

TORTURE – IN SEARCH OF A DEFINITION...

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ABSTRACT

The main purpose of this ICD Brief¹ is to identify and briefly discuss the different constituent elements of the legal notion of ‘torture’, by analysing a handful of (inter)national definitions as well as relevant international jurisprudence and legal doctrine. The question that will be asked in the end will be whether the current definition(s) suffice(s) or whether torture warrants a re-definition.

I. INTRODUCTION

The prohibition of torture is considered a cornerstone of temporary human civilisation. As “*one of the most fundamental values of democratic societies*,”² it has a prominent place in many fundamental treaties in the field of human rights,³ international humanitarian law⁴ and international criminal law.⁵ The torture prohibition has also acquired the status of customary law⁶ and it is (almost) unanimously regarded as one of the very few norms of *jus cogens*,⁷ from which no derogation is permitted. Moreover, it would be difficult to find a single person who has no understanding whatsoever of the notion of torture. Everyone has some idea of its meaning and it appears to be a self-evident concept that does not require much explanation. If one would not know any better, there would be very good grounds to believe that this particular prohibition is not much in need of clarification.

In reality, however, this particular proscription went through a storm the past fifteen years – a period during which this most basic of all bans was challenged. In the wake of the attacks of 9/11, as both

¹ This Brief is based on the first part of the book STEVEN DEWULF, *The Signature of Evil. (Re)Defining Torture in International Law* (Cambridge: Intersentia, 2011).

² See e.g., European Court of Human Rights (‘ECtHR’), *Egmez v. Cyprus*, Appl. No. 30873/96, Judgment, 21 December 2000, para. 77; ECtHR, *Öcalan v. Turkey*, Appl. No. 46221/99, Judgment, 12 March 2003, para. 218.

³ See e.g., art. 5 UDHR; art. 7 ICCPR; art. 3 ECHR; art. 5(2) ACHR.

⁴ See e.g., common art. 3 of the Four Geneva Conventions of 1949; art. 12 and 50 Geneva Convention n° I; art. 17, 87 and 130 Geneva Convention n° III.

⁵ E.g., art. 2 and art. 5 (f) Statute International Criminal Tribunal for the former Yugoslavia (‘ICTY’); art. 3 (f) and 4 (a) Statute International Criminal Tribunal for Rwanda (‘ICTR’); art. 7 (2) (e), art. 8 (2) (a) and art. 8 (2) (c) Statute International Criminal Court (‘ICC’).

⁶ E.g., ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23&23/1, Trial Chamber, Judgement, 22 February 2001, para. 466; Committee against Torture (‘CAT’), Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment – General Comment No. 2: Implementation of article 2 by State parties, 24 January 2008, *UN Doc. CAT/C/GC/2* at para. 1; Sir NIGEL S. RODLEY and MATT POLLARD, *The Treatment of Prisoners under International Law* (Oxford: Oxford University Press, 2009) at 58; GUÉNAËL METTRAUX, *International Crimes and the ad hoc Tribunals* (Oxford: Oxford University Press, 2005) at 110.

⁷ E.g., ICTY, *Prosecutor v. Milan Simić*, Case No. IT-95-9/2-S, Trial Chamber, Judgement, 17 October 2002, para. 34; Extraordinary Chambers in the Courts of Cambodia (‘ECCC’), *Case of Kaing Guek Eav alias Duch*, Case File/Dossier No. 001/18-07-2007/ECCC/TC, Trial Chamber, Judgement, 26 July 2010, para. 352; Inter-American Court of Human Rights (‘IACtHR’), *Maritza Urrutia v. Guatemala*, Judgment, 27 November 2003, para. 92; UNGA Res. 59/182, Torture and other cruel, inhuman or degrading treatment or punishment, 20 December 2004, *UN Doc. A/RES/59/182*, preambular para. 2; Human Rights Committee (‘HRC’), General Comment No. 29 – States of Emergency (Article 4), *UN Doc. CCPR/C/21/Rev./Add.11* at 4, para. 11; CPT, Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009, 30 November 2009, CPT/Inf (2010) 14 at 17, para. 26; Sir NIGEL S. RODLEY and MATT POLLARD, *supra* n. 6 at 65-66; MARC BOSSUYT and JAN WOUTERS, *Grondlijnen van Internationaal Recht* (Antwerp: Intersentia, 2005) at 92.

elusive terrorists and State(s) (agents) trying to apprehend and neutralise the threat resorted to devious tactics and dirty warfare, claims were heard that the existing legal framework had become obsolete or, at least, unworkable, and arguments were made to allow for torture in very specific situations. Some advocates for torture spoke out explicitly and simply argued that torture should be allowed in cases of emergency, when the situation called for it.⁸ But the prohibition was attacked in more covert ways as well. One such tactic consisted of giving the notion a ridiculously limited interpretation so that it would only cover the most extreme conduct. Notorious in this respect is the 'Bybee Memo' of 2002, which described torture in an "*absurdly narrow*"⁹ way.¹⁰

Of course, this was only possible because the concept of torture has always been surrounded by question marks. "*What is torture?*" is indeed a question that has puzzled legal and other scholars for decades, centuries even....

