



THE LAW OF ARMED CONFLICT

Internal security operations – Part B



ICRC



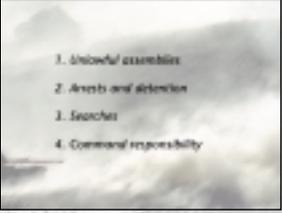
ICRC

International Committee of the Red Cross
Unit for Relations with Armed and Security Forces
19 Avenue de la Paix
1202 Geneva, Switzerland
T +41 22 734 60 01 F +41 22 733 20 57
E-mail: dc_com_fas.gva@icrc.org
www.icrc.org



AIM

The aim of this lesson is to describe the law applicable in internal security operations with regard to:

- 
1. Unlawful assemblies
 2. Arrests and detention
 3. Searches
 4. Command responsibility

[Slide 2]

1. Unlawful assemblies.
2. Arrests and detention –
 - torture;
 - interrogation.
3. Searches.
4. Command responsibility.

1. DEALING WITH UNLAWFUL ASSEMBLIES

Another aspect of the use of force in internal security operations concerns unlawful assemblies.

Key law: the Universal Declaration of Human Rights stipulates that everyone has the right to freedom of peaceful assembly and association. These rights are reiterated in the International Covenant on Civil and Political Rights. The Basic Principles on the Use of Force and Firearms contain further useful guidelines.

UDHR, Art. 20
ICCPR, Arts. 21 & 22
Basic Principles,
Principles 12-14

As with all other aspects of internal security, the armed forces should only be deployed to deal with unlawful assemblies as a last resort. Indeed, the very appearance of the army might well stir fear or panic in the crowd. Police or paramilitary units should be deployed first, if at all possible. The army can be deployed if the situation deteriorates or to block positions away from the centre of the disturbance to prevent further crowds from gathering.

For our purposes, however, let us take a worst-case scenario in which the police and paramilitary forces are unable to cope and the army is called in to deal with the problem.

HUMAN RIGHTS STANDARDS FOR DEALING WITH UNLAWFUL ASSEMBLIES

Every single principle and rule we have covered in relation to the use of force and firearms applies; we will not repeat them here. The Basic Principles also offer the following additional guidelines.

[Slide 3]

[Slide 4]

In the dispersal of assemblies that are **unlawful but non-violent** the use of force must be avoided or, where that is not practicable, restricted to the minimum extent necessary.



Basic Principles,
Principle 13

[Slide 5]

In the dispersal of **violent assemblies**, firearms may only be used when less dangerous means are not practicable and only to the minimum extent necessary. If firearms are used, they must be used under the conditions stipulated in Principle 9, which we covered in lesson 11.



Basic Principles,
Principle 14

It is worth emphasizing here, in case there is any confusion, that Basic Principle 14 certainly does not provide an additional legal reason for opening fire. All the stringent rules of Principle 9 must be applied before anyone can open fire during a violent assembly or riot. You may wish to ask the class what the rules covered in lesson 11 stated and then confirm that firearms must not be used against people except:

- in self-defence or to defend others against an imminent threat of death or serious injury;
- to prevent the perpetration of a particularly serious crime involving a grave threat to life;
- to arrest someone presenting a grave threat and resisting the soldier's authority or to prevent escape.

PRACTICAL APPLICATION OF THE STANDARDS ON INTERNAL SECURITY OPERATIONS

As with the use of force and firearms, let us translate the guidelines into more practical operational language.

Soldiers are not usually required to deal with unlawful assemblies; as a rule, therefore, **they are not trained or equipped for that role.** It represents a new dimension for them. If a State requires its armed forces to operate in this way in an emergency it should ensure they have the lawful authority and the means to do so. The armed forces must ensure the troops are trained for such contingencies. If they are inadequately trained in what to expect or in the techniques involved in dispersing unlawful assemblies, they may make mistakes that could have disastrous consequences. They might, for example, overreact and resort too quickly to the use of lethal force.

As firearms are quite clearly to be used as a last resort, the armed forces must have at their disposal a range of **equipment enabling them to ensure a graduated response.** We have noted the need for defensive equipment such as bullet-proof or flak jackets, helmets with visors,

plastic or light metal shields. Low-level offensive weapons are also required: wooden batons, plastic bullets or baton rounds, water cannons, perhaps with dye to dissuade rioters, and CS gas (riot gas/tear gas canisters or grenades). The latter, although prohibited under the law of armed conflict, is permitted in internal security operations.

A graduated response does not only apply to the use of equipment. **The tactics adopted should ensure the same result.**

Even an unlawful assembly can be tackled using a very low-key approach. Officers can try verbal persuasion. They can negotiate or mediate with the crowd leaders to ask that they disperse or use less contentious routes. The military can then deploy out of sight, securing lateral routes. This is one way of containing a crowd and allowing it to disperse peacefully.

A limited deployment with low-key personal protection equipment such as batons, perhaps combined with loudspeaker requests to disperse, could be tried first. A more robust deployment can follow, with troops deployed on foot with batons, shields and helmets. The next stage might be a baton charge aimed at arresting identified ring leaders. On certain occasions, depending on the size of the violent assembly, it might be appropriate at the outset to deploy a force in sufficient numbers to deter violence and so reduce the likelihood of the use of force or the need to resort to weapons. Weapons should be kept well out of sight, and used only for the defensive purposes outlined earlier. For example, three or four riflemen could carry arms, or armed observation posts could be set up on high buildings just in case it is necessary to open fire. Weapons can always be left in vehicles, readily available if required. **Never should weapons be used as the sole means of dispersing an unlawful or violent crowd.**

[Slide 6]

Unlawful assemblies inevitably attract children, who usually do nothing more than throw stones at the security forces. Of course they should not do this, but in real terms the threat they pose is minimal. Soldiers armed with the range of protective clothing and defensive equipment described above can stand in front of a crowd of stone-throwing children (and indeed adults) all day and probably come to no harm. If the military do not react, then the children usually soon get bored and disperse. The military have therefore achieved their aim. Firing live ammunition at children who are throwing stones indicates a complete breakdown in the soldiers' discipline and a complete lack of command and control by their superiors. It shows they cannot distinguish a military threat from a slight inconvenience or annoyance. It is an unnecessary and utterly disproportionate response.



Tactics should not only provide for a graduated response but allow for **avenues of retreat for the crowd**. The aim is not to bottle them up or to surround them completely. Normally, peaceful demonstrators unexpectedly caught up in a riot will wish to leave the scene and should be allowed to do so.

Training in riot control drill is of the utmost importance. It is worth remembering that riots are also frightening experiences for a soldier. It takes considerable courage to stand in front of an angry mob who in addition to hurling abuse is quite capable of throwing stones and petrol bombs or using small arms against you. Good training will reinforce confidence and ensure there is no overreaction. It is important for every soldier to know exactly how to behave as part of a team, where to go when deployed and what to do. **A well-trained and disciplined force, by its very presence and professional conduct, will normally succeed in dispersing or at least calming a crowd without ever having to resort to the use of force, let alone lethal force.** A military force that deploys in an overly aggressive or chaotic manner, a force that is obviously frightened or unsure of what it is doing or is badly led, will inevitably be noticed by a hostile crowd. It will encourage lawlessness and possibly ridicule, and tend to make matters far worse.

Good command and control at very junior levels and clear rules of engagement are vital.

