. 13, 14 (1993) (“To lack the ability to set limits on one’s condition or to leave it is to lack consent to it.”); Petra D. Seawell, Rape as a Social Construct: A Comparative Analysis of Rape in the Bosnian and Rwandan Genocides and U.S. Domestic Law, 18 NAT’L BLACK L.J. 180; Catharine A. MacKinnon, The ICTR’s Legacy on Sexual Violence, 14 NEW ENGL. J. INT’L & COMP. L. 211, 212 (2008) (arguing “consent is meaningless for acts of a sexual nature that have a nexus to . . . armed conflict”).

This report goes on to note that these episodes were not limited to Iraq and Afghanistan, but "continued at Guantanamo, especially during interrogation."24

Sexually explicit interrogation techniques range among the following: the seemingly innocuous "use of female interrogators,"25 the use of photographic sexual imagery and pornography in interrogation,26 placing women's underclothing on a detainee during interrogation,27 invasion of the personal space of a detainee by a female interrogator;28 threats of sexual assaults against family members;29 threats of rape against detainees,30 and aggressive sexual assault of detainees.31 While each of these may be troubling, this Article will comment on the explicit use of women during the interrogation as objects of sexual torment. It examines whether these specific techniques violate domestic or international laws.

Section II of this Article will begin with an examination of the recent history of the use of sexuality and gender by U.S. forces as a tool of war and interrogation to break detainees both at Guantanamo Bay and at other interrogation sites around the world. Section III of this Article will then examine whether these techniques, either in isolation or collectively, violated domestic and international norms relating to the treatment of women. This Article will examine these questions in four contexts, specifically focusing on the Uniform Code of Military Justice, the Mann Act, domestic prohibitions and international anti-human trafficking conventions, and the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW).32 I selected each of these

23. PHR REPORT, supra note 12, at 84.
24. PHR REPORT, supra note 12, at 84.
25. S. COMM. ON ARMED SERVICES, supra note 4, at 111-12.
27. U.S. v. Specialist Megan M. Ambuhl, A.C.M. R. 200141130, Court-Martial Transcript of Record at 2627, (2004), available at http://www.aclu.org/torturefoia/released/041405/2524_.2672.pdf (“I know that the detainees received blankets and clothing if the interrogators wanted them to have it. SPC [censored] had mentioned to me that they made them wear women's panties, and if they cooperated, some would get an extra blanket.”).
29. See PHR REPORT, supra note 12, at 79 (“They were threatening me, ... saying they will bring [my] mother and sisters [here] and ... rape them.”).
31. See PHR REPORT, supra note 12, at 82-83.
32. It should be noted that Bush Administration officials attempted to exempt virtually all military conduct from the applicability of domestic and international law under an unprecedented and unsupported expansion of the commander-in-chief power. See
categories of laws because each, either in toto or in relevant sections, was designed to protect women from discrimination and exploitation.

Finally, the Article concludes that these actions do amount to violations of domestic and international legal obligations.

II. HISTORY OF THE USE OF SEXUALITY AND GENDER IDENTITY AS A TOOL OF WAR AND INTERROGATION

Sexuality and gender have long been exploited in war. Rape and sexual assault against women have been commonly utilized tools in historical conflicts. This continues into the present day in places such as Darfur, where rape and sexual assault against women and girls are a part of a pattern of gender violence in military conflicts. Indeed, these practices are the most common form sexual exploitation of women takes during times of war. The use of sexual violence as a war tactic has a long and

Memorandum from John Yoo for William J. Haynes II, General Counsel for Dep’t of Def., on Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003), available at http://www.aclu.org/pdfs/ safeeveyoo_army_torture_memo.pdf. However, the argument that basic criminal prohibitions do not apply to military interrogations ordered by authority of the President is a distortion of the law. Military personnel are not given carte blanche to engage in otherwise illegal conduct simply because they are engaged in hostilities. In fact, the “just following orders” defense has been emphatically rejected since the Nuremberg trials. See Harold Hongju Koh, Can the President Be Torturer in Chief?, 81 IND. L.J. 1145 (2006).

33. See, e.g., Catharine A. MacKinnon, Rape. Genocide and Women’s Human Rights, 17 HARV. WOMEN’S L.J. 5, 6 (1994) (describing how during Serbian aggression toward Croatia in 1991 and Bosnia and Herzegovina in 1992, women were being “sexually and reproductively violated on a mass scale, as a matter of conscious policy, in pursuit of genocide through war”); Katie C. Richey, Several Steps Sideways: International Legal Developments Concerning War Rape and the Human Rights of Women, 17 TEX. J. WOMEN & L. 109 (2007) (investigating, among other things, use of war rape as ethnic cleansing and the prosecutions and convictions of war rape by international ad hoc tribunals).


ignominious history, in part because sexual assault has cultural impacts beyond the individual assaulted. Scholars, relief agencies, and NGOs have documented the impact of sexual assault in war upon the moral, social and religious fabric of a community. Historically, this form of sexual abuse and exploitation has not been a common, systematic weapon utilized by U.S. forces during warfare. Sexual exploitation, sexual assault and gender discrimination, however, have had a troubling relationship with U.S. military life. Such scandals as “Tailhook ‘91” or the 2003 sexual assault at the U.S. Air Force Academy illustrate there is a sordid history of gender and sexual violence problems in the U.S. military. This history is not limited to these two well-publicized scandals. There is little dispute the


38. Interestingly, lore has it that the use of the word “hooker” was a term referring to a prostitute originated in reference to Civil War General “Fighting Joe” Hooker and his female camp followers. This lore has been debunked. See Michael Quinion, Hooker, World Wide Words (July 29, 2006), http://www.worldwidewords.org/qa/qa-hoo4.htm. However, even in debunking this common myth, there appears to be a tie to the military’s relationship with women. According to John Bartlett’s Dictionary of Americanism of 1859, the term hooker is defined as “A resident of the Hook, i.e., a strumpet, a sailor’s trull,” and originates from a reference to Corlear’s Hook, which was known for its “number of houses of ill-fame frequented by sailors” in the area. JOHN R. BARTLETT, DICTIONARY OF AMERICANISMS: A GLOSSARY OF WORDS AND PHRASES USUALLY REGARDED AS PECULIAR TO THE UNITED STATES 201 (3d ed.1854), available at http://books.google.com (search “Bartlett and Glossary of Americanisms”).


military has long encouraged, or at the very least turned a blind eye to the worldwide phenomenon of prostitution around U.S. military installations. Moreover, there have been an alarmingly high number of complaints by U.S. servicewomen of sexual assaults during the Iraq and Afghanistan conflicts. However, the exploitation of the gender of female members of the military as sexualized objects to be utilized as part of interrogation of suspected terrorists appears to be a new twist on an old theme.

III. SEXUALIZED INTERROGATIONS IN THE GWOT

In the present conflict, the United States has taken the use of gender and sexual coercion to a new level in its treatment of detainees. The examples of women engaging in sexual coercion shocked the nation. In the press, the most ubiquitous photographs of Abu Ghraib depict women engaged in sexual abuse of prisoners — and not the men who allegedly directed the events.

Since the time that the pictures of the Abu Ghraib scandal first broke, government officials have repeatedly suggested the photographs were not evidence of an approved tactic or interrogation method. Rather, the photographs were depicted as the criminal deviancy of those who participated in the production of those horrific images. Later events and
releases of information about the actions of the military confirm that this was not the case.  

The mounting evidence of sexualized interrogation of suspected enemy combatants makes clear Abu Ghraib was not an isolated incident. Rather, the evidence points to it being a calculated strategy of war. Indeed, evidence of this policy, including interrogation methods that exploit the interrogator’s gender, comes directly from the government itself. The Senate Report of the Committee on Armed Services, Inquiry Into the Treatment of Detainees in U.S. Custody (“Senate Report”), confirms one of the enhanced interrogation techniques presented for consideration to the Department of Defense Working Group on interrogation methods was “use of female interrogators.” The definition of this gender-specific method of interrogation and how it is applied is unspecified in the Senate Report. 

