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Pain as the Essence of Torture: Exploring the Characteristics and Requirements of the Element of "Pain or Suffering" in the Crime Against Humanity of Torture

1 Introduction

'Torture constitutes one of the most serious attacks upon a person's mental or physical integrity'.[1] The prohibition on torture originates from customary international law and constitutes a peremptory norm or norm of *jus cogens*, that is, a norm that enjoys a higher rank than treaty law and ordinary customary rules within the international hierarchy of norms.[2] Accordingly, the prohibition against torture is 'a fundamental principle of customary international law'[3] and is 'absolute and non-derogable in any circumstances' including war, public emergencies or terrorist threats'.[4] As a consequence, the prohibition of torture is 'one of the most fundamental standards of the international community' and it 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'.[5]

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[1] ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Chamber, Judgement, 15 March 2002, paras. 180–181. Torture is prohibited, *inter alia*, by: United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, (hereinafter Torture Convention), Art. 1; European Convention on Human Rights, 3 September 1953, Art. 3; Universal Declaration of Human Rights, December 1948, Art. 5; Inter-American Convention to Prevent and Punish Torture, December 1985; International Covenant on Civil and Political Rights, December 1966, Art. 7; Convention on the Rights of the Child, November 1989, Art. 37; International Convention on the Elimination of All Forms of Racial Discrimination, January 1969, Art. 5; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, December 1990, Art. 10; Convention on the Rights of Persons with Disabilities, March 2007, Art. 15.

[2] ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgement, 10 December 1998, para. 153. *See also* ICTY, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, para. 454 *citing* P. Kooijmans, Report of the Special Rapporteur, 3, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/1986/15, 19 February 1986.

[3] Therefore, 'even States which have not ratified any of the international treaties explicitly prohibiting torture are banned from using it against anyone, anywhere': Association for the Prevention of Torture, *Torture in International Law: a guide to jurisprudence* (2008), pp. 2, 6.

[4] ICTY, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, para. 454.

[5] ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgement, 10 December 1998, para. 154.

'Pain is the very essence of torture'.[6] In fact, torture has been specifically defined as the infliction of pain or suffering.[7] This article contributes to the existing literature by identifying the characteristics of pain in the crime against humanity of torture within international criminal law (ICL) and shedding light on its requirements. Therefore, in order to answer the question "what are the characteristics and requirements that pain or suffering need to have in ICL for an act to amount to the crime against humanity of torture?", I will examine and compare the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the International Criminal Court (ICC). Related conventions and reports will also be analysed and discussed together with the relevant literature.

In this article, I will also clarify whether the characteristics and requirements of the element of pain or suffering were confirmed by the ICC in its recent case law and, specifically, the Ongwen and Al Hassan cases. Additionally, since an analysis of the characteristics and requirements of torture in ICL would not be fully complete without a critical engagement with international human rights law (IHRL) and since the concept of torture represents 'a relevant intersection point' between ICL and IHRL,[8] I will also examine the case law of the European Courts of Human Rights (ECHR) on torture. Thus, this article also contributes to the existing literature by comparing the ECHR's approach towards the crime of torture with the approach of the international criminal tribunals (ICTs) and determining the ECHR's contribution to the definition of torture in ICL.

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[6] *See* P. Kenny, 'The Meaning of Torture', 42(2) *Polity* (April 2010) 131–155, p. 144. *See also* N. Rodley, 'The Definition(s) of Torture in International Law', 55 *Current Legal Problems* (2002) 467–493, pp. 490–491; K. Tate, 'Torture: does the Convention Against Torture Work to actually Prevent Torture in Practice by States Party to the Convention?', 21(2) *Willamette Journal of International Law and Dispute Resolution* (2013) 194–222.
[7] *See* Torture Convention, Art. 1; Rome Statute of the International Criminal Court (hereinafter Rome Statute), 17 July 1998, Art. 7(2)(e); ICC Elements of Crimes, Art. 7(1)(f). *See also* M. Klamberg, *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher, Brussels, 2017) pp. 48–49.
[8] E. Maculan, 'Judicial Definition of Torture as a Paradigm of Cross-fertilisation: Combining Harmonisation and Expansion' , 84 *Nordic Journal of International Law* (2015) 456–48, p. 456.

Thus, I will first investigate the precise meaning of "severe pain or suffering". Secondly, I will deal with the assessment of the severity of the pain or suffering and examine the different objective and subjective criteria taken into consideration by the different ICTs for the purposes of such assessment while also analysing the role assigned to the victim's condition within the assessment of acts charged as torture. After addressing the lack of an agreed minimum threshold of pain or suffering, I will deal with the absence of any requirement of permanent or visible pain, impairments, or minimum duration as well as the fact that the pain or suffering does not need to be necessarily physical. I will then discuss the exception of the pain or suffering arising from lawful sanctions. Finally, the ECHR's contribution to the definition of the concept of torture and its characteristics within ICL and the interactions between IHRL and ICL will also be analysed and discussed.

2 The Pain or Suffering Must Be Severe

As noted by the ICTY Trial Chamber in the Mucić case, torture can take different forms.[9] Nevertheless, whatever the form and whatever means are employed, in order for an act to amount to the CAH of torture, the pain or suffering that the perpetrators inflicted upon the victims must be severe.[10] The intensity of the pain or suffering has been defined as one of

[9] ICTY, *Prosecutor v. Mucić et al.*, Case No. IT-96-21, Trial Chamber, Judgement, 16 November 1998, para. 467. According to the UN Special Rapporteur on Torture, forms of torture include: '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': Report of the United Nations Special Rapporteur on Torture P. Kooijmans, dated 19 February 1986.

[10] The element of pain or suffering is an element common to both torture as a CAH and torture as a war crime. *See* Rome Statute, Art. 8(2)(ii) and ICC Elements of Crimes, Art. 8(2)(ii). *See also* ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber, Judgement, 4 February 2021, para. 2700. *For additional information see*: M. C. Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, Cambridge, 2011), pp. 443–445; W. Schabas, 'The Crime of Torture and the International Criminal Tribunals', 37(2) *Case Western Reserve Journal of International Law* (2006) 349–364; T.

the pillars of the crime of torture.[11] This is because, in ICL, torture as a CAH is not simply the infliction of pain or suffering but the infliction of *severe* pain or suffering.[12] According to Art. 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'the term "torture" means any act by which severe pain or suffering … is intentionally inflicted on a person'.[13] In their jurisprudence, both the ICTY and the ICTR have interpreted the word "torture" in accordance with the Torture Convention, which is considered declarative of customary international law on torture.[14] The fact that the pain or suffering must be severe in order for an act to amount to torture, has been repeatedly confirmed in the case law of the ICTY.[15] For instance, the Furundžija Trial Chamber held that torture consists of the infliction, whether by act or omission, of severe pain or suffering.[16]

Thus, what differentiates torture from other forms of mistreatment is the fact that the torture causes more severe pain or suffering.[17] This was argued, for instance, in the Kvočka case, where the Appeals Chamber, citing the ECHR's case *Ireland v. The United Kingdom*, stated that 'the severity of the pain or suffering is a distinguishing characteristic of torture

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McCormack, 'Crimes Against Humanity', in D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing, Oxford, 2004), p. 193.

[11] Rodley, *supra* note 6, p. 468.

[12] *See* C. K. Hall and C. Stahn, 'Article 7: Crimes Against Humanity – Part B(I)(2)(f)/B(II)(5)(e)', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition (Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016). *See also* Klamberg, *supra* note 7, pp. 48–49; N. Rodley and M. Pollard, 'Criminalisation of Torture: State Obligations under the United Nations Convention against Torture', 2 *European Human Rights Law Review* (2006) 115–141.

[13] Torture Convention, Art. 1; *see also* M. Nowak, M. Birk and G. Monina, *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (2nd edn., Oxford University Press, Oxford, 2019).

[14] As stated, *inter alia,* in ICTY, *Prosecutor v. Brdanin*, Case No. IT-99-36, Appeals Chamber, Judgement, 3 April 2007, para. 249; *see also* Nowak, Birk and Monina, *supra* note 13.

[15] *See* ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgement, 10 December 1998, para. 162; ICTY, *Prosecutor v. Delalic et al*., Case No. IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, para. 468; ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Chamber, Judgement, 15 March 2002, paras. 180–182; ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1, Trial Chamber, Judgement, 27 September 2007, para. 514; ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgement, 30 November 2005, para. 237; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Trial Chamber, Judgement, 1 September 2004, para. 484; ICTY, *Prosecutor v. Kvočka et al*., Case No. IT-98-30/1, Trial Chamber, Judgement, 2 November 2001, para. 143.

[16] ICTY, Prosecutor v. *Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgement, 10 December 1998, para. 162.

