

# THE LIABILITY OF NON-STATE ACTORS FOR TORTURE IN VIOLATION OF INTERNATIONAL HUMANITARIAN LAW: AN ASSESSMENT OF THE JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

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*[The International Criminal Tribunal for the Former Yugoslavia, in considering charges of torture as a war crime, has on three occasions been required to determine the definition of torture under international humanitarian law. One aspect of the definition that has proved problematic is whether torture encompasses only acts committed by public officials or persons acting in an official capacity. This is an element of the definition of torture propounded in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This article surveys the jurisprudence of the ICTY regarding the definition of torture and the relevance of the definition in the Convention against Torture. The conclusions of the ICTY Chambers are then assessed in light of the relevant provisions of, and commentary to, conventional international humanitarian law; the extra-conventional effect of the Convention against Torture; and the definition of torture adopted in other international, regional and national contexts.]*

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### I INTRODUCTION

Torture is a term used in legal discourse to describe, broadly, the infliction of physical or mental pain and suffering upon a person for certain purposes. The precise meaning of the term, however, arguably remains unsettled for the purposes of international law. One notably difficult aspect of the definition of torture has been the status of the perpetrator, that is, whether torture by its very meaning pertains only to acts committed by the state or its agents or persons acting in an official capacity. Argument exists that ‘judicial torture is the *only* kind of torture, whether administered by an official judiciary or by other instruments of the state ... [and] that other things sentimentally called “torture” had better be called something else’.<sup>1</sup> In contrast, it is contended that the practice is defined by the nature of the act and that, as such, the status of the perpetrator is not an inherent element of the definition of torture.

The International Criminal Tribunal for the Former Yugoslavia (‘ICTY’), in its consideration of torture as a war crime, has been required to address the legal definition of torture under international humanitarian law.<sup>2</sup> Torture, whilst broadly proscribed under international humanitarian law, is not defined in international humanitarian law instruments. In the absence of an express definition, the ICTY has been required to determine the definition of torture under customary international law. In its assessment, the ICTY has vacillated in its conclusions as to whether torture by its very definition encompasses only acts committed by public officials or persons acting in an official capacity.

Much of the quandary has related to the question of whether the definition of torture expounded in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>3</sup> is representative of customary international law and, if so, whether it is the customary definition for the purposes of international humanitarian law. The *Convention against Torture* defines torture as follows:

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

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<sup>1</sup> Edward Peters, *Torture* (expanded ed, 1996) 7.

<sup>2</sup> The term international humanitarian law is used in this article to refer to the international law applicable in armed conflicts, including the law relating to the conduct of hostilities and the protection of victims of armed conflicts, evolving from the *Hague Conventions* and *Geneva Conventions*.

<sup>3</sup> Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (‘*Convention against Torture*’).

does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>4</sup>

The *Convention against Torture*, therefore, defines torture as an act perpetrated by a limited class of persons, namely, state officials and persons acting in an official capacity.

This article will examine the relevant jurisprudence of the ICTY that considers the customary definition of torture for the purposes of international humanitarian law, and will detail the conclusions of the ICTY Chambers relating to the status of the perpetrator as an element of that definition. The correctness of the findings of the various ICTY Chambers will be assessed in light of conventional international humanitarian law and the definition of torture used in other international, regional and domestic legal contexts. The extra-conventional applicability of the *Convention against Torture* definition in the context of international humanitarian law will also be assessed.

## II THE JURISPRUDENCE OF THE ICTY CONSIDERING THE DEFINITION OF TORTURE IN INTERNATIONAL HUMANITARIAN LAW

The ICTY has comprehensively examined the definition of torture under international humanitarian law on three occasions. In each instance, the respective ICTY Chambers have reached a different conclusion in respect of the status of the perpetrator as an element of the definition. Prior to providing a synopsis of the judgments, it is prudent to briefly outline the prohibition of torture under international humanitarian law and the basis of the jurisdiction of the ICTY over acts of torture committed in violation of that law.

### A *International Humanitarian Law Provisions Relating to Torture and the Jurisdiction of the ICTY*

The practice of torture has ‘existed through all periods of history’ and is not ‘confined to any single political system, regime, culture, religion or geographical location’.<sup>5</sup> Despite the historical and geographical prevalence of torture, international law has indefatigably addressed itself to the prohibition of torture such that ‘the torturer has become — like the pirate and the slave trader before him — *hostis humani generis*, an enemy of all mankind’.<sup>6</sup> The prohibition of torture in armed conflict has a long history, as ‘generally speaking, wartime human rights preceded those of peacetime in the international arena’.<sup>7</sup> Torture is not explicitly proscribed under early humanitarian law instruments. However, it is clearly contrary to the obligation to treat prisoners of war and civilians humanely, which is expressed in, for example, the *Regulations* annexed to the *Hague Convention Respecting the Laws and Customs of War on Land*.<sup>8</sup> As such,

<sup>4</sup> Ibid art 1 (emphasis added).

<sup>5</sup> Daniel Derby, ‘Torture’ in M Cherif Bassiouni (ed), *International Criminal Law* (2<sup>nd</sup> ed, 1999) vol 1, 705, 705.

<sup>6</sup> *Filartiga v Pena-Irala*, 630 F 2d 876, 890 (2<sup>nd</sup> Cir, 1980) (Kaufman J).

<sup>7</sup> Yoram Dinstein, ‘Human Rights in Armed Conflict: International Humanitarian Law’ in Theodor Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (1984) 345, 347.

<sup>8</sup> *Hague Convention Respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, [1910] ATS 8 (entered into force 26 January 1910), annex 1 arts 4, 46.

‘it follows that torture is implicitly forbidden against these classes of individuals’.<sup>9</sup>

The four *Geneva Conventions* of 1949 prohibit the practice of torture against the classes of persons protected by each respective instrument in times of international armed conflict.<sup>10</sup> The practice of torture is thus proscribed against wounded and sick combatants on land,<sup>11</sup> wounded, sick and shipwrecked combatants at sea,<sup>12</sup> prisoners of war,<sup>13</sup> and civilians in the hands of a party to the armed conflict or an occupying power of which they are not nationals.<sup>14</sup> Further, torture is classified as a grave breach of the *Geneva Conventions*.<sup>15</sup> This requires state parties to criminalise the practice and to prosecute or extradite persons in their custody alleged to have committed torture in violation of the *Geneva Conventions*, regardless of the nationality of the perpetrator or territory where the act was committed.<sup>16</sup> The proscription of torture in international armed conflict is further entrenched under the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*.<sup>17</sup>

International humanitarian law also prohibits torture in non-international armed conflict. Common art 3 to the *Geneva Conventions* — a ‘minimum yardstick’ of protection applicable in non-international armed conflicts<sup>18</sup> — includes torture as an act prohibited against persons ‘taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause’. Similarly, the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict* prohibits the practice of torture against all persons who are not

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<sup>9</sup> Derby, above n 5, 719.

<sup>10</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (*‘Geneva Convention I’*); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (*‘Geneva Convention II’*); *Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (*‘Geneva Convention III’*); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (*‘Geneva Convention IV’*) (collectively *‘Geneva Conventions’*).

<sup>11</sup> *Geneva Convention I*, above n 10, art 12.

<sup>12</sup> *Geneva Convention II*, above n 10, art 12.

<sup>13</sup> *Geneva Convention III*, above n 10, arts 13, 14.

<sup>14</sup> *Geneva Convention IV*, above n 10, arts 27, 32.

<sup>15</sup> *Geneva Convention I*, above n 10, art 50; *Geneva Convention II*, above n 10, art 51; *Geneva Convention III*, above n 10, art 130; *Geneva Convention IV*, above n 10, art 147.

<sup>16</sup> *Geneva Convention I*, above n 10, art 49; *Geneva Convention II*, above n 10, art 50; *Geneva Convention III*, above n 10, art 129; *Geneva Convention IV*, above n 10, art 146.

<sup>17</sup> Opened for signature 12 December 1977, 1125 UNTS 3, art 75 (entered into force 7 December 1978) (*‘Additional Protocol I’*).

