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THE CRIME OF TORTURE AND THE INTERNATIONAL CRIMINAL TRIBUNALS

William A. Schabas †

Torture has held a prominent place in the list of international crimes since the Commission on Responsibilities, which was established at the Paris Peace Conference in 1919, listed “torture of civilians” as the third of thirty-two distinct violations of the “laws and customs of war”, immediately following “murder and massacres; systematic terrorism” and “putting hostages to death”.¹ According to its authors, this early list of international crimes was prepared in light of “explicit regulations”, “established customs” and “the clear dictates of humanity”,² although at the time there was no formal codification of such acts in an international treaty. One of the early guides to such “dictates of humanity” was the instrument prepared for and proclaimed by President Abraham Lincoln during the Civil War, drafted by Colombia University professor Francis Lieber. Article 16 of the famous Lieber Code declared: “Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions.”³

The Versailles Treaty led to only a handful of prosecutions, taken before the German courts rather than allied military tribunals, as had originally been planned.⁴ Some of the cases involved ill-treatment of prisoners of war. The following account appears in one of the reported decisions:

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¹ COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES: REPORT PRESENTED TO THE PRELIMINARY PEACE CONFERENCE (1919), *reprinted in* DIV. OF INT’L LAW, CARNEGIE ENDOWMENT FOR INT’L PEACE, PAMPHLET NO. 32, VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR: REPORTS OF MAJORITY AND DISSENTING REPORTS OF AMERICAN AND JAPANESE MEMBERS OF THE COMMISSION OF RESPONSIBILITIES, CONFERENCE OF PARIS 1919 17 (1919), *and in* 14 AM. J. INT’L L. 95, 114 (1920).

² *Id.*, *reprinted in* 14 AM. J. INT’L L. 95, 113 (1920).

³ ADJUTANT GENERAL’S OFFICE, U.S. WAR DEP’T., GEN. ORDERS NO. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 16 (1863), *reprinted in* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 158, 161 (Leon Friedman ed., 1972) (presenting the document known as the Lieber Code, which was prepared by Francis Lieber, LL.D., and revised by a board of officers).

⁴ *See generally* JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR (1982); SHELDON GLUECK, WAR CRIMINALS: THEIR PROSECUTION AND PUNISHMENT 19-36 (1944).

In at least two cases the accused ordered prisoners to be bound to posts. In the first case, which he himself admits, this was done to a man whom he suspected of having been a ringleader in an intended mutiny. The accused asserts that he made this man stand for about 10 minutes and ordered all the others to march past him; this being intended as a warning to the others

The accused admits that there may have been a second case of tying a prisoner to a post, but he will not call it to mind more precisely. . . . It is possible that there were several such incidents as the several descriptions vary a good deal from each other. But only one case can, however, be held to be proved. Biela has given evidence that in this case, the accused ordered the prisoners to be tied up for three days, two hours each day, and that the accused himself showed Biela how it was to be done. Biela then modified the severity of the punishment, entirely on his own accord, and omitted the third day's tying up altogether.

It has not been established that in these cases the accused either ordered or allowed that these prisoners should be so tied up that they were compelled to gaze continuously in the sun. If anything of the kind actually took place, it may have been because the non-commissioned officers or soldiers who carried out the order acted on their own responsibility; there is no proof that the accused had any knowledge of it. However, even without this inhuman method of carrying out the order, the tying up remains a very severe measure which cannot be justified in any way. This form of service punishment was done away with by an Imperial decree of 26th May, 1917, and certain remarks of the accused seem to show that this decree, which had been duly published and was much discussed, was not unknown to him. He probably ordered this tying up, not so much as a punishment but rather as a means of securing order generally and of putting a stop to insubordination. Of this, however, so far as the court can see, there was no reasonable fear, and the employment of this severe measure cannot be considered otherwise than as a case of ill-treatment under the conditions then obtaining.⁵

Emil Müller was sentenced to forty-five days imprisonment for these acts. Other abuses against British prisoners brought his total sentence to six months.⁶ The Commission of Allied jurists set up to examine the results of what were known as the Leipzig Trials concluded that "in the case of those condemned the sentences were not adequate."⁷

⁵ *In re Muller*, translated in 16 AM. J. INT'L L 684, 688-89 (1922) (presenting the decision of the German "Court of the 2d Criminal Senate of the Imperial Court of Justice," May 30, 1921, in the case of Emil Muller, a German officer who commanded a prisoner of war camp during World War I and was accused of abusing prisoners).

