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SEXUAL TORTURE AS A CRIME UNDER INTERNATIONAL CRIMINAL AND HUMANITARIAN LAW

*Patricia Viseur Sellers**

Thank you. Good morning.

General Comment 2 certainly advances our understanding of the protection afforded individuals and groups from torture as well as cruel, inhumane, degrading treatment and punishment—whether such torture is State driven or otherwise attributable to the State via private actors.¹ Women and girls, as human beings, benefit from the clarifying and progressive aspect of General Comment No. 2. Sexual violence inflicted upon women and girls—and to a lesser extent males—has driven the recent development of torture law and its subsequent interpretation. The Committee Against Torture’s concluding remark in paragraph 27 of General Comment No. 2 exhorts that the previous comments are “without prejudice to any higher protection contained in any international instrument or national law.”²

General Comment No. 2 explicitly encourages the penalization of torture under national law.³ I, however, will direct my remarks to torture as a crime under international criminal law and under humanitarian law, otherwise known as the law of armed conflict. It is important to recognize that other bodies of international law, parallel to human rights law, continuously develop and inter-

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¹ See generally U.N. Office of the High Commissioner for Human Rights [OHCHR], Comm. Against Torture, *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, General Comment No. 2: Implementation of Article 2 by States Parties*, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter *General Comment No. 2*].

² *Id.* ¶ 27 (“The Committee reiterates that this general comment has to be considered without prejudice to any higher degree of protection contained in any international instrument or national law, as long as they contain, as a minimum, the standards of the Convention.”).

³ *Id.*

pret the crimes of torture and cruel and inhumane treatment.⁴ An examination of pertinent facts and relevant legal developments of torture under humanitarian law or international criminal law reveals an impermissible practice—sexual torture. The *jus cogens* value attributable to torture⁵ is the minimum of protections that we must ensure for ourselves and anyone subjected to sexual torture.

I will relate some of the factual bases of criminal convictions for torture. They are retold, not for their gory content, but to plainly illustrate and to underscore why sexual torture, as a practice, must be eliminated, irrespective of any “qualifying circumstances” related to when, where, how, or why the torture was inflicted.

In the Statute of the International Criminal Tribunal for the former Yugoslavia, torture is enumerated: in Article 5, the provision of the crimes against humanity⁶; in Article 2, the war crime provisions of grave breaches⁷; and interpreted under Article 3 of the Statute, a residual provision that covers war crimes not expressly enumerated under the Statute, such as Common Article 3

⁴ See Linda M. Keller, *Is Truth Serum Torture*, 20 AM. U. INTL L. REV. 521, 534–36 (2004–2005). Keller provides a focus on international law stating that it is “where the definition of torture is most developed.” *Id.* at 534. Keller also provides that international law “has risen to the level of a *jus cogens* norm binding on all states.” *Id.* at 535. Keller also provides a list of international documents, which cover torture and cruel, inhuman or degrading treatment. *Id.* at 535–36.

⁵ See Prosecutor v. Furundzija (*Furundzija*), Case No. IT-95-17/1-T, Judgment, ¶ 160 (Dec. 10, 1998).

⁶ See Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 2, February 2008, 32 I.L.M. 1192. Article 5 of the Yugoslav Statute, entitled Crimes Against Humanity reads:

The International Tribunal shall have power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) *torture*; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other their inhumane acts.

Id. art. 5.

⁷ *Id.* Article 2 of the Yugoslav Statute, entitled Grave Breaches of the Geneva Conventions of 1949 reads *inter alia*:

The International Tribunal shall have power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Convention: (a) wilful killing; (b) *torture or inhumane treatment*, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; . . .

Id. art. 2.

of the Geneva Conventions of 1949.⁸ Hence, in terms of international armed conflict or internal armed conflict—hence armed conflict irrespective of its characterization—torture is actionable under the Statute of the Yugoslav Tribunal. Torture was also expressly included as a crime against humanity in Article 3 and as a violation Common Article 3 and Additional Protocol II under Article 4 of the Statute of the International Criminal Tribunal for Rwanda.⁹

Torture was subsumed under the war crime provisions of the London¹⁰ and Tokyo Charters¹¹ that governed the World War II Nuremberg and Tokyo international military tribunals. Nonetheless, neither the Geneva Conventions of 1949, including Common Article 3, nor the subsequent Additional Protocols to the Geneva Conventions defines the elements of torture.¹² Torture's inclusion as a war crime in the Yugoslav and Rwandan Statutes reflects both the treaty bases of Geneva Law and precepts derived from the violations of the laws and customs of war.