Clear instructions for dealing with arrested persons are important. Soldiers must know to whom and where they must take arrested persons. In the heat of the situation, arrested people may be abused, and this must be avoided at all costs. A simple system is required allowing the soldier to hand over any offenders quickly, the arrest to be documented and recorded (for example, a photograph taken showing the soldier with the offender), and the soldier to return quickly to the incident. Without an efficient system, soldiers may be inclined to mete out their own rough justice. If a large number of people are arrested, then almost every soldier will be involved in dealing with arrested persons. Very soon no one will be left to cope with the riot! Without documentation, continuity of evidence will be a problem. When the arrested persons are brought before a civilian court, this evidence will be necessary. Normally the platoon sergeant or company sergeant-major, with a few soldiers as guards, is all that is required properly to receive and safeguard offenders in the immediate vicinity of a riot. **Further details of arrest procedure will be covered shortly.**

Clear instructions are also needed for dealing with the **wounded and injured** in accordance with the legal provisions we have already covered. Civilians who are wounded or injured, including anyone who has been arrested, must be dealt with immediately by army medics or taken to a medical aid post or civilian hospital by ambulance for treatment.

2. ARRESTS AND DETENTION

[Slide 7]

As with other operational matters, the armed forces must adjust their training and operational procedures to comply with the rules for arrest and detention when they are involved in internal security operations. We will now look at the law you “need to know” when you arrest a person or are required to detain them prior to handing them over to the civil authorities.



It is important to note and explain to your class that the rules and procedures we will now be discussing are a distillation of the applicable human rights law and standards. As mentioned at the outset of our internal security lessons, we will be concentrating on what soldiers, their commanders and junior staff officers “need to know” in a tactical or operational scenario at section to brigade level. We are therefore concerned only with the short-term requirements of the law in relation to arrest and detention. It is difficult to define the exact time span we are going to discuss, as each situation differs. However, we are definitely talking about **immediate action drills** that you should follow for detainees who are your responsibility for hours or possibly days, but not weeks or months. Longer term considerations of, for example, care and treatment of prisoners in jails or the judicial aspects of fair trial are beyond the scope of these lessons. Should the armed forces actually become involved in these longer term issues, and some do, then instructors should seek the guidance of their legal services for the additional information they will certainly require. It should also be noted that in most countries only the police have the authority to make an arrest.

Key law: international human rights law and standards provide a series of protective measures to ensure both that individuals are not deprived of their liberty unlawfully or arbitrarily, and that once arrested they are protected from other forms of abuse.

Everyone has the right to life, liberty and security of person.

UDHR, Art. 3

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

ICCPR, Art. 9 (1)

The above rights are also provided for in each of the regional human rights instruments.

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), adopted by United Nations General Assembly resolution 43/173 of 9 December 1988, provides us with detailed guidelines. It contains the following definitions:

“**Arrest**’ means the act of apprehending a person for the alleged commission of an offence or by the action of an authority.

‘**Detained person**’ means any person deprived of personal liberty as a result of conviction for an offence.”

These definitions in the Body of Principles may be different from the definitions used in domestic law. What matters is the factual situation in which the individuals find themselves.

The rules relating to arrest and detention overlap. For the purpose of this lesson, however, we will treat them as separate subjects whenever possible.

ARREST

[Slide 8]

Principles applicable to arrest

The Body of Principles lists the two essential principles to be applied to an arrest, which can only be made:

- on such grounds;
- and in accordance with such procedures as are established by law.

The grounds for the arrest, i.e. the alleged commission of a criminal offence, must be set forth in domestic law. Soldiers must therefore be briefed very carefully so that they are in a position to know if and when the law is being broken.



Domestic law must authorize soldiers to make arrests and lay down **rules and procedures** to be followed by them when doing so.

In addition, **an arrest must not be arbitrary**. This means it must have a sound basis in the law and must not be unreasonable, unjust or disproportionate.

Human rights standards on arrest procedures

[Slide 9]

Soldiers are of course trained in the procedures for the arrest of POWs. The law of armed conflict contains clear rules on initial search and subsequent treatment until the POWs are evacuated from the front: they are entitled to humane treatment, are not to be exposed to any danger, in particular torture or humiliating or degrading treatment. Does this leave anything new to learn? Yes, because although the basic rules are similar, there are also important differences. We must adjust to these and implement the new rules when involved in internal security operations.

The Body of Principles again provides us with useful guidelines. It states that:

“Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.”

This expressly prohibits what is common practice in some countries, where branches of the security forces carry out arrests and detentions although they have no power to do so.

Rights upon arrest

The troops must be taught to apply important new rules in addition to those covered in the law of armed conflict.

Immediate information on the reasons for arrest. Anyone who is arrested must be informed, at the time of arrest, of the reasons for their arrest and must be promptly informed of any charges against them.



Body of Principles,
Principle 2

ICCPR, Art. 9 (2)
Body of Principles,
Principle 10

The main purpose of this information is to allow arrested persons to challenge the legality of their detention. They should therefore be told in simple, non-technical language that they can understand the essential legal and factual grounds for their arrest, so that, if they want, they can apply to a court to challenge its lawfulness.

Procedure after arrest

The operational plan for internal security operations should ideally be based on a procedure which allows any persons arrested to be brought to a temporary holding point where they are immediately handed over to the military or civil police. Apart from the initial requirement to notify the arrested person of the reason for the arrest, all the other procedures should be carried out by these supporting police units. The reasons are clear. Soldiers are not always well versed in the detailed arrest procedures required by the law. In any case, their job is not to become bogged down in time-consuming legal procedures but to get back to their tactical area of responsibility. This is not to say the procedures must be skipped or that they are not important, but simply that a good military plan will ensure that the human rights rules are applied professionally by those best trained to do so and that soldiers are quickly returned to their sections or platoons, where they may be desperately needed.

Under a good plan that provides for the above, the supporting military or civilian police must then carry out the following procedures. **Note, however, that if this ideal state of affairs does not exist then arrest procedures remain a unit responsibility until such time as the police can take over.**

Recording/registration. As soon as possible after the arrest, the following details must be recorded:

- the name, address, date and place of birth of the arrested persons;
- the reasons for the arrest;
- the date and time of the arrest, of the arrested person's transfer to a place of custody, and of his or her first appearance before a judicial or other authority;
- the identity of the arresting soldier or soldiers and any witnesses;
- precise information concerning the place of custody.

These records must be communicated to the arrested person or to his or her legal counsel.

One of the reasons why it is important to maintain accurate custody records is to reduce the risk of "disappearances".

Body of Principles,
Principle 12

Notification of rights. For people to exercise their rights, they must know what those rights are. All those arrested or detained must be promptly informed of their rights and told how to avail themselves thereof. The explanation must be given in a language they can understand. If necessary, an interpreter must be provided for this purpose.

Body of Principles,
Principles 13 & 14

Notification of next of kin. Arrested persons must be allowed to communicate with the outside world, in particular with their next of kin or legal counsel, and they must be allowed to do so within a matter of days. The information can include details of the arrest, detention or imprisonment, or transfer from one holding place to another.

Body of Principles,
Principles 15, 16 & 18

Legal counsel. One of the most important rights which all arrested or detained people need to know is that they are entitled to the help of a lawyer. All those arrested, detained or charged must be informed of their right to have the assistance of legal counsel. Those who do not have their own counsel should be provided with one, free of charge if necessary.

Body of Principles,
Principle 17

The arrested person is to be **moved to a place of official custody and promptly brought before a judge or other officer authorized by law to exercise judicial power.** That authority must decide without delay upon the lawfulness and necessity of the arrest.