⁶ *Id.* at 696.

⁷ HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 48 (United Nations War Crimes Comm'n ed. 1948).

The Charter of the International Military Tribunal, which formed the legal basis of the great Nuremberg trial, did not explicitly refer to "torture," either as a war crime or as a crime against humanity.⁸ There are occasional references to torture in the judgment of the Tribunal, which was issued on September 30 through October 1, 1946. For example, in explaining the inadmissibility of a defense of superior orders, the judges said: "That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defense to such acts of brutality . . ."⁹ The judgment also declared that "[p]risoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity."¹⁰ "Civilian populations in occupied territories suffered the same fate."¹¹ Under the rubric "Persecution of the Jews," the Tribunal heard evidence that in the concentration and extermination camps "[b]eating, starvation, torture, and killing were general."¹²

A reference to torture was included in the definition of crimes against humanity comprised within Control Council Law No. 10, which was adopted in December, 1945, for the purpose of governing prosecutions that were subsequent to those overseen by the International Military Tribunal and were carried out under the auspices of allied military tribunals and German national courts.¹³ In addition to making torture a crime, this definition also expanded on the provisions of the Charter of the International Military Tribunal by including rape and imprisonment.¹⁴

It was this more expansive enumeration of acts of crimes against humanity, including torture, found in Control Council Law No. 10, that was drawn upon by the United Nations Security Council when it adopted the Statute of the International Criminal Tribunal for the former Yugoslavia

⁸ Charter of the International Military Tribunal, *in* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, annex art. 6, Aug. 8, 1945, 82 U.N.T.S. 279. *See also* Charter of the International Military Tribunal for the Far East art. 5, Jan. 19, 1946, *amended by* General Orders No. 20, Apr. 26, 1946, T.I.A.S. No. 1589, *reprinted in* 8 DOCUMENTS ON AMERICAN FOREIGN RELATIONS 354 (Raymond Dennett & Robert K. Turner eds., 1948).

⁹ International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), *reprinted in* 41 AM. J. INT'L L. 172, 221 (1947).

¹⁰ *Id.* at 225.

¹¹ *Id.*

¹² *Id.* at 247, 285.

¹³ Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity art 2, § 1(c), Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946).

¹⁴ *Id.*

("ICTY" or "Yugoslavia Tribunal").¹⁵ The Security Council also listed "torture or inhuman treatment, including biological experiments" as a grave breach of the Geneva Conventions,¹⁶ drawing upon provisions in those instruments.¹⁷ In his report preliminary to the adoption of the ICTY Statute, the Secretary-General indicated that in his view the crimes within the subject matter jurisdiction of the Tribunal were all then recognised "beyond any doubt" as incurring individual criminal responsibility under customary international law.¹⁸ Prior to adopting the ICTY Statute, the Security Council had been informed of acts of torture being committed during the conflict in the former Yugoslavia.¹⁹

A year later, the Security Council included the act of torture as a crime against humanity in the somewhat modified definition found in the Statute of the International Criminal Tribunal for Rwanda ("ICTR").²⁰ The Security Council also listed torture as a war crime, under the heading "Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II."²¹ According to the Secretary-General's report, issued subsequent to the adoption of the ICTR Statute:

. . . [T]he Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether

¹⁵ S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993). The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 47 & art. 5, U.N. Doc. S/25704 (May 3, 1993) [hereinafter *Secretary-General Report*] (making reference to the provision of Law No. 10 of the Control Council for Germany relating to crimes against humanity and including torture, rape, and imprisonment among enumerated crimes against humanity).

¹⁶ *Secretary-General Report*, *supra* note 15, art. 2(b).

¹⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention on POW's]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

¹⁸ *Secretary-General Report*, *supra* note 15, ¶¶ 34-35.

¹⁹ *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. Doc. S/25274 (Feb. 9, 1993).

