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## THE DEFINITION(S) OF TORTURE IN INTERNATIONAL LAW

by

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The literature is replete with analyses of the meaning, in international human rights law, of the notion of torture, as found in the prohibition of ‘torture or cruel, inhuman or degrading treatment or punishment’.<sup>1</sup> Generally, it focuses on definitions contained in three international human rights instruments (the 1975 UN Declaration against Torture,<sup>2</sup> the 1984 (UN) Convention against Torture (UNCAT)<sup>3</sup> and the 1985 Inter-American Convention to Prevent and Punish Torture<sup>4</sup>) and on the case law of bodies set up under human rights treaties prohibiting torture, especially the European Convention on Human Rights,<sup>5</sup> even though the treaties may not themselves contain a definition of torture. Indeed, no general human rights

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<sup>1</sup> Recent examples include A. Cassese, ‘Prohibition of Torture and Inhuman or Degrading Treatment or Punishment’, in R.St.J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (Dordrecht, 1993), ch. 11; D.J. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London, 1995), ch. 3; M. Evans and R. Morgan, *Preventing Torture* (Oxford, 1998), ch. 3; N.S. Rodley, *The Treatment of Prisoners under International Law* (2<sup>nd</sup> edn., Oxford, 1999), ch. 3.

<sup>2</sup> Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 3452 (XXX), Annex, 9 Dec. 1975.

<sup>3</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, Annex, 10 Dec. 1984.

<sup>4</sup> Inter-American Convention to Prevent and Punish Torture (1985), OAS Treaty Series No. 67.

<sup>5</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (1950) [ECHR], European Treaty Series No. 5.

treaty contains such a definition, despite the fact that they all prohibit torture and ill-treatment. In fact, case law has influenced the content of definitions which, in turn, have influenced later case law.

What justifies revisiting the issue is that new definitions have emerged in international criminal law instruments and new case law has emerged from international penal tribunals, especially the International Tribunal for the Former Yugoslavia (ICTY),<sup>6</sup> which (like the general human rights treaty bodies) operate under statutes that do not define the offence(s).

The effect of this is to call into question – or render more acute existing questions about – three key pillars of our understanding of the notion of torture and, to a lesser extent, other forms of ill-treatment. These pillars are most vividly depicted in article 1 of the UN Declaration against Torture (the first instrument to provide a definition of torture):

1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

The three pillars evidently are:

1. the relative intensity of pain or suffering inflicted: it must not only be severe, it must also be an aggravated form of already prohibited (albeit undefined) cruel, inhuman or degrading treatment or punishment;
2. the purposive element: obtaining information, confession, etc.;
3. the status of the perpetrator: a public official must inflict or instigate the infliction of the pain or suffering.

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<sup>6</sup> UN doc. S/25704 (1993), Annex, as approved by SC res. 827(1993), 25 May 1993; reproduced in 32 International Legal Materials 1192 (1993).

This may be compared with the definition of torture contained in article 7(2)(e) of the 1998 Rome Statute of the International Criminal Court (ICC):<sup>7</sup>

‘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.

What is striking is that while the pain or suffering must, in both definitions, be severe, there is no indication in the Rome Statute of any concept of *relative* intensity of pain or suffering by reference to other forms of ill-treatment. There is similarly no reference to any element of purpose; indeed, in the finalized draft text of the Elements of Crimes adopted by the Preparatory Commission for the ICC, a footnote explicitly affirms in respect of the crime against humanity of torture: ‘[i]t is understood that no specific purpose need be proved for this crime’.<sup>8</sup> Nor, finally is there any mention of the perpetrator’s status as a public official. (As far as the modified version of the lawful sanctions exclusion is concerned, this is in fact consistent with the same exclusion contained in the definition of torture found in article 1 of the Convention against Torture, raising no new issues that have not already been examined elsewhere.<sup>9</sup> Accordingly, the matter will not be further pursued here.) On the other hand, a novel notion of custody or control is introduced.

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<sup>7</sup> Rome Statute for the International Criminal Court, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 Jul. 1998, UN doc. A/CONF. 183/9; reproduced in 37 International Legal Materials 999 (1998). See, generally, M.C. Bassiouni, *The Statute of the International Criminal Court – A Documentary History* (Ardsley, New York, 1998) (the author, a champion of the idea of an international criminal court in the decades when the idea seemed like a mirage, was Chairman of the Drafting Committee in Rome); R.S. Lee (ed.), *The International Criminal Court – The Making of the Rome Statute* (The Hague, 1999) (the editor was Executive Secretary of the Rome Conference; contributors played leading roles in the negotiations there).

<sup>8</sup> UN doc. PCNICC/2000/1/Add.2, Art. 7(1)(f), note 14.

<sup>9</sup> See, Rodley, n.1 above, ch. 10.

So, the question is posed as to whether under general international law there is any coherent notion of torture. It would, of course, be conceivable that different definitions be applicable, on the one hand to the prohibition of torture under international human rights law which involves the establishment of state responsibility, and, on the other hand, to the offence of torture under international criminal law which involves the establishment of individual penal responsibility. Such differences might have to do with questions like appropriate burdens of proof required of an alleged victim of a violation of international human rights law, as opposed to a prosecutor seeking to establish individual liability for an offence under international criminal law; or the permissibility of making inferences of mental elements from the facts; or the possibility that a violation of one branch of the law may not always appropriately entail a violation of the other branch.<sup>10</sup> However, no simple, elegant explanation of this sort will be seen to offer itself. To give a brief example before exploring each of the pillars in more depth, the Elements of Crimes text in respect of war crimes under article 8 of the Rome Statute does make the factor of ‘purpose’ the key element of torture.<sup>11</sup> Let us now look more closely at each of the three pillars.

### **(Relative) intensity of pain or suffering**

#### *Up to the mid-1980s*

The issue of intensity of pain or suffering and its relative nature in relation to torture first arose in the *Greek* case before the European Commission of Human Rights in 1969. In that case, the Commission was called upon to apply article 3 of the European Convention on

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<sup>10</sup> For example, the right to life was breached because of inadequate planning of a security action against suspected terrorists who were killed, in circumstances where those who carried out the killing believed they acted (erroneously, as it turned out) in self-defence. Accordingly, the normal requirement of an investigation capable of leading to prosecution of the perpetrators was inappropriate: *McCann et al. v. United Kingdom* (1995), Eur. Ct. HR, Series A, No. 324.

<sup>11</sup> N.8, above; cf. Elements of Crimes in arts. 8(2)(a)(ii)-1 and 8(2)(c)(i)-4 (torture) with those in arts. 8(2)(a)(ii)-2 (inhuman treatment) and 8(2)(c)(i)-3 (cruel treatment).