As a crime against humanity, however, torture originates not from the Nuremberg or the Tokyo prosecutions, but from the subsequent prosecutions in the European theatre that were governed by Control Council Law No. 10.¹³ Torture as originally cast under the crime against humanity provision of Control Council No. 10

⁸ Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-AR72, ¶ 92 (Oct. 2, 1995) [hereinafter *Tadic* Jurisdiction Decision].

⁹ Statute of the International Criminal Tribunal for Rwanda, for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed on the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of the Neighbouring States, between 1 January 1994 and 31 December 1994, S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994), *reprinted in* 33 I.L.M. 1598 (1994) [hereinafter Rwanda Statute].

¹⁰ Charter of the International Military Tribunal, Annexed to the London Agreement, 8 Aug. 1945, art. 6(b) U.N.T.S. 280, 59 Stat. 1544, 8 AS No. 472 [hereinafter London Charter].

¹¹ Charter of the International Military Tribunal for the Far East, Tokyo, Art. 5(b), Jan. 19, 1946, 17 T.I.A.S. 1589 [hereinafter Tokyo Charter].

¹² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, June, 8 1977, 1125 U.N.T.S. 3 (entered into force 7 Dec. 1978) (Additional Protocol I), *reprinted in* 16 I.L.M.1391 (1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, (entered into force 7 Dec. 1978) (Additional Protocol I), *reprinted in* 16 I.L.M.182 (1977).

¹³ Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Control Council Law No. 10, art. 2 (c) (Dec. 20, 1945), *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/01LAW09.pdf.

justifies its enumeration within the Yugoslav and Rwandan Statutes; albeit, torture as a crime against humanity is recognition based upon customary international law.

Still, torture is conducive to individual penal sanctions under humanitarian law, or as a crime against humanity, was rift of the specific criminal elements when the *ad hoc* tribunals were created.¹⁴ Now that seems strange, in particular to people who practice criminal law. How does a crime exist without knowledge or notice of its criminal elements? Thank goodness, in 1984 when the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention" or "CAT convention")¹⁵ was drafted, Article 1 of the Convention informed humanitarian law and international criminal law, as well as human rights law, of torture's customary definition. As a result, the first judgments delivered by the Yugoslav Tribunal and Rwandan Tribunal that addressed torture referred to the customary definition contained in the Convention to enunciate the elements of torture as a war crime and as a crime against humanity.¹⁶

¹⁴ See, e.g., *Furundzija* (*Furundzija*), Case No. IT-95-17/1-T, Judgment, ¶¶ 159; see also *supra* notes 6, 7, 9. Neither the Geneva Convention of 1949, the Additional Protocols to the Geneva Conventions of 1977, nor the Yugoslav Statute and Rwanda Statute discussed above, enumerated crimes prohibited in their instruments, including torture. In direct contrast, crimes under the jurisdiction of the Rome Statute of the International Criminal Court, U.N. Doc. A/CONE.183/9 (July 17, 1998) [hereinafter Rome Statute], state their respective elements in a supplemental instrument, the Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000) [hereinafter Elements of Crimes].

¹⁵ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984) [hereinafter Convention].

According to Articles 1 and 2 of the Convention:

1. For purposes of this Convention, any act by which severe pain and suffering, whether physical or mental, as 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.
2. This article is without prejudice to any international instrument Which does or may contain provisions of wider application.

Id.

Regional human rights instruments, notably Article 2 of the Inter-American Convention to Prevent and Punish Torture, voice slightly different requirements for torture as a human rights violation. See Inter-American Convention to Prevent and Punish Torture, art. 2, Dec. 9, 1985, O.A.S.T.S. No. 67, OEA/Ser.A/42, *entered into force* Feb. 28 1987.