Here case law and State practice tend to point to “promptly” meaning between 24 hours and no longer than 48 hours, i.e. days, not weeks. In situations of emergency, if the State has entered a notice of derogation, it may be possible to hold detainees for up to four days. In that case, it is particularly important for detainees to be given access to a lawyer or an independent doctor or to someone else of their choosing.

ICCPR, Art. 9 (3)
Body of Principles,
Principles 11 & 37

Unlawful arrest. It is important to note that anyone who has been the victim of unlawful arrest or detention has an enforceable right to compensation. In other words, if the correct procedures are not followed, you and your unit may be called to account in a civil court.

ICCPR, Art. 9 (5)

Special rules for the arrest of women

The special status of women must be respected. It is entirely possible that women offenders will be arrested on operations and soldiers must know how to deal correctly with them. Whenever possible, the actual arrest should be made by women soldiers or police officers. When this is not possible, the arrested women should be handed over to female officials as soon as possible. In addition, they should be:

- searched by women officials;
- held separately from any arrested men;
- protected from any humiliating or degrading treatment.

Special rules for the arrest of children

We have already dealt with the law applicable to children and child soldiers in armed conflict. International human rights law tends to reinforce these rules and in some areas enhances the protection given to children. It is important for soldiers to know these rules. In armed conflicts, contact with juveniles tends to be a relatively rare occurrence. The opposite holds true for internal security operations. Almost all the operations undertaken by the armed forces, in particular demonstrations or riots, will bring them into contact with children. Soldiers must therefore know the applicable law.

Key law: there is an emerging consensus in international law that a child is anyone under the age of 18, and therefore anyone under the age of 18 is entitled to special protection if arrested or detained.

The Convention on the Rights of the Child defines a child as everyone aged less than 18, unless majority is attained earlier under national law. **The United Nations Rules for the Protection of Juveniles Deprived of their Liberty** define a juvenile as “every person under the age of 18”. The age of majority is determined by States, but must not deviate greatly from international norms.

The minimum age of criminal responsibility varies from country to country. You will need to seek the advice of your legal branch to know what that age is in your country.

The Convention on the Rights of the Child, Art. 1 Rules for the Protection of Juveniles Deprived of their Liberty, Rule 11 (a)

These two instruments, plus **the International Covenant on Civil and Political Rights and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)**, provide guidance for the arrest or detention of children. The important points for soldiers to know are set out below.

Children retain all the rights already covered above for adults if arrested. **In addition:**

Last resort. Arrest (and, as we will see, detention or imprisonment) of children should be avoided whenever possible and is a measure of last resort. When children are arrested and detained, their cases are to be given the highest priority and handled as fast as possible to ensure the shortest possible period of detention prior to trial.

ICCPR, Art. 10 (2) (b)
Convention on the Rights of the Child, Arts. 37 & 40
Rules for the Protection of Juveniles Deprived of their Liberty, Rules 1 & 17
Beijing Rules, Rules 13 & 19

Notification of next of kin. When a child suspected of breaking the law is arrested or apprehended, his or her parents or guardian are to be notified immediately, unless doing so would be detrimental to the interests of the child. If immediate notification is not possible, the parents or guardian are to be notified within the shortest possible time thereafter.

Convention on the Rights of the Child, Art. 9 (4)
Rules for the Protection of Juveniles Deprived of their Liberty, Rule 22
Beijing Rules, Rule 10.1

Separation from adults. Children arrested and detained pending trial must be segregated from adults, except where this would not be in the best interests of the child. For example, if the child's parents are being held then it might be in the child's best interests to be held with them rather than separately.

ICCPR, Art. 10 (2) (b)
Convention on the Rights of the Child, Art. 37 (c)
Rules for the Protection of Juveniles Deprived of their Liberty, Rule 29
Beijing Rules, Rule 13.4

Respect for special status. Contacts between military personnel and children must be conducted in a manner which respects the legal status of the child, avoids harming it and promotes its wellbeing.

Beijing Rules, Rule 10.3

Practical application of the standards to operations

The above rules are many and detailed. How can soldiers involved in operations possibly comply with them all? While not repeating everything we have already said, let us look at the practical aspects of why and how to apply the law. We are concerned with the immediate tactical implications of the arrest and its immediate aftermath.

Let us take a practical example. Private Bright is ordered by his platoon commander to arrest Mr Trouble for throwing stones at the platoon during an unlawful demonstration. The demonstrators have been repeatedly warned to disperse. Let's look at the situation in two parts: what is required of Private Bright and what is required of his commander and the supporting staff officers at headquarters?

The soldier

- Private Bright has the legal authority and believes it is necessary to arrest Mr Trouble.
- He must deal correctly but quickly with the arrest. Why? Because he is legally bound to treat Mr Trouble correctly and because his platoon needs him back as soon as possible to assist with a difficult situation.
- If it is practical and at all possible at this stage, Private Bright should briefly inform Mr Trouble of the reasons for his arrest.
- Private Bright must now take Mr Trouble to the rear, away from the demonstration, as quickly as possible; he may need the help of another soldier.
- Mr Trouble must not be harmed in any way, shape or form. Torture and cruel, inhumane or degrading treatment are prohibited. Only that degree of force necessary to escort him must be used.

- Ideally, Mr Trouble should be taken to a prearranged location indicated in the orders, such as the platoon sergeant's or company sergeant-major's vehicle, or perhaps a building designated in the orders as a collection point for arrested persons. We are talking about a distance of no more than 200-400 m. If military police or civilian police are available, then ideally Mr Trouble should be handed over to them.
- The platoon sergeant/company sergeant-major/military or civilian police officer should ask Private Bright for the reasons for the arrest and must note at this time details such as the time, place, arresting soldier or soldiers, etc. We are talking here of the briefest details because time is of the essence. We need enough information to link the identity of Private Bright, any colleagues who assisted him and Mr Trouble. We need to be absolutely clear about the reasons for the arrest. The details can be filled in when the situation has stabilized. If these details are not recorded now, however, they will be forgotten in the confusion of the situation. Without them, subsequent legal proceedings against Mr Trouble will be futile. Evidence, particularly continuity of evidence, will be lacking.
- Mr Trouble should be informed immediately of the reasons for his arrest (if this has not already been done).
- Ideally, a photograph should be taken at this time of Private Bright and any other soldier assisting in the arrest of Mr Trouble. Private Bright might arrest a number of people during the demonstration. A picture will enable him later to link the particular offence to a person. An instant (Polaroid) type of photograph is ideal. It can be given a reference number and attached immediately to the hand-written details mentioned above.
- Private Bright can give fuller details as required when the situation has calmed down, and Mr Trouble should be handed over as soon as possible to the civil authorities.
- Private Bright and any other arresting soldier or witness will probably be required to give statements to the police.
- The next time Private Bright and his fellow arresting soldiers are likely to see Mr Trouble is when they are called to give evidence in court. The initial details and photograph will come in useful as a reminder of exactly what happened at the demonstration.