What is clear is that the military made an express decision to use women interrogators as women. There was something about the interrogators being women that made their use a specific technique identified by the military. Though identified to the Working Group, whose task it was to consider the legal and policy implications of each technique of interrogation employed, it is unmentioned in the Working Group’s report. The details of how this technique was utilized are expanded on in recently released government documents. For example, one female interrogator described her interrogation “refresher course” taught at Fort Huachuca, Arizona, called “Tiger Team University.” A portion of this training program was “intended to provide the interrogators with specific scenarios and reinforce the approaches that were both approved and successful at JTO-GTMO.” One approved and successful technique presented in this training involved a female instructor describing how she used her gender, “being a female, as an asset during interrogation sessions . . . .” This use of female gender involved “touching the detainee on the shoulder and knee, lean[ing] in close to the detainee’s face, and whisper[ing] comments or questions in [the detainee’s] ear.” 

FBI agents who were at Guantanamo have also provided evidence of how females were used as interrogators. One FBI agent recounts a report by a detainee who had been raped in Bagram by a female interrogator who threatened the next time, “it will be a man.” Another FBI agent observed

45. For a compelling presentation of this information, see GHOSTS OF ABU GHRAIB (HBO Documentary Films, 2007).
46. S. COMM. ON ARMED SERVICES, supra note 4, at 112.
48. Id. (emphasis added).
49. Id.
50. Witness Statements, supra note 47.
51. An FBI agent’s report noted that this was the first report of such an incident by this detainee and it was possible that this allegation was an effort to “retract his
a female interrogator whispering in a detainee’s ear and rubbing lotion on his arms during Ramadan, when contact with a female is most proscribed by Islam. Though the interrogator had tried to block the FBI agent from observing, the agent detected the interrogator’s hands “moving toward the detainee’s lap” and was subsequently informed by a Marine also present at the interrogation that the interrogator had grabbed the detainee’s genitals. The Marine also indicated to the agent that the interrogator’s treatment of the detainee was less severe than her treatment of other detainees, which was described as having “resulted in detainees curling in a fetal position on the floor and crying in pain.”

Detainees and their lawyers have given accounts of how females were used as interrogators. Kristine Huskey, a lawyer representing Guantanamo detainees, described her clients’ experiences:

During the last year and a half, I learned that my clients — devout Muslim men — have been subject to sexual harassment and abuse both in and out of interrogation. They have been forced to strip naked in front of female guards; some have had their private parts touched and squeezed; some have been offered sex in exchange for cooperation; some have been threatened with rape. One of my clients told of an interrogator pulling out a condom and threatening to use it on him unless he “cooperated.” Another client was forced to lie across a table with his legs spread while a female pulled down his pants.

Ms. Huskey described in detail the actions of the women interrogators of Guantánamo. As she explained:

Over the course of their detention, two of [Huskey’s] clients were repeatedly subjected to excessive sexual abuse and mistreatment by a particular female interrogator, named Megan. She apparently made a habit of wearing tight revealing clothes to interrogations. Her shirt — transparent — was unbuttoned very low. She wore heavy makeup and “full lipstick.” On several occasions she put her chair close to the detainee, and giggled and flirted in a manner so
clearly sexually aggressive that one of my clients said he felt “embarrassed for her.”

Ms. Huskey’s client did not assert these events occurred on one occasion, but rather over a sixteen month period. According to Ms. Huskey, the same interrogator, “went so far as to blow cigarette smoke in [her client’s] face, rub his neck, call him handsome, “talk dirty” by speaking of sexual acts, make sexual sounds, and take her shirt off so [the] client could see her breasts and nipples.” Moreover, it was not just one female interrogator who is alleged to have engaged in this conduct. At times during a detainee’s interrogations, “there was more than one ‘sex interrogator’; two or three females would engage in similar tactics at the same time.” Given the strict controls on interrogations in Guantanamo, it is difficult to imagine such conduct could occur over such a long period of time without, at a minimum, tacit approval of command.

Other detainees have described similar treatment at the hands of female interrogators at Guantanamo. Riva Khoshaba, another lawyer representing Guantanamo detainees, described how her client broke “down in tears when he describe[d] how a woman made gestures suggestive of sexual intercourse and sometimes bared her breasts.” It was then, he related, “that he was truly afraid. He feared she would rape him.”

Baher Azmy, a professor at Seton Hall University, who represents now-freed Guantanamo detainee Murat Kurnaz, has stated that his client complained of “being sexually taunted by female interrogators who, he

56. Id. This author saves for another day the examination of other allegations made by Ms. Huskey’s clients that this same interrogator reminded this detainee “more than once that his lawyers were ‘Jews’ and ‘Jews have always betrayed Arabs.’” Id.
57. Huskey, supra note 55, at 177.
58. Id. Ms. Huskey reports that when her client refused to react to the sexual overtures of the interrogator, she “taunted his masculinity and said she would make him like women. When my client got angry, [the interrogator] laughed and left him shackled for several hours without allowing him to use the toilet.” Id.
59. This is demonstrated by many things, such as the lengthy log of interrogation produced in relation to Inmate 063’s interrogation. See Interrogation Log, Detainee 063, Dec. 6, 2002 (19:30), available at http://www.time.com/time/2006/log/log.pdf. It is also demonstrated by evidence that many of the interrogations were observed or taped by other government agencies, such as the FBI. With these actions occurring regularly, it defies credibility to believe that such events were unknown to people other than those in the interrogation booths, including those at very high levels of the government who were briefed on the details of interrogation. See Andrew Sullivan, Rice and Cheney Approved Torture in Detail, THE ATLANTIC, Apr. 10, 2008, http://andrewsullivan.theatlantic.com/the_daily_dish/2008/04/they-approved-a.html (reporting that Dick Cheney, Condoleeza Rice, Donald Rumsfeld, and John Ashcroft were some of the top officials who not only knew, but rather instituted the practice of various “enhanced interrogation techniques” such as waterboarding). S. COMM. ON ARMED SERVICES, supra note 4.
60. Riva Khoshaba, supra note 30, at 179.
61. Id.
said, offered to have sex with him in exchange for giving information.\textsuperscript{62} When the woman began embracing him from behind, Mr. Kurnaz described turning and head-butting the interrogator.\textsuperscript{63} Human rights groups have further documented the use of gender and sexuality as tools of interrogation. \textit{Guantanamo and Its Aftermath, U.S. Detention and Interrogation Practices and Their Impact on Former Detainees}, a report by the Center for Constitutional Rights, documents some of the allegations of sexual misconduct during interrogation. One detainee described his experience thus:

Then a woman in civilian clothes entered the room and the [male interrogator] said, “Well we’ll leave you with her, maybe this will change your mind.” I kept my head down, I did not know what was going on, I was trying not to talk to her, but she started to undress. And while she was talking to me in English, this lasted a long time. I was still looking down, I was not looking at her, I do not know if she was completely naked or still in her underwear. But she started to touch me and then after a while, after about an hour, a guard came in and said, “Okay, it’s not working, that’s enough.” And I could hear the laughter of the people who were watching this from behind the mirror, the glass, the one-way window. I could hear the laughter, and this was just a very humiliating experience.\textsuperscript{64}

Despite documented “use of a female interrogator” as a technique of interrogation, the U.S. government has denied that these were systematic, strategically designed program methods; similarly, the government denied responsibility for abuses at Abu Ghraib.\textsuperscript{65} However, there is a consistency among the reports of detainees that suggests uniformity in the interrogation methods and lends credence to the accounts. Moreover, these accounts have been corroborated by other individuals who were present during interrogations. For example, former Guantanamo interrogator Erik Saar witnessed sexualized interrogation methods in use at Guantanamo.\textsuperscript{66}

In his book, Mr. Saar described an interrogation involving a female interrogator who was pressured by her supervisors because a particular

\begin{itemize}
\item \textsuperscript{63} Id.
\item \textsuperscript{65} See Mayer, supra note 62 (“All of Kurnaz’s charges have been denied by U.S. authorities.”).
\item \textsuperscript{66} ERIK SAAR & VIVECA NOVAK, \textit{INSIDE THE WIRE: A MILITARY INTELLIGENCE SOLDIER’S EYEWITNESS ACCOUNT OF LIFE AT GUANTANAMO} 221 (2005).
\end{itemize}
During this interrogation, the female interrogator wore a “skin-tight” top that was revealed when she started to take off her military uniform, “teasingly, almost like a stripper.” She rubbed her breasts on the detainee and taunted his sexuality, suggesting he was gay. She concluded the interrogation by wiping fake menstrual blood on the detainee. When this interrogation session concluded, the interrogator reportedly broke down crying.