<sup>18</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, [218].

directly involved in, or who have ceased to be involved in, hostilities in a non-international armed conflict.<sup>19</sup>

The ICTY, created in 1993 by *Security Council Resolution 827*<sup>20</sup> pursuant to Chapter VII of the *Charter of the United Nations*, has jurisdiction under the *Statute of the International Criminal Tribunal for the Former Yugoslavia* to 'prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'.<sup>21</sup> Under art 2(b) of the *Statute of the ICTY*, serious violations of international humanitarian law include torture as a grave breach of the *Geneva Conventions*. In addition, the ICTY has determined that the power to prosecute persons for violations of the laws and customs of war under art 3 of the *Statute of the ICTY* covers, inter alia, violations of common art 3 and provisions of the *Geneva Conventions* other than grave breaches.<sup>22</sup> Thus a secondary means by which to prosecute persons committing torture in violation of international humanitarian law is provided.

### B Prosecutor v Delalić, Mucić, Delić and Landžo

The first charges of torture before the ICTY related to acts alleged to have been committed by four men — three Bosnian Muslims and one Bosnian Croat — against Bosnian Serbs detained in the Celebići prison camp.<sup>23</sup> Delalić, the coordinator of the Bosnian Muslim and Bosnian Croat forces and Commander of the First Tactical Group of the Bosnian Army, was alleged to have exercised control over the Celebići camp. Mucić was alleged to have been the commander of the camp, until replaced by the deputy commander, Delić. Delalić and Mucić faced charges of torture as a result of acts committed by their subordinates. During his tenure, Delić was alleged to have tortured a number of inmates by committing severe beatings and rape. Landžo, a guard at the camp, was charged with torture for inflicting, inter alia, severe beatings and burns on four inmates. The charges against all four men were brought under both arts 2 and 3 of the *Statute of the ICTY*.

In the indictment the Prosecutor alleged that 'in each of the paragraphs charging torture, the acts were committed by, or at the instigation of, or with the consent of an official person or a person acting in an official capacity'.<sup>24</sup> As such, the Prosecutor indicated that he considered the element of the *Convention against Torture* definition relating to the status of the perpetrator to be an element of the definition of torture under international humanitarian law. This was affirmed in the submission of the Prosecution, where it was argued that the

<sup>19</sup> Opened for signature 12 December 1977, 1125 UNTS 609, art 4 (entered into force 7 December 1978) ('*Additional Protocol II*').

<sup>20</sup> *Resolution 827*, SC Res 827, UN SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc S/RES/827 (1993).

<sup>21</sup> *Statute of the International Criminal Tribunal for the Former Yugoslavia*, art 1, annexed to *ibid* ('*Statute of the ICTY*').

<sup>22</sup> *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (Appeals Chamber Judgment)*, Case No IT-94-1-AR72 (2 October 1995) [89].

<sup>23</sup> *Prosecutor v Delalić, Mucić, Delić and Landžo (Trial Chamber Judgment)*, Case No IT-96-21-T (16 November 1998) [6]–[29] ('*Delalić*'). See generally Olivia Swaak-Goldman, '*Prosecutor v Delalić*' (1999) 93 *American Journal of International Law* 514.

<sup>24</sup> *Delalić (Indictment)*, Case No IT-96-21-I (21 March 1996) [3].

'Trial Chamber ought to apply the customary law definition of torture',<sup>25</sup> as expressed in art 1 of the *Convention against Torture*.

The Trial Chamber noted that '[d]espite the clear international consensus that the infliction of acts of torture is prohibited conduct, few attempts have been made to articulate a legal definition of torture'.<sup>26</sup> It referred to the definitions of torture expressed in the *Convention against Torture*, the *United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,<sup>27</sup> and the *Inter-American Convention to Prevent and Punish Torture*.<sup>28</sup> Both the *Convention against Torture* and the *Declaration on Torture* define torture to encompass only acts of public officials (and additionally, in respect of the *Convention against Torture*, acts of persons acting in an official capacity).<sup>29</sup> The *Inter-American Convention*, however, restricts the persons who are able to be held guilty of the crime of torture to public servants or employees who, acting in an official capacity, order, instigate, induce, commit or fail to prevent torture, or persons who do so at the instigation of such an official.<sup>30</sup> The Trial Chamber concluded that

the definition of torture contained in the *Torture Convention* includes the definitions contained in both the *Declaration on Torture* and the *Inter-American Convention* and thus reflects a consensus which the Trial Chamber considers to be representative of customary international law.<sup>31</sup>

The Trial Chamber focused only briefly on the element of the *Convention against Torture* definition requiring that the act be committed by a public official or person acting in an official capacity. It noted that:

Traditionally, an act of torture must be committed by, or at the instigation of, or with the consent or acquiescence of, a public official or person acting in an official capacity. 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 armed conflicts involving some non-State entities.<sup>32</sup>

The definition of torture adopted by the Trial Chamber was not at issue in the appeal.

### C Prosecutor v Furundžija

Furundžija was charged with torture under art 3 of the *Statute of the ICTY* for acts committed as the local commander of a unit of the Croatian Army military police known as the Jokers. Members of the Jokers had arrested a female

<sup>25</sup> *Delalić (Trial Chamber Judgment)*, Case No IT-96-21-T (16 November 1998) [447].

<sup>26</sup> *Ibid* [455].

<sup>27</sup> GA Res 3452 (XXX), UN GAOR, 30<sup>th</sup> sess, 2433<sup>rd</sup> plen mtg, annex, UN Doc A/RES/3452 (1975) ('*Declaration on Torture*').

<sup>28</sup> Opened for signature 9 December 1985, 67 OASTS (entered into force 28 February 1987) ('*Inter-American Convention*').

<sup>29</sup> *Convention against Torture*, above n 3, art 1; *Declaration on Torture*, above n 27, art 1.

<sup>30</sup> *Inter-American Convention*, above n 28, art 3.

<sup>31</sup> *Delalić*, Case No IT-96-21-T (16 November 1998) [459].

<sup>32</sup> *Ibid* [473].

Bosnian Muslim, Witness A, and had taken her to their headquarters for interrogation concerning the activities of her sons.<sup>33</sup> Witness A was then questioned by Furundžija in the presence of other members of the Jokers. During the interrogation Witness A was forced to undress by one of the others present who then ‘rubbed his knife along her inner thigh and lower stomach and threatened to put his knife inside her vagina should she not tell the truth’.<sup>34</sup> Furundžija persisted to question Witness A whilst this was occurring. Witness A was then moved to another part of the Joker’s Headquarters, where Furundžija continued to question her. During this time, and in the presence of Furundžija, the soldier who had previously abused Witness A then beat, sexually abused and raped her. Furundžija failed to prevent or stop these abuses.<sup>35</sup> The Trial Chamber determined Furundžija ‘was present in the room as he carried on his interrogations. When not in the room, he was present in the near vicinity, just outside an open door and knew that crimes including rape were being committed’.<sup>36</sup> As such he was a co-perpetrator of torture on the grounds that he ‘participate[d] in an integral part of the torture and [partook] of the purpose behind the torture’.<sup>37</sup>

The Trial Chamber concurred with the conclusion reached in *Delalić* as to the customary nature of the *Convention against Torture* definition, noting that ‘there is now general acceptance of the main elements contained in the definition set out in article 1 of the *Torture Convention*’.<sup>38</sup> The Trial Chamber expatiated on the grounds on which it considered the *Convention against Torture* definition to be representative of customary international law. First, the Trial Chamber considered that, although the definition contained in the *Convention against Torture* is stated expressly in art 1(1) to apply only ‘for the purposes of this *Convention*’, the definition must be ‘regarded as authoritative ... because it spells out all the necessary elements implicit in international rules on the matter’.<sup>39</sup> The second and third grounds advanced by the Trial Chamber relate to the inclusion of similar definitions in the *Inter-American Convention* and the *Declaration on Torture*, the latter of which the Trial Chamber noted was adopted by consensus and without objection.<sup>40</sup> Finally, the Trial Chamber considered that the *Convention against Torture* definition is in accordance with that used by the ‘United Nations Special Rapporteur and is in line with the definition suggested or acted upon by ... the European Court of Human Rights and the Human Rights Committee’.<sup>41</sup>

Although the Trial Chamber considered that the *Convention against Torture* definition ‘applies to any instance of torture, whether [committed] in time of peace or of armed conflict’, it thought it was ‘appropriate to identify or spell out

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<sup>33</sup> *Prosecutor v Furundžija (Trial Chamber Judgment)*, Case No IT-95-17/1-T (10 December 1998) [39] (‘*Furundžija*’).