[17] ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Trial Chamber, Judgement, 1 September 2004, para. 483. *See* also ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-T, Trial Chamber, Judgement, 12 June 2007, para. 75.

that sets it apart from similar offence'.[18] Similarly, the Krnojelac Trial Chamber, while also referring to the ECHR's case *Ireland v. The United Kingdom*, argued that "severe pain or suffering" 'conveys the idea that only acts of substantial gravity may be considered to be torture'.[19] Accordingly, mistreatments such as 'an interrogation by itself' or a 'minor contempt for the physical integrity of the victim' are acts that lack the "substantial gravity" needed for an act in order to be classified as torture.[20] Therefore, being subject to mistreatment is not enough for an act to be qualified as torture if such mistreatment did not cause severe pain or suffering because there has to be a substantial and considerable degree of pain or suffering.[21] As a result, if a mistreatment causes an insufficient degree of pain that cannot be assessed as severe, then the mistreatment cannot be prosecuted as the CAH of torture.

Nevertheless, those mistreatments that do not rise to the threshold level of severity that is required for an act to amount to torture can amount to different offences. This was explained, for instance, in the Delalic case, where the ICTY Trial Chamber, after taking into consideration three cases before the ECHR - the Greek case and the two Ireland cases - explained that treatments which deliberately cause serious pain or suffering but that fall short of the severe suffering required for the offence of torture may amount to a different offence, such as inhuman treatment.[22] In the same case, after quoting four ECHR cases: the Greek case, the Northern Ireland case, *Aksoy v. Turkey* and *Aydin v. Turkey,* the same Chamber also specified that, while 'the most characteristic cases of torture involve positive acts', an

[18] ICTY, *Prosecutor v. Kvocka*, Case No. IT-98-30/1, Appeals Chamber, Judgement, 28 February 2005, para. 142.
[19] ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Chamber, Judgement, 15 March 2002, paras. 180–181.
[20] ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Chamber, Judgement, 15 March 2002, paras. 180–181.
[21] *See*, e.g., Hall and Stahn, supra note 12; Bassiouni, *supra* note 10, pp. 443–445; Schabas, *supra* note 10.
[22] ICTY, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, paras. 462, 468, 542.

omission may also provide the requisite material element' if the suffering caused 'meets the required level of severity'.[23]

The severe character of the pain or suffering has also been confirmed in the case law of the ICTR which interprets the term "torture" in accordance with the definition set forth in the UN Torture Convention.[24] For instance, both the Musema and Ntagerura Trial Chambers held that torture as a CAH is the intentional infliction of severe pain or suffering.[25] Similarly, in *Prosecutor v. Semanza*, the ICTR stated that '[t]he *actus reus* of torture involves the intentional infliction of severe mental or physical pain'.[26] Additionally, in *Prosecutor v. Akayesu*, the ICTR Trial Chamber underlined that severe pain or suffering is an essential element of the CAH of torture when it held that torture is 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person'.[27]

The ECCC has also interpreted the term 'torture' in accordance with the Torture Convention. Indeed, in *Prosecutor v. Kaing Guek Eav alias Duch*, the ECCC Trial Chamber stated that '[t]orture comprises the infliction, by an act or omission, of severe pain or suffering'.[28] According to the Duch Trial Chamber, the definition of torture that can be found in the Torture Convention has been accepted in substance as customary since 1975 since it closely mirrors the definition of torture given in the 1975 General Assembly Declaration.[29]

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[23] ICTY, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, para. 468.
[24] ICTR, *Prosecutor v.* Akayesu, Trial Chamber, Judgement, 2 September 1998, para. 593; *see also* ICTR, *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46, Trial Chamber, Judgement, 25 February 2004, para. 703; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20, Appeals Chamber, Judgement, 20 May 2005, para. 247.
[25] ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Chamber, Judgement, 27 January 2000, para. 285 and ICTR, *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46, Trial Chamber, Judgement, 25 February 2004, para. 703:
[26] ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Chamber, Judgement, 15 May 2003, para. 544. *See also* ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Chamber, Judgement, 15 May 2003, para. 343.
[27] ICTR, *Prosecutor v.* Akayesu, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998, para. 593.
[28] ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Judgement, 26 July 2010, para. 352.
[29] General Assembly Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 1975 *cited in* ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Judgement, 26 July 2010, para. 353.

As to the ICC, the requirement of the severity of the pain or suffering has been formally incorporated in Art. 7(2)(e) of the Rome Statute, according to which '[t]orture means the intentional infliction of severe pain or suffering'.[30] Furthermore, as per the ICC Elements of Crimes, one of the elements of the CAH of torture is the fact that 'the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons'.[31]

Pursuant to the Rome Statute and the ICC Elements of Crimes, in *Prosecutor v. Bemba*, the ICC Pre-Trial Chamber referred to torture as 'the intentional infliction of severe pain or suffering'.[32] The same Chamber also explained that 'it is constantly accepted in applicable treaties and jurisprudence that an *important degree* [emphasis added] of pain and suffering has to be reached in order for a criminal act to amount to an act of torture'.[33] Similarly, in *Prosecutor v. Ongwen*, the ICC Trial Chamber stated that 'the crime of torture, whether as a crime against humanity or war crime … has a common material element that the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons'.[34] Likewise, the Al Hassan Pre-Trial Chamber, while citing three ECHR's cases: *Selmouni v. France*, *Gäfgen v. Germany* and *El-Masri v. The Former Yugoslav Republic of Macedonia*, held that the severe nature of the pain or suffering is what differentiates torture from other crimes while underlining that a significant degree of pain and suffering must be achieved for the act to be qualified as torture under the RS.[35]

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[30] Rome Statute, Art. 7(2)(e). *See also* Bassiouni, *supra* note 10, pp. 443–445; Hall and Stahn, *supra* note 12; Klamberg, *supra* note 7, pp. 48–49.
[31] ICC Elements of Crimes, Art. 7(1)(f); *see also* Klamberg, *supra* note 7, pp. 48–49; Schabas, *supra* note 10; Bassiouni, *supra* note 10, pp. 443–445.
[32] ICC, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08-424, Pre-Trial Chamber II, Decision on the Confirmation of the Charges, 15 June 2009, para. 191
[33] ICC, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08-424, Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 193.
[34] ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber, Judgement, 4 February 2021, para. 2700. *See also* S. Sivakumaran, 'Torture in International Human Rights and International Humanitarian Law: The Actor and the Ad Hoc Tribunals', 18 *Leiden Journal of International Law* (2005) 541–556.
[35] ICC, *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 13 November 2019, para. 230. This Chamber also referred to the Bemba and Krnojelac cases in this paragraph.

As can be seen from the case law analysed above, when dealing with the interpretive issues connected to the concept of pain or suffering and the threshold level of the severity of pain required for an act to amount to the CAH of torture, the ICTs often referred to the ECHR's jurisprudence which has been a 'primary source of reference' for the case law of these Tribunals.[36] Indeed, it is particularly meaningful that 'the tests and interpretative strategies' developed by the ECHR had a considerable impact on the case law of the ICTs which adopted 'significant aspects of the reasoning on torture' from this Court[37] and referred to its jurisprudence often because of the 'relatively high number of cases in which the ECHR has dealt with torture and its constitutive elements'.[38]

Article 3 of the European Convention on Human Rights attaches a 'special stigma to deliberate inhuman treatment causing very serious and cruel suffering'[39] and states that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[40] Accordingly, in its case law, the ECHR described torture either as the intentional infliction of 'severe pain or suffering'[41] or as the deliberate infliction of 'very serious and cruel suffering'[42] or as mistreatment causing 'particularly serious pain'.[43] In *Ireland v. The United Kingdom*, the ECHR also specified that what distinguishes torture from other ill-treatments is

[36] Maculan, *supra* note 8, p. 476. The ICTY referred to, *inter alia*, *Aksoy v. Turkey*, *Aydin v. Turkey,* the Greek case, the Northern Ireland case; the ICC referred to, inter alia, ECHR, *Selmouni v. France*, Application No. 25803/94, Court (Plenary), Judgement, 28 July 1999, *Gäfgen v. Germany*, *El-Masri v. The Former Yugoslav Republic of Macedonia*.
[37] M. Farrell, 'Just how ill-treated were you? An Investigation of Cross-Fertilisation in the Interpretative Approaches to Torture at the European Court of Human Rights and in International Criminal Law', 84(3) *Nordic Journal of International Law* (March 1, 2015) 1–29, pp. 6, 9–10.
[38] Maculan, *supra* note 8, p. 474.
[39] ECHR, *Selmouni v. France*, Case No. 25803/94, Court (Plenary) Judgement, 28 July 1999, para. 96.
[40] European Convention on Human Rights, Art. 3, 3 September 1953.
[41] *See*, *inter alia*, ECHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Court (Grand Chamber), Judgement, 13 December 2012, para. 211; ECHR, *Ilhan v. Turkey*, Application No. 22277/93, Court (Grand Chamber) Judgement, 27 June 2000, para. 85; ECHR, *Salman v. Turkey,* Application No. 21986/93, Court (Grand Chamber), Judgement, 27 June 2000; ECHR, *Akkoc v. Turkey*, Application No. 21987/93, Court (First Section), Judgement 10 October 2000.
[42] *See*, *inter alia*, ECHR, *Egmez v. Cyprus*, Application No. 30873/96, Court (Fourth Section), Judgement, 21 December 2000, para. 77; ECHR, *Selmouni v. France*, Application No. 25803/94, Court (Plenary), Judgement, 28 July 1999, para. 96; ECHR, *Al Nashiri v. Romania*, Application No. 33234/12, Court (First Section), 31/05/2018, para. 666.
[43] ECHR, *Selmouni v. France*, Application No. 25803/94, Court (Plenary), Judgement, 28 July 1999, para. 105.