Human Rights, which provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.' However superfluously, considering that no specific legal consequences flowed from it, the Commission famously decided to break down the overall prohibition into its component parts, with an indication of its understanding of each. It began with 'inhuman treatment' which it described as covering 'at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation is unjustifiable'.<sup>12</sup> Torture, it continued, is 'inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, *and it is generally an aggravated form of inhuman treatment*'.<sup>13</sup> For the sake of completeness, it should also be noted that 'degrading treatment' of a person, which the Commission also considered to be a component of torture, was in its view treatment which 'grossly humiliates him before others or drives him to act against his will or conscience'.<sup>14</sup>

Leaving aside the issue of the implication of potential justifiability of inhuman treatment which has been abandoned by the European Court of Human Rights and rejected elsewhere,<sup>15</sup> it is evident that the Commission's approach, which led it to find *falanga* to be a form of torture,<sup>16</sup> heavily influenced the drafters of the UN Declaration against Torture,

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<sup>12</sup> 12 *Yearbook of the European Convention on Human Rights – The Greek Case* (1969), 186.

<sup>13</sup> *Ibid.*; emphasis added.

<sup>14</sup> *Ibid.* This paper does not pursue the question of the lower threshold for the applicability of ECHR art. 3 and analogous provisions of other instruments. For the European Convention system, the oft-repeated formula invoked regards the minimum level of severity as 'in the nature of things, relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.': *Ireland v. UK* (1976), Eur. Ct. HR, Ser.A, No. 25, 41, para. 162.

<sup>15</sup> *Chahal v. UK*, Eur. Ct. HR, Judgment, 15 Nov. 1996; also *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, 16 Nov. 1998, para. 454; see, generally, Rodley, n.1 above, 78-84.

<sup>16</sup> *Greek case*, n.12 above, 499. *Falanga* involved beatings on all parts of the body and especially the soles of the feet.

article 1(2) of which manifestly borrows the idea of aggravation: ‘Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.’<sup>17</sup>

The Declaration, in turn, fed directly back into the European Convention case law. In *Ireland v. United Kingdom*, the European Court of Human Rights considered the five interrogation techniques used on IRA suspects by the UK’s security forces.<sup>18</sup> Despite the fact that they were found by the European Commission of Human Rights to constitute torture, the Court held that they were inhuman and degrading, but not torture. According to the Court, the notion of torture was characterized by ‘a special stigma’ attaching to ‘deliberate inhuman treatment causing very serious and cruel suffering’.<sup>19</sup> It then prayed in aid article 1(2) of the UN Declaration which it quoted emphasizing the word ‘aggravated’,<sup>20</sup> blithely overlooking the paragraph’s evident origins in the Commission’s treatment of the issue in the *Greek* case.

If the concentration so far has been on case law under the European Convention, this is because the organs of that Convention were the first ones called upon to apply a treaty-based prohibition of torture. Once the International Covenant on Civil and Political Rights entered

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<sup>17</sup> The issue of deliberation has effectively been subsumed into that of intentionality, as indicated in the UNCAT definition below, and does not appear to have posed conceptual problems.

<sup>18</sup> *Ireland v. UK*, n.14 above, para. 96, where the five techniques were described as consisting of:

(a) 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’;

(b) hooding: putting a black or navy coloured bag over the detainees’ heads and, at least initially, keeping it there all the time except during interrogation;

(c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;

(d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep;

(e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.

<sup>19</sup> *Ibid.*, para. 167.

<sup>20</sup> *Ibid.*

into force in 1976<sup>21</sup> and its Human Rights Committee established a year later, it too was potentially in a position to contribute to an elucidation of these issues. Its practice in fact leaves matters opaque.

In a 1982 General Comment on article 7, the Committee stated:

[T]he scope of the protection required [by this article] goes far beyond torture as normally understood. It may not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment. These distinctions depend on the kind, purpose and severity of the particular treatment.<sup>22</sup>

Much of the Committee's case law under the (first) Optional Protocol to the Covenant<sup>23</sup> was consistent with this, in that, as often as not, it found violations of article 7, without indicating whether or not the treatment at issue should be categorized as torture or as some other form of prohibited ill-treatment.<sup>24</sup> In a number of cases, it categorized the treatment in question as being torture.<sup>25</sup> In one case, it described the treatment as 'inhuman and

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<sup>21</sup> UNGA res. 220 A(XXI), 16 Dec. 1966.

<sup>22</sup> General Comment 7(16)(1982), para. 2, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN doc. HRI/GEN/I/Rev.5(2001), 116. General Comments are statements adopted by the Committee (and other bodies established under UN human rights treaties) giving guidance on the Committee's understanding of the scope of states parties' obligations under the Covenant.

<sup>23</sup> A state that is a party to the Optional Protocol accepts the right of the Human Rights Committee to receive and consider complaints by individuals claiming to be victims of a violation of the rights guaranteed by the Covenant.

<sup>24</sup> E.g., *Netto, Weismann and Lanza v. Uruguay* (8/1977), Report of the Human Rights Committee, GAOR, 35<sup>th</sup> Session, Supp. No. 40 (1980), Annex VI; for other such 'unclassified' cases, see Rodley, n.1 above, 97-98.

<sup>25</sup> E.g., *Bazzano and Massera v. Uruguay* (5/1977), Report of the Human Rights Committee, GAOR, 34<sup>th</sup> Session, Supp. No. 40 (1979), Annex VII; for other cases specifying that the acts in question constituted torture, see Rodley, n.1 above, 86-88.

degrading'.<sup>26</sup> In none of these cases did it spell out any doctrinal basis for its choice of one word rather than another.

As I have indicated elsewhere, it is simply impossible to infer anything of significance in the distinction between those cases where the word 'torture' figured in the finding and those where no category was used: typically the treatment in question would be the same or similar whichever group the case fell into. Indeed, most concerned the same country, Uruguay, using the same practices.<sup>27</sup> Thus cases in which the term torture was used, or in which no specific term was attached, involved practices such as electric shocks, burning, near suffocation, near drowning and intense beatings – often in combination, often for protracted periods. In just one case, *Boutón v Uruguay*<sup>28</sup> if there is any rationale at all, could it be that the Committee was unwilling to apply the term torture on the grounds of the relative severity of the treatment. In that case, evidence of Esther Soriano de Boutón's suffering seems to have been that:

she was forced to stand for 35 hours, with minor interruptions; that her wrists were bound with a strip of coarse cloth which hurt her and that her eyes were continuously kept bandaged. During day and night she could hear the cries of other detainees being tortured. During interrogation she was allegedly threatened with "more effective ways than conventional torture to make her talk",<sup>29</sup>

It would be rash to deduce from this one case that the Human Rights Committee had accepted the doctrine of relative intensity of pain or suffering as the basis for a distinction between torture and other ill-treatment. *Boutón* was decided in 1981 (most of the Uruguayan cases were decided between 1979 and 1984). The reference, in the General Comment to

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<sup>26</sup> *Boutón v. Uruguay* (37/1978), Report of the Human Rights Committee, GAOR, 36<sup>th</sup> Session, Supp. No. 40 (1981), Annex XIX.