Commanders and staff must ensure that:

- clear orders are given to the soldiers so that they know the law and are in a position to know if and when it is being broken;
- these orders are carried out;
- the correct arrest procedures are known to their soldiers and carried out;
- soldiers are trained in the details of arrest procedures prior to operations;
- provision is made for the special treatment of women and children if arrested;

- liaison and coordination take place before an operation to ensure adequate support is available, for example that military or civilian police are available to take over responsibility for arrested persons as soon as possible, and that women police officers are also available;
- procedures are in place to inform Mr Trouble of the reasons for his arrest and the charges against him, to correctly record all personal details relating to him, Private Bright and any other arresting soldiers, and to notify Mr Trouble of his rights (remember that you may need a translator/interpreter for this);
- Mr Trouble can communicate with his next of kin, legal counsel and a doctor of his own choosing etc. Ideally this should be done if Mr Trouble is to be held by the military for more than 24 hours. If the period in military detention is shorter than this, i.e. hours rather than a day or days, then the last requirement would be difficult if not impossible to implement. It must be promptly met, however, once Mr Trouble is handed over to the civilian authorities.

DETENTION

[Slide 10]

We have already said that the human rights instruments relating to arrest and detention inevitably overlap. We will not repeat ourselves but concentrate on the important issues that affect the armed forces on operations. **Remember also that we are concerned only with tactical and operational issues involved with the immediate aftermath of arrest and the short-term requirements of holding detainees before they are handed over to the civilian authorities, usually the police.**

Key law: the international human rights instruments mentioned in connection with arrest above also apply to detention. In addition, **the Standard Minimum Rules for the Treatment of Prisoners (SMR)** provide the armed forces with guidelines as to “what is generally accepted as being good principle and practice in the treatment of prisoners”.

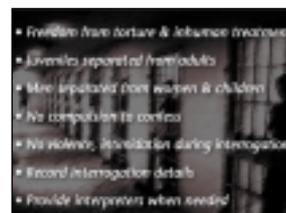


SMR, Rule 1

Human rights standards on detention

[Slide 11]

The SMR contain the following provisions.



All detainees held by the armed forces must be registered. In addition to the details noted on arrest above, the register must contain the day and time of admission to a detention centre and of release (or handover to another detaining authority).

SMR, Rule 7

Men and women must be detained in separate buildings or at least separate accommodation. Women should be provided with separate sanitary facilities. Young persons must be kept separate from adults (but note the exceptions below).

SMR, Rules 8 (a) & (d)

Even for short-term detention, thought must be given to sleeping accommodation, lighting, heating and ventilation. Sanitary facilities must be available so that detainees can comply with the needs of nature when necessary in a clean and decent manner. Thought must also be given to avoid overcrowding. Food and drinking water must be made available.

SMR, Rules 10, 12 and 20

Injured or sick detainees must be transferred to civilian or military hospitals for treatment. Each detainee must be examined by a medical officer as soon as possible after arrest.

SMR, Rules 22 (2) & 24

This is as much to safeguard the armed forces from subsequent accusations of ill-treatment as it is to protect the detainees.

Instruments of restraint, such as handcuffs, chains, irons and straitjackets, must never be applied as a punishment. Chains and irons must not be used as restraints. Other instruments of restraint must not be used except in the following circumstances:

- as a precaution against escape during transfer;
- on medical grounds if directed by a medical officer;
- as a last resort to prevent detainees from injuring themselves or others or damaging property.

SMR, Rule 33

All money, valuables, clothing and other personal effects belonging to the detainees which it is decided they should not keep must be recorded and stored in safety. The detainees must sign an inventory for anything that is removed.

SMR, Rule 43

The items should be signed for by the civil authorities when they assume responsibility and the detainees leave military control.

Special rules on detention relating to women and children

We have covered most of these in the rules of arrest. However, it is important to remember that special rules do apply.

Women

- Women must be detained in separate accommodation from men. SMR, Rule 8 (a)
- They must have access to separate sanitary facilities.
- They must be supervised by women, either women police officers or women soldiers. SMR, Rule 53
- Special arrangements, including medical care, must be made for pregnant women and nursing mothers. Instruments of restraint must not be used on women giving birth. Body of Principles, Principle 5
SMR, Rule 23
- Women should be present during the interrogation of female detainees and should be solely responsible for conducting body searches. (This guideline comes directly from General Comment 16, paragraph 8 of the United Nations Human Rights Committee, established to monitor implementation of the ICCPR.)
- Women must be protected from abuse and humiliating or degrading treatment such as sexual violence.

Children

- The standards relating to detention of children are based on the principle that, in most cases, the best interests of the child are protected by not separating it from the parents. See *inter alia* –
Convention on the Rights
of the Child, Art. 9
Declaration of the Rights
of the Child, Principle 6
- Detention must be used as a last resort, must conform with the law, and be for the shortest appropriate time. Convention on the Rights
of the Child, Art. 37 (b)
Beijing Rules, Rule 19
- When detained, children must be held separately from adults unless this is not in their best interests; if the adult members of the family are also being held, the child should stay with them. Convention on the Rights
of the Child, Art. 37 (c)

TORTURE AND INTERROGATION

We have left these important subjects for the end of this section. The rules we will describe apply as much to the use of force as to arrest and detention.

TORTURE

Human rights standards applicable to torture

As with the law of armed conflict, **no one may ever be subjected to torture or to cruel, inhumane or degrading treatment or punishment.** The same rules are provided for in all the major treaties and standards we have studied to date. The prohibition of torture was further codified in the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)**, adopted by United Nations General Assembly resolution 39/46 of 1984.

UDHR, Art. 5
ICCPR, Art. 7
Body of Principles,
Principle 6

A definition of torture

The CAT defines torture as follows:

“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”.

The prohibition against torture is absolute and non-derogable. It applies to all people at all times.

ICCPR, Art. 4

In simple terms, this definition sets out three essential elements which constitute torture:

- the infliction of severe mental or physical pain or suffering;
- by or with the consent or acquiescence of the State authorities;
- for a specific purpose, such as gaining information, punishment or intimidation.

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture.

CAT, Art. 2 (2)
Body of Principles,
Principle 6
Code of Conduct, Art. 5

This means that **the argument of military necessity can never be used to justify torture**. You can never say that you needed to torture someone because you knew they had vital information that might save the lives of others, sometimes referred to as the **“ticking bomb scenario”**.

In addition, cruel, inhumane or degrading treatment or punishment is also prohibited in all circumstances and at all times. This applies not only to such things as electric shock treatment, but also to such treatment as beatings, mock executions etc.

All soldiers on internal security operations are quite clearly prohibited from inflicting, instigating or tolerating torture or other cruel, inhumane or degrading treatment or punishment on any person. The fact that they were ordered to do so by their superiors may not be used as a justification. In fact, they are bound by international standards to disobey such orders and to report them.

CAT, Art. 2 (3)
Code of Conduct,
Arts. 5 & 8

Remember that rape and all other forms of sexual violence are a form of torture and are prohibited.

International standards prohibit the imposition of **corporal punishment** for disciplinary offences committed by detainees. It is also absolutely prohibited to punish detainees by placing them in a dark cell.

SMR, Rule 31

Corporal punishment is generally understood to be physical punishment involving blows to the body or mutilation, imposed by judicial order or as an administrative sanction.

INTERROGATION

[Slide 12]

The basic rule here is the same in internal security operations as in the law of armed conflict. **Remember, we are talking about a tactical situation.**

Interrogation should always be carried out by experts operating within the law. If you think it is necessary to interrogate a detainee, then have the interrogation carried out by professional police interrogators or, if that is not possible, by military interrogators. Do not attempt a forward interrogation, or what is sometimes called **“tactical questioning”**. Tactical questioning is a waste of time and can lead to abuse. It can become an excuse to bully, vent anger on or humiliate the detainee. It is unlikely to produce anything of value. An offender is either going to tell



you exactly what you want to hear because he or she is frightened, to waste time or to mislead you. For all these reasons, use the professional approach: rapidly evacuate the detainee away from the operational area to a place where trained interrogators, operating within the law, can do the job properly.