the different 'intensity of the suffering inflicted'.[44] Indeed, as the Court itself explained, we can speak of torture within the meaning of Art. 3 of the Convention 'only when the treatment inflicted on a person is such as to cause him physical or psychological suffering of a certain severity.'[45]

Furthermore, in *Selmouni v. France*, the ECHR was satisfied that the mistreatment amounted to torture because the suffering inflicted was 'particularly serious and cruel' and thus amounted to torture since the victim was inflicted 'a large number of blows', that would 'cause *substantial* [emphasis added] pain' regardless of the state of health of a person.[46] Thus, following the reasoning given in the Selmouni case, it appears that, according to the ECHR, the suffering inflicted qualifies as *particularly serious* when the victims endure *substantial* pain. It is also meaningful that this definition given in this case is quite similar to the one given in the Bemba case, where the ICC Pre-Trial Chamber found that the pain inflicted was "severe" because the victims endured an *important* degree of suffering.[47]

Although there is a certain similarity between the definition of the pain required for an act to amount to torture provided by the ICTs (which describe the pain as *severe*) and the definition of the ECHR (which describes this pain as either severe or very serious or particularly serious), it could nevertheless be argued that there are also noticeable substantial differences in such definitions. One significant difference is that, while the definition given by the ICTs and their Statutes focuses rather on the severe character of the pain, the ECHR's definition, while also considering the severity of pain, puts rather important stress on the cruel, inhuman and degrading character of the mistreatment inflicted. The stress on cruelty can be found, for instance, in *Ireland v. The United Kingdom* (2018), where the ECHR stated

[44] ECHR, *Selmouni v. France*, Application No. 25803/94, Court (Plenary), Judgement, 28 July 1999, para. 167.
[45] ECHR, *Ireland v. The United Kingdom*, Application No. 5310/71, Court (Plenary), 25 April 1978, Separate Opinion of Judge Matscher.
[46] ECHR, *Selmouni v. France*, Application No. 25803/94, Court (Plenary), Judgement, 28 July 1999, paras. 102, 105.
[47] *See* ICC, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08-424, Pre-Trial Chamber II, Decision on the Confirmation of the Charges, 15 June 2009, para. 191.

that torture implies suffering of particular intensity together with cruelty.[48] Similarly, the stress on inhumanity and the degrading character of torture can be found in *Jalloh v. Germany*, where torture was described as 'an aggravated form of inhuman and degrading treatment[49] and in *Ireland v. The United Kingdom* (1978), where it was argued that torture is 'undoubtedly an aggravated form of inhuman treatment'.[50]

One may argue that the stress on the cruel, inhuman and degrading character of torture is a particularly significant difference since such stress is absent in the definition of torture given in the jurisprudence of the ICTY, the ECCC and the ICC which do not mention cruelty, inhumanity or the degrading character of the mistreatment when referring to the CAH of torture.[51] As a result, it appears that, while the cruel, inhuman or degrading character of a mistreatment may have a role within the assessment of the seriousness of the act charged as torture in ICL since it falls within the assessment criteria of "methods and manner of execution of a mistreatment", it is still not required for an act to amount to torture as it is not an essential component of the CAH of torture.[52]

Additionally, it may also be argued that a possible reason why the Statutes of these ICTs chose not to make any reference to cruelty, inhumanity or the degrading character of the mistreatment in the case of torture is that they opted for classifying cruel, inhuman and degrading treatments as separate offences. For instance, the RS contemplates the CAH of "other inhumane acts" in Art. 7(1)(k).[53] Similarly, both the Statute of the ICTR and the

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[48] ECHR, *Ireland v. The United Kingdom*, Application No. 5310/7, Court (Third Section), 20 March 2018, para. 133.
[49] ECHR, *Jalloh v. Germany*, Application No. 54810/00, Court (Grand Chamber), 11 July 2006, Concurring Opinion of Judge Zupančič, para. 2.
[50] ECHR, *Ireland v. The United Kingdom*, Application No. 5310/71, Court (Plenary), 25 April 1978, Separate Opinion of Judge Zekia.
[51] Rome Statute, Art. 7(1)(f), Statute of the International Criminal Court for Rwanda, 8 November 1994, Art. 3, Statute of the International Criminal Court for the Former Yugoslavia, 25 May 1993, Art. 5, Statute of the Extraordinary Chambers in the Courts of Cambodia, April 2005, Art. 5. Although the reference to cruelty appears in Art. 4(a) of the Statute of the ICTR, which refers to torture as a 'cruel treatment' and is the only Statute of an ICT to describe torture in this way.
[52] For additional information *see, inter alia*, Rodley, *supra* note 6, pp. 490–491; C. Einolf, 'The Fall and Rise of Torture: A Comparative and Historical Analysis', 25(2) *Sociological Theory* (June 2007) 101–121.
[53] Rome Statute, Art. 7(1)(k).

Statute of the ICTY contemplate the CAH of "other inhumane acts" in Art. 3(i) and Art. 5(i) respectively.[54] Likewise, the Statute of the ECCC envisages "other inhumane acts" as a CAH in Art. 5.[55] As to degrading treatments, the RS criminalise them in international armed conflicts in Art. 8(2)(b)(xxi) and in non-international armed conflicts in Art. 8(2)(c)(ii) while the Statute of the ICTR envisages degrading treatments in Art. 4(e).[56] Finally, regarding cruel mistreatments, the RS criminalise these in non-international armed conflicts in Art. 8(2)(c)(i).[57]

It is also worth noting that, although the pain or suffering must be severe for an act to amount to the CAH of torture, it does not have to be extreme as 'no more than "severe" pain or suffering is required under customary international law'.[58] In fact, under customary international law, the pain or suffering inflicted upon the victims only needs to be severe and does not have to rise to the level of extreme pain or suffering.[59] This was held in *Prosecutor v. Brđanin*, where the ICTY Appeals Chamber noted that the Torture Convention decided that the character of the pain and suffering in the crime of torture ought to be "severe" rather than "extreme".[60]

Indeed, in the Brđanin case, the appellant challenged the threshold of the severity of pain or suffering that must be met for a mistreatment to amount to torture by arguing that

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[54] Statute of the International Criminal Court for Rwanda, 8 November 1994, Art. 3(i); Statute of the International Criminal Court for the Former Yugoslavia, 25 May 1993, Art. 5(i).
[55] Statute of the Extraordinary Chambers in the Courts of Cambodia, April 2005, Art. 5.
[56] Rome Statute, Arts. 8(2)(b)(xxi) and 8(2)(c)(ii); Statute of the International Criminal Court for Rwanda, 8 November 1994, Art. 4(e).
[57] Rome Statute, Art. 8(2)(c)(i); at the same time, the statutes of the ICTY and ECCC do not refer to cruel treatments as separate offences.
[58] ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Appeals Chamber, Judgement, 3 April 2007, para. 250.
[59] *See* M. Ventura, 'Prosecuting Starvation under International Criminal Law: Exploring the Legal Possibilities', 17(4) *Journal of International Criminal Justice* (September 2019) 781–814, p. 795, *citing* ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgement, 3 April 2007, para. 249. See also ICTY, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Appeals Chamber, Judgement, 3 May 2006, para. 300.
[60] ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Appeals Chamber, Judgement, 3 April 2007, para. 249; *see also* J. Herman Burgers and H. Danelius, *The United Nations Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff, 1988), p. 45.

such severity should be interpreted in accordance with the Bybee Memorandum.[61] According to this memorandum, issued by the United States' Office of Legal Counsel, to be classified as torture mistreatment 'must inflict pain that is difficult to endure' and 'must be equivalent in intensity to the pain accompanying serious physical injury'.[62] It appears that, in this, case, the appellant proposed a definition of torture that would favour him since it narrows the scope of the crime of torture.[63] Nevertheless, the Appeals Chamber correctly argued that the issuing of a memorandum by the United States' Office of Legal Counsel is not enough to 'make pain of such intensity a requirement for conviction under customary international law' because 'no matter how powerful or influential a country is, its practice does not automatically become customary international law'.[64]

