

## TORTURE PROHIBITIONS

### I. International instruments prohibiting torture

*The Universal Declaration on Human Rights*, adopted and proclaimed by the General Assembly 10 December 1948. UDHR, G.A. res. 217A (III), U.N. Doc 1A/810 at 71;

*The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, of August 12, 1949,(GC I);

*Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, of August 12, 1949, (GC II);

*Geneva Convention relative to the Treatment of Prisoners of War*, of August 12, 1949 (GC III);

*Geneva Convention relative to the Protection of Civilian Persons in Time of War*, of August 12, 1949, (GC IV, all entered into force 21 October 1950;

*UN General Assembly Resolution, Question Of The Punishment Of War Criminals And Of Persons Who Have Committed Crimes Against Humanity* 15 December 1969 by resolution, the General (U.N. G.A. Res. 2583 (XXIV) 15 December 1969.

*Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975;

*The International Covenant on Civil and Political Rights*. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976;

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

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

*Standard Minimum Rules for the Treatment of Prisoners*, Adopted by the First United Nations Congress on the Prevention of Crimes and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663C of 31 July 1957 and 2076 of 13 May 1977

*Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987 and was ratified by Canada 24 July 1987;

*Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Adopted by the General Assembly resolution 43/173 of 9 December 1988;

*Rome Statute of the International Criminal Court*, entered into force 1 July 2002.

*The Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Violations of International Human Rights and Serious Violations of International Humanitarian Law*, Adopted April 2005, the 61st session of the Human Rights Commission.

## **I.1 Particulars of international prohibitions against torture and other cruel, inhuman or degrading treatment or punishment.**

**1948:** *The Universal Declaration on Human Rights* – Article 5 “no one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.” This article have become part of customary international law. The UDHR, G.A. res. 217A (III), U.N. Doc 1A/810 at 71 (1948), adopted and proclaimed by the General Assembly 10 December 1948. Canada (U.N. member as of 9 November 1945 and all states then members of the United Nations, voted to adopt the UDHR except for abstentions by the following: Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, Ukrainian SSR, Union of South Africa, USSR, Yugoslavia.

**1948:** *American Declaration Of The Rights And Duties Of Man*, (Approved by the Ninth International Conference of American States, Bogotá, Colombia, 1948)

Article XXVI “...Every person accused of an offense has the right...not to receive cruel, infamous or unusual punishment.”

**1949:** The four Geneva Conventions, 12 August 1949, entered into force 21 October 1950 and the two Optional Protocols of 1977 have all been ratified by Canada. The four Geneva Conventions came into force in Canada 14 November 1965: the two Optional Protocols on 20 May 1991.

- o *The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of August 12, 1949,(GC I)*
- o *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of August 12, 1949, (GC II)*
- o *Geneva Convention relative to the Treatment of Prisoners of War, of August 12, 1949 (GC III)*
- o ***Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949, (GC IV)***

Torture and inhuman treatment are prohibited by all four Geneva Conventions the use of “torture or inhuman treatment” is designated as a grave breach of all Geneva Conventions. For example,

Article 17 of GC III

“No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse

to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.”, and Article 130 designates “torture or inhuman treatment as grave breaches.

**1975:** *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975. This declaration designates torture and other cruel, inhuman or degrading treatment or punishment as a crime and as a violation of the purposes of the U.N. Charter (article 2) and further that no exceptional circumstances such as a state of war, threat of war, internal political instability or public emergency can be invoked to justify torture. (Article 3.

Article 2

Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights .

Article 3

No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

**1976:** *The International Covenant on Civil and Political Rights*. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. Canada acceded to the ICCPR 18 August 1976.

Article 7. “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No one shall be subjected without his free consent to medical or scientific experimentation.”

**1977:** *Standard Minimum Rules for the Treatment of Prisoners*, Adopted by the First United Nations Congress on the Prevention of Crimes and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663C of 31 July 1957 and 2076 of 13 May 1977.

Article 31. “...all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.”

**1988:** *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Adopted by the General Assembly resolution 43/173 of 9 December 1988 prohibits torture.

*Principle 6.* No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.\* No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

**1998:** *The Rome Statute of the International Criminal Court* (Rome Statute), approved by an overwhelming majority of UN member states on 17 July 1998 was signed (18 December 1998) and ratified (7 July 2000) by Canada. The Rome Statute entered into force 1 July 2002. The only member states to vote against approval were U.S., China, Iraq, Libya, Yemen, Qatar and Israel.

