The Law of Interrogations

The issue of Torture and Ill-treatment

Office of the Judge Advocate General
Strategic Legal Paper Series
Issue 1

National Defence Défense nationale

Office of the Judge Advocate General
Cabinet du Juge-avocat général

Canada

National Defence / Défense nationale

A-LG-007-SLA/AF-001

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OFFICE OF THE JUDGE ADVOCATE GENERAL STRATEGIC PAPER SERIES – ISSUE 1

(BILINGUAL)

Issued on Authority of the Chief of the Defence Staff

OPI: JAG-DSLA

2008-06-04

Canada

LIST OF EFFECTIVE PAGES

Insert latest changed pages and dispose of superseded pages in accordance with applicable orders.

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Dates of issue for original and changed pages are:

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PREFACE

The purpose of the Strategic Legal Paper Series is to promote consideration and discussion among Canadian Forces legal officers on selected topics of strategic legal importance.

The complex security environment of the 21st Century, including the threat of transnational terrorism, presents unique and challenging legal issues for military commanders and their legal advisors. Therefore, topics addressed in this series should also be of professional interest to military commanders and their staffs.

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The Issue of Torture and Ill-treatment

Captain Sara R. Siebert

ABSTRACT

This paper discusses the law applicable to Canadian Forces intelligence gathering interrogations activities that take place in the context of international operations. The objective is to provide a broad overview of the law of interrogation by considering interrogation methods and techniques and exploring what is meant by torture and ill-treatment in this context. In situations of armed conflict, International Humanitarian Law (IHL) is applicable as lex specialis and human rights law as lex generalis. This paper considers the minimum level of protection to which detainees are entitled under the provisions of IHL and the standards of treatment that define the acceptable legal boundaries relevant to interrogations. In so doing, the analysis also considers other areas and sources of law to better understand and interpret the applicable legal obligations. Finally, specific methods and techniques aimed at persuading a detainee to cooperate are examined.

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INTRODUCTION

Interrogation is the processes by which specially trained and authorized personnel conduct controlled and systemic questioning of individuals in order to obtain information.[1] This type of formal questioning and information gathering has been likened to an intense and thorough cross-examination.[2] The goal, or challenge, of an interrogation, is to have a detainee divulge information that he or she is predisposed to hold back. In this respect interrogation is, in effect, a contest of wills. The purpose of this paper is to discuss legal issues that provide doctrinal guidance with respect to the conduct of Canadian Forces ("CF") interrogations which take place in the context of a full range of international operations.[3]

The CF's legal obligations and the standards applicable thereto, are derived from, and informed by, international law, domestic law, and military doctrine. These sources of law jointly and severally create the legal framework applicable to intelligence gathering activities and to the interrogations of detainees in an operational context. The content, scope of application, and interrelationship of the various sources of law and related policies that may potentially apply in a defined operation require careful and complex legal analysis. The applicability of the relevant legal regimes and their precise hierarchical relationships are not considered in this paper.[4] The objective is to provide a broad overview of the law of interrogation by considering interrogation methods and techniques and exploring what is meant by torture and ill-treatment in this context.

It is useful to recall that while there is a general legal framework which restricts the methods that may be used to elicit information from a detainee, there is nothing in the texts (or indeed spirit) of the laws which prohibits the interrogation process itself.[5] Individuals subject to interrogations have rights and protections that are defined primarily by international law and the primacy of international humanitarian law (IHL) as the law applicable in situations of armed conflicts.[6] Specifically, in the context of international armed conflict (IAC) and non-international armed conflict (NIAC) the *lex specialis* character of IHL and applicability of international human rights law (IHRL) as *lex generalis* is asserted.[7]

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1 Interrogation, as defined by the Merriam Webster Dictionary, is the act of "questioning; formally and systematically."

2 Kantwill, Holdaway, and Corn "'Improving the Fighting Position' A Practitioner's Guide to Operational Law Support to the Interrogation Process" (July 2005) The Army Lawyer 12 at 18 ["Improving the Fighting Position"].

3 In this respect, this paper does not discuss CF interrogations that take place within Canada.

4 For example, this paper does not address the issue of whether the *Canadian Charter of Rights and Freedoms* applies specifically to particular CF operations.

5 "The ICRC has never stated, suggested or intimated that interrogation of any detainee is prohibited, regardless of the detainee's status or lack of status under the Geneva Conventions. The ICRC has always recognized the right of States to take measures to address their security concerns. It has never called into question the right of the US to gather intelligence and conduct interrogations in furtherance of its security interests. Neither the Geneva Conventions, nor customary humanitarian law, prohibit intelligence gathering or interrogation. They do, however, require that detainees be treated humanely and their dignity as human beings protected. More specifically, the Geneva Conventions, customary humanitarian law and the Convention against Torture prohibit the use of torture and other forms of cruel, inhuman or degrading treatment. This absolute prohibition is also reflected in other international legal instruments and in most national laws." See *ICRC Reactions to the Schlesinger "Panel Report"* (Aug 9, 2004), available online at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/64mhs7?opendocument> (visited 25 Jan 2008). See also *R (Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58 wherein the House of Lords accepted that a power of detention was recognized under customary IHL.

6 The term IHL is used to describe the totality of rules specifically applicable in situations of conflict.

7 See generally Heintze "On the relationship between human rights law protection and international humanitarian law" (2004) 86 *International Review of the Red Cross* 789; Schabas, "Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum" (2007) 40 *Isr. L. Rev.* 592; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep 226.; *Legal Consequences of the Construction of a Wall in the Occupied Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136.

From a doctrinal and principled perspective the legal analysis of the *lex specialis* applicable to interrogations conducted in the context of international operations elucidates fundamental norms which are commonly understood to inform the rules protecting detainees and, by extension, the lawfulness of interrogation techniques that may be used. The two principle ideas that permeate this area of law are the following: detainees are to be *treated humanely* and be *protected against all forms of coercion.* In this respect, it is clear that both positive and negative obligations are engaged. In addition, we can identify a further overarching principle namely that to be lawful, at a minimum, all conduct must have an articulable purpose that is directly, and determinedly related, to the investigative process.

The focus of this paper is to explore the minimum level of protection to which detainees are entitled to under the provisions of IHL. In addition, this paper also considers the standards of treatment that define the acceptable legal boundaries relevant to interrogations. In so doing, the analysis will consider both areas and sources of law that may inform our understanding and interpretation of the applicable legal obligations. As such, the analysis does not engage the debate on whether the current legal limits are morally defensible and it does not consider nor explicate policy considerations that could limit what is otherwise permissible conduct.[8] Consideration of the procedural and substantive requirements relating to the manner of arrest, treatment of detainees generally and ultimate disposition of cases is also beyond the scope of this paper. Reference to rules applicable in respect of the overall handling and treatment of detainees is thus only addressed incidentally.[9]

In addition, and very importantly, this paper does not address the relationship between interrogation and the rules of evidence and due process requirements.[10] A person detained on suspicion of involvement in crime has legal rights and failure to provide for exercise of those rights may lead to the inadmissibility of evidence in court, or other remedies. In addition, in some cases willfully depriving a detainee of due process rights could be considered a grave breach of the Geneva Conventions (GCs).[11] Accordingly, while matters of rules of evidence and due process requirements are extremely serious and must be fully understood by persons conducting interrogations, a discussion of them is beyond the scope of this paper.

There is very little specific legal guidance on the issue of interrogations in the context of international operations. There are, however, important rules of specific and general application that apply in the context of interrogations. As suggested above, the international law relevant in this context can be considered under two headings: IHL and IHRL. As a general rule, we may say that a CF operation will engage IHL as *lex specialis*, when the interrogation takes place in the context of an armed conflict. In addition, CF policy provides that "all interrogation and TQ activity will fully comply with Canadian law and relevant international law, conventions, and agreements, including the Third Geneva Convention (relative to the treatment of PW), and the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984)*" and that at "a minimum the spirit and principles of the Law of Armed Conflict in all CF operations other than Canadian domestic operations"[12], will prevail.

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8 Policy-based constraints may result in restricting the use of otherwise legal techniques. For example, withholding certain non-legally mandated privileges. See e.g. "Improving the Fighting Position" at 21.

9 See e.g. B-GJ-005-110/FP-020, *Prisoner of War Handling: Detainees and Interrogation & Tactical Questioning in International Operations* (1 Aug 04) [*PW Handling Manual*]; B-GG-005-027/AF-023, *Code of Conduct for CF Personnel* [*Code of Conduct*]; B-GJ-005-104/FP-021, *Law of Armed Conflict at the Operational and Tactical Levels* (13 Aug 01).

10 "If in the course of interrogation or tactical questioning, information is rendered that is related to a possible or known war crime or other criminal offence, the immediate action unless otherwise specified shall be to continue the operationally-oriented questioning while ensuring that the military police are informed as soon as practicable" *PW Handling Manual* at art. 4A03.

11 *Convention Relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949 [GCIII], art. 130; *Convention Relative to the Protection of Civilian Persons in Times of War* Geneva, 12 August 1949, [GCIV], art. 147. See also Geiβ, "Name, Rank, Date of Birth, Serial Number and the Right to Remain Silent" (2005), 87 *International Review of the Red Cross* 721.

12 *Code of Conduct*, at 4-2 and 1-1.

THE LEGAL FRAMEWORK

In CF international operations, IHL and IHRL are complementary branches of international law, which define the rules that delineate the line between permissible and prohibited conduct in the context of interrogations. The majority of the general international law rules applicable to interrogations are framed negatively: that is the law states that certain conduct is not permitted. Perhaps the most important rule is, however, a positive one, namely that all persons detained by the CF must be treated humanely. In situations of armed conflict, IHL is applicable as *lex specialis*, and IHRL as *lex generalis*. It is however recognized that IHL and IHRL rules emanate from the same basic principle: ensuring respect for human dignity. For this reason, a review of existing IHRL frameworks is of practical and normative significance. In addition, contrary to IHRL, IHL has not benefited from treaty bodies and mechanisms that have supervised its implementation and contributed to its evolution. In this way, while the normative differences between IHRL and IHL are recognized, a review of IHRL principles and jurisprudence will help elucidate IHL obligations and standards.

By way of example, customary and conventional rules of IHL prohibit absolutely, in all forms of armed conflict, inhumane treatment. The Third and Fourth GCs direct that all detainees be treated humanely at all times. Specifically, the killing, torture, or inhumane treatment or the causing of great suffering or injury to persons protected by the GCs are grave breaches of the treaties and constitute war crimes. Customary and treaty-based human rights law also defines concepts and standards which are applicable to interrogations. The jurisprudence in this area explores whether certain techniques are permitted, whether used alone or in combination with other methods. Human rights obligations prohibit torture and other forms of ill-treatment including cruel, inhuman or degrading treatment or punishment.

Although relevant human rights principles "can only be decided by reference to the law applicable in armed conflict",[13] namely IHL, a state's human rights obligations do not cease to apply during armed conflicts. Human rights obligations are interpreted in light of the *lex specialis* of IHL. Without addressing the complex and difficult issue of whether other sources of law may be applicable to CF operations, a review of interrogation techniques that have been identified as abusive by international treaty bodies and in domestic courts applying criminal law, is instructive. This review is intended to identify the kinds of treatment which may be consider unlawful.[14]

I. International Humanitarian Law

A) Protection Under the Geneva Conventions of 1949

As a matter of treaty law and of customary law, Common Article 3 of the 1949 GCs prescribes rights and obligations with respect to any person who is *hors de combat* and no longer taking an active part in hostilities.[15] Common Article 3 requires that all such persons "shall in all circumstances be treated humanely" and as such sets out a minimum standard for the conduct of interrogations and treatment of detainees. The GCs provide a baseline for broad protections because Common Article 3 articulates a humane treatment standard which applies "in all circumstances" and "at any time and at any place whatsoever".

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13 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 226, at para. 24.

14 See for example: Evans, "Getting to Grips with Torture" (2005) 51 Int'l & Comp. L. Q. 365; Evans & Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (New York: Oxford University Press, 1998); Guiora & Page "The Unholy Trinity: Intelligence, Interrogation and Torture" (2006) 37 Case W. Res. J. Int'l L. 427; Shany, Yuval "The Prohibition Against Torture and Cruel, Inhuman, and Degrading Treatment and Punishment: Can the Absolute be Relativized Under Existing International Law?" (2007) 56 Cath. U. L. Rev. 837; and Rona, Gabor "War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Legal Frameworks to Combat Terrorism" (2005) 5 Chi. J. Int'l L. 499.

15 The Geneva Conventions protect two types of detainees: prisoners of war (PW) and civilians (also known as protected persons). In addition, Article 75 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977 [API] assures the same minimum guarantees to every person detained, regardless of status. These protections have achieved the status of customary law. See e.g. *Prosecutor v. Musema*, ICTR-96-13-A, Trial Chamber I Judgment and Sentence (27 January 2000): along with Common Article 3 these provisions represent "Fundamental Guarantees as a humanitarian minimum of protection for war victims" which are recognized as customary international law.

State obligations enshrined in IHL vary in accordance with the nature of the conflict and the status of the detained individual.[16] Principles reflected in the provisions of IHL treaty law may also apply as a matter of customary international law. The minimum standard is one of humane treatment and one can identify the concomitant legal prohibitions which flow from constraints which apply at all times. This principle is reflected in Common Article 3 of the GCs, as well as other provisions of the GCs. The humane treatment principle is commonly understood and accepted as the "baseline standard of treatment for any person affected by armed conflict who is not, or is no longer, taking part in hostilities."[17]

The International Court of Justice (ICJ) has confirmed that the rules relating to the protection of persons *hors de combat* constitute the "minimum yardstick" in so far as they reflect "elementary considerations of humanity."[18] The importance of this basic principle is buttressed by the fact that the humane treatment principle enshrined in Common Article 3 is further emphasized throughout the provisions of the four GC's. The International Committee of the Red Cross (ICRC) has, in its Commentary on the GCs, emphasized that "the obligation to grant protected persons humane treatment is in truth the *leitmotiv* of the four Geneva Conventions."[19]

In addition, it is clear that there can be no derogations from the dictates of humanity. As such, this principle is fundamental because it is valid at all times and must be respected notwithstanding any military or other security imperative.

The GCs do not explicitly define humane treatment or inhumane treatment.[20] A sense of the meaning of these terms, however, is developed through reference to positive and negative obligations relating to the treatment and interrogation of persons.[21] In this respect, the specific provisions of the GCs and Additional Protocols I[22] (API) and II[23] (APII) further particularize the content and scope of the standard of humane treatment. As is discussed below, both the GCIII, relative to prisoners of war,[24] and GCIV, relative to the protection of civilian persons in time of war,[25] elaborate on the principle of humane treatment and explicate the standard of treatment and concomitant prohibited conduct.

With respect to the issue of the interrogation process itself, the GCs prohibit the use of coercion to obtain information. This aspect of the protective scope of the GCs complements the general obligation to treat detainees humanely. Again this term is not defined within the provisions of the GCs but it is clear that coercion, whether physical or moral, is equally prohibited.

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16 For example, although IHL applies to all armed conflicts, treaty provisions regulating conduct in international armed conflicts are more extensive than those applicable to non-international armed conflicts.

17 "Improving the Fighting Position" at 22.

18 *Nicaragua Case*, [1984] I.C.J. Rep. 392 paras. 218 and 255; see also *Abella v. Argentina* (1997) Inter-Am. CHR.Case No. 11.137, Report No. 5/97 paras. 155-156.

19 ICRC, *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War: Commentary* Article 3 (Jean Pictet Ed., 1958), available at http://www.icrc.org [ICRC Commentary IV].

20 The definition provided in the GC's for "humane treatment" is thus "not a very precise one," and that it is easier to frame the definition in the negative, through defining what is inhumane than in the positive. ICRC Commentary IV, Article 3, at 39.

21 Arguably the standard is also informed by, but not necessarily equivalent to, those methods of interrogation which are prohibited under other sources of international and domestic law.

22 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I),* Geneva, 8 June 1977 [API].

23 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),* Geneva, 8 June 1977 [APII].

24 *Third Geneva Convention relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949 [GCIII].

25 *Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949 [GCIV].

B) Humane Treatment

i) *Detainees Must Be Treated Humanely:*

Most of the IHL rules relating to interrogations are negative ones that prohibit a certain type of treatment. The one exception is the positive requirement to treat all detainees humanely.[26] This positive obligation permeates the provisions and protections afforded in the four GCs.

In the prisoner of war (PW) context, the general obligation is simply stated: "Prisoners of war must at all times be humanely treated."[27] The ICRC Commentary to the GCs explains that the drafters added "at all times" to prevent any derogation from the principle of humanity by reference to the exigencies of the conflict.[28] Simply put, the notion of "military necessity" cannot be invoked to modify the standard of treatment.

The text of Article 13 of GCIII, further provides that PWs must be protected, "at all times", "particularly against acts of violence or intimidation and against insults and public curiosity." The article goes on to specify types of treatment that are prohibited, and others that are mandated. In the ICRC's view, the "principal elements of humane treatment" as listed in Article 13 are as follows:[29]

a. any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited;[30]

b. no prisoner of war may be subjected to physical mutilation;

c. no prisoner of war may be subjected to […] medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest;

d. prisoners of war must at all times be protected, particularly against acts of violence; intimidation;[31] and insults and public curiosity;[32]

e. measures of reprisal against prisoners of war are prohibited.

GCIV provides that "protected persons" benefit from the same rule.[33] Civilians must be treated at all times with humanity. The wording of Article 27 of GCIV can be used to clarify the meaning of humane treatment within the GCs. Article 27 recognizes that "protected persons are entitled, in all circumstances, to respect for their persons,

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26 In this context, a detainee may be defined as any person captured or otherwise detained by an armed force.

27 GCIII, art. 13. A similar rule exists for sick and wounded in the field: *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, 12 August 1949 [GCI], art. 12; and wounded and sick at sea and shipwrecked: *Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked members of Armed Forces at Sea*. Geneva, 12 August 1949 [GCII], art. 12. API, art. 10, also reinforces the requirement to treat wounded, sick and shipwrecked humanely.

28 ICRC, *Geneva Convention (III) Relative to the to the Treatment of Prisoners of War: Commentary* (Jean Pictet Ed., 1958), available at http://www.icrc.org [ICRC Commentary III] at 140.

29 ICRC Commentary III. See also Elsea, *Lawfulness of Interrogation Techniques under the Geneva Conventions* (September 8, 2004), CRS Report for Congress, RL32567 ["CRS: *Lawfulness of Interrogation Techniques*"] at 18, suggesting that GCIII articles 14-16 might also contain elements of humane treatment.

30 Such an act or omission is explicitly denounced as a "serious" breach in the text of the article.

31 ICRC Commentary III states that this protection against intimidation means that "the protection extends to moral values, such as the moral independence of the prisoner."

32 Whether this prohibition prevents displaying detainees in news media is subject to some debate: see, e.g. CRS: *Lawfulness of Interrogation Techniques*, at 19.

33 GCIV, art. 27.

their honour, their family rights, their religious convictions and practices, and their manners and custom;" and also provides that "they shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity." The ICRC Commentary to Common Article 3 states that Article 27 conveys "the sense in which 'humane treatment' should be understood." Again, this article repeats prohibited acts contained in the articles mentioned above, but we may add to the list threats of violence. In addition, API Article 75, also provides that persons covered by that article, namely every person detained, regardless of status, "shall be treated humanely in all circumstances."[34]

The protection guaranteed by Common Article 3 of the GCs also includes freedom from "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" as well freedom from "outrages upon personal dignity, in particular humiliating and degrading treatment".[35] This non-exhaustive list of general acts is clearly demonstrative of conduct which is prohibited on the basis that they are inhumane. Torture constitutes a grave breach of the Conventions.[36]

ii) *Torture:*

There are several express references in the GCs prohibitions which proscribe the use of torture.[37] The use of torture is a grave breach of all four of the GCs,[38] is a crime against humanity,[39] and a war crime.[40] Common Article 3 prohibits the use of torture in any circumstance but does not actually define what constitutes torture.[41] There is no definition of torture within IHL, however, the ICRC's Commentary offers the following: "The word torture refers here especially to the infliction of suffering on a person in order to obtain from that person, or from another person, confessions or information."[42]

The law in relation to PWs includes the rule that "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever."[43] In the context of

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34 The same rule is provided at APII, art. 4, 5, and 7, in respect of those non-international armed conflicts governed by APII, for wounded, sick or shipwrecked as well as detained persons and all others "who do not take a direct part or have ceased to take part in hostilities."

35 GC Common Article 3(1)(a)-(c).

36 GCIII art. 130.

37 In addition to the rules prohibiting torture cited below, there are others applicable in particular circumstances. Under GCI, art. 12, wounded or sick may not be "subjected to torture." Under GCII, art. 12, the same rule applies for those wounded, sick at sea, or shipwrecked.

38 GCI art. 50, GCII art. 51, GCIII art. 130, GCIV art. 147. In the PW context, see GCIII, art. 130; and for protected persons, see GCIV, art. 147. This point is expressly made in the *Rome Statute of the International Criminal Court*. U.N. Doc. A/CONF.183/9 (17 July 1998). Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July, 1998 ["Rome Statute"] art. 8(2)(a).