<sup>34</sup> *Ibid* [40].

<sup>35</sup> *Ibid* [41].

<sup>36</sup> *Ibid* [128].

<sup>37</sup> *Ibid* [257].

<sup>38</sup> *Ibid* [161].

<sup>39</sup> *Ibid* [160].

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*. The definitions of torture adopted by the European Court of Human Rights and the UN Human Rights Committee are each discussed below at part III(C)(2).

some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts'.<sup>42</sup> The last of the five elements of the definition of torture outlined by the Trial Chamber required that '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, eg as a de facto organ of a state or any other authority-wielding entity.'<sup>43</sup>

The Appeals Chamber concurred with the conclusions of the Trial Chamber, noting that '[t]he Trial Chamber correctly identified the ... elements of the crime of torture in a situation of armed conflict'.<sup>44</sup>

#### D Prosecutor v Kunarac, Kovac and Vukovic

The charges of torture under art 3 of the *Statute of the ICTY* against Kunarac and Vukovic related to acts committed against Bosnian Muslims by the accused in their capacity as soldiers fighting with Bosnian Serb forces in the town of Foca.<sup>45</sup> The Bosnian Serb forces were alleged to have removed women and children from the town and to have taken them to detention centres where they were kept in appalling conditions and repeatedly raped by soldiers.<sup>46</sup>

The Trial Chamber did not concur with previous decisions that found the *Convention against Torture* definition to be representative of the customary definition of torture applicable in all contexts, including international humanitarian law. After reviewing international and regional human rights instruments pertaining to torture and the jurisprudence of international and regional human rights bodies, the Trial Chamber concluded that 'the definition of torture contained in the *Torture Convention* cannot be regarded as the definition of torture under customary international law which is binding regardless of the context in which it is applied'.<sup>47</sup> The Trial Chamber based this conclusion on the grounds that the *Convention against Torture* definition 'was meant to apply at an inter-state level and was, for that reason, directed at the states' obligations' and 'was ... meant to apply only in the context of that *Convention*'.<sup>48</sup> The Trial Chamber considered that art 1 of the *Convention against Torture* 'can only serve, for present purposes, as an interpretational aid'.<sup>49</sup>

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<sup>42</sup> Ibid [162].

<sup>43</sup> Ibid. The other elements considered by the Trial Chamber to be elements of torture in armed conflict were that the torture: (i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition (ii) this act or omission must be intentional; (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person; and (iv) it must be linked to an armed conflict: *ibid*.

<sup>44</sup> *Prosecutor v Furundžija (Appeals Chamber Judgment)*, Case No IT-95-17/1-A (21 July 2000) [111].

<sup>45</sup> *Prosecutor v Kunarac, Kovac and Vukovic (Trial Chamber Judgment)*, Case No IT-96-23-T and IT-96-23/1-T (22 February 2001) ('*Kunarac*').

<sup>46</sup> Julie Mertus, 'Judgment of Trial Chamber II in the *Kunarac, Kovac and Vukovic Case*' (American Society of International Law Insight, 2001) <<http://www.asil.org/insights/insigh65.htm>> at 1 May 2003.

<sup>47</sup> *Kunarac (Trial Chamber Judgment)*, Case No IT-96-23-T and IT-96-23/1-T (22 February 2001) [482].

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid*.

Whilst the Trial Chamber accepted that three elements of the *Convention against Torture* definition were unquestionably elements of any definition of torture under customary law,<sup>50</sup> it considered that three further elements remained contentious. One element considered to be of contentious application under international humanitarian law was ‘the requirement, if any, that the act 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’.<sup>51</sup> The Trial Chamber determined that the

violation of one of the relevant articles of the *Statute [of the ICTY]* will engage the perpetrator’s individual criminal responsibility. In this context, the participation of the state becomes secondary, and generally, peripheral. With or without the involvement of the state, the crime committed remains of the same nature and bears the same consequences. ... The involvement of the state does not modify or limit the guilt or responsibility of the individual who carried out the crimes in question.<sup>52</sup>

The Trial Chamber thus concluded that the definition of torture for the purposes of international humanitarian law is not the same as the definition generally applied in the context of international human rights law. It found that ‘in particular, ... the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law’.<sup>53</sup> The Trial Chamber noted that the ‘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’.<sup>54</sup>

The conclusions of the Trial Chamber relating to the definition of torture were not raised on appeal by the accused. However, the Appeals Chamber considered it ‘important to address this issue in order that no controversy remains about this appeal or its consistency with the jurisprudence of the Tribunal’.<sup>55</sup> The Appeals Chamber accepted that the *Convention against Torture* definition could be considered to be customary.<sup>56</sup> However, the Appeals Chamber noted that the *Convention against Torture* ‘was addressed to States and sought to regulate their conduct’ and as such,

the requirement set out by the *Torture Convention* that the crime of torture be committed by an individual acting in an official capacity may be considered as a limitation of the engagement of States; they need prosecute acts of torture only

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<sup>50</sup> Ibid [483]. The Trial Chamber accepted the following as elements of torture under international humanitarian law: (i) torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; (ii) this act or omission must be intentional; (iii) the act must be instrumental to another purpose, in the sense that the infliction of pain must be aimed at reaching a certain goal: *ibid*.

<sup>51</sup> Ibid [484]. The other elements of the *Convention against Torture* definition considered by the Trial Chamber to be contentious were: (i) the list of purposes, the pursuit of which could be regarded as illegitimate and coming within the realm of the definition; (ii) the necessity, if any, for the act to be committed in connection with an armed conflict.

<sup>52</sup> Ibid [493].

<sup>53</sup> Ibid [496].

<sup>54</sup> Ibid [495].

<sup>55</sup> *Kunarac (Appeals Chamber Judgment)*, Case No IT-96-23 and IT-96-23/1-A (22 February 2002) [145].

<sup>56</sup> Ibid [146].

when those acts are committed by a ‘public official ... or any other person acting in a non-private capacity’.<sup>57</sup>

The Appeals Chamber concurred with the Trial Chamber that ‘the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the *Torture Convention*’.<sup>58</sup>

Notably, the Appeals Chamber did not explicitly determine that the *Furundžija* judgment was wrong. Rather, the Appeals Chamber stated that because *Furundžija* had acted as a member of the armed forces involved in the conflict and not in a private capacity, the applicability of the *Convention against Torture* definition was not questioned. The ICTY Trial and Appeals Chambers were thus ‘in a legitimate position’ to conclude that the perpetrator must act in an official capacity.<sup>59</sup> The Appeals Chamber concluded that

[t]his assertion, which is tantamount to a statement that the definition of torture in the *Torture Convention* reflects customary international law as far as the obligation of States is concerned, must be distinguished from an assertion that this definition wholly reflects customary international law regarding the meaning of torture generally.<sup>60</sup>

It is noteworthy that the judgment of the Trial Chamber has been cited with approval in a subsequent case considering charges of torture. The Trial Chamber in *Prosecutor v Krnojelac* noted that ‘[u]nder international humanitarian law in general, and under Article 3 ... of the *Statute* in particular, the presence or involvement of a state official or of any other authority-wielding person in the process of torture is not necessary for the offence to be regarded as “torture”’.<sup>61</sup>

### E Summary of the Conclusions of the ICTY

The jurisprudence of the ICTY gives rise to alternate conclusions regarding the status of the perpetrator as an inherent element of the definition of torture under international humanitarian law. It would appear that all three judgments accept that the term torture can encompass non-state actors. *Delalić* and *Furundžija* qualify this by requiring that such non-state actors act in an official capacity for a state-like entity. *Kunarac*, however, accepts that torture can be committed by private individuals in violation of international humanitarian law, regardless of official capacity. It rejects any requirement relating to the status of the perpetrator, considering that torture is defined solely by the nature of the act committed.

## III THE DEFINITION OF TORTURE UNDER INTERNATIONAL HUMANITARIAN LAW

In the absence of an authoritative conclusion from the ICTY, the precise definition of torture under international humanitarian law remains unsettled. The findings of the ICTY Chambers should therefore be assessed in light of

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<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid* [148].

<sup>59</sup> *Ibid* [147].