Interestingly, during the negotiations of the Torture Convention, in an attempt to make the definition of torture more restrictive, The United Kingdom proposed that the pain or suffering inflicted should be extreme for an act to amount to torture.[65] This proposal was however rejected.[66] This rejection has been viewed as a confirmation of the fact that "severe" and "extreme" are not the same.[67] Indeed, the Torture Convention, together with its drafting history, made it clear that the words "extreme" and "severe" are not synonyms, nor do they have a similar meaning as "extreme" suggests a level of pain or suffering that is "more intense".[68] As the Torture Convention is recognized to be declarative of customary

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[61] ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Appeals Chamber, Judgement, 3 April 2007, paras. 244–252.
[62] Bybee Memorandum, 18 U.S.C., August 2002, paras. 2340–2340A.
[63] *On this point see* Maculan, *supra* note 8, p. 469.
[64] ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Appeals Chamber, Judgement, 3 April 2007, para. 247. In para. 248, this Chamber also observed that the Bybee Memorandum had been superseded by another memorandum: the Levin Memorandum which 'did not endorse the view that physical torture consists only of those acts that inflict pain … equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death' but 'suggested that the criminal prohibition on torture found in U.S. federal law was not intended to reach only conduct involving excruciating and agonizing pain or suffering.'
[65] *See* ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Appeals Chamber, Judgement, 3 April 2007, para. 249.
[66] ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Appeals Chamber, Judgement, 3 April 2007, para. 249; *see also* Herman Burgers and Danelius, *supra* note 60, p. 117.
[67] *See* ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Appeals Chamber, Judgement, 3 April 2007, para. 249.
[68] ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Appeals Chamber, Judgement, 3 April 2007, para. 249.

international law on torture, it can subsequently be inferred that, under customary international law, torture includes those acts inflicting pain or suffering less severe than extreme pain or suffering.[69] Thus, the drafters of the Torture Convention considered the infliction of severe pain to be already worthy of being classified as torture.[70]

One may argue that the characterisation of torture as the infliction of severe pain rather than extreme pain in ICL is particularly beneficial for the victims of torture because choosing to criminalise as torture only acts inflicting extreme pain or suffering would have regrettably set a considerably high threshold after which mistreatment can be considered torture. This, in turn, would have resulted in the perpetrators of torture escaping prosecution every time the prosecutor could not prove the infliction of extreme pain (notwithstanding that the mistreatment in question might be prosecuted as an alternative crime). On the other hand, the choice to use the term "severe" over "extreme" with regard to pain is crucial since it sets a lower threshold after which a mistreatment becomes torture, thus allowing for the criminalisation of a wider range of mistreatments and for the prosecution of the perpetrators whenever a mistreatment causes severe pain.[71]

3 The Assessment of the Gravity of the Acts and the Severity of the Pain or Suffering

Assessing the gravity of a certain act and determining whether it caused insufficient or severe suffering may prove to be a difficult task. Whether the severity of certain mistreatment amounted to torture must be decided by considering and evaluating various objective and

[69] ICTY, *Prosecutor v. Brđanin* Case No. IT-99-36, Appeals Chamber, Judgement, 3 April 2007, para. 249; *see also* Nowak, Birk and Monina, *supra* note 13;
[70] For additional information *see*, e.g., Rodley and Pollard, *supra* note 12; Tate, *supra* note 2.
[71] For a detailed analysis of the international crime of torture *see*, *inter alia*, Herman Burgers and Danelius, *supra* note 60.

subjective criteria. In the past, in order to assess the seriousness of the acts charged as torture, the ICTs have considered the individual circumstances of each case.[72] As stated in *Prosecutor v. Mrkšić et al.*, any assessment of whether the acts charged as torture inflicted severe pain or suffering must be made by taking into consideration all the circumstances of the case.[73] The assessment criteria varied considerably among different Chambers. The Krnojelac Trial Chamber, for instance, explained that any assessment of the severity of the pain or suffering must take into account several circumstances, such as:

- the nature and context of the infliction of pain,
- the premeditation,
- the institutionalisation of ill-treatment,
- the physical condition of the victim,
- the manner and method used,
- the position of inferiority of the victim.[74]

Among these circumstances, only two are concerned with the victim's conditions: the physical condition of the victim and his or her position of inferiority. A greater focus and attention to the victims and their condition within the general assessment of the gravity of the act and the severity of the pain were given by the Mrkšić Trial Chamber, which held that the assessment of the acts should include:

> [T]he 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 the method used and the position of inferiority of the victim, the physical or mental effect of the treatment on the victim, the victim's age, sex, and state of health, and whether the mistreatment occurred over a prolonged period of time.[75]

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[72] C. Burchard, 'Torture in the Jurisprudence of the Ad Hoc Tribunals: A Critical Assessment', 6(2) *Journal of International Criminal Justice* (May 2008) 159–182, p. 165; s*ee also* J. Marshall, 'Torture Committed by Non-State Actors: The Developing Jurisprudence from the Ad Hoc Tribunals', 5 *Non-State Actors and International Law* (2005) 171–182.
[73] ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1, Trial Chamber, Judgement, 27 September 2007, para. 514.
[74] ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Chamber, Judgement, 15 March 2002, para. 182.
[75] ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1, Trial Chamber, Judgement, 27 September 2007 para. 514.

In this case, the number of circumstances concerned with the victims' conditions increased to six, which is symptomatic of the greater attention given to the victim's subjective experience within the assessment of the gravity: 1) the victim's physical condition, 2) the effect of the treatment on the victim, 3) the victim's age, 4) sex and 5) state of health and 6) the position of inferiority of the victim.

Nevertheless, at the ICTY, the greatest importance and attention for the victims and their condition within the assessment of the gravity of the act and the severity of the pain has been given by the Brđanin Trial Chamber, according to which any assessment of the gravity of the mistreatment must take into consideration:

- the nature of the acts committed,
- the purpose of the acts committed,
- consistency of the acts committed,
- the objective severity of the harm inflicted,
- the physical condition of the victim,
- the mental condition of the victim,
- the effect of the treatment on the victim,
- the victim's age,
- the victim's sex,
- the victim's state of health,
- the victim's position of inferiority.[76]

As can be seen in Table 1 and Table 2, this Chamber had the merit of assigning a particularly important role to the victims and their condition within the assessment of the gravity of the harm caused by torture. Indeed, it is truly significant that out of the eleven circumstances indicated by the Chamber, as many as seven are concerned with the victim's condition: 1) the

[76] ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Trial Chamber, Judgement, 1 September 2004, para. 484.

physical condition of the victim, 2) the mental condition of the victim, 3) the effect of the treatment on the victim, 4) the victim's age, 5) the victim's sex, 6) the victim's state of health and 7) the victim's position of inferiority. The criteria taken into consideration by this Chamber are symptomatic of the increased importance given to the victims' role within the assessment of cases of torture before the ICTY. Similar criteria were also considered in the Kvočka and Limaj cases.[77]

It is particularly relevant that the Limaj Trial Chamber also recognised that 'in certain circumstances, the suffering can be exacerbated by social and cultural conditions'.[78] Indeed, according to this Chamber, an assessment of the severity of pain or suffering 'should take into account the specific social, cultural and religious background of the victims'.[79] This statement is truly meaningful as it shows a deeper understanding of the victim's role within the assessment of an act charged as torture and the acknowledgement that the social, cultural and religious background of the victim is particularly relevant since it can considerably influence the intensity of the pain or suffering endured by the victim.

The victim's condition received considerable attention in the case law of the ECCC as well. This Court took into consideration several subjective criteria for the assessment of the severity of the pain or suffering in *Prosecutor v. Kaing Guek Eav alias Duch*, where the Trial Chamber stated that:

> In determining whether an act or omission constitutes severe pain or suffering, the Chamber is required to consider all subjective and objective factors. Objective factors include the severity of the harm inflicted. Subjective criteria may include the age, sex, state of health of the victim, or the physical or mental effect of treatment on a particular victim. In addition, the nature and context of the infliction of pain, the premeditation and institutionalization of the

[77] ICTY, *Prosecutor v. Kvočka et al*., Case No. IT-98-30/1, Trial Chamber, Judgement, 2 November 2001, para. 143; ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgement, 30 November 2005, para. 237: 'the assessment of the seriousness of the acts charged as torture ... should take into account all circumstances of the case and in particular the nature and context of the infliction of pain, the premeditation and institutionalisation of the ill-treatment, the physical condition of the victim, the manner and the method used and the position of inferiority of the victim … the physical or mental effect of the treatment on the victim, the victim's age, sex, or state of health.'

