

5. Survey of the Crime of Torture in the Jurisprudence of the ICTY

Tsvetana Kamenova¹

A. Introduction

The International Tribunal for the Prosecution of persons responsible for serious violations of international humanitarian law is governed by its Statute, adopted by the Security Council of the United Nations on 25 May 1993 and by the Rules of Procedure and Evidence of the International Tribunal, adopted by the Judges of the International Tribunal on 11 February 1994, as amended. Under the Statute, the International Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Articles 2 through 5 of the Statute further confer upon the International Tribunal jurisdiction over grave breaches of the Geneva Conventions of 12 August 1949 (Article 2); violations of the laws or customs of war (Article 3); genocide (Article 4); and crimes against humanity (Article 5).

The practice of torture has existed through all periods of history and is not confined to any single political system, regime, culture, religion or geographic location.² The offences of torture as they are set forth in the ICTY Statute are not defined, thus leaving the determination of the meaning of ‘torture’ to the jurisprudence of the Tribunal.

The prohibition of torture in international law derives from a number of instruments, notably Article 3 of the European Convention on Human Rights (ECHR), Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the Universal Declaration of Human Rights and from international *ius cogens*. It is generally understood to be without any exceptions whatsoever, but attempts have recently been made to reduce the prohibition, allowing torture in situations of grave emergency, for instance, in the notorious case of the ticking time bomb. It may therefore be said that the prohibition of torture is indeed absolute, regardless of recent attempts to reduce this prohibition.

The Appeals Chamber of ICTY determined that under customary International Law crimes against humanity could be committed in peacetime and that war crimes are punishable when committed in non-international armed conflict. As one renowned scholar states ‘[these findings are of direct relevance to the International criminalization of torture, which was already acknowledged to be a crime against

1 Dr. Kamenova is at present judge at ICTY and law professor at the Institute for Legal Studies, Bulgarian Academy of Sciences. The views expressed are those of the author.

2 D. Derby, ‘Torture’ in M. Cherif Bassiouni (ed.), *International Criminal Law* (2nd ed., New York, Transnational Publishers, 1999) vol. I, p. 705.

humanity as well as a war crime, but only in a narrow ambit.³ It had been contended that the crime of torture as a crime against humanity could only be committed in association with armed conflict. At least this is what article 5 of the ICTY statute seem to say:

Article 5

Crimes against humanity

The International Tribunal shall have the 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 inhumane acts.

The traditional view that war crimes could only be committed in international armed conflicts would have excluded torture prosecutions with respect to internal conflict. The conclusions of the Appeals Chamber were of great importance for rejecting such restrictive interpretations. Note that these conclusions were made in 1995, before the adoption of the Rome Statute of the ICC⁴. The first indicted before the Tribunal, Tadic, was found responsible for acts of torture by the Trial Chamber of ICTY in May 1997.

B. Developments in the case law of the ICTY with regard to the definition of torture

*I. Prosecutor v. Delalic et al.*⁵

In one of the early cases before the ICTY, the so-called Celebici case, known by the name of the Celebici prison-camp, a detention facility, located in Central Bosnia and Herzegovina, the Trial Chamber accepted that the prohibition against torture is *ius*

3 See W. Schabas, 'The Crime of Torture in the International Criminal Tribunals'. *Case Western Reserve Journal of International Law* 37 (2006): 349.

4 The Rome Statute of the International Criminal Court accepted a far broader definition of torture.

5 Trial Chamber Judgment, 16 November 1998

cogens.⁶ In this Judgment the Trial Chamber referred to various international instruments that prohibit torture starting with the Universal Declaration of Human Rights, including the Convention against torture and the Declaration on the prohibition of torture. The Trial Chamber said that these General Assembly declarations and the various treaty provisions established that the prohibition of torture was also a norm of customary International Law. Accepting that the prohibition of torture was a norm of *jus cogens*, the Trial Chamber cited as authority for the proposition the UN Special Rapporteur for torture.. ‘The prohibition of torture contained in the International instruments is absolute and non-derogable in any circumstances, says the Judgment in Celebici case.

1. The Definition of Torture under Customary International Law

There are two international instruments that are solely concerned with the prohibition of torture, the most significant of which is the Torture Convention⁷. This Convention was adopted by the General Assembly on 10 December 1984 and has been ratified or acceded to by many states, including the SFRY, representing more than half of the membership of the United Nations. It was preceded by the Declaration on the Protection from Torture, which was adopted by the United Nations General Assembly on 9 December 1975 without a vote.