¹⁶ See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2,

Among the first Yugoslav Tribunal judgments that opined on torture was the Čelebići case,¹⁷ formally called the *Prosecutor vs. Delalic* case. The case concerned a Muslim-run detention camp that held Serbian victims.¹⁸ Serbian women and men were separated from each other and kept in different sections of the detention camp.¹⁹ The judgment found that the camp's deputy commander raped two Serbian female prisoners in order to intimidate the other female detainees²⁰ and to discourage dissent among the prisoners, in particular the women.²¹ The Trial Chamber held that those incidents of rape amounted to torture as a war crime under Article 3 of the Yugoslav Statute.²² Even though the Trial Chamber resorted to the CAT Convention's customary definition to derive the elements of torture as a war crime,²³ the Chamber's interpretation of the elements varied slightly from the Convention's. The Chamber held that torture could be committed by State actors and non-State actors.²⁴ This legal holding took into account the break-up of the former Yugoslavia, which resulted in Parties to an armed conflict acting on behalf of political entities, rather than *bona fide* States that were fully recognized by the international community. Nonetheless, the Čelebići Trial Chamber held the individual perpetrators responsible as *de facto* State actors.²⁵

Turning our attention to the facts of the Čelebići case is crucial. Professor Rhonda Copelon reminds us, that generally, we precipitate over the meaning and the experience of rape as torture. Although it is agreed that rape should be recognized as torture, we

1998), *Furundzija* (*Furundzija*), Case No. IT-95-17/1-T, Judgment, ¶¶ 159–164; *see also* *Prosecutor v. Delalic* (*Delalic*), Case No. IT-96-21-T, Judgment, ¶¶ 452–469 (Nov. 16, 1998).

¹⁷ *Delalic*, Case No. IT-96-21-T, Judgment.

¹⁸ *Id.* ¶¶ 4, 130.

¹⁹ *Id.* ¶ 153.

²⁰ *Id.* ¶ 941.

²¹ *Id.*

²² *Id.* ¶¶ 941, 963.

²³ *Id.* ¶¶ 459.

²⁴ The Trial Chamber observed that, “In the context of international humanitarian law, this requirement must be interpreted to include officials of non-State parties to a conflict, in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities.” *Id.* ¶ 473.

²⁵ The Trial Chamber found that Hazim Delic and Esad Landzo perpetrated acts of torture in their roles as officials of the Bosnian authorities running the prison-camp. *Delalic*, Case No. IT-96-21-T, Judgment, ¶¶ 923, 940, 962, 967, 998. The State of Bosnia and Herzegovina was recognized as independent on April 6, 1992, however, The Republic of Bosnia and Herzegovina became Bosnia and Herzegovina after the Dayton Peace Agreement in 1995. *Id.* ¶ 2 n.6.

hesitate to visualize rape and to truly understand why rape is torture. Let me describe what often happens when a person, usually a woman, suffers rape in a detention setting. The act is completely unrelated to any sexual relations that, I hope, you in the audience have experienced.

Sexual penetrations or rapes, in a detention center are usually forced²⁶ upon women who have not bathed in days, who have not brushed their teeth in weeks, who are starving, who are recovering from or are still in shock from seeing loved ones killed or mutilated, or who have witnessed their houses burned down. The actual rape is usually perpetrated upon a person who is utterly and physically exhausted and terrorized. Her body is stiff. Her mind sends no hormonal signals to release lubricating fluids to the body. The person is forced to witness and participate in her own torture—the forceful penetration. The victim is also forced to engage in unwanted touching, fondling, and kissing. Usually the victim is forced to be nude during the rape and to listen to the perpetrator insult her, her race, or her ethnic group. The rape is often committed in public, even if only one other person is present, maybe another guard at the side of the perpetrator who waits for his turn. Such facts certainly amount to the infliction of severe pain and severe mental suffering even before a victim-survivor is stricken with Post Traumatic Stress Disorder.²⁷ Rape as torture is an act of sexual penetration that is separate and differentiated from, and unrelated and adverse to the sexual relations one experiences in their everyday life.