The purpose of the *Rome Statute of the International Criminal Court* as stated in the Preamble, is to put

“...an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”

The Rome Statute defines torture as a war crime [Article 8 (2) (a) (ii) and bars all immunity for torture and other war crimes, crimes against humanity and genocide. Article 27.1 provides:

“27.1 This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”

The U.S. signed the Rome Statute on 31 December 2000 and in an unprecedented move, then President G. W. Bush withdrew the U.S. signature 6 May 2002. Domestically, the U.S. sought to exempt U.S. citizens from the jurisdiction of the International Criminal Court (ICC) by the *American Service Members Protection Act* which prohibits U.S. cooperation with the ICC and authorizes the President to “use all means necessary and appropriate” to free U.S. personnel detained or imprisoned by the ICC. Internationally the U.S. has also sought to further hamper and restrict the jurisdiction of the ICC to try U.S. citizens by pressuring other states to sign bilateral immunity agreements, dubbed Article 98 agreements or impunity agreements. States signing Article 98 agreements, agree not to bring the other parties’ “current or former” government officials, military or other personnel before the jurisdiction of the ICC. Human Rights First has concluded that these agreements are illegal.<sup>1</sup> Amnesty International has called on states to oppose such agreements on the basis that states that are party to the Rome

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<sup>1</sup> Human rights first, International Justice, September 10 2002.  
[http://www.humanrightsfirst.org/international\\_justice/icc/us\\_role/us\\_role\\_02.htm](http://www.humanrightsfirst.org/international_justice/icc/us_role/us_role_02.htm)

Statute violate, by signing such agreements, specific provisions of the Rome Statute, such as the Article 86 duty to detain and the general obligation not to act to defeat the object or purpose of the Rome Statute.<sup>2</sup>

## II. Regional Instruments prohibiting torture

**1963:** *European Convention on Human Rights and Fundamental Freedoms*. Text completed by Protocol No. 2 (ETS No. 44) of 6 May 1963 and amended by Protocol No. 3 (ETS No. 45) of 6 May 1963, Protocol No. 5 (ETS No. 55) of 20 January 1966 and Protocol No. 8 (ETS No. 118) of 19 March 1985.

Article 3 No one shall be subjected to torture or to inhuman or degrading treatment or punishment.  
Article 15 (1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. No derogation from... Article 3, 4 (paragraph 1) and 7 shall be made under this provision.

**1969:** *American Convention on Human Rights*. Signed at the Inter-American Specialized Conference on Human Rights, San Josi, Costa Rica, 22 November 1969.

Article 5.2 No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

**1985:** *African Charter on Human and People's Rights*. Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986)

Article 5. Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

### Canada: Laws prohibiting torture

**1960:** On 10 August 1960 *The Canadian Bill of Rights* became law and determined that Canadian law be construed and applied to as prohibit laws from being interpreted or applied to authorize or impose cruel or unusual treatment or punishment. (section 2.(b))

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<sup>2</sup> *INTERNATIONAL CRIMINAL COURT: US efforts to obtain impunity for genocide, crimes against humanity and war crimes, Amnesty International*  
<http://www.amnestyusa.org/refugee/document.do?id=4C453D02446864BD80256C25003D3289>

inconsistent with its other obligations under international law. No derogation from... Article 3, 4 (paragraph 1) and 7 shall be made under this provision.

**1982:** On 17 April 1982, the *Charter of Rights and Freedoms* became part of Canada's constitution and established a right to freedom from cruel and unusual treatment or punishment by section 12.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

**1985:** Canada passed the *Geneva Conventions Act* R.S. 1985, c. G-3 (GCA). Section 3 of the GCA makes torture and inhuman treatment an offence punishable by life imprisonment, if death is caused, and otherwise by up to 14 years imprisonment, by importing the grave breaches referred to in Articles 50 of GC I, 51 of GC II, 130 of GC III and 147 GC IV all of which designate torture as a grave breach;

“...torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health,”.

Section 3 of the GCA also created the jurisdiction for Canadian courts to prosecute torture wherever committed by and against whomever and provided that such prosecutions could be commenced and the accused tried in any territorial division in Canada. GCA prosecutions can only be commenced, (section 3(4)) with the consent of the Attorney or Deputy Attorney General of Canada.

**1987:** *Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, (CAT) G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987 and was ratified by Canada 24 July 1987. Article 1 defines torture;

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

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

The freedom from torture is non-derogable and cannot be displaced for reasons of security or otherwise. Articles 2.1, 2.2 prohibits the use of torture in the name of 'military necessity'.

2.1. “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 of torture.”

2.2. “An order from a superior officer or a public authority may not be invoked as a justification of torture.”

In compliance with the duty imposed by Article 5.2 of CAT, Canada amended the Criminal Code, sections 269.1 and 7(3.7) to include torture as an indictable offence and to create the jurisdiction to take criminal proceedings against “a person alleged to have committed any offence referred to in article 4 [torture] is present...” regardless of where the alleged torture occurred and of the nationality of victim(s) and perpetrator(s).

Section 269.1 of the *Criminal Code* mirrors the definition of torture in Article 1 of CAT and defines torture as an act or omission:

- by which severe physical or mental pain or suffering is intentionally inflicted on a person
- carried out for the purpose obtaining information, punishing, intimidating or coercing.
- At the instigation of or with the consent or acquiescence of an official.