39 Rome Statute, art. 7(1)(f).

40 Rome Statute, art. 8(2)(a)(ii). Under the Rome Statute, art. 8(2)(c)(i), torture is also a war crime when committed in the context of an armed conflict not of an international character through reference to Common Article 3 of the Geneva Conventions.

41 Common Article 3 contains an express prohibition on torture framed along the lines of that in API. Common Article 3 prohibits "violence to life and person, in particular…torture." As with API, art. 75, the prohibition in common article 3 is against "violence to life and person," and thus prohibits conduct short of torture including, expressly, "cruel treatment." It is clear that common article 3 applies during interrogations: see CRS: *Lawfulness of Interrogation Techniques*, at 8 and cited cases.

42 ICRC Commentary III, Article 130.

43 GCIII, art. 17. The rule is restated in the context of penal and disciplinary sanctions against PWs at GCIII, art. 87.

protected persons, a blanket prohibition on causing "physical suffering or extermination" includes a specific prohibition on murder, torture, corporal punishment, mutilation, medical experimentation, and "any other measure of brutality whether applied by civilian or military agents."[44] API contains a set of rules applicable to "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment." One rule is the prohibition on "torture of all kinds, whether physical or mental."[45] The wording of the article makes it clear that torture is considered a type of "violence to the life, health, or physical or mental well-being of persons." Accordingly, API Article 75(2) prohibits conduct short of torture as well, including, expressly, "corporal punishment."

iii) *Cruel or Inhuman Treatment:*

Common Article 3 prohibits "cruel treatment" as a type of "violence to life and person."[46] GCIII sets out rules specific to PWs who are punished by the detaining power for violations of law. One such rule prohibits "any form of […] cruelty."[47] A similar rule for internees provides that "all forms of cruelty without exception are forbidden."[48] A rule for APII non-international armed conflicts prohibits "cruel treatment."[49]

GCIII also limits disciplinary sanctions against PWs, including an absolute prohibition on those that are "inhuman, brutal or dangerous to the health of" PWs.[50] A comparable rule exists for disciplinary sanctions against internees.[51] In certain cases IHL permits derogations from the protections afforded to a protected person detained as a spy or saboteur or definitely suspected of hostile activities. However, in all cases such persons must "be treated with humanity."[52] It is a grave breach to commit an act of "inhuman treatment" against PWs,[53] protected persons,[54] wounded or sick persons,[55] or those wounded or sick at sea, or shipwrecked.[56] The Rome Statute makes committing acts of "inhuman treatment" a war crime.[57]

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44 GCIV, art. 32. The ICRC Commentary IV, Article 147: "The word torture has different acceptations. It is used sometimes even in the sense of purely moral suffering, but in view of the other expressions which follow (i.e. inhuman treatment including biological experiments and suffering, etc.) it seems that it must be given here its, so to speak, legal meaning - i.e., the infliction of suffering on a person to obtain from that person, or from another person, confessions or information."

45 API, art. 75(2)(a). APII has an almost identical provision for "all persons who do not take a direct part or have ceased to take part in hostilities" in the context of an APII non-international armed conflict.

46 As noted above, torture is also prohibited as "violence to life and person." Rome Statute, art. 8(2)(c)(i) criminalizes violation of this prohibition in Common Article 3 in the context of an armed conflict not of an international character.

47 GCIII, art. 87.

48 GCIV, art. 118.

49 APII, art. 4. Examples of cruel treatment given in the text are "torture, mutilation or any form of corporal punishment." Interestingly, API, art. 75 guarantees don't explicitly prohibit cruel treatment although any treatment that might be considered cruel is certainly prohibited under API on other grounds.

50 GCIII, art. 89.

51 GCIV, art. 119. The term "internee" refers to detained protected persons in certain cases.

52 GCIV, art. 5.

53 GCIII, art. 130.

54 GCIV, art. 147.

55 GCI, art. 50.

56 GCII, art. 51.

57 Rome Statute, art. 8(2)(a)(ii).

The ICRC Commentary to the GCs has considered the question of which ill-treatment or abusive practices, other than torture, can be classified as inhuman and concluded that it is not limited to treatment affecting a detainee's physical integrity or health; "the aim of the Convention is certainly to grant prisoners of war in enemy hands a protection which will preserve their human dignity and prevent their being brought down to the level of animals." As such, measures which would cause "great injury to their human dignity" should be considered as inhuman.

Common Article 3 prohibits "humiliating and degrading treatment" as part of the class of treatment referred to as "outrages upon personal dignity."[58] The ICTY in the Kunarac case considered the criteria to be used as a basis for measuring the humiliating or degrading character of an act or omission. The Trial Chamber held that the humiliation of the victim must be so intense that any reasonable person would be outraged: outrages upon personal dignity are constituted by "any act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity."[59]

This exact wording was replicated in Article 75 of API and is thereby applicable to the class of persons covered by that article.[60] The Rome Statute makes committing such acts a war crime.[61]

C) Questioning Persons in Detention

Interrogation is explicitly considered in Article 17 GCIII and in Article 31 GCIV. GCIII, applicable to PWs, prohibits the use of any form of coercion while GCIV prohibits the use of physical or moral coercion against civilians.

More specifically, Article 17 GCIII reads: "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever." In addition, a PW who refuses to answer may not be "threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind". Article 99 also provides as follows: "No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused."[62] The prohibition in Article 17 is comprehensive. Commentators observe that the language of its predecessor, Article 5 of the 1929 Convention, prohibited coercive interrogation only as it related to information "relative to the condition of their army or their country". The drafters of the 1949 Convention clearly expanded the scope of the prohibition by proscribing all forms of coercion relating to information of any kind whatever.[63]

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58 What is prohibited is "outrages upon personal dignity, in particular, humiliating and degrading treatment." But some appear to suggest that only certain humiliation or degradation meets the requirements necessary to be termed an outrage upon human dignity: "Acts causing severe humiliation or degradation may rise to the level of 'outrages upon human dignity.'"(CRS: *Lawfulness of Interrogation Techniques*, at 20).

59 *Prosecutor v. Kunarac*, IT-96-23, Trial Chamber Judgment (22 February 2001) para. 507. This approach was endorsed on Appeal. See *Prosecutor v. Kunarac*, IT-96-23, Appeals Chamber Judgment (12 June 2002).

60 API, art. 75, also adds to the list of examples of "outrages upon human dignity" "enforced prostitution and any form of indecent assault." Tracking language also appears in APII, art. 4, with the addition of "rape" to the list of examples of "outrages upon human dignity."

61 Rome statute, art. 8(2)(b)(xxi), and, in the specific context of an armed conflict not of an international character, art. 8(2)(c)(ii).

62 GCIII, art. 99.

63 See e.g Glod, & Smith "Interrogation Under the 1949 Prisoners of War Convention" (1968) *Military Law Review* 145, at 145: GC III expanded both the types of information protected by the 1929 Convention ("information of any kind whatever") and reduced the means by which information could be extracted ("no physical or mental torture, nor any other form of coercion").

The prohibition relative to protected persons reads: "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."[64] This prohibition "covers all cases, whether the pressure is direct or indirect, obvious or hidden" and "for any purpose or motive whatever."[65] Article 32 further requires that protected persons be protected from murder, torture, corporal punishment, mutilation, medical experimentation, and any measures of brutality. Article 33 supplements these prohibitions by providing that "all measures of intimidation or of terrorism are prohibited."

Coercion is not expressly prohibited under Common Article 3. It is suggested that the type of activity that might qualify as coercion is otherwise prohibited under Common Article 3 as inhumane, or particularly as forms of "cruel treatment" or "degrading treatment."[66]

D) Coercion in the Context of Interrogations

There is no single or comprehensive definition of coercion which can be used to classify which acts are clearly impermissible and prohibited.[67] There are however general guidelines which are helpful: within the context of the GCs, torture is considered a form of coercion, but there are coercive activities, short of torture, that are nonetheless prohibited. In addition, as was detailed above, the meaning of coercion within IHL is linked to the principle of humane treatment. In this respect, coercion is not limited to the use of physical force. Psychological coercion and efforts to break down detainees are considered unlawful. The definition provided in the US Army Field Manual is instructive:

> Certain prohibited physical coercion may be obvious, such as physically abusing the subject of the screening or interrogation. Other forms of impermissible coercion may be more subtle, and may include threats to turn the individual over to others to be abused; subjecting the individual to impermissible humiliating or degrading treatment; implying harm to the individual or his property. Other prohibited actions include implying a deprivation of applicable protections guaranteed by law because of a failure to cooperate.[68]

Differentiating coercive techniques from non-coercive ones can be difficult in practice. Interrogations measures which involve psychological pressures are permissible yet those which are inherently coercive are unlawful. To determine where the line is drawn in a particular case, it can be helpful to consider the effect they produce on the person interrogated. Coercive interrogation techniques compromise a detainee's free will. It has been stated that "the essence of coercion is the compulsion of a person by a superior force […] to do or refrain from doing something involuntarily."[69] In this connection, we can differentiate between activity that robs a person of free will, and activity that merely causes a person to reevaluate a course of action.[70] The latter is not prohibited; at least to

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64 GCIV, art. 31.

65 ICRC Commentary IV, at 219-210.

66 "Improving the Fighting Position" at 22.

67 Likewise, it is likely not helpful to define coercion through reference to activity that would justify treasonous conduct. Many countries place rules on members of their armed forces to be followed in the event of capture by the enemy. Generally, only under very limited circumstances will treasonous conduct be excusable. Importantly, there is no direct connection between the type of interrogation practice that might justify treasonous conduct and the type of practice that might be unlawful as coercive. CRS: *Lawfulness of Interrogation Techniques*, at 15.

68 US Army Field Manual *Human Intelligence Collector Operation*s No. 2-22.3 (6 September 2006) [US Army FM 2-22.3] at 5.22.

69 CRS: *Lawfulness of Interrogation Techniques*, at 13. Importantly, use of this definition should not imply applicability in this context of domestic common law rules relating to the admission of involuntary statements in court.

70 There is a strong historical legal basis for a rule preventing the compelling of information. The rule stands on its own, not directly connected to torture or coercion at API, art. 75(4)(f) relating to testifying against oneself or confessing guilt. This "right to remain silent" is entrenched in the Canadian legal system. This right is reflective of the idea that a person never "owes" it to justice to convey information. As is pointed out is the ICRC Commentary III, art. 99, the contrary position historically "led to the institution of torture."

the extent that it does not meet the definition of coercion.[71] Put another way, "the pertinent question appears to be whether the person subject to treatment designed to influence his conduct is able to exercise a choice and complies willingly or has no choice other than to comply."[72] In this respect coercion is not defined as influencing the detainee's choice as to whether or not to provide information but rather removing the free will to chose.

Another possible definition of coercion is "the use of physical or mental pain or intimidation to compel an unwilling detainee to provide information."[73] If such an approach is used, the issue then becomes determining the degree of "pain or intimidation" that is legally significant as this will differentiate techniques which are lawful from those that are coercive and thus unlawful.[74]

The GCs are clear about the prohibition of torture and other forms of inhumane or degrading treatment and specifically prohibit the use of any form of coercion in the context of interrogation. So long as these provisions of the GCs are not violated, an interrogation approach which involves a ruse or deception is lawful.

The idea of coercive activity is not that a statement is made by a person who would rather not have had to make it, but rather that the person felt that he or she had no choice but to comply. Viewed negatively, coercion is not "trickery, deception or manipulation," which are *prima facie* legal insofar as they do not involve inhumane tactics.[75] Inherently coercive measures are thus techniques which result in an "externally" sourced pressure on the detainee, the upshot of which is that the detainee has no alternative but to choose to cooperate. Coercion is also distinguished from incentives. In most circumstances, influencing a detainee's choice by offering incentives and privileges would thus not be considered coercion because the detainee remains free to chose whether to cooperate.[76] It has been argued that where cooperation is obtained as a result of a desire on behalf of the detainee to obtain relief from a particular situation (e.g. infliction of suffering), the cooperation has been coerced. Incentives involve situations where a non-legally mandated privilege is withheld or withdrawn as a result of non-cooperation and can also include situations where a detainee can gain benefits and advantages or privileges as a result of cooperation. So long as the consequence of non-cooperation does not involve the imposition of a standard of treatment which falls below the baseline required by the provision of GCIII or GCIV, the use of incentives can be considered legitimate tactics.[77]

E) Coercive Conduct in the Context of Police Interviews

As stated above, this paper is concerned with operationally-oriented interrogation, namely intelligence gathering, and not with interrogation for the purpose of criminal investigation. There are different rules which are applicable to each context. There are however parallels and similarities between the two types of interrogation.[78] For this reason it is useful to review the domestic criminal rules which are applicable to police interviews. For our purposes, these aspects of Canadian criminal law are relevant to the issue of coercion because Canadian courts

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71 CRS: *Lawfulness of Interrogation Techniques*, at 13.

72 Ibid., at 14.

73 "Improving the Fighting Position" at 22. See also US Army FM 2-22.3.

74 In this respect international human rights law standards are informative.

75 "Improving the Fighting Position" at 23.

76 Ibid., at 26-27.

77 *Ibid*. at 23. By way of example, the author suggests that while the deprivation of food would be impermissible as a form of manipulation because it would result in inhumane treatment, the issuance of extra food rations as a reward for cooperation would be a legitimate incentive.

78 Indeed within the CF the term 'interrogation' may be used to refer to either intelligence gathering or criminal investigation. (see *PW Handling Manual* at 4-1).

focus on police conduct and the conditions of the interview process which affect a suspect's free will.[79] In the criminal law context, there are of course additional rules and factors which affect the admissibility of statements which are not relevant to the issue at hand. We can expect that not all cases of inadmissibility in the criminal law context may raise concerns in the international intelligence gathering context. However, there are many cases where, in a criminal case, evidence is ruled inadmissible because it is obtained as a result of conduct or practices which would also be prohibited in the context of international military intelligence interrogations. In this respect, a review of the confession rule provides useful insights.

When dealing with interrogations in the criminal law context, the Supreme Court of Canada has defined the concept of "voluntary statement".[80] This body of law explicates the circumstances in which a detained suspect is denied a meaningful choice when deciding whether to make any statements be they inculpatory or exculpatory.[81] In determining whether a detainee is provided an effective choice, the focus of the court's inquiry is on whether police conduct was proper.[82] At one end of the spectrum is improper police persuasion and pressure which results in an individual being totally broken down by the interrogation[83] and at the other a police officer merely influencing a suspect to change his/her mind to provide a statement.[84] As is the case in the context of intelligence gathering interrogation, it is clear that the domestic criminal law does allow the police to attempt to influence the behaviour of a detainee. In this regard, not all means used to persuade an accused to make an admission are improper. The Supreme Court of Canada jurisprudence recognizes that police questioning is a legitimate tool of investigation.[85]

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79 In *R. v. Hobbins*, [1982] 1 S.C.R. 553, Justice Laskin noted that in determining the voluntariness of a confession, courts should be alert to the coercive effect of an "atmosphere of oppression", even though there was "no inducement held out of hope of advantage or fear of prejudice, and absent any threats of violence or actual violence".

80 The purpose of the voluntariness rule is twofold: preventing unreliable admissions but also vindicating the rights of the accused by protecting the accused decision or choice to speak or remain silent. *R. v. Hebert*: ". . . one of the themes running through the jurisprudence on confessions is the idea that a person in the power of the state's criminal process has the right to freely choose whether or not to make a statement to the police. This idea is accompanied by a correlative concern with the repute and integrity of the judicial process." [1990] 2 S.C.R. 151.

81 In *R. v. Fitton* Rand J. wrote: "The rule on the admission of confessions, which, following the English authorities, was restated in *Boudreau v. The King*, at times presents difficulty of application because its terms tend to conceal underlying considerations material to a determination. The cases of torture, actual or threatened, or of unabashed promises are clear; perplexity arises when much more subtle elements must be evaluated. The strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of conversation, all call for delicacy in appreciation of the part they have played behind the admission, and to enable a Court to decide whether what was said was freely and voluntarily said, that is, was free from the influence of hope or fear aroused by them."[1956] S.C.R. 958.

82 *R. v. Whittle*, the confession rule provides "not only a standard of reliability with respect to the evidence obtained from persons suspected of crime who are detained but fairness in the investigatory process." In this respect, Justice Sopinka wrote that the confession rule protects the idea that the suspect has the right to make a choice. In order to determine whether a statement was lawfully obtained and admissible, the court will consider whether "the action of police authorities deprive[d] the suspect of making an effective choice by reason of coercion, trickery, or misinformation or lack of information" [1994] 2 S.C.R. 914.

83 In *R. v. Horvath,* Spence J. concluded that "under the circumstances of the four-hour interview the complete emotional disintegration of the appellant had been brought about" and for this reason the statement was inadmissible. [1979] 2 S.C.R. 376 at p. 400.

84 "Although improper police questioning may in some circumstances infringe the governing [confessions] rule it is essential to bear in mind that the police are unable to investigate crime without putting questions to persons, whether or not such persons are suspected of having committed the crime being investigated. Properly conducted police questioning is a legitimate and effective aid to criminal investigation... . On the other hand, statements made as the result of intimidating questions, or questioning which is oppressive and calculated to overcome the freedom of will of the suspect for the purpose of extracting a confession are inadmissible…." Martin, J.A. wrote in *R. v. Precourt* (1976), 18 O.R.(2d) 714 (C.A.), at 721.

85 See the recent endorsement of this position by the majority of the SCC in *R. v. Singh,* [2007] 3 S.C.R. 405.

The rule of general application, known as the voluntariness rule (also referred to as the confessions rule), can be stated as follows: Statements are excluded whenever improper conduct is detected. The roots of the confessions rule is linked to a very real concern that a confession sometimes obtained by torture or threats could well be unreliable. The confessions rule is a rule of evidence insofar as it represents an exception to the hearsay rule. Over the years, forms of compulsion other than torture were recognized as being just as compulsive, just as insidious and just as abhorrently unfair. Efforts by the police to convince detainees to make admissions become improper only when pressure "standing along or in combination with other factors, [is] strong enough to raise a reasonable doubt about whether the will of the subject has been overborne".[86]

In *R. v. Hodgson*, Justice Cory, writing for the majority of the Supreme Court of Canada, reviewed the rationale for the confession rule and reiterated its significance. A statement, which is prompted by threats or inducements, raises issues of reliability. Confessions are admitted as an exception to the hearsay rule under which they are otherwise presumptively inadmissible. Reliability concerns with respect to this type of evidence is thus a predominant consideration in a Court's decision whether to admit a statement into evidence as an exception to the hearsay rule. The second rationale for the rule relates to trial fairness. If the circumstances surrounding the statement raises issues of reliability, trial fairness is engaged. This is again related to the question of reliability because admitting unreliable hearsay statement into evidence may affect the fairness of the trial.[87] The two rationales "blend together so as to ensure fair treatment to the accused in the criminal process by deterring coercive state tactics."[88]

The law in Canada as it relates to the voluntariness of a suspect's statement was recently reviewed by the Supreme Court of Canada in *R. v. Oickle*. Writing for the majority, Justice Iacobucci, states that a trial judge should strain to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness. The relevant factors to be considered include threats or promises, oppression, the operating mind requirement and police trickery. If police interrogators subject a detained person to intolerable conditions or offer inducements strong enough to question the reliability of the statement, it should be excluded. Trial judges must consider the entire circumstances surrounding the confession to make their decision.[89]

Most recently in *R. v. Singh*, the Supreme Court of Canada reaffirmed its position with respect to the voluntariness rule. During the course of two police interviews the accused stated on many occasions that he did not want to talk about the incident. The interviewing officer persisted in trying to get him to make a statement. The trial judge reviewed all the circumstances surrounding the interrogation and it was admitted into evidence. Justice Charron, writing for the majority, re-iterated the Court's view that "the focus of the trial judge's inquiry is on the conduct of the police and its effect on the accused's ability to exercise his or her free will."[90] While detainees cannot be compelled to speak once they have asserted their right to silence, the police are not required to refrain from further questioning the detainees.[91] Justice Charron affirmed that the police may use legitimate means of persuasion to break a detainee's silence.

i) *Threats or Promises:*

The confessions rule provides that the Crown must prove that the statement was not obtained by fear of prejudice. Fear of prejudice relates to express or implied threats that would be carried out if the suspect does not cooperate and speak. The Court in *Oickle* provided a non-exhaustive list of "fear of prejudice" inducements. Any

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86 *R. v. Oickle*, [2000] 2 S.C.R. 3.

87 Trial fairness is clearly a consideration under the modern and principled approach to the hearsay exceptions. See e.g. *R. v. Starr,* [2000] 2 S.C.R. 144

88 *R. v. Hodgson*, [1998] 2 S.C.R. 449 at para. 21.

89 *R. v. Oickle* at para. 69.

90 *R. v. Singh* at para. 36.

