

## **5. Substantive Legal Assessment**

### **5.1 Abuse of Prisoners as Torture and War Crimes under Sec. 8 of the CCIL and International Law**

The crimes described above against detainees at Abu Ghraib and the plaintiffs al Qahtani and Mowsboush constitute torture and war crimes under German and international criminal law. Therefore, sufficient evidence exists of criminality under Sec. 8 I nos. 3 and 9 CCIL.

The following will provide a detailed legal analysis of the prohibitions in the CCIL and international law that were violated by the above-described acts. First, it will note the way in which two high-ranking members of the U.S. government dealt with the traditional torture techniques of “water boarding” and “longtime standing,” which is significant from the plaintiff’s perspective. In their publicly documented statements, both of government officials reveal a high degree of cynicism, coupled with ignorance of historical, legal and medical contexts.

#### **“Water Boarding” and “Longtime Standing”**

In the course of an interview on 24 October 2006, the Vice President of the United States, Richard Cheney, asked by radio reporter Scott Hennen whether “a dunk in water is a no-brainer if it can save lives,” gave the following answer: “It’s a no-brainer for me, but for a

while there, I was criticized as being the ‘Vice President for torture.’ We don't torture. That's not what we're involved in. We live up to our obligations in international treaties that we're party to.” Cheney was the first member of the Bush government to admit that “water boarding” had been used in the case of detainee Khalid Scheikh Mohammed and other high-ranking al Qaeda members.

This contradicts all the official declarations that international obligations are being adhered to. “Water boarding” is a torture technique in which interrogators hold a detainee’s head under water or cover his nose and mouth and pour water over his face. In this way, the detainee is deprived of the ability to breathe and believes he is suffocating or drowning. Like a mock execution, this leads to despair, panic attacks, and fear of death. The use of such methods causes severe psychological suffering and can lead to severe physical pain and cause psychological harm lasting years or even decades.

As early as 1946, the prosecutors in trials before US military tribunals and the International Military Tribunal in Tokyo clearly called for the prohibition of this interrogation practice and demanded that the perpetrators be punished. They were responding to the use of the “water cure” by the Japanese during World War II as an interrogation method against US soldiers and Philippine civilians. This prohibition would ultimately be reflected in the legal concepts adopted by other US military tribunals in the Pacific.

Later, this technique was also used during the Korean War and the Vietnam War. Particularly in the 1970s and 80s, this method, also known as the “submarino,” was used by the henchmen of military dictators in Central and Latin America. At the time, however, it had already been classified as torture by national courts, legislative bodies, and human rights courts, and its use was considered criminal and not to be tolerated by a government or its representatives. In the trial of a Texan sheriff and his deputy in 1983, district court judge James DeAnda sentenced the defendant to a long prison term for “violating the civil rights” of prisoners (i.e., using the “water treatment”) and commented that the sheriff had allowed the justice system to fall into “the hands of a bunch of thugs. . . . The operation down there would embarrass the dictator of a country.”

Nevertheless, in March 2002, CIA director Porter Goss was still describing the use of water boarding as a “professional interrogation technique.” John Yoo, now a law professor at the University of California at Berkeley and formerly a Deputy Assistant Attorney General in the Department of Justice testified before the U.S. Senate in 2005 that he did not know that water boarding met the definition of torture. In an open letter to Attorney General Alberto Gonzales on 5 April 2006, more than 100 law professors took a position against this view, defining water boarding as plainly torture and affirming that its use was a federal crime.

Additional interrogation methods were authorized by US Secretary of Defense Donald Rumsfeld on 2 December 2002, at the request of US officials at Guantanamo. These included, among other things, the use of so-called stress positions, such as so-called

longtime standing for four hours. He wrote on the response memo, “I stand for eight to ten hours a day. Why is standing limited to four hours?”

Thus he was legitimizing an interrogation technique that the writer Alexander Solzhenitsyn described as follows in his fact-based novel “The Gulag Archipelago”:  
“Then there is the method of simply compelling a prisoner to stand in one place” This technique is used, along with other techniques, to break the prisoner. Author Robert Conquest also discusses forced standing and sleep deprivation in his book “The Great Terror,” quoting a Czech prisoner who described “having to be on his feet eighteen hours a day, sixteen of which were devoted to interrogation. During the six-hour sleep period, the guard pounded on the door every ten minutes, whereupon he had to jump to attention and report, ‘Detainee No. 1473 reports: , everything in order.’ Thus he was ‘awakened thirty or forty times a night. If the banging did not wake him, a kick from the guard would. After two or three weeks, his feet were swollen and every inch of his body ached at the slightest touch; even washing became a torture.”

In 2004 the Washington Times reported that, according to survivors of the North Korean gulag, one of the most feared types of torture was actually quite banal: the guards would force the prisoners to stand quietly for hours or to do constant repetitive exercises until they were completely exhausted physically.

The use of water boarding or longtime standing clearly violates the provisions of US Army Field Manual (FM) 34-52, which prohibits the torture and abuse of prisoners. In

2004, the UN Special Rapporteur on Torture stated in his report to the General Assembly of the United Nations that interrogation methods like stress and pain positions, long periods of sleep and light deprivation, exposure to extreme temperatures, light and noise, undressing the detainees, and use of dogs were being used to gain important information from terror suspects. According to the jurisprudence of international and national human rights bodies, this violated the prohibition on torture and inhuman treatment.

The use of such techniques was condemned by the United States itself as a violation of the prohibition on torture in the cases of Burma (painful positions for long periods), Eritrea (tying arms and legs for long periods), Saudi Arabia (sleep deprivation), and Turkey (long periods of standing, solitary confinement), to name only a few. The US State Department strongly criticized some of these countries in a 2004 report on torture.

### **The Absolute Prohibition of Torture under National and International Law**

As Theo van Boven<sup>1</sup> established in his article “The Prohibition of Torture in International Law,” the right “to be free of torture or cruel and degrading treatment” is the core of an ample number of internationally recognized human rights.