Mr. Saar reports that he “knew she hadn’t enjoyed this. She had done what she thought was best to get the information her bosses were asking for.”

Additional reports of using fake menstrual blood and wearing skimpy clothing during interrogations lend credence to the allegation that the practices were deliberate and systematic. There are reports indicating that on at least one occasion, an interrogator who used the fake-blood tactic was reprimanded as a result of this conduct. However, as noted, government policies themselves confirm the use of gender as tool of war, approving the use of invasion of space by a female as an approved “enhanced” interrogation tactic.

Detailed and official interrogation logs reveal that such conduct was done with the full knowledge of the military chain of command. For example, the log of Mohammed al-Qahtani’s interrogation verifies there were several episodes described as “Invasion of Space by a Female.”

During the interrogation of Khaled Shaik Mohammed, the interrogation log reports he was waterboarded while naked with female interrogators present to increase the humiliation aspect of the treatment. Nude interrogation of detainees was frequently used. Threats of sexual assault against the

67. SAAR & NOVAK, supra note 66, at 221.

68. Id. at 223. The issues raised by homosexual accusations is beyond the scope of this Article.

69. Id. at 224.

70. Id. at 223.

71. Id.

72. SAAR & NOVAK, supra note 66, at 228.


74. Substantiated cases of misconduct at JTF-GTMO reported in CAROLYN P. BLUM ET AL., INT’L CTR. FOR TRANSITIONAL JUSTICE, CRIMINAL JUSTICE FOR CRIMINAL POL’Y: PROSECUTING ABUSES OF DETAINEES IN U.S. COUNTER-TERRORISM OPERATIONS 57, (Nov. 2009), available at http://www.icij.org/static/Publications/ICTJ_USA_CriminalJustCriminalPolicy_p2009.pdf. The report documents a verbal reprimand to a female interrogator who wiped dye from a red felt pen on a detainee’s shirt after detainee spit on her. She told the detainee the stain was menstrual blood. Id.


77. Id. at 14.
detainee or the “arrest and rape of his family” were also commonly reported methods of interrogation.\(^7\)

IV. A LEGAL ANALYSIS OF GENDER-BASED INTERROGATION METHODS

The evidence from interrogations during the GWOT makes clear the United States adopted a policy of using gender and female sexuality as a weapon of war. Women and their sexual identity have been used as objects of sexual torment. Such objectification of women is morally repugnant. However, the question remains whether the use of women as sexual weaponry violated any domestic and international norms relating to the treatment of women.

To address that question, this Article examines four legal sources, each designed, in whole or in part, to protect women from discrimination and exploitation, and to explores whether women have been violated by the systematic use in the military as objects of sexual torment. These sources are the Uniform Code of Military Justice, the Mann Act, anti-trafficking statutes and the Convention for the Elimination of All Forms of Discrimination Against Women.

A. THE UNIFORM CODE OF MILITARY JUSTICE

Members of the United States military stationed domestically and overseas are subject to a myriad of jurisdictions for criminal conduct. They are subject to the requirements of international law.\(^7\) They are subject to the requirements of federal law.\(^8\) Notably, they are subject to the jurisdiction of the Uniform Code of Military Justice (“UCMJ”).\(^9\) The UCMJ identifies general and specific behavior prohibited for those under its jurisdiction. As discussed below, it contains a number of sections relevant in considering the legality of the military’s actions with regard to sexualized interrogation.

The applicability of the provisions of the UCMJ to the actions of military members in the newly designed interrogation program has been recognized both by the military and the administration.\(^10\) In designing interrogation techniques to be approved, it was noted “UCMJ policy issues

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78. ICRC REPORT, supra note 76, at 17.
80. Id.
81. UNIFORM CODE OF MILITARY JUSTICE, 10 U.SC. § 802 (2009) (identifying persons subject to jurisdiction of the UCMJ).
82. S. COMM. ON ARMED SERVICES, supra note 4.
should be resolved." The UCMJ's applicability to the actions of the military personnel in interrogations was not only acknowledged, it was presented for analysis to the Department of Defense detainee interrogation working group ("Working Group"). This group was set up by former Secretary of Defense Rumsfeld "to assess the legal, policy and operational issues relating to the interrogations of detainees held by the U.S. Armed Forces in the war on terrorism." 

The Working Group was briefed specifically on the "use of female interrogators" as an interrogation technique. Interestingly, the report issued by the Working Group is silent on the "legal, policy and operations issues" relating to this technique. Shockingly, out of the thirty-six techniques on which the Working Group was briefed, the use of females as a tactic of interrogation is the only technique not mentioned in the final report of the Working Group.

As presently in force, by its very terms many of the provisions of the UCMJ relating to sexual abuse of some form or another apply to the actions of the military during interrogations. For example, there are sections that deal with sexual offenses that may apply to the actions of U.S. military personnel in sexualized interrogations. The UCMJ covers a broad range of conduct, such as sexual misconduct, rape, and aggravated sexual abuse.

83. S. COMM. ON ARMED SERVICES, supra note 4. What is interesting about this reference is that it appeared to be in relation to such mild, non-injurious contact as stomach slaps, not in reference to its use of women as sexual objects to torment the detainees.

84. Memorandum from Sec'y of Defense Donald Rumsfeld to the General Counsel of the Dep't of Defense 1, (Jan. 15, 2003) available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.01.15b.pdf.

85. S. COMM. ON ARMED SERVICES, supra note 4, at 112 (Mr. Becker also listed three "less common techniques" for the Working Group's consideration, i.e., use of drugs, use of female interrogators, and sleep deprivation.).


87. One of the areas to which the Working Group Report devotes a great deal of time is potential defenses including that of following orders. Giving orders to engage in sexualized interrogations, however, was not analyzed and it is this behavior that is particularly problematic under the statutes and laws analyzed in this Article. Id.

88. In 2006, the UCMJ was amended to include many forms of sexual assault. The prior version of the UCMJ only criminalized forcible rape, sodomy and carnal knowledge, which required sexual intercourse in order to prove the offense. 10 U.S.C. § 920(c) (2007).

89. 10 U.S.C. § 920(a) (2007). 10 U.S.C. § 920(a) provides: "Rape" under the UCMJ is defined as any person causing:

... another person of any age to engage in a sexual act by

(1) using force against that other person;
(2) causing grievous bodily harm to any person;
(3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnaping;
(4) rendering another person unconscious; or
(5) administering to another person by force or threat of force, or without the
This conduct closely mirrors in federal statutes indecent exposure,\textsuperscript{91} forcible pandering,\textsuperscript{92} and wrongful sexual contact.\textsuperscript{93} "Wrongful sexual contact" occurs under the UCMJ when a person subject to this chapter "without legal justification or lawful authorization, engages in sexual contact with another person without that other person's permission. . . ."\textsuperscript{94} This section is one of the most interesting provisions in the 2007 amendments to the UCMJ relating to sexual misconduct. It exempts from criminality a scenario wherein there is a non-consensual sexual touching, because it is legally justified or lawfully authorized. Exactly which scenarios were intended to be included within this section raise important questions as to whether Congress was attempting to create a rationale that would excuse sexual assaults during interrogation, for it is hard to imagine a non-consensual sexual touching as "authorized" or "justified" in any other scenario. If Congress did not intend to provide a justification or

knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct.