91 *Ibid*., at paras. 5 and 18.

confession that is the product of outright violence is inadmissible. Where there is evidence that the accused was assaulted by police during an interrogation, the conduct is considered so egregious that it is assumed that the assaultive behaviour could impact on the will of the suspect for some time (even hours) after.[92] Threats of violence have an equally coercive effect.[93]

Promises of leniency (whether with respect to the suspect or a third party) are equally powerful motivators which can be strong enough to induce false confessions. This is a danger that the Court is seeking to avoid. A statement may be induced where the police officer offers the suspect a threat or promise in exchange for a confession. In the context of such a *quid pro quo*, the courts will consider whether the promise made by the police is such that the suspect will say "whatever [is] needed, true or false".[94] With respect to the *quid pro quo* it must be established that the inducement caused the suspect to give a statement. In this respect not every inducement held out by a police officer will cause a statement to be inadmissible.

Conduct proscribed by the confessions rule is focused on whether the accused was able to make a choice of whether to speak or remain silent. The issue is not whether the accused made a wise choice or whether the choice was in his or her best interests. The inquiry focuses on the effect of police conduct on the accused's choice – whether actions of police deprive the accused from making an effective choice by reason of coercion, trickery or misinformation. Conduct is prohibited only if it has the effect of depriving an accused of an effective choice. Similarly, an offer of assistance may undermine the voluntariness of the statement where it results in the loss of an accused's meaningful independent ability to choose whether or not to speak.

The overall analysis focuses on the voluntariness of the statement and considers whether, as a result, its patent reliability is jeopardized when the strength of the inducement offered as a *quid pro quo* is sufficient to raise the possibility of a false confession. The Court's concern, of course, is ultimately with the reliability of the admission. Where the will of the suspect is overborne in this context he or she is willing to say whatever it takes. The actions of the person in authority are thus deemed to have had a coercive effect. Where there is a connection between the promise of help and the statement itself, the inducement is likely to result in the exclusion of the statement.[95] Where the police excite a hope of advantage, for example *promising* an accused will be released, or charges will be reduced, if he or she makes a statement. On the other hand, where an accused gives a statement simply in the hope that he will be released, there is no inducement and the statement will be held to be voluntary. The lynchpin is the *quid pro quo*. Causation is a central consideration. The police conduct must cause the accused to make the statement, not simply cause the accused to choose to make a statement. The nature and intensity of the pressure is therefore a relevant consideration. The use of fear to induce an accused to speak is definitely an unlawful means to obtain a statement.

Any form of coercion is contrary to IHL and consequently prohibited. Whether information obtained through promises or hope of advantage (likely inadmissible in the context of criminal proceedings) are also prohibited in an intelligence gathering context is unclear. With respect to intelligence interrogations, the concern is not necessarily with the broadly understood concept of voluntariness as applied in the criminal law context. The prohibition relates to coercion. There is scope for an argument that the notion of a voluntary statement is broader than a non-coerced statement. That said, while an intelligence operation is not concerned with "false" confessions, there is an issue of reliability of information which may militate in favour of adopting the voluntariness standard.

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92 *R. v. Sabri* (2002), 4 C.R. (6th) 349 (Ont. C.A.).

93 Imminent threats of torture will clearly render a confession inadmissible. The use of veiled threats require closer examination: *R. v. Oickle* para. 48-57.

94 See e.g. *R. v. Spencer*, [2007] 1 S.C.R. 500. In *Spencer* the accused confessed in exchange of leniency for his girlfriend.

95 In *R. v. Dhandwar,* (1996) 31 W.C.B. (2d) 96 (Ont. Ct. J. (Gen. Div.)), the accused contacted the authorities to seek protection for himself and his family. Justice Strong found that the evidence supported the accused's claim that the only reason he provided information to the police was because the police had made assurances of protection for himself and his family. He found that the police had deceived the accused and preyed upon his desperation.

ii) *Oppression:*

In addition to inducements, threat of violence, or indeed actual violence, a confession may be "tainted" where the atmosphere is deemed to be oppressive. The coercive effect of an "atmosphere of oppression" can be strong enough to overbear the will of the subject.[96] Oppression clearly has the potential to induce a suspect to divulge information. Oppression is therefore a psychological as opposed to physical mechanism that can induce a confession.

Oppressive conditions and circumstances have the potential to induce a detainee to speak where the detainee provides a statement to escape the inhumane conditions. In *Oickle*, the Court identified this as a stress-compliant confession.[97] Factors which are relevant to the court's assessment of oppression include: deprivation of food, clothing, water, sleep, or medical attention, denying the suspect access to legal counsel and excessively aggressive, intimidating questioning for prolonged periods.

R. v. Hoilett provides a compelling example of oppression.[98] Mr. Hoilett, a detained person who was under the influence of crack cocaine and alcohol, was left naked in a cold cell for two hours before being provided light clothing. His cell contained only a metal bunk to sit on. The bunk was so cold that he had to stand up. He was awakened in the middle of the night for the purpose of interrogation. During the course of his interview he nodded off several times. His requests for warmer clothing and a tissue to wipe his nose were refused. While he admitted knowing that he did not have to talk, and that the officers had made no explicit threats or promises, he hoped that if he talked to the police they would give him some warm clothes and cease the questioning.[99]

When dealing with interrogations, we may adopt a similar reasoning and consider that an atmosphere of oppression created by the above-noted factors would amount to coercion and be prohibited under IHL.

iii) *Police Trickery:*

In conducting interrogations, police may resort to tricks or other forms of deceit. It is not per se improper for the police to lie.[100] The courts have been cautious not to unduly limit police techniques. In some circumstances, however, the use of police trickery may render an otherwise admissible statement inadmissible. The doctrine is related to the issue of voluntariness but the inquiry is not related to a finding that the will of a detainee was overborne. Rather, the objective is to maintain the integrity of the criminal justice system.[101] The test to be applied is whether the police conduct is so appalling as to shock the conscience of the community.[102]

The use of non-existent or fabricated evidence may, when combined with other factors, affect the determination of whether a confession is voluntary. Standing alone, however, confronting a suspect with fabricated evidence will not likely be deemed impermissible conduct.[103] Where a suspect is confronted with enough false evidence to give rise to a feeling of hopelessness, this may be sufficient to break the will of the suspect and induce a statement.

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96 *R. v. Hobbins*, at 556-57.

97 *R. v. Oickle* at para. 58-62.

98 *R. v. Hoilett* (1999), 136 C.C.C. (3d) 449 (Ont. C.A.).

99 *R. v. Owen* (1983), 4 C.C.C. (3d) 538 (N.S.S.C., App. Div.); *R. v. Serack*, [1974] 2 W.W.R. 377 (B.C.S.C.).

100 *R. v. Cook*, [1998] 2 S.C.R. 597 at para. 60.

101 *R. v. Oickle* at para. 65.

102 As examples of what might "shock the community", Lamer J. suggested a police officer pretending to be a chaplain or a legal aid lawyer, or injecting truth serum into a diabetic under the pretence that it was insulin. Lamer J.'s discussion on this point was adopted by the Court in *R. v. Collins*, [1987] 1 S.C.R. 265 at 286-87; see also *R. v. Clot* (1982), 69 C.C.C. (2d) 349 (Que. Sup. Ct.).

103 *R. v. Oickle* at para. 61.

F) Coercive Activity

The idea of coercive activity is absolute: it is not that a statement is made by a person who would rather not have had to make it, but rather that the person felt, as a result of the interrogator's behaviour, that he or she had no choice but to comply. As the above discussion suggests, Canadian domestic law with respect to permissible conduct in the area of coercive interrogation practices is primarily concerned with the reliability of confessions. Indeed, as this paper is intended to explore the legal framework(s) that define the limits of lawful interrogation techniques and practices, it is of interest to consider factual situations which have been considered by Canadian courts, despite the fact that the purposes for which domestic courts have conducted their analysis and the nature of the remedies sought may be different. The case law reflects an understanding that false confessions may result when an interrogator successfully convinces a suspect that an admission of guilt is, in all the circumstances, the only option. Interrogation techniques that utilize deception and psychological pressures to persuade a suspect to admit guilt are carefully scrutinized to determine their effect on an accused.[104]

In the intelligence gathering context, the concern of a false confession is not at the forefront. However, the reliability of the information received is of great importance. In this respect, experts suggest that it is imperative to analyze the information received from the detainee to determine whether it was contaminated by outside sources, including police interrogators.[105] The GCs do not impose limits on the subject matter about which a PW, or person of another legal status, may be questioned so long as an answer is not compelled by unlawful means. The GCs are clear about the prohibition of many forms of inhumane treatment and specifically prohibit the use of any form of coercion. Providing these provisions of the GCs are not violated, an interrogation approach which influences a detainee's choice is lawful. The line between persuasive conduct and coercive conduct is not easily defined. The guiding principle is that coercive conduct is such that a detainee's free will to choose whether or not to speak has been overborne. Influencing the detainee's choice though logic or other manipulation is lawful.

The use of any physical force and all acts of violence used to compel a detainee to cooperate and provide information are clearly prohibited by law. Certain methods will clearly fall within this category and be easily identified as prohibited (i.e. assaults, threats, actual or implied). Interrogation tactics that aim to persuade or manipulate a detainee require close consideration. Whether stress, disorientation, and duress techniques (i.e. sleep deprivation, hooding, stress position) constitute some form of physical or mental coercion, will be considered further below.

II. International Human Rights Law

Although the scope of IHRL obligations and rights is to be defined in accordance with IHL standards, international human rights obligations are not displaced in times of conflict. Rather, human rights norms and principles are interpreted in light of the law applicable in armed conflict, the *lex specialis* of IHL.[106] The continued applicability of IHRL in situations of conflict suggests that the standard of humane treatment, applicable to CF interrogations under IHL treaty and customary law, may be informed by the prohibition against torture, cruel, inhumane or degrading treatment as defined in IHRL.

The prohibition of the use of torture and other forms of ill-treatment is universally recognised and is enshrined in all of the major international and regional human rights instruments. The foundational document in this respect is the *Universal Declaration of Human Rights*.[107] Article 5 of the Declaration provides that "[no] one shall be

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[104] Cory J. writes in *R. v. Hodgson* "it focuses on putative reliability by analyzing the circumstances surrounding the statement and their effect on the accused, regardless of the statement's accuracy, at para. 21.

[105] In this respect, see the discussion of Dr. Ofshe's research in *R. v. Oickle,* and *R. v. Osmar* [2007] O.J. No. 244.

[106] See generally Heintze "On the relationship between human rights law protection and international humanitarian law" (2004) 86 International Review of the Red Cross 789; Schabas, "Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum" (2007) 40 Isr. L. Rev. 592; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep 226.; *Legal Consequences of the Construction of a Wall in the Occupied Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136.

[107] G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

subjected to torture or to cruel, inhuman or degrading treatment or punishment". The *International Covenant on Civil and Political Rights* (ICCPR) incorporates the same prohibition in Article 7 which utilizes the exact same language.[108] The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) also prohibits torture and other forms of ill-treatment.[109]

Although international courts, treaty monitoring bodies, and commentators more generally, have recognized a theoretical distinction between torture and other forms of ill-treatment, a doctrinal approach to defining the distinction has proven difficult.[110] The CAT, for example, provides no definition of ill-treatment, nor any criteria to distinguish it from torture. In any event, the distinction is of no great practical significance because both torture and other forms of ill-treatment are prohibited under both IHL and IHRL regimes.[111]

A) Torture

i) *Torture Under International Law:*

There are express prohibitions on the use of torture in human rights law. Under both the ICCPR and the CAT, the prohibition on torture may not be derogated from under any circumstances.[112] All forms of torture are captured under this prohibition. In particular, the impugned activity need not be a direct attack on physical integrity to be torture; proscribed methods of interrogation include those that cause severe pain and suffering even though no actual bodily harm or injury is caused.

As was stated above, under IHL, torture is a form of coercive treatment. Under IHRL, torture is generally considered to be a form of "cruel, inhuman or degrading treatment or punishment."

In its 1975 *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment,*[113] the UN General Assembly gave the following definition of torture:

> torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.[114]

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[108] *International Covenant on Civil and Political Rights,* G.A. Res. 2200A, (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966). Regional human rights treaties also reproduce this same prohibition. See e.g. *African Charter on Human and People's Rights*, the *American Convention on Human Rights.*

[109] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85.

[110] See e.g. De Vos, Christian M. "Mind the Gap: Purpose, Pain, and the Difference Between Torture and Inhuman Treatment" (2006) 14 No. 2 *Hum. Rights Brief* 4.

[111] It is recognized that there are some reasons to draw the distinction. For example, the CAT explicitly bans torture, even in times of emergency. With respect to other forms of ill-treatment the Convention is silent. It is also generally accepted that torture carries a 'special stigma' although this does not detract from the prohibitions proscribed in international law with respect to other forms of ill-treatment.

[112] See ICCPR, art. 4(2); CAT, art. 2(2).

[113] GA Res. 3452 (XXX), 30 UN GAOR, Supp. No. 34, UN Doc. A/10034, at 91 (1976). Like all UN GA resolutions, this instrument is not a binding source of international law.

[114] *Ibid.*, art. 1(1).

The CAT essentially tracks the 1975 Declaration in its definition of torture:

> The term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. [115]

There are no circumstances which may be invoked to justify the use of torture.[116] The absolute nature of the prohibition of torture under treaty law is reinforced by its *jus cogens* status under customary international law.[117] Its *jus cogens* status connotes the fundamental, peremptory character of the norm, which is, in the words of the International Court of Justice, "intransgressible."[118]

The Rome Statute contains the following definition of torture, which in all relevant respects is identical to that from the CAT:

> "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.[119]

In its jurisprudence, the ICTY has incorporated the following constituent elements in the definition of torture: (i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition (ii) this act or omission must be intentional; (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.[120]

Torture involves "severe pain or suffering, whether physical or mental."[121] The "severe pain or suffering" necessary for torture can be either physical or mental. The test for whether or not activity amounts to torture refers to the effect the activity has on the interrogated person. The definition leads directly to the question of how

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[115] CAT, art. 1(1).

[116] CAT, art. 2.

[117] There is ample international authority recognising the prohibition of torture as having jus cogens status. *Prosecutor v. Kunarac*, IT-96-23, Trial Chamber Judgment (22 February 2001) at 466; see also *Prosecution v. Delalic et al*, IT-96-21-T, First Trial Chamber Judgment (16 November 1998), *Prosecutor v. Furundzija*, IT 95-17/1, Trial Chamber Judgment (10 December 1998). With respect to torture as *jus cogens* norm and Canada's treaty obligations see *Bouzari v. Iran* (2004) 71 O.R. (3d) 675.

[118] *Legal Consequences of the Constructions of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 136 at para. 157. See also Ulbrick, "Tortured Logic: The (il)legality of United States Interrogation Practices in the War on Terror" (2005) 4 *Nw. U. J. Int'l Hum. Rts*. 210 at para. 30 [Tortured Logic].

[119] Rome Statute, art. 7(2)(e).

[120] *Prosecutor v. Kvocka et al.,* IT-98-30/1, Trial Chamber Judgment (2 November 2001). In *Prosecutor v. Furundzija*, IT 95-17/1, Trial Chamber Judgment (10 December 1998), the ICTY Trial Chamber noted that although IHL does not provide for a definition of torture, the definition contained in Article 1 of the 1984 CAT would apply as this definition had obtained customary law status. As a result, the crime of torture is characterized by the following elements: (i) it consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; (ii) this act or omission must be intentional: (iii) the act must be instrumental to another purpose in the sense that the infliction of pain must be aimed at reaching a certain goal.

[121] The idea that the pain or suffering need be "severe" for it to be considered torture is found in the ICTY jurisprudence. *Prosecution v. Delalic et al*., IT-96-21-T, First Trial Chamber Judgment (16 November 1998). "Severe level of mental or physical pain or suffering"; *Prosecutor v. Furundzija*, IT 95-17/1, Trial Chamber Judgment (10 December 1998): "the infliction, by act or omission, of severe pain or suffering, whether physical or mental".

severe the pain or suffering must be before it will be considered the result of torture. It is extremely difficult to determine the threshold,[122] but we have general guidance. Permanent injury is not required.[123] The matter of severity will be examined both objectively and subjectively.[124] As a corollary to this latter point, because the analysis will involve consideration of the interrogated person's pain and suffering, "whether a particular practice amounts to torture can vary widely from case to case."[125] It is the whole of treatment that is considered, and not particular activity in isolation. Accordingly, the combination of individual activities that may not on their own amount to torture could be considered as such, as could the use of a prima facie non-torturous technique used for an amount of time such that the resultant pain or suffering exceeds the torture "threshold."[126]

Torture expressly "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[127] It is clear, however, that in no circumstances will activity resulting in "severe" pain or suffering be lawful, as amounting to torture.

Coercive interrogation techniques which are routinely used to extract confessions were considered by the UN Special Rapporteur on Torture in his 2004 report.[128] He determined that threats and intimidation can amount to torture: "It is my opinion that serious and credible threats, including death threats, to the physical integrity of the victim or a third person can amount to cruel, inhuman or degrading treatment or even torture, especially when the victim remains in the hands of law enforcement officials."[129]

The CAT also imposes specific obligations on states parties. These include taking effective legislative, administrative, judicial or other measures to prevent acts of torture. No exceptions, including emergencies or war, may be invoked as justification for torture.[130] Article 3(1) of the CAT provides that no state party shall "expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[131] Article 4 requires that states parties make all acts of torture criminal

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122 See, e.g., Rodley, S., *The Treatment of Prisoners Under International Law* (2ed) Oxford University Press, 1999.

123 *Prosecutor v. Kvocka et al.,* IT-98-30/1, Trial Chamber Judgment (2 November 2001) at para. 148.

124 *Ibid.,* at paras. 142-43.

125 "Tortured Logic" at para. 48. This comment reflects a consideration of the ECrtHR cases considering torture.

126 See Cohen, "Democracy and the Mis-Rule of Law: The Israeli Legal System's Failure to Prevent Torture in the Occupied Territories" (2001) 12 *Ind. Int'l & Comp. L. Rev.* 75; see also CRS: *Lawfulness of Interrogation Techniques*, at 12; and *Prosecutor v. Kvocka et al*., IT-98-30/1, Trial Chamber Judgment (2 November 2001) at paras. 142-43.

127 The CAT, as an element of IHRL, is subject to limits on its lawful applicability. It is likely that in any case in which the CF was able to interrogate a person, Canada would be considered to have the level of control over that person necessary to invoke its IHRL obligations, including those under the CAT. Further, it is not likely that IHRL and IHL differ on the definition of the term "torture."

128 An independent expert mandated by the United Nations Human Rights Commission to report on the situation of torture around the world.

129 *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. U.N. GAOR. 59th Sess. Agenda. September 1, 2004: para. 17. U.N. Doc. A/59/324.

130 CAT, art. 2.

131 In *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3, the Supreme Court of Canada ruled that "in exceptional circumstances, deportation to face torture might be justified" under the *Charter* "either as a consequence of the balancing process mandated by section 7 . . . or under section 1." Notwithstanding Canada's international obligations, the Court concluded that deportation to face torture is not necessarily a violation of the *Charter*.

offences, including attempts and complicity. States parties must also assert jurisdiction over torture offences when they are committed in their territory, when the alleged offender is one of their nationals, and when the alleged offender is within their territorial jurisdiction and not extradited.[132]

Obligations on states parties also include limiting the use of incommunicado detention; ensuring that detainees are held in places officially recognized as places of detention; ensuring the names of persons responsible for their detention are kept in registers readily available and accessible to those concerned, including relatives and friends; recording the time and place of all interrogations, together with the names of those present; and granting physicians, lawyers and family members access to detainees.[133]

Article 12 of the CAT obliges states to ensure that prompt and impartial investigations are initiated whenever there is reasonable ground to believe that torture has been committed "in any territory under its jurisdiction". Additionally, Article 13 obliges states to investigate complaints by alleged victims of torture promptly and impartially. In *Aksoy v. Turkey*, the European Court of Human Rights (ECrtHR) considered the scope of this obligation and found that "where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the cause of the injury, failing which a clear issue arises under Article 3 of the Convention.[134]

The ECrtHR went further in *Assenov and others v. Bulgaria* by concluding that a violation of Article 3 of the *European Convention on Human Rights* (ECHR) had occurred not as a result of any ill-treatment per se but because of the failure to carry-out an effective, official investigation into the allegations of ill-treatment: "Where an individual has an arguable claim that he has been ill treated in breach of Article 3, the notion of an effective remedy entails, in addition to a thorough and effective investigation as required also by Article 3, effective access for complainant to investigatory procedure and payment of compensation where appropriate."[135]

CAT provisions also speak to the inadmissibility in court of statements gained through torture.[136] States parties must also ensure that education and information regarding the prohibition of torture is included in the training of law enforcement personnel (civil and military), medical personnel, public officials and other appropriate persons.[137]

ii) *Torture Under Canadian Law:*

There is reference to the term torture in four Canadian Federal Statutes: The *Criminal Code*; *Crimes Against Humanity and War Crimes Act (2001)*; *Geneva Conventions Act (1985)*; and *Immigration and Refugee Protection Act (2001)*.[138] What follows is a discussion of the legal aspects of the torture offence as defined in the Canadian *Criminal Code*.