The Trial Chamber Judgment notes that the prohibition contained in the international instruments is absolute and non-derogable in any circumstances.

Despite 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. In fact, of the instruments prohibiting torture, only three provide any definition. The first such instrument is the Declaration on Torture, article 1 of which states:

torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. . . . Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading punishment.

This definition was used as the basis for the one subsequently articulated in the Torture Convention, which states, in article 1 that,

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

6 *Prosecutor v. Z. Delalic et al.*, Case No. IT-96-21-T, 16 November 1998, para. 454

7 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or punishment. As of 2008 the Torture Convention has been ratified by 145 states.

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.

This differs from the formulation used in the Declaration on Torture in two ways. First, there is no reference to torture as an aggravated form of ill-treatment in the Torture Convention. However, this quantitative element is implicit in the requisite level of severity of suffering. Secondly, the examples of prohibited purposes in the Torture Convention explicitly include ‘any reason based on discrimination of any kind’, whereas this is not the case in the Declaration on Torture.

Having in mind also the third such instrument, the Inter-American Convention, the Trial Chamber Judgment concludes that the definition of torture contained in the Torture Convention reflects a consensus which the Trial Chamber considers to be representative of customary international law.

Having reached this conclusion, the Trial Chamber considers in more depth the requisite level of severity of pain or suffering, the existence of a prohibited purpose, and the extent of the official involvement that are required in order for the offence of torture to be proven.

2. Severity of Pain or Suffering

Although the Human Rights Committee, a body established by the ICCPR to monitor its implementation, has had occasion to consider the nature of ill-treatment prohibited under article 7 of the ICCPR, the Committee’s decisions have generally not drawn a distinction between the various prohibited forms of ill-treatment. However, in certain cases, the Committee has made a specific finding of torture, based upon the following conduct: beating, electric shocks and mock executions, *plantones*, beatings and lack of food; being held incommunicado for more than three months whilst being kept blindfolded with hands tied together, resulting in limb paralysis, leg injuries, substantial weight loss and eye infection.

The European Court and the European Commission of Human Rights have also developed a body of jurisprudence that deals with conduct constituting torture, prohibited by article 3 of the European Convention. As with the findings of the Human Rights Committee, it is difficult to obtain a precise picture of the material elements of torture from the decisions of these bodies, although they are useful in providing some examples of prohibited conduct⁸.

The Trial Chamber Judgment notes that the Special Rapporteur on Torture, in his 1986 report, provided a detailed, although not exhaustive, catalogue of those acts which involve the infliction of suffering severe enough to constitute the offence of

8 The Judgment discusses in detail the *Greek Case*, (1969) 12a Yearbook of the European Convention of Human Rights, the Northern Ireland Case (*Ireland v. UK* (1979-80) 2 E.H.R.R. 25), and *Aksoy v. Turkey* (1997) 23 E.H.R.R. 553.

torture, including: beating; extraction of nails, teeth, etc.; burns; electric shocks; suspension; suffocation; exposure to excessive light or noise; sexual aggression; administration of drugs in detention or psychiatric institutions; prolonged denial of rest or sleep; prolonged denial of food; prolonged denial of sufficient hygiene; prolonged denial of medical assistance; total isolation and sensory deprivation; being kept in constant uncertainty in terms of space and time; threats to torture or kill relatives; total abandonment; and simulated executions.

The conclusion is made that the most characteristic cases of torture involve positive acts. However, omissions may also provide the requisite material element, provided that the mental or physical suffering caused meets the required level of severity and that the act or omission was intentional, that is an act which, judged objectively, is deliberate and not accidental. Mistreatment that does not rise to the threshold level of severity necessary to be characterized as torture may constitute another offence.

It is difficult to articulate with any degree of precision the threshold level of suffering at which other forms of mistreatment become torture. However, the existence of such a grey area should not be seen as an invitation to create an exhaustive list of acts constituting torture, in order to neatly categorize the prohibition.

3. Prohibited Purpose

Another critical element of the offence of torture is the presence of a prohibited purpose. The list of such prohibited purposes in the Torture Convention expands upon those enumerated in the Declaration on Torture by adding ‘discrimination of any kind’. The use of the words ‘for such purposes’ in the customary definition of torture, indicate that the various listed purposes do not constitute an exhaustive list, and should be regarded as merely representative. Further, there is no requirement that the conduct must be solely perpetrated for a prohibited purpose. Thus, in order for this requirement to be met, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose.