²⁰ S.C. Res. 955, annex, art. 4, UN Doc. S/RES/955 (Nov. 8, 1994).

²¹ *Id.* Provisions that are essentially identical to those of the Rwanda Statute dealing with torture were also incorporated in the statute of the most recent of the international criminal tribunals, the Special Court for Sierra Leone. See Statute of the Special Court for Sierra Leone, arts. 2-3, in Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, annex, Jan. 16, 2002.

they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, and for the first time criminalizes common article 3 of the four Geneva Conventions.²²

Doubts about the state of customary international law were soon laid to rest by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia. In perhaps its most important ruling, on October 2, 1995, the Appeals Chamber determined that, under customary international law, crimes against humanity could be committed in peacetime and that war crimes were punishable when committed in non-international armed conflict.²³ These findings are of direct relevance to the international criminalisation of torture, which was already acknowledged to be a crime against humanity as well as a war crime, but only in a narrow ambit. On a narrow reading of the law, relying on the Nuremberg case law and international humanitarian law treaties, it had been contended that the crime against humanity of torture could only be committed in association with armed conflict, and indeed this is what Article 5 of the ICTY Statute seemed to confirm. Similarly, the traditional view that war crimes could only be committed in international armed conflict would have excluded torture prosecutions with respect to civil wars. The conclusions of the Appeals Chamber rejecting such restrictive interpretations were subsequently endorsed in the final text of the Rome Statute of the International Criminal Court.²⁴ This provides added confirmation as to the state of customary international law.

²² The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)*, ¶ 12, U.N. Doc. S/1995/134 (Feb. 13, 1995). Slightly more than a decade later, a United Nations Commission of Inquiry referred to the Secretary-General's remarks at the time the ICTR *Statute* was being adopted, pointing out that no member of the Security Council objected to the "expansive approach" that he had taken. This "demonstrat[ed] consensus on the need to make headway in the legal regulation of internal conflict and to criminalize deviations from the applicable law." See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General ¶ 160 (Jan. 25, 2005). The Commission suggested that the recognition by the Security Council that violations of Common Article 3 and Additional Protocol II were punishable was in itself sufficient to push these two categories into the realm of customary international law. *Id.*

²³ Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995) (indicating that "International humanitarian law applies . . . and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.").

²⁴ See Rome Statute of the International Criminal Court arts. 7-8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute]. See also WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 12 (2d ed. 2004).

The Rome Statute of the International Criminal Court, which was adopted on July 17, 1998, before the *ad hoc* tribunals had yet provided any significant judicial interpretation of the term "torture,"²⁵ included the act in its enumeration of crimes against humanity together with a definition: "'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."²⁶ The Rome Statute also lists torture as a war crime when committed in both international and non-international armed conflict.²⁷

JUDICIAL INTERPRETATION OF "TORTURE"

Less than two months after the adoption of the Rome Statute, the International Criminal Tribunal for Rwanda issued a landmark judgment, convicting *bourgmestre* ("mayor") Jean-Paul Akayesu of, inter alia, the crime against humanity of torture, which was listed in Article 4 of the Tribunal's Statute.²⁸ Akayesu was involved in several episodes of torture. One case involved one of his employees, identified in the proceedings as Witness K or Victim U. A Tutsi woman married to a Hutu man, Victim U worked as an accountant in the office of the *bureau communal* in Taba. She attended at her office on April 19, 1994 at the request of Akayesu, where she found him "changed in mood and in temper."²⁹

... She said he asked her why she had not been coming to work and she told him that she was afraid and had come only at his request. After then witnessing the killing of Tutsi at the bureau communal, which she said was ordered by the Accused, Witness K said the killers asked the Accused why she had not been killed as well. She said he told them that they were going to kill her after questioning her about the secrets of the Inkotanyi. According to Witness K, the Accused then took her keys, locked her in her office and left, saying he was going to search for Ephrem Karangwa, the Inspector of Judicial Police.

The Accused returned, said Witness K, with other men whom she referred to as "killers", and they questioned her. She said they asked her to explain how she was cooperating with the Inkotanyi, which she denied. She said

²⁵ Tadić was found responsible for acts of torture by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in May 1997, but these were more or less subsumed within other acts of "cruel treatment," and the judgment of the Trial Chamber does not provide a discussion of the elements of the crime. See Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (May 7, 1997).