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[132] Article 5. Section 269.1 of the *Criminal Code* extended the jurisdiction of Canadian courts to include incidents that take place outside of Canada. This amendment allows prosecution of torture committed anywhere if the victim is a Canadian citizen; the accused is either a Canadian citizen, or currently in Canada.

[133] CAT art. 11.

[134] *Aksoy v. Turkey* (1997) 23 E.H.R.R. 553, at para. 62.

[135] *Assenov and Others v. Bulgaria*, App. No. o. 90/1997/874/1086, 28 October 1998, at para. 117.

[136] CAT, art. 15.

[137] CAT, art. 10.

[138] See Macdougall, "Torture in Canadian Criminal Law" (2005) Criminal Reports (6th) 24, for an insightful analysis which contrasts and compares the concept of torture as defined in the *Criminal Code*, the *Crimes Against Humanity and War Crimes Act*.

In order to comply with its IHRL obligations generally and, in particular the CAT, section 269.1 of the *Criminal Code* incorporates into Canada's domestic criminal law the offence of torture.[139] This section creates and defines the offence of torture,[140] eliminates the defence of superior orders and the exceptional circumstances (e.g. public emergency) defence.[141] In addition, it creates an evidentiary rule which bars the introduction of any statement obtained as a result of the commission of an offence under the section.[142]

The CAT definition of torture has been incorporated almost verbatim at section 269.1 of the *Criminal Code* of Canada. "Torture" is defined in subsection 269.1(2) as "any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person". The definition of torture requires that the conduct be for a proscribed ulterior purpose or "for any reason based on discrimination of any kind". The three purposes listed include "(i) obtaining from the person or from a third person information or a statement, (ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and (iii) intimidating or coercing the person or a third person".[143] In addition, Section 269.1(1) provides that the offence of torture may only be committed by a defined class of persons, specifically, an official, or person acting at the instigation of or with the consent or acquiescence of an official. Conduct which arises from, is inherent in, or incidental to lawful sanctions is expressly excluded.

The mental element required for section 269.1 was considered in *R. v. Rainville*: "torture involves a subjective *mens rea* [and] specific intent, i.e. the pursuit of an aim or precise consequence, in this case the intent to inflict "acute physical or mental pain or suffering."[144] Finding *Rainville* guilty of torture, among other offences, the court stated:

> [The victim] was subjected to this scenario of threats and intimidation for one solid hour. A scenario designed by Michel Rainville and executed by him or under his direction. Did the latter intend to inflict "severe pain or suffering, physical or mental" to [the victim]? Physical, probably not but mental, without a doubt. His goal was to instill unbearable fear in [the victim], to the point where he would yield and tell him where the key was located.[145]

In *Suresh*, the Supreme Court of Canada noted that torture has as its end the denial of a person's humanity. It is fundamentally unjust because it induces fear and its consequences are devastating.[146]

Other *Criminal Code* provisions concerning offences against the person may be invoked in respect of certain forms of cruel, inhuman or degrading treatment or punishment falling short of torture.[147]

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139 Canada became a party to CAT in 1987 and, fulfilling its obligations under Article 4, implemented the criminal provision of the Convention into Canada's domestic law through the enactment of section 269.1. Although torture only became an offence in 1987, it has been argued that types of incidents which the new offence encompassed were already addressed in the *Criminal Code* provisions proscribing conducts such as assault causing bodily harm, murder, extortion, and intimidation.

140 Sections 269.1(1) and (2).

141 Section 269.1(3).

142 Section 269.1(4).

143 The language of the section suggests that this list is representative, not exhaustive.

144 *R. v. Rainville* [2001] J.Q. no 947, at paras. 66-75 [author's unofficial translation].

145 *Ibid*., at para. 80 [author's unofficial translation].

146 Suresh v. Canada (Minister of Citizenship and Immigration) [2002] 1 S.C.R. 3 at para. 51.

147 Canada, *Fourth Report on the Convention Against Torture and Inhuman or Degrading Treatment or Punishmen*t (2002) at para. 14.

B) Cruel, Inhuman, or Degrading Treatment or Punishment

The phrase “cruel, inhuman or degrading treatment or punishment” is a term of art from human rights law. This phrase refers to a range of ill-treatment which is proscribed in international and regional treaties. As mentioned, the ICCPR contains a rule that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[148] The CAT also proscribes rules for states to suppress such treatment or punishment.[149] The rule against cruel, inhuman or degrading treatment or punishment is non-derogable under the ICCPR,[150] but there is no comparable non-derogation provision in the CAT.[151]

As with the notion of torture, inhuman or degrading treatment or punishment embraces mental or psychological ill-treatment as well as physical abuse. It covers the conditions of detention, it includes discrete incidents as well as the totality of circumstances.

International adjudicative bodies have defined inhumane treatment in terms relative to torture. The ITCY, for example, has observed, that “Inhuman(e) treatment has been defined as treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture. Furthermore, the offence need not have a prohibited purpose or be committed under official sanction as required by torture.”

There is no definition of the term “cruel, inhuman, or degrading treatment or punishment” in human rights law. The Human Rights Committee (HRC) has stated the following respecting the ICCPR’s prohibition:

> The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.[152]

Nonetheless, the HRC has made important pronouncements which explicate the scope of Article 7 protections. In this respect, the HRC has said that “the aim of the provisions of article 7 […] is to protect both the dignity and the physical and mental integrity of the individual.”[153] As such, Article 7 proscribes conduct that causes either physical or mental suffering or pain. No derogations are permissible with respect to these obligations and the HRC has affirmed that even situations of public emergency do not provide an exception to the prohibitions contained therein and that there are no exceptions and no justifications to excuse violations.[154]

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[148] ICCPR, art. 7. Again, this wording tracks exactly that from art. 5 of the *Universal Declaration of Human Rights.*

[149] Although the CAT rules respecting torture are much more stringent than those respecting cruel, inhuman or degrading treatment or punishment: see “Tortured Logic” at 34.

[150] ICCPR, art. 4(2).

[151] The non-derogation provision of the CAT (art. 2(2)) is limited in scope to torture. See generally, “Tortured Logic” at 41. The *European Convention on Human Rights* (to which Canada is not a party) makes both torture and cruel, inhuman or degrading treatment or punishment non-derogable.

[152] Human Rights Committee, General Comment 20, Article 7 (1992) (U.N. Doc. HRI\GEN\1\Rev.1 at 30 (1994). [General Comment No. 20].

[153] *Ibid*.

[154] ICCPR, art. 4.

The proscribed conduct outlined in Article 7 of the ICCPR must be read in concert with Article 10 which enshrines the following positive obligation: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[155] In this respect, the HRC has explained that Article 10 imposes positive obligations on States parties with respect to persons who are particularly vulnerable because they have been deprived of their liberty. Coercive interrogation techniques including death threats[156], solitary confinement[157], sleep deprivation, hooding, and shaking, used alone or in combination constitute a violation of Article 7.[158]

The ICTY has offered the following definition: "Inhuman treatment is treatment which deliberately causes mental and physical suffering that falls short of the severe mental and physical suffering required for the offence of torture."[159]

C) Regional Instruments

i) *American Convention on Human Rights:*

The *American Convention on Human Rights* (ACHR) also contains a specific prohibition of torture, cruel, inhuman or degrading treatment or punishment.[160] In addition, the provisions of the ACHR specify that detained persons must be treated with "respect for the inherent dignity of the human person". The scope of the protections enshrined in these provisions were considered by the Inter-American Court of Human Rights (IACrtHR) in the *Loayza Tamayo* case. The Court wrote that "The violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects."[161] The Court went on to specifically apply this principle to interrogations conducted in the context of the fight against terrorism:

> The degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance […]. That situation is exacerbated by the vulnerability of a person who is unlawfully detained […]. Any use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person […] in violation of Article 5 of the American Convention. The exigencies of the investigation and the undeniable difficulties encountered in the anti-terrorist struggle must not be allowed to restrict the protection of a person's right to physical integrity.[162]

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[155] See Human Rights Committee, General Comment 21, Article 10, (1992) U.N. Doc. HRI\GEN\1\Rev.1 at 33 (1994) [HRC General Comment No. 21], at para. 3: "Article 10 complements the ban on torture or other cruel, inhuman or degrading treatment or punishment in article 7 of the Covenant." See HRC Jurisprudence *Campos Case* where the Committee found that placing an individual in a cage in the presence of the press constituted degrading treatment in violation of Article 10.

[156] *Communication No. 255/1987: Jamaica, 22/10/92*. Human Rights Committee. 46th Sess. 1992: para. 8.5. U.N. Doc. CCPR/C/46/D/255/1987.

[157] General Comment No. 20, para. 6.

[158] Concluding Observations of the Human Rights Committee : Israel. Human Rights Committee (1998) 63rd Sess.U.N. Doc. CCPR/C/79/Add.93, para. 19.

[159] *Prosecution v. Delalic et al*., IT-96-21-T, First Trial Chamber Judgment (16 November 1998) at para. 542.

[160] "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *American Convention on Human Rights*, article 5. November 22, 1969. 1144 U.N.T.S. 123.

[161] *Loayza Tamayo Case* (1997) Inter-Am. Ct. H.R. (Ser. C). No. 33. at para. 57.

[162] *Ibid*., at para. 57.

With respect to the specific facts of the case, the Court found that "solitary confinement in a tiny cell with no natural light, blows, and maltreatment, including total immersion in water, intimidation with threats of further violence, a restrictive visiting schedule" all constitute forms of cruel, inhuman or degrading treatment.[163]

Treatment which harms a detainee's psychological and moral integrity (i.e. prolonged isolation and deprivation of communication) rises to the level of cruel and inhuman treatment.[164]

ii) *European Convention for Human Rights:*

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) provides that "No one shall be subjected to torture or to inhumane or degrading treatment or punishment".[165] Although these decisions are not binding precedents, they provide a useful standard with which to define CF interrogation practices.[166] The ECrtHR has said that "Article 3 enshrines one of the most fundamental values of democratic societies.[167] Even in the most difficult of circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Article 3 makes no provision for exceptions and no derogation from it is permissible even in the event of a public emergency threatening the life of the nation."[168]

To fall within the scope of Article 3 of the ECHR, the impugned ill-treatment must attain "a minimum level of severity". The ECrtHR has developed a contextual approach to this determination rather than a bright-line test. The assessment of the minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some circumstances, the sex, age and state of health of the victim.[169]

The ECrtHR decision in the *Northern Ireland* case[170] provides a short analysis on the meaning of the term "inhuman or degrading treatment or punishment" as that term is understood in ECHR[171] and, in particular, how that term relates to the concept of "torture." While the wording of the comparable right in the ICCPR and the CAT, both binding on Canada, is not identical to the ECHR wording, the analysis provides an idea as to how the terms under those two treaties might be understood.[172]

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163 *Ibid*., at para. 58.

164 *Velasquez Rodriguez Case* (1998) Inter-Am. Ct. H.R. (Ser. C). No. 4. at para. 187. The Court also found that the treatment did not respect the detainee's dignity.

165 ECHR, art. 3.

166 With respect to the applicability of ECHR standards in the context of conflicts, the applicability of IHL as *lex specialis* and in particular how the ECrtHR applies IHL, see Reidy, "The Approach of the European Commission and Court of Human Rights to international humanitarian law" (1998) 324 *International Review of the Red Cross* 513.

167 For a general discussion of ECHR jurisdiction treaty system see Shelton, "The Boundaries of Human Rights Jurisdiction in Europe" 13 *Duke J. of Comp. & Int'l L.* 95.

168 *Assenov and Others v. Bulgaria*, App. No. o. 90/1997/874/1086, 28 October 1998, at para. 93; see also *Selmouni v. France* (25803/94), (2000) 29 E.H.R.R. 403, at para. 95.

169 A*. v. United Kingdom*, (1999) 27 Eur. H.R. Rep. 611 at para. 20.

170 *Ireland v. United Kingdom* (5310/71), (1978) 25 Eur. Ct. H.R. (ser. A), [1978] E.C.H.R. 1 ["*Nothern Ireland Case*"].

171 ECHR, art. 3. Canada is not a party to the ECHR.

172 The decision indicates "the direction that international law is evolving": "Tortured Logic" at para. 43.

The case considered the so-called "five techniques" used by members of the Royal Ulster Constabulary against persons rounded up in an operation in Northern Ireland. The now infamous five techniques were: wall standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink. The court found that the use of these techniques amounted to treatment that was both inhuman and degrading, but that it did not amount to torture. The "distinction" between torture and inhuman or degrading treatment, the court stated, "derives principally from a difference in the intensity of the suffering inflicted."[173] The Court held that these five techniques, when used in combination for long periods, "undoubtedly amounted to inhuman and degrading treatment" but found that they did not "occasion suffering of the particular intensity and cruelty implied by the word torture."

The ECrtHR continued to examine the severity of pain and suffering to determine whether a detainee's treatment amounted to torture. In *Aksoy v. Turkey*, the Court found that Mr. Aksoy's treatment amounted to torture. During his interrogation by the Turkish police, Mr. Aksoy was stripped naked, with his hands tied behind his back, and hung by his arms. This technique is known as the "Palestinian hanging". Mr. Aksoy was also subjected to electric shocks to his genitals and several beatings. The Court found that the "Palestinian hanging" caused sever pain. This, coupled with the finding that Mr. Aksoy suffered paralysis in both arms, was sufficient for the Court to conclude that Mr. Aksoy had been subjected to torture. The Court did not comment on whether the beatings and shocks also amounted to torture in the circumstances.

In its more recent jurisprudence, the ECrtHR has modified its approach. The Court continues to maintain a distinction between torture and cruel, inhuman, and degrading treatment but the principle determining factor is no longer the level of pain inflicted. The seminal case in this regard is *Selmouni v. France*. Mr. Selmouni was beaten and sodomized while in police custody. The Court found that the severity of the physical and mental violence endured by Mr. Selmouni was enough to constitute torture. The Court reconsidered the threshold for torture as set-out in the *Northern Ireland Case*:

> [T]he Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

While there is a general and accepted agreement that, as a matter of international law, torture is prohibited, the definition of what of types conduct give rise to a certain level of torture may develop and change over time. The issues addressed in this paper regarding the particular distinction between torture and other forms of ill-treatment is only peripheral. While the standard of treatment used to distinguish between torture and ill-treatment might shift over time, there is no question that all forms of ill-treatment are proscribed as a matter of human rights law. As such, the distinction is of little legal relevance for our purposes.

In *Aydin v. Turkey*, the applicant was blindfolded, paraded around naked and subject to rape. The ECrtHR found that "the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention".[174] . The Court would have reached the same conclusion on either of the grounds taken separately.

The ECrtHR's jurisprudence categorizes conduct which is premeditated, prolonged, causing either actual bodily harm or intense physical or mental suffering as "inhuman treatment". Treatment is deemed to be "degrading" where it is such as to arouse in victims feelings of fear, anguish, and inferiority capable of humiliating and debasing them.

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[173] *Norther Ireland Case*, at para. 167.

[174] She was detained over a period of three days during which she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical pain and mental anguish brought on by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability. *Aydin v. Turkey*, App. No. 23178/94 (1998) 25 E.H.R.R. 251 at para. 27.

(a) Inhuman Treatment:

Treatment has been held by the Court to be "inhuman" because, *inter alia,* it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. It can also be "degrading" because it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must, in any event, go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. The question of whether the purpose of the treatment was to humiliate or debase the victim is a further factor to be taken into account. Nonetheless, absence of any such purpose cannot conclusively rule out a finding of violation of Article 3.[175]

In the *Northern Ireland Case*, the Court found that, applied in combination, the five techniques caused "if not actual bodily injury, at least intense physical and mental suffering".[176] This led the Court to conclude that the five techniques amounted to inhuman treatment. The Court did not specify the reason for this conclusion. Importantly, the Court in the *Northern Ireland Case* considered the combined effect of the five techniques, leaving open the issue of whether each technique alone amounted to "inhuman or degrading treatment."[177]

As exemplified in the *Tomasi*, *Ribitsch*, and *Tekin* cases discussed below, the ECrtHR does not always explain which aspects of the impugned conduct are inhuman and which are degrading.

While in custody, Mr. Tomasi was struck by officers, deprived of sleep, deprived of food, left naked in front of an open window, and subjected to beatings.[178] There were physical markings, bruising and scratches, on his body as a result of this treatment. The Court characterized this treatment as inhuman and degrading.[179] The injuries were not severe but they were indicative of the use of physical force on an individual in custody. For this reason, the commission concluded that the treatment in question did violate Article 3 of the Convention.[180]

Mr. Ribitsch was held in police custody and interrogated by police officers. He was grossly insulted, repeatedly subjected to assaultive behaviour, which included punches and kicks. He was also pulled to the ground by the hair and his head was banged against the floor. The treatment caused bruising, vomiting and diarrhea.[181] The Court found that Mr. Ribitsch had suffered inhuman and degrading treatment. The standard applied by the Court was the following: "in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set froth in Article 3 of the Convention."[182]

During his interrogation, Mr. Tekin was kept in a cold dark cell, he was detained for four days in total darkness in sub-zero temperatures with no bed or blankets and blindfolded. His treatment left him with bruises and other wounds. He was being aggressively interrogated, threatened with death, and denied food and liquids. He also was stripped naked, hosed with cold water, beaten with a truncheon on his body and the soles of his feet, and

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175 *Raninen v. Finland* (1997) VI Eur Ct. H. R. 2260 at para. 55.

176 *Northern Ireland Case*, at para. 167.

177 For a discussion on this point, for example "Tortured Logic" at 45.

178 *Tomasi v. France*, No. 12850/87 [1992] ECHR 53 (Aug. 27, 1992) at para. 45.

179 *Ibid*., at para. 112.

180 *Ibid*., at para. 113.

181 *Ribitsch v. Austria* (1995) 336 E.C.H.R. (Ser. A) 6 at para. 12.

182 *Ibid*., at para. 38.

had electric shocks administered to his fingers and toes. In reviewing the complaint, the Court found a violation of Article 3 and adopted the view that the treatment had to be considered as a whole and did not distinguish between inhuman and degrading elements of the treatment.[183]

(b) Degrading Treatment:

In the *Greek Case*, the Commission wrote that degrading treatment grossly humiliates and drives the detainee to act against his will or conscience.[184] This general principle was applied and further elaborated upon throughout ECrtHR case law.

In the *Northern Ireland Case* the Court considered the five techniques and found that they were degrading since "they were such as to arouse in their victims feelings of fear, anguish and inferiority, capable of humiliating and debasing them and possibly breaking their physical or moral resistance."[185]

In *Raninen v. Finland*, the Commission considered a complaint wherein the applicant was handcuffed in public presence while being transferred from the Court. The Commission wrote that "a treatment may also be said to be degrading if it grossly humiliates a person in front of others or drives him to act against his will or conscience". The Commission also found that "a measure which does not involve physical ill-treatment […] may constitute degrading treatment provided that it attains a minimum level of severity thereby interfering with human dignity." Humiliation in the eyes of the victim may be sufficient for treatment to attain the proscribed level of severity. In addition, "it is essential whether or not the treatment in question denotes contempt or lack of respect for the personality of the person subjected to it and whether it was designed to humiliate or debase him instead of, or in addition to, achieving other aims."[186]

In Mr. Selmouni's case, the Court paid particular attention to the degrading treatment which he suffered at the hands of the police:

> [T]he court also notes that the applicant was dragged along by his hair; that he was made to run along a corridor with police officers positioned on either side to trip him up; that he was made to kneel down in front of a young woman to whom someone said "Look, you're going to hear somebody sing"; that one police officer then showed him his penis, saying "Here, suck this," before urinating over him; and that he was threatened with a blowlamp and then a syringe.

The Court observed that such treatment would be "heinous and humiliating for anyone, irrespective of their condition" specifically because the acts complained of were "such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance."

The *East African Asians* case also addressed the issue of degrading treatment. The general principle applied was that action, which lowers a person in rank, position, reputation or character, is degrading treatment if it reaches a certain level of severity. In this case, it was to publicly single out a group of persons for differential treatment on the basis of their race. The level of severity must be such that the treatment breaks the victim's physical or moral resistance.[187]

Degrading treatment is therefore treatment which is calculated to humiliate or debase and denotes a lack of respect or contempt for the victim. It is also treatment which has the effect of gross humiliation in front of others or in the victim's own eyes. It is treatment which arouses feelings of fear, anguish or inferiority. In order to rise to the necessary level of severity, it must humiliate and debase the victim and break physical or moral resistance. The ECrtHR's case law also makes clear that the conduct is required to go beyond the inevitable suffering or humiliation connected with legitimate treatment or punishment.

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183 *Tekin v. Turkey*, App. no. 52/1997/836/1042 9 June 1998 at paras. 49 and 54.

184 *The Greek Case*, 1969 (1972) 12 Yearbook of the European Convention on Human Rights at 74.

185 *Northern Ireland Case*, at para. 167.

186 *Raninen v. Finland* (1997) VI Eur Ct. H. R. 2260, Commission Report No. 20972/92 Oct. 24/1996.

187 *East African Asians v. United Kingdom* (1981) 3 E.H.R.R. 76, at para. 189.