II. INTERNATIONAL DEFINITIONS OF TORTURE?

The fact that torture is illegal and even criminal behaviour according to various international and regional documents, does not mean that there are many definitions. Article 5 of the Universal Declaration on Human Rights (1948) states that: "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Article 7 of the International Covenant on Civil and Political Rights (1966) holds that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation". Article 3 of the most important European basic rights document, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), equally declares that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment".

It immediately stands out that these and other¹¹ treaties and declarations fail to describe what exactly is meant by torture, even though all these documents do prohibit the practice in the firmest

⁸ See in particular ALAN DERSHOWITZ, "Tortured Reasoning" in SANFORD LEVINSON (ed.), *Torture. A Collection* (Oxford: Oxford University Press, 2006) at 257 *et seq.*

⁹ HAROLD HONGJU KOH, "A World Without Torture", 43 *Colum. J. Transnat'l L.* 642 (2004-2005) at 648 and 652.

¹⁰ According to this Memo, an act "must be of an extreme nature to rise to the level of torture (...) [The act] must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity accompanying serious physical injury, such as organ failure, impairment of bodily function or even death. For purely mental pain or suffering to amount to torture (...) it must result in significant psychological harm of significant duration, e.g. lasting for months or even years (...) [T]he mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures to deeply disrupt the senses, or even fundamentally alter an individual's personality; or threatening to do any of these things to a third party." (emphasis added). See Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A, 1 August 2002, to be found on <http://f11.findlaw.com/news.findlaw.com/nytimes/docs/doj/bybee/80102mem.pdf> at 1.

¹¹ See inter alia also art. 4 of the Charter of Fundamental Rights of the European Union (which simply reproduces Article 3 ECHR) art. 5 (2) ACHR; art. 5 African Charter on Human and People's Rights.

manner, going as far as making this proscription one of the core human rights. The conclusion remains the same when international humanitarian law is analysed. The prohibition on the use of torturous treatments and punishments is included in all the basic conventions and protocols¹², but the term is never defined.

Chronologically, the first place where one can find an actual definition is in the '*Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*', which was adopted by the General Assembly of the United Nations on 9 December 1975 ('UNGA Declaration').¹³ A second document that contains a description is the Inter-American Convention to Prevent and Punish Torture from 1985 ('IACPPT').¹⁴ However, the most influential definition of torture can be found in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted almost thirty years ago, on 10 December 1984¹⁵ ('UNCAT'). According to its Article 1,

"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".

¹² See e.g., art. 12 and 50 Geneva Convention n° I; art. 12 and 51 Geneva Convention n° II; art. 17, 87 and 130 Geneva Convention n° III; art. 32 and 147 Geneva Convention n° IV; art. 75 Additional Protocol n° I; art. 4 Additional Protocol n° II.

¹³ UNGA Res. 3452 (XXX), 9 December 1975, to be found on <http://www.un-documents.net/dpptcidt.htm> (last consulted on 01/10/2014). Article 1 of this Declaration stipulates that "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".

¹⁴ To be found in CHRIS VAN DEN WYNGAERT and STEVEN DEWULF (eds.), *International Criminal Law. A Collection of International and European Instruments. Fourth Revised Edition* (Martinus Nijhoff: Leiden, 2011) at 615. Article 2 specifies that "[f]or 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."

¹⁵ To be found in CHRIS VAN DEN WYNGAERT and STEVEN DEWULF (eds.), *supra* n° 14 at 595.

This description has become a reference point, as many definitions of later date rely heavily on its wording,¹⁶ even if several more recent definitions of torture, in international and in regional treaties and jurisprudence, do depart somewhat from the UNCAT formulation. Nonetheless, on the basis of this definition as well as those other descriptions, by and large, six constituent elements of torture can be identified.

III. THE BASIC ELEMENTS OF TORTURE

A) The Infliction of Severe Physical or Mental Pain or Suffering

The infliction of severe pain or suffering appears in nearly all descriptions¹⁷ and it is almost universally deemed a basic feature if not the distinguishing mark of torture.¹⁸ Torture is not simply hurting a person. In its most traditional and hierarchical understanding, torture must be given a place at the summit of the pyramid of agony.¹⁹ As a result, one immediately gets the impression that a general consensus exists that, as the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia explicitly observed in its *Kvočka et al.* judgement, the threshold of pain or suffering that is set for torture, is higher than that for other ill-treatment.²⁰ This idea that only the severest abuse can be designated as torture, is most clearly written down in the UNGA Torture

¹⁶ See in particular the definitions in art. 7 (2) (e) Statute ICC; art. 7 (l) (f) Elements of Crimes ICC; art. 8 (2) (a) (ii)-1 and Article 8 (2) (c) (i)-4 Elements of Crimes ICC; section 5.2. (d) and 7 UNTAET Reg. 2000/15, on the establishment of panels with exclusive jurisdiction over serious criminal offences, 6 June 2000, *UN Doc. UNTAET/REG/2000/15* ('Statute Special Panels'). International courts and tribunals have also referred to and emphasised the importance of the definition of torture in art. 1 UNCAT, see *inter alia* ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998, paras. 593-594; ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Appeals Chamber, Judgement, 21 July 2000, para. 111; ECtHR (Grand Chamber), *Salman v. Turkey*, Appl. No. 21986/93, Judgment, 27 June 2000, para. 114.