As already proclaimed in the Universal Declaration of Human Rights of 10 December 1948, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” This was later echoed in the International Covenant on Civil and Political

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<sup>1</sup> Professor of International Law, University of Maastricht; former UN Special Rapporteur for Torture.

Rights (Article 7), the European Human Rights Convention (Article 3), and the American Convention on Human Rights (Article 5). The Geneva Conventions of 1949 also prohibit “torture or inhuman treatment, including biological experiments” and “willfully causing great suffering or serious injury to body or health.”<sup>2</sup> The prohibition on torture has been recognized as customary international law and has the status of a peremptory norm, or *jus cogens*.<sup>3</sup>

The definition of torture is considered “unique” as a result of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Torture Convention) of 10 December 1984; in Article 1, it expands on the obligations in Article 7 of the ICCPR<sup>4</sup>:

For the purposes of this Convention, 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.

Under Germany’s domestic constitutional law, the prohibition on torture and other cruel or degrading treatment can be inferred from the obligation of all state bodies to respect

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<sup>2</sup> Theo van Boven: The prohibition of Torture in International Law, p. 6 et seq.

<sup>3</sup> See also UN Yugoslavia Tribunal (ICTY), Delalic and Mucic, judgment of November 16, 1998, marginal no. 454; Reinhard Marx: Folter: Eine zulässige polizeiliche Präventionsmaßnahme? Kritische Justiz 2004, pp. 278, 280.

<sup>4</sup> International Covenant on Civil and Political Rights.

and protect human rights (Article 1, Basic Law) and the guarantee of the right to bodily integrity (Article 2(2), Basic Law).<sup>5</sup>

### **The Definition of Torture**

Torture is not defined in Sec. 8 CCIL. Therefore, according to German law, we must turn to the definition in international law, for which the starting point must be Article 1 of the Convention Against Torture. In addition, case law must be taken into account, in particular that of the ICTY, which reflects the development and current state of customary law on torture as a war crime.

The definition of torture thus contains the following elements: It must be an act attributable to the state. The infliction of pain must reach a certain degree of intensity. The act must be intentional and must have a specific purpose.<sup>6</sup> However, the necessity of the first element as part of a war crime has not yet been clarified. (While the requirement of attribution to a state was considered in the ICTY judgments in Delalic [see above] and Furundzija of 10 December 1998, this requirement was dropped in the Kunarac judgment of 22 February 2001).

### **Attribution of Acts of Torture**

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<sup>5</sup> See the petition by German constitutional law scholars to defend the prohibition on torture, at <http://www.amnesty.de/download/aufruf-verfassungsrechtler.pdf>.

<sup>6</sup> Reinhard Marx: Folter: Eine zulässige polizeiliche Präventionsmaßnahme? Kritische Justiz 2004, pp. 278, 283.

It must first be considered whether the state's responsibility for acts of torture is a requirement for war crimes within the meaning of Sec. 8 CCIL, because here, in contrast to other areas of human rights, the issue is not a state obligation, but individual criminal liability on the part of the torturer (ICTY, Kvočka, judgment of 2 November 2001, para. 139; Kunarac, see above, para. 496). However, abuse of fellow prisoners, etc. is not included. Thus it must be sufficient for torture to be committed, as it was here, during imprisonment and by persons who have access to detainees solely because of their position, for example as translators.

In addition, however, the US is also responsible for the events at Abu Ghraib and Guantanamo. The abuse at both Abu Ghraib and Guantanamo was committed by soldiers (for example incidents 2, 3, 4, etc.), who are clearly public officials within the meaning of the torture definition in Article 1 of the Convention Against Torture. Where the abuse was committed by civilians working for the US armed forces (such as incidents 16, 22), they can be ascribed to the United States at least as a failure to protect prisoners from abuse by private actors. Although not mentioned in the definition in Article 1 of the Convention Against Torture, the prohibition on torture includes a positive obligation to prevent torture, at least according to the Human Rights Committee's interpretation of Article 7 ICCPR<sup>7</sup> and the European Court of Human Rights's interpretation of Article 3 EHRC.<sup>8</sup> This broad interpretation must either be incorporated into Sec. 8 I no. 3 CCIL or can be derived as a separate obligation from i.a. the obligation to prevent, prosecute and punish torture (Article 2 et seq., Torture Convention).

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<sup>7</sup> Dr. Manfred Nowak: CCPR Commentary, 1993, Art. 7, marginal no. 6 et seq.

<sup>8</sup> ECHR, D. P. and J. C. v. UK, Nr. 3719/97, decision of 10 October 2002, § 109; ECHR, A. O. UK, Reports 1998 – VI, § 22 ECHR, Z. et al v. UK, No. 29392/95, decision of 10 May 2001, § 73.

## Degree of Pain

The European Court of Human Rights considers torture to be a particularly severe form of inhuman treatment, distinguishing torture from inhuman treatment depending on whether it causes suffering of particular intensity and cruelty. Following this jurisprudence, the ICTY also considers the factor distinguishing torture from inhuman treatment to be the severity of the pain inflicted.<sup>9</sup> The purpose of the act has also been used as a distinguishing criterion,<sup>10</sup> with “severe” pain and suffering required for inhuman treatment as well as for torture. To judge the severity of the inflicted pain and suffering, we must not only consider the objective severity of the injurious act; subjective criteria must also be incorporated into the assessment, such as particular physical and psychological consequences depending on the circumstances of the concrete case, for example the length of the treatment, the physical and mental effects, and in some cases the sex, age and health of the victim.<sup>11</sup>

Given the increasingly high standards in the area of human rights protection today, in investigating abuse in which pain is purposefully inflicted on the victim, one can always assume that the necessary severity for torture has been reached.<sup>12</sup> In human rights jurisprudence, beatings, sexual violence, long periods of sleep deprivation, rape, mock

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<sup>9</sup> ICTY, Kvočka, op. cit., para. 161.

<sup>10</sup> See, e.g., Art. 8 II a ii 2 of the Rome Statute.