²⁶ Force must be interpreted broadly. It is not limited to notions of physical coercion as noted in the International Criminal Court's definition of the War crime of rape:

1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2) The invasion was committed by force, or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such a person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

Elements of Crimes, *supra* note 14, art. 8(2) (b) (xxii)-1.

²⁷ A person with Post Traumatic Stress Disorder (PTSD) "has been exposed to a traumatic event in which both of the following were present: (1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others; (2) the person's response involved intense fear, helplessness, or horror." AM. PSYCHIATRIC ASSN., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV § 309.81 (4th ed. 1994).

In the Čelebići case, two women were raped under circumstances similar to those just described.²⁸ Sexual violations were also inflicted upon the male prisoners.²⁹ Certain male prisoners were forced to commit fellatio upon each other. The Trial Chamber factually found that a father-son pair was forced to suffer such a sexual assault. The act not only increased the fear and the terror among the other male inmates, but also sharpened the father and son's sense of humiliation.³⁰ Investigations at the Yugoslav Tribunal reveal that males are often sexually tortured³¹ in related pairs: captain/private, father/son, brother/brother.³² Male sexual assault is frequently done publicly, in front of the other male prisoners. It purposefully sends a terrorizing message to them. In addition, in the Čelebići camp males were sexually tortured by having live wires wrapped around their penis.³³

The Trial Chamber found that these acts amounted to cruel treatment and inhumane treatment.³⁴ Again, humanitarian law did not provide specific elements of these offenses.³⁵ In this instance, the Trial Chamber did not revert to the CAT Convention, but developed elements from past international jurisprudence, in particular from the subsequent trials of Nuremberg.³⁶ Accordingly, the Trial Chamber's jurisprudence on sexualized torture under humanitarian law also scrutinized factual findings, as well as humanitarian law policy when determining the elements of torture and cruel and inhumane treatment and when forging their subsequent interpretation.

Another case that examined sexual torture, at the Yugoslav Tribunal was the *Prosecutor v. Furundzija*.³⁷ It is a very short case that resulted in the Trial Chamber convicting a paramilitary com-

²⁸ *Delalic*, Case No. IT-96-21-T, Judgment, ¶¶ 926–43, 944–65.

²⁹ *Id.* ¶¶ 1062–66.

³⁰ *Id.* ¶ 1065.

³¹ See, e.g., *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgement, ¶ 206 (May 7, 1997); *Prosecutor v. Milan Simic*, Case No. IT-95-9-T, Judgment (October 17, 2003); *Prosecutor v. Stevan Todorovic*, Case No. IT-95-9/1-S, Sentencing Judgment (31 July 2001); *Prosecutor v. Ranko Cesic*, Case No. IT-95-10/1-S, Sentencing and Judgment (March 11, 2004); *Prosecutor v. Plavsic*, Case No. IT-00-39 and 40, Sentencing and Judgment (Jan. 27, 2003).

³² *Delalic*, Case No. IT-96-21-T, Judgment, ¶ 1065.

³³ *Id.* ¶¶ 1038–40, 1045.

³⁴ *Id.* ¶ 1072. But see *id.* ¶ 1019 (The placing of a burning fuse cord around the genital areas two victims caused "great suffering or serious injury.").

³⁵ *Id.*

³⁶ Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 123 (2008).

³⁷ *Furundzija*, Case No. IT-95-17/1-A, Judgment, Disposition ¶ 112.

mander of torture and rape.³⁸ The pertinent facts are as follows: A Bosnian Muslim woman, Witness A, was arrested and taken to the barracks of a Bosnian-Croat paramilitary group, the Jokers. At the barracks she was “asked” to take off her clothes.³⁹ She stood in a state of forced nudity while she awaited someone called the “Boss” to arrive and to interrogate her.⁴⁰ When Furundzija, the “Boss,” appeared, he questioned her on the whereabouts of her son and a hidden military radio. During the interrogation, another member of the Jokers paramilitary group, Bralo, drew out a knife and slowly scraped the blade up and down her body. Bralo threatened to cut out Witness A’s vagina if she didn’t answer Furundzija’s questions correctly.⁴¹