The above introduction to interrogation should be sufficient for junior audiences, i.e. don't even attempt interrogation, leave it to experts. For more senior audiences such as commanders and staff who might be responsible for supervising or arranging interrogations, the rules below should be covered.

If having said this the situation is such that the military are the only ones available to carry out the interrogation, then their experts should follow the human rights standards on the subject.

Human rights standards applicable to interrogation

Several rights aim to safeguard people during investigation of an offence.

- **The presumption of innocence.** Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law.
- **The prohibition of torture,** cruel, inhumane or degrading treatment or punishment which we have covered in detail.

ICCPR, Art. 14.2

In recognition of the fact that people under interrogation are vulnerable, the Body of Principles provides that:

1. it is prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself or to testify against any other person;
2. no detained person while being interrogated is to be subject to violence, threats or methods of interrogation which impair his capacity of decision or judgement.

Body of Principles,
Principle 21
ICCPR, Art. 14.3 (g)

There is no point in resorting to torture since any statement obtained as a result of torture will not be admissible in evidence.

CAT. Art 15.

Linked with the above is the **detainee's right to remain silent** during the investigation. This is inherent in the presumption of innocence and an important safeguard of the right not to be compelled to confess guilt or

testify against oneself. The right to remain silent may be abused during the interrogation as interrogators are doing their best to extract a confession or an incriminating statement from the detainee, whose exercise of the right to remain silent frustrates these efforts. The right to remain silent is incorporated into many national legal systems. Although it is not expressly guaranteed in international human rights treaties, it is **expressly recognized in the Rules of Procedure and Evidence of the International Tribunals for the former Yugoslavia (Rule 42(A)(iii)) and Rwanda (Rule 42(A)(iii)), and in the Statute of the International Criminal Court (Art. 55. (2) (b)).**

A key safeguard which military interrogators should carefully consider is **the right to the presence of a lawyer during interrogation.**

Body of Principles,
Principle 17
Basic Principles on
the Role of Lawyers,
Principle 1

Records must be kept of all interrogations. They must specify:

- the **duration** of each interrogation;
- the **intervals between interrogations**;
- the **identities of the officials** conducting the interrogation **and other persons present**;
- the **time and place** of the interrogation.

The records should be accessible to the detainees or their counsel.

The Rules of Procedure and Evidence of the International Tribunals for the former Yugoslavia and Rwanda require **video or audio recordings** of interrogations (Rule 43). The armed forces might well consider their use as a safeguard for the detainee and for the interrogator against possible complaints.

Body of Principles,
Principle 23

Anyone who does not understand or speak the language of the authorities is entitled to have an **interpreter** to help with the interrogation, free of charge if necessary.

Body of Principles, P. 14

Interrogation of Children. Children should only be interrogated in the presence of a parent or guardian. Remember that children may be physically and emotionally more vulnerable than adults. Treatment that may be acceptable when applied to adults might constitute inhumane treatment of a child.

Education and information regarding the prohibition against torture must be included in the training of all persons involved in the custody, interrogation or treatment of any individual under any form of arrest, detention or imprisonment. **“All” quite clearly includes military interrogators.**

CAT, Art. 10.1

International standards require States regularly and systematically to review rules and instructions for the conduct of interrogations, interrogation

methods and practices. This requirement must clearly be implemented with regard to armed forces rules and methods of interrogation.

CAT, Art. 11

Where it is alleged that a person has been detained or that a person has been subjected to ill-treatment, the authorities have an obligation to conduct a thorough and effective investigation.

PRACTICAL APPLICATION OF THE HUMAN RIGHTS STANDARDS ON DETENTION TO OPERATIONS

As you can see, the human rights standards reflect many of the rules we have learnt concerning the initial treatment of POWs in international armed conflicts and detainees in non-international armed conflicts. Again, however, some adjustments are required for internal security operations. Let us look at the requirements in relation to soldiers and then to commanders and staff.

Soldiers

Soldiers, as we have said, are involved in the initial arrest of a person. **Their responsibilities in connection with the details of longer term detention are limited.** They might of course be involved in guarding detainees. Their orders must ensure that they:

- do not torture or administer any form of cruel, inhumane or degrading treatment or punishment;
- do not carry out “tactical questioning” in the misguided belief that they can gain information; interrogations must be conducted only by trained interrogators;
- do not use illegal forms of restraint on a detainee;
- treat women and children with special respect;
- do not steal from detainees and account for any items removed from the detainees in a register.

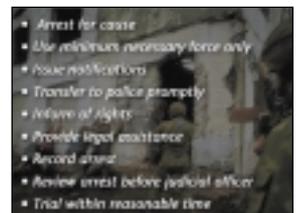
Commanders and staff

Arrangements for detention are largely the responsibility of commanders and staff.

- As a matter of principle, **military planning should be aimed at detainees being held for as short a time as possible** by the armed forces. The detainees should be handed over as quickly as the situation allows to civilian police or to the appropriate judicial authority under national law.

- If the above is not possible for any reason, or if there is reason to believe that the arrested persons' lives or physical integrity are at risk, they should be taken to a designated place of detention by the armed forces. If no such place is available, they should be taken to an armed forces unit until arrangements are made to deal with them. During this period detainees should be looked after by military police personnel trained for the task, if at all possible. The staff should in particular draw up contingency plans to ensure the provision of adequate accommodation.
- Detailed staff planning must ensure that even in short-term detention centres, provision is made to cover the administrative requirements listed above (namely to register detainees, to provide adequate accommodation and food, etc.), to furnish separate accommodation and sanitary facilities for men and women, to ensure that children are held separately unless they are with members of their family, to guarantee that legal advice and interpreters are available on request, etc.
- Commanders in particular must ensure that any interrogations are carried out in compliance with the strict requirements of the human rights instruments mentioned above.

[Slide 13] (summary of above)



3. SEARCHES

Legal authority and procedures relating to the right to conduct searches is governed by domestic law. Prior to operations, soldiers must be instructed in the rules applied by the civilian police in their country. Below are some suggestions on searches based on general principles of human rights law.

Soldiers on internal security operations may have to carry out searches in connection with various tasks. For example, they may have to search:

- **persons** (spot searches of suspicious people, routine searches of people entering restricted areas or shopping precincts, people at vehicle checkpoints, identity checks etc.);
- **vehicles** (at checkpoints);
- **property** (private homes, business premises, goods containers, etc.).

Searches, particularly of vehicles or property, can be slow and time-consuming. If the search is not thorough or properly conducted, it is not worth doing at all. If it is not lawful, anything you find might be inadmissible as evidence later and the case will be dismissed.

We have already seen that the law tells us that women should be searched by female soldiers or police officers. It tells us that property taken from detainees should be properly registered and recorded. So what else does a soldier need to know regarding searches?

PRACTICAL GUIDELINES ON SEARCHES

Let us suggest some common-sense guidelines. These are intended as much for the protection of the soldier as for that of the persons being searched and their property.

Both the reasons for the search and the procedures under which it is carried out must be specified by domestic law. Soldiers therefore should never use searches as a punishment, to bully or as a form of degrading or humiliating treatment. **Searches must be conducted for a reason**, i.e. on the strong suspicion of an offence, or as a justifiable deterrent, i.e. to dissuade bombers from entering a town, village or shopping precinct.

Searches must be legal. Domestic law must grant soldiers the right to search. They cannot assume that right without this authority. For example, domestic legislation may require that a search warrant be issued before property can be searched. An illegal search may lay you open to an accusation of assault or damage.