"Sexual act" is defined by 10 U.S.C. §920(t) (2007) as either:
contact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or . . . the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

90. 10 U.S.C. § 920(c) (2007). 10 U.S.C. § 920(c) provides: "Aggravated sexual assault" occurs under the UCMJ when any person:
(1) causes another person of any age to engage in a sexual act by--
   (A) threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or
   (B) causing bodily harm; or
(2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of--
   (A) appraising the nature of the sexual act;
   (B) declining participation in the sexual act; or
   (C) communicating unwillingness to engage in the sexual act.

91. 10 U.S.C. § 920(n) (2007). "Indecent exposure" under the UCMJ is when "[a]ny person subject to this chapter who intentionally exposes, in an indecent manner, in any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor's family or household, the genitalia, anus, buttocks, or female areola or nipple. . . ." \textit{Id.}

92. 10 U.S.C. § 920(l) (2007). "Forcible pandering" occurs under the UCMJ when a person subject to its provisions "compels another person to engage in an act of prostitution with another person to be directed to said person." "Act of prostitution" is defined as "a sexual act, sexual contact, or lewd act for the purpose of receiving money or other compensation." 10 U.S.C. § 920(l)(13).

93. 10 U.S.C. §920(m) (2007). "Wrongful sexual contact" occurs when any person "without legal justification or lawful authorization, engages in a sexual contact with another person without that person's permission." \textit{Id.}

94. \textit{Id.} (emphasis added).
defense to sexualized interrogations, it is hard to imagine what type of behavior they were attempting to condone with this provision.

The indecent exposure statute demonstrates the potential applicability of these newly added UCMJ sections to the actions of the military in sexualized interrogation. Indecent exposure occurs under the statute when a person exposes (in an indecent manner) a female areola or nipple to a person other than a member of that actor's family. Ms. Huskey's client, referenced above, described an incident wherein the interrogator exposed her breasts and nipples. Such conduct would meet the definition of indecent exposure under the UCMJ.

However, most of these provisions were only added to the UCMJ in 2006. Prior to that time, the only explicitly sexual offenses under the UCMJ were rape, sodomy, and carnal knowledge. These offenses would only apply to the most egregious allegations made regarding sexualized interrogations. Although some of the aforementioned allegations, if proven, would qualify as violations of these serious offenses under the UCMJ. Thus, it is necessary to refer to more generically applicable sections of the UCMJ to establish criminal liability for most of the conduct that occurred during these sexualized interrogations.

As was done in the cases of Ms. England and Mr. Graner, for example, violators could be prosecuted under the UCMJ sections relating to cruelty and maltreatment, assault and indecent conduct. Assault

96. Id. at 175; 10 U.S.C. § 920(n) (2007).
98. It is interesting to note that is was not until 2006 that sexual assaults not involving intercourse were considered explicit violations of the UCMJ.
99. This statement assumes that such conduct has been discontinued by the military in the wake of the modifications and application of the Army Field Manual on interrogation techniques, which explicitly prohibited using such methods as forced nakedness or forcing a subject of interrogation to pose in a sexually explicit manner. "The following actions will not be approved and cannot be condoned in any circumstances: forcing an individual to perform or simulate sexual acts or to pose in a sexual manner; exposing an individual to outrageously lewd and sexually provocative behavior; intentionally damaging or destroying an individual's religious articles." DEP'T OF THE ARMY, FIELD MANUAL NO. 2-22.3: HUMAN INTELLIGENCE COLLECTOR OPERATIONS 5-21 (Sept. 2006), available at http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf.
100. For the charges upon which conviction was obtained against Ms. England and Mr. Graner, see Mark Follman & Tracy Clark-Flory, Prosecutions and Convictions, A Look at Accountability to date for Abuses at Abu Ghraib and in the Broader 'War on Terror.' SALON, Mar. 14, 2006, http://www.salon.com/news/abu_ghraib/2006/03/14/prosecutions_convictions/index.html.
103. 10 U.S.C. § 934.
occurs under the UCMJ when a person “attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated.” A number of the allegations made about the nature of the interrogations conducted meet this definition. For instance, the report by the FBI agent who witnessed an interrogation wherein a female interrogator grabbed a detainee’s genitals would easily meet this definition.

Perhaps most obviously applicable to the actions of those involved in the sexualized interrogations, including those higher in the chain of command than the service members who participated in sexualized interrogations, is the UCMJ “general” section that penalizes “all conduct of a nature to bring discredit upon the armed forces.” At least since the adoption of the modern UCMJ in 1950, these provisions have been used to prosecute a wide range of sexual activity as misconduct. Designing and implementing a system of sexualized interrogation would necessarily bring discredit upon the armed forces.

Beyond those offenses specifically relating to criminal conduct of the actual interrogators, the UCMJ has a number of other provisions that could be applied to the actions of not only the actual sex interrogators and their immediate supervisors, but those military officials high in the chain of command who designed and approved these practices. For example, the UCMJ conspiracy statute is potentially applicable. Conspiracy under the UCMJ, as under federal law, is very broad. It encompasses any agreement to commit any offense under the UCMJ. Any agreement to

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104. 10 U.S.C. § 928.
105. Letter from T. J. Harrington, supra note 52.
106. 10 U.S.C. § 934.
107. For instance, “Military prosecutors bring such sexual misconduct charges under either Article 133 or Article 134 of the Uniform Code of Military Justice.” Anne M. Coughlin, Sex and Guilt, 84 VA. L. REV. 1, 24 n. 86 (1998).
108. S. COMM. ON ARMED SERVICES, 110TH CONG., REPORT ON INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, supra note 47.
110. 10 U.S.C. § 881 states:
Conspiracy:
(a) Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.
(b) Any person subject to this chapter who conspires with any other person to commit an offense under the law of war, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a court-martial or military commission may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a court-martial or military commission may direct.
engage in assault, for example, could be considered a conspiracy under the UCMJ.\textsuperscript{111}

Notably, it is not only the line soldiers who were directed to engage in these actions who could face criminal liability, but those of higher rank who designed the system using female interrogators in this manner who could and should face criminal liability. Thus, under a number of provisions of the UCMJ, there is potential criminal accountability for members of the United States military, as well as potential liability for civilian actors under the Mann Act.

B. THE MANN ACT

Although the Mann Act\textsuperscript{112} has largely been repudiated by scholars,\textsuperscript{113} and has fallen into disuse,\textsuperscript{114} it remains a potentially viable and effective means of combating sexual exploitation. The Mann Act grants authority to the federal government to prosecute those who transport persons for the purpose of sexual activity. The Mann Act states in its entirety:

Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.\textsuperscript{115}

Historically termed the White Slave Act, the statute was originally based on paternalistic and racist notions that white women were helpless against men in general and needed protection. It was designed to “protect women who are weak from men who are bad.”\textsuperscript{116} As initially drafted, this statute applied to transporting a woman for any debauched or immoral

\textsuperscript{111}Conspiracy is not the only statute that could be applied to those higher in the chain of command in these sexualized interrogations. For example, the UCMJ also criminalizes solicitation, penalizing one “who solicits or advises another or others to commit an act of misbehavior before the enemy.” 10 U.S.C. § 882. This could apply to those who devised this system of interrogation.

\textsuperscript{112}18 U.S.C. § 2421.

\textsuperscript{113}See generally, David J. Langum, Crossing Over the Line: Legislating Morality and the Mann Act (1994).


\textsuperscript{115}18 U.S.C. § 2421. The “interstate or foreign commerce” requirement is easily established and will not be a focus of this article. For a discussion of how the interstate or international transportation of individuals satisfies the “channels or instrumentalities” aspect of the commerce clause, see Laura Elizabeth Brown, Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy Under the Mann Act, 39 McGeorge L. Rev. 267, 288-92 (2008).

purpose.\textsuperscript{117} That broad language has been deleted, but what remains is a commitment to protect all people from sexual exploitation when such exploitation would be criminal.

