

1998

International Human Rights Law and Military Personnel: A Look Behind the Barrack Walls

Raymond J. Toney

Shazia N. Anwar

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Toney, Raymond J. and Shazia N. Anwar. "International Human Rights Law and Military Personnel: A Look Behind the Barrack Walls." *American University International Law Review* 14, no. 2 (1998): 519-543.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

INTERNATIONAL HUMAN RIGHTS LAW AND MILITARY PERSONNEL: A LOOK BEHIND THE BARRACK WALLS

RAYMOND J. TONEY* AND SHAZIA N. ANWAR**

INTRODUCTION	520
I. THE PROBLEMS	521
A. MILITARY RECRUITMENT	522
B. BASIC TRAINING AND RITUAL INITIATION	524
C. PUNISHMENT AND DISCIPLINE.....	525
D. CASE ANALYSIS	526
1. <i>Case One: Sexual Abuse</i>	526
2. <i>Case Two: Basic Training Techniques</i>	527
3. <i>Case Three: Ritual Hazing</i>	527
II. INTERNATIONAL HUMAN RIGHTS LAW AND MILITARY PERSONNEL	529
A. TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT	529
1. <i>The United Nations</i>	529
2. <i>The European Human Rights System</i>	530
3. <i>The Inter-American Human Rights System</i>	531

* Raymond J. Toney, a former military officer, is the Executive Director of the National Interreligious Service Board for Conscientious Objectors (NISBCO). NISBCO provides counseling, legal and advocacy services for conscientious objectors and military personnel. Mr. Toney is a member of the national G.I. Rights Network, which advocates the rights of military personnel. He is co-editor of "Military Justice: A Guide to the Rights and Responsibilities of Military Personnel," to be published in October, 1998, by the G.I. Rights Network. Mr. Toney wishes to thank his wife, Rina Kushnir, for her patience and support and David Sheldon, Esq., for his wisdom, comradery, and tutelage.

** Shazia Nazli Anwar currently serves as NISBCO's Harrop Freeman Legal Intern. Ms. Anwar researches the human rights of military personnel in the Americas and the Russian Federation. Ms. Anwar is co-author of the forthcoming publication, "Military Justice: A Guide to the Rights and Responsibilities of Military Personnel." Ms. Anwar received her J.D. degree from the American University Washington College of Law.

B. SYNTHESIS OF INTERNATIONAL UNDERSTANDINGS OF TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT	533
III. APPLICATION OF THESE UNDERSTANDINGS TO MILITARY PERSONNEL	534
IV. ADDRESSING THE HUMAN RIGHTS OF MILITARY PERSONNEL	536
A. PROPOSAL FOR GOVERNMENTS, NGOS, AND MULTI-NATIONAL BODIES	536
B. INCREASE RESEARCH AND REPORTING	537
C. ESTABLISH CIVILIAN HUMAN RIGHTS COMMISSIONS FOR THE ARMED FORCES	539
D. REVISE MILITARY AND CIVILIAN LEGAL CODES GOVERNING THE TREATMENT OF MILITARY PERSONNEL	539
E. LITIGATE VIOLATIONS OF THE HUMAN RIGHTS OF MILITARY PERSONNEL	541
CONCLUSION	542

INTRODUCTION¹

I was born in a bomb crater, my mother was an M-16, my father was a devil! Each moment I live is an additional threat upon your life.²

Military service is an environment unlike any other. Training human beings to kill obediently and efficiently is the central mission of the armed forces, and especially of combat units. Regimentation and control characterize nearly all personnel activities in the military environment, imposing severe deprivations on individual liberty.

Military trainers exercise extraordinary control and power over their subordinates. They also face the difficult task of molding often undisciplined and unschooled recruits with no interest or experience

1. This essay addresses the treatment of military personnel in all regions of the world. The term "armed forces" refers to governmental armed forces generally. The frequent references to the United States, the Russian Federation, and Latin American countries reflect the greater availability of information on these countries and regions rather than an intentional focus.

2. Text accompanying an unofficial United States Marine Corps illustration removed from the wall of a Marine Corps facility (on file with authors).

in military matters into willing combatants. As a result, military trainers commonly employ both fear and terror as motivators and tools of discipline.

Military personnel figure prominently in international human rights advocacy and litigation as suspected or accused perpetrators of gross human rights violations. In contrast, human rights advocates traditionally give little attention to military personnel as victims of systematic human rights abuses.³ As this essay will show, the abuse of military personnel is widespread.

This essay briefly reviews current findings on the treatment of military personnel by their peers and superiors, giving special attention to the issues of torture or cruel, inhuman, or degrading treatment or punishment as defined in various international human rights agreements. Finally, this essay proposes measures that human rights advocates, governments, and multinational human rights organizations should adopt to eradicate these grave injustices.

I. THE PROBLEMS

The real problem was the ritual cruelty inflicted on recruits by soldiers hardly older than they were. The crucial point is that the military authorities tolerate these activities, which they perceive as a training in discipline. The impunity of these budding torturers is total.⁴

Ongoing research demonstrates that military personnel face an array of physical and psychological abuses throughout the course of their military service. Such abuses are neither confined to the armed forces of the so-called developing nations, nor to those countries that obtain their personnel through military conscription. Available data indicates the problem is nearly universal.

Documented abuses suffered by military personnel vis-à-vis other military personnel range from severe forms of corporal punishment to ritual hazing practices that leave recruits maimed or dead.