¹⁷ E.g., art. 1 UNGA Torture Declaration; art. 1 UNCAT; art. 7 (2) (e) Statute ICC; art. 7 (1) (f) 1. Elements of Crimes ICC (torture as a crime against humanity); art. 8 (2) (a) (ii)-1 1. and 8 (2) (c) (i)-4 1. Elements of Crimes ICC (torture as war crime); Sections 5.2 (d) and 7.1. Statute Special Panels. See also e.g. ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23&23/1, Appeals Chamber, Judgement, 12 June 2002, para. 149; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber, Judgement, 2 November 2001, para. 137; ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Trial Chamber, Judgement, 3 April 2008, para. 127.

¹⁸ E.g., Report by Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights resolution 1985/33, *UN Doc. E/CN.4/1986/15* at 10, paras. 33-35; OHCHR, Mapping state obligations for corporate acts: an examination of the UN Human Rights Treaty System. Report No. 5 on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 2007, to be found on <http://198.170.85.29/Ruggie-report-Convention-against-Torture-Dec-2007.pdf> (last consulted 01/10/2014) at 5; LINDA M. KELLER, "Is Truth Serum Torture?", 20 *Am. U. Int'l L. Rev.* 521 (2004-2005) at 575; HERMAN BURGERS, "Het VN-verdrag tegen foltering [The UN convention against torture]", *VN Forum* 49 (2009) at 53. See amongst others also GERHARD WERLE, *Principles of International Criminal Law* (The Hague: TMC Asser Press, 2005) at 245, para. 713; J. HERMAN BURGERS and HANS DANIELIUS, *The United Nations Convention against Torture. A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff Publishers, 1988) at 117-118; GUÉNAËL METTRAUX, *supra* n. 6 at 111 *et seq.*; ELA GRDINIC, "Application of the Elements of Torture and Other Forms of Ill-Treatment, as Defined by the European Court and Commission of Human Rights, to the Incidents of Domestic Violence", 23 *Hastings Int'l & Comp. L. Rev.* 217 (1999-2000) at 246.

¹⁹ See also ECtHR, *Aksoy v. Turkey*, Appl. No. 21987/93, Judgment, 18 December 1996, para. 63; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgement, 1 September 2004, para. 483; ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, Trial Chamber, Judgement, 16 November 1998, paras. 442-443 and 542-544.

²⁰ ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber, Judgement, 2 November 2001, para. 226. See also ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-T, Trial Chamber, Judgement, 12 June 2007, para. 75. See on the lesser amount of pain and suffering needed for cruel and inhuman treatment GERHARD WERLE, *supra* n. 18 at 301, para. 904.

Declaration. According to its Article 1 (2), torture is an ‘aggravated form’ of inhuman, cruel or degrading treatment and punishment.²¹

However, determining that specific “higher” threshold for torture has proved to be a great challenge. There is in fact no red line, plain for all, which should be crossed for acts or omissions to become torture. There has never been such a clear threshold and, it has been said, there shall never be one. All needs to be examined *in concreto*. Or, as the ECtHR put it, “*the term severe is (...) in the nature of things relative*”.²² The measurement of the intensity of the ill-treatment is essentially a relative exercise. All the circumstances of the case must be evaluated, including the duration of the treatment, its physical and/or mental effects, and in some but not all cases, the age, sex and state of health of the victim,²³ as well as the nature and context of the ill-treatment²⁴, and the manner and method of its execution.²⁵ The HRC,²⁶ San José Court²⁷ and the Inter-American Commission²⁸ referred to and copied this jurisprudence, as did the African Commission on Human and Peoples’ Rights.²⁹ The international criminal tribunals, especially the ICTY, drew great inspiration from this European jurisprudence as well, and further developed this approach in various cases that involved the crime of torture.³⁰

Moreover, the notion of torture evolves. In particular, the threshold of pain or suffering of torture does not just alter, it is becoming lower. As again the ECtHR emphasised: “*certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in the future. [The Court] takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties*

²¹ The ECtHR has also referred to this text, see ECtHR, *Ireland v. the United Kingdom*, Appl. No. 5310/71, Judgment, 18 January 1978, para. 167. See equally ECtHR, *Ireland v. the United Kingdom*, Appl. No. 5310/71, Judgment, 18 January 1978, Separate Opinion of Judge ZEKIA at 89; ECtHR (Grand Chamber), *Jalloh v. Germany*, Appl. No. 54810/00, 11 July 2006, Concurring Opinion of Judge ZUPANCIC at 40. Certain national criminal provisions further confirm the embedding of torture in inhuman treatment, see e.g. 417 *bis* Belgian Criminal Code.

²² See e.g., ECtHR (Grand Chamber), *Selmouni v. France*, Appl. No. 25803/94, Judgment, 28 July 1998, para. 100.

²³ ECtHR, *Ireland v. the United Kingdom*, Appl. No. 5310/71, Judgment, 18 January 1978, para. 162; ECtHR (Grand Chamber), *Selmouni v. France*, Appl. No. 25803/94, Judgment, 28 July 1998, para. 100.

²⁴ E.g., ECtHR, *Soering v. United Kingdom*, Appl. No. 14038/88, Judgment, 7 July 1989, para. 100; ECtHR (Grand Chamber), *V. v. the United Kingdom*, Appl. No. 24888/94, Judgment, 16 December 1999, para. 70.