As an initial matter, it is important to note that by its very terms, the consent of the individual transported for this purpose is irrelevant to finding of criminal liability under the statute.\textsuperscript{118} Thus, the fact that a woman may have consented to transportation to Guantanamo for this purpose is irrelevant to consideration of its criminality. Instead, potential application of this section to the actions of the United States military in its use of women in interrogation will likely turn on the issue of intent and the potential criminal offense.

Judicial interpretations of this statute illustrate that a finding of liability does not require that “the dominant purpose” of the interstate or foreign travel be for the criminal sexual purpose, it need only be “one of the dominant purposes.”\textsuperscript{119} It is axiomatic that given the very clear gender-specific tactics being designed, military officials needed to ensure women were assigned to Guantanamo and transferred there so as to participate in these newly designed sexualized interrogations.

Military officials could assert they never foresaw these innocuously labeled tactics, such as “mild non-injurious physical touching” and “invasion of space by a female” would evolve to something sexual. This would be a spurious assertion for many reasons. First, the “invasion of space by a female” is dependent on the female sexual identity of the interrogator. Moreover, there can be little dispute these interrogation tactics were designed for sexual humiliation, for they were derived from a reverse engineering of the Survival, Evasion, Resistance and Escape (“SERE”) training to which military personnel are subjected.\textsuperscript{120} SERE training is designed to train U.S. military personnel to withstand methods enemies may use to break U.S. military personnel in captivity.\textsuperscript{121} It was not intended for use in developing interrogation methods, but was adapted for

\begin{itemize}
    \item \textsuperscript{118} United States v. Pelton, 578 F.2d 701, 712 (8th Cir. 1978), Dodson v. United States, 215 F.2d 196 (6th Cir. 1954).
    \item \textsuperscript{119} See, e.g., United States v. Miller, 148 F.3d 207, 212-13 (2d Cir. 1998), United States v. Jenkins, 442 F.2d 429, 434 (5th Cir. 1971) (“[T]here can be dual purposes under this statute – prostitution need be only one of the principal purposes.”).
    \item \textsuperscript{120} See Sworn Statement of Interrogation Chief Element (ICE) Guantanamo, Mar. 22, 2005, available at http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-interrogators/testimony-of-a-former-interrogation-control-element-chief (“When I arrived at GTMO [REDACTED] my predecessor, arranged for SERE instructors to teach their techniques to the interrogators at GTMO. The instructors did give some briefings to the Joint Interrogation Group interrogators.”).
\end{itemize}
that use.122 This is important to this discussion because SERE has utilized
women as objects of sexual torment to train U.S. soldiers to withstand
possible tactics of enemies.

A former military-intelligence officer who was familiar with
practices at Guantanamo told me that a friend who had gone
through Level C SERE training, which lasts three weeks, said that
he had been sexually ridiculed by females during the program.
‘They strip you naked and make you do work while women laugh
at the size of your junk,’ the intelligence officer told me.
‘Apparently, it’s very humiliating.’ The SERE affiliate described
another disturbing training technique: the “mock rape.” In this
exercise, the female officer stands behind a screen and screams as
if she were being violated. A trainee is told that he can stop the
rape if he cooperates with his captors.123

The import of this information is that the U.S. military possibly
adapted for use as an interrogation tool a tactic designed to train U.S.
military to withstand sexual intimidation. The military knew the sexualized
nature of the methods because it had designed them. The transportation of
any military personnel to implement the policies of sexualized interrogation
would meet the intent requirement under the Mann
Act.124

The final question to be resolved in considering the potential
application of this statute to the actions of the military is whether the sexual
activity engaged in during interrogation was of the kind that could give rise
to criminal liability.

The language of the statute is very broad. It criminalizes knowingly
transporting an individual to engage in “any sexual activity for which any
person can be charged with a criminal offense.”125 On its face, the
language simply requires that anyone could be charged with any criminal
offense for the sexual activity — not that the sexual activity must be a
sexual criminal offense in the jurisdiction in which it occurs. The language
suggests that it is sufficient that the sexual activity meet the elements of
any criminal offense in any U.S. jurisdiction that could bring the charge.
For example, if there was sexual activity that met the elements of a general
assault this would appear to be sufficient.

Such a plain reading is supported by the seminal case on statutory
interpretation, Caminetti v. United States,126 in which the Supreme Court

122. JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 124 (2006);
see also Scott Shane, 2 U.S. Architects of Harsh Tactics in 9/11’s Wake, N.Y. TIMES, Aug. 11,
124. S. COMM. ON ARMED SERVICES, supra note 4.
126. 242 U.S. 470 (1917).
interpreted an earlier version of the Mann Act. Before the Court in Caminetti was the question of whether an earlier version of the Mann Act should be read plainly according to the language of the statute, or whether the Court needed to go beyond the plain reading of the statute. It was argued to the Court in Caminetti that the title of the statute (the White Slave Act) and the legislative history supported the conclusion that Congress intended to limit application of this section to prostitution. Thus, it was argued the Court should limit the application of the statute to such factual scenarios. The Court rejected this argument, instead applying the plain language of the statute. "It is elementary, that the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, ... the sole function of the courts is to enforce it according to its terms." Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need not discussion." In explaining how this plain reading was to be done, the Court stated that "[s]tatutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them." Here, the plain language of the statute is easily understood. The adjective "sexual" modifies "activity," not "criminal offense." Thus, the criminal offense need not be a sexual criminal offense. Moreover, the legislative history of the amendment to the Mann Act that included this language in the Act illustrates the intent of the amendments was not to limit its application to sexual criminal offenses. Rather, it was designed to "eliminate anachronistic features and to make it gender neutral." Thus, nothing in the legislative history supports a limited reading of the Mann Act to cases involving solely sexual criminal offenses.

Moreover, a broad reading of the application of the Mann Act is supported by case law. It is irrelevant under the Mann Act that the jurisdiction to which a person is transported does not criminalize the sexual activity. In United States v. Pelton, the court considered appellant's claim that he had a valid defense to a Mann Act prosecution because the agreement in that case was to transport a woman from Wisconsin (where

128. Id. at 485.
129. Id. at 485-86.
130. P.L. 99-628, H.R. Rep. 99-910, 1986 U.S.C.C.A.N. 5952. (The legislative history clarifies Congressional intent that the amending language was designed to ensure that the Mann Act not be applied to "non-commercial sex between consenting married adults.") Id.
131. For a discussion of how the 1994 amendment to the Mann Act was designed to permit domestic Mann Act prosecutions for sexual activity that does not amount to a crime in the extraterritorial jurisdiction where the activity occurs, see Eric Thomas Berkman, Responses to the International Child Sex Tourism Trade, 19 B.C. INT'L COMP. L. REV. 397, 415-16 (1996).
132. Pelton, 578 F.2d at 701.
prostitution was illegal) to Nevada (where prostitution was legal). The court rejected this assertion summarily, stating that the finding of criminality under the Mann Act is not "keyed to the legality or illegality" of the sexual activity at issue "under the law of the state where the transportation ends."

Considered in this light, the question becomes whether these sexualized interrogations constitute any crime that could be charged.

Applying the logic of the Pelton court, it makes no difference if the sexual activity at issue here could be considered legal at Guantanamo Military Base. For Mann Act purposes, if the sexual activity could be charged as a criminal offense anywhere, it could be prosecuted under the Mann Act. Thus, any purported assertions of legality on the military installation at Guantanamo are without relevance to whether the Mann Act applies, so long as the sexual activity was criminal anywhere.

Both domestic and international law proscribe as sexual assaults much of the activity that took place during the sexualized portion of the interrogations at places such as Guantanamo. All of the UCMJ crimes discussed supra could satisfy the "criminal offense" requirement of the Mann Act. In addition, Title 18 U.S.C. section 2244 criminalizes abusive sexual contact. "Sexual contact" is defined for purposes of this section as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, arouse, or gratify the sexual desire of any person."