After the initial interrogation, Furundzija left the barracks and went to another building on the paramilitary compound. Meanwhile, Bralo continued to sexually torture Witness A, raping her orally, anally, and vaginally in conditions similar to those I described earlier. Imagine her physical and mental pain.⁴² Moreover, Witness A endured the torture in front of about thirty other paramilitary soldiers who were fully armed.⁴³

The commander returned with a Bosnian-Croat soldier, Witness D, who the paramilitary group had detained earlier in order to extract information from him.⁴⁴ Prior to his detention by the Jokers, Witness D had been held in a Bosnian Muslim Army prison. Furundzija wanted to know whether Witness D had revealed any facts to the Bosnian Muslim Army about the Bosnian-Croat military command or its future military operations.⁴⁵ In order to coerce Witness D’s confession, he was taken to the barracks where he was forced to watch the anal, vaginal, and oral rape inflicted on a naked woman,⁴⁶ Witness A.

The Trial Chamber held that Witness A was tortured. It also

³⁸ *Id.*

³⁹ *Id.* ¶ 40.

⁴⁰ *Id.* ¶ 80.

⁴¹ *Id.* ¶ 82.

⁴² *Id.* ¶ 83.

⁴³ *Id.* ¶ 76.

⁴⁴ *Id.* ¶ 84.

⁴⁵ *Id.* ¶ 75.

⁴⁶ *Id.* ¶ 87. See also Prosecutor v. Miroslav Bralo, Case No. IT-95-17-S, Sentencing Judgment, Dec. 7, 2005. Bralo was indicted, but only arrested several years after Furundzija was tried. Bralo pleaded guilty to the rape and torture of Witness A and currently serving a twenty year prison term. The *Bralo* Trial Chamber characterized the relevant facts of torture as, “Bralo threatened Witness A’s life while she was being interrogated, he raped her in front of an unknown number of other people over an extended period of time, and he bit her and ejaculated repeatedly over her body

held that Witness D, even though he was a Bosnian-Croat soldier like the perpetrators, had been tortured because he was forced to watch someone else be tortured in an attempt to make him confess.⁴⁷ The *Furundzija* Trial Chamber, like the Čelebići case, looked to the CAT Convention definition to pronounce the elements of the prohibition of torture under humanitarian law. The judgment reiterated that Furundzija, acting under color of Herzeg-Bosna, an independent political entity inside the Republic of Bosnia and Herzegovina,⁴⁸ was a *de facto* State actor and could be guilty of torture. Again, the Trial Chamber did not require facts to establish the actions nor lack of due diligence on the part of a “legitimate” State as a pre-condition to convict the paramilitary commander.⁴⁹

The next Yugoslav judgment that advanced torture jurisprudence was the *Prosecutor v. Kunarac*.⁵⁰ It is commonly referred to as the Foca judgment, in reference to the town where the crimes occurred. The case follows eight to twenty Bosnian Muslim women and girls through a series of Bosnian Serb detention centers and private homes. In these locations, the females suffered countless rapes by Kunarac’s military unit and other Bosnian Serb troops who rotated back and forth to the frontlines of battle.⁵¹ Several of the women and girls were eventually enslaved.⁵² Later, some were sold for a television set or the sum of 500 Deutsch marks.⁵³

The facts of the *Kunarac* case are unbearable. In one incident, Kunarac’s deputy urged a young woman to “please” his commander, Kunarac. While Kunarac’s soldiers are in the living room of a house, raping another female detainee, the young woman is told to go into the commander’s bedroom and to initiate sexual intercourse with him. She is, in essence, ordered to start her own torture process. The young woman was aware that Kunarac’s soldiers in the living room were fully armed. The deputy had threatened to kill her if she did not ensure that Kunarac was

during his prolonged assault of her. These actions demonstrate a desire to debase and terrify a vulnerable woman, who was at the complete mercy of her captors.” *Id.* ¶ 34.

⁴⁷ *Furundzija*, Case No. IT-95-17/1-A, Judgment, Disposition ¶ 267(ii).

⁴⁸ *Id.* ¶ 51.

⁴⁹ The *Furundzija* Trial Chamber interpreted the official capacity element as: “at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.* as a *de facto* organ of a State or any other authority-wielding entity.” *Id.* ¶ 62.