<sup>60</sup> *Ibid.*

<sup>61</sup> *Prosecutor v Krnojelac (Trial Chamber Judgment)*, Case No IT-97-25-T (15 March 2002) [187] (*‘Krnojelac’*).

conventional international humanitarian law and other relevant international and regional instruments and jurisprudence. The customary status of the definition of torture articulated in art 1 of the *Convention against Torture* will be appraised in light of these conclusions.

#### A *International Humanitarian Law Conventions*

The provisions of the conventions that expressly prohibit torture in both international and non-international armed conflict do not define torture, but still provide an indication of the meaning that should be ascribed to the act. Such intimations are manifested in the provisions themselves as well as in the official commentary to the *Conventions*. Further, it is contended that the provisions delineating the scope of application of the *Conventions* indicate more generally the actors to whom the *Conventions* are intended to apply. Thus they shed light on the compatibility of a restrictive definition of torture with the design or objective of the *Conventions*.

##### 1 *Provisions Proscribing Torture*

International humanitarian law conventions include provisions that are expressly addressed to states and state agents, and others that expressly or by implication address individuals. As noted in the *Kunarac* Trial Chamber judgment,

[v]iolations of the former provisions result exclusively in the responsibility of the state to take the necessary steps to redress or make reparation for the negative consequences of the criminal actions of its agents. On the other hand, violations of the second set of provisions may provide for individual criminal responsibility, regardless of an individual's official status.<sup>62</sup>

Therefore, it is necessary to determine firstly whether the articles proscribing torture in international humanitarian law conventions address themselves to non-state actors and, if so, whether any limitation on the class of actors encompassed by these provisions is expressed.

Of the provisions expressly proscribing torture, only a limited number are expressly restricted to imposing obligations on the state and its agents. These provisions apply only to situations of international armed conflict. For example, *Geneva Convention IV* provides:

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies ... to ... torture ... whether applied by *civilian or military agents*.<sup>63</sup>

Similarly, art 75 of *Additional Protocol I*, which provides fundamental guarantees for all persons who are in the power of a party to the conflict, prohibits acts, expressly including torture, 'whether committed by civilian or by military agents'.

<sup>62</sup> *Kunarac (Trial Chamber Judgment)*, Case No IT-96-23-T and IT-96-23/1-T (22 February 2001) [489].

<sup>63</sup> *Geneva Convention IV*, above n 10, art 32 (emphasis added).

In contradistinction, the provisions relating to the ‘grave breaches’ regime of the *Geneva Conventions* do not appear to manifest any intention to limit the class of persons who can be found liable for the commission of grave breaches. The respective articles of the *Geneva Conventions* conferring jurisdiction over grave breaches refer only to ‘persons committing, or ordering to be committed’ the prohibited acts.<sup>64</sup> Likewise, in respect to torture, those articles setting out the acts amounting to grave breaches contain no reference to the status of the perpetrator.<sup>65</sup>

The remaining provisions proscribing torture in the context of international armed conflicts are not expressly restricted in their application to state actors. Further, the commentary to a number of the provisions explicitly states that the scope of the provision extends to non-state actors, including individuals acting in a private capacity. For example, art 12 of *Geneva Convention I* provides that wounded or sick members of the armed forces shall not be subjected to torture. The commentary to art 12 provides:

The obligation [of respect and protection] applies to all combatants in an army, whoever they may be, and also to non-combatants. It applies also to civilians, in regard to whom Article 18 specifically states: ‘The civilian population shall respect these wounded and sick, and in particular abstain from offering them violence’. A clear statement to that effect was essential in view of the special character which modern warfare is liable to assume (dispersion of combatants, isolation of units, mobility of fronts, etc) and which may lead to closer and more frequent contacts between military and civilians. It was necessary therefore, and more necessary today than in the past, that the principle of the inviolability of wounded combatants should be brought home, not only to the fighting forces, but also to the *general public*. That principle is one of the fine flowers of civilization, and should be implanted firmly in public morals and in the public conscience.<sup>66</sup>

The provisions relating to the practice of torture in non-international armed conflicts do not include restrictions in relation to the status of the persons covered. For example, art 4 of *Additional Protocol II* prohibits, inter alia, the act of torture against ‘[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted’. The commentary to art 4 provides, in relation to the prohibition of torture, that

[t]he most widespread form of torture is practised by public officials for the purpose of obtaining confessions, but torture is not only condemned as a judicial institution; the act of torture is reprehensible in itself, regardless of its perpetrator, and cannot be justified in any circumstances.<sup>67</sup>

The international humanitarian law provisions proscribing torture provide a strong indication that, for the purposes of international humanitarian law, the

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<sup>64</sup> *Geneva Convention I*, above n 10, art 49; *Geneva Convention II*, above n 10, art 50; *Geneva Convention III*, above n 10, art 129; *Geneva Convention IV*, above n 10, art 146.

<sup>65</sup> *Geneva Convention I*, above n 10, art 50; *Geneva Convention II*, above n 10, art 51; *Geneva Convention III*, above n 10, art 130; *Geneva Convention IV*, above n 10, art 147.

<sup>66</sup> Jean Pictet (ed), *Commentary to 1949 Geneva Convention I for the Wounded and the Sick in Armed Forces in the Field* (1952) 135 (emphasis added).

<sup>67</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 1373–4.

definition of torture is not to be restricted to acts of state officials or persons acting in an official capacity. Although the provisions are varied — some make express reference to state agents, others to civilians and many are silent on the question — this alone makes a restrictive definition insupportable. Unless one accepts that the definition of torture varies for the purposes of each provision, the very reference to an actor other than a state official or person acting in an official capacity demonstrates that the status of the perpetrator is not an inherent element of the definition of torture.

## 2 *The Scope and Application of International Humanitarian Law*

An interpretation of the definition of torture which encompass acts of non-state actors is further supported by the provisions of conventional international humanitarian law delineating the scope of application of the *Conventions*. The distinction between international and non-international armed conflicts requires, in the absence of a single threshold of applicability, an articulation of the material field of application of the law. These provisions, in defining the situations to which the law is applicable, address concurrently the actors to whom the law is intended to apply. It is contended that this provides an indication of whether a definition of torture restricted to acts of state officials or persons acting in an official capacity accords with the intended scope of application of the law.

The *Geneva Conventions* and *Additional Protocol I* apply in cases of international armed conflict, which is defined in common art 2 to the *Geneva Conventions* and art 1(3) of *Additional Protocol I* as ‘all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them’, and ‘all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance’. The first element fails to clarify the applicability of the *Conventions* to non-state actors. Although the second element does not address the status of the occupying forces, such that the provision could be read to cover cases of occupation by non-state actors, the context of the provision (international armed conflicts) suggests that it relates to occupation by a state. This is implicitly confirmed by the relevant commentary which speaks of state entities.<sup>68</sup> As such, neither provision elucidates the applicability or otherwise of the *Conventions* to non-state actors.

However, *Additional Protocol I* extends the definition of international armed conflicts to include conflicts which, by their very nature, involve non-state actors. Article 1(4) provides that the provisions of *Additional Protocol I* are also to be applied in ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination’.<sup>69</sup> The commentary to this provision provides that the ‘requirements for the correct application of the law ... are an authority representing the people engaged in the struggle and an organised structure of its armed forces, including a responsible command’.<sup>70</sup> Thus, the provisions of

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<sup>68</sup> Ibid 40; Pictet, *Commentary to Geneva Convention I*, above n 66, 21–2.

<sup>69</sup> *Additional Protocol I*, above n 17, art 1(4).

<sup>70</sup> Sandoz, Swinarski, and Zimmermann, above n 67, 55.

*Additional Protocol I* are expressed to apply to armed conflict involving non-state actors. Notably, however, the commentary indicates that such non-state actors are required to be composed in a state-like manner.

The provisions relating to non-international armed conflicts, by the very nature of the conflict, necessarily refer to non-state actors. Common art 3 to the *Geneva Conventions* does not define non-international armed conflicts for the purposes of the application of its provisions. It simply states that common art 3 applies '[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. The commentary to common art 3 suggests a number of 'convenient criteria', based on proposed amendments discussed during negotiations, to determine the situations in which common art 3 is applicable. These include, inter alia, the requirements that the non-state entity 'possess an organised military force, an authority responsible for its acts, acting within a determinate territory'; is 'in possession of a part of the national territory'; that 'the insurgents have an organisation purporting to have the characteristics of a State ... [and] that the insurgent civil authority exercises *de facto* authority over persons within a determinate portion of the national territory'.<sup>71</sup> It would appear, therefore, that the applicability of common art 3 to non-state actors is again limited to those exhibiting state-like characteristics.