3. See generally Rachel Brett & Raymond J. Toney, *Torture in the Military?*, in 20 ANS CONSECRÉS A LA RÉALISATION D'UNE IDÉE (1997) (providing background on the victimization of military personnel at the international level).

4. ASS'N FOR THE PREVENTION OF TORTURE, VISIT REPORT POLAND, 3 APT J. 7 (1996).

Superiors may force recruits to masturbate in front of roommates or even rape them.⁵ In countries where women serve in the armed forces, rape, sexual assault, and sexual harassment are pervasive.⁶ At the extreme, military training for some recruits may even include the consumption of animal or human blood.⁷

Three dimensions of military life expose military personnel to abusive measures: (1) recruitment, (2) basic training and ritual initiation, and (3) punishment and discipline. This essay addresses each of these three areas in turn.

A. MILITARY RECRUITMENT

In many countries, children whose national identification cards list their age as less than eighteen years old are taken to a special military commission where the military officers amend their age to meet the criteria of military service. Through this process, countries are sending children aged less than fourteen years to the armed forces.⁸

The most serious abuses of the recruitment phase arise from the common practice of forced recruitment, also known as press-ganging. In scores of countries, military forces conduct systematic sweeps of poor urban and rural areas, abducting military-age youth and children at gunpoint.⁹ These "recruits" often face beatings, insults, and humiliation at the time of recruitment and during the journey to military installations. Initially, military forces hold victims of forced conscription incommunicado for days or weeks at a time.

5. The G.I. Rights Network, a United States based coalition of organizations, documents such cases and provides counseling along with legal and advocacy services to military personnel.

6. An association of survivors of military abuse, including sexual assault, Survivors Take Action Against Abuse by Military Personnel ("STAMP"), assembles information on the issue of sexual assault and advocates changes in this area of United States military policy.

7. See generally Cindy Forster, *A Conscript's Testimony: Inside the Guatemalan Army*, 13 REPORT ON GUATEMALA (1992) (providing an insider's look at the harsh realities of military life in Guatemala).

8. See RACHEL BRETT & MARGARET MCCALLIN, CHILDREN: THE INVISIBLE SOLDIERS 86 (1996) (commenting on the recruitment of child soldiers in Rwanda).

9. See Hugo Valiente, *Military Service and Human Rights*, IV PARAGUAY REP. 1989-95 (1996) (noting the prevalence of forced recruitment on the poorer classes in Paraguay).

Family members often have no knowledge of the whereabouts of those recruited. Furthermore, individuals who resist forced recruitment, including conscientious objectors, are especially vulnerable to physical assault.¹⁰

The growing problem of child soldiers stems in part from the widespread use of forced recruitment. Recruiters frequently receive a bounty for each recruit they obtain or are required to meet a specific quota. Such practices readily lend themselves to abuse. In protracted armed conflicts where the supply of military-age youth is minimal, military forces frequently resort to the conscription of children.

The problem of abuse also exists in countries where military service is voluntary. Military recruiters frequently face accusations of rape and sexual assault of recruits.¹¹ In some instances, recruiters demand sexual favors from the youth in exchange for more desirable military occupational training and service locations.¹² Recruiters themselves acknowledge that these problems are pervasive and under-reported.¹³

10. See TITUS PEACHEY & LINDA GEHMAN, *SEEKING PEACE* 8 (1991) (noting that soldiers severely beat a Mennonite Pastor in Honduras when he refused to submit to forcible recruitment); see also *Interview with Judge Roberto Lernus: Inside Guatemala's Judicial System*, 13 REPORT ON GUATEMALA (Network in Solidarity with the People of Guat., Washington, D.C.), Summer 1992, at 2, 2 (detailing the murder of a man because he missed his tour of duty with the civil patrol).

11. See, e.g., *Army Recruiter Convicted of Rape*, UNITED PRESS INT'L, Mar. 14, 1997; Tim Bryant, *Lawyer in Harassment Suit Assails Area Army Recruiter; He Calls Office in St. Peters 'A Real Den of Iniquity'*, ST. LOUIS POST-DISPATCH, Apr. 29, 1997, at B1; Cox News Service, *Civilian Sex Assault Claims Targeted Army; Most Alleged Rape, Other Violent Attacks*, ST. LOUIS POST-DISPATCH, Nov. 24, 1996, at 11D; *Police Blotter, Army Recruiter Charged With Sexual Assault*, CHARLESTON DAILY MAIL, Jan. 9, 1998, at A4; *Three U.S. Sergeants Charged in Sexual Abuse Scandal in Germany*, AGENCE FRANCE PRESS, Feb. 28, 1997.

12. See generally *Shirley v. United States*, 832 F. Supp. 1324, 1325-26 (1993) (describing an action for sexual abuse against a United States army recruiter under the Federal Tort Claims Act ("FCTA")). While the defendant did not dispute the historic facts of the case, the court granted defendant's motion to dismiss because the statute of limitations under the FCTA had expired. See *id.* at 1328.