[78] ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgement, 30 November 2005, para. 237.

[79] ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgement, 30 November 2005, para. 237.

> ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim have all been considered relevant factors.[80]

It appears that the attention given by this Chamber to the victim's role within the assessment of the acts charged as torture is rather conspicuous and it is a meaningful example of how the importance given to the victim's condition within such assessment by the ECCC is comparable with the one given by the ICTY.

As to the ICC, in *Prosecutor v. Ongwen*, the Trial Chamber explained that the severity of pain or suffering can only be assessed 'on a case-by-case basis in the light of all the circumstances of the case'.[81] Similarly, in *Prosecutor v. Al Hassan*, the ICC Pre-Trial Chamber, while citing the ECHR's case *Ireland v. The United Kingdom*, held that the seriousness of the mistreatment must be assessed on a case-by-case basis, having regard to all the circumstances, including the repeated and prolonged nature of the violence.[82] It is truly significant that in the Al Hassan case, the ICC put a great focus on the importance of the subjective factors within the assessment of the severity of the seriousness of the act, which included: 1) the physical condition of the victim, 2) the mental effects of the act on the victims, 3) their age, 4) sex, 5) health, 6) their physical and psychological state, 6) their position of inferiority, 7) the social, cultural and religious context relating to victim.[83]

Thus, as shown in Table 1 and Table 2, the role and attention given by the Al Hassan Pre-Trial Chamber to the victims within the assessment of the gravity of the acts charged as torture equals the attention given to the victims by the Brđanin Trial Chamber. It also appears

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[80] ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010, para. 355.
[81] ICC, *Prosecutor v. Ongwen,* Case No. ICC-02/04-01/15, Trial Chamber, Judgement, 4 February 2021, para. 2701. The same was argued in ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-T, Trial Chamber, Judgement, 12 June 2007, para. 75. In this case, the Court held that whether the acts charged as torture inflicted severe pain or suffering on the victim needs to be assessed on a case-by-case basis taking into consideration not only objective criteria but subjective criteria as well, including 'the duration of the suffering inflicted, the nature of the crimes, the physical or mental condition of the victim, the effect of the acts on the victim, the victim's age, and the victim's position of inferiority'.
[82] ICC, *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 13 November 2019, para. 230.
[83] ICC, *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 13 November 2019, para. 230.

to be particularly meaningful that, like the Limaj Trial Chamber before it, the Al Hassan Pre-Trial Chamber also stressed the importance of taking into consideration the social, cultural and religious context relating to victims while assessing the gravity of the mistreatment since such context may considerably affect the severity of the physical or mental pain endured by the victims.[84] As a consequence, certain mistreatments that would normally not be considered serious enough to amount to torture may reach the threshold of severity needed for establishing liability for the CAH of torture in cases where the victims were particularly vulnerable because of their health, age, sex, physical condition and position of inferiority.[85]

The objective criteria considered by the different Chambers of the ICTs and analysed in this section are summed up in Table 1 while the objective criteria are summed up in Table 2.

Insert here Table 1

Insert here Table 2

As can be noticed from Table 1 and Table 2, the number of circumstances and criteria taken into consideration for the assessment of the severity of the pain or suffering varied considerably among different ICTs and even among different Chambers within the same ICTs. At the same time, the focus on the victim's condition varied greatly among different cases with some Chambers focusing predominantly on objective criteria while others placing more emphasis on subjective criteria and the victim's condition.

It appears that the ICTY had the important merit of being the first ICT to give proper attention to the victim's conditions within the assessment of the acts charged as torture.

[84] ICC, *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 13 November 2019, para. 230.
[85] Association for the Prevention of Torture, *supra* note 3, p. 12.

Indeed, previously, the victim's conditions did not receive the same degree of attention in cases before the ICTR, which did not mention any subjective criteria for the assessment of the severity of the pain or suffering in its jurisprudence.[86] Thus, one may argue that there has been a significant development process of the victim's role within the assessment of acts charged as torture in ICL, a development that started with the Kvočka case in 2001 and saw the importance given to subjective criteria - which received negligible attention in the ICTR's case law where they are practically absent - becoming considerable in the ICTY's jurisprudence on torture.

It is therefore particularly meaningful that, in the ICTY's case law, the victims are consistently assigned an important role in the assessment of the severity of the pain for the first time. I believe that this constituted a crucial turning point in the ICTs' approach towards the victim's conditions while assessing acts charged as torture which is symptomatic of the will to assign a more important role to the victims of torture within ICL. The role of the victims in the assessment of torture then kept receiving considerable importance in the case law of the ECCC. The same can be said about the ICC which, although it did not list any subjective criteria in the Bemba and Ongwen cases, took into consideration a truly remarkable number of subjective criteria in the Al Hassan case.

As to the cases where the victims suffered from the infliction of pain or suffering for a prolonged period, the Krnojelac Trial Chamber held that when a person has been subject to torture for a prolonged period of time or repeated or various forms of mistreatment the severity of the pain or suffering should be assessed as a whole as long as 'this lasting period or the repetition of acts are inter-related, follow a pattern or are directed towards the same

[86] For instance, the reference to subjective criteria does not appear, *inter alia*, in ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998; ICTR, *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46, Trial Chamber, Judgement, 25 February 2004; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20, Appeals Chamber, Judgement, 20 May 2005; ICTR, *Prosecutor v. Bagilishema,* Case No. ICTR-95-1A-T, Trial Chamber, Judgement, 7 June 2001.
ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Chamber, Judgement, 27 January 2000.

prohibited goal'.[87] Similarly, in *Prosecutor v. Limaj et al.*, it was argued that if the mistreatment has lasted for a prolonged period of time, the severity of the treatment should be assessed as a whole.[88] Likewise, at the ICC, the Ongwen Trial Chamber, after confirming that the severity element implies an *important* degree of pain or suffering, held that the pain or suffering 'may be met by a single act or by a combination of acts when viewed as a whole'.[89] This was also stated in the Al Hassan case where the ICC Pre-Trial Chamber, citing the ECHR' cases *Selmouni v. France* and *Aydin v. Turkey*, stated that the "acute" severe degree of pain or suffering can be achieved by means of a single act or a combination of acts taken as a whole.[90]

3.1 The Assessment of the Severity of the Act Charged as Torture in the ECHR's Jurisprudence

The principle according to which any assessment of the act charged as torture depends on a series of circumstances - including the nature of the treatment, its duration, its physical effects and the sex, age and health of the victim - is known as the principle of relative assessment of the treatment. Such a principle was affirmed by the ECHR in its jurisprudence and was endorsed by the ICTs.[91] For instance, it is particularly meaningful that the ICTY borrowed this principle 'almost word for word' from the ECHR in the Delalic, Kvočka and Brdanin cases.[92] One may argue that the adoption of this principle by the ICTs is yet another

[87] ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Chamber, Judgement, 15 March 2002, para. 182.
[88] ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgement, 30 November 2005, para. 237.
[89] ICC, *Prosecutor v. Ongwen,* Case No. ICC-02/04-01/15, Trial Chamber, Judgement, 4 February 2021, para. 2701; *see also* ICTY, *Prosecutor v. Naletilić and Martinović,* Case No. IT-98-34, Appeals Chamber, Judgement, 3 May 2006, para. 299; ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Chamber, Judgement, 15 March 2002, para. 182.
[90] ICC, *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 13 November 2019, para. 230. Although the Court also referred to the Martinovic and Krnojelac cases in this reference.
[91] *See*, e.g., ECHR, *A. v. The United Kingdom*, Application. No. 25599/94, Court (Chamber), 23 September 1998, para. 20.
[92] Farrell, *supra* note 37, p. 14 *referring to* ICTY, *Prosecutor v Kvočka*, Trial Chamber, Judgement, 2 November 2001, para. 143 and ICTY, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, para. 536.

meaningful example of the remarkable influence that the ECHR's jurisprudence had on the case law of the ICTs when these were dealing with the crime of torture.[93]

In its jurisprudence, the ECHR held that any assessment of whether a certain mistreatment attains the required level of severity to amount to torture depends on all the circumstances of the case, including:

- the nature of the treatment,
- the context of the treatment (such as an 'atmosphere of heightened tension and emotions'),
- the manner, means and methods employed for the execution of the treatment,
- the duration of the treatment,
- the premeditation of the ill-treatment,
- the duration of the mistreatment (whether the mistreatment was inflicted for 'hours at stretch'),
- the repetition of the treatment,
- the physical effects of the treatment (such as the causation of actual bodily injury or intense physical pain),
- the mental effects of the treatment (causation of intense mental pain),
- the mental and psychological condition of the victim,
- the sex of the victim,
- the age of the victim,
- the state of health of the victim,

[93] Although the ICTY 'referred not only to the European Convention on Human Rights and to the ECtHR's case law, but also to other human rights bodies' case law. Particular attention has been devoted to the International Covenant on Civil and Political Rights (ICCPR) as the main relevant instrument at the universal level, and to the 'views' of the Human Rights Committee (HRC) as the body in charge of the interpretation of the ICCPR': O. de Frouville, 'The Influence of the European Court of Human Rights' Case Law on International Criminal Law of Torture and Inhuman or Degrading Treatment', 9 *Journal of International Criminal Justice* (Oxford University Press, Oxford, 2011) 633–649, p. 641.