Similarly, art 1 of *Additional Protocol II* extends the application of the *Protocol* to all conflicts that

take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this *Protocol*.

Article 1(2) is expressed not to apply to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'. This is considered to express a similar limitation applicable in relation to common art 3.<sup>72</sup> Again, therefore, the provisions relate to non-state actors only to the extent that such actors exhibit state-like qualities.

The provisions contained in conventional humanitarian law delineating the material field of application of the instruments recognise and apply to non-state actors. This is particularly evident in later developments under the *Additional Protocols*. However, as one commentator has noted that

[w]hile these latest extensions were driven by the new realities of violent conflicts in the post-World War II era, there were nevertheless limited and predictable extensions. The non-state actors who are now covered by these extensions are those who have the same legal characteristics of state actors. Thus, these non-state actors must have some of the characteristics of state actors, which is the exercise of dominion or control over territory or people, or both.<sup>73</sup>

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<sup>71</sup> Jean Pictet (ed), *Commentary to 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (1958) 36.

<sup>72</sup> The commentary to common art 3 speaks of a 'genuine armed conflict' rather than 'a mere act of banditry or an unorganised and short-lived insurrection': *ibid*.

<sup>73</sup> M Cherif Bassiouni, 'The Sources and Content of International Criminal Law: A Theoretical Framework' in M Cherif Bassiouni (ed), *International Criminal Law* (2<sup>nd</sup> ed, 1999) vol 1, 3, 27.

International humanitarian law conventions, therefore, recognise a limited category of non-state actors for the purpose of the application of the law. Such recognition is arguably a strong indication that any definition of torture for the purposes of international humanitarian law should extend to encompass such non-state actors. In positing that the definition of torture under international humanitarian law encompasses acts of non-state actors displaying state-like characteristics, the *Delalić* and *Furundžija* Trial Chambers expressly support this conclusion.

### 3 *Conclusion*

International humanitarian law conventions, although not explicitly defining torture, indicate a number of the characteristics required for the act to constitute torture in that context. In particular, the *Conventions* and relevant commentary provide a cogent indication of the correctness of the inclusion of an element relating to the status of the perpetrator. It is contended that two conclusions as to the definition of torture under international humanitarian law can be reached. Firstly, the definition of torture clearly encompasses acts of non-state actors acting in an official capacity for an entity that exhibits state-like qualities. This is abundantly clear from the commentary to the relevant provisions and, by implication, from the provisions relating to the application of the *Conventions*. Secondly, torture should not be restricted to acts of officials, but read to encompass acts committed by individuals acting in a private capacity. The commentary to a number of the provisions supports this conclusion.

#### B *Article 1 of the Convention against Torture*

The above conclusions challenge the determination that the definition of torture promulgated in art 1 of the *Convention against Torture* is representative of the customary definition of torture in the context of international humanitarian law. As noted above, art 1 of the *Convention against Torture* defines torture as an act ‘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’. Thus it is necessary to examine the interpretation and the scope of this element to determine whether the *Convention against Torture* definition can be reconciled with the conclusions reached above.

#### 1 *Interpretation of ‘Public Official or Persons Acting in an Official Capacity’*

*Delalić* and *Furundžija* considered that the public official element of the *Convention against Torture* definition needed to be interpreted, in the context of international humanitarian law, to include officials of non-state entities. The survey of the international humanitarian law conventions above indicates that any definition of torture should encompass acts of these actors. Indeed, it is apparent from the *travaux préparatoires* of the *Convention against Torture* and the jurisprudence of the *Convention’s* supervisory body, the Committee against Torture, that the *Convention against Torture* is intended to encompass such actors.

The *travaux préparatoires* indicate that the phrase ‘other person acting in an official capacity’ was included in response to delegates’ desires that the definition of torture under the *Convention against Torture* should extend beyond the definition found in the *Declaration on Torture* to encompass persons acting in a de facto official capacity.<sup>74</sup> The *Declaration on Torture* narrowly defined torture as ‘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’.<sup>75</sup> Additionally, the Federal Republic of Germany stated during negotiations that it considered that

the term ‘public official’ referred not only to persons who, regardless of their legal status, have been assigned public authority by State organs on a permanent basis or in an individual case, but also to persons who, in certain regions or under particular conditions, actually hold and exercise authority over others and whose authority is comparable to government authority or — be it only temporarily — has replaced government authority or whose authority has been derived from such persons.<sup>76</sup>

The interpretation of art 1 to encompass acts of non-state actors was recently accepted by the Committee against Torture in the decision of *Elmi v Australia*.<sup>77</sup> Australia was seeking to return Sadiq Shek Elmi, a Somali national, to Somalia after domestic authorities determined that he failed to meet the requirements for protection as a refugee under Australian law. Elmi claimed that to do so would violate Australia’s obligations under art 3 of the *Convention against Torture* which provides that ‘[no] State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’. Elmi claimed that if returned to Somalia he would be tortured by members of one of the clans exercising control over parts of the country on the grounds of his membership of another clan. Australia, however, argued that the obligations under art 3 did not arise because the provision was to be read in light of the definition of torture in art 1. Therefore acts by Somali non-state officials or persons not acting in an official capacity would not amount to torture for the purpose of the *Convention against Torture*.

The Committee against Torture, having considered the *travaux préparatoires* in detail, rejected the arguments of Australia and determined that Elmi’s claim did indeed fall within the scope of art 3. The Committee determined that

[i]t follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the

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<sup>74</sup> Robert McCorquodale and Rebecca La Forgia, ‘Taking off the Blindfolds: Torture by Non-State Actors’ (2001) 1(2) *Human Rights Law Review* 189, 196.

<sup>75</sup> *Declaration on Torture*, above n 27, art 1.

<sup>76</sup> J Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) 45.

<sup>77</sup> Committee against Torture, Communication No 120/1998, UN Doc CAT/C/22/D/120/1998 (1998).

*Convention*, within the phrase ‘public officials or other persons acting in an official capacity’ contained in article 1.<sup>78</sup>

That is, the Committee considered that ‘actions by non-state actors could, in certain circumstances, be considered to be sufficiently “State like” to amount to torture under article 1 of the *Convention against Torture*’.<sup>79</sup>

The *Convention against Torture* definition of torture therefore covers acts of officials of state-like non-state entities. However, there are no grounds to argue that the *Convention* definition extends to acts of individuals acting in a private capacity in light of the express wording of art 1. This is further confirmed by the *travaux préparatoires* which indicate the opposition of some states to a definition restricted to official acts. For instance, ‘France considered that the definition of the act of torture should be a definition of the intrinsic nature of the act of torture itself, irrespective of the status of the perpetrator’.<sup>80</sup> Similarly, Panama and Spain also indicated their dissatisfaction with the limitation of the *Convention*. Panama, for example, considered that ‘the prohibition of torture should not have been limited to public officials since the purpose of the *Convention* is to eradicate any and all activities which result in the violation of the physical and psychological integrity of the individual’.<sup>81</sup>

In response to the disquietude of such states, the majority that supported a more limited definition highlighted that ‘the purpose of the [*Convention*] was to provide protection against acts committed on behalf of, or at least tolerated by, the public authorities’<sup>82</sup> and, as such, ‘only torture for which the authorities could be held responsible should fall within the article’s definition’.<sup>83</sup> These states considered that

[i]f torture is committed without any involvement of the authorities, but as a criminal act by private persons, it can be expected that the normal machinery of justice will operate and that prosecution and punishment will follow under the normal conditions of the domestic legal system.<sup>84</sup>

Thus, as the *Convention against Torture* definition cannot be interpreted to encompass acts of individuals acting in a private capacity, and as the above analysis indicates that such a restriction is not consistent with conventional international humanitarian law, it is difficult to sustain the conclusion that the *Convention against Torture* definition represents the customary definition of torture in the context of international humanitarian law.