<sup>11</sup> ECHR, Selmouni ./ France, Human Rights Law Report 1999, p. 238; Kvočka, op. cit., para. 143.

<sup>12</sup> Reinhard Marx: Folter: eine zulässige polizeiliche Präventionsmassnahme? Kritische Justiz 2004, pp.278-285.

executions and longtime standing are considered torture.<sup>13</sup> Such acts often cause long-term health damage to the victims, but this is not a prerequisite for torture. Physical and mental injuries are, however, considered in assessing the severity of the pain and suffering inflicted.<sup>14</sup> The combination of different types of abuse is also relevant. Multiple instances of abuse can lead to a situation in which acts that in themselves would not necessarily inflict “great” pain and suffering can cumulatively be considered torture.

Both physical and mental abuse fall under the definition of torture in Sec. 8 CCIL. Physical abuse is undoubtedly present in cases in which prisoners are, for example, beaten severely with tools or beaten unconscious. Physical abuse is also present in those cases where soldiers jump or stand on a prisoner or cut his ear so badly that it must be stitched, where a prisoner is kicked or thrown to the floor or against the wall, his arms are twisted, etc. In all these acts, pain is purposely inflicted on the prisoner, in some cases causing physical injury. The necessary severity for torture is thus reached, especially because purposeful infliction of pain is involved.

The European Human Rights Commission has also found the necessary level of severity of pain for torture when people in police custody were forced, among other things, to stand against a wall for prolonged periods in uncomfortable stress positions while listening to an unbroken whistling noise, and subjected to sleep deprivation before interrogations. In the case in question, a prisoner was similarly forced to stand erect in his cell while “white noise” was played, and he was subjected to sleep deprivation.

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<sup>13</sup> Kvočka , op. cit., para. 144 with additional notes.

<sup>14</sup> Kvočka , op. cit., para. 148 et seq.

In contrast, one speaks of mental abuse when mental, but not physical, pain and suffering are inflicted. The Geneva Convention on the Treatment of Prisoners of War, upon which Sec. 8 CCIL is based, speaks to this; Article 17 IV forbids both mental and physical torture of prisoners of war. The Human Rights Committee,<sup>15</sup> as well as jurisprudence on Article 3 EHRC and the case law of the ICTY,<sup>16</sup> have recognized that torture does not necessarily require physical abuse.

The case law of the European Court of Human Rights includes among mental torture techniques types of pressure that, by inflicting mental suffering, create states of fear<sup>17</sup> or, without directly violating bodily integrity, interfere with free will by causing severe mental and psychological disturbance.<sup>18</sup> In judging whether the pain inflicted is serious and cruel enough to be regarded as torture, the interaction between physical and mental violence must be considered.<sup>19</sup> This depends on the concrete circumstances; in particular, the social and religious context must be included in the assessment.

Here the use of isolation as a punishment is a method of disorientation and sensory deprivation, which deprives the detainee of the ability to exercise free will through the infliction of severe mental and psychological disturbance.<sup>20</sup> Through this method, the

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<sup>15</sup> *Estrella v. Uruguay* (74/1980), Report of the Human Rights Committee, *supra* note 46, Annex XII, para. 1.6.; Nigel S. Rodley: *The Treatment of Prisoners under International Law*, 1987, p. 82.

<sup>16</sup> *Kvočka*, *op. cit.*, para. 149.

<sup>17</sup> *The Greek Case*, Yearbook 12, 461.

<sup>18</sup> Frowein, Art. 3 ECHR, marginal no. 5.

<sup>19</sup> See ECHR, *Selmouni./France*, Human Rights Law Report 1999, p. 238; *Tyrer v. UK*, Series A 26 § 29-35, 1978.

<sup>20</sup> Frowein, Art. 3 EHRC, marginal no. 5.

prisoner is meant to lose his sense of space and time and is to be made helpless and enfeebled. Thus these disorientation and sensory deprivation methods are at least psychological torture within the meaning of Sec. 8 I no. 3 CCIL.

The disparagement of religious symbols, forced shaving, and creation of an Osama bin Laden shrine were practices aimed at humiliating and degrading the prisoners and thus breaking their will and forcing them to cooperate—not to mention the threat of possible worse interrogations, intentional degradation to the level of a dog, being forced to dance before the entire team, insulting the prisoner's mother or sister as whores and prostitutes. The range of interrogation methods extended from chaining prisoners' arms and legs, seating them in a metal chair during the interrogation, and intravenous force feeding to the use of sleep deprivation and cold, threats and forced nudity. The abuses inflicted on the prisoners were not limited to a short period, but were often repeated and continued for a prolonged period (50 days).

In a judgment, the European Court of Human Rights defined similar actions as torture.<sup>21</sup> In that case, the plaintiff was forced to run a gauntlet of police officers while being beaten. He was forced to kneel before a young woman to whom an officer said, "Look, you're going to hear somebody sing." Another officer showed him his penis and said, "Here, suck this," and then urinated on him. Finally, he was threatened with a blowlamp and a syringe. The European Court referred to these as varieties of inhuman treatment that, aside from their violent nature, would be heinous and humiliating for anyone. If one considered the physical and mental violence as a whole, the court said, it "caused 'severe'

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<sup>21</sup> Selmouni ./ France, Human Rights Law Report 1999, p. 238.

pain and suffering and was particularly serious and cruel.” Such treatment could be regarded as torture.

Following this argument, most of the mental abuse of detainees at Guantanamo is to be regarded as torture. Detainees were forced to perform inhuman acts that would be heinous and humiliating for anyone, such as in the cases in which their clothing was removed, sometimes in the presence of women, which is considered especially tormenting and painful for Muslim men and goes counter to Muslim culture, so that this action can destroy the detainee’s honor for the long term.

Also falling into this category are incidents in which prisoners were forced to humiliate themselves--for example, to bark like a dog, dance for the officials in a type of burka, or put on a mask and be struck in the face at regular intervals with a balloon.

These are actions that, aside from their violent nature, are obviously heinous and humiliating, and they are done with the purpose of subjugating, humiliating and emasculating the detainees, as well as destroying their dignity and breaking their will.