A fundamental distinction regarding the purpose for which torture is inflicted is that between a ‘prohibited purpose’ and one which is purely private. The rationale behind this distinction is that the prohibition on torture is not concerned with private conduct, which is ordinarily sanctioned under national law. In particular, rape and other sexual assaults have often been labeled as ‘private’, thus precluding them from being punished under national or international law. However, such conduct could meet the purposive requirements of torture as, during armed conflicts, the purposive elements of intimidation, coercion, punishment or discrimination can often be integral components of behavior, thus bringing the relevant conduct within the definition.

II. *The Prosecutor v. Furundzija*⁹

The approach of the Trial Chamber Judgment differs: it discusses first international humanitarian law and after that international human rights law.

The judgment cites the relevant articles of the Geneva Conventions and the Additional Protocols, which explicitly prohibit torture in times of armed conflict¹⁰.

The Trial Chamber also noted that torture was prohibited as a war crime under article 142 of the Penal Code of the Socialist Federal Republic of Yugoslavia and that the same violation has been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992.

The Trial Chamber agrees that a general prohibition against torture has evolved in customary international law. This prohibition has gradually crystallized from the Lieber Code and The Hague Conventions, in particular articles 4 and 46 of the Regulations annexed to Convention IV of 1907, read in conjunction with the 'Martens clause' laid down in the Preamble to the same Convention. Torture was one of the acts expressly classified as a crime against humanity under article II(1)(c) of Allied Control Council Law No. 10. As stated above, the Geneva Conventions of 1949 and the Protocols of 1977 prohibit torture in terms.

All these treaty provisions have ripened into customary rules and it is evinced by various factors. The Trial Chamber Judgment goes on:

First, these treaties and in particular the Geneva Conventions have been ratified by practically all States of the world. Admittedly those treaty provisions remain as such and any contracting party is formally entitled to relieve itself of its obligations by denouncing the treaty (an occurrence that seems extremely unlikely in reality); nevertheless the practically universal participation in these treaties shows that all States accept among other things the prohibition of torture. In other words, this participation is highly indicative of the attitude of States to the prohibition of torture. Secondly, no State has ever claimed that it was authorised to practice torture in time of armed conflict, nor has any State shown or manifested opposition to the implementation of treaty provisions against torture. When a State has been taken to task because its officials allegedly resorted to torture, it has normally responded that the allegation was unfounded, thus expressly or implicitly upholding the prohibition of this odious practice. Thirdly, the International Court of Justice has authoritatively, albeit not with express reference to torture, con-

9 Trial Chamber Judgment, 10 December 1998

10 Under the Statute of the International Tribunal, as interpreted by the Appeals Chamber in the Tadic Jurisdiction Decision, these treaty provisions may be applied as such by the International Tribunal if it is proved that at the relevant time all the parties to the conflict were bound by them. In this case, Bosnia and Herzegovina ratified the Geneva Conventions of 1949 and both Additional Protocols of 1977 on 31 December 1992. Accordingly, at least common article 3 of the Geneva Conventions of 1949 and article 4 of Additional Protocol II, both of which explicitly prohibit torture, were applicable as minimum fundamental guarantees of treaty law in the territory of Bosnia and Herzegovina at the time relevant to the Indictment. In addition, in 1992, the parties to the conflict in Bosnia and Herzegovina undertook to observe the most important provisions of the Geneva Conventions, including those prohibiting torture. Thus undoubtedly the provisions concerning torture applied as treaty law in the territory of Bosnia and Herzegovina as between the parties to the conflict.

firmed this custom-creating process: in the Nicaragua case it held that common article 3 of the 1949 Geneva Conventions, which *inter alia* prohibits torture against persons taking no active part in hostilities, is now well-established as belonging to the corpus of customary international law and is applicable both to international and internal armed conflicts.

The Trial Chamber Judgment concludes that the treaty and customary rules impose obligations upon States and other entities in an armed conflict, but first and foremost address themselves to the acts of individuals, in particular to State officials or more generally, to officials of a party to the conflict or else to individuals acting at the instigation or with the consent or acquiescence of a party to the conflict. Both customary rules and treaty provisions applicable in times of armed conflict prohibit any act of torture. Those who engage in torture are personally accountable at the criminal level for such acts.

Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating State responsibility.

When discussing international human rights law the Trial Chamber Judgment notes that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency (on this ground the prohibition also applies to situations of armed conflicts). This is linked to the fact, that the prohibition on torture is a peremptory norm or *jus cogens*. This prohibition is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.