These sections apply to many of the actions that occurred during sexualized military interrogations and thus, they could be considered predicate acts for purpose of prosecution under the Mann Act. For example, an allegation that a lap dance was performed would certainly meet the requirements for prosecution for abusive sexual contact. Such an act is a touching of the genitals of a detainee for the purpose of humiliating, harassing, or degrading him.

These activities may also meet the requirements for prosecution under various state statutes governing sexual abuse because the effect of the enactment of the 1985 Mann Act Amendments was to specifically link the "sexual activity" to state law definitions.

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133. Pelton, 578 F.2d at 712.
136. See Summary of Interview by John Furlow, Jan. 10, 2005, available at http://www.aclu.org/files/projects/foiasearch/pdf/DOD055762.pdf (confirming that "one of the best interrogators" was reprimanded for the "lap dance" incident). After reprimand, "Major General Miller sponsored" this interrogator so she could obtain a commission. Id.
prohibitions against sexual abuse is found in the Arizona code which states, a person "commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person who is fifteen or more years of age without consent of that person." Sexual contact is defined in part as "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact." The actions of the female interrogator who grabbed a detainee’s genitals without his consent meet the elements of the Arizona state statute. Furthermore, those who transported that interrogator to Guantanamo to engage in these sexually coercive interrogations may be subject to prosecution under the Mann Act.

Violations of any one of the relevant provisions of the UCMJ may also meet the “criminal offense” element of the Mann Act. Moreover, the degrading actions of interrogators may breach the Geneva Convention and give rise to international criminal prosecution. The Mann Act applies under multiple theories to identify predicate criminal violations, to the prosecution of U.S. military personnel engaging in this sexualized interrogation and their superiors who transported them for such purposes.

C. ANTI-TRAFFICKING LAWS

The scholarship surrounding efforts to understand and eradicate trafficking of human beings for sexual or other purposes is voluminous. At first blush, it is difficult to imagine the U.S. military use of women as sexual objects could be a form of sex trafficking. In light of the history of sex trafficking and its causes and definitions, however, a potential application to these interrogations emerges.

In recent years, domestic and international legislative actions reflect rising concern about sex trafficking. For example, in 2000, the United States banned all forms of human trafficking through the Trafficking Victims Protection Act of 2000. Internationally, major covenants attempting to stem the flow of sex trafficking have entered into force. In 2000, the United Nations drafted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children,

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138. ARS § 13-1404. I chose Arizona statutes for this example because of the evidence that training on these interrogation methods occurred in Arizona at Fort Huachuca.
139. ARS § 13-1401.
140. Letter from T. J. Harrington, supra note 52.
141. See UCMJ discussion, supra.
Supplementing the United Nations Convention against Transnational Organized Crime. In 2003, it was entered into force and the United States ratified the Convention in 2005. In addition to these legal developments, there has been a great deal of attention to examining the root causes of sex trafficking and exploring ways to combat it.

As traditionally understood, sex trafficking typically involves the involuntary servitude of women for prostitution. Under such an understanding, there are many ways to distinguish the participation of women in the armed forces in interrogation from this traditional view. Women join the military voluntarily. They are paid for their service. They are recruited to do honorable work on behalf of their nation, not to be sexually exploited.

The issue, however, is whether there are analogies that can be drawn between sex trafficking and the U.S. military’s use of women as sexual objects during interrogation and whether the elements of the statute prohibiting sex trafficking are met when applied to the actions of the military. Because the concept of sex trafficking has expanded beyond the traditional scenario identified above, arguably the actions of the U.S. military could be deemed violations of the anti-trafficking laws designed to protect women from sexual exploitation.

Sex trafficking is defined under U.S. law as “the recruitment, harboring, transportation, provision or obtaining of a person for the purpose of a commercial sex act.” The first element is easily met in the context of females selected to perform sexualized interrogations. While this author discovered no evidence to suggest specific women were recruited to join the military in order to engage in sexually coercive interrogation, there is little doubt women were transported to Guantanamo Bay and other interrogation sites for the purpose of providing the “female” for the tactics of “use of female interrogators.” There would have been no way to engage in this sexualized technique without the requisite female.

The next question is whether transporting a female to facilitate the sexualized interrogations constitutes transporting a person for the purposes of

148. See e.g., WHITE HOUSE BULLETIN, First Lady Announces Campaign to End Forced Prostitution, Nov. 18, 1997 (“It is a violation of human rights when women are trafficked, bought and sold as prostitutes.”).
149. 22 U.S.C. § 7102(9) (Sex Trafficking).
150. Id.
a commercial sex act, as required by the statute. It is important to note sex trafficking occurs even in the absence of actual sexual intercourse or prostitution.\textsuperscript{151} In U.S. statutes governing sex trafficking, the term "commercial sex act" means "any sex act on account of which anything of value is given to or received by any person."\textsuperscript{152} While there are no cases that interpret the meaning of "anything of value" under this statute, statutes involving similar language have been broadly interpreted to include such intangibles as "amusement, sexual intercourse, a promise to reinstate an employee, and information."\textsuperscript{153} Here, the "commercial" aspect to the transaction is arguably met in any number of ways. The thing of value could be the money received by the military personnel for assigning a female interrogator to work in these sexualized interrogations. It could be the information received in exchange for the sexual coercion, any promotion, or commendation given based on a sexual interrogator's work.

Interestingly, the term "sex act" is not further defined in this statute, nor cross-referenced to any other federal statute. "Sex act" is defined in federal law in statutes criminalizing aggravated sexual abuse.\textsuperscript{154} In the aggravated sexual abuse context, "sex act" is rather narrowly defined and applicable to the most egregious allegations discussed in this article. However, it is unlikely the statutory definition would control in the sex trafficking context: In enacting the Trafficking Victims Protection Act of 2000, Congress noted the problem of sex trafficking is broader than simply forced prostitution.\textsuperscript{155} "It involves sexual exploitation of persons,

\begin{itemize}
\item A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight;
\item B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
\item C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
\item D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.
\end{itemize}

Were this statute to govern in the anti-trafficking context, it would only concern some of the most egregious acts alleged to have been committed.

\begin{itemize}
\item 152. 22 U.S.C. § 7102(3) ("Commercial Sex Act").
\item 153. \textit{United States v. Marmolejo}, 89 F.3d 1185, 1192 (5th Cir. 1996). \textit{See also, United States v. Girard}, 601 F.2d 69, 71 (2d Cir. 1979) ("The word ‘thing’ not withstanding, the phrase is generally construed to cover intangibles as well as tangibles.").
\item 154. "Sex act" is defined in 18 U.S.C. § 2246 (a criminal statute that governs aggravated sexual abuse), as:
\item A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight;
\item B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
\item C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
\item D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.
\end{itemize}

\item 155. Trafficking Victims Protection Act of 2000, PL 106-386, Sec. 102(b)(2).
predominantly women and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services." It is widely recognized "women have been trafficked to the US primarily for the sex industry." This industry is frequently defined to include a broad range of sexually related activity, including "prostitution, stripping, peep and touch shows, and massage parlors that offer a variety of sexual services." Thus, the recognized purposes of the prohibition against trafficking and the broad range of sexual behavior that anti-trafficking statutes are designed to address argue for a much broader interpretation of "sex act" than is included in criminal sexual abuse statutes. Sex trafficking stands apart from the practice of sexual intercourse; it arguably includes the sexualized interrogations in which U.S. military personnel engaged.

The use of female interrogators was designed to use female sexuality as a coercive weapon in the interrogation of suspected enemy combatants. It was explicitly gender based. The military used the interrogators' sexuality. The technique was overtly sexual. In practice, this tactic entailed women stripping, sexually taunting, lap dancing, rubbing their breasts against detainees, sexually humiliating detainees and even sexually assaulting detainees. The purpose of these sexual acts was to obtain something of value for those who instigated the sexual practices.

The intent behind the use of female interrogators could only have been the intent to use female sexuality as a coercive force. The military hierarchy must have been aware that sexualized interrogation occurred because the military not only documented the use of female sexuality in interrogation, but also trained its interrogators in the practice. Those who engaged in the practice were not prosecuted for their actions. Instead, there is evidence the military rewarded those who were adept in the practice.