13. See Michael Gormley, *Anything to Enlist Recruits*, ALBANY TIMES UNION, June 20, 1993, at A1 (quoting an unidentified Army recruiter who stated that sexual impropriety with female recruits "goes on all the time. It's rampant. I did it."). The recruiter estimated that, on average, recruiters engage in sex with nine of ten female recruits. See *id.*

B. BASIC TRAINING AND RITUAL INITIATION

Characteristically, basic military training is a harsh environment in which military officials intentionally subject recruits to high levels of stress and physical exertion. Stress-inducing techniques include sleep deprivation, prolonged physical exercises, and routine verbal abuse. Basic training is also a “weeding-out” process whereby superiors single out recruits posing disciplinary problems for especially harsh treatment as a method of assessing their ability to adapt to the military environment. Recruit-on-recruit abuse also occurs during the basic training phase, frequently under the condoning gaze of superiors. Recruits who appear weak and defenseless may face violent assaults. Recruits accused or suspected of being homosexual can also be targets of brutal treatment.¹⁴ In addition, conscientious objectors often face severe physical assaults.

Recruits are often subjected to great cruelty during their first months of military service. In some instances these abuses lead to permanent injury or even death. Documented accounts of such abuses from the United States, Eastern Europe, the Russian Federation, and South America include, but are not limited to, the following:

- Deprivation of food and sleep for excessive periods;
- Open-handed blows to the ears and head;
- Requirements to masturbate in front of roommates;
- Exercises that exceed a normal person’s physical endurance;
- Forced eating of lighted cigarettes;
- Being urinated upon;
- Public insult, mockery, and humiliation; and
- Forced scrubbing of the barracks floor while naked in the presence of other recruits.¹⁵

14. See SERVICEMEMBERS’ LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: SECOND ANNUAL REPORT ON DON’T ASK, DON’T TELL, DON’T PURSUE (1996) (detailing the situation of homosexuals in the United States military).

15. See e.g., *Vitaly’s Story: Knocking the Spirit Out of the New Recruits*, ST. PETERSBURG PRESS, Oct. 11-17, 1994, at 6 (describing the torture that a young recruit in the Russian army received at the hands of other military personnel,

Ritual initiation practices, also known as hazing, are commonplace and dangerous. Such practices range from being required to perform services on behalf of more tenured recruits to severe beatings, even to the point of death. Many elite military units also subject their incoming members to violent and long-established hazing practices. Reported practices include severe beatings, burning of the genitalia with cigarettes, and forcing recruits to consume alcohol until they lose consciousness or become ill. Some interviewed members of these units, while recognizing the brutality of the practices, consider them to be important rites of passage that create a necessary bond among the unit members.¹⁶

C. PUNISHMENT AND DISCIPLINE

Many unit members are subjected to blows and physical punishments with instruments such as machetes, sticks, rifle-butts or pistol butts, and dagger-handles on sensitive parts of the body; burns with lighted cigarettes on various parts of the body; forced ingestion of lighted cigarettes; punches to the head, nape, neck, or ears; kicks to the legs or stomach; and stamping on the hands.¹⁷

Many abuses of military personnel are officially sanctioned and considered legitimate exercises of military discipline and authority. The official use of physical exercise as punishment, however, often leads to severe injury and death. Such exercises can be accompanied by kicks, beatings with a club or rifle, cigarette burns, insults, and humiliation.¹⁸ The resulting injuries range from broken bones to permanent neurological impairment.

In addition to punitive exercises, the military employs severe forms of corporal punishment. Common techniques utilized by superiors and sometimes other recruits include open-handed blows to the head, neck, and ears; beatings with truncheons, clubs, machetes, rifle butts, and pistols; and kicks to the legs and buttocks. Additionally, many such injuries and deaths are attributable to the

including food deprivation and exceedingly strenuous physical activity).

16. See *Dateline: Bloodwings* (CNBC television broadcast, Jan. 31, 1997) (interviewing participants in military hazing).

17. See Valiente, *supra* note 9, at 28.

18. See Brett & Toney, *supra* note 3, at 235.

inadequacies of military conscription systems that permit the recruitment of malnourished children and youth and ineffective pre-induction medical evaluations that do not screen recruits for existing or potential medical conditions.¹⁹

D. CASE ANALYSIS

While an in-depth analysis of each of the instances cited above is beyond the scope of this essay, the following selected cases illustrate some of the challenges of applying current international human rights law to the context of military service. Keep these scenarios in mind as this essay reviews the current legal understanding of torture or cruel, inhuman, or degrading treatment or punishment.

This essay provides examples of cases relating to three distinct areas of abuse: (1) those involving sexual acts or the threat of sexual acts; (2) basic training practices; and (3) ritual hazing. While we recognize that there is considerable overlap among these three areas, these case types are enlightening because they are nearly universal in their occurrence. The degree of physical and psychological suffering endured by the victims does vary considerably, however, and is context-dependent. Likewise, the relationship between the perpetrators, the acts committed, and state authority is not always clear.

1. Case One: Sexual Abuse

The facts of this case are as follows: A military recruiter informed male recruits that entrance into the military service required certain medical examinations to which the recruits consented.²⁰ The military recruiter then utilized non-sterilized hypodermic needles and syringes to extract fluids from the penises and scrotums of the recruits and injected water into their buttocks.²¹ Further, the recruiter

19. See Matthew Brelis, *Navy Probes Fraud; Recruiter: Woman Was Helped to Hide Drug Use*, BOSTON GLOBE, Sept. 15, 1997, at A5. Such was also the case of Paraguayan youth Victor Hugo Maciel, who, forcibly recruited at the age of 16, died from an undiagnosed heart condition while performing punitive physical exercises. The Center for Justice and International Law ("CEJIL") in Washington, D.C. brought the Maciel case before the Inter-American Human Rights Commission.