²⁶ ICC Statute, *supra* note 23, art. 7(2)(e).

²⁷ *Id.* arts. 8(2)(a)(ii), 8(2)(c)(i).

²⁸ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

²⁹ *Id.* ¶ 387.

the Accused insisted and said that if she did not tell them how she worked with the Inkotanyi, they would kill her. After further discussion, she said the Accused again threatened her, saying she should tell them what she knew or they would kill her, and then left. At this time she estimated it was about three o'clock in the afternoon. Witness K testified that the Accused returned at around midnight with a police officer and asked her whether she had decided to tell them what she knew. When she said she knew nothing, she said he told her, "I wash my hands of your blood." She said he then told her to leave the office and go home and when she expressed concern about the late hour, he asked the driver and the police to accompany her home.³⁰

The Trial Chamber found that the interrogation by Akayesu of Victim U, under threat to her life, constituted torture.³¹ Akayesu was found guilty of torture with respect to several other similar interrogations involving threats and, in some cases, great brutality.³² In its legal findings, the Trial Chamber offered a definition of torture:

The Tribunal interprets the word "torture", as set forth in Article 3(f) of its Statute, in accordance with the definition of torture set forth in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, that is "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".³³

The Tribunal also said that it considered that acts of torture could also be addressed under the crime of genocide, which makes punishable the causing of serious bodily or mental harm to members of a national, ethnic, racial or religious group. On this point, it referred to the celebrated *Eichmann* case, in which Israeli courts held that serious bodily or mental harm could be caused "by the enslavement, starvation, deportation and persecution [...] and by detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights

³⁰ *Id.* ¶¶ 387-88.

³¹ *Id.* ¶ 682.

³² *Id.* ¶¶ 682, 684.

³³ *Id.* ¶ 681 (quoting Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention]).

as human beings, and to suppress them and cause them inhumane suffering and torture."³⁴

In November 1998, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ventured that institution's first major consideration of the elements of torture. The case involved abuse of detainees in the Celebici prison camp, administered by Bosnian Muslims in a town about halfway between Sarajevo and Mostar.³⁵ The Trial Chamber referred to the various international instruments that prohibit torture, starting with the Universal Declaration of Human Rights, including two specialized instruments, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ("Torture Convention") and the Declaration on the Protection from Torture.³⁶ The Trial Chamber said that these General Assembly declarations and the various widely-ratified treaty provisions established that the prohibition of torture was also a norm of customary law.³⁷ Moreover, it said, that the prohibition of torture was a norm of *jus cogens*, citing as authority for the proposition the United Nations Special Rapporteur for Torture.³⁸ The Trial Chamber noted that "[i]t should additionally be noted that the prohibition contained in the aforementioned international instruments is absolute and non-derogable in any circumstances."³⁹

Like the *Akayesu* Trial Chamber of its sister tribunal, the ICTY Trial Chamber in *Delalić* opted to follow the definition of torture in the 1984 Convention, after some discussion about somewhat different definitions found in international legal instruments.⁴⁰ The Trial Chamber said the definition "reflects a consensus which the Trial Chamber considers to be

³⁴ *Id.* ¶ 503 (quoting 36 INT'L L. REP. 8 (1968) (summarizing CrimC (Jer) Attorney Gen. of Isr. v. Eichmann, [1961] IsrDC 45, at 3; CrimA Attorney Gen. of Isr. v. Eichmann, [1962] IsrSC 16, at 2033)).

³⁵ Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment (Nov. 16, 1998).

³⁶ *Id.* ¶¶ 447, 452, 453 (citing Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration]; Torture Convention, *supra* note 33; and Declaration on the Protection from Torture, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 4, U.N. Doc. A/1034 (1975)).

³⁷ *Id.* ¶¶ 447, 454.

³⁸ *Id.* ¶ 454 (citing Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331; P. Kooijmans, *Report of the Special Rapporteur*, ¶ 3, *delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/1986/15 (Feb. 19, 1986)).