D) State of Israel and the General Security Services

The General Security Service (GSS) is responsible for the investigation of individuals suspected of crimes that affect the security of the State of Israel. In carrying out its functions, the GSS also investigates those suspected of terrorist activities. In so doing, the GSS used methods of interrogations which were authorized in directives and internal regulations designed to regulate interrogation methods. These included the use of physical pressure. In the *GSS Practices Case*, the petitioners challenged the legality of the methods used.

In the *GSS Practices Case*, the Israel Supreme Court noted that "An interrogation inevitably infringes upon the suspect's freedom, even if physical means are not used. Indeed, undergoing an interrogation infringes on both the suspect's dignity and his individual privacy."[188] The approach adopted by the Israel Supreme Court:

> In the *GSS case*, the Court held that investigators had, in essence, the same power as police officers concluding that neither "possess the authority to employ physical means which infringe upon a suspect's liberty during the interrogation, unless these means are inherently *accessory to the very essence of an interrogation* and are both *fair* and reasonable" (emphasis added).

The Court held that the legality of interrogation techniques is "deduced from the propriety of purpose and from its methods."[189]

Specially, the Court found that forcing a suspect to adopt a stress position, in that case forcing a detainee to crouch on the tips of his toes for five-minute intervals was prohibited because "it does not serve any purpose inherent to an investigation". With respect to the practice of hooding, the Court found that there may be a legitimate consideration in limiting the eye contact between the detainee and the interrogator, but that having a hood covering the entire head (which may lead to suffocation) is not permitted. In addition, the Court held that in the circumstances of the case, loud music, when combined with other impermissible methods of interrogation, is also prohibited.[190] Finally, with respect to sleep deprivation, the Court found that this practice may only be allowable when it is found to be "an inevitable result of an interrogation, or one of its side effects". As such, it is impermissible to subject a detainee to sleep deprivation "for a prolonged period of time" when used "for the purpose of tiring him out, of 'breaking him'".[191] Similarly, cuffing a detainee for the purpose of preserving safety is within the investigator's authority provided that this is in fact the purpose for which the individual is cuffed.[192] In order to be legitimate interrogation methods, there must be an essential link and connection between the conduct and inherent investigative need which relates to the very essence of the interrogation. Methods which do not meet this test are prohibited.[193]

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[188] *The Judgment Concerning the Interrogation Methods Implied by the GSS*, Supreme Court of Israel, sitting as the High Court of Justice, 6 September 1999, official website of the Israeli Supreme Court <http://www.court.gov.il> (last visited 6 January 2008), at para. 18. [*GSS Practices Case*]

[189] *GSS Practices Case* at para. 23. See generally Cohen, "Democracy and the Mis-Rule of Law: The Israeli Legal System's Failure to Prevent Torture in the Occupied Territories" (2001) 12 *Ind. Int'l & Comp. L.* Rev. 75; and Guiora & Page, "The Unholy Trinity: Intelligence, Interrogation and Torture" (2006) 37 *Case W. Res. J. Int'l L.* 427.

[190] *Ibid*., at para. 29.

[191] *Ibid*., at para. 31.

[192] *Ibid*., at para. 26.

[193] In this vein, consider ICRC Commentary GCIII: "anything which attacks the internees personal dignity without being necessary for security reasons, is to be banned as inhuman."

E) Necessity and the Ticking Bomb

It has been suggested that there are some situations which could justify acts which would otherwise be illegal.[194] Specifically, there are those who argue that the application of physical and mental force, short of torture, which would otherwise fall within the ambit of ill-treatment, should be permissible where coercive measures are necessary to save the lives of others. Where there is, for example, an imminent threat. In this context, commentators often use the "ticking bomb" concept as an example. This scenario presumes that a detainee has information (or is believed to have information) which the interrogator must have to save the lives of others, namely to "disarm a ticking bomb". Without the extraction of the information, there is a significant (and imminent) risk of harm and loss of life. In these circumstances, some argue that derogations from legal obligations should be permissible.[195]

In the *GSS Case*, the Israeli Court considered this issue. The Court opined that, while a necessity defense could not be relied upon to authorize the use of torture, the defense could be raised in rare situations where the use of force in an interrogation was deemed necessary. Specifically, the Court held that the necessity defence could be open to an investigator in some circumstances. However, the court imported two important caveats: any physical force used "must still be inherently accessory to the very essence of the interrogation and be both fair and reasonable" and second, that the notion of necessity cannot be used to justify what is otherwise prohibited conduct *a priori*. The necessity defence is not a source of authority to make use of otherwise prohibited methods of interrogation. The Supreme Court of Israel determined that "ticking bomb" situations could not be used to determine, *a priori*, the guidelines which are applicable to interrogations. That is to say that while a necessity defence may be raised, after the fact, it does not justify the use of torture or other forms of ill-treatment. In defining applicable norms, the notion of "necessity" does not affect the definition of what is permissible conduct because it does not permit infringement of human rights.

In *R. v. Perka*, the Supreme Court of Canada recognized necessity as a common law defence in Canada. Chief Justice Dickson restricted necessity to "circumstances of imminent risk where the action was taken to avoid a direct and immediate peril". In addition, the impugned act would only benefit from the defence if it was "morally involuntary" as "measured on the basis of society's expectation of appropriate and normal resistance to pressure"; and where it was clear that there was no reasonable legal alternative to avoid the peril.[196] The Court stressed that necessity could operate as an excuse for morally involuntary conduct but not as a justification. The standard required for necessity would seem to preclude premeditated and deliberate decisions to violate the law. If a situation is clearly foreseeable, the defence would not apply as the circumstances would not be necessitous.

In order to consider the necessity defence, there must be an air of reality to the defence. There must be evidence relating to the three parts of the test. The Court's restrictive formulation of an immediate threat, namely that the threat must be "on the verge of transpiring" and "virtually certain to occur",[197] certainly limits the applicability of the defence in the context of interrogation. A subjective belief that there is a threat of imminent peril is not sufficient. There must be a reasonable basis for the belief given the circumstances.

In addition, as the Court determined in *Perka*, "if there is a reasonable legal alternative to disobeying the law, then the decision to disobey becomes a voluntary one, imperilled by some consideration beyond the dictates or necessity and human instinct". Simply put, if there is a reasonable legal alternative, there is no necessity. Legal alternatives must be pursued even though they are "demanding" or "unappealing".[198] The analysis of whether peril

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194 See Posner & Vermeule, "Should Coercive Interrogation Be Legal?" (2006) 104 *Mich. L. Rev.* 671.

195 *Ibid*.

196 *R. v. Perka* [1984] 2 S.C.R. 232. Subsequently, in *R. v. Latimer*, [2001] 1 S.C.R. 3, the Supreme Court articulated the elements of necessity as follows: (1) the requirement of imminent peril or danger; (2) the requirement of no reasonable legal alternative; and (3) the requirement of proportionality between the harm inflicted and the harm avoided.

197 *R. v. Latimer*, at para. 29.

198 *R. v. Latimer*, at para. 38.

is imminent and whether there was a reasonable legal alternative are both highly factual and highly contextual questions. The final consideration is whether the harm caused is proportional to the harm committed. The harm avoided does not have to "clearly outweigh" the harm caused so long as the two harms are "of a comparable gravity".[199]

Proponents of a necessity doctrine make clear that the doctrine could only apply where an interrogator "is reacting to an emergency rather than to a state contemplating the creation of broad policies."[200] In the context of applicable Canadian law, it would appear that a deliberate and planned decision to engage in prohibited conduct during an interrogation is inconsistent with the morally involuntary response to an immediate threat required for a necessity defence.

F) Section 12 of the Canadian Charter

As outlined above, this paper is intended to examine aspects of the legal framework that defines the law of interrogation. In this respect, the issue of the scope of extraterritorial application of the *Charter* is not engaged.[201] In considering the IHL rules applicable to interrogations, however, *Charter* rights are relevant although not determinative of the standards to be applied.

The guarantee of freedom from cruel and unusual treatment is enshrined in section 12 of the *Charter*.[202] The protections offered by section 12 are absolute in so far as there is no prescribed limitation within the wording of the section. On a strict reading of the *Charter* provisions, however, section 12 rights could be limited by section 1. Given Canada's international obligations, however, it would seem unlikely that a court would accept an argument relying on section 1 to justify what would otherwise be prohibited conduct. A section 1 justification was considered by the Supreme Court of Canada in *R. v. Smith*.[203] The majority rejected the argument finding that "no law of Canada shall be construed or applied so as to impose or authorize the imposition of cruel and unusual treatment or punishment."[204]

The prohibition contained in section 12 is *prima facie* narrower than the prohibitions considered above. Specifically, while international and regional instruments expressly prohibit torture and cruel, inhuman, or degrading treatment or punishment, the wording of section 12 appears to express a narrower restriction. In *R. v. Suresh*, the Supreme Court of Canada concluded that torture could be read-into section 12 because torture falls into the category of proscribed conduct.[205] It suggested, however, that Canadian courts can take the view that section 12 is intended to fully implement Canada's international human rights obligations.[206]

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199 *R. v. Latimer*, at para. 31.

200 Rubel, "A Missed Opportunity: The Ramifications of the Committee Against Torture's Failure to Adequately Address Israel's Ill-Treatment of Palestinian Detainees" (2006) 20 *Emory Int'l L. Rev.* 699, at 715-716.

201 For a discussion on the Supreme Court of Canada's most recent statement on the extraterritorial application see *R. v. Hape,* [2007] 2 S.C.R. 292.

202 Section 12 provides: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment".

203 *R. v. Smith*, [1987] 1 S.C.R. 1045.

204 See McIntyre and Le Dain JJ. in *R. v. Smith*, [1987] 1 S.C.R. 1045 at 1085 and 111 respectively.

205 *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3 at para. 51. The Court also wrote that "[w]hen Canada adopted the Charter in 1982, it affirmed the opposition of the Canadian people to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s. 12".

206 The Supreme Court of Canada has not explicitly found that section 12 should be interpreted in conformation with Canada's treaty obligations. In *R. v. Smith* however, Lamer J. does quote ICCPR art. 7 and cites UDHR art. 5 and ECHR art. 3 in his analysis of section 12.

In *Kindler v. Canada (Minister of Justice)*, Justice Cory noted that through section 12 Canada affirmed its commitment to the principle of human dignity. Although writing in dissent on the disposition of the facts of the particular case, Justice Cory's comments with respect to the fundamental importance of human dignity in the *Canadian Charter* are worth noting. Justice Cory reviewed a number of seminal Supreme Court of Canada cases and underlined jurisprudential pronouncements which confirm that the notion of human dignity is one of the basic principles and values which permeate almost every right and freedom guaranteed in the *Charter*.[207]

In the *Smith* Case, the Supreme Court of Canada set out the test to be applied to determine whether treatment or punishment is "cruel and unusual" within the meaning of section 12 of the *Charter*. Justice Lamer (as he then was) wrote that punishment (or treatment) is "cruel and unusual" where it is so excessive as to outrage standards of decency. The concept of outraging standards of decency would be met if a "Canadian would find the punishment abhorrent or intolerable."[208] No matter what the crime or whom the offender, punishments must be appropriate. When punishment is "so demeaning that all human dignity is lost, then the punishment must be considered cruel and unusual."[209] This standard applies even when dealing with the worst crime and the worst offender. The infliction of corporal punishment, even if only one lash, is simply not acceptable.[210] These guiding principles were approved by the Court in *R. v. Wiles*[211] and in *Canada (Minister of Employment and Immigration) v. Chiarelli*.[212]

More recently, in *Charkaoui v. Canada (Citizenship and Immigration)*, the Supreme Court found that because indefinite detention without hope of release or recourse to a legal process to procure release may cause psychological stress, the security certificate provisions of the Immigration and Refugee Protection Act ("IRPA") amounted to cruel and unusual treatment.[213] Confinement of an inmate in administrative or protective segregation is not per se cruel and unusual treatment. It may however become so if it is so excessive as to outrage standards of decency.

III. The Emerging Legal Imperatives

The rules applicable to CF interrogations that take place in the context of international operations are informed by IHL, as the applicable *lex specialis*, as well as IHRL. The above discussion considered some of the areas of commonality and difference with respect to the two regimes. There are clear overlaps and inter-relations between these two areas of law and their mutual application in the context of CF operations is not contentious.

Although the GCs place restrictions on the methods that can be used to interrogate a detainee, there is nothing in the GCs that prohibit interrogation. The Conventions regulate the method of interrogation. In the specific context of interrogations the concept of humane treatment and the prohibition against coercion shape each other mutually. Neither one subsumes the other.

The rules are easily stated: in conducting intelligence interrogations it is clear that detainees must be treated humanely at all times. In addition, there is conduct and there are practices which are clearly proscribed. Subjecting a detainee to inhumane treatment, and acts of violence or intimidation or any other form of coercion

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207 *Kindler v. Canada (Minister of Justice)* (1991) 67 C.C.C. (3d) 1, at paras 145-149.

208 *R. v. Morrisey* (2000), 148 C.C.C. (3d) 1 at 16-17. These principles were reviewed with approval in *R. v. Wiles*, [2005] 3 S.C.R. 895.

209 *Kindler v. Canada (Minister of Justice)* (1991) 67 C.C.C. (3d) 1, at para. 152.

210 *Ibid.,* at para. 152 citing Justice Lamer's decision in *R. v. Smith.*

211 *R. v. Wiles*, [2005] 3 S.C.R. 895.

212 *Canada (Minister of Employment and Immigration) v. Chiarelli,* [1992] 1 S.C.R. 711.

213 *Charkaoui v. Canada (Citizenship and Immigration),* [2007] 1 S.C.R. 350. See also *El Megreisi v. Libyan Arab Jamahiriya* 440/1990 HRC, GAOR 50th Session, 23 March 1994 (being held by the State indefinitely, without any contact with the outside world is inhuman).

used in aid of interrogation is prohibited and a clear violation of the *Geneva Conventions of 1949.* The basic principles derived from the text of the GCs can be identified without great difficulty. IHRL norms and obligations clearly proscribe torture and cruel, inhuman and degrading treatment. These are non-derogable obligations. Coercive interrogations, that is, interrogations which fall short of torture but nonetheless subject a person to ill-treatment are clearly prohibited whether under IHL or IHRL frameworks.

Providing clear guidance with respect to the conduct of questioning detainees is not always straightforward and listing conduct as categorically legal or illegal may be difficult in some cases. There may, for example, be conduct which on its own is acceptable but when combined with other factors is no longer lawful and permitted. It is accepted that some minor physical discomfort will be associated with the interrogation process because interrogation involves the loss of liberty. Establishing a bright-line rule to define the point at which the discomfort will amount to inhumane treatment is not always feasible given that a number of issues must be factored into the equation. In the context of the interrogation process, the legal parameters are defined with respect to factors which are related to the method of questioning (i.e. techniques) but also to extrinsic factors (i.e. conditions in the detention facility). Similarly, it is accepted that some form of persuasion may be applied to an uncooperative detainee in order to extract information. The precise point at which the lawful persuasive techniques cross the Rubicon such that they can be classified as coercive and thus prohibited is not easily identified. That is not to suggest that there are not methods which cannot be condoned in any circumstances.

What the legal imperatives discussed above do is provide principles and frameworks from which we may develop doctrinal guidance and procedures in order to identify interrogation methods and techniques which are expressly prohibited.

One of the clear guiding principles which does emerge is that external pressures, namely pressures which are applied by interrogators in order to break a detainee's will, are prohibited if, as a result, the detainee provides the information and cooperates in order to end or avoid the distress which the interrogator has brought to bear on the individual. Where the conduct in question is specifically designed to overbear the will of the detainee in that way, it is impermissible. The cases of torture, actual or threatened, or physical violence are clear; perplexity arises when much more subtle elements must be evaluated. The strength of mind and will of the accused, the influence of custody or its surroundings, the effect of questions or of conversation, all call for delicacy in appreciation of the part they have played behind the ultimate cooperation. The purpose of conduct is therefore paramount. The pain and suffering inflicted is not the decisive standard.

It is also clear that coercive interrogations are not legally acceptable simply because the impugned treatment does not rise to the level of torture. The UN Special Rapporteur has recently addressed this issue:

> An increasing number of Governments, in the aftermath of 11 September 2001 and other terrorist attacks, have adopted a legal position which, while acknowledging the absolute nature of the prohibition of torture, brings the absolute nature of the prohibition of cruel, inhuman or degrading treatment or punishment into question. In particular, it is argued that certain harsh interrogation methods falling short of torture might be justified for the purpose of extracting information aimed at preventing future terrorist acts that might kill many innocent people.[214]

He concluded that "If a person is detained or otherwise under the de facto control of another person, i.e. powerless [...] the prohibition of torture and cruel, inhuman or degrading treatment is absolute."[215]

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[214] Report of the Special Rapporteur on the Question of Torture, E/CN.4/2006/6, at para. 34.

[215] *Ibid.*, para. 41.

THE LAW OF INTERROGATION

I. CF Doctrine

A) Standard of Treatment

With respect to the conduct of interrogation, some international law rules are only applicable as a matter of law in times of armed conflict, that is to say that IHL is normally only applicable in the case of a factual armed conflict. Further, some rules are applicable only in the case of a particular type of armed conflict: for example, the vast majority of the rules in the Geneva Conventions are only applicable in the case of an international armed conflict and can thus be considered a part of the law of *international* armed conflict. In addition, within IHL are differing rules and protections which are dependent on the legal status of the detainee. However, "it is Canadian Forces policy that all captured persons or detainees be treated to the standard required for PWs, as this is the highest standard required under International Humanitarian Law."[216] Accordingly, regardless of the status a particular detainee is given under the IHL, he or she will always be treated to the PW standard.

Further, as is stated in the Code of Conduct, the CF will, as a minimum, apply the spirit and principles of the law of armed conflict during all operations other than domestic operations. As such, IHL rules are always applicable to CF interrogation activities, even if they do not apply to a specific international deployment/operation in a strict legal sense. This baseline standard is consistent with CF policy on the Law of Armed Conflict generally which provides that the basic principles of IHL must be applied, as a minimum, by all members of the CF taking part in all Canadian military operations other than Canadian domestic operations. Subjects of interrogations will, as a minimum, be provided the protections accorded by the Third Geneva Convention whether or not as a matter of law, the convention applies. All detainees are therefore provided with the same standards of treatment and care.[217]

B) Aim and Purpose of Interrogation

According to CF doctrine, interrogation and tactical questioning (TQ) are intelligence-gathering activities, defined as follows:

a. Interrogation. Interrogation is the systematic questioning of a PW to obtain information of intelligence value.

b. Tactical Questioning. The first questioning and screening to which a PW is subjected to obtain information of immediate tactical value.[218]

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216 PW Handling Manual at i.

217 For a general discussion on the evolution of US Policy and changes in this respect see: Nowak, "What Practices Constitute Torture?: US and UN Standards" (2006) 28 *HRQ* 809; O'Connell, "Affirming the Ban on Harsh Interrogation" (2005) 66 *Ohio St. L. J.* 1231; Parry "'Just for Fun': Understanding Torture and Understanding Abu Ghraib" (2005) 1 *J. Nat'l Security L. & Pol'y* 253, Paust; "Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees" (2005) 43 *Colum. J. Transnat'l L.* 817. As regards specific treatment standards, the US Army Field Manual was updated in September 2006. It provides that the only authorized interrogation techniques or approaches are those included in the Manual. The Manual also specifically requires all detainees be treated in a manner consistent with the Geneva Conventions. US Army FM 2.22-3 also specifically prohibits eight techniques when used in conjunction with intelligence interrogations, at 5-75. If used in conjunction with intelligence interrogations, prohibited actions include, but are not limited to: forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner; placing hoods or sacks over the head of a detainee; using duct tape over the eyes; applying beatings, electric shock, burns, or other forms of physical pain; "waterboarding"; using military working dogs; inducing hypothermia or heat injury; conducting mock executions; and depriving the detainee of necessary food, water, or medical care. See also CRS: *Lawfulness of Interrogation Techniques;* Garcia, "Interrogation of Detainees: Overview of the McCain Amendment" *CRS Report for Congress RL33655* October 23, 2006; and Wood, "Overview and Analysis of Senate Amendment Concerning Interrogation of Detainees" *CRS Report for Congress RS22312* (November 2, 2005).

218 PW Handling Manual at 402.

For the purpose of this paper no distinction is made between interrogation and tactical questioning activities; the law discussed herein does not differentiate in application between the two and is equally applicable to both. Any reference in this paper to "interrogation" could be understood to refer to both interrogation and TQ under CF doctrine.