20. See *United States v. Brantner*, 28 M.J. 941, 942-43 (1989).

21. See *id.* at 943.

masturbated two recruits, ostensibly to obtain semen samples.²² The recruiter also told the recruits that he was required to conduct a hernia examination, which entailed inserting his finger into the rectums of the recruits while simultaneously fondling their genitals.²³ The appeals court affirmed the lower court conviction of one specification of attempt to commit indecent assault, twelve specifications of assault with means likely to produce grievous bodily harm, and twenty-two specifications of indecent assault.²⁴

2. Case Two: Basic Training Techniques²⁵

The facts of this case are as follows: As a component of basic military training, recruits were subjected to a “toughening-up” exercise called “the Ram.” “The Ram” consisted of stripping to one’s underwear and being forced to roll back and forth across a rough surface, such as asphalt, thorny grass, or stones. While the recruits rolled about in this manner, the official in charge of the unit kicked or beat them repeatedly with a club. The exercises bloodied and bruised the recruits.

3. Case Three: Ritual Hazing

A fairly typical case of ritual hazing²⁶ follows: Military personnel had just completed a rigorous and competitive training program for membership in an elite and prestigious military unit. On the evening of their graduation, more tenured members of the unit subjected their

22. *See id.*

23. *See id.*

24. *See id.* at 942. The perpetrator received a sentence of five years confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. *See id.*

25. *See generally* El Comité de Paz y Justicia, *Soldados Menores de Edad*, LA IGLESIA MENONITA DE HONDURAS (1996) (on file with authors).

26. *See* J.R. Williams, DNIGMC Investigation into Allegations of Assault Maltreatment and Abuse at Marine Barracks, Washington DC, pt. III, para. 1 (Dec. 7, 1992), attachment to letter from B.L. Thompson, Head, Freedom of Information and Privacy Acts Section, Administration and Resource Management, Dept. of the Navy, to Raymond J. Toney, Program Director, NISBCO, (Mar. 21, 1997) (on file with the *American University International Law Review*) [hereinafter *Marine Report*] (stating that “[h]azing has occurred over a period of time in both marching companies at the Barracks”); *id.* pt. III, para. 7 (reporting that such hazing took place from 1990-1992).

comrades to a traditional hazing ritual, requiring their victims to remove their clothing and wait in a bathroom.²⁷ The recent graduates cowered together in a corner in fear and anticipation. The more tenured recruits then entered, wearing gas masks and carrying containers filled with a liquid mixture of human excrement, saliva, and dead rodents, which they had previously left to rot under the desert sun.²⁸

The more tenured recruits poured the vile mixture over the heads of the victims. The odor caused some of the victims to choke and vomit. The more tenured members then applied boot polish to the genitals and anal areas of the victims.²⁹ In some cases, they inserted the polish applicator into the anuses of the graduates. The insoluble boot polish caused a strong burning sensation. The victims screamed in agony, and attempted to wash the polish from their bodies without success. The ritual lasted approximately fifteen minutes. Military officials in charge of the unit who knew of such hazing even issued guidance in an attempt to control the conduct of ritual hazing.³⁰ Other officials in charge dismissed the hazing rituals as “fraternity type silliness” or a way for new members to “blow off steam.”³¹

Two of the graduates who were submitted to this practice later reported the incident to military and civilian officials.³² Both suffered retaliation in the form of threats and physical assault.³³ They described the pain they endured as “excruciating” and the worst they had ever experienced. Both expressed disgust and humiliation from both with the treatment they received and the condoning attitudes of military officials. The graduates also reported that they suffered

27. See *Prime Time Live: Hell Night* (ABC television broadcast Nov. 1994) (portraying a video of the hazing ritual for the United States Marine Corps Silent Drill Team).

28. See *id.*; see also Marine Report, *supra* note 26, pt. II, para 4 (detailing the horrible substances inflicted upon the trainees, which included “edge dressing, putrid liquids, super glue and K-Y jelly”).

29. See *Prime Time Live*, *supra* note 27.

30. See Marine Report, *supra* note 26, pt. III, para. 4 (quoting a Marine officer ordering subordinates to “[m]ake sure no one gets hurt”).

31. *Id.* pt. III, para 10.

32. See *Prime Time Live*, *supra* note 27; see also Marine Report, *supra* note 26, pt. I, para. 1 (reporting that investigation was initiated in response to correspondence received by the Department of Navy, Office of the Deputy Naval Inspector General for Marine Corps Matters).

33. See *Prime Time Live*, *supra* note 27.

psychological difficulties as a result of the incident. The military subsequently discharged them.³⁴

II. INTERNATIONAL HUMAN RIGHTS LAW AND MILITARY PERSONNEL

One must distinguish carefully between military rigor and abuse.³⁵

As the previous discussion demonstrates, military commanders and human rights advocates have failed to distinguish between abuse and acceptable forms of military discipline and training. This essay begins to draw such a distinction by reviewing the legal understandings of torture or cruel, inhuman, or degrading treatment or punishment through a brief examination of the interpretation and application of these terms within the United Nations, European, and Inter-American human rights systems. This review then applies these understandings to the context of military service.

A. TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

There is substantial disagreement over what constitutes torture or cruel, inhuman, or degrading treatment or punishment. Issues such as cultural relativism and the context-specificity of the questioned treatment compound the general difficulties of defining these terms precisely. The following discussion briefly reviews the findings of the United Nations, European, and Inter-American human rights systems with respect to these issues.