## 2 *The Intended Scope of Application of Article 1*

The intended scope of application of art 1 further supports the conclusion that the *Convention against Torture* definition is not the customary definition of torture for the purpose of international humanitarian law. The *Convention*

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<sup>78</sup> Ibid [6.5].

<sup>79</sup> McCorquodale and La Forgia, above n 74, 198.

<sup>80</sup> Burgers and Danelius, above n 76, 45.

<sup>81</sup> Ahcene Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (1999) 24.

<sup>82</sup> Burgers and Danelius, above n 76, 119.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid 119–20.

against Torture definition is expressed in art 1(1) to be ‘for the purpose of the [Convention]’ and was not intended to be illustrative of the definition of torture in a broader context. As noted by Burgers and Danelius, the *Convention against Torture*

elucidate[s] what the concept implies by listing a number of constitutive elements. In this way paragraph 1 gives a *description of torture* for the purpose of understanding and implementing the *Convention* rather than a legal definition for direct application in criminal law and criminal procedure.<sup>85</sup>

The *Kunarac* Trial Chamber judgment focused on this express limitation in art 1 of the *Convention against Torture* when determining whether the definition could be of extra-conventional effect.<sup>86</sup> The Trial Chamber also noted the provision in art 1(2) that the article applies ‘without prejudice to any international instrument or national legislation which does or may contain provisions of wider application’.<sup>87</sup> It considered this to mean that persons shall continue to benefit from broader or better protection where offered in other international instruments or national laws. It concluded that the *Convention against Torture* definition, therefore, was ‘meant only to apply in the context of that *Convention*, and only to the extent that other international instruments or national laws did not give the individual a broader or better protection’.<sup>88</sup>

### 3 *The Nature of Obligations under International Human Rights Law*

In further support of the conclusion that the *Convention against Torture* definition is not representative of the customary definition of torture under international humanitarian law, the distinction between the nature of international human rights law and international humanitarian law must be highlighted. International human rights law, of which the *Convention against Torture* forms a part, concerns the relations between individuals and the state. Therefore, international human rights law imposes obligations on the state in relation to acts for which they can be held responsible, namely acts of state agents and public officials. Further, a state may be held accountable where it is found to have acquiesced in the commission of the human rights violation by failing to prevent or adequately respond to human rights abuses by non-state actors within its jurisdiction.<sup>89</sup> International human rights law thus replicates the public–private dichotomy of domestic legal systems ‘through its traditional

<sup>85</sup> Ibid 122 (emphasis in original).

<sup>86</sup> *Kunarac*, Case No IT-96-23-T and IT-96-23/1-T (22 February 2001) [473].

<sup>87</sup> Ibid.

<sup>88</sup> Ibid [482].

<sup>89</sup> In *Velásquez Rodríguez* the Inter-American Court of Human Rights held that a state’s responsibility arises ‘not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American Convention on Human Rights]’: *Velásquez Rodríguez v Honduras (Judgment)* (1988) Inter-Am Ct HR (ser C) No 4, [172]. The responsibility of states for torture committed by non-state actors in the context of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’), is confirmed by the Human Rights Committee: *CCPR General Comment 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment*, UN Doc HRI/GEN/1/Rev.5 (2001).

applicability only to the relations between the state and individuals, through the acts of public officials'.<sup>90</sup>

International humanitarian law, however, 'aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities'.<sup>91</sup> Internationally human rights are enforceable against States, while international humanitarian law is enforceable against both individuals and states. The difference in the obligations imposed by the two regimes was highlighted by the *Kunarac* Trial Chamber:

In the human rights context, the state is the ultimate guarantor of the rights protected and has both duties and a responsibility for the observance of those rights. In the event that the state violates those rights or fails in its responsibility to protect the rights, it can be called to account and asked to take appropriate measures to put an end to the infringements.

In the field of international humanitarian law, and in particular in the context of international prosecutions, the role of the state is, when it comes to accountability, peripheral. Individual criminal responsibility for violation of international humanitarian law does not depend on the participation of the state and, conversely, its participation in the commission of the offences is no defence to the perpetrator.<sup>92</sup>

The element of the *Convention against Torture* definition relating to the status of the perpetrator is arguably a reflection of the corpus of law to which the *Convention against Torture* belongs. The definition restricts torture to acts perpetrated by public officials or persons acting in an official capacity because the *Convention* is intended only to deal with acts of torture for which the state can be held responsible. Thus, it can be argued that this requirement is not so much an inherent element of the definition of torture, but a restriction on the type of torture to which the *Convention against Torture* is applicable.

#### 4 Conclusion

The definition of torture expounded in art 1 of the *Convention against Torture* cannot be considered to be representative of the customary definition of torture under international humanitarian law. Firstly, whilst the definition can be interpreted to apply to acts of officials of non-state entities, it does not encompass acts of individuals acting in a private capacity. It is contended that the restriction of the definition of torture to acts committed by persons acting in an official capacity is irreconcilable with the law flowing from international humanitarian conventions. Secondly, the definition was not intended to be applied outside the framework of the *Convention against Torture*. Thirdly, even if art 1 were considered to be of extra-conventional effect and representative of the general customary definition of torture, there are strong grounds on which to reject its applicability in the context of international humanitarian law based on the differing nature of international humanitarian law and human rights law. It is

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<sup>90</sup> Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 *European Journal of International Law* 387, 389.

<sup>91</sup> *Kunarac (Trial Chamber Judgment)*, Case No IT-96-23-T and IT-96-23/1-T (22 February 2001) [470].

<sup>92</sup> *Ibid.*

therefore correct to conclude that the definition of torture does not require that the act be committed by a public official or person acting in an official capacity.

### C *The Definition of Torture in Other Contexts*

The conclusion that the status of the perpetrator is not an element of the definition of torture for the purposes of international humanitarian law also accords with the definition of torture espoused in other legal contexts: international, regional and national. It is suggested that this supports the conclusion reached above.

#### 1 *International Criminal Tribunals — Statutes and Jurisprudence*

International criminal tribunals have been established in the post-World War II period to determine the criminal responsibility of individuals alleged, inter alia, to have violated international humanitarian law. Examples of such tribunals include, in addition to the ICTY itself, the International Military Tribunals for Nuremberg and Tokyo, the International Criminal Tribunal for Rwanda ('ICTR') and the newly established International Criminal Court ('ICC'). International criminal tribunals exercising jurisdiction over war crimes have, on the whole, rejected a definition of torture restricted to public officials or persons acting in an official capacity. Further, pronouncements of international criminal tribunals relating to the persons able to be found criminally responsible for violations of international humanitarian law indicate, in a manner similar to the material field of application of conventional humanitarian law, the inappropriateness of a restrictive definition. The following is a brief survey of the relevant jurisprudence and instruments.

##### (a) *United States Military Tribunal*

The *Nuremberg Charter*,<sup>93</sup> relied upon by the International Military Tribunals for Nuremberg and Tokyo, did not include torture as a war crime but referred, rather, to 'ill-treatment'. As such, 'the decisions of these tribunals provide no enlightenment on the meaning of the term "torture"'.<sup>94</sup> Of relevance to the present inquiry are the following comments made by the US Military Tribunal in response to a claim by the defendants that international criminal responsibility arose only in relation to the acts of public officials. The Tribunal stated:

It is argued that individuals holding no public offices and not representing the State, do not, and should not, come within the class of persons criminally responsible for a breach of international law. It is asserted that international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged to be criminal when done by an officer of the Government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is

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<sup>93</sup> *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 UNTS 280 (entered into force 8 August 1945) ('*Nuremberg Charter*').

<sup>94</sup> Derby, above n 5, 721.

charged with personal wrong and punishment falls on the offender in *propria persona*. The application of international law to individuals is no novelty. ... There is no justification for a limitation of responsibility to public officials.<sup>95</sup>

Although the charges against the defendants did not include torture, the statement of the Tribunal can be interpreted as evidence against a restrictive definition of an offence, such as torture, under international humanitarian law.