<sup>27</sup> Rodley, n.1 above, 97. There was also a non-Uruguayan case of this sort: *Muteba v. Zaire* (124/1982), Report of the Human Rights Committee, GAOR, 39<sup>th</sup> Session, Supp. No. 40 (1984), Annex XIII.

<sup>28</sup> N.26 above.

severity of treatment as a factor in understanding the distinctions between the terms of article 7, while inconclusive, together with the inconsistent and unexplained practice of the Committee, prevent us from excluding relative intensity of suffering as a factor. In the end, the matter was left uncertain.

#### *Mid-1980s onwards*

In December 1984 the UN General Assembly adopted the Convention against Torture with its own definition of the notion. According to article 1:

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.

Despite the modest aim, limited to the treaty itself, it could be expected that this definition would become the benchmark. This has largely proven to be the case.

The starkest difference between this definition and that contained in the Declaration against Torture on which it was based, is the dropping of the reference to torture’s being an aggravated form of other ill-treatment. Indeed, the effect of the new paragraph 2 seems implicitly to acknowledge that there may be other understandings of torture that would be *wider* rather than narrower.

On the other hand, as the full title of the Convention indicates, there are aspects of it that go beyond torture to cover other ill-treatment. Article 16 further refers explicitly to ‘cruel, inhuman and degrading treatment or punishment not amounting to torture’ (emphasis added),

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<sup>29</sup> *Ibid.*, para. 2.3.

providing for a number of the Convention articles to be applicable, not only to torture, but to such other ill-treatment. The emphasized words represented a compromise. On one side, were mainly two non-governmental organizations (Amnesty International<sup>30</sup> and the International Commission of Jurists) favouring the phrase ‘which do not constitute torture’. They sought total elimination of the idea of the intensity of pain or suffering being relative to, that is, higher than that for other ill-treatment. Against that position were those, notably the United Kingdom, which precisely wanted to reaffirm the relative intensity of pain or suffering, presumably anxious to preserve the perceived benefits of the decision in *Ireland v. UK*. The agreed language left the issue open.

What then has been the subsequent practice? The Committee against Torture, the body established by the Convention to monitor its application, has not had occasion to address the matter. The European Court of Human Rights has, on balance, tended to maintain its traditional position. In a series of recent cases,<sup>31</sup> it has explicitly endorsed the UNCAT definition of torture, stressing especially the purposive element (see following section). Yet it has continued its standard incantation that ‘it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering’.<sup>32</sup> Indeed, it has generally reaffirmed its approach in *Ireland v UK*. In the latter case, in addition to the five interrogation techniques, there were cases of beatings, including persons being ‘severely beaten or otherwise physically ill-treated’, resulting in contusions and bruising.<sup>33</sup> For one individual, medical evidence disclosed ‘substantial’

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<sup>30</sup> The author represented Amnesty International at all of the meetings of the Commission on Human Rights working group charged with preparing a draft of the Convention.

<sup>31</sup> *Selmouni v. France*, Eur. Ct. HR, Judgment, 28 Jul. 1999; *Ilhan v. Turkey*, Eur. Ct. HR, Judgment, 27 Jun. 2000; *Salman v. Turkey*, Eur. Ct. HR, Judgment, 27 Jun. 2000; *Akkoc v. Turkey*, Eur. Ct. HR, Judgment, 10 Oct. 2000.

<sup>32</sup> *Selmouni*, para. 96; *Ilhan*, para. 85; *Salman*, para. 114; *Akkoc*, para. 115.

<sup>33</sup> N.14 above, paras 110, 174.

injuries; for another the injuries were ‘massive’.<sup>34</sup> All of this amounted, not to torture, but to inhuman treatment. This was the approach in the 1992 case of *Tomasi v. France*, where beatings on various parts of the body occurred leaving medically certified trauma.<sup>35</sup> The same also applied in the 1995 case of *Ribitsch v. Austria* (blows leading to bruises on the inside and outside of the right arm). It should be noted that in both these cases applicants’ counsel had ‘only’ complained of ill-treatment. Again, in 1998, the Court found in *Tekin v. Turkey*,<sup>36</sup> following the Commission’s ‘cautious’ findings of fact (‘the applicant had been kept in a cold and dark cell and blindfolded and treated in a way which left wounds and bruises on his body in connection with his interrogation’),<sup>37</sup> that ‘the manner in which he must have been treated in order to leave wounds and bruises on his body, amounted to inhuman and degrading treatment’.<sup>38</sup> Evidently, the Court was maintaining its practice of considering serious beatings to be inhuman, but not torture.

However, the 1999 case, *Selmouni v. France*, represents a change. The Commission blazed the trail.<sup>39</sup> It found that numerous medically certified traumas on various parts of the body, consistent with the application of beatings over a period of days, involving punches, kicks and blows with a truncheon and baseball bat, as denounced by the applicant, were proof of torture.<sup>40</sup> The Court unanimously agreed, using language that was clearly intended to mark a departure from the line of cases that began, for the Commission, with the *Greek* case and,

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<sup>34</sup> *Ibid.*, paras. 111 & 174.

<sup>35</sup> *Tomasi v. France*, Eur. Ct. HR, Judgment, Ser.A, No. 241-A, paras. 108, 115.

<sup>36</sup> *Tekin v. Turkey*, Eur. Ct. HR, Judgment, 9 Jun. 1998.

<sup>37</sup> *Ibid.*, para. 24; the applicant, who had only one kidney, had alleged, *inter alia*, electric shocks, death threats and denial of food and light, over four days (at para. 49).

<sup>38</sup> *Ibid.*, para. 53.

<sup>39</sup> *Selmouni v. France*, (Application No. 25803(94), Eur. Ct. HR, Report, 11 Dec. 1977.

<sup>40</sup> *Ibid.*, paras. 19-27, 61, 67-70. Two Commission members (Mr. Busuttil and M. Soyer), in separate concurring opinions, disagreed with the torture categorization, as the treatment was not such as to attract the ‘special stigma’ associated with torture.

for the Court, with *Ireland v. UK*. Invoking its doctrine of the Convention being a living instrument, it said that it

considers that certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.<sup>41</sup>

Evidently the *Selmouni* court was accepting that sustained beatings leaving physical sequelae, which it would previously have categorized as inhuman and degrading treatment, was now to be considered as torture.

It may also not be overestimating the reach of the quoted language to believe that the Court was also signalling that it would now consider the mixed physical and psychological pressures involved in the five interrogation techniques as applied in Northern Ireland to count as torture. Yet the Court was at the same time insisting on its traditional distinction, based on stigma, as indicated in the passage quoted above.<sup>42</sup> Strangely, it cavalierly overlooked the difference of definition in the UN Torture Declaration and Convention and, reading UNCAT articles 1 and 16 together, found corroboration in its traditional approach. The only consolation in all this is that it has left much less leeway than before for the distinction to be sustained in practice.