²⁵ E.g., ECtHR, *Soering v. United Kingdom*, Appl. No. 14038/88, Judgment, 7 July 1989, para. 100; ECtHR (Grand Chamber), *Mamatkulov and Askarov v. Turkey*, Appl. Nos. 46827/99 and 46951/99, Judgment, 4 February 2005, para. 70.

²⁶ E.g., HRC, *Vuolanne v. Finland*, Comm. No. 265/1987, Views, 7 April 1989, *UN Doc. CCPR/C/35/D/ 265/1987*, para. 9.2.

²⁷ E.g., IACtHR, *Gómez-Paquiyaqui Brothers v. Peru*, Judgment, 8 July 2004, para. 113; IACtHR, *Miguel Castro-Castro Prison v. Perú*, Judgment, 25 November 2006, para. 316.

²⁸ Inter-American Commission on Human Rights (‘IACnHR’), *Luiz Lizardo Cabrera v. Dominican Republic*, Case 10.832, Report N° 35/96, 19 February 1998, Annual Report of the IACnHR 1997, paras. 78 and 83.

²⁹ ACnHPR, *Huri-Laws v. Nigeria*, Comm. No. 225/98, Decision, November 2000, to be found on <http://www1.umn.edu/humanrts/africa/comcases/allcases.html> (last consulted 01/10/2014), para. 41 (although the Commission said so with reference to the whole of art. 5 African Charter and not with regard to torture in particular).

³⁰ See e.g. ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber, Judgement, 2 November 2001, para. 143; ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25, Trial Chamber, Judgement, 15 March 2002, para. 182.

correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.”³¹

As a result, the absence of a flawless method to determine the intensity of the agony appears to be not the only problem. As the threshold of torture in itself is unclear and changing – in particular, becoming lower – one may ask whether torture truly still requires the infliction of pain or suffering that is of a more intense level than that of other ill-treatment.

B) Act or Omission

In many of the international definitions, mention is made of ‘acts’³² of torture. It is a fact that, as the ICTY put it, “*the most characteristic cases of torture involve positive acts.*”³³ Notwithstanding the wording of the different definitions, it is, however, not essential that the torturer actually does something. What is important, is that severe pain or suffering is inflicted. It has indeed been acknowledged many times in a universal manner³⁴ that it is equally possible to torture by omitting to act when this is necessary to prevent, divert, or end the infliction of severe pain or suffering.³⁵ Such omissions have even been specifically included in a number of national definitions.³⁶

C) Intent

It is generally put forward that torture entails severe pain or suffering that has been inflicted *intentionally*.³⁷ One cannot torture by negligence. Two types of intent are sufficient for torture: direct intent *strictu sensu*³⁸ and indirect intent³⁹. Both types of intent require the same mental element as regards the conduct of the perpetrator: in both cases, the perpetrator must have wanted to act or omit to act, meaning that he wanted to beat, suffocate, rape, threaten, electrocute, ... the victim.

³¹ E.g., ECtHR (Grand Chamber), *Selmouni v. France*, Appl. No. 25803/94, Judgment, 28 July 1998, para. 101; ECtHR, *Elci et al. v. Turkey*, Appl. Nos. 23145/93 and 25091/94, Judgment, 13 November 2003, para. 634 (.

³² For instance, art. 1 UNGA Torture Declaration; art. 1 UNCAT; art. 2 IACPPT.

³³ ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, Trial Chamber, Judgement, 16 November 1998, para. 468.

³⁴ *Inter alia ibid.*, paras. 442 and 468; ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23&23/1, Trial Chamber, Judgement, 22 February 2001, para. 483; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgement, 1 September 2004, para. 481; ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-T, Trial Chamber, Judgement, 12 June 2007, para. 74; J. HERMAN BURGERS and HANS DANIELIUS, *supra n. 18* at 118; MANFRED NOWAK AND ELIZABETH McARTHUR, *THE UNITED NATIONS CONVENTION AGAINST TORTURE. A COMMENTARY* (OXFORD: OXFORD UNIVERSITY PRESS, 2008) at 66.

³⁵ The IACPPT even includes a specific provision that indicates that a public servant or employee who is able to prevent torture, yet fails to do so, is to be found guilty of the crime of torture (art. 3, a).

³⁶ E.g., art. 269. 1 (2) Criminal Code of Canada; Section 2 (1) Crimes of Torture Act 1989 New Zealand.

³⁷ See, e.g., art. 1.1 UNGA Torture Declaration; art. 1 UNCAT; art. 2 IACPPT; art. 7, 2. (e) Statute ICC; Section 7.1 Statute Specials Panels; ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Chamber, Judgement, 27 January 2000, para. 285; ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23&23/1, Trial Chamber, Judgement, 22 February 2001, para. 483; ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-T, Trial Chamber, Judgement, 12 June 2007, para. 74; ECtHR, *Öktem v. Turkey*, Appl. No. 74306/01, Judgment, 19 October 2006, para. 33; IACtHR, *Bueno-Alves v. Argentina*, Judgment, 11 May 2007, para. 79.

³⁸ See, e.g., ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber II, Judgment, 30 November 2005, para. 238.

³⁹ See, e.g., ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-T, Trial Chamber, Judgement, 12 June 2007, para. 77.