- whether the victim was in a vulnerable situation.[94]

As can be seen, the assessment criteria taken into consideration by the ECHR are quite similar to the ones considered by the ICTs. At the same time, one may argue that the ECHR's jurisprudence gave particular attention to the victim's experience within the assessment of the acts charged as torture. Indeed, the subjective experience of the victims has considerable relevance in the ECHR's approach to the assessment of torture[95] given that, as the Court itself correctly argued in *Jalloh v. Germany*, 'the subjective threshold of pain may vary a great deal from one person to another'.[96] The importance of the subjective experience of the victims within the assessment of torture can also be seen in *Ireland v. The United Kingdom*, where the Court explained that, in determining whether torture has been committed, it is fundamental 'to apply not only the objective test but also the subjective test.'[97] As a result, it has been argued that, according to the ECHR, the "measuring stick" for assessing whether an act amounts to torture is … a subjective decision based upon the severity of pain and suffering occasioned by the act.'[98]

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[94] *See* ECHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Court (Grand Chamber), Judgement, 13 December 2012, para. 196; ECHR, *Soering v. The United Kingdom*, Application No. 14038/88, Court (Plenary), Judgement, 07 July 1989, para. 100; ECHR, *Ireland v. The United Kingdom*, Application No. 5310/71, Court (Plenary), 25 April 1978, paras. 130–131, 167 and Separate Opinion of Judge Zekia; ECHR, *Selmouni v. France*, Application No. 25803/94, Court (Plenary), Judgement, 28 July 1999, para. 100; ECHR, *Labita v. Italy*, Application No. 26772/95, Court (Grand Chamber), 06 April 2000, para. 120; ECHR, *Gäfgen v. Germany*, Application No. 22978/05, Court (Grand Chamber), Judgement, 01 June 2010, para. 101; ECHR, *Ireland v. The United Kingdom*, Application No. 5310/71, Judgement, Court (Plenary), 18 January 1978, para. 167; ECHR, *Khlaifia and Others v. Italy*, Application No. 16483/12, Court (Grand Chamber), Judgement, 15 December 2016, para. 160; ECHR, *Aksoy v. Turkey*, Case No. 21987/93, 18 December 1996, para. 63; ECHR, *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996, para. 63; ECHR, *Kudla v. Poland,* Application No. 30210/96, Court (Grand Chamber), 26 October 2000, paras. 91–92; ECHR, *Al Nashiri v. Romania*, Application No. 33234/12, Court (First Section), 31 May 2018, para. 666; ECHR, *Raninen v. Finland*, Application No. 20972/92, Judgement, 16 December 1997, para. 55; ECHR, *Ramirez Sanchez v. France*, Application No. 59450/00, Court (Grand Chamber), 04 July 2006, paras. 117–118; ECHR, *Selçuk and Asker v. Turkey*, Application No. 23184/94, 28 November 1996, Judgement, para. 76; ECHR, *Tekin v. Turkey*, Application No. 22496/93, Judgement, 9 June 1998, para. 52.

[95] On this point *see* Farrell, *supra* note 37, p. 23.

[96] ECHR, *Jalloh v. Germany*, Case No. 54810/00, Court (Grand Chamber), 11 July 2006, Concurring Opinion of Judge Zupančič, para. 2.

[97] ECHR, *Ireland v. The United Kingdom*, Case No. 5310/71, Court (Plenary), 25 April 1978, Separate Opinion of Judge Zekia.

[98] Association for the Prevention of Torture, *Guide to Jurisprudence on Torture and Ill-treatment: Article 3 of the European Convention for the Protection of Human Rights* (June 2022), p. 14.

3.2 Missing Assessment Criteria in ICC Cases: Suggestions for Future Cases

The analysis of the criteria for the assessment of torture considered by the ICTs and the ECHR has revealed that, overall, the ICC has given a considerable deal of attention to subjective criteria, especially when compared with other ICTs such as the ICTR or the ECCC. Indeed, although the ICC did not mention any subjective criteria for the assessment of the acts charged as torture in the Bemba and Ongwen cases, it did mention a considerable number of subjective criteria in *Prosecutor v. Al Hassan*, including a particularly valuable criterion previously considered only in the Limaj case: the social, cultural and religious context relating to the victim. One may argue that this constitutes a truly considerable step forward in the understanding of the victim's role within the assessment of torture in ICL, a step that is symptomatic of the increasing importance given to the subjective experience of the victims of torture in cases before the ICC.

Nevertheless, it may be suggested that, in the future, while assessing acts charged as torture, the ICC could also take into consideration one relevant subjective criterion considered by the ECHR when assessing the gravity of the mistreatment: whether the victim was in a vulnerable situation. One may argue that the use of this criterion, so far never used by the ICC, would allow the Court to take into consideration whether and to what extent the fact of being in a vulnerable situation influenced the degree of pain or suffering that the victim experienced. Similarly, there are also five objective criteria considered by the ICTY and the ECHR in their jurisprudence that I believe the ICC could take into consideration while assessing acts charged as torture. These are the premeditation of the infliction of pain and the means or methods employed for its execution (considered by both the ICTY and the ECHR), the nature of the mistreatment and the context of the infliction of pain (considered solely by the ECHR) and the institutionalisation of the ill-treatment (considered solely by the ICTY).

Indeed, the ICC could decide to replicate the approach of these two Courts in future assessments of alleged cases of torture and take into consideration these criteria. I believe that this may contribute to producing a more correct assessment of the act charged as torture by giving proper consideration to the context surrounding the infliction of pain, which may have involved, for instance, an atmosphere of heightened tension and emotions, and the means and methods employed which, for example, may have been particularly inhuman or may have involved a certain disregard for human life or the health of the victim. At the same time, it would also give proper importance to the presence of any premeditation on the side of the perpetrator and to the achieved level of institutionalisation of the infliction of pain.

3.3 The Absence of an Agreed Minimum Threshold of Pain or Suffering

The pain or suffering caused must be severe for an act to amount to torture, but there is still no unanimity as to the minimum degree of pain or suffering required for the CAH of torture.[99] The existing jurisprudence of the ICTY, the ICTR, the ECCC and the ICC has not identified a specific minimum threshold after which the pain or suffering can be considered as "severe" and the respective act can amount to torture.[100] Thus, the degree of pain required for an act to amount to torture has not yet been determined.[101] Indeed, although it has been determined that torture is constituted by acts or omissions causing severe pain or suffering, there are no additional specific requirements that might be used for the classification of the acts that may constitute torture.[102]

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[99] Ventura, *supra* note 59, p. 795.
[100] *See* ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & 23/1, Appeals Chamber, Judgement, 12 June 2002, para. 149; ICTY, *Prosecutor v. Mucić et al.*, Case No. IT-96-21, Trial Chamber, Judgement, 16 November 1998, para. 469; ICTY, *Prosecutor v. Kvočka et al*., Case No. IT-98-30/1, Trial Chamber, Judgement, 2 November 2001, para. 143; ICTY, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, para. 469.
[101] *See* ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & 23/1, Appeals Chamber, Judgement, 12 June 2002, para. 149.
[102] ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & 23/1, Appeals Chamber, Judgement, 12 June 2002, para. 149.