Persons should be searched with **respect for their dignity, quickly and efficiently. Soldiers should be trained exactly how to search a vehicle or a person.** As we have said, women soldiers or police officers should be available to search women and girls. Be respectful and courteous, but do not trust anyone until your search is over. They might still have a concealed weapon. Most people searched will not want the searcher to be successful. It is also wise while searching to have a fellow soldier acting as a guard for you.

Do not cause intentional and wanton damage while searching.

Remember, modern technology such as handheld metal or explosives detectors can help with searches. If your unit can obtain these, they can be most useful. Again, soldiers will need some training in how to use this equipment. Search dogs or “sniffer” dogs can also be of assistance to the military.

Try if possible to make the search consensual rather than confrontational. Ask the person if they have what you are looking for (or anything else illegal) and ask them to give it up. Sometimes they will! Even so, they will have to be searched.

Soldiers should **not be tempted to take “souvenirs”** from vehicles or property. Remember, **pillage and stealing are crimes.** In order to control matters and also to protect soldiers and those being searched, it might be considered useful to **issue search certificates.** A simple form can be devised which soldiers give to vehicle or property owners after the search to certify that the search was carried out correctly and that nothing was removed. Similarly, if it is necessary to remove suspicious items, this should be recorded in the presence of the owner, who should then be given a receipt to countersign.

The vehicle or property owner should always be present throughout the search to witness that it was carried out correctly and that nothing was illegally removed. If they are not available, then their official representative or an independent witness should be present.

Items taken during a search should be divided, if possible, into personal effects, evidence/suspect items and valuables and recorded and stored independently. If you find “evidence”, do not examine it thoroughly or handle it too much. It might be required for fingerprint or forensic evidence, which might be lost through over- or mishandling. Records of valuables should be complete and precise. Money should be counted in the presence of a witness. The record should bear the sum written in words to prevent possible alterations later. Any property returned to the person (clothing, cigarettes, etc.) should be carefully recorded as being taken off the original written record.

In long, drawn-out search operations, for example a cordon and search, commanders and staff must make provision for the **care of the civilian population**. Thought must be given to the sick, the elderly, pregnant women, women with young children, etc. The search phase of such operations can last for hours. The population needs to be cared for during this time. The military may have to provide shelter, food, water and even emergency medical support. If the population cannot use its own property because of the search operation, the military must provide alternative shelter and support.

Remember, searching can be dangerous; booby traps may have been laid. A suspicious vehicle may be rigged to explode using a remote control device. Those searching these and similar items must proceed carefully and professionally.

If you are searching a child, make sure a same-sex parent or “guardian” is present.

4. INDIVIDUAL AND COMMAND RESPONSIBILITY

[Slide 14]

Internal security operations do not change anything that we have already covered in relation to individual or command responsibility. In fact, the human rights standards reinforce the points we covered under the law of armed conflict.

Internal security operations place a considerable burden on commanders. Responsibility, as we have said, often rests at very junior levels of command. A wrong decision or action by a corporal or platoon commander can have consequences that attract political or even international attention.



Commanders must plan carefully at all levels and issue clear rules of engagement (ROE).

The principles of command and of *respondeat superior* established by custom remain pertinent. Anyone giving an order to commit an offence is as guilty of the offence as the person actually committing it.

As we have said, human rights standards reinforce the rules we covered in lesson 6 on command responsibility. For example, the **Basic Principles on the Use of Force and Firearms by Law Enforcement Officials** state that governments must ensure that arbitrary or abusive use of force and firearms by soldiers is punished as a criminal offence under their law.

Basic Principles,
Principle 7

Governments and military authorities must ensure that superior officers are held responsible if they know, or should have known, that those under their command are resorting, or have resorted, to the unlawful use of force and firearms, and did not take all measures in their power to prevent, suppress or report such use.

Basic Principles,
Principle 24

No criminal or disciplinary sanction may be imposed on a soldier who, in compliance with the Code of Conduct for Law Enforcement Officials, refuses to carry out an order to use force and firearms, or who reports such use by other officials.

Basic Principles,
Principle 25

Obedience to a superior is no defence if a soldier knew that an order to use force and firearms resulting in death or serious injury was manifestly unlawful, and he or she had a reasonable opportunity to refuse to follow it. In any case, responsibility also rests with the superiors who gave the unlawful orders.

Basic Principles,
Principle 26

COMMAND RESPONSIBILITY IN RELATION TO TRAINING

We have already mentioned the importance of training soldiers. **Training of subordinates in the conduct of internal security operations is the responsibility of every commander within his or her sphere of responsibility.**

SUMMARY

During the last two lessons we have dealt with internal security operations. You have seen that the laws and rules applicable in such operations are based on international human rights law. The first ten lessons explained the obligations of armed forces under international humanitarian law. Although the two bodies of law are different, you most probably observed that there are many similarities in their practical execution.

We covered a great deal of ground in both lessons. You now have the confidence, through knowledge of the law, to act professionally and efficiently should you be required to take part in internal security operations. As with the law of armed conflict, there is really nothing in this area of the law that a good soldier would disagree with or find impossible to implement on operations. Adjustments in training and operational procedures are certainly necessary. Any professional armed force with good commanders will be able to take these adjustments in stride.

The law, as you can see, reflects common sense and is based on practical guidelines which are designed to help you, the soldier, as much as those you are charged with protecting – your fellow citizens.

Questions from the class.

APPENDIX

Questions to the class

1. You are an infantry platoon/company commander. Your commanding officer tells you the unit will be placed on standby for internal security operations in three weeks. He says: "You have two weeks to train your own sub unit, then for the last week we will concentrate on battalion level operations". What aspects of sub unit training will you cover in the two weeks available to you?

The question is intended to make the class realize that training is important and to focus on the adjustments that have to be made in comparison with routine operations.

Possible answers

Lectures on the applicable law. Do not spend too much time in the classroom. You could use short plays or practical demonstrations.

Instruction followed by practical training on:

- dealing with unlawful assemblies (drills and procedures);
- arrest procedures and short-term detention;
- search procedures;
- dealing with injured comrades and civilians;
- orders for opening fire (explanation of the restrictions, practical exercises);
- training in the use of new equipment such as batons, shields, rubber-bullet guns, etc.

2. Private Bright and Private Dull have been posted as observation sentries on a tall office building to provide cover for their platoon operating below against a rioting mob. They are equipped with rifles and a radio. Private Bright sees what he believes to be a person moving in a crouched position along the flat roof of a building opposite him. He then sees the same person take up a firing position on the roof with a rifle clearly pointed at his platoon below. Private Bright immediately fires at this person, who does not reappear.

Was Private Bright justified in firing. Should he have given a warning first?

Answer

In the circumstances, Private Bright was justified in firing. His task was to provide cover for his platoon. The person with the rifle posed an imminent threat of death or serious injury to his fellow soldiers. In this case, a warning would be clearly inappropriate and pointless. Giving a warning would not prevent the person from firing at the platoon or indeed at Bright or his colleague Dull.

3. The platoon was unaware of Private Bright's action on the rooftop, as it was completely immersed in its efforts to contain the riot. After the incident, Bright rejoins his platoon but decides not to mention the shooting. *"I may get into trouble with all these rules and regulations"*, he thinks to himself. He and Private Dull agree to say nothing.