³⁹ *Id.* ¶ 454 (citing Torture Convention, *supra* note 33, art. 2(2); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15(2), Nov. 4, 1950, 312 U.N.T.S. 221; Organization of American States, American Convention on Human Rights art. 27(2), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Organization of American States, Inter-American Convention to Prevent and Punish Torture art. 5, Dec. 9, 1985, O.A.S.T.S. No. 67, 25 I.L.M. 519).

⁴⁰ Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶¶ 455-60 (Nov. 16, 1998).

representative of customary international law.”⁴¹ The judgment goes on to explore the distinction between torture and other forms of cruel, inhuman and degrading treatment.⁴² The Trial Chamber referred to the case law of international human tribunals, lingering on the famous ruling of the European Court of Human Rights in *Ireland v. United Kingdom*, which refused to classify acts of ill treatment carried out in British prisoners in Northern Ireland as torture.⁴³

The *Northern Ireland Case* best illustrates the inherent difficulties in determining a threshold level of severity beyond which inhuman treatment becomes torture. Whereas the European Commission of Human Rights considered that the combined use of wall-standing, hooding, subjection to noise, sleep deprivation and food and drink deprivation constituted a violation of article 3 amounting to torture, in this case, the European Court concluded that such acts did not amount to torture as they “did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.” Instead, the European Court found that the relevant acts constituted inhuman and degrading treatment in breach of article 3 of the European Convention.⁴⁴

But, as the Trial Chamber observed, the European Court’s decision has been much criticized in the literature and, moreover, not followed in subsequent cases by other international human rights bodies.⁴⁵

The *Delalić* Trial Chamber also rejected defense arguments that torture was confined to acts committed in pursuit of a limited list of prohibited purposes, concluding that the infliction of severe pain or suffering by a public official would only escape the charge of torture in exceptional cases where it could be demonstrated that the torture acted for purely private reasons.⁴⁶

On the symbolic date of December 10, 1998, which was the fiftieth anniversary of the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly,⁴⁷ a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia convicted Anto Furundžija of the crime of torture.⁴⁸ The case involved a single act of torture

⁴¹ *Id.* ¶ 459.

⁴² *Id.* ¶¶ 461-72.

⁴³ *Id.* ¶ 463 (quoting *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978)).

⁴⁴ *Id.* ¶ 463 (quoting *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978)).

⁴⁵ *Id.* ¶¶ 464-68.

⁴⁶ *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, ¶¶ 470-72 (Nov. 16, 1998).

⁴⁷ See Universal Declaration, *supra* note 36. Article 5 of the Universal Declaration states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” *Id.*

⁴⁸ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998).

of a female prisoner. Lacking the “widespread or systematic attack” element that customary law has determined to be one of the contextual elements of crimes against humanity, Anto Furundžija was prosecuted for torture as a war crime.⁴⁹ The charges concerned acts committed at the headquarters of the “Jokers,” “a special unit within the armed forces of the Croatian Community of Herzeg-Bosna, known as the Croatian Defence Council (“HVO”).”⁵⁰ Anto Furundžija was its local commander. On or about May 15, 1993, Furundžija and another member of the group questioned a female Muslim civilian.⁵¹ Furundžija was apparently trying to obtain a list of names and information about the activities of her sons.⁵² During the questioning—which took place in the presence of a large number of soldiers—Furundžija’s associate forced the woman to undress, and then rubbed a knife against her inner thigh and lower stomach, threatening to put it inside her vagina if she would not tell the truth.⁵³ The woman was taken to another room where Furundžija continued to interrogate her, as well as a male captive who had already been badly beaten.⁵⁴ While this was going on, Furundžija’s partner beat both individuals on the feet with a baton, then forced the woman to have oral and vaginal intercourse with him, and to “lick his penis clean” when it was over.⁵⁵ Furundžija was present and did nothing to stop the sexual assault.⁵⁶

Concluding that the prohibition of torture was a customary rule, the Trial Chamber cited a number of treaty provisions that it said had “ripened” into customary rules because they had been ratified by practically all States, a fact “highly indicative of the attitude of States to the prohibition of torture.”⁵⁷ Moreover, the Trial Chamber indicated that “no State [had] ever claimed that it was authorized to practice torture in time of armed conflict”⁵⁸ Finally, the International Court of Justice, in the *Nicaragua* case, had held that common Article 3—which prohibits torture—was a customary norm.⁵⁹ Consequently, said the Trial Chamber, it seems “incontrovertible that torture in time of armed conflict is prohibited by a general rule of inter-

⁴⁹ *Id.*

⁵⁰ *Id.* ¶ 2.