Returning to the practice of the Human Rights Committee since the mid-1980s, uncertainty continues to attend on its case law, with no articulation as to the reasons for its preference, if any, when it uses or does not use specific terminology. In many of its cases during this period it has specifically referred to the existence of torture as part of its

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<sup>41</sup> *Selmouni*, n.31 above, para. 10.

<sup>42</sup> Text accompanying n.32 above.

findings,<sup>43</sup> in others it has made no categorization.<sup>44</sup> There is nothing in the reported facts, certainly not of relative gravity of the treatment, that suggests any reason for the distinction. In some of the cases there may have been doubts as to the specifics of the facts,<sup>45</sup> but no such doubts are evident in others.

In one case, the Committee found inhuman treatment<sup>46</sup> and in another degrading treatment.<sup>47</sup> In neither did the treatment appear to take place in the context of interrogation and, accordingly, the purposive element was not apparent, which could account for the non-use of the word ‘torture’.

Thus, the later practice of the Committee seems to evince a willingness to use the categorization of torture, though in circumstances where there could be no question as to the gravity of the acts. Non-categorization has occurred where the gravity of the facts was not in doubt and categorization as inhuman or degrading treatment occurred in a context where the purposive element was absent. It may also be noted that in the revised General Comment on article 7 issued in 1992 the Committee omits the language about the scope of protection going ‘far beyond torture as normally understood’, though it retains the reference to distinctions depending on ‘the nature, purpose and severity of treatment applied’. A tentative assessment

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<sup>43</sup>E.g. *Lafuente Peñarrieta et al. v. Bolivia* (166/1984), Report of the Human Rights Committee, GAOR, 43<sup>rd</sup> Session, Supp. No. 40 (1988), Annex VIII C; *Rodríguez v. Uruguay* (322/1988), Report of the Human Rights Committee, GAOR, 49<sup>th</sup> Session, Supp. No. 40 (1994), Annex IX B; *Kanana v. Zaire* (366/1989), *ibid.*, Annex IX J; *Arhuacos (Villafañe Chaparro et al.) v. Colombia* (612/1995), UN doc. CCPR/C/60/D/612/1995 (1997); other cases may be found in Rodley, n.1 above, 88-94.

<sup>44</sup>*Terán Jijón v. Ecuador* (277/1988), Report of the Human Rights Committee, UN doc. A/47/40 (1992), Annex IX I; *Zelaya Blanco v. Nicaragua*, Report of the Human Rights Committee, Vol. II, GAOR, 49<sup>th</sup> Session, Supp. No. 40 (1994), Annex IX C; *Domukovsky v. Georgia*, Report of the Human Rights Committee, Vol. II, GAOR, 53<sup>rd</sup> Session, Supp. No. 40 (1998), Annex XIM; see also *Cañon García v. Ecuador* (319/1988), *ibid.*, Annex IX M.

<sup>45</sup> See Rodley, n.1 above, 98.

<sup>46</sup>*Birindra and Tshisikedi v. Zaire* (241 and 242/1987), Report of the Human Rights Committee, Vol. II, GAOR, 45<sup>th</sup> Session, Supp. No. 40 (1990), Annex I.

<sup>47</sup>*Polay Campos v. Peru* (577/1994), UN doc. CCPR/C/611/D/577/1994 (1998).

may be justified: while the Committee's practice does not definitively deny the pertinence of the notion of aggravation, neither does it seem to support the view that the notion is required.

Casting further doubt on the relevance of aggravation of pain and suffering as a component of the notion of torture is the definition found in the Inter-American Convention to Prevent and Punish Torture of 1985. Article 2 reads:

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

It is readily apparent that, not only is there no reference to aggravated intensity of pain or suffering, there is no reference even to severity. Seemingly any pain or suffering will suffice, once the other elements are present. Indeed, no pain or suffering at all needs to be shown where the methods used 'are intended to obliterate the personality of the victim or to diminish his physical or mental capacities'. This is clearly aimed at sophisticated medical or psychological techniques used as an aid to interrogation.

The approach of the Inter-American Commission on Human Rights to article 5 of the American Convention on Human Rights (ACHR) is exemplified by the case of *Mejía v. Peru*, in which it applied the criteria spelled out in the Inter-American Torture Convention and found that Raquel Mejía was a victim of torture. Her rape involved physical and mental pain and suffering (no reference to severity, nor to aggravation), was committed for the purpose of

punishing and intimidating her and was perpetrated by a public official (a member of the security forces).<sup>48</sup> In two cases it has used the following, barely penetrable language:

The violation of the right to physical and psychological integrity of persons is a category of violations that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation.<sup>49</sup>

All that may safely be inferred from this, in the absence of any specification of the factors referred to, is that perhaps the notion of gradation could be taken as not excluding the possibility of relative intensity of pain or suffering being relevant. In neither of these cases did it use the word ‘torture’ as part of its finding. By way of contrast, in cases in which the Court is applying both the ACHR and the Inter-American Torture Convention (IATC), it appears to have no problem in expressly finding the existence of torture.<sup>50</sup>

In the recent *Cantoral Benavides* case, the Court seems to have been influenced by the European case law which it refers to extensively. Yet it is notable that at no point does it refer to a notion of aggravation. Rather it stresses the latter Court’s insistence on the absolute prohibition of both torture and other ill-treatment, the purposive element, the approach of including matters not previously thought to have been covered (an implicit reference to *Selmouni*), and its acceptance that psychological suffering is sufficient.<sup>51</sup>

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<sup>48</sup> *Mejía v. Peru*, Report No. 5/96, Annual Report of the Inter-American Commission on Human Rights 1995, OAS doc. OEA/Ser.L/V/II.9 Doc. rev.7(1996), 157, 185-87, (applying the American Convention on Human Rights (1969), OAS Treaty Series No. 36).

<sup>49</sup> *Loayza Tamayo Case* (1997), I-A Ct. HR, Ser. C, No. 33 (Peru), para. 57; *Castillo Petruzzi and others Case* (1999), I-A Ct. HR, Ser. C, No. 52 (Peru), para. 196.

<sup>50</sup> E.g. *Paniagua Morales et al. Case* (1998), I-A Ct. HR, Ser. C, No. 37 (Guatemala), para. 134 (in respect of two individuals, it found cruel, inhuman or degrading treatment, as a result of injuries, grazes and bruises, evidently unsure on how they had come about: para. 135).

<sup>51</sup> *Cantoral Benavides Case* (2000), I-A Ct. HR, Ser. C, No. 69 (Peru), paras. 95-102. In contrast to the cases referred to at n.49 above, Peru had become a party to the IATC by the time of the events in respect of which the present case was brought.

On balance, it may be concluded that the organs of the inter-American system have not espoused the conception of aggravated intensity of suffering as a necessary component of torture. Rather the Inter-American Court should perhaps be taken to be saluting rather than following its European counterpart.