What should Private Bright actually have done?**Answer**

- He should have reported the incident immediately over the radio to his platoon commander.
- After the riot, on rejoining his platoon, he should report the incident again to his platoon commander or sergeant, stating that he used his rifle and exactly how many rounds he fired.
- The platoon commander should, as soon as the situation permits, search for, treat or recover the body of the person on the roof.
- The platoon commander should then as soon as practicable make a detailed record of the incident e.g. by taking statements from Privates Bright and Dull. A report should be given initially by radio to the company commander and subsequently the written report should be passed upwards through the chain of command.

4. You are involved in a serious internal security situation in a town in which you have been fired at from various points. A sniper has been operating from one building in particular. Suddenly the front door of this same building is thrown open and a civilian runs out and away from you down the street.

Would you be justified in opening fire on this person?

Answer

Clearly not. He or she could simply have been trapped in the house. The person is not threatening you or anyone else. There is no suggestion that they are carrying a firearm. To shout a warning to “stop or I’ll shoot” would also in the circumstances probably be futile. The person is quite likely to be so frightened as to continue running even if they can hear you.

The scenario is not clear-cut enough to justify the use of lethal force. It is not absolutely necessary that you do so. **You must not fire in this case.**

5. You are a company commander who has been tasked to carry out a cordon and search operation on village X tomorrow morning starting at first light. The village is thought to be the base of a group of eight troublemakers who are also using it as their arms cache. It is inhabited by about 50 people.

Ignoring the tactical aspects of this question, what administrative and logistic considerations would you build into your plan for the operation?

Answer

- The needs of the civilian population should feature prominently in the plan.
- There are 50 inhabitants. Some will be old, others sick, there will be pregnant women and women with children. Their needs must be seen to during the search operation.
- The company commander might need:
 - to find and speak to the village elders as quickly as possible once the cordon is set up, to explain things and calm the situation;
 - to ensure tents or shelters are provided if it is very hot, wet or cold;
 - to ensure there is medical back-up;
 - to provide some basic food rations and water (the people may not be able to get to their houses for some time);
 - to have some forms on hand for troops to obtain the signature of householders once each house has been searched, stating that nothing has been removed.

CASES AND EXAMPLES

These cases are taken from real life events. The discussion points should be put to the class and the actual outcome of the case described once the issues have been discussed. There might of course be further discussion if students disagree with a particular decision. An alternative approach is to divide the class into two groups, one representing the security forces, the other the legal position in the form of a court or commission. Each is given some time to look at the problem, then presents and argues its position. The instructor then sums up as before by describing the actual outcome.

Use of force

The case of Private Clegg. Private Clegg was a soldier in the British Parachute Regiment serving in Northern Ireland in 1990. On 30 September 1990 he was part of a joint police/army patrol in the Upper Glen Road area of Belfast, the capital of Northern Ireland. The patrol was led by a lieutenant with a police constable present. It was divided into three smaller vehicle checkpoints. A car driven by a male civilian accompanied by a female friend drove past the first vehicle checkpoint. The second checkpoint directed it to stop. The driver refused to comply and instead drove at speed towards the third and final checkpoint, at which Private Clegg was stationed. Clegg and others in his patrol heard the order "Stop the car" being shouted and opened fire at the vehicle. Both the driver and passenger were killed. It was discovered soon after that they were not terrorists but joy riders. At the trial, forensic evidence established that Clegg had fired the shot that killed the female passenger. It was found that he had fired four rifle shots altogether and that the fourth shot had killed the female passenger. It was also found that the first three shots had been fired when the vehicle was still approaching the last soldier at the checkpoint but that the fourth was fired when the vehicle had gone past Private Clegg and his colleagues.

Discussion points

1. Should Private Clegg have acted as he did?
2. What law applies in this situation?
3. If you were the judge what would your verdict be?

Outcome

Private Clegg had to make a split-second decision: was the speeding vehicle a threat to his colleagues? Was he within the law to fire at it? He certainly was while the vehicle was still approaching his checkpoint. After it had passed the checkpoint, it no longer posed a threat either to him or his colleagues. The situation no longer met the restrictions imposed by Basic Principle 9. **It was not strictly necessary to fire the last round.**

Private Clegg was found guilty and sent to jail.

Use of force –
absolute necessity/command responsibility/training. British Special Air Service (SAS) regiment, Gibraltar, 1988

The case known as **McCann and Others v. United Kingdom** was brought before the European Court of Human Rights. It concerned three Irish Republican Army (IRA) members who were shot dead in Gibraltar by members of the British security forces, the Army Special Air Service (SAS) regiment. The Court found as a fact that the SAS soldiers did not start the operation intending to kill, but that they had been briefed on the basis of intelligence assessments to believe, and did actually believe, that the IRA members were armed and in possession of a remote-control device capable of detonating a bomb or explosive device said to have been placed in a car (in fact they were unarmed, had no detonator and the car contained no bomb), and that they fired intending to kill in order to prevent any detonation of the bomb. The Court based its deliberations on the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Article 2, which states that:

1. Everyone's right to life shall be protected by law...
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - a. in defence of any person from unlawful violence;
 - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Discussion points

1. Could better **command** of the operation have averted the incident? How?
2. Was the action by the SAS absolutely necessary?
3. Could better **intelligence** have avoided it? How?
4. Could better **training** have affected the outcome?

Outcome

In responding to the above questions, the Court found that Article 2 of the European Convention had been violated. It did so after an extensive analysis of the **planning and conduct of the whole operation**, including the decision to let the IRA members, who were in any case under surveillance, enter Gibraltar from Spain, and concluded:

“In sum, having regard to the **decision** not to prevent the suspects from travelling into Gibraltar, to the **failure of the authorities** to make sufficient allowances for the possibility that their **intelligence assessments** might, in some respects at least, be erroneous, and to the **automatic recourse to lethal force** when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than **absolutely necessary** in defence of persons from unlawful violence within the meaning of Article 2.2 (a) of the Convention.”

The Court also questioned why the **soldiers’ training** had not included a measured response, i.e. wounding rather than an immediate reflex action to kill which “lacked the degree of caution expected from law enforcement officials in a democratic society”.

The Court also reaffirmed the **principle of proportionality** by stating that the force used must be strictly proportionate to the achievement of the aims set out in Article 2.2 (a), (b) and (c). It is also of relevance to note that the Court quoted Basic Principle 9 in its findings.

Use of force/absolute necessity. The Guerrero Case – Colombia

This case came before the Human Rights Committee in 1979.¹ Maria Guerrero was one of seven people shot dead by Colombian policemen. The case was brought by her husband. On 13 April 1978 the police raided a house in Bogota, the Colombian capital. It was believed that the victim of a guerrilla kidnapping was being held prisoner at the house. The victim could not be found. The police therefore decided to hide in the house to await the arrival of the suspected kidnappers. Seven people subsequently entered the house (separately) and each was shot dead as they did so. Forensic evidence showed that Mrs Guerrero was shot several times after she had already died of a heart attack.

In its deliberations, the Human Rights Committee drew particular attention to ICCPR Article 6 (1), which states:

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

Discussion points

1. Presuming the police were working on good intelligence, was their action in staking out the house, i.e. hiding in it, operationally sound? *No real problem with the plan.*
2. Was their subsequent action in killing each person who entered operationally or legally justified? *Absolutely not – see below.*
3. What laws or standards should have guided them apart from ICCPR Article 6 (1)? *Principles of necessity and proportionality as well as Code of Conduct and Basic Principles, especially Principle 9.*

Outcome

A review of the evidence led the Committee to conclude that the police action, involving deliberate and intentional deprivation of life, “was apparently taken **without warning** to the victims and **without giving them any opportunity to surrender** to the police **or to offer any explanation of their presence or intentions**”.