Additionally, by examining the characteristics of the most common victims of sex trafficking, the behaviors of sex traffickers and workers, and the breadth of harms associated with trafficking, one can draw analogies between trafficking and military directives to conduct sexualized interrogations.

Trafficking is broadly defined to include individuals who are forced to engage in sex work against their will. It also includes those who engage in

156. Trafficking Victims Protection Act of 2000, PL 106-386, Sec. 102(b)(2) at 4.
158. Id.
159. As has been documented supra notes 55-8, interrogators are reported to have offered to exchange sex acts (as defined by the criminal sexual abuse statutes) in exchange for information. It is unclear if these offers would be construed as legitimate attempts to engage in such exchanges. If they were so construed, the commercial sexual act purpose would be established under even the most stringent standard.
sex work willingly but are forced to do so under conditions to which they did not agree.\textsuperscript{160} Women in both categories are often coerced into participation through means of force, duress, or fraud.\textsuperscript{161} They are often poorly educated, young, and without alternative economic options.\textsuperscript{162} Moreover, traffickers take “advantage of the unequal status of women . . . including harmful stereotypes of women as property, commodities, servants, and sexual objects.”\textsuperscript{163} “Gender inequality results in fewer educational and employment opportunities, making women more likely to accept traffickers’ misleading offers.”\textsuperscript{164} Because of this confluence of circumstances, women fall prey to traffickers who recruit them with promises of “high wages and good working conditions in exciting . . . cities.”\textsuperscript{165} “[T]he common thread in the many different methods of trafficking is that a woman is duped into believing she will find prosperity, or simply a better life, by taking a fraudulent offer from a trafficker in disguise.”\textsuperscript{166}

Once recruited, the sex worker is often relocated to a distant place, away from any support network of friends and family.\textsuperscript{167} She is threatened with arrest if she should attempt to flee.\textsuperscript{168} She is monitored constantly.\textsuperscript{169} She is required to follow the demands of the trafficker or face reprisals and punishment.\textsuperscript{170}

Some of the attributes found in sex workers are common to military recruits. Thus, while there are certainly differences, analogies to the


\textsuperscript{161} See, 22 U.S.C. § 7102(8).

\textsuperscript{162} “Traffickers successfully lure women into sex work because these women are victims of: poverty; the social practice of marginalizing women; the failure of some cultures and societies to place a value on traditional women’s work; and the lack of education and employment opportunities for women in developing and transition countries.” Susan W. Tiefenbrun, \textit{Sex Sells Dut Drugs Don’t Talk: Trafficking of Women Sex Workers and an Economic Solution}, \textit{24 T. Jefferson L. Rev.} \textit{199}, 208 (2000-2001).

\textsuperscript{163} Richard, supra note 157, at 1.


\textsuperscript{165} Richard, supra note 157, at 5.


\textsuperscript{169} Statement of Dr. Laura J. Lederer, supra note 167.

\textsuperscript{170} Id.
recruiting targets and tactics of the U.S. military can be drawn.171 Many military recruits are young.172 They are often without the necessary means for furthering their education.173 Their employment options are extremely limited. They are lured with promises of travel to exciting places, steady employment and educational opportunities.174 Simply put, often it is the lure of the promise of a better life that they seek through enlisting in the military.

Once enlisted, the “victims” are relocated to a distant place, away from any support network of friends and family. They face arrest if they flee. They are monitored constantly. They are required to follow the demands of their superior officers or they face punishment.175 Thus, comparisons can be drawn between the means used to target and obtain women for sex trafficking and military enlistment practices.

While it must be acknowledged that it is unknown precisely when and why female military personnel were recruited into the ranks of interrogators, it is known that women were specifically chosen to participate in some of the sexualized interrogations because of their gender. Given the length of time during which the methods were used, women must have been transported to facilitate sexualized interrogations. Those involved in developing these techniques and deploying women to engage in sexualized interrogations have therefore transported women for a purpose prohibited by anti-trafficking laws. Some of the acts could meet the broad range of “sex acts” meant to be proscribed by such laws and could have been done to obtain something of value. Arguably those responsible for the program have violated the anti-trafficking laws.

D. THE CONVENTION FOR THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The Convention for the Elimination of All Forms of Discrimination Against Women (“CEDAW”) was adopted in 1979 by the United Nations

171. The author is comparing attributes of those who fall prey to the tactics of sex traffickers and the methods used to entice people to join the military and who enlists in the military.
175. The author recognizes the real distinctions between an enslaved victim and the general situation faced by enlisted members of the U.S. workers. This comparison is limited in its scope to those members of the U.S. military who were used as objects of sexual torment during interrogations. The author’s intent is to analogize the pressures faced by those asked to use their sexuality during interrogations of detainees.
USE OF FEMALE INTERROGATORS

General Assembly. One hundred-eighty five countries, over ninety percent of the members of the United Nations, are parties to the Convention. Tellingly, the United States has been a signatory to CEDAW since 1980 but has yet to ratify it.

In considering how the terms of this treaty are relevant to an analysis of the legality of the actions of the United States in this context, there are three areas that must be addressed: the question of ratification, its application to actions of the military, and whether the specific actions of military personnel amount to discriminatory behavior as defined under the treaty.

1. The Applicability of CEDAW in the Absence of Ratification

This treaty, even in the absence of ratification, should be examined in considering the legality of the U.S. military’s use of women in sexualized interrogations. As recently as 2005, the United States Supreme Court looked to international covenants broadly adopted in other countries, yet not ratified in the United States, to determine the definition and scope of certain rights in the United States. In Roper v. Simmons, the Court analyzed the constitutionality of the execution of juveniles. Despite the absent U.S. ratification, the Court found widespread international adoption of the Rights of the Child relevant and persuasive. If a female interrogator compelled to use sexual interrogation methods brings a civil suit, CEDAW may impact the outcome.

Additionally, the United States is a party to the International Covenant on Civil and Political Rights (“ICCPR”). The ICCPR explicitly states

178. There are many reasons why the Unites States has not ratified this treaty. These reasons include the effects of the treaty on such varied subjects as access to lawful abortions to concern that it would proscribe celebrations of Mother's Day holidays. See, Harold Honju Koh, Why America Should Ratify the Women's Rights Treaty, CEDAW, 24 CASE W RES. J. Int'l L. 263, 272–75 (2002). Many critics have asserted that these reasons are unfounded and even "preposterous." Id. at 274.
180. Id.
181. Roper, 543 U.S. at 576.
that state parties "undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights..."\textsuperscript{183} The Covenant plainly provides "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . sex."\textsuperscript{184} CEDAW specifically obliges the signatories to comply with other human rights treaties to which they are parties, and affirms the necessity for CEDAW because "despite these various instruments extensive discrimination against women continues to exist."\textsuperscript{185}

Moreover, the United States recently affirmed its commitment to ensuring equality of women under international law. In the Statement by the Delegation of the United States to the Human Right's Counsel, the United States applauded the "Vienna Declaration and Programme of Action for its attention to the rights of women" and its call for "the eradication of all forms of discrimination against women, both hidden and overt."\textsuperscript{186} In this statement the United States reiterated that "eliminating discrimination against women is fundamental."\textsuperscript{187} It went on to state that "it is critical to eliminate not only de jure discrimination against women, but also de facto discrimination."\textsuperscript{188}

Finally, the pan-national targets of the United States' efforts in the GWOT supports consideration of the terms of CEDAW, even in the absence of formal ratification. Given that the United States emphasized the global nature of this conflict, internationally accepted norms that limit discrimination against women are appropriate to consider in the evaluation of U.S. actions.\textsuperscript{189}


\textsuperscript{187} Id.

\textsuperscript{188} Id.