1. *The United Nations*

The Universal Declaration of Human Rights states that "no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."³⁶ The General Assembly of the United Nations has re-affirmed that the basic precepts of the United Nations

34. See *Prime Time Live*, *supra* note 27.

35. Interview with Jorge Burgos, former Chilean Undersecretary of War (July 1996) (discussing the treatment of Chilean conscripts).

36. G.A. Res. 217, U.N. Doc. A/810, at 73 (1948).

Charter embodied in this Declaration constitute customary international law.³⁷

Article VII of the International Covenant on Civil and Political Rights states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."³⁸

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as:

[A]ny 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.³⁹

2. *The European Human Rights System*

The Convention for the Protection of Human Rights and Fundamental Freedoms governs all member states of the European Union. Article 3 states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."⁴⁰ Under this Article, the Commission has articulated a flexible working definition by which it interprets claims of torture and inhuman or degrading punishment.

37. See G.A. Res. 2825, U.N. GAOR, 25th Sess., Supp. No. 28, at 67, U.N. Doc. A/8028 (1970).

38. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 53, U.N. Doc. A/6316 (1966).

39. G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter *Convention Against Torture*].

40. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter *European Convention on Human Rights*].

According to the Commission, “[i]t is plain that there may be treatment to which all these descriptions may apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading.”⁴¹ The Commission has constructed a vertical analysis of these concepts, beginning with inhuman treatment. The Commission stated:

The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. The word ‘torture’ is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or a confession, or the infliction of punishment, and is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will.⁴²

The Commission described non-physical torture as “the infliction of mental suffering by creating a state of anguish and stress by means other than bodily contact.”⁴³ The European Court further commented on the necessary inquiries to be made in cases of alleged torture or cruel, inhuman, or degrading treatment or punishment. The European Court said that such an inquiry depends on all the circumstances of the case—including the duration of the treatment; its physical or mental effects; and, in some cases, the sex, age, and state of health of the victim.⁴⁴

3. *The Inter-American Human Rights System*

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights interpret and enforce the American Convention on Human Rights.⁴⁵ Article 5 of the American Convention, entitled “Right to Humane Treatment,” stipulates that “[n]o one shall be subjected to torture or to cruel, inhuman, or

41. See Greek Case, 12 Y.B. EUR. CONV. H.R. 1, 186 (1969) (Commission Report).

42. *Id.*

43. *Id.* at 461.

44. See Ireland v. United Kingdom, 2 Eur. Ct. H.R. (Ser. A) at 25 (1978).

45. See American Convention on Human Rights, O.A.S. Treaty Series No. 36, at 1, Nov. 22, 1969, OEA/Ser. L/V/II.23 doc. rev. 2 (entered into force July 18, 1978) [hereinafter American Convention].

degrading punishment or treatment.”⁴⁶ This Article also states that every person has the right to the respect of their physical, mental, and moral integrity and that punishment shall not extend to anyone other than criminals.⁴⁷

The Organization of American States, whose members are eligible to participate in the Inter-American Human Rights System, adopted the Inter-American Convention to Prevent and Punish Torture in 1986.⁴⁸ According to Article 2 of the Convention on Torture, torture “shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventative measure, as a penalty, or for any other purpose.”⁴⁹

The Convention also states:

Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.⁵⁰

In a recent case involving Peru, the Commission articulated a three-step analysis for claims alleging torture.⁵¹ To determine the existence of torture, the following elements must be present:

- 1) an intentional act, through which physical and mental pain and suffering is inflicted on a person;
- 2) the act must be committed with a purpose;

46. *Id.* art. v, § 2.

47. *See id.* art. v, §§ 2-3 (asserting that persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person).

48. *See* Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S. Treaty Series No. 67, OEA/Ser. A/42 (SEPF) (*entered into force* Feb. 28, 1987) [hereinafter *Convention on Torture*].

49. *Id.* art. 2.

50. *Id.*

51. *See* *Egocheaga v. Peru*, Case 10.970, Inter-Am. C.H.R. 157, 185 Report No. 5 (1996) (defining the prerequisites for a judicial finding of torture).

- 3) the act must be committed by a public official or by a private person acting at the instigation of the former.⁵²

B. SYNTHESIS OF INTERNATIONAL UNDERSTANDINGS OF TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

As the foregoing discussion demonstrates, current understandings of torture or cruel, inhuman, or degrading treatment or punishment are imprecise and evolving. Moreover, they require case-by-case analysis of the facts and the context of the treatment. Despite these ambiguities, the following review attempts to synthesize these understandings.

For an act to rise to the level of torture, the following elements must be present:

- (1) the intent to cause severe mental and/or physical pain;
- (2) a purpose, including, but not limited to, obtaining information during a criminal investigation, punishing an individual for an act committed by himself or a third party, or intimidating an individual to not commit an act in the future; and
- (3) the act must be conducted by a state official, or an individual acting under the color of state authority.⁵³

Lacking any of these essential elements of torture, an act may still be held to constitute inhuman and/or cruel treatment. Less precise and more context-dependent than the analysis for torture, the analysis of the inhuman and/or cruel treatment emphasizes the following elements:

- (1) the nature and severity of physical or mental suffering;
- (2) the manner and method of its infliction;
- (3) the age, sex, health, and maturity of the recipient of the treatment; and
- (4) whether the treatment forced the victim to act against his or her will.