In the Mucić case, the ICTY underlined the difficulty of calculating a precise threshold of suffering at which a form of mistreatment can be considered torture.[103] Likewise, the Delalic Trial Chamber, while citing the Northern Ireland Case before the ECHR, held that 'it is difficult to articulate with any degree of precision the threshold level of suffering at which other forms of mistreatment become torture'.[104] Thus, the specific minimum threshold after which the pain or suffering is sufficiently severe to meet the definition of torture has never been delineated.[105] Indeed, both the ICTY and the ICTR agreed that 'no absolute threshold level of pain or suffering can be determined'.[106] This was also underlined in *Prosecutor v. Brđanin*, where the Chamber held that 'the jurisprudence of this Tribunal and of the ICTR has not specifically set the threshold level of suffering or pain required for the crime of torture'.[107]

Consequently, the threshold level of pain or suffering depends on the individual circumstances of each specific case and will thus have to be evaluated on a case-by-case basis.[108] The jurisprudence of the ICC has also confirmed this approach. For instance, in *Prosecutor v. Bemba*, the ICC Pre-Trial Chamber held that '[a]s to the objective element, the *actus reus* … there is no definition of the severity threshold as a legal requirement of the crime of torture'.[109] Similarly, the ECHR also failed to determine the exact threshold after which an act may be classified as torture. Indeed, this Court held that certain mistreatment

[103] ICTY, *Prosecutor v. Mucić et al.*, Case No. IT-96-21, Trial Chamber, Judgement, 16 November 1998, para. 469.
[104] ICTY, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, paras. 463, 469.
[105] ICTY, *Prosecutor v. Kvočka et al*., Case No. IT-98-30/1, Trial Chamber, Judgement, 2 November 2001, para. 143.
[106] Burchard, *supra* note 72, p. 165; *see also* ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & 23/1, Appeals Chamber, Judgement, 12 June 2002, para. 149.
[107] ICTY, *Prosecutor v. Brđanin*, Trial Chamber, Judgement, Case No. IT-99-36, 1 September 2004, para. 483.
[108] ICTY, *Prosecutor v. Brđanin*, Trial Chamber, Judgement, Case No. IT-99-36, 1 September 2004, para. 483.
[109] ICC, *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08-424, Pre-Trial Chamber II, Decision on the Confirmation of Charges, 15 June 2009, para. 193.

'must attain a minimum level of severity if it is to fall within the scope of Article 3',[110] but did not specify the specific threshold after which the mistreatment would amount to torture.

It is truly regrettable that the existing case law of the ICTs, including the recent Ongwen and Al Hassan cases, has consistently failed to determine the minimum degree of pain required to classify an act as the CAH of torture and that, as a result, such a degree is still uncertain. This is because such a determination could be particularly beneficial for the victims of torture since it would contribute to lessening the prosecutorial burden of the proof and make it easier for a Chamber to identify when exactly a form of mistreatment becomes torture because it crosses the minimum threshold level of pain. It will have to be seen whether the ICC will choose to maintain this approach in its future cases, or whether it will decide to establish the minimum threshold of pain required for an act to meet the definition of torture.

4 The Pain Does Not Need to Cause Permanent Injuries or Impairments, Be Visible or Have a Minimum Duration

Although the infliction of severe pain or suffering often causes permanent damage to the victim's health, such permanent injury is not a requirement for torture.[111] Indeed, for an act to amount to the CAH of torture, it is irrelevant whether the injury caused by the pain or suffering is permanent.[112] Thus, temporary harm may suffice and mistreatment can amount to torture even when it does not cause a permanent injury.[113] This was clarified in, for instance,

[110] ECHR, *Labita v. Italy*, Application No. 26772/95, Court (Grand Chamber), 06 April 2000, para. 120.
[111] ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, Trial Chamber, Judgement, 2 November 2001, paras. 148–149.
[112] *See, inter alia,* Rodley, *supra* note 6; Einolf, *supra* note 52.
[113] Burchard, *supra* note 72, p. 165; *see also* D. Robinson, 'Article 7(1)(e) – Crime Against Humanity of Imprisonment or Other Severe Deprivation of Physical Liberty', in R. S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Ardsley, 2001), pp. 88–89; Marshall, *supra* note 72.

Prosecutor v. Mrkšić et al., where the ICTY explained that 'there is no requirement that the act or omission has caused a permanent injury'.[114] Similarly, in the Brđanin case, it was stated that a permanent injury is not a requirement for torture[115] while the Limaj Trial Chamber also confirmed that 'it is not required that the act or omission has caused a permanent injury'.[116] This was also argued by the ECCC in *Prosecutor v. Kaing Guek Eav alias Duch*, where the Trial Chamber noted that the injury caused does not need to be permanent for an act to amount to torture.[117] The absence of a requirement for permanent injuries was also confirmed in the ICC case law (e.g., *Prosecutor v. Ongwen*).[118]

Moreover, the pain or suffering inflicted does not need to cause any impairment of body functions, organ failure or other disabilities for the act to amount to the CAH of torture.[119] Indeed, under customary international law, torture does not need to cause organ failure, impairment of bodily functions, or even death.[120] This was also explained by the Brđanin Appeals Chamber,[121] as well as confirmed in the jurisprudence of the ICC. For instance, in the Ongwen case, the ICC Trial Chamber argued that torture does not need to cause organ failure or impairment of a bodily function or death.[122] A similar statement is to be found in *Prosecutor v. Al Hassan*, where the ICC Pre-Trial Chamber stated that it is not

[114] ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1, Trial Chamber, Judgement, 27 September 2007, para. 514.
[115] ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Trial Chamber, Judgement, 1 September 2004, para. 484.
[116] ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgement, 30 November 2005, para. 236.
[117] ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010, para. 355.
[118] ICC, *Prosecutor v. Ongwen,* Case No. ICC-02/04-01/15, Trial Chamber, Judgement, 4 February 2021, para. 2701.
[119] *See* Ventura, *supra* note 59, p. 795. *See also* Rodley, *supra* note 6.
[120] Ventura, *supra* note 59, p. 795.
[121] ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Appeals Chamber, Judgement, 3 April 2007, para. 249; according to the Chamber this is not required by the Convention against Torture.
[122] ICC, *Prosecutor v. Ongwen,* Case No. ICC-02/04-01/15, Trial Chamber, Judgement, 4 February 2021, para. 2701. *See also* ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Judgement, 26 July 2010, para. 355; ICTY, *Prosecutor v. Kunarac et al.*, Appeals Chamber, Judgement, 12 June 2002, para. 150; ICTY, *Prosecutor v. Kvočka et al*., Case No. IT-98-30/1-T, Trial Chamber, Judgement, 2 November 2001, para. 148.

necessary to demonstrate that the pain or suffering caused organ failure or the deterioration of a biological function.[123]

Furthermore, it is not required, for an act to amount to the CAH of torture, that such torture caused visible pain or suffering on the victim's body.[124] This was argued in, for instance, *Prosecutor v. Brđanin*, where the ICTY Trial Chamber held that 'evidence of the suffering need not even be visible after the commission of the crime'.[125] As for the ECCC, the Duch Trial Chamber stated that 'the consequences of the act or omission need not be visible on the victim to constitute torture'.[126] The irrelevance of the visibility of the pain inflicted on the victims was also confirmed by the ICC Trial Chamber in the Ongwen case'.[127] Hence, whether the pain inflicted left visible signs on the victim's body is irrelevant and, as Burchard pointed out, it is 'no defence that victims did not show effects of physical or mental pain or suffering'.[128] It can be argued that the ECHR took a similar approach towards visible pain in its jurisprudence when, in the Selmouni case, it implicitly admitted the non-indispensable character of the visibility of the pain inflicted by holding that the series of blows inflicted upon the victim amounted to torture because they caused substantial pain even though they did not leave a visible mark on the body.[129]

It is thus the infliction of severe pain itself that qualifies as torture. The consequences or effects of such pain, be it a visible injury, a permanent injury, an impairment or a deterioration of a bodily function, a disability, an organ failure or even death, are irrelevant

[123] ICC, *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 13 November 2019, para. 231.
[124] Ventura, *supra* note 59, p. 795. *See also* ICTY, *Prosecutor v. Kunarac*, Case No. IT-96-23-A, Appeals Chamber, Judgement, 12 June 2002, para. 150; ICTY, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Appeals Chamber, Judgement, 3 May 2006, para. 300.
[125] ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Trial Chamber, Judgement, 1 September 2004, para. 484.
[126] ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010, para. 355.
[127] ICC, *Prosecutor v. Ongwen,* Case No. ICC-02/04-01/15, Trial Chamber, Judgement, 4 February 2021, para. 2701. *See also* ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010, para. 355; ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & 23/1, Appeals Chamber, Judgement, 12 June 2002, para. 150; ICTY, *Prosecutor v. Kvočka et al*., Case No. IT-98-30/1-T, Trial Chamber, Judgement, 2 November 2001, para. 148.
[128] Burchard, *supra* note 72, p. 165. *See also* Robinson, *supra* note 113, pp. 88–89.
[129] ECHR, *Selmouni v. France*, Application No. 25803/94, Court (Plenary), Judgement, 28 July 1999, para. 102.

for the purposes of an assessment of the severity of the pain or suffering. Lastly, it is not required that the pain or suffering inflicted upon the victims have lasted for a particular length of time for an act to amount to torture.[130] Indeed, the elements of the crime of torture do not include a 'rigid durational requirement'.[131] As a result, it was argued that 'there is no basis for the defence to claim that a possibly torturous incident involved insufficient duration to satisfy the requisite threshold of gravity'.[132]

One may argue that not requiring the pain inflicted to be visible, have a minimum duration, cause permanent injuries, disabilities, organ failure or death in order for an act to amount to the CAH of torture is undoubtedly beneficial for the victims of the mistreatment. Indeed, requiring the presence of the elements mentioned above would dramatically reduce the range of situations in which the mistreatments can be classified as torture while putting an additional and considerable burden upon the prosecution. Thus, not having to prove that the mistreatment inflicted caused visible effects, had a minimum duration, caused a permanent injury, a disability or an organ failure is particularly meaningful since it allows for the criminalisation of a wider range of acts while also lessening the prosecutorial burden of proof.