Although little or no physical violence was involved in these actions, they attained the necessary level of severity to qualify as torture. This can be based, for one, on the fact that severe psychological injury was inflicted on the person abused. Such injuries are not to be assessed as less serious than physical injury *per se*; in particular, they often lead to longer lasting suffering and pain than is the case with physical injury. In addition, these

actions—heinous and humiliating for anyone—are aimed as a rule at the areas that are particularly sensitive and humiliating to Muslims, through sexual humiliation and “emasculatation.” Finally, the actions as a rule did not happen in isolation, but in combination with a range of other types of physical and psychological abuse.

Following the European Court of Human Rights jurisprudence cited above in the Selmouni case, the physical and psychological abuse that took place, in its extent and intensity as well as the great pain and suffering it caused, should be considered as a whole and for this reason regarded as torture under Sec. 8 I no. 3 CCIL.

### **Physical Abuse**

As shown above, at the very least those cases in which prisoners were physically abused represent torture within the meaning of Sec. 8 I no. 3 CCIL. Physical abuse occurs in cases in which the prisoners were severely beaten (incidents 1, 6, 20, 23), in some cases with tools (incidents 4, 8, 18), or were beaten unconscious (incidents 4, 5, 11), as well as in the case in which a prisoner died as a result of a beating (incident 7). The same is true of the case in which a prisoner was shot at (incident 12). Physical abuse also occurs in cases in which soldiers jumped (incidents 5, 11) or stood (incident 8) on prisoners, cut a prisoner’s ear so badly it had to be stitched (incident 5), kicked prisoners (incidents 1, 4, 23) or threw them to the floor (incidents 1, 6, 16) or against a wall (incidents 20, 23), twisted a prisoner’s arm (incident 15), etc. Through all these acts, physical pain was purposely inflicted on the prisoners, in some cases resulting in physical injuries. Thus the necessary

intensity for torture was attained, especially because purposeful infliction of pain was involved.

Also, keeping prisoners for long periods in stressful and painful positions, as was the practice at Abu Ghraib, especially by chaining them to objects with handcuffs (incidents 5, 8 13, 18, 20, 23), can clearly be regarded as torture. It is comparable to forcing someone to stand against a wall for a long period of time, which, as the European Commission for Human Rights found, attains the necessary severity of pain for torture. Remaining for a prolonged period in an unnatural and stressful position, as in handcuffing to a door, etc., causes severe physical pain and was purposely used for that reason—aside from the psychological pain caused by this humiliating demonstration of subjugation and power.

### **Sleep Deprivation and Stress Positions**

In reviewing a report by the UN Special Rapporteur on Torture stating that a prisoner was “forced to sit handcuffed and hooded in painful and contorted positions, subjected to prolonged sleep deprivation and beaten over the course of three weeks,”<sup>22</sup> the Committee Against Torture (CAT)<sup>23</sup> concluded that the use of stress positions constitutes torture within the meaning of Article 1 of the UN Torture Convention.<sup>24</sup> In its report, the Committee stated that the following interrogation methods were to be regarded as torture

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<sup>22</sup> Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted to the UN Commission on Human Rights, E/CN.4/1998/38/Add. 1, Dec. 24, 1997.

<sup>23</sup> UN Committee Against Torture (CAT)

<sup>24</sup> See also Office of the High Commissioner for Human Rights, Concluding Observations of the Committee against Torture: Israel. 09/05/97. A/52/44, para. 257.

under the UN Torture Convention: “(1) restraining in very painful conditions, (2) hooding under special conditions, (3) playing loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill . . .”<sup>25</sup>

The UN Special Rapporteur on Torture also determined that the use of stress positions can be regarded as torture and inhuman treatment under the UN Torture Convention.<sup>26</sup> In particular, he explained that “the jurisprudence of international and regional bodies has clearly determined that such methods,” including “restraining in painful stress positions” and “exposure to extreme heat or cold violates the prohibition on torture and inhuman treatment.”<sup>27</sup>

In a report published in 1997 on interrogation methods used, for example, by the Israeli Defense Forces, the CAT came to the conclusion, without further explanation, that prolonged sleep deprivation should be viewed as torture as defined in Article 1 of the UN Torture Convention.<sup>28</sup>

Subsequently, in 2001, the CAT subjected the Israeli Security Agency’s use of sleep deprivation to more careful examination. It followed the views of the Israeli Supreme Court, which considered the use of certain interrogation methods to be prohibited if they

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<sup>25</sup> Office of the High Commissioner for Human Rights, Concluding Observations of the Committee against Torture: Israel. 09/05/97. A/52/44, para. 257.

<sup>26</sup> Quote no. 20.

<sup>27</sup> Id. [*note: cite unclear, so unable to find original wording*]

<sup>28</sup> Office of the High Commissioner for Human Rights, Concluding observations of the Committee against Torture: Israel. 09/05/97. A/52/44, para 257.

were not used within the framework of an interrogation.<sup>29</sup> The court found that interrogations can be very long and, as a side effect, can lead to situations in which it is not possible for a person to sleep during the interrogation.<sup>30</sup> But it distinguished cases “in which sleep deprivation shifts from being a ‘side effect’ inherent to the interrogation, to an end in itself. If the suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him out or ‘breaking’ him, it shall not fall within the scope of a fair and reasonable investigation.”<sup>31</sup> The UN Special Rapporteur on Torture in this way made clear that prolonged deprivation of rest or sleep is a measure that inflicts suffering to such a degree that it can be regarded as a torture technique violating the UN Torture Convention.<sup>32</sup>

Sensory deprivation and hyperstimulation meet the definition of torture under international legal standards. The CAT came to the conclusion that sensory deprivation and isolation through almost total prohibition of communication constituted “persistent and unjustified suffering amounting to torture.”<sup>33</sup> Similarly, the UN Special Rapporteur on Torture listed cases that can be viewed as severe enough to amount to torture, including beatings, pulling out nails, teeth, etc., burning, electric shocks, causing a feeling of suffocation, exposure to extreme light or noise, sexual assault, use of drugs in prisons or psychiatric facilities, prolonged deprivation of rest or sleep, food, sufficient

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<sup>29</sup> Consideration of Reports Submitted by States Parties Under Article 10 of the Convention, Committee against Torture, 2001, U.N. Doc. CAT/C/54/Add.1).