⁵¹ *Id.* ¶ 25.

⁵² *Id.* ¶ 40.

⁵³ *Id.*

⁵⁴ Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 41 (Dec. 10, 1998).

⁵⁵ *Id.* ¶ 87.

⁵⁶ *Id.*

⁵⁷ *Id.* ¶ 138.

⁵⁸ *Id.*

⁵⁹ *Id.*

national law.”⁶⁰ The Trial Chamber added that State responsibility for acts of torture could also ensue, in addition to issues of individual criminal liability.⁶¹

In addition to the prohibition of torture by international humanitarian law, the ICTY Trial Chamber also noted that torture was prohibited by international human rights law.⁶² Moreover, it is both a peremptory or *jus cogens* norm⁶³ and an *erga omnes* norm.⁶⁴ *Furundžija* held that the prohibition of torture has:

... [E]volved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.⁶⁵

But this point, while interesting and comforting, and developed extensively in the judgment, seems of little or no relevance to the issue of whether torture is a crime subsumed within the violations of the laws and customs of war set out in Article 3 of the *Statute*. The Trial Chamber noted that the importance that the international community attaches to the protection of individuals from torture extends to potential breaches.⁶⁶

The *Furundžija* Trial Chamber endorsed the conclusions of the Trial Chamber in *Delalić* concerning the elements of the crime of torture, but produced some additional legal arguments in support.⁶⁷ It listed five elements of the war crime of torture:

[T]orture (i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition (ii) this act or omission must be intentional; (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person; (iv) it must be linked to an armed conflict; (v) at least one of the persons involved in the torture process must be a public official or

⁶⁰ Prosecutor v. *Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 139 (Dec. 10, 1998).

⁶¹ *Id.* ¶ 142.

⁶² *Id.* ¶ 143.

⁶³ *Id.* ¶¶ 144, 153-56 (citing numerous supporting documents and cases).

⁶⁴ *Id.* ¶¶ 151-52.

⁶⁵ *Id.*

⁶⁶ Prosecutor v. *Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 148 & n.168 (Dec. 10, 1998) (citing *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 35 (1989)).

⁶⁷ *Id.* ¶ 160.

must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.⁶⁸

The elements proposed in *Furundžija* differ slightly from the language of Article 1(1) of the Torture Convention.⁶⁹ Thus, the Trial Chamber did not reproduce the word “severe” prior to “pain or suffering.” With respect to the purposes of torture, the Trial Chamber added the word “humiliation,” explaining in the text of the judgment why this concept is so important:

As is apparent from this enumeration of criteria, the Trial Chamber considers that among the possible purposes of torture one must also include that of humiliating the victim. This proposition is warranted by the general spirit of international humanitarian law: the primary purpose of this body of law is to safeguard human dignity. The proposition is also supported by some general provisions of such important international treaties as the Geneva Conventions and Additional Protocols, which consistently aim at protecting persons not taking part, or no longer taking part, in the hostilities from “outrages upon personal dignity.” The notion of humiliation is, in any event close to the notion of intimidation, which is explicitly referred to in the Torture Convention's definition of torture.⁷⁰

These “adjustments” to the definition of torture were not, however, confirmed in the *Elements of Crimes* (“the *Elements*”) adopted by the Assembly of States Parties of the International Criminal Court. The text in the *Elements* dealing with torture, inspired by article 1(1) of the *Torture Convention*, precisely tracks the text of that instrument.⁷¹ Moreover, subsequent decisions of the Yugoslavia Tribunal have distanced themselves from the broad approach taken in *Furundžija*. In *Krnjelac*, for example, a Trial Chamber said torture intended to “humiliate” the victim was not within the

⁶⁸ *Id.* ¶ 162.

⁶⁹ Torture Convention, *supra* note 33, art. 1(1).