Having considered the case law of human rights treaty bodies, that of the international criminal tribunals will be briefly considered. The earliest of these was *Akayesu* in the International Tribunal for Rwanda. There the Court confined itself to affirming the applicability of UNCAT article 1.<sup>52</sup>

Four ICTY cases have explored the definition of torture. Two of them refrained from addressing any requirement of aggravated intensity of pain or suffering.<sup>53</sup> Two most certainly have. The Trial Chamber in *Delalic*, after a sympathetic examination of the European Convention practice, concluded that '[m]istreatment that does not rise to the level of severity necessary to be characterized as torture may constitute another offence'.<sup>54</sup> Indeed, it specifically held inhuman treatment to be that 'which deliberately causes serious mental or physical suffering that falls short of the severe mental and physical suffering required for the offence of torture'.<sup>55</sup> While the 1998 case of *Delalic* may not reasonably have been expected to be much influenced by the Rome Statute, adopted earlier that year, the same cannot be said for the November 2001 case of *Kvočka et al.*<sup>56</sup> which firmly follows *Delalic*.

The latest definitions of torture, those in ICC Statute article 7 (crimes against humanity) and in the Elements of Crime for the article 8 (war crimes in international and non-international armed conflict) require a severity of pain or suffering, but not relative to any other treatment.

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<sup>52</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 Sep. 1998, paras. 593-94.

<sup>53</sup> *Prosecutor v. Furundzija*, Case No. IT-96-21, Judgment, 10 Dec. 1998; and *Prosecutor v. Kunarac, Kovac and Vukovic*, Case Nos. IT-96-23 and IT-96-23/1, Judgment, 22 Feb. 2001.

<sup>54</sup> *Delalic*, n. 15 above, paras. 462-68.

<sup>55</sup> *Ibid.*, para. 542.

### **Factor of purpose**

Except in respect of crimes against humanity as defined in article 7 of the Rome Statute for the ICC, the notion of purpose seems to be central to the understanding in international law of the concept of torture, regardless of whether we are considering state responsibility under international human rights law or individual responsibility under international criminal law. Every other instrument defining torture contains a reference to a purposive element: article 1 of the UN Declaration and Convention against Torture, article 2 of the Inter-American Torture Convention, and the Elements of Crimes concerning the war crime of torture under the ICC Statute in respect of international armed conflict (article 8(2)(a)(ii).1) and of non-international armed conflict (article 8(2)(c)(i).4).

### *International human rights law*

The trend, it will be recalled, started with the *Greek* case, in which the European Commission of Human Rights opined that torture was inhuman treatment ‘which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment’, as well – of course – as generally being an aggravated form of inhuman treatment.<sup>57</sup> It would appear that the Convention organs take this element seriously. In *Selmouni*, Commission member Mr Herndl dissented from the finding of torture, not like the other dissenters on the basis of relative severity of treatment, but on the grounds that for him the purposive element had not been proven.<sup>58</sup> The Court, having bought in to the UNCAT definition, has also invoked a purposive element in recent cases. Indeed, in two cases against Cyprus, it seems that the Court located its finding of an article 3 violation of inhuman or degrading treatment, substantially

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<sup>56</sup>*Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, Judgment, 2 Nov. 2001, paras. 142-51.

<sup>57</sup>See n.12 above, and accompanying text.

<sup>58</sup>See n.31 and n.40 above.

on the basis that the treatment in question was not sufficiently closely linked to the relevant purpose, namely, extracting a confession.<sup>59</sup>

In respect of purpose, as of relative intensity of suffering, the Human Rights Committee has refrained from articulating a basis for any distinction it may make between torture and other ill-treatment. It is worth recalling, nevertheless, that in respect of one finding of inhuman treatment and another of degrading treatment, the element of purpose was lacking.<sup>60</sup> This could have been the deciding factor.

The element of purpose certainly seems to have been central in one instance to the thinking of the Special Rapporteur of the UN Commission on Human Rights on the question of torture. After a visit to the Russian Federation focussing primarily on pre-trial detention centres, he found conditions in those centres he visited to be sufficiently inhuman to be described as ‘torturous’. He was not able to justify the use of the noun ‘torture’, as he did not possess evidence adequate for him to conclude that there was the relevant purposive element, but he did indicate that ‘[t]o the extent that suspects are confined there to facilitate the investigation by breaking their wills with a view to eliciting confessions or information, they can properly be described as being subjected to torture’.<sup>61</sup>

Within the inter-American system, a purposive element would appear to be integral. In addition to it being part of the definition of torture in article 2 of the Inter-American Torture Convention, the Inter-American Commission on Human Rights found a case of rape to amount to torture, at least partly because of its purpose of being to punish her personally and intimidate her.<sup>62</sup>

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<sup>59</sup> *Egmez v. Cyprus*, Eur. Ct. HR, Judgment, 21 Dec. 2000, para. 78; *Denizci v. Cyprus*, Eur. Ct. HR, Judgment, 23 May 2001, paras. 384-86.

<sup>60</sup> See n.45 above, and accompanying text.

<sup>61</sup> UN doc. E/CN.4/1995/34/Add.1, para. 98; emphasis added.

<sup>62</sup> *Meija v. Peru*, n.48 above, 186-88.

The Inter-American Court stressed the purposive element in the *Cantoral Benavides* case.<sup>63</sup>

*International criminal law*

A purposive element has also been central to the notion of torture as understood by the ICTY, whether applying its Statute article 3 (violations of the laws and customs of war) or article 5 (crimes against humanity). There may have been varying approaches among trial chambers concerning the importance of the UNCAT definition – applicable with appropriate contextual modifications, or applicable only as an aid to interpretation – and there is some variation as to exactly which purposes are relevant (see below), but the trial chambers have been consistent in requiring the element.<sup>64</sup> Indeed, for the trial chamber in *Furundzija*, where, as is often the case, more than one person may be involved in the acts that constitute torture, the distinction between being guilty as a perpetrator or as an aider or abetter resides precisely in whether the person shared in the purpose of the activity: if not, then the person could only be an accomplice, not a co-perpetrator.<sup>65</sup>

The ICTR has not had occasion to go beyond its earlier-mentioned acceptance of the UNCAT definition in the *Akayesu* case.

Meanwhile, as far as torture as a war crime under Elements of Crime for the Rome Statute for the ICC is concerned, the only element that distinguishes the war crime of torture from the war crime of inhuman treatment (article 8(2)(a)(ii)-2: international armed conflict) and from the war crime of cruel treatment (article 8(2)(c)(i)-3: non-international armed conflict) is that there must be a purposive element for the offence of torture to be applicable.

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<sup>63</sup> See n. 51 above, para. 97.

<sup>64</sup> *Delalic*, n.15 above, para. 470-72; *Furundzija*, *Kunarac*, and *Kvočka*, n.53 above, paras. 162, 484-86, 140-41.

<sup>65</sup> *Furundzija*, n.53 above, paras. 250-57.