<sup>30</sup> Public Committee Against Torture in Israel v. Israel. HCJ 5100/94. Sept. 1999.

<sup>31</sup> Israel Report at para. 14 (viii) (quoting Israel Supreme Court decision at para. 31). See also Republic of Korea, Committee against Torture, Nov. 13, 1996, para. 56. U.N. Doc. A/52/44.

<sup>32</sup> UN Commission on Human Rights, Report of the Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment, Visit by the Special Rapporteur to Pakistan, U.N. Doc E/CN.4/1997/7/Add.2 (1996) (Nigel Rodley, Special Rapporteur); See also Press Release, Special Rapporteur on Torture Highlights Challenges at End of Visit to China (Dec. 2, 2005).

<sup>33</sup> 36th Session, Geneva, May 2006; Peru)

hygiene or medical care, complete isolation and sensory deprivation, holding in complete absence of time or place, threatening to torture or kill relatives, and simulated executions.<sup>34</sup>

### **Psychological Abuse**

The definition of torture in Sec. 8 CCIL includes psychological torture, that is, abuse that causes not physical but mental pain and suffering. This is supported by the Geneva Convention on the Treatment of Prisoners of War, upon which Sec. 8 CCIL is based; Article 17 IV forbids both mental and physical torture of prisoners of war. The Human Rights Committee,<sup>35</sup> as well as jurisprudence on Article 3 EHRC and the case law of the ICTY,<sup>36</sup> have recognized that torture does not necessarily require physical abuse.

The case law of the European Court of Human Rights includes among mental torture techniques types of pressure that, by inflicting mental suffering, create states of fear<sup>37</sup> or, without directly violating bodily integrity, interfere with free will by causing severe mental and psychological disturbance.<sup>38</sup> In judging whether the pain inflicted is serious and cruel enough to be qualified as torture, it is particularly important to consider the interaction between physical and mental violence.<sup>39</sup> In assessing the degree of pain and

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<sup>34</sup> Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights res. 1985/33 E/CN.4/1986/15, 19 Feb. 1986, para. 119. *[unable to locate original]*

<sup>35</sup> Estrella v. Uruguay (74/1980), Report of the Human Rights Committee, supra n. 46, Annex XII, para. 1.6.; Nigel S. Rodley, *The Treatment of Prisoners under International Law*, 1987, p. 82.

<sup>36</sup> Kvočka, op. cit., para. 149.

<sup>37</sup> The Greek Case, Yearbook 12, 461.

<sup>38</sup> Frowein, Art. 3 EHRC, marginal note 5.

<sup>39</sup> See ECHR, Selmouni./France, Human Rights Law Report 1999, 238; Tyrer v. UK, Series A 26 § 29-35

suffering, it is not sufficient to evaluate physical pain: one must also consider the additional psychic pain and damage inflicted upon the victims through the rupture of their will and the destruction of their dignity. This depends on the concrete circumstances; in particular, the social and religious context must be included in the assessment.

The psychological abuse at Abu Ghraib thus constitutes torture within the meaning of Sec. 8 I no. 3 CCIL. For many of the acts in question it is any case difficult to determine whether they have only psychological effects or if the desired effects, such as disorientation, depression, paralysis of the extremities, etc. can be seen as physical torture.

The present case involves such disorientation and sensory deprivation measures, through the use of isolation and light deprivation in the “hole” as a punitive measure (incidents 4, 42, 43, 44), as well as forced disorientation by putting bags over the heads of prisoners without justification or interest, for example for prolonged periods in their cells (incidents 5, 43), or while also forcing them into humiliating positions (incidents 6, 37). These were intended to cause severe mental and psychological disturbance and thus break the prisoners’ will.<sup>40</sup> Through these methods, the prisoners were supposed to lose their sense of space and time, and thus be made helpless and enfeebled. These disorientation and sensory deprivation methods thus constitute at least psychological torture within the meaning of Sec. 8 no. 3 CCIL.

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(1978).

<sup>40</sup> Frowein, Art. 3 EHRC, marginal no. 5.

In addition, methods that aim to break the prisoners' will through infliction of mental and psychological disturbance must be considered psychological torture. This is the case, for example, for sleep deprivation (incidents 5, 18), because when a certain level of exhaustion is reached, a person is no longer physically able to think or orient himself. This was also the purpose of exposing prisoners to cold, for example through cold showers or cold water (incidents 3, 8, 20) or by confiscating clothes and blankets, sometimes for several days (incidents 4, 5, 8).

The same is true of "mock executions" and death threats, because fear of death generally suppresses free will. Here the prisoners were threatened with death in various ways, sometimes explicitly (incidents 8, 23), sometimes implicitly, for example by being attached to simulated electric wires (incident 10) or kept from breathing by having their mouth and nose held closed (incident 15). Such methods can be classified as torture in themselves. This is even more true if, as in Abu Ghraib, they are used not only individually, but in conjunction with other methods.

### **Abuse by Destroying Self-Respect**

Many acts took place in Abu Ghraib calculated to humiliate and degrade the prisoners, destroy their self-respect and self-esteem, and thus break their will and force them to cooperate. In a judgment of the ECHR, the court found similar acts to be torture.<sup>41</sup> Considering the physical and mental violence as a whole, the court found that they

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<sup>41</sup> Selmouni ./ . France, Human Rights Law Report , op. cit.

inflicted severe pain and were especially severe and cruel. Thus such treatment had to be regarded as torture.