⁵⁰ *Prosecutor v. Kunarac*, Case No. IT-96-23 and 23/1, Judgment (Feb 22, 2001).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* ¶¶ 775–782.

“pleased.”⁵⁴ In addition to the incessant rapes in the Kunarac case, there was forced nudity. Women and girls are forced to dance on tabletops while naked and generally made to remain unclothed, as long as the soldiers so desired.⁵⁵

For the countless rapes, the *Kunarac* Trial Chamber found the three accused guilty,⁵⁶ *inter alia*, of torture as a war crime. Likewise, they were guilty of the crimes of rape, enslavement, and inhumane acts as crimes against humanity under the Yugoslav Statute. The *Kunarac* Trial Chamber, moreover, after a lengthy comparison of torture’s characterization as a human rights violation and its status as an international crime, revised the elements of torture handed down in the previous Yugoslav judgments.⁵⁷ The *Kunarac* Trial Chamber duly regarded the definition in the CAT Convention, but rejected the utilization of those requirements not in conformity to humanitarian law norms. The *Kunarac* Trial Chamber viewed torture, including sexual torture, as not requiring *any* element of official capacity.⁵⁸ It held that humanitarian law eschewed an element of State or official capacity or acquiescence or consent of official capacity.⁵⁹ It opined that other crimes under humanitarian law did not confine perpetrators to be State actors.

The jurisprudence of the *ad hoc* Tribunals fostered a more germane interpretation of torture under humanitarian law and international criminal law that readily encompassed rape yet removed requirements of official capacity or consent. Emphasis is to be

⁵⁴ *Id.* ¶ 219.

⁵⁵ *Id.* ¶¶ 766–774.

⁵⁶ *Id.* ¶¶ 593–822.

⁵⁷ The *Kunarac* Trial Chamber opined that:

[The Chamber] must consider each element of the definition “from the specific viewpoint of international criminal law relating to armed conflicts.” In practice, this means that the Trial Chamber must identify those elements of the definition of torture under human rights law which are extraneous to international criminal law as well as those which are present in the latter body of law but possibly absent from human rights regime.

Kunarac, Case No. IT-96-23 and 23/1, Judgment ¶ 488 (quoting *Furundzija*, Case No. IT-95-17/1-T, Judgment ¶ 162).

⁵⁸ *Id.* ¶ 496.

⁵⁹ The *Kunarac* Chamber held that torture as characterized by international customary law of international humanitarian law consisted of: (1) The infliction by act or omission, of severe pain or suffering, whether physical or mental; (2) The act or omission must be intentional; (3) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating, or coercing the victim or a third person, or at discriminating, on any ground against the victim or a third person. *See id.* ¶ 497.

placed on the torture act alleged to have been committed,⁶⁰ not the official or unofficial status of the torturer. To obtain a conviction for torture, the status of the perpetrator became irrelevant⁶¹ as long as other elements and the jurisdictional prerequisites were established. The humanitarian and criminal law interpretation, hence, moved beyond the Convention's customary definition.

I would endeavor to add that the factual bases also assisted in the development of torture law. The fact findings of sexual torture found in the *Kunarac* case together with the Chamber's acknowledgment of the sexual torture jurisprudence of the Čelebići and *Furundžija* cases, might have prompted, in part, the *Kunarac* Chamber's revisitation of the relevance of the element of official capacity for torture.

In another Yugoslav case, *Prosecutor v. Tadic*,⁶² two Bosnian Muslim male prisoners were forced to lick the buttocks of another male prisoner, suck his penis, and then were told to bite off his testicles.⁶³ In the indictment, the Prosecutor alleged torture and cruel treatment jointly, not alternatively, under Article 2 and 3 of the Yugoslav Tribunal Statute. The Trial Chamber held that those acts of sexual violence could amount to torture, under Article 3; however, the Defendant was owed the benefit of the lesser conviction⁶⁴ whenever the Prosecutor failed to distinguish the two crimes in the charging instrument. Therefore, the *Tadic* Trial Chamber entered a conviction for the war crime of cruel treatment.⁶⁵

I am confident that if torture were to have been properly charged in *Tadic*, the factual findings would have sufficed as the basis of the conviction.⁶⁶ Nevertheless, the acts of male sexual violence enriched the interpretation of cruel treatment and inhumane treatment as war crimes.⁶⁷

The International Criminal Court ("ICC"), as of yet, has not adjudicated evidence of torture as either a crime against humanity or as a war crime. The governing instrument of the ICC, the Rome

⁶⁰ *Id.* ¶ 495.