As to what specific purposes are involved, the trial chamber in *Delalic* accepts the purposes referred to in UNCAT as ‘representative’,<sup>66</sup> while that in *Kunarac* lists a number of purposes that happen to coincide with these, expressing ‘doubts as to whether other purposes have come to be recognized under customary international law’, the matter not needing to be resolved in the instant case.<sup>67</sup> It is not clear to what other purposes the trial chamber is referring, although it is likely to be referring to the formulation in the IATC, especially its reference to ‘or for any other purpose’.<sup>68</sup> It may also have had in mind, though did not expressly mention, the list in *Furundzija*, which was also identical to the UNCAT list with the addition of ‘humiliating the person or a third person’.<sup>69</sup> But the Trial Chamber in *Kvočka* has reaffirmed humiliation as a qualifying purpose.<sup>70</sup> Perhaps significantly, the *Delalic* trial chamber considered ‘fundamental’ the distinction between a prohibited purpose and ‘one which is purely private’.<sup>71</sup> The Elements of Crime for the ICC probably put the matter to rest by prescribing ‘such purposes as’ those actually referred to in UNCAT article 1.

The problem of the absence of a need for a purposive element for torture as a crime against humanity under the ICC will be addressed in the conclusion.

## **Status of the perpetrator**

### *International human rights law*

UNCAT article 1 defines the perpetrator as being a ‘public official or other person acting in an official capacity’. The fundamental idea is that, as is conceptually appropriate in the context of giving legal form to human rights principles, the state violates the right through its agents, human rights being the normative articulation of the fundamental rules mediating the

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<sup>66</sup> *Delalic*, n.15 above, para. 470.

<sup>67</sup> *Kunarac*, n. 53 above, para 485.

<sup>68</sup> *Ibid.*, para. 474.

<sup>69</sup> *Furundzija*, n.53 above, para. 162.

<sup>70</sup> *Kvočka*, n. 56 above, para. 152.

relationship of the organs of organized society – typically the state – and the individual members of the society. This fits neatly with the basic approach of international law which identifies legal obligations as a matter of state responsibility and violations of those obligations as breaches of state responsibility. It is no accident that the purposive element of torture reflects precisely state purposes or, at any rate, the purposes of an organized political entity exercising effective power.<sup>72</sup>

The question then arises as to what is expected of a state when an act capable of violating its obligations occurs. Normally, reparation involving some form of material compensation and/or some form of satisfaction will be called for. This is the case also in respect of acts that may breach most human rights rules. Indeed, while this is not the place to pursue the matter, I take the view that the existence of the rule of exhaustion of domestic remedies is explicable as reflecting the idea that, ultimately, the human rights violation arises, not as a result of the immediate act causing the initial harm, but as a result of the failure of the state to repair it.

However, some acts require a further form of reparation, namely, the subjection of those who have committed the act to criminal liability.<sup>73</sup> This is especially likely to be the case when individuals invested with special powers by the state, notably powers of physical coercion, abuse that power to commit serious crimes with, to use current terminology, impunity.

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<sup>71</sup> *Delalic*, n. 15 above, para. 471.

<sup>72</sup> It is significant that the General Assembly resolution containing the Declaration against Torture adopted it as a ‘guideline for all States *and other entities* exercising effective power’: UNGA res. 3452 (XXX), 9 Dec. 1975; emphasis added.

<sup>73</sup> The International Law Commission gives as examples the requests for action against the individuals guilty of the 1948 killing of UN envoy Count Bernadotte and of the killing of US consular officials in Tehran: International Law Commission, Draft Articles on State Responsibility, Report of the Work of its 53<sup>rd</sup> Session, GAOR, 55<sup>th</sup> Session, Supp. No. 10 (A/56/10) (2001), para. 77, art. 37 (‘satisfaction’), Commentary, para. (5), n. 622. The Draft Articles do not cover the responsibility of states to individuals.

So, the typical torturer will be a law enforcement official or member of the security or intelligence services, precisely seeking to obtain, in the course of and in furtherance of his duties, information or confessions. It may also be someone with no official status acting in collusion with, and to advance the purposes of, public officialdom, often to shroud the responsibility of members of that officialdom. Conversely, the direct perpetrator of the torture may be acting in collusion with, and to advance the purposes of, civilian political authorities who prefer to turn a blind eye to the ‘excesses’ of the law enforcement or security officials. That is why the UNCAT definition describes the perpetrator, not only as the official who directly inflicts the torture, but also the official who instigates, consents to or acquiesces in it.<sup>74</sup>

Even this broad notion of the perpetrator will not necessarily solve problems of proof. All those involved in what may be understood as human rights violations involving the commission of serious crime and thus in principle requiring the state to pursue those responsible through the criminal law – murder, torture, enforced disappearance – may be able to conceal their responsibility, particularly in the light of their public functions. Torture is usually committed in the dark and secret reaches of state power. Accordingly, case law has assigned state responsibility for some acts of omission where there may, deliberately or otherwise, be insufficient information to pursue or even identify those who have committed the acts in question.

In a famous passage, the Inter-American Court of Human Rights, in the *Velásquez Rodríguez* and *Godínez Cruz* cases, stated:

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations

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<sup>74</sup> See Rodley, n.1 above, 100-01; J.H. Burgers and H. Danelius, *The United Nations Convention against Torture* (Dordrecht, 1988), 119-20.

committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation.<sup>75</sup>

Evidently, this language, by referring generally to human rights violations is too broad. It is best suited to the type of criminal violations just mentioned that were at issue in those cases. The European Court of Human Rights has followed suit in similar cases.<sup>76</sup> I venture to suggest that, if in such cases there had been no suspicion of official involvement there would have been no such finding. It is true that there have been a few cases in which the European Court has been willing to find violations of the right to an effective remedy in connection with acts contemplated by article 3 committed by private individuals.<sup>77</sup> These have not concerned acts assimilable to torture, if only because of the absence of the purposive element. The other category of violation of article 3 where there is no direct responsibility of officialdom is the threat of sending, or sending, a person to a country where the person risks murder or torture or similar ill-treatment. But, again, there has been no finding that the (potential) deportation would amount to torture, presumably because here too the purposive element would be absent.<sup>78</sup>

To sum up this point, a public official has to be the perpetrator, directly or indirectly, for a violation of international human rights law to be established.

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<sup>75</sup> *Velásquez Rodríguez Case* (1988), I-A Ct. HR, Ser. C, No. 4 (Honduras), para. 174; *Godínez Cruz Case* (1989), I-A Ct. HR, Ser. C, No. 5, para 184. In both cases the Court was reading the obligations in ACHR articles 4 (right to life), 5 (right to humane treatment) and 7 (right to personal liberty), together with article 1(1) (obligation to respect rights).

<sup>76</sup> E.g. *Aksoy v. Turkey*, Eur. Ct. HR, Judgment, 19 Dec. 1996, para. 98 (torture); *Kaya v. Turkey*, Eur. Ct. HR, Judgment, 19 Feb. 1998, paras. 86-92, 107; *Kurt v. Turkey*, Eur. Ct. HR, Judgment, 25 May 1998, para. 140.