The purpose of interrogation as defined by the CF is "to obtain *usable and reliable* information, in a lawful manner and in the least amount of time, which meets the intelligence requirements of any echelon of command."[219] In this respect, an interrogation is successful if it results in "time, complete, clear, and accurate" information.[220] "Interrogations provide commanders with information about enemy networks, leadership and tactics. Such information is critical in planning operations. Tactically, detainee interrogation is a fundamental tool for gaining insight into enemy positions, strength, weapons, and intentions. Thus, it is fundamental to the protection of our forces in combat."[221]

The Israeli Supreme Court defined interrogation as "asking questions which seek to elicit truthful answers" and wrote that the purpose of interrogations is to gather information with respect to the methods of operation of the detainees in order to thwart and prevent them from carrying out attacks.[222]

CF Doctrine defines the concept of interrogation as "controlled, systematic processes by which specified personnel question individuals in order to obtain information."[223] In the *GSS Practices Case*, the Israeli Supreme Court suggested a very pragmatic way to articulate what is inherent in the concept of interrogation: "An interrogation is a 'competition of minds', in which the investigator attempts to penetrate the suspect's thoughts and elicit from him the information the investigator seeks to obtain".[224]

II. Legal Rules Relating to Interrogations

A) Authority to Detain

The question of whether or not detention is permitted for a particular operation will be considered at the strategic level and the answer reflected in the rules of engagement. For the purpose of providing context and to present a whole picture of the law relating to interrogations, this paper will briefly discuss the law relating to detention. Importantly, it is not only consideration of the law that will influence strategic decisions on whether to authorize detentions in a particular operation: policy considerations will also enter into the analysis.

Very generally, which law is referenced for rules governing authority to detain depends on the nature of the international operation. If the operation takes place in the context of an international armed conflict, then IHL will be applicable. In that situation, in the case of persons who would be entitled to PW status, the conventional IHL does not provide a specific authority to detain. This authority, however, is clearly implied by other IHL rules. For example, GCIII relates to the treatment of PWs, and part of the definition therein for the term PW is that the person has "fallen into the power of the enemy."[225] Furthermore, customary international law provides for the detention of combatants. The conventional IHL is more explicit in the case of persons who would be considered

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219 *Ibid.,* (emphasis added). This is consistent with NATO doctrine: "The primary aim of interrogation is timely extraction of information and/or intelligence from [captured personnel/detainees], and dissemination of that product to the relevant command in order that it may be used in the production of intelligence estimates and in decision making."

220 *Ibid*.

221 *Final Report of the Independent Panel to Review DoD Detention Operations*, The Honorable James R. Schlesinger, Chairman, (August 2004), at 65.

222 G*SS Practices Case* at para. 1.

223 *PW Handling Manual* at para. 403.

224 G*SS Practices Case* at para. 22.

225 GCIII, art. 4.

"protected persons." Parties to a conflict "may take such measures of control and security in regard to protected persons as may be necessary as a result of the war."[226] That such measures may include detention is clear, reinforced by the definition for "protected persons" requiring in part that such persons be "in any manner whatsoever […] in the hands of a Party to the conflict […] of which they are not nationals."[227] The IHL also provides for the specific measure of "internment" of "protected persons" in certain cases.[228]

In cases of a conflict not of an international character, Common Article 3 presupposes that detention will occur by including within the term "persons taking no active part in the hostilities" those "placed *hors de combat* by […] detention."

In some cases, the CF will conduct an international operation under the authority granted by UN Security Council resolution. In these cases, the mandate will define the scope of the allowable use of force. For example, by Resolution 1510 (2003), the Security Council gave authority to the International Security Assistance Force ("ISAF") to engage in certain activities in Afghanistan, and authorized "member states participating in (ISAF) to take all necessary measures to fulfil its mandate." This broad language authorizes detention of persons where necessary.

B) Authority to Interrogate Detainees

As a general rule, the authority to interrogate derives from the authority to detain. In other words, if the CF may lawfully detain an individual, it may also interrogate that individual, although the rule permitting interrogation does not derive explicitly from conventional law. That is, there is no rule permitting interrogation. There is also, however, no rule prohibiting interrogations, and, as has been discussed, several rules govern how interrogations are to be done: it's not what you ask but how you ask it.

Further, the legal authority to interrogate can be sourced in the past and ongoing practice of states. Possessing information is helpful in military operations, and obtaining intelligence has always been a priority for militaries engaged in hostilities. It is likely that this state practice has coalesced into a customary law rule generally permitting interrogation where detention is lawful.[229]

C) Legal Rules Relating to the Conduct of Interrogations

The GCs are clear about the prohibition of torture and other forms of inhumane or degrading treatment and specifically prohibit the use of any form of coercion. According to the ICRC, all detainees fall somewhere within the protections of these two Conventions. According to the ICRC Commentary:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or […] a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.

All of this said, it is CF policy to treat all detainees to the standard afforded to PWs. From this we may surmise that regardless of whether the operation takes place against the backdrop of an international or non-international armed conflict, and regardless of the actual legal status of a detained person, the detainee will be entitled to the PW standard of treatment.

Several provisions in GCIII prescribe the means by which information may be elicited in the context of interrogations. The following rules set out the PW standard, and therefore the standard applicable to all detainees interrogated by the CF.

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226 GCIV, art. 27.

227 GCIV, art. 4.

228 GCIV, art. 42. See also GCIV, art. 78 for internment in occupied areas.

229 See e.g. *R (Al-Jedda) v. Secretary of State for Defence,* [2007] UKHL 58.

Detained persons must always be treated humanely, including during interrogation. Viewed positively, humane treatment requires that detainees must at all times be protected, particularly against acts of violence, intimidation, insults, or public curiosity.

Any interrogation techniques that result in the CF not providing such protection are always prohibited as inhumane, and may never be used.

Negatively, interrogation techniques that involve the following are always prohibited as inhumane, and may never be lawfully used:[230]

a. seriously endangering health,

b. physical mutilation,

c. medical or scientific experiments,

d. violence,

e. threats of violence,

f. intimidation,

g. reprisals, and

h. taking of hostages.

Interrogation techniques that involve the following are always prohibited and may never be lawfully used:

a. physical or mental torture,

b. cruel, inhuman or degrading treatment or punishment, including:

   (1) use of violence,

   (2) outrages upon human dignity,

   (3) humiliation, and

   (4) physical or moral coercion.

As outlined above, GCIII delineates general provisions that prohibit abusive treatment of PWs, protect their health,[231] and describes specific conditions relating to their confinement.[232] In the same way, GCIV which protects

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[230] "Cruel treatment and torture;" as well as "outrages upon personal dignity, in particular humiliating and degrading treatment," are each prohibited on their own terms, but are also examples of inhumane treatment and thus prohibited on that ground as well.

[231] GCIII, Article 17 (specifically prohibits mental torture and any other form of coercion of PWs in order to secure information), Article 13 (requires that at all times PWs must be treated humanely. Any act, or omission by the detaining power that causes death or seriously endangers the health of PWs is a serious breach of the Convention), Article 14 (PWs are entitled to respect for their person and their honour), Article 87 (prohibits any form of torture or cruelty in the context of punishments).

[232] See, e.g., GCIII, Article 21 specifying that PWs may not be held in close confinement except where necessary to safeguard their health; Article 25 specifying conditions must make allowance for the habits and customs of PWs and "shall in no case be prejudicial to their health."; and Article 90 prohibiting punishment that lasts more than 30 days.

civilians in times of conflict, provides a specific prohibition on coercion and also contains general prohibitions on ill-treatment, as well as specific conditions of treatment.[233] These principles are enshrined in CF policy relating to the key principles which govern interrogation and TQ.[234]

D) Prohibition on Subjecting a PW to Unpleasant or Disadvantageous Treatment

All detainees in the hands of the CF are entitled to the standards of treatment for PWs. This means that PWs or other detained persons who refuse to answer questions may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.[235] The broad scope of this prohibition may be deduced from its context; the sentence preceding it in the convention reads: "no physical or mental torture, nor any other form of coercion, may be inflicted on PWs to secure from them *information of any kind whatever*." (Emphasis added.) Accordingly, the rule prohibiting unpleasant or disadvantageous treatment applies to a refusal to answer *any* question.

Importantly, this rule does not prohibit interrogation for any purpose; it merely provides that certain interrogation techniques may not be employed.[236]

With respect to the techniques that may not be employed, the wording of the rule clearly sets a very low standard for interrogation practice.[237] This wording sets out a general prohibition on exposing a person to "unpleasant or disadvantageous treatment," and gives as examples causing a person to be "threatened" or "insulted." Threatening and insulting is thus a type of unpleasant or disadvantageous treatment.[238]

It has been pointed out that, strictly speaking, the bar on unpleasant or disadvantageous treatment only applies to PWs "who refuse to answer," but practically, the rule applies to PWs at all stages of the interrogation process.

IHL also provides some positive obligations on PWs relevant in this context. PWs are "bound" to provide the following information when questioned on the subject: "surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information."[239] If the PW "willfully infringes" this rule, he or she may be liable to a "restriction of privileges."[240] This rule appears in the same paragraph as the rule,

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233 GCIV, Article 31 ("No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties"), Article 27 (protected persons are entitled to respect for their persons, honour, religious convictions and practices, manners and customs. "They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof …"), Article 32 (measures that cause physical suffering, including murder, torture, and mutilation are prohibited), Article 118 (forbids without exception imprisonment in premises without daylight, and, in general, all forms of cruelty).

234 PW Handling Manual at 404.

235 GCIII, art. 17.

236 See, e.g. *ICRC Commentary* III, art. 17: "a State which has captured (PWs) will always try to obtain military information from them. Such attempts are not forbidden; the present paragraph covers only the methods to which it expressly refers."

237 See, e.g. Glod & Smith, "Interrogation under the 1949 Prisoners of War Convention" (1968) *Military Law Review* 145 at 152 where it is stated in relation to this rule: "one principle which can be used to determine the legality of an interrogator's action is whether or not a particular prisoner was treated less favorably than the others in order to pressure him into giving military information."

238 Many instances of threatening or insulting will also be prohibited on other grounds in the law, for example as amounting to intimidation or threats of violence.

239 GCIII, art. 17. This is an expansion of the rule which provides PWs are bound to provide only "true name and rank."

240 GCIII, art. 17. Although the wording of the rule is not as clear as it could be, this is the most that may be done by the detaining power to get this information: see Levie, "Prisoners of War in International Armed Conflict" (1977) 59 I.L.S 1 at 108.

cited above, providing that PWs "who refuse to answer" may not be exposed to "any unpleasant or disadvantageous treatment of any kind."[241] One way of reading these two rules together would be to say that a "restriction of privileges" is therefore not "unpleasant or disadvantageous treatment" since PWs may have privileges restricted in certain circumstances. This reading would unavoidably mean that PWs may be subject to "restriction of privileges" at any time, there being no rule against it. The trouble with such a reading is that it goes against the specific rule allowing for restriction of privileges when PWs refuse to give-up information they are obliged to provide. The better reading is that "restriction of privileges" is a type of "unpleasant or disadvantageous treatment" that is allowable against PWs only when they refuse to provide name, rank, date of birth, and serial number.[242]

These requirements led to the rule that the PW is obliged to provide information to help the detaining power establish identity, but nothing more; and preventing the detaining power from using even minimally unpleasant or disadvantageous treatment to persuade the PW to provide more information.

With respect to the use of incentives to reward cooperation, varying the quantity and quality of privileges may not, in all circumstances, be appropriate if a non-cooperative detainee is exposed to disadvantageous treatment as a result.[243]

III. The Treatment of Detainees

As stated above, interrogation tactics which have a goal to "break" prisoners are prohibited. If a detainee is "broken", his/her will is overborne. Although it is not possible to draw a bright-line between coercive and non-coercive interrogations, a very sharp line must be drawn between efforts to break down a detainee, and the use of trickery, ruse, deception or other forms of manipulation. Any use of force, torture, threats, insults or inhumane treatment is prohibited. It is clear that military necessity cannot override the obligation/standard of "humane treatment" for detainees as provided in the GCs. Psychologically coercive interrogation techniques beyond trickery are unlawful.

Interrogation tactics which involve physical force – beatings, stress position, deprivation of food, and subjection to cold or hot temperatures are prohibited. Methods which are more subtle but have a harmful psychological effect are equally prohibited. Sensory deprivation, sleep deprivation, isolation, humiliation, music and light control, use of phobia, and environmental manipulation are also prohibited. It is not however necessarily improper to reward a cooperative detainee with incentives and privileges.

In 2004, the Special Rapporteur specifically responded to allegations about the kinds of methods being used on detainees in the "war on terror." He was clear in his condemnation of the methods used as torture and ill-treatment:

> The Special Rapporteur has recently received information on certain methods that have been condoned and used to secure information from suspected terrorists. They notably include holding detainees in painful and/or stressful positions, depriving them of sleep and light for prolonged periods, exposing them to extremes of heat, cold, noise and light, hooding, depriving them of clothing, stripping detainees naked and threatening them with dogs. The jurisprudence of both international and regional human rights mechanisms is unanimous in stating that such methods violate the prohibition of torture and ill-treatment.

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[241] GCIII, art. 17.

[242] The *ICRC Commentary* III suggests the first reading: "The Detaining Power may not therefore exert any pressure [referring to the prohibition on coercion] on prisoners, and this prohibition even refers to the information specified in the first paragraph of the Article [i.e. name, rank, date of birth, and serial number.]"

[243] See e.g. CRS: Lawfulness of Interrogation Techniques at 26-27.

Since the scandals[244] broke-out with respect to the treatment of detainees at Abu Ghraib in Iraq, considerable attention has been paid to the limits of interrogation techniques with respect to physical forms of torture and cruel, inhuman and degrading treatment of detainees (e.g. stress position, sleep and sensory deprivations). Indeed, there have been significant legislative and policy changes in the US as a result (e.g. the new US Army Field Manual and the new DOD policy). The principles governing interrogation procedures and treatment of detainees conform, at a minimum, to Common Article 3 of the GCs.[245]

In order to obtain a remedy within the human rights system, allegations of ill-treatment must be supported by evidence. The ECrtHR has adopted the standard of proof "beyond reasonable doubt". The Court recognizes, however, that where the events lie in whole or in great part in the exclusive knowledge of the authorities as is the case in most cases involving persons in detention, a strong presumption of fact arises where there are injuries caused while an individual is in custody. "In such cases the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."[246] In the absence of such explanation, the Court will draw adverse inference against the State.[247]

A) Conditions of Detention

The physical conditions in which a person is held can also be inhuman or degrading. In the *Greek Case,* the European Commission on Human Rights found that when considered in combination, the following conditions of detention amounted to a violation of Article 3: overcrowding, incommunicado detention, no access to open air, limited lighting, no exercise, and prolonged detention.[248]

The HRC has adopted a similar approach in applying Article 7 of the ICCPR. In *Portorreal v. Dominican Republic*, the applicant was detained in a cell measuring 20 x 5 metres where 125 persons were held. The restrictive space meant that some detainees had to sit on excrement. The applicant received no food or water until the following day and was detained for 50 hours. The HRC found that this treatment constitutes inhuman and degrading treatment amounting to a violation of Article 7.

Similarly, in *Tshisekedi v. Zaire*, the HRC found a violation of Article 7 amounting to inhuman treatment. The applicant had been "deprived of food and drink for four days after his arrest […] and was subsequently kept interned under unacceptable sanitary conditions."

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244 *Final Report of the Independent Panel to Review DoD Detention Operations*, The Honorable James R. Schlesinger, Chairman, (August 2004); AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade LTG Jones & MG Fay.

245 See e.g. "International Human Rights and International Criminal Law" (2006) 100 Am. J. Int'l. L. 936. Prior to the coming into force of these new policies in 2006, US policy provided that any interrogation methods which did not cause death or severe pain were lawful. Current doctrinal guidance provides that all detainees shall be treated humanely and prohibits cruel, inhuman or degrading treatment or punishment. The war on terror may have ushered in a new paradigm but there has been a significant renunciation of interrogation practices following the scandal at Abu Ghraib and in Guantanamo.

246 *Salman v. Turkey* App No. 21986/93 (27 June 2000), at para. 100.

247 *Mikheyev v. Russia*, App No. 77617/01 (26 January 2006), at para. 102.

248 *The Greek Case* at 468-497. This has been confirmed in more recent judgments of the ECrtHR.

B) Methods of Interrogation

i) *Physical Abuse:*

(a) Beatings and Blows

The use of force during an interrogation may range from a slap to severe blows. Physical "abuse" or beatings have been defined as follows: "The prisoner is subjected to forceful physical contact, either directly or through an instrument."[249] Reported assaultive behaviours include severe beatings, kicking, and electric shock. The ICRC has reported that detainees in Iraq complained of the following treatment during interrogations: "beatings with hard objects (including pistols and rifles), slapping, punching, kicking with knees or feet on various parts of the body (legs, sides, lower back, groin)".[250] Physically restraining a person in very painful conditions, threats of ill-treatment or reprisals against family members can also constitute inhuman treatment.

With respect to minor physical force, the European Commission of Human Rights in the *Greek Case* concluded that "some prisoners may tolerate […] and even take for granted […] a certain roughness of treatment […] by both police and military authorities […]. Such roughness may take the form of slaps and blows of the hand on the head or face." The Commission concluded that, in the circumstances, the conduct did not attain the level of severity required to constitute cruel, inhuman or degrading treatment within the meaning of Article 3 of the ECHR because "the point up to which prisoners and the public may accept physical violence as being neither cruel nor excessive, varies between different societies and even between different sections of them."[251]

We may question whether it is likely that the Commission or the ECrtHR would come to the same conclusion if this case was heard in 2008. The ECrtHR has emphasized that the Convention is a "living instrument which must be interpreted in the light of present-day conditions."[252] The Court "takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies".[253] In applying this statement, the Court has found that certain conduct could possibly be classified more harshly than it had before.[254] It follows that certain acts, previously falling outside the scope of prohibited conduct, might now be deemed to have attained the required level of severity to amount to ill-treatment.

With respect to any use of physical force, more recent ECrtHR jurisprudence provides as follows: "In respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his or her own conduct diminishes human dignity and is in principle an infringement on the right set for in Article 3 of the Convention."[255]

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249 Physicians for Human Rights & Human Rights First, *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality* (August 2007) [*Leave No Marks*] at 2.

250 International Committee of the Red Cross, (2004) *Report of the Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment, and Interrogation* [ICRC Report] at para. 25.

251 *The Greek Case* at 180 and 501.

252 *Tryer v. United Kingdom* (1979-80) 2 E.H.R.R.1 at 15-16.

253 *Selmouni v. France* (25803/94), (2000) 29 E.H.R.R. 403 at para. 101.

254 *Ibid.* In *Selmouni*, the Court found that treatment previously classified as cruel, inhuman and degrading could possibly be classified as torture, ibid.

255 See e.g. *Tekin v. Turkey*. App. no. 52/1997/836/1042 (9 June 1998); *Labita v. Italy*, App. No. 26772/95 (6 April 2000); *Aktas v. Turkey*, App. No. 24351/94 (24 April 2003).

Although it was reported that physical abuse was widely accepted and commonly used as an interrogation technique by US personnel, the use of applied beatings or any forms of physical force causing pain is now expressly prohibited in the US Army Field Manual.[256]

The common element with respect to these interrogation techniques is the pain, mental and physical, suffering and distresses caused to the detainee.[257] This is the case even though there are no marks or bruises: "Severe beatings (often of the feet) with wooden or metal sticks or bars without breaking the bones or causing lesions, yet causing intense pain and swelling, are torture indeed".[258] The *Istanbul Protocol* states that the absence of bruising does not mean that illegal force was not applied.[259] The external indicia of a beating is dependent on where the force is applied, not its extent or severity.[260]

Beatings are most often used along with other forms of ill-treatment. In many such cases the combined effect of the treatment rises to the level of torture. The HRC has considered the following conduct to amount to torture: beatings and withholding food; beatings and being buried alive; electric shocks; beatings, and being hung with arms behind one's back; head forced under water until nearly asphyxiated.[261] Rape or threats of physical mutilation constitute torture as well.[262]

(b) Shaking

The Israeli Supreme Court noted that, "among the investigation methods outlined in the GSS interrogation regulations, shaking is considered the harshest. The method is defined as the forceful and repeated shaking of the suspect's upper torso, in a manner which causes the neck and head to swing rapidly."[263] The Court heard expert evidence that shaking is "likely to cause serious brain damage, harm the spinal cord, cause the suspect to lose consciousness, vomit and urinate uncontrollably and suffer serious headaches."[264] In support of the use of this tactic, the Government argued that prior to using this method of interrogation a detainee was given a health evaluation and that a doctor was present during interrogations. In addition, the Government argued that not only was shaking "indispensable to fighting and winning the war on terrorism" but that it had proven an effective

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256 U.S. Department of the Army, Field Manual 2-22.3 Human Intelligence Collector Operations, at paras. 5-75, p. 5-21 (Sept. 6, 2006) [US Army FM 2-22.3] ("If used in conjunction with intelligence interrogations, prohibited actions include, but are not limited to … applying beatings, electric shock, burns, or other forms of physical pain").

257 For a comprehensive review of the physiological effects (i.e. trauma, muscle injuries) of beatings see *Leave No Marks,* at 13. It is also reported that beatings may cause post-traumatic stress disorder (PTSD), see *Leave No Marks*, at 13-14. See also UNHCHR, Professional Training Series No. 8, *Istanbul Protocol* "Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (2004) [Istanbul Protocol] Chapter V.

258 Rodley, *The Treatment of Prisoners Under International Law* at 77. The ECrtHR makes a similar comment in *Selmouni v. France* (25803/94), (2000) 29 E.H.R.R. 403 at 102 "The Court is satisfied that a large number of blows were inflicted on Mr. Selmouni. Whatever a person's state of health, it can be presumed that such intensity of blows will cause substantial pain. Moreover, a blow does not automatically leave a visible mark on the body."