Section 269.1 (1) Every official, or every person acting at the instigation of or with the consent of or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2) For the purposes of this section,

“official” means

(a) a peace officer,

(b) a public officer,

(c) a member of the Canadian Forces, or

(d) any person who may exercise powers, pursuant to a law in force in a foreign state, that would, in Canada be exercised by a person referred to in Paragraph (a), (b), or (c),

(e) whether the person exercises powers in Canada or outside Canada;

“torture” means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

(a) for a purpose including

(i) obtaining from the person or from a third person information or a statement,

(ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and

(iii) intimidating or coercing the person or a third person, or

(b) for any reason based on discrimination of any kind, but does not include any act or omission arising only from an act inherent in or incidental to lawful sanctions.

(3) It is no defence to a charge under this section that the accused was ordered by a superior or a public authority to perform the act or omission that forms the subject-matter of the charge or that the act or omission is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency.

In compliance with the duty imposed by Article 6.1 of CAT, section 7 (3.7) of the *Criminal Code* was enacted to create the jurisdiction to prosecute torture wherever the torture occurred, whatever the nationality of the victim(s) and whatever the residence or nationality of the alleged perpetrator provided ‘that the person who commits the act or omission is, after the commission, present in Canada.’ (section 7(3.7).

CAT, Article 6.1.

“Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 [torture] is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.”

The Committee against Torture recently recorded approved of these 1987 Criminal Code in the 20 May 2005 UN Press Release *Committee against Torture Concludes Thirty-Fourth Session*;

“The Committee said among positive aspects in the report of **Canada** were the definition of torture in the Canadian Criminal Code that was in accordance with the definition contained in article 1 of the Convention, and the exclusion in the Criminal Code of defences of superior orders or exceptional circumstances, including armed conflict, as well as the inadmissibility of evidence obtained by torture; the general inclusion, in the Immigration and Refugee Protection Act 2002, of torture within the meaning of article 1 of the Convention ;”

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**2000:** Canada implemented its obligations arising from ratification of the Rome Statute by passing the *Crimes against Humanity and War Crimes Act (CAHWCA)* (entry into force 23 October 2000) and by amending the *Extradition Act*, the *Mutual legal Assistance in Criminal Matters Act* and the *Criminal Code*. By so doing, “Canada was the first country to introduce comprehensive legislation incorporating the provisions of the international Criminal Court statute into domestic law...” Seventh Annual Report Canada’s Program on Crimes Against Humanity and War Crimes, 2003 – 2004, p.4.

CAHWCA gives Canada jurisdiction to prosecute anyone present in Canada suspected of committing, conspiring or attempting to commit genocide, crimes against humanity and war crimes including torture (a war crime) wherever and by and against whomever such crime is committed. (sections 6 and 8). No prosecution can be commenced without the written consent of the Attorney General of Canada and the Attorney General of Canada must conduct prosecutions. (section 9) Military commanders and superiors commit the offences if such person:

‘fails to exercise control or to take necessary and reasonable preventative measures and offences are committed as a result.’ (Sections 5 – 8)

Morris Rosenberg, then Deputy Minister of Justice and Deputy Attorney General of Canada heralded the CAHWCA as a substantial step and representing,

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<sup>3</sup> Human rights first, International Justice, September 10 2002.  
[http://www.humanrightsfirst.org/international\\_justice/icc/us\\_role/us\\_role\\_02.htm](http://www.humanrightsfirst.org/international_justice/icc/us_role/us_role_02.htm)

<sup>4</sup> *INTERNATIONAL CRIMINAL COURT: US efforts to obtain impunity for genocide, crimes against humanity and war crimes*, Amnesty International  
<http://www.amnestyusa.org/refugee/document.do?id=4C453D02446864BD80256C25003D3289>

“...a balance between the Canadian values of justice, fairness and the rule of law, and the need to prosecute persons who participate in the commission of the crimes of genocide, crimes against humanity and war crimes, as well as those people in authority who fail to fulfil their obligations as commanders to prevent the commission of these crimes by their subordinates...Article 28 of the Universal Declaration of Human Rights reads: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” Both the Rome Statute, and the domestic legislation enacted by Canada, are strong tools to establish this social and international order, and thus contribute to making these rights and freedoms a reality.” Morris Rosenberg, *Canadian Legislation against Crimes against Humanity and War Crimes*, *The Changing Face of International Criminal Law: Selected Papers*, (Vancouver 2002) page 236. (Speaking at the 10<sup>th</sup> Annual Conference of the International Centre for Criminal Law Reform and Criminal Justice Policy, June 8-9, 2001.

More recently Canada's War Crimes Program, a joint initiative of the Department of Justice Canada (DOJ), the Canada Border Services Agency (CBSA), and the Royal Canadian Mounted Police (RCMP) mandated to either keep war criminals and those responsible for crimes against humanity out of Canada or to take appropriate actions against such people including investigation, prosecution or extradition, reported;

“The policy of the Government of Canada is unequivocal. Canada will not be a safe haven for persons involved in war crimes, crimes against humanity or other reprehensible acts.” Seventh Annual Report Canada's Program on Crimes Against Humanity and War Crimes, 2003 – 2004, p.3.

“The most effective way to deny safe haven to people involved or complicit in war crimes and crimes against humanity is to prevent them from coming to Canada.” Canada's Program on Crimes Against Humanity and War Crimes, Tenth Annual Report, 2006-2007, p. 4.