⁶¹ *Id.*

⁶² *Tadic*, Case No. IT-94-I-T, Judgement, ¶ 536.

⁶³ *Id.* ¶ 660.

⁶⁴ *Id.* ¶¶ 720, 726.

⁶⁵ *Id.* ¶¶ 720, 726.

⁶⁶ On appeal, the Appellate Chamber also held Dusko Tadic criminally liable for the sexual abuse as inhumane treatment under Article 2 of the Yugoslav Statute. *Prosecutor v. Tadic*, Case No. IT-94-I-A, Appeals Judgement (July 15, 1999).

⁶⁷ See Chandra Jeet, *International Criminal Justice: Issues and Perspectives*, 44 INT'L STUD. 258, 253–63 (2007) (book review).

Statute,⁶⁸ as supplemented by the Elements of the Crimes⁶⁹ modifies the requirements of torture. The Elements of the Crimes removes several CAT Convention prerequisites, codifies some of the *ad hoc* Tribunals' jurisprudence, and incorporates further changes.

The Rome Statute's elements of torture focus on an act where there is a knowing infliction of severe pain or suffering, whether physical or mental. The Rome Statute's potential interpretation, accordingly deletes any elements of official capacity and underlying purposes for the commission of the torture act. Paralleling the *ad hoc* Tribunal jurisprudence, it removes the relevance of official capacity, acquiescence, or consent. Thus, torture can be committed by a State or a non-State actor. The Rome Statute includes another element, namely, that the victim of torture must be in the custody or under the control of the perpetrator.⁷⁰ The definition of torture set forth in the CAT Convention has been addressed by international judicial institutions. How will the ICC elements of torture affect future adjudications of sexual violence under humanitarian law or international criminal law? Concerted attention must be given to the ICC's development of torture jurisprudence.

I emphasize that the facts of sexual torture described today, offers a lens and perspective from which to perceive and better understand facts that have surfaced from the detention facilities in Guantánamo and Abu Ghraib.⁷¹ In this week's *New Yorker* magazine, appears an article about the female soldier who snapped many of the pictures of Abu Ghraib prisoners when they were subjected to sexual torture. The article recounts that the soldier was incredulously unaware that she was photographing acts of torture actionable under humanitarian law. She justified these acts by simply observing that, "well, they were forced naked, but no one touched them." In essence, no physical harm was done to them.⁷²

⁶⁸ See Rome Statute, *supra* note 14.

⁶⁹ ELEMENTS OF CRIMES, *supra* note 14.

⁷⁰ For example, the Elements of the Crimes gives the critical elements of torture, as a crime against humanity under: "(1) The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; (2) Such person or persons were in the custody or under the control of the perpetrator." *Id.* art. 7(1)(f).

⁷¹ See generally Jamie Mayerfeld, *Playing by Our Own Rules: How Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89 (2007); THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

⁷² Specialist Sabrina Harman stated, "Until Redcross came we had prisoners the MI put in womens panties trying to get them to talk. Pretty funny but they say it was 'cruel.' I don't think so. No physical harm was done." Philip Gourevitch & Errol Morris, *Exposure: The Woman Behind the Camera at Abu Ghraib*, THE NEW YORKER, Mar. 24,

Soldiers must understand factually, what is torture. What does it mean to be held for hours in a position of forced nudity, among guards who are armed, while your genitals are exposed and female underwear is tied on your head? Such acts resurface homophobic taunting, patriarchal sexism, and dire fear. At their lowest denominator, they are degrading punishment. More appropriately, the mental suffering suffices to establish the crime of torture.

Today, as we proceed through the conference, we will concentrate on torture in its manifestation as a human rights violation. I, however, would underscore torture's other legal life under international criminal law and humanitarian law.

Thank you.