<sup>77</sup> E.g., *Z v. UK*, Eur. Ct. HR, Judgment, 10 May 2001, para. 73 (failure of local authority to act to protect children known to be at risk of ill-treatment by their parents).

<sup>78</sup> E.g. *Chahal v. UK*, n.15 above, Geneva Conventions of 12 August 1949: GC I, arts. 49-51; GC II, arts 50-51; GC III, arts 129-30; GC IV, arts. 146-47.

*International Criminal Law*

In contrast with international human rights law, international criminal law does not attach, as such, any particular status to the perpetrator. This is true of the Geneva Conventions' provisions relating to grave breaches in international armed conflict and those of Additional Protocol I.<sup>79</sup> Common article 3 of the Geneva Conventions, like much of Additional Protocol II, lays down minimum standards of conduct in non-international armed conflict, violation of which is not couched in terms of invoking criminal responsibility. However, the ICTY has interpreted its jurisdiction over violations of the laws and customs of war under article 3 of its Statute to cover violations of common article 3.<sup>80</sup> In any event, responsibility is determined rather by the status of the victim (protected person, one *hors de combat*, one in the power of an adverse party, etc.).

Predictably, the same is true of the Rome Statute, article 8(2)(a) and (b) of which mostly codifies grave breaches of the Geneva Conventions and Additional Protocol I and article 8(2)(c) and (e) of which does the same for violations of common article 3 and Additional Protocol II. The Elements of Crimes document confirms this.

This is natural. Except in the case of that almost extinct species of conflict – a contest between the organized armed forces of two or more states – the question of the membership of an individual in an entity of a party, particularly a non-state party, to an armed conflict (which may be international as well as non-international) eludes effective determination. Rather, there is an *implicit* assimilation of an individual to a party to the conflict, precisely by virtue of the protected status or other defined status of the victim, as well as by the context of the existence of an armed conflict with which the act must be associated, and by the mental element requiring awareness of the factual circumstances that established the existence of an

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<sup>79</sup> Additional Protocol I to the Geneva Conventions of 12 August 1949, art. 75 (this article does not specifically provide for grave breaches).

<sup>80</sup> *Prosecutor v. Tadic*, Case No. IT-94-1, Appeals Chamber, 2 Oct. 1995, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 134.

armed conflict.<sup>81</sup> As far as the war crime of torture is concerned, the requirement of having to establish the purposive element should be especially effective in linking the activity to a party to the conflict and excluding purely private activities.

While a link to an armed conflict was a central threshold element for the jurisdiction of the International Military Tribunal at Nuremberg<sup>82</sup> and for the jurisdiction of the ICTY (international and non-international respectively) over crimes against humanity, this was not the case in respect of the ICTR and will not be the case for the ICC. It is often said that now crimes against humanity can be committed in peacetime, by anybody. This may be an oversimplification.

Certainly, if there are problems in assigning an individual to a party to an armed conflict, it would be even harder to assign someone to a group other than a government engaged in crimes against humanity. Yet, in respect of such crimes too, factors have to be present such that private activities will, for the most part, not qualify. Thus, the acts have to be committed knowingly or intentionally *as part of* a widespread or systematic attack directed against a civilian population. Any attack against a civilian population bespeaks some substantial organization; all the more so if the attack has to be widespread or systematic. Especially telling as far as the crime against humanity of torture is concerned, is that the victim of torture must be ‘in the custody or under the control of the perpetrator’. Such custody and control within the context of the attack goes far towards excluding the purely private act of cruelty. In the words of an authoritative commentary written by a Canadian

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<sup>81</sup> In *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, Judgment, 25 Jun. 1999, for example, the Trial Chamber was at pains to show that, despite unclarity as to the accused’s military status, his role as prison director gave him hierarchical status over the soldiers who were the guards: paras. 90-106; aff’d Judgment, Appeal Chamber, 24 Mar. 2000, paras. 66-76.

<sup>82</sup> Charter of the International Military Tribunal (1945), 5 UNTS 251: art. 6 required that crimes against humanity within the jurisdiction of the Tribunal be committed ‘in execution of or connection with any crimes within the jurisdiction of the Tribunal’, that is, crimes against peace and war crimes, committed during World War II.

delegate to the drafting process, '[g]iven the deletion [of the relevant language of UNCAT on which the Rome Statute is 'loosely based'] of any link to a public official, a requirement of custody or control was included in article 7, in order to establish some link of power or control between the perpetrator and the victim.'<sup>83</sup>

To sum up, in respect of torture as a war crime and as a crime against humanity, the reality of the context requires abandoning an explicit analogy with international human rights law concerning the status of the perpetrator. On the other hand, other elements are required to be present, the effect of which may be expected to impose an analogous *discipline* in the selection of the accused.

## Conclusion

The one element of torture that is common to all case law and definitions in legal instruments is that it should involve pain or suffering which, in all but perhaps the Inter-American system, should be severe. The European Court of Human Rights has maintained an insistence on relative intensity of pain or suffering, which has to be an aggravated form of that already serious enough to amount to inhuman treatment. The laconic language and unclear practice of the Human Rights Committee prevents us from affirming conclusively that it does not espouse the notion of aggravation. Two ICTY cases indicate a disposition to follow the European Court practice.

There is nothing in the language of the Rome Statute of the Elements of Crime suggesting a need for an aggravation of the pain or suffering. On the contrary, as far as war

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<sup>83</sup> R.S. Lee (ed.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, New York, 2001), 90 (Darryl Robinson commentary). Interestingly, a footnote to the Elements of Crime in respect of art. 8(2)(a)(ii)-1 seems to corroborate this function of the element of custody and control: 'As element 3 requires that all victims must be "protected persons" under one or more of the Geneva Conventions of 1949, these elements do not include the custody and control requirement found in the elements of article 7(1)(e).' (Evidently, the reference must have been intended to be to article 7(1)(f) which defines the crime against humanity of torture.)

crimes are concerned, the only difference in the Elements of Crimes relevant to torture, on the one hand, and to inhuman treatment or wilfully causing great suffering (in international armed conflict) or cruel treatment (in non-international armed conflict), on the other hand, is the element of purpose.

It will be evident from what has preceded this conclusion that I should prefer to see the purposive element as the sole element distinguishing torture from cruel or inhuman treatment, and it may be that the train is not so far from the station that it may not be recalled. While one can sympathize with those judges who find certain practices inhuman, and thus condemnable, and yet who fear to debase the currency of the word ‘torture’, especially when there may be some unclarity about the acts that have caused the severe pain or suffering, it will not be easy for the ICC judges, at any rate, to read the element of aggravation into the war crime of torture, as opposed to the war crimes of inhuman or cruel treatment or wilfully causing great suffering. Nor, in dealing with crimes against humanity will it be any easier to make the same distinction between, on the one hand, torture and, on the other, ‘other inhumane acts’.