259 See e.g. *The Istanbul Protocol*.

260 *Leave No Marks*, at 13.

261 For a discussion of cases reported by the HRC see Rodley, *The Treatment of Prisoners Under International Law* at 87-88.

262 *Ibid*., 89-90.

263 *GSS Practices Case,* at para. 9.

264 *Ibid*.

technique in the past.[265] The Court held that "shaking is a prohibited investigation method. It harms the suspect's body. It violates his dignity. It is a violent method which does not form part of a legal investigation. It surpasses that which is necessary."[266]

Shaking would seem to clearly fall within the category of prohibited ill-treatment. It can cause physical pain and risks inflicting severe pain and suffering.[267] Even where it causes no actual injury shaking should be barred because it represents a prohibited use of force.

(c) Hand or Leg Cuffs

It is accepted that there may be some instances where cuffing is necessary and justified for security purposes. This practice has been proscribed; however, where it is maintained for excessively long periods of time or when it causes the detainee an unacceptable level of pain. Where cuffing is used for a lawful purpose, the mere fact that a detainee experiences some discomfort as a result would not be sufficient to render the practice unlawful in the circumstances.

The ECrtHR has ruled that "handcuffing does not normally give rise to an issue under Article 3 of the Convention where the measure has been imposed in connection with a lawful detention and does not entail the use of force, or public exposure, exceeding what is reasonably considered necessary." In determining what may be necessary and justified, the Court concluded that proper considerations include the danger of a person absconding or causing injury or damage.[268]

In the *GSS Practices Case*, the Israeli Court provides a comprehensive analysis of this practice. A number of petitioners complained of excessively tight hand or leg cuffs. The practice resulted in injury to the detainee's hands, arms and feet because of the length of the interrogations. In addition, the petitioners argued that particularly small cuffs were used. The state denied using cuffs which were too small. In defence of its practice, it submitted to the Court that the types of injuries complained of were to be expected when interrogations were lengthy. The Court accepted that cuffing "for the purpose of preserving the investigator's safety" is acceptable. As such, *if* safety requires cuffing *and* it is in fact used for that purpose, cuffing a detainee during interrogation is permitted.[269] Where the method of cuffing is unrelated to the safety requirements (i.e. the hands are in a distorted position) the practice is prohibited.[270] In all circumstances, if the cuffing causes pain (because of the position used or the size of the cuffs) or is a superfluous use of force, it is not permitted.[271]

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265 *Ibid*.

266 *Ibid*., at para. 24.

267 See *Leave No Marks* at 26-27 for a discussion of the potential brain damaged which can be caused.

268 *Raninen v. Finland* (1997) VI Eur Ct. H. R. 2260 at para. 56.

269 By implication therefore where the exigencies do not require the detainee to be cuffed, it may constitute ill-treatment if an interrogator nonetheless chooses to cuff the individual during the interview.

270 In the *GSS Practices Case*, the cuffing was associated with the "Shabach" position, where "the suspect is cuffed with his hands tied behind his back. One hand is placed inside the gap between the chair's seat and back support, while the other is tied behind him, against the chair's back support. This is a distorted and unnatural position. The investigators' safety does not require it" at para. 26.

271 In this respect, the Court in the *GSS Practices Case* reminds us that "there are other ways of preventing the suspect from fleeing which do not involve causing pain and suffering." *Ibid*., at para. 26.

The ICRC observed the following with respect to the treatment of detainees in Iraq: "Handcuffing with flexi-cuffs, which were sometimes made so tight and used for extended periods that they caused skin lesions and long term after effects on the hands (nerve damage)".[272] In applying the standards set-out by the Israeli Court, one easily comes to the conclusion that the effects of the use of handcuffs suggests that the practice did not conform to acceptable standards.

ii) *Sleep Deprivation:*

As with other disorientation techniques, sleep deprivation clearly fall within the definition of ill-treatment. In their report, Human Rights First defined the practice as follows: "The prisoner is deprived of normal sleep for extended periods through the use of stress positions, sensory overload, or other techniques of interrupting normal sleep."[273] Sleep deprivation is used to break down the detainee's resistance by impairing cognitive functions. Its affect can be to cause physical as well as physiological burdens on the detainee.[274]

The ECrtHR has concluded that this practice, when used in combination with other forms of ill-treatment, can constitute a violation of Article 3.[275] CF doctrine specifically prohibits sleep deprivation or manipulation.[276]

Interrogation can be an exhausting experience and can be lengthy "due to the suspect's failure to cooperate, the complexity of the information sought, or in light of the need to obtain information urgently and immediately."[277] For this reason, the Israeli Supreme Court accepted that in some cases a detainee will be deprived of sleep during the course of the interrogation process. As such, the Court concluded that this practice is only prohibited "if [it] shifts from being a 'side effect' inherent to the interrogation, to an end in itself." If the purpose of the sleep deprivation is intentionally prolonged to break the prisoner's will, "it shall not fall within the scope of a fair and reasonable investigation." Such means, the Court found, "harm the rights and dignity of the suspect in a manner surpassing that which is required."[278] Where sleep patterns are manipulated in order to break a detainee from exhaustion or where non-stop interrogations are used for that same purpose, the conduct is not permitted.[279]

iii) *Sensory Manipulation:*

(a) Sensory Deprivation

Sensory deprivation is defined as "the reduction or removal of stimuli from one or more of the senses for prolonged periods".[280] Amongst the methods of ill-treatment observed by the ICRC in its report on the treatment of detainees in Iraq, it noted the following: "Hooding, used to prevent people from seeing and to disorient them, and also to prevent them from breathing freely. One or sometimes two bags, sometimes with an elastic blindfold over the eyes which, when slipped down, further impeded proper breathing. Hooding was sometimes used in

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272 ICRC Report, at para. 25.

273 *Leave No Marks*, at 22.

274 See *Leave No Marks* for an analysis of the medical effects of sleep deprivation, at 22-23.

275 See e.g. *Northern Ireland Case*; see also *Kalashnikov v. Russia*, App. No. 47095/99 (15 July 2002).

276 *PW Handling Manual* at 4A-2.

277 *GSS Practices Case*, at para. 31.

278 *Ibid.*

279 The US Army Field Manual provides that a detainee must be permitted four hours of continuous sleep during every 24 hour period. This pattern of sleep may be used for up to 30 consecutive days. US Army FM 2-22.3 at M-10.

280 *Leave No Marks*, at para. 30.

conjunction with beatings thus increasing anxiety as to when blows would come. The practice of hooding also allowed the interrogators to remain anonymous and thus to act with impunity. Hooding could last for periods from a few hours to up to 2 to 4 consecutive days, during which hoods were lifted only for drinking, eating or going to the toilets."[281]

The ECrtHR has considered various forms of sensory deprivation. Sensory isolation or deprivation (i.e. blindfolding or hooding to deprive prisoners of their sight) especially when coupled with social isolation or other forms of ill-treatment subjects detainees to psychological and physical pressures. Sensory deprivation techniques cause serious psychological disorientation, and as a result, amount to inhuman treatment. Sensory deprivation which endangers pain and suffering, physical or mental, or arouses feelings of fear, anxiety and vulnerability which are likely to break the detainee's will and resistance, constitutes a violation of the prohibition against ill-treatment.

The ECrtHR has said that "complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason."[282] In the *Northern Ireland Case,* the ECrtHR found that the detainees had been subject to sensory deprivation as a result of the following treatment: hooding, wall-standing, deprivation of sleep, and subjection to a constant wall of neutral sound.[283]

In the *GSS Practices Case*, the state argued that hooding (in that case a sack which fell down to the detainee's shoulders was placed over the head) was necessary to prevent contact between detainees but also between the detainee and the interrogator. The Court acknowledged that "the need to prevent contact may, for instance, flow from the need to safeguard the investigators' security, or the security of the suspects and witnesses. It can also be part of the "mind game" which pits the information possessed by the suspect, against that found in the hands of his investigators. For this purpose, the power to interrogate—in principle and according to the circumstances of each particular case—may include the need to prevent eye contact with a given person or place."[284] Where however the practice is not related to the purpose, it is prohibited. The interrogators should use the less harmful means available to achieve their purpose. Where it is necessary to cover a suspect's eyes, it is not necessary to cover the entire head or to continue the treatment for a prolonged period of time. In determining the limits of the use of this method, the Court held that if there is "no essential link to the goal of preventing contact between the suspects under investigation, [then it] is not part of a fair interrogation. It harms the suspect and his dignity. It degrades him. It causes him to lose his sense of time and place. It suffocates him. All these things are not included in the general authority to investigate."[285]

The Army Field Manual prohibits sensory deprivation: "sensory deprivation is defined as an arranged situation causing significant psychological distress due to a prolonged absence, or significant reduction, of the usual external stimuli and perceptual opportunities. Sensory deprivation may result in extreme anxiety, hallucinations, bizarre thoughts, depression, and anti-social behavior. Detainees will not be subjected to sensory deprivation."[286] With respect to the specific practice of hooding, the Manual provides as follows: "If used in conjunction with intelligence interrogations, prohibited actions include, but are not limited to [...] placing hoods or sacks over the head of a detainee; using duct tape over the eyes."[287]

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281 ICRC Report, at para. 25.

282 *Ilascu and Others v. Moldova and Russia,* App. No. 48787/99 (8 July 2004) at para. 432.

283 *GSS Practices Cases*, at paras. 96-104, 106-107, 165-168.

284 *Ibid*., at para. 28.

285 *Ibid*. The State's suggestion that a 'ventilated sack' could be used was rejected by the Court. The Court wrote "The covering of the head in the circumstances described, as distinguished from the covering of the eyes, is outside the scope of authority and is prohibited".

286 US Army FM 2-22.3 at M-8.

287 *Ibid*., at 5-21.

(b) Sensory Bombardment

Exposure to noise or light for prolonged periods may constitute ill-treatment. In many reported cases, the use of constant illumination or bright lights (i.e. strobe lights) and loud music is used to induce sleep deprivation. Such practices can inflict severe mental harm even when used as a discrete interrogation tool.[288]

In the *GSS Practices Case,* the Israeli Court considered whether playing loud music to prevent the detainees from communicating with each other and passing on information was prohibited. The Court found that "being exposed to very loud music for a long period of time causes the suspect suffering." [289]

The use of systemic loud noise or music and the exposure to constant light by US personnel in Iraq was also condemned by the ICRC.[290]

Although the issue of sensory bombardment is not directly addressed in the US Army Field Manual, interrogators are directed to take care "to protect the detainee from exposure (in accordance with all appropriate standards addressing excessive or inadequate environmental conditions) to […] excessive noise."[291]

The CF PW Handling Manual provides that the following treatment, *inter alia*, is specifically prohibited: sensory deprivation or manipulation through the use of blindfolds, hoods, earmuffs, loud music, bright lights or other methods.[292]

iv) *Solitary Confinement and Isolation:*

Prolonged isolation, "where the detainee is denied contact with other human beings, including through segregation from other prisoners, for prolonged periods of time"[293] is, in effect, a complete deprivation of any stimuli. Depriving detainees of social and environmental stimuli for an extended period of time may induce stress, fear, anxiety, may cause delusions and hallucinations and may cause profound and long-lasting mental harm or distress.[294]

The ECrtHR has taken the position that where solitary confinement is appropriate, it may only be used for periods as short as possible. The Court has ruled "that complete sensory isolation coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason."[295] The Court did recognize, however, that the prohibition of contact with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment. However, where a detainee suffers physically and psychologically damaging effects as a result of periods of solitary confinement, or where a detainee is subjected to distress and hardship of an intensity considerably exceeding the unavoidable level of suffering inherent in detention, the treatment will amount to inhuman treatment within the meaning of Article 3.[296]

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288 *Leave No Marks,* at 24-25.

289 *GSS Practices Case,* at para. 29.

290 ICRC Report, at para. 27.

291 US Army FM 2-22.3, at M-10.

292 *PW Handling Manual,* at 4A-2.

293 *Leave No Mark*, at 30.

294 For a more detailed analysis of the pathological effects see *Leave No Marks*, at 32.

295 See *Öcalan v. Turkey* (46221/99) ECHR 2005-IV, at para. 191.

296 *Mathew v. The Netherlands*, App. No. 24919/03 at para. 197-205; *Hauschildt v. Denmark* App. No. 10486/83 (24 May 1989), the Court found that 15 days solitary confinement did not constitute a breach of the ECHR.

The ICRC condemned the use of prolonged isolation techniques on detainees in Iraq. In its report, the ICRC observed that detainees were "being stripped naked for several days while held in solitary confinement in an empty and completely dark cell that included a latrine. […] being held in solitary confinement combined with threats (to intern the individual indefinitely, to arrest other family members, to transfer the individual to Guantanamo), insufficient sleep, food or water deprivation, minimal access to showers (twice a week), denial of access to open air and prohibition of contacts with other persons deprived of their liberty."

The US Army Field Manual permits the use of the separation interrogation technique, in exceptional circumstances where there is a "unique and critical operational requirement". The purposes of this technique is to deny the detainee the opportunity to communicate with other detainees in order to keep him from (i) learning counter-resistance techniques; (ii) gathering new information to support a cover story. It is also to decrease a detainee's resistance to interrogation. The separation technique is described at Appendix M of the US Army Field Manual as a restricted technique. Of particular interest is the specific instruction that separation may not be used on detainees covered by the GCIV. The US Army Field Manual specially prohibits the use of this practice on PWs.[297]

The Committee Against Torture considered a case where a detainee was held in solitary confinement for less than two months total. Her cell measured 8x2 and had no windows. She had no radio and had not been informed about access to books from the library. The prison doctor reported that she was "close to a psychotic breakdown […]". The Committee Against Torture found that her condition could "fully be explained as the result of incarceration and solitary confinement." The Committee concluded that "solitary confinement, particularly in cases of pre-trial detention, is considered to have extremely serious mental and psychological consequences for the detainee." The Committee had called upon States parties to abolish the practice. Although abolition is preferable, the concluding observations of the Committee reveal that solitary confinement should be applied only in exceptional cases and not for prolonged periods of time.[298]

v) *Environmental Manipulation:*

A common interrogation technique is to subject the detainee to prolonged periods of extreme heat or of extreme cold. The ICRC noted that in Iraq, detainees were subjected to "prolonged exposure while hooded to the sun over several hours including during the hottest time of the day when temperatures could reach 50 degrees Celsius or higher."[299] The US Army Field Manual states that "if used in conjunction with intelligence interrogations, prohibited actions include, but are not limited to […] inducing hypothermia or heat injury."[300] Such temperature manipulation can constitute ill-treatment. Hypothermia or even more moderate exposure to cold can have adverse physical effects. Exposure to extreme heat can cause heat stroke, a life-threatening condition.[301]

vi) *Stress Positions:*

The use of stress position involves the practice of requiring that a detainee adopt and maintain a specific posture for a period of time, the effect of which is physical pain and exhaustion. There are numerous reports indicating that the US has used this practice in Guantanamo, in Iraq, and in Afghanistan.[302] By way of illustration, stress positions can include forcing a detainee to stand, to kneel, or squat for a prolonged period with or without arms

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[297] US Army FM 2.22-3 at Appendix M, M-1. This is of particular interest given the CF policy that all detainees shall, at a minimum, be afforded the protections which are afforded to PWs.

[298] Communication No. 202/2002: Denmark. Committee against Torture. May 11, 2004: para. 25. U.N. Doc. CAT/C/32/D/202/2002. 783 Id. Para. 5.6.

[299] IRCR Report, at para. 27.

[300] US Army FM 2.22-3.

[301] *Leave No Marks*, at 16.

[302] See e.g. ICRC Report.

lifted; being forced to sit in unnatural and painful positions; being placed in the fetal position and chained; being attached for hours at a time with handcuffs to a cell door in uncomfortable positions, made to stand naked against a wall with arms raised, being forced to stand, handcuffed with feet shackled to an eye bolt in the floor for more than 40 hours.[303]

In the *Northern Ireland Case*, one of the interrogation techniques used was "wall standing", defined as follows: "forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers".[304] Similarly, in their report, Human Rights First defined the practice as follows: "The prisoner is forced to maintain painful physical positions, such as forced standing, and awkward sitting or suspension of the body from a chain or other implement, for prolonged periods of time."[305] In the *GSS Practices Case*, petitioners complained of being subjected to interrogations in a "frog crouch position". This refers to "consecutive, periodical crouches on the tips of one's toes, each lasting for five minute intervals."[306]

In addition to the physical pain[307] and exhaustion caused by the stress of maintaining a position for prolonged periods, stress positions are used to "develop a sense of debility, dependency, and helplessness."[308]

Both the Israeli Supreme Court in the *GSS Practices Case* and the ECrtHR in the *Northern Ireland Case* and its progeny, have considered the legality of the use of stress positions under international law. In its ruling in the *GSS Practices Case,* the Israeli Supreme Court adopted the approach that where stress positions are used specifically to break a suspect's will, the practice constitutes ill-treatment. The Court banned this method of interrogation ruling that: "This is a prohibited investigation method. It does not serve any purpose inherent to an investigation. It is degrading and infringes an individual's human dignity."[309] While the ECrtHR found that the five techniques in combination did not amount to torture, it is important to recall that the ultimate determination was that the detainees were subjected to prohibited ill-treatment.

The case law provides a clear indication that stress positions amount to ill-treatment but none has specifically found that when used alone this practice amounts to torture. In most cases stress position were used in combination with other techniques.

In cases, for example, where stress positions are used in combination with beatings or other illegal practices, the combined practices may constitute torture. The HRC has in certain cases made specific findings of torture based

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303 See generally *Leave no Marks* and ICRC Report.

304 *Northern Ireland Case*, at para. 96.

305 *Leave No Marks*, at 9.

306 *GSS Practices Case*, at para. 11. It is of interest to note that prior to hearing the petition, this interrogation practice ceased to be used by the GSS in their interrogations.

307 Human Rights First have documented from a medical perspective the anatomical and physiological effects of stress positions on detainees. See *Leave No Marks* at 9-12. See also Istanbul Protocol at 40.

308 *Leave No Marks*, at 9. Human Rights First also notes that where detainees are not provided with access to toilet facilities and are forced to soil themselves results in humiliation.

309 *GSS Practices Case*, at para. 25.

on the following conduct: beating, electric shocks and mock executions,[310] *plantones*,[311] beatings and lack of food; being held incommunicado for more than three months whilst being kept blindfolded with hands tied together (resulting in limb paralysis, leg injuries, substantial weight loss and eye infection).[312]

The CF manual relating to the handling of Prisoners of War and Detainees specifically prohibits the use of any stress positions.[313]

vii) *Acts of Humiliation:*

Among the methods of ill-treatment observed by the ICRC in visits at detention facilities in Iraq were acts of humiliation. The detainees were being made to stand naked against the wall of the cell with arms raised or with women's underwear over their head for prolonged periods while being laughed at by guards, including female guards, and sometimes photographed in this position. They were also paraded naked outside their cells in front of other persons, deprived of their liberty, and sometimes hooded with women's underwear over the head.[314] These acts of humiliation were used as a means of breaking down the resistance of detainees.

The ECrtHR has found a violation of Article 3 where a detainee was stripped naked in the presence of a female officer, with the intention of humiliating him. The Court ruled as follows: "Obliging the applicant to strip naked in the presence of a woman, and then touching his sexual organs and food with bare hands, showed a clear lack of respect for the applicant, and diminished in effect his human dignity. It must have left him with feelings of anguish and inferiority capable of humiliating and debasing him."[315]

In another case, the detainee was stripped to his underwear in front of a group of guards who were verbally abusing and deriding him. The ECrtHR found that the guard's behaviour was intended to cause feelings of humiliation and inferiority and constituted a lack of respect for his human dignity.[316]

Depriving detainees of clothing and forced nudity is considered inhumane and degrading. If used in combination with threats or sexual assaults, such conduct could be deemed an "outrage upon human dignity."[317]

viii) *Dietary Manipulation:*

There is no question that the deprivation of food or water constitutes ill-treatment. A detainee must not be deprived of food or water required to maintain health. Conversely, it is suggested, that a detainee's diet may be manipulated in a way that causes no deprivation and does not affect the health of the detainee. The purpose of this latter case is simply to disorient the detainee and upset the regular routine but not to deny the detainee of food or water.[318]

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310 *Muteba v. Zaire*, (124/1982) Report of the Human Rights Committee, GAOR, 22nd Session, Supplement No. 40, (1984), para.10.2.

311 *Setelich v. Uruguay*, (63/1979) Report of Human Rights Committee, GAOR, 14th Session, para. 16.2. The practice of plantones involves forcing prisoners to remain standing for extremely long periods of time.

312 *Weinberger v. Uruguay*, (28/1978) Report of Human Rights Committee, GAOR, 31st Session, para. 4.

313 PW Handling Manual at 4A-2.

314 ICRC Report.

315 *Valasinas v. Lithuania*, App. No. 44558/98. (24 July 2001) at para. 117.