However, there is a subtle difference as regards the consequences of (t)his behaviour. It is additionally required that the perpetrator either wanted these consequences, but it could be that he either really wanted to subject the victim to the ensuing pain or suffering (direct intent), or, at least, that he was aware that, under a normal course of events, this would follow from his conduct (indirect intent), albeit that it should be obvious that the line between the conduct and the consequence(s) will not always be very clear.⁴⁰ In any case, *dolus eventualis* and recklessness are excluded as they appear to be insufficient states of mind for torture.⁴¹

D) Specific purpose

It is (nearly) universally accepted that, next to the deliberate infliction of severe pain or suffering, torture is essentially defined by its 'special intent'. Almost all contemporary international definitions of this evil require that the agony is inflicted for a rather specific purpose.⁴² This *dolus specialis*⁴³ also appears incontestable in international and regional jurisprudence,⁴⁴ and in consequence, this element has also been inserted in many national definitions of torture.⁴⁵

The UNCAT lists six such purposes: (i) obtaining information, (ii) obtaining a confession, (iii) punishment, (iv) intimidation, (v) coercion and (vi) "*torture for any reason based on discrimination of any kind.*" Furthermore, the language of Article 1 UNCAT⁴⁶ quite clearly suggests that its list is merely indicative and by no means exhaustive.⁴⁷ As a result, and even if especially coercion and

⁴⁰ See similarly ROGER S. CLARK, "The Mental Element in Criminal Law: the Rome Statute of the International Criminal Court and the Elements of Offences", 12 *Criminal Law Forum* 291 (2001) at 330.

⁴¹ See, e.g., ANTONIO CASSESE, *International Criminal Law* (Oxford: Oxford University Press, 2003) at 120 (who equally regards recklessness or negligence as insufficient); MOHAMED ELEWA BADAR, "Drawing the Boundaries of *Mens Rea* in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia", 6 *Int'l Crim. L. Rev.* 313 (2006) at 321 (*ibid.*, *dolus eventualis* and recklessness are not sufficient); GUÉNAËL METTRAUX, *supra* n. 6 at 116. Compare, however, APT and CEJIL, *Torture in International Law. A guide to jurisprudence*, 2008, to be found on http://www.apr.ch/content/files_res/jurisprudenceguide.pdf (last consulted 01/10/2014) at 12.

⁴² See, e.g., art. 1 UNGA Declaration; art. 1 UNCAT; art. 2 IACPPT; art. 8 (2) (c) (i)-4 ICC Elements of Crimes.

⁴³ See on specific intent in general ALBIN ESER, "Mental Elements – Mistake of Fact and Mistake of Law" in ANTONIO CASSESE, PAOLA GAETA and JOHN R.W.D. JONES (eds.), *The Rome Statute of the International Criminal Court: a commentary* (Oxford: Oxford University Press, 2002), Volume I at 900-902.

⁴⁴ European Commission of Human Rights ('ECnHR'), *Denmark, Norway, Sweden and the Netherlands v. Greece*, Appl. Nos. 3321/67, 3322/67, 3323/67 and 3344/67, Report, 5 November 1969, Volume II at 1, para. 2; ECnHR, *Ireland v. the United Kingdom*, Appl. No. 5310/71, Report, 25 January 1976 at 377; ECtHR, *Terzi and Erkmen v. Turkey*, Appl. No. 31300/05, Judgment, 28 July 2009, para. 31; ECtHR, *Gisayev v. Russia*, Appl. No. 14811/04, Judgment, 20 January 2011, paras. 143-145; IACnHR, *Mejía v. Peru*, Case 10.970, Report N° 5/96, 1 March 1996, Annual Report of the IACnHR 1995; IACtHR, *Bueno-Alves v. Argentina*, Judgment, 11 May 2007, para. 79; CAT, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment – General Comment No. 2: Implementation of article 2 by State parties, 24 January 2008, *UN Doc. CAT/C/GC/2* at 3, para. 10; HRC, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7): 10/03/92, *UN Doc. A/47/40(SUPP)*, para. 4; ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23&23/1, Trial Chamber, Judgment, 22 February 2001, para. 483; ICC, *Situation in the Central African Republic: Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Pre-Trial Chamber, Decision pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 294 (as regards torture as a war crime)

⁴⁵ E.g., art. 1(1) (e) Dutch International Crimes Act; Section 3 (b) (1) US TVPA; art. 174 (1) *Código Penal español*; art. 321 *Código Penal de Peru*; art. 269.1 Criminal Code of Canada.

⁴⁶ Art. 1 UNCAT refers to "such purposes as".