At first glance, this would seem to be an option. For torture, it will be recalled, the perpetrator must inflict ‘severe physical or mental pain or suffering’, while for other inhumane acts it must be ‘great suffering, or serious injury to body or to mental or physical health’. Even assuming – which is far from obvious – that ‘great suffering’ or ‘serious injury’ is somehow less grave than ‘severe suffering’ (the same language is used to ‘distinguish’ the war crime of inhuman treatment from the war crime of wilfully causing great suffering), there remains a further obstacle to the ICC judges’ taking this route. To establish the crime against humanity of ‘other inhumane acts’, it must be shown that the act ‘was of a character similar to any other act referred to in article 7’ and a footnote to this element clarifies that “‘character’ refers to the nature *and gravity* of the act’ (emphasis added). It appears to be the case, then, that an inhumane act similar to torture has to be of similar gravity to that required for torture.

It follows inexorably that aggravation of pain or suffering or, rather the lack of it, cannot be a relevant basis for choosing the crime of other inhuman acts in preference to that of torture.

If this view is correct, the question then arises as to what influence the ICC approach, rejecting aggravation of intensity of suffering as an element of the crime of torture, may have elsewhere. Evidently it has not yet percolated down to the ICTY trial chamber in *Kvočka*, but it could come to represent the international criminal law approach. Might there be reasons to prefer this approach in international criminal law and the opposite in international human rights law? It is hard to see why this should be the case. After all, an individual accused is no more deserving than a respondent state of being found guilty of torture, with its attendant stigma. Indeed, arguably it is less appropriate for an individual to be denied the option of being convicted on the lesser charge, which could be expected to entail a less severe sentence than would be applicable to the offence of torture.

So I maintain my preference for suppressing the element of aggravation in the understanding of the notion of torture. As to whether this view will prevail the jury – or, rather, the judiciary – is out.

In contrast to the disparity of practice and definition in regard to the factor of aggravation, there is virtually uniform treatment of the factor of purpose as a, if not *the*, central component of the concept of torture. The problem, and it is considerable, is what should be made of the exclusion of this element from the crime against humanity of torture under the Rome Statute.

No clear explanation seems to emerge from the *travaux préparatoires* of the Rome Statute of the decision taken in Rome to abandon the purposive element. One argument seems to have been that there was a sufficient requirement in the notion, espoused in the European Convention jurisprudence, of aggravation, despite the fact that the understanding of other inhumane acts, by reference to which the aggravation would have to be measured, offered no basis for such measurement. Another motive apparently consisted in a fear,

however unfounded, that the list of purposes would have to be exclusive (despite the ‘such as’ in UNCAT) thereby making the list into a potential straightjacket.<sup>84</sup> Speculatively, one other consideration may have been the existence of the ‘custody or control’ requirement which, in addition to implying a quasi-official connection with an organized group, would tend to allow it to be inferred that the purposes would be those of the group, which in turn, would tend to be analogous to those typical of a state, that is, the sort of purposes referred to in UNCAT and, later, in the elements of the war crime of torture. A further consideration could well have been that the erratic and, in the case of non-governmental commission of crimes against humanity, unclear environment in which the acts take place, would make it too difficult for a prosecutor to prove an additional mental element, which is what purpose is.

The issue did surface again at the Preparatory Commission drafting the Elements of Crime, but the majority successfully beat back an attempt to insert a purposive element. The decisive argument seems to have been that the issue was settled in Rome. A further argument apparently was that a purposive element was necessary for war crimes, precisely to distinguish the latter from inhuman treatment.<sup>85</sup>

Indeed, in retrospect the latter point may provide a clue to our answer. There is no equivalent, in respect of crimes against humanity, of the notions of cruel or inhuman treatment in international human rights law or international humanitarian law (from which war crimes emerge). The category of ‘other inhumane acts’ does not fill the gap. They are an analogical cluster parasitic on the specified crimes against humanity. Accordingly, they must not only have similar gravity, as already mentioned, to the specified acts – in our case torture

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<sup>84</sup> Interview, 22 April 2002, with Christopher Keith Hall, the Amnesty International legal adviser, who played a crucial role in the deliberations relating to the ICC Statute before, during and after the Rome Conference. According to Darryl Robinson, a Canadian delegate who was a key actor in this aspect of the negotiations, a fear that sadistic purposes may be excluded by reliance on the Torture Convention’s list of purposes was a factor in the omission of the purposive element: Interview, 31 March 2002.

<sup>85</sup> Lee (ed.), n.83 above, 91.

– they must also have a similar *nature*. If torture had demanded a purposive element, then any other similar inhumane act would have had to have a similar element. The idea, then, would be to allow the crime against humanity of torture to embrace both torture (in its traditional purposive understanding) and inhuman treatment (in which the purposive element may be absent or not demonstrable); this conflation of the two notions is effected precisely because the alternative category of inhuman treatment is not available.

This conceptual explanation of the absence of a purposive element in the crime against humanity of torture is not wholly satisfying and leaves us with an outcome that remains unsatisfactory. Yet it may offer some coherence to an otherwise baffling problem.

It has been asserted that the absence of a purposive element means that the crime against humanity of torture ‘includes random, purposeless or merely sadistic infliction of severe pain or suffering’.<sup>86</sup> If this view were correct, then the notion of torture would seem to encompass precisely the sort of private acts that international human rights law and international humanitarian law have set their faces against. I believe that the explanation I have offered, speculative and conceptual, suggests that the assertion may not be well-founded.

I shall not recapitulate my earlier analysis regarding the status of the perpetrator. It is clear in international human rights law: it must be a public official or someone acting as such. In international criminal law there is no such restriction, but the context in which war crimes and crimes against humanity occur, and other elements requiring to be proved, imposes a discipline, especially as regards the crime of torture, calculated to bring the perpetrator into a class of persons analogous to public officialdom in peacetime proper. This too has the effect of excluding private acts for purely personal ends.

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<sup>86</sup> O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden Baden, 1999), 164 (Christopher K. Hall commentary). The fact that the observation may reflect comments made in the drafting discussions would not be sufficient to displace the powerful doctrinal arguments weighing against the view.

Some might feel that in contexts in which all local law and public order have broken down, leaving individuals free to pursue such private ends, contexts in which crimes against humanity may and sometimes do occur, those engaging in torturous acts should not be beyond the reach at least of international law. Yet it is not in all such contexts that crimes against humanity do occur – remember they must be committed as part of a widespread or systematic attack against a civilian population – and it is hard to see why the liability of perpetrators of torture or other atrocities analogous to crimes against humanity should be determined by their mere association or otherwise with an attack against a civilian population. In other words, there is no particular justification for international criminal law to extend its reach to random, purposeless or merely sadistic pain or suffering when inflicted in the context of a widespread or systematic attack against a civilian population, while refusing to be concerned with precisely the same acts that happen to be committed in other situations in which local law and public order have broken down, but without the context of the attack.