(b) Rome Statute of the International Criminal Court

Torture is included within the jurisdiction of the newly established ICC as a war crime under the *Rome Statute of the International Criminal Court*.<sup>96</sup> Article 8(2)(a)(ii) relates to international armed conflicts. Article 8(2)(c)(i) relates to non-international armed conflicts, but excludes, by art 8(2)(d), 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature'. The *Elements of Crimes* — adopted pursuant to art 9 of the *Statute of the ICC* to 'assist the Court in the interpretation and application' of, inter alia, art 8 — provide a definition of torture for the purposes of the ICC.<sup>97</sup>

The elements of the war crime of torture do not include any reference to the status of the perpetrator.<sup>98</sup> The omission of this element was not without contention. A number of delegations argued that the element of torture requiring that the perpetrator act in an official capacity was necessary in order to distinguish torture from the crime of inhumane treatment.<sup>99</sup> This was countered by the assertion of other delegates that the distinguishing feature between the crimes of torture and inhuman treatment is the degree of pain and suffering.<sup>100</sup> Dormann notes that

[t]he vast majority of delegations argued that while war crimes necessarily take place in the context of an armed conflict and in most cases, involve persons acting in an 'official capacity', the inclusion would create the unintended impression that non-State actors are not covered. This would greatly restrict the crime, particularly in non-international armed conflicts involving rebel groups. Given the fact that it was the understanding of the Preparatory Commission that the definition of torture should identically apply to both international and non-international armed conflicts, this argument had considerable weight.<sup>101</sup>

<sup>95</sup> *Trial of Friedrich Flick and Five Others*, (1947) 9 Law Reports of Trials of War Criminals 1, 18.

<sup>96</sup> Opened for signature 17 July 1998, 37 ILM 999 (entered into force 1 July 2002) ('*Statute of the ICC*').

<sup>97</sup> *Report of the Preparatory Commission for the ICC: Addendum 2 — Finalized Draft Text of the Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000).

<sup>98</sup> See *ibid* 8(2)(a)(ii)-1.

<sup>99</sup> Knut Dormann, 'Grave Breaches of the 1949 Geneva Conventions' in Roy Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 124, 127; Knut Dormann, 'Preparatory Commission for the International Criminal Court: The Elements of War Crimes' (2000) 839 *International Review of the Red Cross* 771, 775.

<sup>100</sup> Dormann, 'Grave Breaches of the 1949 Geneva Conventions', above n 99, 127; Dormann, 'Preparatory Commission for the International Criminal Court', above n 99, 776. In *Ireland v UK* the Court held that the 'distinction derives principally from a difference in the intensity of the suffering inflicted': (1978) 25 Eur Court HR (ser A) 66, [167].

<sup>101</sup> Dormann, 'Grave Breaches of the 1949 Geneva Conventions', above n 99, 127.

Though the *Elements of Crimes* relating to the war crime of torture under the *Statute of the ICC* encompasses the acts of non-state actors, the requirement that actors, both state and non-state, act in an official capacity is not expressly dismissed. However, art 27, which provides that the *Statute of the ICC* ‘shall apply equally to all persons without any distinction based on official capacity’, implies that persons acting in a private capacity are not excluded from the jurisdiction of the court. Thus it supports a definition of torture that encompasses such persons.

(c) *ICTR — Akayesu Distinguished*

The ICTR was established in response to the atrocities that occurred in Rwanda between April and July 1999. It has jurisdiction to ‘prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States’.<sup>102</sup> Whilst much of the jurisprudence of the ICTR has related to the crime of genocide, the case against Jean-Paul Akayesu involved charges of torture as a crime against humanity.<sup>103</sup> The ICTR has express jurisdiction under the *Statute of the ICTR* to entertain allegations of torture. It can do so under art 3(f) as a crime against humanity, and under art 4(a) as a serious violation of common art 3 to the *Geneva Conventions* and of *Additional Protocol II*. In *Akayesu*, the Trial Chamber determined that torture for the purposes of art 3(f) of the *Statute of the ICTR* should be given the same definition as torture under the *Convention against Torture*, including the ‘public official’ requirement.<sup>104</sup>

The conclusion of the ICTR in this instance should be distinguished from the findings of the ICTY relating to the commission of torture by non-state actors. Firstly, Akayesu was convicted of torture as a crime against humanity rather than as a war crime in violation of international humanitarian law. The question of whether the definition of torture for both crimes is the same is beyond the scope of this article. However, it should be noted that the definition of torture advanced by the ICTY Trial Chamber in *Kunarac* was considered in the later ICTY decision, *Krnjelac*, to be the definition of torture for both war crimes and crimes against humanity.<sup>105</sup> Secondly, Akayesu was the *bourgmestre* of his commune. He was

charged with the performance of executive functions and the maintenance of public order within his commune, ... [he] had exclusive control over the communal police, as well as any gendarmes put at the disposition of the commune ... [and] was responsible for the execution of laws and regulations and the administration of justice.<sup>106</sup>

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<sup>102</sup> *Statute of the International Criminal Tribunal for Rwanda*, annexed to *Resolution 955*, SC Res 955, UN SCOR, 49<sup>th</sup> sess, 3453<sup>rd</sup> mtg, UN Doc S/RES/955 (1994) (*‘Statute of the ICTR’*).

<sup>103</sup> *Prosecutor v Akayesu (Trial Chamber Judgment)*, Case No ICTR-96-4-T (2 September 1998) (*‘Akayesu’*).

<sup>104</sup> *Ibid* [681].

<sup>105</sup> *Krnjelac (Trial Chamber Judgment)*, Case No IT-97-25-T (15 March 2002) [178].

<sup>106</sup> *Akayesu (Trial Chamber Judgment)*, Case No ICTR-96-4-T (2 September 1998) [4].

Thus Akayesu falls clearly within the definition of a public official. As such, although the ICTR took a short-sighted approach, particularly given that its jurisdiction relates to a non-international armed conflict, the ICTR was arguably not required to consider specifically the appropriateness of this element in international humanitarian law.

More difficult to reconcile, however, is the acquittal of Akayesu of all charges relating to the violation of the laws and customs of war, including charges of torture brought under art 4 of the *Statute of the ICTR*. The Trial Chamber held that Akayesu was ‘not within the class of perpetrators contemplated’ by common art 3 and *Additional Protocol II*.<sup>107</sup> It considered that these provisions were limited to ‘persons who by virtue of their authority, are responsible for the outbreak of, or are otherwise engaged in the conduct of hostilities’ — namely, all military personnel and some civilians.<sup>108</sup> Of the civilians considered to be subject to the obligations set out in common art 3 and *Additional Protocol II*, the Trial Chamber determined that they must be ‘legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts’.<sup>109</sup>

Whilst the findings of the Trial Chamber in this respect do not speak expressly of torture, the restriction of the classes of persons who are able to be held criminally responsible for violations of common art 3 and *Additional Protocol II*, which include torture, is clearly relevant to any definition of torture. The conclusions of the Trial Chamber add an additional burden by requiring that the perpetrator be legitimately mandated and expected to support or fulfil the war effort. These pronouncements do not appear to have any foundation in the relevant provisions. One is only able to conclude that the decision in *Akayesu* is incorrect, and that ‘its standard for civilian liability is unduly high ... [as] far too many civilians will escape responsibility for committing war crimes against non-combatants caught in the middle of armed conflict’.<sup>110</sup>

## 2 *International and Regional Human Rights Instruments*

In addition to the *Convention against Torture*, the practice of torture is also broadly proscribed under international and regional human rights instruments. On the whole, the *Conventions* do not themselves provide an express definition of torture. However, in many cases the definition of torture adopted by supervisory or judicial bodies rejects limitations relating to the status of the perpetrator as an inherent element of the definition.

The *Universal Declaration of Human Rights*<sup>111</sup> provides in art 5 that ‘[n]o one shall be subjected to torture’. The same absolute prohibition was later incorporated as art 7 of the *ICCPR*. However, neither the *UDHR* nor the *ICCPR* articulate a definition of torture. Further, the Human Rights Committee, the

<sup>107</sup> Diane Amann, ‘Prosecutor v Akayesu’ (1999) 93 *American Journal of International Law* 195, 195.

<sup>108</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [6.5].

<sup>109</sup> *Ibid.*

<sup>110</sup> Amann, above n 107, 199.