Following this argument, a majority of the psychological torment of prisoners at Abu Ghraib can be regarded as torture. The prisoners were forced to commit inhuman acts, clearly heinous and humiliating to anyone, when for example they were forced to pose in simulated sexual positions (incidents 3, 11) or to wear women's underwear on their heads (incidents 5, 33), in some cases while being photographed. In addition to the humiliation through the coercion itself, the sexual humiliation, and the presence of male and female observers, the fact that sexual relations between members of the same sex is contrary to the Muslim worldview played a particular role, so that the poses and the fact that they were photographed could destroy the prisoners' honor for the long term. The same is true of the case in which a prisoner was forced to eat pork and drink wine, thus violating the basic rules of his religion. Even though no physical injuries were caused, the prisoner's religious honor and self-esteem were permanently harmed, if not destroyed.

The same is true of cases in which prisoners' clothes were removed (incidents 4, 8, 20, 34, 35, 36, 39, 40), in some cases in the presence of women (incidents 5, 8, 35). This is considered especially tormenting and painful to Muslim men.

Cases also fall into this category in which the prisoners were forced to humiliate themselves, for example, by being photographed while led on a leash by a female soldier (incident 9), or forced to stand on all fours and bark like dogs (incident 5), or crawl on

their bellies (incidents 5, 6), let themselves be spit at or urinated on by their tormentors (incidents 5, 18), build human pyramids (incident 11), put their heads in strangers' urine (incident 8), eat from the toilet (incident 4), or beat each other (incident 11). These involve acts that, regardless of their violent nature, are obviously disgusting and humiliating, and these methods have the purpose of subjugating the prisoners, humiliating and emasculating them, and thus destroying their dignity and breaking their will.

Although little or no physical violence was involved in these acts, they attain the necessary intensity to be considered torture. This is based first of all on the fact that significant mental injury was inflicted on the victims. Such injuries are not to be regarded as less important *per se* than physical injuries; in particular, they often lead to longer-lasting suffering and pain than is the case with physical injury. Also, these acts, heinous and humiliating to anyone, as a rule aim at areas that are especially sensitive and humiliating for Muslims, in particular through sexual humiliation and "emasculat[i]on." Finally, these acts as a rule do not occur in isolation, but in conjunction with multiple physical and mental abuses (for example, incidents 3, 5, 11, 18, etc.). As in the Selmouni case,<sup>42</sup> the physical and mental force used here, and the pain and suffering inflicted, must be regarded as a whole and such treatment defined as torture.

## **Threats**

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<sup>42</sup> ECHR, *op. cit.*

Threats comprise another complex of cases. The prisoners were in some cases threatened explicitly with torture, rape, and serious bodily harm (incidents 18, 250, in some cases only implicitly, for which the presence of guard dogs was often used (incidents 26, 28, 29, 30, 31, 32, 40). Serious threats can as a rule be regarded as torture, depending on an overall consideration of the circumstances.<sup>43</sup> If the threat of harm occurs in conjunction with comparable inhuman and humiliating acts, the intensity required for torture is attained.<sup>44</sup>

### **Sexual Assault or Rape**

Undoubtedly, rape (incident 22) and sexual assault, as well as forced mass masturbation (incident 11), anal penetration with a police club (incidents 5, 8) and similar cases (incidents 2, 38) fulfill the definition of torture, since in addition to physical suffering they also cause the prisoners psychological suffering. The ICTY has found that rape and other forms of sexual violence can generally be regarded as torture, as long as the other requirements are fulfilled, because rape affects the very core of human dignity and physical integrity.<sup>45</sup> In most of the cases at Abu Ghraib, the psychological suffering of the victims of rape and sexual assault was exacerbated by social and cultural conditions, so that the mental pain and suffering could be particularly acute and long lasting for Muslim victims.<sup>46</sup> These cases of sexual assault are covered by Sec. 8 I no. 4 CCIL, in addition to the crime of torture.

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<sup>43</sup> ICTY, Kvočka, , op. cit., para. 144.

<sup>44</sup> Reinhard Marx, op. cit., p. 286.

<sup>45</sup> ICTY, Delalic, judgment of November 16, 1998, para. 495 et seq.

<sup>46</sup> See ICTY, Delalic, , op. cit., para 495.

Concerning the condemnation of degrading treatment, especially sexual humiliation, international law is clear. This is particularly true when the sexual humiliation is combined with other interrogation methods to create an atmosphere of fear and confusion that is incompatible with human dignity. If the intention is to gain information or confessions, it constitutes torture. UN reports have variously condemned the use of sexual violence and humiliation as torture or inhuman and degrading treatment. The CAT, in particular, called on the United States in its 2006 Periodic Report to “rescind any interrogation technique, including methods involving sexual humiliation, ‘waterboarding,’ ‘short shackling’ and using dogs to induce fear.”<sup>47</sup>

UN reports have also frequently condemned the use of sexual humiliation and forced nudity in connection with combined interrogation methods. Thus, for example, the Representative of the High Commissioner for Human Rights in Nepal reported on the “deeply shocking” incidents of torture and cruel, inhuman and degrading treatment in Nepal, explaining that “In almost all cases, victims of this torture, including women, were made first to remove their clothing, and were subjected to continuous abusive and degrading language. In addition, there were *acts of torture involving sexual humiliation* [emphasis added] of both male and female detainees.”<sup>48</sup> The UN Special Rapporteur on Torture reported that former detainees had testified that torture and cruel, inhuman and degrading treatment continued to occur in Spain and described the following methods

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<sup>47</sup> Second Periodic Report of the United Nations under the Convention Against Torture UN Doc CAT/C/USA/2, 25 July 2006, para 24.

<sup>48</sup> United Nations OHCHR In Nepal, Statement to the Press, Ian Martin, Representative of the HCHR in Nepal, 26 May 2006.

that were used during their incommunicado detention: “hooding, forced nudity, forced physical exercise, being forced to stand for prolonged periods facing the wall, sleep deprivation, disorientation, the ‘bolsa’ (asphyxiation with a plastic bag), sexual humiliation, threatened rape, and threats of execution.”<sup>49</sup>

### **Intent**

Unlike inhuman and degrading treatment, torture requires intent. Here intent can be easily affirmed, as the abuse occurred knowingly and willfully. This can be seen by the fact that most of the acts required a certain degree of preparation and were committed repeatedly. The soldiers knew what they were doing. Whether they themselves always considered their acts to be torture is irrelevant. Even if they may have assumed in some cases that the acts were permitted, this at most involved an avoidable mistake of law as defined by Sec. 2 CCIL in conjunction with Sec. 17 of the Criminal Code. If they had made the necessary efforts of knowledge and conscience, they would, like other soldiers, easily have realized that these acts were not permitted behavior but violations of the Geneva Conventions.