1. Guerrero v. Colombia (45/1979), Report of the Human Rights Committee, GAOR, 37th Session, Supplement No. 40 (1982), Annex XI.

Referring to criteria that might have justified the police action, the Committee found “**no evidence that the action of the police was necessary in their own defence or that it was necessary to affect the arrest or prevent the escape of the persons concerned**”. The Committee concluded that the police action “was **disproportionate** to the requirements of law enforcement in the circumstances of the case and that **Mrs Guerrero was arbitrarily deprived of her life contrary to Article 6 (1) of the Covenant**”.

Use of force/weapons/proportionality/necessity

This case is known as **Stewart v. the United Kingdom**.² It concerns action by a soldier in an internal security situation in Northern Ireland in 1976 and was brought by the mother of a 13-year-old boy, Brian Stewart, before the European Commission of Human Rights. Brian Stewart was killed by a plastic baton round (similar to a rubber bullet) fired by the British Army. Mrs Stewart brought the petition before the Commission alleging a violation of Article 2 of the European Convention on Human Rights (already outlined above). The Commission found that the boy had been present during a riot by some 150 people who were throwing stones and other missiles at a patrol of eight soldiers. A soldier fired a baton round into the crowd. The soldier concerned, the Commission accepted, was trained and experienced in the use of plastic baton rounds. Further, he had aimed at the legs of the rioter next to Brian Stewart, but his aim had been disturbed at the moment of firing because he was struck by a number of missiles.

Discussion points

1. Was the soldier justified in firing a plastic baton round in the circumstances? *Yes. A graduated response to a difficult situation.*
2. Was he correct in firing at the rioters' legs? *Yes. Less risk of injury.*
3. Is it reasonable that his aim could have been deflected as he stated? *Yes.*
4. Were the actions necessary and proportionate in the circumstances? *See below.*

Outcome

The Commission felt that despite the fact that the plastic baton round “is a dangerous weapon which can occasion serious injuries and death, particularly if it strikes the head”, it “is less dangerous than alleged”. It made this finding in the light of the number of casualties as “compared with the number of baton rounds discharged”.

2. Application No. 10044/82, Decision of the European Commission of Human Rights as to Admissibility (1984).

The Commission declared the application inadmissible. In reaching that conclusion it accepted that **the killing was not intentional but accidental, the soldier's aim having been deflected by missiles. The action was proportionate to the threat, and the soldier was convinced he was using the minimum force necessary in the circumstances ruling at the time.**

Use of force: Canadian forces

In August 1990 soldiers of the Canadian army were tasked to help resolve an internal law and order situation involving land claims by Mohawk Indians. One company was to clear a number of barricades erected by the Indians to control access to a specific parcel of land. The company commander designated one of his platoons, armed with personal weapons, as a rapid reaction force. The mission given this force was to react immediately to any threats to the security of the company.

The soldiers of the rapid reaction force had been on duty for a long time and were becoming tired. This was noticed by a group of Mohawk women. The women waited until they had the attention of the media present at the scene, then advanced on the rapid reaction platoon. They isolated the platoon commander and proceeded to seriously assault him. The remainder of the platoon failed to intervene promptly and effectively in aid of the officer and more generally was unable to gain the upper hand over the Mohawk women.

Discussion points

1. Why do you think the men of the platoon did not intervene to help their officer out of a difficult situation? *Soldiers in internal security situations might be so confused by the law that they can lose confidence and feel that it is better to do nothing than risk court martial or a civil conviction for getting it wrong. How can this problem be overcome? Training is the key. It must be aimed at controlling aggression, not removing it completely. Good knowledge of the law and good briefings on possible scenarios would also have helped and given the platoon greater confidence.*
2. Would the law have allowed some form of intervention? If so, how would you have rescued your officer? *Yes, intervention was allowed. Force can be used in self-defence and to defend others. It should be proportionate to the threat, i.e. the lethal use of force would seem unnecessary in this case, but a lower-level graduated response should have been tried.*

Outcome

One reason suggested for the rapid reaction platoon's failure to provide effective assistance to its officer, notwithstanding that the law clearly permitted the use of force to defend him, was that individual members of the platoon were in fact unsure as to what force they could use and how much. For example, could they use their personal weapons in the officer's defence?

Torture, cruel, inhumane or degrading treatment or punishment/interrogation. The Northern Ireland case.

Between 1972 and 1976 Ireland brought a case against the United Kingdom for alleged breaches of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Article 3 of that Convention, which like the ICCPR and all other regional instruments states: "No one shall be subjected to torture or to inhumane or degrading treatment or punishment". The charges were that the United Kingdom systematically employed the so-called "five interrogation techniques" on persons detained in connection with the internal troubles in Northern Ireland. The case was first heard by the European Commission of Human Rights and then went to the European Court of Human Rights. The five techniques used by the joint military/police interrogation centres were:

- wall-standing: forcing the detainees to remain for periods of some hours in a stress position, described by those who underwent it as being spread-eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers;
- hooding: putting a black bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
- noise: holding detainees awaiting interrogation in a room where there was a continuous loud hissing sound;
- sleep deprivation: not allowing the detainees to sleep between interrogations;
- deprivation of food and drink: allowing detainees only a reduced diet during their stay at the interrogation centre pending investigation.³

3. *Ireland v. United Kingdom, European Court of Human Rights, Series A, No. 25, 41, Para 96.*

Discussion points

1. Do you consider the five techniques amount to torture? If not, do they amount to inhumane and degrading treatment?
2. In either of the above cases, were the security forces justified in using the five techniques?
3. Would your answer to the last question be different if you knew that the person under interrogation had planted a bomb set to go off somewhere in the centre of the city in two hours' time?

All the answers to the above were covered in the findings of the Commission and Court as follows.

Outcome

The Commission stated that the purpose of the five techniques was to obtain information,⁴ the extraction of confessions and the naming of others and or information. It was unanimous in its view that **the combined effect of the five techniques amounted to torture.**⁵ It regarded them as a sophisticated method to break or even eliminate the detainees' will.⁶

The Commission dealt also with the stress imposed on the security forces in internal security situations. It stated: "it is not difficult to take a hypothetical situation, to imagine the extreme strain on a police officer (or soldier) who questions a prisoner about the location of a bomb which has been timed to explode in a public area within a very short while".⁷ It was clear in its view on what is sometimes called a **ticking bomb scenario:**

"Any such strain on the members of the security forces cannot justify the application on a prisoner of treatment amounting to a breach of Article 3" (inflicting torture or inhumane or degrading treatment or punishment).

4. *Id.*, Para 167.

5. *19th Yearbook of the European Conventions on Human Rights (1976)*, 794.

6. *Id.*, Para. 792.

7. *19th Yearbook as above*, 764-6 (1976).

The Court referred to the five techniques as a form of in-depth interrogation involving disorientation or sensory deprivation techniques. However, it disagreed with the Commission, concluding that the use of the five techniques did not amount to torture, but it did agree that their use constituted inhumane and degrading treatment.

The net outcome can be summarized as follows. The five techniques were certainly at the upper limit of the type of abuse which would be understood by most people to be inhumane and degrading treatment bordering on torture. In any event, they constituted a violation of Article 3 of the European Convention and of every other convention, treaty or standard on the subject of torture, cruel, inhumane or degrading treatment.

LAND