316 *Iwanczuk v. Poland*, App. No. 25196/94.(15 November 2001) at paras. 15, 59-60.

317 CRS: Lawfulness of Interrogation Techniques at 35.

318 CRS: Lawfulness of Interrogation Techniques at 32.

ix) *Fear and Threats:*

Mock executions and death threats are common interrogation techniques used to intimidate detainees. In addition, the use of dogs by US personnel in many detention facilities was widely reported. The use of military working dogs was originally intended to provide a psychological and physical deterrent in the detention facilities as an alternative to the use of firearms.[319] They were not used in that way. The reports conclude that dogs were used in the detention facilities to instill fear in the inmates.[320]

With respect to the use of threats, the ICRC has observed the following: "Persons deprived of their liberty undergoing interrogation […] were allegedly subjected to frequent cursing, insults and threats, both physical and verbal, such as having rifles aimed at them in a general way or directly against the temple, the back of the head, or the stomach, and threatened with transfer to Guantanamo, death or indefinite internment. Threats were extended to family members, particularly the wives and daughters, of detainees."[321]

The effects of such treatment was also noted by the ECrtHR in the *Akkoc* case. The Court found that "threats made concerning the ill-treatment of [the applicant's] children, caused intense fear and apprehension. This treatment left the applicant with long-term symptoms of anxiety and insecurity. He was diagnosed with post-traumatic stress disorder and required treatment by medication." In concluding that a violation of Article 3 had occurred, the Court found that Mr. Akkoc was the victim of very serious and cruel suffering that could be characterized as torture.[322]

x) *Psychological Manipulation and Incentives:*

The use of psychological methods of interrogation also deserves attention.[323] The legal limits of interrogation tactics in the context of domestic criminal law focus to some extent on whether the investigator's conduct, words, and actions are such that the statement is not only voluntary but also, based on the surrounding circumstances, putatively reliable and trustworthy. The notion of an involuntary confession is clearly broader than a confession as a result of real or threatened physical force. There is a psychological tactic aspect to the voluntariness rule.[324]

Intelligence gathering activities cast a wide net with respect to their purpose. The focus is not on obtaining a confession, in this sense the detainee is not interviewed in order to convince him/her to provide a statement and an admission of guilt.[325] The focus is on obtaining information. There are certain acts which are clearly prohibited and others which are more subtle in their effect and thus may be less obvious.

Aggressive interrogation which relies on the application of force or subjects a detainee to the types of treatments set-out above are coercive because they require the detainee to choose between providing information and cooperating or enduring more of the treatment. These "outer pressures" are easily identified as coercive. "Under

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319 *Final Report of the Independent Panel to Review DoD Detention Operations*, The Honorable James R. Schlesinger, Chairman, (August 2004), at 76.

320 See reports detailed in *Leave no Marks.*

321 ICRC Report, at paras. 31 and 34.

322 *Akkoc v. Turkey*. App. Nos. 22947/93 and 22948/93 (10 October 2000) at paras. 116-117.

323 See US Army FM 2-22.3 at 8-6 to 8-17 for a list of approved approaches. These approaches are considered in CRS: *Lawfulness of Interrogation Techniques*.

324 As one commentator suggests: "Deceptive tactics in the interrogation room distract from the search for truth in the courtroom". Kageleiry, "Psychological police interrogation methods: Pseudoscience in the interrogation room obscures justice in the courtroom" (2007) 193 *Military Law Review* 1 at 45.

325 Police interrogators often begin with the notion that every suspect is guilty of an offence. With this mindset, there is a real danger of false confessions being elicited. Interrogators therefore use tactics that will, willingly or even unconsciously, interpret or create information to verify and solidify that belief.

such circumstances, a subject's decision to provide information is said to be "coerced" because external forces have compromised a subject's ability to take a rational decision to reveal or not reveal information"[326] The focus is on the detainee's ability to choose. So long as the detainee maintains his or her free will to choose, an interrogator may manipulate an uncooperative detainee to influence the exercise of that choice. Coercive interrogation methods remove the choice completely and this is why they are impermissible. In this context, coercion involves abuse tactics, whether physical or psychological, which are inherently inhumane. Incentives involve situations where a detainee can gain benefits and advantages in the form of privileges through cooperation.[327] The US Army Field Manual provides the following guidance:

> The incentive approach is trading something that the source wants for information. The thing that you give up may be a material reward, an emotional reward, or the removal of a real or perceived negative stimulus. The exchange of the incentive may be blatant or subtle. On one extreme, the exchange may be a formal cash payment for information during some contact operations while on the other extreme it may be as subtle as offering the source a cigarette. Even when the direct approach is successful, the HUMINT collector may use incentives to enhance rapport and to reward the source for cooperation and truthfulness. The HUMINT collector must be extremely careful in selecting the options offered to a detainee source. He cannot deny the detainee anything that he is entitled to by law.[328]

For instance, if we accept that we may act on information obtained in the context of interrogations although such information may not be admissible in legal proceedings, then some of the techniques which are prohibited for purposes of criminal law prosecutions may be approved techniques within the law of interrogation so long as the standard does not fall below the minimum standard required.[329] The prohibition against torture and ill-treatment and the obligation for humane treatment is a legal principle rather than a rule of evidence. It is on this basis that the distinction between lawful manipulation techniques (which includes subtle psychological pressures, trickery, incentives and privileges) and unlawful coercive measures may be maintained. Although the primary concern of the applicable IHL standards is not reliability, it should be remembered that often more permissive rules may be to the detriment of reliability and may in the intelligence gathering context dissuade their use.

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[326] Thompson, "Note: The legality of the use of psychiatric neuroimaging in intelligence interrogation" (2005) 90 *Cornell L. Rev.* 1601 at 1617.

[327] *Ibid*. at 23. By way of example, the author suggests that while the deprivation of food would be impermissible as a form of manipulation because it would result in inhumane treatment, the issuance of extra food rations as a reward for cooperation would be a legitimate incentive.

[328] US Army FM 2-22.3 at 8-7 and 8-8. Note also the cautions set-out at para. 8-22 with respect to the practical application of this method of interrogation.

[329] For a discussion on the admissibility of evidence obtained by torture in another country by foreign authorities in proceedings before domestic Court, see Schabas, "House of Lords Prohibits Use of Torture Evidence, but Fails to Condemn Its Use by the Police" (2007) 7 *Int'l Crim. L. Rev*. 133.

ANNEX A

WORKS CITED

A. Legislation/Treaties

American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 123.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act*, *1982*, Being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85.

Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24.

Criminal Code, R.S.C. 1985, c. C-46.

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, 9 December 1975, GA Res. 3452 (XXX), annex, 30 U.N. GAOR, Supp. No. 34, at 91, UN Doc. A/10034, (1975).

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31.

Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85.

Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135.

Geneva Convention Relative to the Protection of Civilian Persons in Times of War, 12 August 1949, 75 U.N.T.S. 287.

Geneva Conventions Act, R.S.C. 1985, c. G-3.

Immigration and Refugee Protection Act, S.C. 2001, c. 27.

International Covenant on Civil and Political Rights, 19 December 1966, G.A. Res. 2200A, (XXI), 21 U.N. GAOR Supp. No. 16, U.N. Doc. A/6316 (1966),999 U.N.T.S. 171.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609.

Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90.

Universal Declaration of Human Rights, 10 December 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

B. Jurisprudence

Canada:

Bouzari v. Iran (2004), 71 O.R. (3d) 675 (Ont. C.A.).

Canada (Minister of Employment and Immigration) v. Chiarelli, [1992] 1 S.C.R. 711.

Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350.

Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779.

R. v. Brocklebank, [1996] C.M.A.J. No. 4.

R. v. Campbell, [2004] O.J. No. 2151 (Ont. C.A.).

R. v. Clot (1982), 69 C.C.C. (2d) 349 (Que. Sup. Ct.).

R. v. Collins, [1987] 1 S.C.R. 265.

R. v. Cook, [1998] 2 S.C.R. 597.

R. v. Dhandwar (1996), 31 W.C.B. (2d) 96.

R. v. Fitton, [1956] S.C.R. 958.

R. v. Hape, [2007] 2 S.C.R. 292.

R. v. Hebert, [1990] 2 S.C.R. 151.

R. v. Hobbins, [1982] 1 S.C.R. 553.

R. v. Hodgson, [1998] 2 S.C.R. 449.

R. v. Horvath, [1979] 2 S.C.R. 376.

R. v. Hoilett (1999), 136 C.C.C. (3d) 449 (Ont. C.A.).

R. v. Latimer, [2001] 1 S.C.R. 3.

R. v. Oickle, [2000] 2 S.C.R. 3.

R. v. Osmar, [2007] O.J. No. 244 (Ont. C.A.).

R. v. Owen (1983), 4 C.C.C. (3d) 538 (N.S.S.C., App. Div.).

R. v. Morrisey, [2000] 2 S.C.R. 90.

R. v. Moore-McFarlane (2001), 56 O.R. (3d) 737 (Ont. C.A.).

R. v. Perka, [1984] 2 S.C.R. 232.

R. v. Precourt (1976), 18 O.R.(2d) 714 (Ont. C.A.).

R. c. Rainville, [2001] J. Q. No. 947.

R. v. Sabri (2002), 4 C.R. (6th) (Ont. C.A.).

R. v. Serack, [1974] 2 W.W.R. 377 (B.C.S.C.).

R. v. Singh, 2007 SCC 48.

R. v. Smith, [1987] 1 S.C.R. 1045.

R. v. Spencer, [2007] S.C.J. No. 11.

R. v. Starr, [2000] 2 S.C.R. 144.

R. v. Whittle, [1994] 2 S.C.R. 914.

R. v. Wiles, [2005] 3 S.C.R. 895.

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3.

European Court of Human Rights:

A*. v. United Kingdom* (1999), 27 E.H.R.R. 611.

Aksoy v. Turkey (1997), 23 E.H.R.R. 553.

Akkoc v. Turkey, Appl. Nos. 22947/93, 22948/93 (10 October 2000).

Assenov and Others v. Bulgaria, Appl. No. 24760/94 (28 October 1998).

Aktas v. Turkey, App. No. 24351/94 (24 April 2003).

Aydin v. Turkey (1998), 25 E.H.R.R. 251.

East African Asians v. United Kingdom (1981), 3 E.H.R.R. 76.

The Greek Case 1969 (1972), 12 Y.B. Eur. Conv. H.R. 1.

Hauschildt v. Denmark, Appl. No. 10486/83 (24 May 1989).

Ilascu and Others v. Moldova and Russia, Appl. No. 48787/99 (8 July 2004).

Ireland v. United Kingdom, [1978] E.C.H.R. 1.

Iwanczuk v. Poland, Appl. No. 25196/94 (15 November 2001).

Jalloh v. Germany (2007), 44 E.H.R.R. 32.

Kalashnikov v. Russia, Appl. No. 47095/99 (15 July 2002).

Labita v. Italy, Appl. No. 26772/95 (6 April 2000).

Mathew v. The Netherlands, Appl. No. 24919/03 (29 September 2005).

Mikheyev v. Russia, Appl. No. 77617/01 (26 January 2006).

Öcalan v. Turkey, Appl. No. 46221/99 (12 May 2005).

Raninen v. Finland, Appl. No. 20972/92 (16 December 1997).

Ribitsch v. Austria, Appl. No. 18896/91 (4 December 1995).

Rozhkov v. Russia, Appl. No. 64140/00 (19 July 2007).

Salman v. Turkey, Appl. No. 21986/93 (27 June 2000).

Selmouni v. France (2000), 29 E.H.R.R. 403.

Tekin v. Turkey Appl. No. 22496/93 (9 June 1998).

Tomasi v. France (1993), 15 E.H.R.R. 1.

Tryer v. United Kingdom (1979-80), 2 E.H.R.R.1.

Valasinas v. Lithuania, Appl. No. 44558/98 (24 July 2001).

Inter-American Court of Human Rights:

Abella v. Argentina, (1997) Inter-Am. Ct H.R. Case No. 11.137, Report No. 5/97.

Loayza Tamayo Case, (1997) Inter-Am. Ct. H.R. (Ser. C). No. 33.

Velasquez Rodriguez Case, (1998) Inter-Am. Ct. H.R. (Ser. C). No. 4.

U.N. Human Rights Committee:

Concluding Observations of the Human Rights Committee : Israel, U.N. Doc. CCPR/C/79/Add.93 (1998).

El Megreisi v. Libyan Arab Jamahiriya, Communication No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990 (1994).

General Comment 20, Article 7, U.N. Doc. HRI\GEN\1\Rev.1 (1994).

General Comment 21, Article 10, U.N. Doc. HRI\GEN\1\Rev.1 11994).

Jensen v. Denmark, Communication No. 202/2002, U.N. Doc. CAT/C/32/D/202/2002 (2004).

Linton v. Jamaica, Communication No. 255/1987, U.N. Doc. CCPR/C/46/D/255/1987 (1992).

Muteba v. Zaire, Communication No. 124/1982, U.N. Doc. Supp. No. 40 (A/39/40) (1984).

Setelich v. Uruguay, Communication No. 63/1979, U.N. Doc. CCPR/C/OP/1 (1985).

Weinberger v. Uruguay, Communication No. R.7/28, U.N. Doc. Supp. No. 40 (A/36/40) (1981).

International Court of Justice:

Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, [1996] I.C. J. Rep. 288.

Advisory Opinion Legal Consequences of the Construction of a Wall in the Occupied Territory, [2004] I.C.J. General List No. 131.

Nicaragua Case, [1984] I.C.J. Rep. 392.

ICTR & ICTY:

Prosecutor v. Delalic et al., IT-96-21-T, First Trial Chamber Judgment (16 November 1998).

Prosecutor v. Furundzija, IT 95-17/1, Trial Chamber Judgment (10 December 1998).

Prosecutor v. Kvocka et al., IT-98-30/1, Trial Chamber Judgment (2 November 2001).

Prosecutor v. Kunarac, IT-96-23, Trial Chamber Judgment (22 February 2001)

Prosecutor v. Kunarac, IT-96-23, Appeals Chamber Judgment (12 June 2002).

Prosecutor v. Musema, ICTR-96-13-A, Trial Chamber I Judgment and Sentence (27 January 2000).

Other:

HCJ 5100/95 Public Committee Against Torture in Israel v. Israel [1999] IsrSC 53(4), reprinted in 38 I.L.M. 1471 (1999).

The Judgment Concerning the Interrogation Methods Implied by the GSS, Supreme Court of Israel, Sitting as the High Court of Justice, 6 September 1999.

R (Al-Jedda) v. Secretary of State for Defence, [2007] UKHL 58.

C. Academic Writing

Cohen, Barak "Democracy and the Mis-Rule of Law: The Israeli Legal System's Failure to Prevent Torture in the Occupied Territories" (2001) 12 *Ind. Int'l & Comp. L. Rev.* 75.

De Vos, Christian M. "Mind the Gap: Purpose, Pain, and the Difference Between Torture and Inhuman Treatment" (2006) 14 *No. 2 Hum. Rights Brief* 4.

Elsea, Jennifer K. *Lawfulness of Interrogation Techniques Under the Geneva Conventions* (8 September 2004) *CSR Report for Congress* RL32567.

Evans, Malcolm D. "Getting to Grips with Torture" (2005) 51 *Int'l & Comp. L. Q.* 365.

Evans, Malcolm D. & Morgan, Rod *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (New York: Oxford University Press, 1998).

Garcia, Michael John "Interrogation of Detainees: Overview of the McCain Amendment" (23 October 2006) *CRS Report for Congress* RL33655.

Geiß, Robin "Name, Rank, Date of Birth, Serial Number and the Right to Remain Silent" (2005) 87 *International Review of the Red Cross* 721.

Glod, Stanley J. Lt., Smith, Lawrence J. Lt. "Interrogation Under the 1949 Prisoners of War Convention" (1968) *Military Law Review* 145.

Guiora, Amos N., Page, Erin M. "The Unholy Trinity: Intelligence, Interrogation and Torture" (2006) *37 Case W. Res. J. Int'l L.* 427.

Heintze, Hans-Joachim "On the Relationship Between Human Rights Law Protection and International Humanitarian Law" (2004) 86 *International Review of the Red Cross* 789.

International Human Rights and International Criminal Law [2006] 100 Am. J. Int'l. L. 936.

Kageleiry, Peter, Maj. "Psychological Police Interrogation Methods: Pseudoscience in the Interrogation Room Obscures Justice in the Courtroom" (2007) 193 *Military Law Review* 1.

Kantwill, Paul L.Col., Holdaway, Jon D., Capt., Corn, Geoffrey "'Improving the Fighting Position': A Practitioner's Guide to Operational Law and Support to the Interrogation Process" (July 2005) *The Army Lawyer* 12.

Levie, H. "Prisoners of War in International Armed Conflict" (1977) 59 I.L.S 1.

Macdougall, Donald "Torture in Canadian Criminal Law" (2005) *Criminal Reports* (6th) 24.

Nowak, Manfred "What Practices Constitute Torture?: US and UN Standards" (2006) 28 *HRQ* 809.

O'Connell, Mary Ellen "Affirming the Ban on Harsh Interrogation" [2005] 66 *Ohio St. L. J.* 1231.

Odeshoo, Jason R. "Truth or Dare?: Terrorism and 'Truth Serum' in the Post-9/11 World" (2004) 57 *Stan. L. Rev.* 209.

Parry, John, T. "'Just for Fun': Understanding Torture and Understanding Abu Ghraib" (2005) 1 *J. Nat'l Security L. & Pol'y* 253.

Parry, John, T. "What Is Torture, Are We Doing It, And What If We Are?" (2003) 64 *U. Pitt. L. Rev.* 237.

Paust, Jordan J. "Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees" [2005] 43 *Colum. J. Transnat'l L.* 817.

Posner, Eric A. & Vermeule, Adrian "Should Coercive Interrogation Be Legal?" (2006) 104 *Mich. L. Rev.* 671.

Reidy, Aisling "the Approach of the European Commission and Court of Human Rights to International Humanitarian Law" (1998) 324 *International Review of the Red Cross* 513.

Rodley, Nigel *The Treatment of Prisoners Under International Law*, 2nd ed. (New York: Oxford University Press, 1999).

Rona, Gabor "War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Legal Frameworks to Combat Terrorism" (2005) 5 *Chi. J. Int'l L.* 499.

Rubel, Jordana S. "A Missed Opportunity: The Ramifications of the Committee Against Torture's Failure to Adequately Address Israel's Ill-Treatment of Palestinian Detainees" (2006) 20 *Emory Int'l L. Rev*. 699.

Schabas, William A. "House of Lords Prohibits Use of Torture Evidence, but Fails to Condemn Its Use by the Police" (2007) 7 *Int'l Crim. L. Rev.* 133.

Schabas, William, A. "Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum" (2007) 40 *Isr. L. Rev.* 592.

Shany, Yuval "The Prohibition Against Torture and Cruel, Inhuman, and Degrading Treatment and Punishment: Can the Absolute be Relativized Under Existing International Law?" (2007) 56 *Cath. U. L. Rev.* 837.

Shelton, Dinah "The Boundaries of Human Rights Jurisdiction in Europe" 13 *Duke J. of Comp. & Int'l L.* 95.

Thompson, Sean Kevin "Note: The Legality of the Use of Psychiatric Neuroimaging in Intelligence Interrogation" (2005) 90 *Cornell L. Rev.* 1601.

Ulbrick, Trevor J. "Tortured Logic: The (Il)legality of United States Interrogation Practices in the War on Terror" (2005) 4 *Nw. U. J. Int'l Hum. Rts.* 210.

Wood, Lee "Overview and Analysis of Senate Amendment Concerning Interrogation of Detainees" (2 November 2005) *CRS Report for Congress* RS22312.

D. Reports/Doctrine

Canada, *Fourth Report on the Convention Against Torture and Inhuman or Degrading Treatment or Punishmen*t, (2002).

CF Prisoner of War Handling: Detainees and Interrogation & Tactical Questioning in International Operations, B-GJ-005-110/FP-020 (1 August 04).

CF Code of Conduct for CF Personnel, *B*-GG-005-027/AF-023 (20 October 99).

CF Law of Armed Conflict at the Operational and Tactical Levels, B-GJ-005-104/FP-021 (13 August 01).

Final Report of the Independent Panel to Review DoD Detention Operations, The Honorable James R. Schlesinger, Chairman, (August 2004).

ICRC, *Geneva Convention (III) Relative to the Treatment of Prisoners of War: Commentary* (Jean Pictet Ed., 1958) (available at <http://www.icrc.org>).

ICRC, *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War: Commentary* (Jean Pictet Ed., 1958) (available at <http://www.icrc.org>).

ICRC Reactions to the Schlesinger "Panel Report" (9 August 2004) (available online at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/64mhs7?opendocument>).

ICRC, *Report of the Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment, and Interrogation* (2004) (available at <http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.htm>).

Physicians for Human Rights & Human Rights First *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality* (August 2007).

Jones, LTG & Fay, MG *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, DoD (23 AUG 2004).

UNHCHR, Professional Training Series No. 8, *Istanbul Protocol* "Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2004).

US Army Field Manual *Human Intelligence Collector Operations* No. 2-22.3 (6 September 2006).