⁴⁷ Also ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, Trial Chamber, Judgment, 16 November 1998, para. 470; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, para.

discrimination already greatly increase the scope of torture, certain (inter)national definitions go even further. Article 2 IACPPT, for example, also refers to torture “for purposes of a criminal investigation”, torture “as a preventive measure” and even to torture “for any other purpose”. One such another purpose that has already been contemplated in the recent past, is humiliation.⁴⁸

The list thus seems to be expanding with ever more broader purposes. Moreover, even though one of the specific objectives needs to be pursued by the torturer, the ill-treatment must not be perpetrated solely for that purpose. It suffices that it was part of the motivation behind his (or her) acts. It must not be his only purpose, not even the predominating one.⁴⁹ The specific intent does not require a consequence or result element either. The particular goal must not be reached for the crime of torture to be committed.⁵⁰

It appears therefore that, although the specific intent has been put forward not only as an essential feature of torture but even a distinguishing aspect and for some even the element that makes torture unique, the open-ended list(s) and the fairly broad interpretations given to the different purposes make it easier to fulfil this condition. And international law has gone even further, as the ICC Elements of Crimes state that for torture as a crime against humanity, *no* specific purpose needs to be proved.⁵¹ Thus, there seems to be certain contradictory evolutions in international law: making the purpose of the torturer all-decisive appears rather difficult to reconcile with deleting the entire element. This appears all the more puzzling, when this evolution is coupled with the lowering of the threshold of the necessary pain or suffering: which element, one could ask, would then still distinguish torture from other ill-treatment?

E) A Perpetrator

Torture cannot be committed by itself. There has to be at least one perpetrator, one torturer. But it seems that not just anybody can torture. According to Article 1 UNCAT, the “*pain or suffering [should be] 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*”.⁵² Nonetheless, it should be immediately emphasised

140; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgement, 1 September 2004, para. 487; J. HERMAN BURGERS and HANS DANIELIUS, *supra* n. 18 at 46 and 118; MANFRED NOWAK and ELIZABETH MCARTHUR, *supra* n. 34 at 40-41. See similar language in art. 8 (2) (a) (ii)-1 2. & 8 (2) (c) (i)-4 2. Elements of Crimes ICC.

⁴⁸ See, e.g., ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998, para. 687; ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Appeals Chamber, Judgement, 21 July 2000, para. 111.

⁴⁹ See, e.g., ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, Trial Chamber, Judgement, 16 November 1998, para. 470; ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25, Trial Chamber, Judgement, 15 March 2002, para. 184; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Chamber, Judgement, 15 May 2003, para. 343.

⁵⁰ See equally MOHAMED ELEWA BADAR, “Drawing the Boundaries of *Mens Rea* in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia”, 6 *Int'l Crim. L. Rev.* 313 (2006) at 484 and 499.

⁵¹ Art. 7 (1) (f), fn. 14 Elements of Crimes ICC.

⁵² Similar stipulations can be found in other international definitions. The UNGA Torture Declaration used more restrictive language, and it put forward that the torture had to be inflicted “*by or at the instigation of a public official*”. Even though no reference is made to the capacity of the torturer in Article 2 of the 1985 Inter-American Convention,

that this requirement is not to be interpreted in a strict or rigid manner: it suffices that a (distant) link exists between the perpetrator and a person acting in an official capacity, whether the latter be part of the *de iure* or *de facto* authorities, and whether he or she acted within or outside his or her sphere of competence.⁵³

Moreover, in the fields of international humanitarian law and international criminal law, this requirement seems to have been dropped altogether. The ICTY in particular decided in *Kunarac et al.* that Article 1 (1) of the Torture Convention could not be regarded as representative of the international customary law definition, without considering the specific framework in which this definition is to operate. It concluded that in the context of international humanitarian law, the involvement of a State official or any other authority-wielding individual is not necessary for the offence of torture, as it stated that “[t]he characteristic trait of the offence in this context is to be found in the nature of the act committed rather than in the status of the person who committed it”.⁵⁴ Various successive judgements endorsed this ruling⁵⁵ and the condition was, for instance, no longer inserted in the definitions of the crimes of torture in the ICC Elements of Crimes.⁵⁶ The core crime of torture, as it now seems undisputed, can, as a result, be committed by State and non-State actors⁵⁷ alike.

But whether private torture should also be accepted in the context of human rights law still appears to be a different question. In the quite renowned *H.L.R.* case, the ECtHR did not rule out the possibility that Article 3 ECHR may also apply in cases where the danger emanates from persons or groups of persons who are not public officials.⁵⁸ In *A. v. United Kingdom*, the ECtHR even asserted that “the obligation on the High Contracting Parties under Article 1 of the Convention⁵⁹ to

its Article 3 does specify that the crime can only be committed by a public servant or an employee acting in that capacity who orders, instigates, induces, commits or fails to prevent torture, or by a person ‘who at the instigation of a public servant or employee mentioned (...) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto’.

⁵³ See STEVEN DEWULF, *supra* n. 1 at 363-370, nrs. 233-240.

⁵⁴ ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23&23/1, Trial Chamber, Judgement, 22 February 2001, paras. 482-496.

⁵⁵ E.g., ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23&23/1, Appeals Chamber, Judgement, 12 June 2002, paras. 146-148; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Chamber, Judgement, 28 February 2005, para. 284; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgement, 1 September 2004, paras. 488-489; ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber II, Judgment, 30 November 2005, para. 240.

⁵⁶ See art. 7 (1) (f), art. 8 (2) (a) (ii)-1 and art. 8 (2) (c) (i)-4 Elements of Crimes ICC. See also art. 27 Statute ICC.

⁵⁷ This refers to actors who are not officially part of the machinery of the State, and whose conduct is not generally attributable to it, JOHN CERONE, “Much Ado About Non-State Actors: The Vanishing Relevance of State Affiliation in International Criminal Law”, 10 *San Diego Int’l L.J.* 335 (2008-2009) at 338.