\textsuperscript{189} This Article is not meant to be a dissertation on the role of Customary International Law and its applicability to U.S. personnel. However, it is clear that the United States accepts the applicability of Customary International Law. See, e.g., Hamdan v. Rumsfeld, 548 U.S. 587, 633 (2006), citing William H. Taft IV, The Law of Armed Conflict After 9/11: Some Salient Features, 28 YALE J. INT'L L. 319, 322 (2003). The Restatement (Third) of Foreign Relations Law of the United States, sec. 702, entitled "Customary International Law," makes clear that a state violates international law, if "as a matter of state policy, it
2. Application of CEDAW to Actions of Military Personnel

In addition to the broad proscriptions contained in CEDAW, the covenant addresses specific areas such as employment, health and political participation by women. However, it is silent on the issue of discrimination against women in the military. Thus, the question of whether limitations on discrimination against women contained in CEDAW apply to the policies and actions of the military remains open. Moreover, there has been considerable controversy surrounding this issue.190

The controversy focuses on Articles 7 and 8 of the treaty. An examination of these articles is necessary to determine whether actions of the military are governed by CEDAW. Article 7 states in relevant part:

Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right...[t]o vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; and [t]o participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.191

Article 8 states, “Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.”192

By their explicit terms, these sections apply to participation in “public functions,” the implementation of government policy, and “representation of governments at the international level,” all of which suggest the inclusion of military actions. Specifically, it could be argued these sections practices, encourages, or condones... (g) a consistent pattern of gross violations of internationally recognized human rights.” CEDAW by its terms protects against violations of “fundamental human rights” including the “equal rights of men and women.” CEDAW, Preamble. Customary International Law supports the notion that the United States would have jurisdiction to prosecute anyone who, as a policy, practices, encourages or condones a pattern of gross violations of these internationally recognized human rights. At the very least, customary international law supports U.S. jurisdiction over any allegations involving sexual assaults against persons under the age of eighteen. See, Benjamin Perrin, Taking a Vacation from the Law? Extraterritorial Criminal Jurisdiction and Section 7(4.1) of the Criminal Code, 13 CAN. CRIM. L.R. 175, 203 n.132 (and accompanying text) (2009).


apply to the actions of the United States in the GWOT as an international event in which a coalition of multinational forces engaged. Further, the sections seem applicable because of the United States’ assertion that its actions in invading Iraq, for example, were a response to Iraq’s refusal to follow U.N. mandates about weapons inspections. Since the international character of this conflict is evident, the terms of these provisions could be applied to the actions of members of the U.S. military.

The record of the U.S. Senate consideration of the treaty also supports its applicability to the military actions aforementioned. The Senate Foreign Relations Committee in 1994 recommended the inclusion of a reservation to CEDAW that the United States “does not accept an obligation under the Convention to assign women to all military units and positions which may require engagement in direct combat.” Thus, it appears the United States government recognized that the terms of this treaty, if ratified, would apply to military actions, and chose to reserve from its CEDAW obligations the decision to send women into “engagement in direct combat.”

In the years since the CEDAW signing, the Committee for the Elimination of All Forms of Discrimination against Women (Committee), which was organized as part of the treaty, issued several General Recommendations expanding upon the meaning and application of CEDAW. In 1992, in its discussions on the provisions regarding the issue of violence against women, the Committee referred to the right of women to be free from discrimination as defined under the CEDAW in “time of international or internal armed conflict.” Thus, the Committee recognized the provisions’ applicability in protecting women from discrimination even in during times of war.

In 1997, the Committee again commented on the meanings of CEDAW, specifically relating to Articles 7 and 8. With regard to the breadth of Article 7, the Committee stated, “[A]rticle 7 extends to all areas of public and political life and is not limited to those areas specified in

195. It appears beyond dispute that the actions of coalition forces who come from states who are parties to the CEDAW could be founds to have violated these provisions if those member states participated in these sexualized interrogations in any manner.
subparagraphs (a), (b) and (c). The political and public life of a country is a broad concept. Given this breadth of application, it is difficult to imagine the military would be excluded from application of the non-discriminatory principles.

The Committee stated with regard to Article 8:

Governments are obliged to ensure the presence of women at all levels and in all areas of international affairs. This requires that they be included in economic and military matters, in both multilateral and bilateral diplomacy, and in official delegations to international and regional conferences.

Thus, the Committee itself interprets the terms of CEDAW to apply to the actions of the military. However, the debate is settled on the impact this treaty has on the engagement of women in direct military combat. At a minimum, it would appear that this treaty, designed to eliminate discrimination and all forms of degrading treatment, would encompass the use of women’s sexuality as a tool of warfare.

3. Sexualized Interrogations and Discrimination under CEDAW

The preamble to the CEDAW emphasizes the goal of this convention was to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.” To achieve this end, the Convention lays out certain actions required by member states to eliminate discrimination.

“Discrimination” is defined under the treaty as:

[ANY] distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

CEDAW addresses the problem of discriminatory actions in a number of ways, explicitly defining trafficking and the exploitation of prostitution.

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200. Id.
201. This statement has only increased the concerns identified by the Senate Foreign Relations Committee that the CEDAW would require the United States to engage women on the front lines of combat, in contravention of U.S. military policy.
of women as forms of discrimination. Article 6 states that “[p]arties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”204 In light of the discussions of trafficking, criminal exploitation under the Mann Act and violations of the UCMJ, sexualized interrogations likely run afoul of Article 6’s command to suppress trafficking and the exploitation of prostitution of women, as well as the general prohibition against degrading treatment found in Article 7.

In addition, Article 5 of the treaty requires party states to “take all appropriate measures to . . . modify the social and cultural patterns of men and women with a view to achieving the elimination of practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”205 It is perhaps this broad mandate that is most relevant to the actions of the United States military in this context. The military’s use of women as instruments of sexual torment is a practice that facially stereotypes both men and women. The male stereotype at issue here is the stereotype that Arab and Muslim men exposed to female sexuality can be coerced into making statements by the “use of female interrogators.” The female stereotype at issue here is the idea that women are defined solely by their sexuality and sexual identity. Both forms of stereotyping are proscribed under CEDAW. Member states are required to take all appropriate measures to modify these patterns, rather than engage in activity that perpetrates those stereotypes.

V. CONCLUSION

The use of sexualized interrogation has been largely ignored in recent debates over the legality and efficacy of the Bush Administration’s policies of torture and interrogation methods, as well as the related arguments about whether these practices have truly been abandoned by the Obama Administration. Some discussion on the role women played in these interrogations exists; however this Article analyzes the use of women in the performance of sexualized interrogations under the various legal regimes designed to protect women from subjugation and exploitation on the basis of gender.

Careful analysis of the relevant provisions of the UCMJ illustrates specific laws governing the behavior of U.S. military personnel have been violated by the use of sexualized interrogation techniques. These violations, in turn, give rise to potential Mann Act prosecutions, despite the

recent dormancy of that provision. Although prosecutions under the UCMJ and the Mann Act are exceedingly unlikely given the resistance to prosecuting such torturous acts as waterboarding,\footnote{Greg Miller & Josh Meyer, \textit{Criminal Investigation Into CIA Treatment of Detainees Expected}, \textit{Los Angeles Times}, Aug. 8, 2009, available at \url{http://www.latimes.com/news/nationworld/nation/la-na-cia-interrogate9-2009aug09,0,34626.story}.} perhaps this Article will spur some discussion about whether prosecutors should prosecute those who ordered and orchestrated sexualized interrogations under these provisions and whether civil liability should extend to those who designed this system.

The analyses of sexualized interrogations under anti-trafficking laws and CEDAW provide clear indication that U.S. military policies have subverted the essence of laws designed to protect women from exploitation and to provide them with equal opportunities and rights. Not only has the letter of these laws and conventions been violated, their spirit was grievously injured.

Sadly, the United States has joined the nations of the world that use gender and sexuality as weapons of war. In the long history of using gender and sexuality in warfare, these actions are far from the worst examples. Yet, the use of this tactic undermines the United States’ moral standing among other nations and frustrates the quest to treat women with equality. Those who designed, orchestrated, and implemented this policy should all be held to account under the law.

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