These treaty provisions impose upon States the obligation to prohibit and punish torture, as well as to refrain from engaging in torture through their officials. In international human rights law, which deals with State responsibility rather than individual criminal responsibility, torture is prohibited as a criminal offence to be punished under national law; in addition, all States parties to the relevant treaties have been granted, and are obliged to exercise jurisdiction to investigate, prosecute and punish offenders. Thus, in human rights law too, the prohibition of torture extends to and has a direct bearing on the criminal liability of individuals.

The Trial Chamber Judgment points that the prohibition against torture exhibits three important features:

1. The Prohibition Even Covers Potential Breaches

States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed

In the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility.

2. The Prohibition Imposes Obligations *Erga Omnes*

Furthermore, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community.

Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfill its international obligations. The existence of such international mechanisms makes it possible for compliance with international law to be ensured in a neutral and impartial manner.

3. The Prohibition Has Acquired the Status of *Jus Cogens*

While the *erga omnes* nature appertains to the area of international enforcement, the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.

Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.

Some of the consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.

The broad convergence of the aforementioned international instruments and international jurisprudence demonstrates that there is now general acceptance of the main elements contained in the definition set out in article 1 of the Torture Convention.

The Trial Chamber concludes that it is appropriate to identify or spell out some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts. The Trial Chamber considers that the elements of torture in an armed conflict require that 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;
- (iv) it must be linked to an armed conflict;
- (v.) at least one of the persons involved in the torture process must be a public official or 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.

III. *Prosecutor v. Dragoliub Kunarac et al.*¹¹

In the Judgment of the Appeals Chamber in *Kunarac* further clarification is provided as to the nature of the definition of torture in customary international law as it is given in the Torture convention, in particular with regard to the participation of a public official or any other person acting in a non-private capacity. The Appeals chamber agrees that the definition of the crime of torture, as set out in the Torture Convention, may be considered to reflect customary international law.

The Torture Convention was addressed to States and sought to regulate their conduct, and it is only for that purpose and to that extent that the Torture Convention deals with the acts of individuals acting in an official capacity. Consequently, 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 when those acts are committed by a public official or any other person acting in a non-private capacity

¹¹ Appeals Chamber, 20 June 2002

In the *Furundzija* Trial Judgment, the Trial Chamber noted that the definition provided in the Torture Convention related to the purposes of the Convention.

The accused in that case had not acted in a private capacity, but as a member of armed forces during an armed conflict, and he did not question that the definition of torture in the Torture Convention reflected customary international law. In this context, and with the objectives of the Torture Convention in mind, the Appeals Chamber in the *Furundzija* case was in a legitimate position to assert that at least one of the persons involved in the torture process must be a public official or must act in a non-private capacity.

This 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 the crime of torture generally.

The Trial Chamber Judgment in *Kunarac* was right to say that the public official requirement is not a requirement under customary international law in relation to the customary responsibility of an individual for torture outside of the framework of the Torture Convention. This is confirmed by the Appeals Chamber Judgment.

IV Conclusions

Having reviewed these three cases, it is possible to conclude that two trends could be observed in the ICTY jurisprudence.

Firstly, this is the expansion of the list of prohibited purposes as well as the deletion of the specific purpose requirement.

Secondly, the removal of the official sanction requirement. All three judgments accept that the term torture can encompass non-state actors. The first two judgments qualify this by requiring that such non-state actors act in an official capacity for a state-like entity. *Kunarac* 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.

C. Constitutive elements for the crime of torture at present

The constitutive elements required for the crime of torture at the ICTY are:

- the infliction, by act or omission, of severe pain or suffering, whether physical or mental;
- the act or omission must be intentional; and
- the act or omission must be for a prohibited purpose, such as obtaining information or a confession; or punishing, intimidating or coercing the

victim or a third person; or discriminating, on any ground, against the victim or the third person.¹²

Here is a more detailed explanation of the constitutive elements.