⁵⁸ ECtHR, *H.L.R. v. France*, Appl. No. 24573/94, Judgment, 29 April 1997, para. 40. See already (implicitly) ECtHR, *Ahmed v. Austria*, Appl. No. 25964/94, Judgment, 17 December 1996, para. 44. With respect to art. 3 ECHR, the Strasbourg Court has, on various occasions, also put forward that States have the duty to prevent and safeguard individuals under its jurisdiction from being ill-treated by other private individuals. See *inter alia* ECtHR, *Pantea v. Romania*, Appl. No. 33343/96, Judgment, 3 June 2003, paras. 189-190; ECtHR, *M.C. v. Bulgaria*, Appl. No. 39272/98, Judgment, 4 December 2003, para. 149; ECtHR, *Ay v. Turkey*, Appl. No. 30951/96, Judgment, 22 March 2005, para. 55.

⁵⁹ Art. 1 ECHR: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals".⁶⁰ In *Pueblo Bello Massacre*, the IACtHR equally concluded that Colombia had not diligently fulfilled its duties to protect the right to humane treatment of victims who had been tortured and ill-treated by (private) paramilitary outfits.⁶¹ And in its General Comment No. 20, the HRC also established that State parties have to afford protection against all the acts prohibited by Article 7, "whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity".⁶²

That being said, the notion of private torture does raise some complex questions from a human rights perspective, not so much from a definitional point of view, but rather as regards the issues of accountability and liability. Only States can be held accountable for human rights violations before, *inter alia*, the HRC, ECtHR and IACtHR. That does not mean that only States and their officials can commit acts of ill-treatment. Private violence could be identified as torture too; the human rights courts and bodies can even explicitly call it such. But they will not be able to sentence the private perpetrator, nor will they necessarily be able to hold a State accountable for the abuse.

However, the distinction between definition and responsibility can never be absolute. This is a most complicating factor. Defining torture in international human rights law is and remains intertwined with the obligations that the prohibition against torture creates for States. Giving a private reading to a human rights norm can greatly affect the duties of States. Even though certain cases of private abuse do and ought to qualify as torture in international human rights law, one must then still question why exactly that situation is given that designation, and more precisely, why, in that instance, a State would be held responsible for that violation.

F) A Victim

Finally, and of course, there needs to be a victim of the torturous pains and sufferings. This victim must be a human being. All definitions on the matter are quite clear: the pain or suffering must be inflicted on one or more person(s).⁶³

⁶⁰ ECtHR, *A. v. United Kingdom*, Appl. No. 25599/94, Judgment, 23 September 1998, para. 22.

⁶¹ The State had not carried out an effective investigation as was required either. The non-fulfilment of its positive obligations by the respondent party was examined and established simultaneously *vis-à-vis* the right to humane treatment, the right to life (art. 4 ACHR) and the right to personal liberty (art. 7 ACHR), IACtHR, *Pueblo Bello Massacre v. Colombia*, Judgment, 31 January 2006, paras. 119-153.

⁶² HRC, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7): 10/03/92, *UN Doc. A/47/40(SUPP)*, para. 2 (see also para. 13). See also HRC, General Comment No. 31 [80]: Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004, *UN Doc. CCPR/C/21/Rev.1/Add.13*, para. 8.

⁶³ E.g., art. 1.1. UNGA Torture Declaration; art. 1 UNCAT; art. 7 (1) (f) 1. Elements of Crimes ICC (torture as a crime against humanity); art. 8 (2) (a) (ii)-1-1. (torture as a war crime in an international armed conflict) and 8 (2) (c) (i)-4 1. (*ibid.*, in non-international armed conflicts) Elements of Crimes ICC; Section 7.1 Statute Special Panels.

As a torturer will want to establish control over his victim, the latter will (be made to) feel helpless. This helplessness or *powerlessness*, it has been argued in more recent times, should even be regarded as one distinctive, if not *the most* distinctive feature of torture.⁶⁴ Yet this element does not appear in any of the international definitions. Moreover, this element seems all but exclusive to torture. The European Court of Human Rights, for instance, stressed in *Rachwalski and Ferenc* the profound feeling of vulnerability and sense of powerlessness the victim must have experienced, before it concluded that the maltreatment was degrading.⁶⁵ Others have also fiercely objected to making this element an essential or distinctive part of the legal definition of torture, as an inherent danger exists of misinterpreting the notion of powerlessness.⁶⁶

Such a situation of powerlessness, nonetheless, creates an ideal atmosphere for the torturer to break the will of the victim. By generating total dependency and by rousing a sense of complete despair, the victim will ultimately give up. He will submit to his torturer and comply with his wishes; he will lose self-control.⁶⁷ This submission automatically creates full power for the torturer. A victim who breaks and then loses his will to an alien force, has equally been called an essential characteristic of torture. What makes a person an individual, is his choosing capacity, his ability to do as he desires. This is the essence of being human. If this is taken away, a human being is violated in his core.⁶⁸ Yet once more, this does not appear to be a feature that is unique to or absolute for torture. This could be because other types of ill-treatment could equally be inflicted in order to force the victim into submission⁶⁹ or to act against his will or conscience⁷⁰. Or it could be because there are cases of torture possible in which the victim did not break or surrender to his tormentor. The same observations apply to the potential annihilation of the victim: even though

⁶⁴ See, e.g., Report of the Special Rapporteur on the question of torture, Manfred Nowak, *UN Doc. E/CN.4/2006/6* at 13, para. 39; MANFRED NOWAK and ELIZABETH MCARTHUR, *supra* n. 34 at 1.