⁷⁰ *Id.* (quoting Geneva Convention on POW's, *supra* note 15, art. 3(1)(c); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75(2)(b), Dec. 12, 1977, 1125 U.N.T.S. 4; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(2)(e), Dec. 12, 1977, 1125 U.N.T.S. 609) (noting that the phrase “outrages upon personal dignity” is common to articles 3(1)(c) of the Geneva Conventions, *supra* note 15).

⁷¹ Torture Convention, *supra* note 33; Assembly of States Parties to the Rome Statute of the International Criminal Court art. 8(2)(a)(ii)-1, 1st Sess., U.N. Doc. ICC-ASP/1/3 (Sept. 3-10, 2002). But note that “humiliation” is addressed by the war crime of “outrages upon personal dignity.” *Id.* art. 8(2)(c)(ii). “Humiliation” could also be addressed as the crime against humanity of “persecution” or that of “other inhumane acts.” *Id.* art. 7(1)(h), (k).

Tribunal's subject matter jurisdiction because it is not mentioned in any of the principal international instruments prohibiting torture.⁷²

The early rulings confirmed that at least one of the perpetrators of torture must be a public official or, at any rate, someone not acting in a private capacity; that is, that it be "committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity."⁷³ This view was based on the inclusion of this criterion within the definition of torture in the Torture Convention. But more recent decisions have said this is not a requirement of the crime of torture under customary international law.⁷⁴ In *Kvočka*, an ICTY Trial Chamber explained that "the state actor requirement imposed by international human rights law is inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law."⁷⁵

It is the severity of the pain or suffering inflicted in the case of torture that sets it apart from similar offences. In assessing the seriousness of such mistreatment, it has been held that the objective severity of the harm inflicted must first be assessed.⁷⁶ Then, the tribunal should consider subjective criteria, such as the physical or mental effect of the treatment upon the particular victim and, in some cases, factors such as the victim's age, sex, or state of health.⁷⁷ According to one ICTY Trial Chamber:

⁷² Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶ 186 (Mar. 15, 2002).

⁷³ Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶¶ 494-96 (Nov. 16, 1998). See also Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 593-95, 681 (Sept. 2, 1998); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 162 (Dec. 10, 1998); Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgment, ¶ 111 (July 21, 2000).

⁷⁴ Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgment, ¶ 148 (June 12, 2002); *Krnojelac*, Case No. IT-97-25-T, ¶ 187.

⁷⁵ Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 139 (Nov. 2, 2001) (citing ICC Statute, *supra* note 22, art. 7(2)(e)). See also Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶¶ 342-43 (May 15, 2003) (citing *Akayesu*, Case No. ICTR-96-4-T, ¶ 593-95; Torture Convention, *supra* note 33; *Kunarac*, Case No. IT-96-23/1-A, ¶ 146-48; *Kvočka*, Case No. IT-98-30/1-T, ¶ 140; Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 162 (Dec. 10, 1998); Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 470 (Nov. 16, 1998); Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 486 (Feb. 22, 2001)); Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Judgment, ¶¶ 280-84 (Feb. 28, 2005) (citing Brief of Appellant, *Kvočka*, Case No. IT-98-30/1-A, ¶¶ 112, 120-21, 127; *Kvočka*, Case No. IT-98-30/1-T, ¶¶ 138, 139, 141; Brief of Respondent, *Kvočka*, Case No. IT-98-30/1-A, ¶¶ 5.107, 5.112-5.134, *Kunarac*, Case No. IT-96-23/1-A, ¶ 148).

⁷⁶ *Kvočka*, Case No. IT-98-30/1-T, ¶ 143.

⁷⁷ *Id.* ¶¶ 142-43 (citing *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) ¶¶ 162, 167 (1978); *Delalic*, Case No. IT-96-21T, ¶ 468-69; U.N. High Comm'r for Human Rights, *General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)*, ¶ 4, U.N. Doc. A/47/40, annex 6 (Apr. 3, 1992)).