<sup>111</sup> *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/RES/217A (III) (1948) (*UDHR*).

supervisory body established under art 28 of the *ICCPR*, has not itself provided a definition of what it considers to be torture. It stated that it does not ‘consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied’.<sup>112</sup>

Elements of the definition of torture for the purpose of the *ICCPR* can, however, be extrapolated from other statements of the Human Rights Committee. The Human Rights Committee’s *General Comment No 20* on art 7 of the *ICCPR* provides that:

It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.<sup>113</sup>

It is therefore reasonable to infer that the Human Rights Committee does not consider the status of the perpetrator to be an element of the definition of torture for the purposes of the *ICCPR*. Indeed, Clapham notes that ‘[t]he references to “private capacity” ... leave no doubt that Article 7 of the *Covenant* has now been interpreted as covering the private sphere’.<sup>114</sup>

Similarly, the European Court of Human Rights has accepted that acts committed by non-state actors and persons acting in a private capacity can amount to torture for the purposes of the European *Convention on Human Rights and Fundamental Freedoms*.<sup>115</sup> Article 3 of the *ECHR* proscribes torture and prohibits the extradition or expulsion of a person to a country where he or she may be subjected to torture. The jurisprudence of the European Court of Human Rights on this provision has accepted that the obligation not to return a person extends to instances where the individual may be subjected to torture by non-state actors. For example, in *HLR v France*,<sup>116</sup> France argued that its obligation under art 3 did not arise where the threat of torture emanated from non-state actors. The applicant, who had been arrested in France on charges of trafficking in drugs, claimed that he feared he would be subjected to torture by drug traffickers if returned to Colombia. The European Court of Human Rights rejected the state party’s argument, finding that:

Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the *Convention* may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.<sup>117</sup>

Thus, it is justified to surmise that neither the Human Rights Committee nor the European Court of Human Rights consider the definition of torture for the

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<sup>112</sup> Human Rights Committee, *General Comment No 20*, above n 89, [4].

<sup>113</sup> *Ibid* [2].

<sup>114</sup> Andrew Clapham, *Human Rights in the Private Sphere* (1993) 109.

<sup>115</sup> Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (*‘ECHR’*).

<sup>116</sup> (1997) III Eur Ct HR 745; (1998) 26 EHRR 29.

<sup>117</sup> *Ibid* [40].

purposes of the *ICCPR* and *ECHR* respectively to comprehend only acts committed by public officials or persons acting in an official capacity. Rather, the jurisprudence of these supervisory bodies indicates that the definition of torture should not be interpreted to include any reference to the status of the perpetrator.

Torture is also proscribed under the *American Convention on Human Rights*<sup>118</sup> and the *African Charter on Human and Peoples' Rights*,<sup>119</sup> though neither instrument defines torture. The *Inter-American Convention* does, however, contain an express definition of torture.<sup>120</sup> The definition does not refer to a requirement of official involvement or acquiescence in the act of torture. However, the application of the *Inter-American Convention*, pursuant to art 3, is limited to

a public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so [or] a person who at the instigation of a public servant or employee ... orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

Therefore, while the definition of torture for the purposes of the *Inter-American Convention* is not restricted to acts of public officials, the application of the *Convention* is.

### 3 *Jurisprudence of Domestic Courts*

Reference should be made briefly to the relevant jurisprudence of domestic courts that considers the definition of torture in international law. The US, pursuant to the *Alien Tort Claims Act* (first enacted in 1789), confers jurisdiction on domestic courts to hear 'any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.<sup>121</sup> In 1995, a group of Bosnian Croats and Muslims instituted civil proceedings under the *Alien Tort Claims Act* against Radovan Karadžić, leader of the self-proclaimed Bosnian Serb Republic of Srpska.<sup>122</sup> The plaintiffs sought damages for, inter alia, acts of torture perpetrated by the military under his command. In defence of the charges, Karadžić claimed that, as Srpska was not recognised by the US as a state, he was a non-state actor. As such, he argued he was 'not capable of committing torts in violation of international law, which governs the behaviour of states'.<sup>123</sup> The Court of Appeals for the Second Circuit was therefore required to consider whether non-state actors could commit torture in violation of international law. The Court reached the conclusion that 'torture ... when not perpetrated in the course of genocide or war crimes [is] proscribed by international law only when committed by state officials or under the color of

<sup>118</sup> Opened for signature 22 November 1969, 1144 UNTS 123, art 5(2) (entered into force 18 July 1978) ('*American Convention*').

<sup>119</sup> Opened for signature 27 June 1981, 1520 UNTS 217, art 5 (entered into force 21 October 1986) ('*African Charter*').

<sup>120</sup> *Inter-American Convention*, above n 28, art 2.

<sup>121</sup> 28 USC § 1350 (1994).

<sup>122</sup> *Kadic v Karadžić*, 70 F 3d 232 (2<sup>nd</sup> Cir, 1995).

<sup>123</sup> Judith Hippler Bello and Theodore Posner, '*Kadic v Karadžić*' (1996) 90 *American Journal of International Law* 658, 659.

law'.<sup>124</sup> Thus the Court recognised that torture, when committed in violation of international humanitarian law (making it a war crime), can be committed by non-state actors.

#### 4 Conclusion

The foregoing survey indicates that the status of the perpetrator is not an inherent element of the definition of torture used in other international and regional contexts. It is contended that this supports the conclusion that the definition of torture in the context of international humanitarian law is not restricted in application to acts of public officials or persons acting in an official capacity. Further, the absence of this element in the definition applied in other international and regional contexts, most notably in the corpus of human rights law, calls into question the customary status of art 1 of the *Convention against Torture*.

### IV CONCLUSION

The determination of the definition of torture under international humanitarian law has proved to be an arduous challenge for the ICTY. Three ICTY Chambers have reached differing conclusions as to the requirement that torture be committed by a public official or a person acting in an official capacity. The heterogeneity of the ICTY Chambers' judgments results from the differing conclusions they have reached about the customary status of the definition of torture expounded in art 1 of the *Convention against Torture*.

International humanitarian law instruments provide a strong indication that the status of the perpetrator should not be considered an element of the definition of torture. The provisions proscribing torture and the relevant commentary make reference to non-state actors and private individuals. Whilst the provisions are not uniform in their references to these actors — for example, non-state actors are referred to predominantly in relation to non-international armed conflicts — it is insupportable to conclude that a different definition was intended in different contexts. The status of the perpetrator should not be considered as an inherent element of the definition of torture. Rather, limitations on the actors should be considered to reflect the intended application of the law. Indeed, the definition of torture utilised in other contexts confirms that 'torture not committed by a state official is also torture, but of the sort that the *Torture Convention* and other conventions do not apply to'.<sup>125</sup>

In reaching this conclusion, one must accept that the definition of torture in art 1 of the *Convention against Torture* cannot be representative of the customary definition of torture in the context of international humanitarian law. Although the definition can, and has been, interpreted to encompass acts of state-like non-state actors, its application is still restricted to acts committed by officials, be they of state or non-state entities. The *Convention against Torture* definition does not apply to individuals acting in a private capacity which, it is

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<sup>124</sup> *Kadic v Karadžić*, 70 F 3d 232, 234 (2<sup>nd</sup> Cir, 1995).

<sup>125</sup> Jan Wauters, 'Torture and Related Crimes — A Discussion of the Crimes before the International Criminal Tribunal for the Former Yugoslavia' (1998) 11 *Leiden Journal of International Law* 155, 161.

contended, is not in accordance with the scope of application of international humanitarian law. Additionally, the differing nature of international human rights instruments and the express confinement of art 1 to the *Convention against Torture* indicate the inappropriateness of the definition in the context of international humanitarian law.

As was noted in the context of the negotiations on the *Elements of Crimes* under the *Statute of the ICC*, most charges of torture in violation of international humanitarian law will involve persons acting in an official capacity. However, one need only consider a number of contemporary conflicts, such as the Israel–Palestine conflict or the conflict in Rwanda, to recognise that individuals acting in a private capacity can commit violations of international humanitarian law. As such, it is asinine to define torture to exclude the acts of such persons where those acts would otherwise arguably be inconsistent with the law .

The definition of torture for the purposes of international humanitarian law should not be restricted only to acts of public officials or persons acting in an official capacity. Under international humanitarian law, it is contended, torture is defined by the act itself and not by the status of the perpetrator. As such, the conclusions of the *Kunarac* judgment should be regarded as the correct pronouncement of the law. It is contended that, after three attempts, the ICTY has finally got it right.