52. *See id.*

53. *See id.*

Degrading treatment, perhaps the lowest level of violation possible, at a minimum requires the presence of humiliation, if not the intent to humiliate.⁵⁴

III. APPLICATION OF THESE UNDERSTANDINGS TO MILITARY PERSONNEL

Do the exercises, punishments, and disciplinary practices discussed above constitute violations of international human rights norms? Do violent, ritualistic hazing practices rise to the standard of torture? Does requiring a young recruit to masturbate or scrub the floor naked in front of his peers constitute inhuman or degrading treatment? Are recruits subjected to humiliating or degrading treatment when they must chant, in unison, mantras of rape, blood, killing, and death?

Under the current international standards, the following six questions address whether these acts rise to the level of human rights violations: (1) Was the perpetrator acting under color of state authority? (2) Were the acts intentional and designed to cause physical or psychological pain? (3) What was the severity of physical or psychological pain and suffering inflicted? (4) What was the purpose of the acts? (5) Were the acts degrading and/or grossly humiliating? (6) Was the victim required to act against his or her will?

Employing this analytical framework, do the three cases we outlined above constitute torture or cruel, inhuman, or degrading treatment or punishment?

In each of the three cases, the perpetrators were uniformed military personnel acting under color of state authority. The acts in all three cases were intentional. Questions remain whether the perpetrator in Case One intended to cause physical or psychological pain, or whether his methods, which produced pain and suffering, were merely intended to permit him to fondle the recruits' genitalia and thus derive personal sexual gratification. In Cases Two and Three, the acts were clearly designed to cause physical and psychological pain.

54. *See id.*

The pain and suffering analysis entails objective and subjective measurements, the latter being more difficult to quantify. A thorough interview with the victims is necessary in evaluating the pain and suffering criteria. Moreover, individual variations in pain assessment, tolerance, and reporting render these criteria somewhat unreliable and thus limit their usefulness as analytical tools.

In Case One, the victims' physical pain may have been no greater than that experienced by individuals receiving legitimate physical examinations of a similar nature. The psychological pain and suffering, however, given the intrusive and intimate nature of the acts combined with the recruiter's use of deception in obtaining the consent of the victims, likely did cause significant psychological pain and suffering. In Cases Two and Three, psychological pain and suffering are readily apparent. In Case Three, the interviewed victims reported severe and disabling psychological and emotional distress as a result of the hazing.

With regard to analysis of the purpose of the act, significant differences exist among the three cases. In Case One, the ostensible purpose of the acts was the sexual gratification of the perpetrator. Secondary to that purpose may have been the intentional infliction of pain and suffering. In Case Two, the purpose was to develop physical and psychological endurance and increased pain tolerance. Arguably, a secondary purpose was to establish and exercise military authority and control over individuals vis-à-vis the infliction of pain and suffering. In this manner the perpetrator also would succeed in establishing an environment of generalized fear, or terror.

The degrading and humiliating analysis relies both on the reports from the victims and normative understandings of these terms held by non-victims and society at-large. The problems of cultural relativism and the context-specificity of the act arise in this analysis, as understandings of what is permissible or impermissible treatment vary greatly across cultures and societies.

While cultural and individual views on sexuality and sexual privacy vary, the acts described in Case One would likely receive negative views, given the use of deception and the physically, sexually, and psychologically intrusive nature of the acts. In cultures that condone corporal punishment in a variety of contexts—including the realms of public education, the family, and in the treatment of

criminals, Case Two could fall short of meeting the degrading or humiliating treatment standards. Moreover, public acceptance of the need for rigorous military training practices could give rise to the view that such treatment is, if not necessary for the preparation of effective soldiers, acceptable, given the uniquely demanding contexts of military service and warfare. Most people and cultures would likely perceive the hazing practices described in Case Three, to be viewed by most people and cultures as bizarre, grotesque, and unnecessary, even in the unusual context of military service.

Finally, it is necessary to inquire whether the victims were required to commit acts against their wills. Recall that in Case One, the perpetrator obtained the consent of the victims through official deception, though without apparent coercion. In Case Two, the victims had little choice but to comply with the basic training exercise, though if given the choice they likely would have opted out of the exercise. In Case Three, the consequences of refusing to participate in the hazing practice are unclear. It would appear that, in psychological terms, the environment was a highly coercive one, and not all of the victims were willing participants.

IV. ADDRESSING THE HUMAN RIGHTS OF MILITARY PERSONNEL

A. PROPOSAL FOR GOVERNMENTS, NGOS, AND MULTINATIONAL BODIES

Governments, non-governmental organizations ("NGOs"), and multinational human rights monitoring bodies only recently have begun to concern themselves with the application of human rights norms to military personnel.⁵⁵ In several countries NGOs have

55. See generally Hugo Valiente, *Servicio Militar y Derechos Humanos*, in SERVICIO, PAZ Y JUSTICIA—PARAGUAY (SERPAJ-PY) (1997); Patricia Diaz, VIOLACIONES DE DERECHOS HUMANOS DENTRO DE LAS FUERZAS ARMADA (1996) (on file with authors); BLACK BOOK ON RIGHTS OF CONSCRIPTS IN CENTRAL AND EASTERN EUROPE (Marc Hulst ed., 1996) (on file with authors); Rudolf Bernhardt et al., "Report on the Conformity of the Russian Federation With Council of Europe Standards," in Doc. AS/Bur/Russia 7 (1994) (on file with authors); Peter Rowe, *The European Convention on Human Rights and the Armed Forces*, in LEGAL VISIONS OF THE NEW EUROPE 249 (B.S. Jackson & D. McGoldrick eds., 1993); U.N. Human Rights Comm., 54th Sess. 1440th mtg. at 54, para. 21, U.N.

prepared detailed reports examining human rights issues within the context of military service. The United Nations' Graca Machel report on the impact of armed conflict on children produced the most extensive and detailed information available to date on the treatment of children in governmental and non-governmental armed forces.⁵⁶ Much of the data from the Machel study is applicable to the present discussion.