I. Severe Pain or Suffering

The threshold level of suffering that is necessary to meet the definition of torture is difficult to articulate with any degree of precision.¹³ Moreover, existing case-law has not determined the absolute degree of pain required for an act to amount to torture.¹⁴ However, the Trial Chamber in *Kvočka* articulated the following approach:

[i]n assessing the seriousness of any mistreatment, the Trial Chamber must first consider the objective severity of the harm inflicted. Subjective criteria, such as the physical or mental effect of the treatment upon the particular victim and, in some cases, factors such as the victim's age, sex or state of health will also be relevant in assessing the gravity of the harm.¹⁵

The articulation by the *Kvočka* Trial Chamber has received the endorsement of the Trial Chambers in other subsequent judgements.¹⁶ One such judgement provided a further detailed articulation:

When assessing the seriousness of the acts charged as torture, the Trial Chamber must take into account all the circumstances of the case, including the nature and context of the infliction of pain, the premeditation and institutionalization of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim. In particular, to the extent that an individual has been mistreated over a prolonged period of time, or that he or she has been subjected to repeated or various forms of mistreatment, the severity of the acts should be assessed as a whole to the extent that it can be shown that this lasting period or repetition of acts are inter-related, follow a pattern or are directed towards the same prohibited goal.¹⁷

Mistreatment that does not rise to the threshold level of severity necessary to be characterized as torture may constitute another offence.¹⁸

The physical or mental suffering need not be visible after the commission of the crimes in question.¹⁹ Though torture often causes permanent (physical or mental)

12 Kunarac Appeal Judgment, paras. 142 and 144; see also *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, 2 November 2001 ('Kvočka Trial Judgment'), para. 141, cited with approval in *Kvočka* Appeal Judgment, para. 289.

13 Čelebići Trial Judgment, paras. 461-469.

14 Kunarac Appeal Judgment, para. 149.

15 Kvočka Trial Judgment, para. 143.

16 See *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgment, 15 March 2002 ('Krnojelac Trial Judgment'), para. 182; Brđanin Trial Judgment, para. 484.

17 Krnojelac Trial Judgment, para. 182.

18 Čelebići Trial Judgment, para. 469.

damage to the health of the victims, permanent injury is not a requirement of torture.²⁰

The act of rape, once it has been proved, necessarily implies the pain or suffering as required by the definition of the crime of torture.²¹

II Intentional Act or Omission

Most characteristic cases of torture involve positive acts. However, omissions may also provide the requisite material element, provided that the mental or physical suffering caused meets the required level of severity and that the act or omission was intentional, that is an act which, judged objectively, is deliberate and not accidental.²²

There is an important distinction between ‘motivation’ and ‘intent.’ For instance, in torture of sexual nature, the Appeals Chamber has held that even if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain and suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. ... In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain and suffering, whether physical or mental, to his victims.²³

III. Prohibited Purpose

The prohibited purposes listed in the definition of torture ‘do not constitute an exhaustive list, and should be regarded as merely representative.’²⁴

Humiliation of a victim has been included as a prohibited purpose by some Trial Chambers, while other Trial Chambers have rejected this notion.²⁵ The Appeals Chamber has not clearly taken a position with respect this question.²⁶

19 Kunarac Appeal Judgment, para. 150. In the appellate brief, the Applicant-Accused had argued that the evidence from his expert medical witnesses showed that there were no severe consequences to the victims thereafter.

20 Kvočka Trial Judgment, para. 148.

21 Kunarac Appeal Judgment, para. 151.

22 Čelebići Trial Judgment, para. 468.

23 Kunarac Appeal Judgment, para. 153.

24 Čelebići Trial Judgment, para. 470.

25 Kvočka Trial Judgment, para. 152; Furundžija Trial Judgment, para. 162 (specifically including the humiliation of the victim among the possible purposes of torture). *But see* Krnojelac Trial Judgment, *supra* n. 15, para. 186 (explicitly rejecting the Trial Chamber’s dicta in *Kvočka* and *Furundžija*).

Acts need not have been perpetrated solely for one of the purposes prohibited by international law.²⁷ According to the Appeals Chamber, ‘if one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial.’²⁸

The prohibited purpose need not be the predominating purpose.²⁹

- 26 The Appeals Chamber endorsed the Trial Chamber definition given in Furundžija. However, the Appeals Chamber has also endorsed a definition given by the Trial Chamber in *Kunarac*, which specifically did not include humiliation of a victim as a prohibited purpose. See Furundžija Appeal Judgment, para. 111; Kunarac Appeal Judgment, , paras. 142-144.
- 27 Kunarac Appeal Judgment, para. 155.
- 28 Kunarac Appeal Judgment, para. 155.
- 29 Čelebići Trial Judgment, para. 470; *Prosecutor v. Dragoljub Kunarac et al*, Case No. IT-96-23-T & IT 96-23/1-T, 22 February 2001 (‘Kunarac Trial Judgment’) para. 486. The Appeals Chamber has been silent as to whether the prohibited purpose must be predominating.