### **Purpose of the Abuse**

Only abuse that is inflicted to achieve a specific purpose is regarded as torture. If such a purpose is lacking, it is inhuman treatment or punishment. Article 1 of the Torture Convention lists a broad range of possible purposes, ranging from extorting a confession

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<sup>49</sup> Civil and Political Rights, Including The Question Of Torture And Detention, Report of Special Rapporteur on the question of torture, Theo van Boven, Visit to Spain, E/CN.4/2004/56/Add.2, 6 February 2004, para 27.

to punishment to intimidation. The ICTY, whose judgments reflect the state of customary international law, has added humiliation as an additional purpose.<sup>50</sup> Given the difficulty, especially for non-physical methods, of differentiating torture from inhuman treatment based on the level of suffering inflicted, today the purpose of the abuse plays a major role in finding a measure to be torture. The forbidden purpose need not, however, be the only or the main purpose of the infliction of suffering.<sup>51</sup>

It appears that the abuse generally occurred because the prisoners were considered dishonest or uncooperative following interrogations and were to be prepared for their next interrogation (for example, incident 4), or as punishment for prior behavior (e.g., incident 18). But even in cases where the purpose is not explicit, the point of departure is that the abuse happened in the context of pressure from the White House, the Pentagon, and the CIA to extract more and better information from the prisoners,<sup>52</sup> and therefore all of it follows the dynamic of trying anything to live up to the demands from the United States and be able to provide more information through prisoners' statements and confessions. Ultimately, the use of torture and inhuman treatment must be seen against the background of the desire to gain more actionable intelligence from the detainees, which was ordered and communicated from above, from Washington to Guantanamo and Baghdad, to below, Abu Ghraib. The detainees were supposed to be softened up. The direct actors understood these orders in their own way and implemented them in practice.

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<sup>50</sup> ICTY, Furundzija, judgment of December 10, 1998, para. 162.

<sup>51</sup> ICTY, Celebici, para. 470.

<sup>52</sup> John Diamond, Blake Morrison: Pressure at Iraq Prison Detailed. USA Today at [http://www.usatoday.com/news/world/iraq/2004-06-17-prison-cover\\_x.htm](http://www.usatoday.com/news/world/iraq/2004-06-17-prison-cover_x.htm).

In addition, it is enough to be regarded as torture if individual acts were for the purpose of intimidating, punishing or humiliating the prisoners, because according to the current state of customary international law on torture, these motives also constitute forbidden purposes.

### **Cruel and Inhuman Treatment**

The offense of cruel and inhuman treatment, which is subsidiary to torture, also applies. The difference between this and torture is gradual; that is, it assumes the pain and suffering imposed is of lower intensity.<sup>53</sup> Cruel and inhuman treatment does not require the perpetrator to pursue a specific purpose in inflicting the pain or suffering. Also included are the infliction of mental suffering<sup>54</sup> and serious attacks on human dignity.<sup>55</sup> According to an ICTY judgment, “psychological abuses, humiliation, harassment, and inhumane conditions of detention,” for example, can cause severe pain and suffering to the detainees.<sup>56</sup>

Thus the above-described incidents in any case constitute cruel and inhuman treatment, even if they cannot always be classified as torture because—despite an overall multiplicity of inhuman acts—they do not always attain the necessary severity of physical or mental pain.

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<sup>53</sup> ICTY, Kvočka, op. cit., para. 161.

<sup>54</sup> Werle, op. cit., marginal no. 882 et seq.

<sup>55</sup> ICTY, Kvočka, op. cit., para. 159.

<sup>56</sup> ICTY, Kvočka, op. cit., para. 164.

### **Humiliating or degrading treatment**

The subsidiary offense of humiliating and degrading treatment within the meaning of Sec. 8 I no. 9 CCIL is also relevant. It protects the person's personal dignity. It includes acts that cause serious humiliation or degradation or can otherwise be classified as serious attacks on human dignity. Aside from the objective assessment of what a "reasonable person" would experience as humiliating and degrading, subjective criteria must also be included in the assessment—including the victim's particular sensitivity.<sup>57</sup> It is not necessary to cause lasting pain.<sup>58</sup> The ICTY has, for example, recognized public nudity, continuous fear of abuse, and inhuman conditions in prison as humiliating and degrading treatment.<sup>59</sup>

The abuses at Abu Ghraib are in any even to be regarded as humiliating and degrading treatment under Sec. 8 I no. 9 CCIL, because they violated the prisoners' dignity and destroyed, and were intended to destroy, their self-esteem. Forcing the prisoners to undress, sometimes in the presence of women (incidents 4, 5, 13, 8, 20, 34, 35, 36, 39, 40), building human pyramids with them (incident 11), putting them on a leash (incident 9), having them bark like dogs (incident 5), and forcing them to crawl on the floor while in some cases being spat on (incidents 5, 6), etc. were acts intended to violate their dignity and self-esteem and demonstrate American superiority.<sup>60</sup> This is even more the case since the prisoners were forced to perform acts that are considered particularly

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<sup>57</sup> ICTY, *Aleksovski*, trial court judgment, para. 56.

<sup>58</sup> ICTY, *Kunarac*, op. cit., para. 503.

<sup>59</sup> ICTY, *Kvočka*, op. cit., para. 170; *Aleksovski*, op. cit., para. 184-210, *Kunarac*, op. cit., para. 766-774, *Furundzija*, op. cit., para. 272.