We now outline measures that governments, NGOs, and multinational monitoring bodies can take to address the human rights needs and concerns of military personnel. The transitions from authoritarian regimes to electoral democracies taking place in many areas of the world, and the integration of these countries into regional human rights systems, provide an important window of opportunity for raising and remedying the concerns we have addressed in this essay.

B. INCREASE RESEARCH AND REPORTING

The most urgent task in this emerging area of human rights law and advocacy is the collection and dissemination of reliable information. This is a formidable task, given the general isolation of military personnel, the level of control over their lives, and the frequent unwillingness of armed forces officials to divulge information about military personnel and military operations. Moreover, the concerns for the safety of victims and collaborators that human rights advocates typically address are also present with military personnel who are vulnerable to retaliation.

The task of researching and documenting the treatment of military personnel falls upon governments, NGOs, and multinational human rights bodies. Both national and international NGOs should include

Doc. CCPR, "Comments on the Report of the Russian Federation," U.N. Doc. CCPR/C/79 (1995) (asserting that the committee is concerned that conscientious objection to military service, although recognized under the Russian Constitution, is not a practical option under Russian law); DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1996, 1085 (discussing hazing in the military in Russian Federation countries).

56. See Graca Machel, *Study of the Impact of Armed Conflict on Children*, U.N. Doc. A/51/306, addendum 1 (1996) (proposing elements of a comprehensive agenda for action by member states and the international community to improve the protection and care of children in conflict situations).

information on the treatment of military personnel in their periodic reports. Recommended topics include military conscription and other forms of recruitment, the conscription of children, health screening procedures, and the general treatment of recruits once they begin active military service. Additionally, special attention must be given to deaths and serious injuries that occur in the armed forces during peacetime.

The armed forces' characteristic opaqueness is a primary obstacle to the gathering of information. Increased transparency is both an indispensable condition for and a primary objective of researching the treatment of military personnel. Governments are responsible for the conduct of their armed forces and should require that the armed forces make a wider range of information available to public officials charged with military oversight. As a standard component of annual or periodic military oversight procedures and fiscal appropriations, armed forces should be required to submit reports to appropriate legislative committees, ministries of justice, and governmental bodies monitoring the health and safety of the population. This information should also be available to NGOs and the general public.

Multinational monitoring bodies such as the United Nations Human Rights Committee and the Committee Against Torture can facilitate such transparency by requesting that governments provide information regarding the treatment of military personnel in their compliance reports and other communications for various treaties. The Human Rights Commission's Special Rapporteur on Torture, Cruel and Inhuman or Degrading Punishment should consider the treatment of military personnel a necessary subject of inquiry when devising country and thematic reports. The Special Rapporteur should request access to both military installations and military personnel in his or her country visits. Moreover, the United Nations Secretary-General or the Human Rights Commission should request a thorough study of the treatment of military personnel to include a review of the effectiveness and desirability of military justice systems. Such a study is long overdue.

C. ESTABLISH CIVILIAN HUMAN RIGHTS COMMISSIONS FOR THE ARMED FORCES

Legislative bodies and administrative branches of government can and oftentimes do play a critical role in protecting the human rights of military personnel. This function can be enhanced through the creation of independent civilian human rights commissions charged with investigating and reporting conditions within the armed forces. Such a link between the armed forces and civilian governments could serve not only to enhance human rights protections for military personnel, but also to strengthen dialogue and interaction between the armed forces and civilian governments.

These commissions would be most effective if established as permanent bodies with personnel and offices located in all military installations. A civilian ombudsman could serve as the governmental supervisor and coordinator of the individual commissions.⁵⁷ The commission's funding should be independent of that of the armed forces, and they should receive unhindered, twenty-four hour access to military personnel, training, and housing facilities. Frequent and regular meetings with base commanders would ensure that channels of communication remain open and that the ongoing work of the commissions is understood and appreciated. Human rights advocates, the press, and the general public should also enjoy access to the commissions and their findings.

D. REVISE MILITARY AND CIVILIAN LEGAL CODES GOVERNING THE TREATMENT OF MILITARY PERSONNEL

Domestic legislation, police forces, and judiciaries are the first and most important line of defense in the protection of human rights. International human rights treaties typically instruct states to accommodate treaty provisions vis-à-vis domestic legislation. Importantly, military codes of justice wholly inapplicable to civilians and en-

57. See U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN PRACTICES FOR 1997 (last modified Jan. 30, 1998) <<http://www.state.gov/www/global/human-rights/1997-hrp-report/russia.html>> (recommending the creation of civilian ombudsmen to serve as government supervisors). This report also mirrored one such recommendation of the November 1997 conference on military service and human rights in Moscow, hosted in part by the Russian Federation Presidential Commission on Human Rights. See *id.*

forced by active duty military police and the judiciary frequently govern military personnel. While adequate studies do not exist on the compatibility of military justice codes with international human rights standards, available evidence warrants the conclusion of this essay that military justice codes do not sufficiently incorporate key international human rights standards.