⁶⁵ ECtHR, *Rachwalski and Ferenc v. Poland*, Appl. No. 47709/99, Judgment, 28 July 2009, para. 61.

⁶⁶ They give the example of a detained person who has information that could save lives, but which he refuses to give up to his interrogators. This, these authors assert, creates some sort of power for the captive that he has over his captors. If in this scenario, powerlessness would be identified as a vital component of torture, then this could lead to erroneous legal conclusions. It could be argued that the victim was not completely powerless, which could then exclude the qualification of torture, even if the victim was subjected to extreme pains so that he would disclose his secrets. SIR NIGEL S. RODLEY and MATT POLLARD, *supra* n. 6 at 119, fn. 193. See, for another critique on the element of powerlessness in the context of gender-based violence, RHONDA COPELON, "Gender Violence as Torture: The Contribution of CAT General Comment No. 2", 11 *NYCLR* 229 (2008) at 242, fn. 52.

⁶⁷ E.g., ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, Trial Chamber, Judgment, 16 November 1998, para. 941; ECtHR, *Polonskiy v. Russia*, Appl. No. 30033/05, Judgment, 19 March 2009, para. 124.

⁶⁸ Cf. LOUIS MICHAEL SEIDMAN, "Torture's Truth", 72 *U. Chi. L. Rev.* 881 (2005) at 900-901. See also JOSEPH L. FALVEY JR. and BRIAN D. ECK, "Holding the High Ground: The Operational Calculus of Torture and Coercive Interrogation", 32 *Campbell L. Rev.* 561 (2010) at 562.

⁶⁹ E.g. ECtHR, *Barabanshchikov v. Russia*, Appl. No. 36220/02, Judgment, 8 January 2009, paras. 52-53 (inhuman treatment).

⁷⁰ The European Court of Human Rights, for instance, described degrading treatment within the meaning of art. 3 ECHR as treatment that is such as to arouse in the victims feelings of fear, anguish and inferiority, capable of debasing and humiliating them (e.g. ECtHR (Grand Chamber), *Kudla v. Poland*, Appl. No. 30210/96, Judgment, 26 October 2000, para. 92) and possibly breaking their moral or physical resistance (e.g.); ECtHR (Grand Chamber), *Selmouni v. France*, Appl. No. 25803/94, Judgment, 28 July 1998, para. 99), or when it was such to drive the victims to act against their will or conscience (e.g. ECtHR, *Gäffen v. Germany*, Appl. No. 22978/05, Judgment, 30 June 2008, para. 66).

victims can be destroyed for life by the torments they endured, this is not necessarily the case either. Some will never break and perish without surrendering. Others may reduce themselves to a temporary state of passivity during a torture session, as part of a survival tactic.⁷¹

Given that a torture victim must not be destroyed *per se*, nor must his will necessarily be broken or must he have surrendered, the essential nature of these components should be questioned. More than that, one ought to ask what significance must be attributed to the intertwined elements of control of the perpetrator and powerlessness of the victim. Indeed, *is a state of full control and powerlessness truly necessary?* This question becomes all the more important and delicate when one takes into account the vague nature of both terms and, above all, the fact that control and powerlessness are not exclusive to torture. Accepting these elements as distinguishing features could potentially have vastly expanding consequences for this core type of ill-treatment. Not accepting them as essential components, on the other hand, could similarly open up the concept to non-traditional torture cases.

IV. CONCLUSION

If all elements are taken into consideration, it must be concluded that there is not one unambiguous, definite and completely satisfactory definition of torture in international law. There is, to begin with, not *one* definition of torture. Various treaties and other documents, for instance, contain definitions that are not fully identical, and every international court or body interprets torture in a manner which, in one way or another, is different or unique from how the other institutions understand this practice. Moreover, each constituent element of torture is plagued by *vagueness* and forms a topic of discussion, not only as regards content but also as to whether (part of) the element in question is a distinguishing or an essential feature of torture. This is only worsened by the fact that torture *evolves*. The passing of time seems to have a considerable impact on how the practice is conceived. The meaning of some basic elements alters, new components seem to be added and some features appear to gain importance, whereas other parts seem to lose significance. That (the views on) torture and (the interpretations of) its basic components evolve is not automatically a bad thing. On the contrary, it allows for flexibility and for the legal concept to adapt to changing times. But the ensuing imprecision makes it more complicated to grasp what torture actually stands for. Moreover, if all evolutions are taken together, then the danger looms of massively expansive interpretations. Against this background, a redefinition of torture indeed seems warranted...⁷²

⁷¹ E.g., in case of rape. This is often a first phase, before the victim completely loses its will to live. See RHONDA COPELON, "Recognizing the Egregious in the Everyday: Domestic Violence as Torture", 25 *Colum. Hum. Rts. L. Rev.* 291 (1993-1994) at 347.

⁷² For a suggestion of a new definition of torture, see STEVEN DEWULF, *supra* n. 1 at 453-560, nrs. 296-369.