<sup>60</sup> See *Kvočka*, op. cit., para. 173.

humiliating for Muslims. Since the prisoners' human dignity was purposely attacked through subjugation and sexual humiliation—that is, through intentional humiliation — the requirements of Sec. 8 I no. 9 CCIL are fulfilled, even if one considers that the threshold to the more specific definitions of torture and inhuman treatment under Sec. 8 I no. 3 CCIL has not in all cases been crossed.

Finally, it should be noted that the above-described incidents constitute several types of abuse under Sec. 8 I CCIL, specifically cruel and inhuman treatment, especially torture, as specified in Sec. 8 I no. 3, sexual assault or rape, as specified in no. 4, and humiliating or degrading treatment, as specified in no. 9.

The basic points in the very comprehensive debate in the United States on the use of torture and prohibited interrogation methods have already been described. In the memoranda released so far, we can observe the authors' attempts to narrow the definition of both torture and the intent required for torture so as to contradict all the established definitions reflecting customary international law in international treaties, judgments of international tribunals, and literature on international criminal law. The debate must thus be regarded as extremely important politically and legally. However, to date the definition of torture propagated by some members of the US administration has not been legally accepted (and hopefully will not be), so that a legal assessment oriented towards the current state of the law need not go more deeply into this attempted redefinition.

This legal assessment of the incidents at Abu Ghraib has been confirmed by almost all relevant reports by international institutions and human rights organizations. Rather than cite many of them, we will cite mainly the report of the UN Special Rapporteur on Torture, Theo van Boven, to the UN General Assembly on 1 September 2004. In the introduction to his report, van Boven specifically referred to a visit to Guantanamo and to his own press release on Abu Ghraib. He pointed to the absolute nature of the prohibition on torture and cruel, inhuman or degrading treatment or punishment, which is not changed by the current threat of terrorism.<sup>61</sup> He maintained that no executive, legislative, administrative or judicial measure that justifies such actions can be considered legal under international law. Any such act would be the responsibility of the state, which works through people acting in their official capacity. “The argument that public officials have used torture having been advised by lawyers or experts that their actions were permissible is not acceptable either. No special circumstance may be invoked to justify a violation of the prohibition of torture for any reason . . .”<sup>62</sup> The Special Rapporteur said he had recently received reports on specific methods being used to secure information from people suspected of terrorism. These included 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 international regional human rights tribunals, he said, is unanimous in judging these methods to be prohibited torture and abuse. The Committee Against Torture had already declared such methods as restraining in very painful conditions, hooding under special

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<sup>61</sup> No. 14 in the Report.

<sup>62</sup> No. 15 in the Report.

conditions, sounding of loud music for prolonged periods, sleep deprivation for prolonged periods, threats, including death threats, violent shaking, and using cold air to chill to be violations of Article 16 constituting torture as defined in Article 1 of the UN Torture Convention. This conclusion, he added, particularly suggests itself when these methods of interrogation are used in combination.<sup>63</sup> “It must be recalled,” he stated, “that the principle of non-refoulement is firmly anchored in international human rights law, notably in Article 3 of the Convention against Torture, which states that ‘no State Party shall expel, return, “refouler,” 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.’”<sup>64</sup>

### **Connection to an International Armed Conflict**

The objective definition in Sec. 8 CCIL requires that persons protected under international humanitarian law be abused in connection with an international armed conflict and within the scope of international criminal law regarding place and time.

The Iraq War is an international armed conflict. The “Coalition of the Willing,” that is, several countries acting together, used direct armed force against Iraqi territory, that is, the internationally protected area of Iraq.<sup>65</sup>

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<sup>63</sup> No. 17 in the Report.

<sup>64</sup> No. 26 in the Report.

<sup>65</sup> See Ipsen, *Völkerrecht*, 5th edn. 2004, § 66 marginal no. 11.

The Afghanistan War is an international armed conflict. Based on UN Security Council Resolution 1368, several countries, under United States leadership, used direct armed force (“Operation Enduring Freedom”) against Afghan territory, that is, the internationally protected area of Afghanistan.

The victims’ character as prisoners of war should be sufficient to justify application of international criminal law. In addition, however, the abuse occurred within the temporal and physical scope of the international law of war crimes. It is not necessarily a condition that abuse should happen during and at the site of the conflict, but they must have a functional connection with the armed conflict.<sup>66</sup> It is true that hostilities between the armies had already ceased. However, the functional connection is found in the fact that the perpetrators are members of the armed forces of the United States, one of the parties to the conflict.<sup>67</sup> The invasion of Iraq and its occupation gave the perpetrators the opportunity to abuse the prisoners. In addition, most of the abuse occurred in order to prepare the prisoners to talk; that is, for “professional” reasons. The explanatory memorandum for the CCIL gave the treatment of prisoners of war subject to the custodial power as an example of a case in which war crimes could be committed even after hostilities had ended, because in such a case the substantive provisions of international humanitarian law continue to apply.<sup>68</sup>

The prisoners are protected persons under international humanitarian law within the meaning of Sec. 8 VI CCIL. Some of the inmates of Abu Ghraib Prison are prisoners of

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<sup>66</sup> See Werle, *op. cit.*, marginal no. 836 et seq.

<sup>67</sup> See ICTR, judgment of May 21, 1999, Kayishema and Ruzindana, TC, para. 174 et seq.

<sup>68</sup> Explanatory memorandum from the Federal Ministry of Justice, p. 53.

war as defined in Art. 4 of the Third Geneva Convention (GC III), that is, members of the opposing military, militias, volunteer corps or civilians who voluntarily took up arms and fell into the hands of the enemy, or otherwise protected persons under Sec. 8 VI CCIL. Some of them are persons protected by other provisions of the Geneva Conventions, especially civilians who fell into the hands of the enemy power within the meaning of Article 4 GC IV.

Several of the definitions of abuse in Sec. 8 I CCIL have been met. They include cruel and inhuman treatment, especially torture within the meaning of Sec. 8 I no. 3, sexual assault or rape under no. 4, and humiliating or degrading treatment under no. 9