Within an electoral democratic framework, parliamentary action serves to promulgate laws that govern military personnel in the same manner as laws governing civil society. These laws take into account the unique characteristics and needs of the armed forces and thus vary considerably from civilian legal codes. Nevertheless, it remains the responsibility of legislative bodies to bring military justice codes into compliance with international human rights obligations.

Concurrent with the establishment of the civilian human rights commissions and the utilization of the information provided by these commissions, governments should undertake a thorough study of the compatibility of their military justice codes with international human rights obligations.⁵⁸ Necessary changes should be made to the military justice codes. Military judges, attorneys, non-commissioned and commissioned officers, and military recruits should receive instruction on these human rights provisions.

Of special concern is the need for civilian review, either administrative or judicial, of all cases of alleged human rights violations brought before military investigatory bodies and military tribunals. A system of automatic appeal and review for both adjudicated cases and investigations of alleged violations of human rights should be established through domestic legislation. The civilian human rights commissions could play an invaluable role in ensuring the proper investigation of alleged human rights violations, that the perpetrators are brought to justice, and that a fair trial is administered.

58. Guatemala presents one positive example where the Comision de Apoyo Tecnico ("UPAT") of the Guatemalan Congress recommended approval of a law recognizing conscientious objection and ending the practice of forced recruitment. The Commission based its recommendation on Guatemala's international human rights treaty obligations.

In some countries, military personnel and their family members are barred from suing the armed forces for tortuous acts.⁵⁹ Because the human rights violations of military personnel frequently involve permanent physical and psychological disability, the right to just compensation must be established and enforced. The combined threat of criminal prosecution and civil suits would go far toward ending the impunity of individual military officials and the armed forces as a whole.

E. LITIGATE VIOLATIONS OF THE HUMAN RIGHTS OF MILITARY PERSONNEL

International jurisprudence on the human rights of military personnel is undeveloped. Few cases alleging violations of the human rights of military personnel have been brought before international human rights bodies. With increased education and awareness, this unfortunate situation should improve.

It is imperative that private attorneys and NGOs fully litigate cases involving violations of the human rights of military personnel in both domestic and international jurisdictions. Such litigation would permit domestic and international adjudicative bodies to delineate the boundaries of what constitutes acceptable military training, discipline, and punishment, and what constitutes violations of international human rights standards. Without the jurisprudence and recommendations of these legal authorities, military officials will

59. See *Feres v. United States*, 340 U.S. 135, 135 (1950) (holding that the government is not liable under the Federal Tort Claims Act for injuries to servicemen arising out of or in the course of activity incident to the service). In the United States, the "Feres Doctrine" limits the ability of military personnel to recover damages for injuries sustained while on active military duty. See *id.* The underlying rationale of this doctrine is that permitting military personnel to bring law suits against other military personnel for wrongful conduct would undermine military order and discipline. See *id.* at 141-42 (noting the effect of the Act was to waive immunity from recognized causes of action and not to visit the government with novel and unprecedented liabilities); see also *United States v. Shearer*, 473 U.S. 52, 58 (1985) (holding recovery under the Federal Tort Claims Act is barred by the Feres Doctrine). Dorothy Mackey, a former United States military officer who was sexually harassed and assaulted while on active military duty, is currently challenging the Feres Doctrine in the Court of Appeals for the Sixth Federal Circuit. See John Nolan, *U.S. Seeks to Stop Air Force Suit*, PLAIN DEALER, June 12, 1998, at 2B.

continue to lack guidance in distinguishing traditionally accepted military behavior from violations of national and international human rights norms.

CONCLUSION

Much of the treatment we describe above constitutes torture or cruel, inhuman, or degrading treatment or punishment. In most instances, these treatments and punishments occur with the consent and even encouragement of public officials, namely military officers.

The unique mission of the armed forces, to prepare for and wage war, cannot be considered a mitigating factor in cases where the severity of physical or psychological abuse results in significant short-term or permanent disability. Treatment that results in psychological or neurological damage, soft tissue injury, broken bones, or death is not acceptable under any circumstances.

Military conscription lends itself to such abuse that it deserves the utmost concern, suspicion, and scrutiny. The practice of forced recruitment should be proscribed. The failure to exempt conscientious objectors from military service is inexcusable and is at variance with established international law.⁶⁰

In an effort to guide future research in this area, this essay concludes with a series of questions sure to be encountered and raised by human rights advocates, scholars, and government and military officials: (1) To what degree should domestic and international legal bodies defer to the "unique characteristics and needs" of the world's armed forces when evaluating claims of human rights abuses? (2) Given the unique position of the armed forces in society, does the world need to develop a dual system of interpretation and application of international human rights norms for civilian and

60. See *United Nations Human Rights Committee General Comment 22*, Article 18, 48th Sess., at 35, U.N. Doc. HRI/GEN/1/Rev.1 (1994) (noting that the right to refuse to perform military service can be derived from Article 18 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights); see also *Conscientious Objector to Military Service*, U.N. Human Rights Commission Res. 1995/83, 51st Sess., 62nd mtg., at 245, U.N. Doc. E/CN:4/1995/176 (1995) (drawing attention to the right to have conscientious objections to military service as a legitimate exercise of the freedoms laid down in the Universal Declaration of Human Rights).

military personnel? (3) Would the full application of international human rights norms to military personnel undermine military discipline and order and thus the ability of armed forces to wage war? (4) Is it possible to prepare recruits for warfare without subjecting them to human rights violations such as those described above? and (5) Is there a relationship between violations of the human rights of military personnel and the armed forces as perpetrators of war crimes such as rape, torture, and homicide?