In assessing the seriousness of the acts charged as torture, the Trial Chamber must take into account all the circumstances of the case, including the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim.⁷⁸

“[T]he extent that an individual has been mistreated over a prolonged period of time” will also be relevant.⁷⁹ Although torture often causes permanent damage to the health of its victims, permanent injury is not a required element of the crime.⁸⁰ The mental suffering of an individual forced to watch severe mistreatment of a relative could reach the level of gravity required for the crime of torture. In *Kvočka*, a Trial Chamber wrote: “[B]eing forced to watch serious sexual attacks inflicted on a female acquaintance was torture for the forced observer. The presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped.”⁸¹

Perhaps the most striking example of torture in the case law of the international tribunals concerns rape. The first to link rape and torture was the Trial Chamber of the ICTR in *Akayesu*: “Like torture rape is a violation of personal dignity, and rape in fact constitutes torture when 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.”⁸² Its views were endorsed by an ICTY Trial Chamber in *Delalić*.⁸³ That Trial Chamber noted that “[t]he psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting.”⁸⁴ In its celebrated ruling dealing with the Foca rape camp, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia stated:

. . . [S]ome acts establish *per se* the suffering of those upon whom they were inflicted. Rape is obviously such an act. . . . Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture. Severe pain or suffering, as required by the definition of the crime of torture, can

⁷⁸ *Krnjelac*, Case No. IT-97-25-T, ¶ 182.

⁷⁹ *Id.*

⁸⁰ *Kvočka*, Case No. IT-98-30/1-T, ¶ 148.

⁸¹ *Id.* ¶ 149 (citing *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 267 (Dec. 10, 1998)).

⁸² *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 597 (Sept. 2, 1998).

⁸³ *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, ¶¶ 490, 495-97 (Nov. 16, 1998) (quoting *Akayesu*, Case No. ICTR-96-4-T, ¶ 597).

⁸⁴ *Id.* ¶ 495.

thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.⁸⁵

The crime of torture, regrettably, continues to feature in the work of international criminal tribunals. The initial investigations undertaken by the International Criminal Tribunal have referred to acts of torture, and it seems likely that these will soon form the subject matter of prosecutions. For example, in one of the files currently opened by the Prosecutor involving the eastern region of the Democratic Republic of Congo, victims have intervened and been given standing before the Court on the basis of allegations that they were tortured.⁸⁶ The Commission of Inquiry into Darfur, whose allegations form the basis of the first Security Council referral to the International Criminal Court,⁸⁷ also include charges of torture.⁸⁸ For example,

The Commission heard shocking accounts of physical and mental torture and cruel and degrading treatment to which these detainees had been subjected, and the inhuman conditions of detention in which they were kept. Most of them were repeatedly beaten, whipped, slapped and, in one case, kept under the scorching sun for four days. Three of the persons were suspended from the ceiling and beaten, one of them continuously for ten days. The Commission also met with another individual who had been tortured by the National Security and Intelligence Service for three days after his arrest from an “internally displaced persons” camp in Western Darfur. He stated that he had been suspended from the ceiling and beaten repeatedly. The Commission saw the scars left on the bodies of those detainees and prisoners as signs of the torture inflicted on them. In most of the cases torture, including threats to life and physical integrity, was used to coerce information or extract confessions. They were blindfolded with their hands tied whenever they were transported from one place of detention to another, and sometimes food was denied to them for long periods of time.⁸⁹

Though universally condemned, the practice of torture remains widespread. It is even encouraged by some of the great democracies in the name of the War on Terror, as articles elsewhere in this learned journal explain. The condemnation of torturers by international criminal tribunals is a most help-

⁸⁵ Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgment, ¶¶ 149-51 (June 12, 2002) (citing Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 163, 171 (Dec. 10, 1998); *Delalić*, Case No. IT-96-21-T, ¶¶ 480-96).

⁸⁶ Situation en République Démocratique du Congo, Case No. ICC-01/04, Version publique expurgée décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, ¶¶ 171-75, 181, 184-85 (Jan. 17, 2006).

⁸⁷ S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

⁸⁸ The Secretary-General, *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, ¶¶ 96, 116, 186, 341, 362-74, delivered to the Security Council, U.N. Doc. S/2005/60 (Jan. 31, 2005).

⁸⁹ *Id.* ¶ 369.

ful reminder of the uncompromising position taken by international law. Hopefully, it is also a deterrent.