5 The Pain or Suffering Can Be both Physical and Mental

The pain or suffering inflicted upon the victims does not need to be necessarily physical, but it can also be mental. Indeed, according to Art. 1 of the Torture Convention,

[130] Ventura, *supra* note 59, p. 795. *See also* Rodley, *supra* note 6.
[131] Burchard, *supra* note 72, p. 165. *See also* Robinson, *supra* note 113, pp. 88–89.
[132] Burchard, *supra* note 72, p. 165.

torture 'means any act by which severe pain or suffering, whether physical or *mental* [emphasis added], is intentionally inflicted on a person'.[133]

The ICTY has repeatedly held that the pain or suffering caused by torture does not necessarily need to be physical. For instance, both the Limaj and Mrkšić Trial Chambers stated that there is no requirement that the pain or suffering caused by torture must be physical.[134] Likewise, the Kvočka Trial Chamber explained that an abuse amounting to torture does not have to necessarily involve physical injury.[135] In a similar way, the jurisprudence of the ICTR has also underlined that both physical and mental pain can amount to torture. For instance, in *Prosecutor v. Akayesu*, the ICTR Trial Chamber held that torture is 'any act by which severe pain or suffering, *whether physical or mental* [emphasis added], is intentionally inflicted on a person'.[136] Likewise, both in the Musema and the Ntagerura cases, the ICTR Trial Chamber underlined that '[t]orture as a crime against humanity is the intentional infliction of severe physical or *mental* [emphasis added] pain or suffering'.[137] Additionally, in *Prosecutor v. Semanza*, the ICTR stated that '[t]he *actus reus* of torture involves the intentional infliction of severe mental or physical pain'.[138]

As for the ECCC, this Court too recognised that mental pain or suffering can amount to torture. In particular, in *Prosecutor v. Kaing Guek Eav alias Duch*, the ECCC stated that '[t]orture comprises the infliction, by an act or omission, of severe pain or suffering, whether

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[133] Torture Convention, Art. 1. *See also* Einolf, *supra* note 52. Similarly, according to Art. 2 of the Inter-American Convention to Prevent and Punish Torture, 'torture shall be understood to be any act intentionally performed whereby physical or mental [emphasis added] pain or suffering is inflicted on a person': Inter-American Convention to Prevent and Punish Torture, December 1985, Art. 2.
[134] ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgement, 30 November 2005, para. 236 and ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1, Trial Chamber, Judgement, 27 September 2007 para. 514.
[135] ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, Trial Chamber, Judgement,, 2 November 2001, paras. 148–149.
[136] ICTR, *Prosecutor v.* Akayesu, Case No. ICTR-96-4-T, Trial Chamber, Judgement, 2 September 1998, para. 593.
[137] ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Chamber, Judgement, 27 January 2000, para. 285 and ICTR, *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46, Trial Chamber, Judgement, 25 February 2004, para. 703.
[138] ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Chamber, Judgement, 15 May 2003, para. 544. *See also* ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Chamber, Judgement, 15 May 2003, para. 343.

physical or *mental* [emphasis added]'.[139] As to the ICC ecosystem, pursuant to the Rome Statute, '[t]orture means the intentional infliction of severe pain or suffering, whether physical or mental'.[140] In conformity with this provision, in *Prosecutor v. Ongwen*, the ICC Trial Chamber confirmed that 'the pain and suffering may be either physical or mental'.[141]

As the case law of the ICTY has often shown, mental pain or suffering is actually the most common kind of pain or suffering that is inflicted through torture. This was noted in, for instance, the Mrkšić case, where the Trial Chamber argued that the infliction of mental pain or suffering is the prevalent form of torture.[142] Likewise, both the Limaj and Kvočka Trial Chambers pointed out that 'mental harm is a prevalent form of inflicting torture'.[143]

The fact that the pain caused by a certain act does not need to be necessarily physical but may be mental as well has also been recognised by the ECHR, according to which 'there can be little doubt that torture may be inflicted in the mental sphere.'[144] It is indeed meaningful that, in *Al Nashiri v. Romania*, the ECHR clarified that 'Article 3 of the Convention does not refer exclusively to the infliction of physical pain but also to that of mental suffering.'[145] Similarly, in *Gäfgen v. Germany*, after finding that the victims suffered from 'considerable fear, anguish and mental suffering', the ECHR, correctly argued that 'the

[139] ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Judgement, 26 July 2010, para. 353.
[140] Rome Statute, Art. 7(2)(e). *See also* Klamberg, *supra* note 7, pp. 48–49.
[141] ICC, *Prosecutor v. Ongwen,* Case No. ICC-02/04-01/15, Trial Chamber, Judgement, 4 February 2021, para. 2701. *See also* ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Judgement, 26 July 2010, para. 355; ICTY, *Prosecutor v. Kunarac et al.*, Appeals Chamber, Judgement, 12 June 2002, para. 150; ICTY, *Prosecutor v. Kvočka et al*., Case No. IT-98-30/1-T, Trial Chamber, Judgement, 2 November 2001, para. 148.
[142] ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1, Trial Chamber, Judgement, 27 September 2007 para. 514.
[143] ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgement, 30 November 2005, para. 236 and ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, Trial Chamber, Judgement, 2 November 2001, paras. 148–149.
[144] *See* ECHR, *Ireland v. The United Kingdom*, Application No. 5310/71, Court (Plenary), 25 April 1978, Separate Opinion of Judge O'Donoghue.
[145] ECHR, *Al Nashiri v. Romania*, Application No. 33234/12, Court (First Section), Judgement, 31 May 2018, para. 675.

nature of torture covers both physical pain and mental suffering' and that, for an act to constitute torture, it is not necessary 'for physical injury to be caused.'[146]

Additionally, in *Selmouni v. France,* the ECHR found that the ill-treatment that the victim had to endure caused both physical and mental pain or suffering.[147] Indeed, in this case, the Court held that 'the blows inflicted on the applicant had caused him actual injuries and acute physical and mental suffering' and that such treatment was of such a serious and cruel nature that it could only be described as torture.[148] Moreover, in *Soering v. The United Kingdom*, the ECHR found that certain ill-treatment caused intense mental suffering because it provoked 'feelings of fear' and 'anguish' while aiming at breaking the 'physical or moral resistance' of the victim.[149] In the same case, the Court also pointed out that it is not just the physical pain experienced by the victims that must be taken into account, but also 'the person's mental anguish of anticipating the violence he is to have inflicted on him.'[150]

Finally, it is also worth considering that even a threat of torture may amount to psychological torture to the extent that it causes anguish resulting in severe mental suffering for the victim.[151] This has been affirmed by the ECHR in *Gäfgen v. Germany*, where the Court pointed out that 'the fear of physical torture may itself constitute mental torture',[152] and in *Akkoc v. Turkey*, where the Court explained that '[t]hreats of ill-treatment to the applicant's children' can amount to torture.[153] The ICTY took a similar approach in the Kvočka case, where the Trial Chamber argued that a person who is forced to watch torture inflicted on a

[146] ECHR, *Gäfgen v. Germany*, Application No. 22978/05, Court (Grand Chamber), Judgement, 01 June 2010, paras. 86, 103.
[147] ECHR, *Selmouni v. France*, Application No. 25803/94, Court (Plenary), Judgement, 28 July 1999, para. 98.
[148] ECHR, *Selmouni v. France*, Application No. 25803/94, Court (Plenary), Judgement, 28 July 1999, para. 92.
[149] ECHR, *Soering v. The United Kingdom*, Application No, 14038/88, Court (Plenary), Judgement, 07 July 1989, para. 100.
[150] ECHR, *Soering v. The United Kingdom*, Application No. 14038/88, Court (Plenary), Judgement, 07 July 1989, para. 100.
[151] Association for the Prevention of Torture, *supra* note 3, p. 12 *citing* Committee Against Torture, Report on Argentina, UN Doc. A/45/44, 1990, para. 154.
[152] ECHR, *Gäfgen v. Germany*, Application No. 22978/05, Court (Grand Chamber), Judgement, 01 June 2010, para. 86.
[153] Article 3: Freedom from torture and inhuman and degrading treatment or punishment, Human Rights review (2012), p. 74 *citing* ECHR, *Akkoc v. Turkey*, Application No. 21987/93, Court (First Section), Judgement 10 October 2000.

relative or friend may also endure mental pain or suffering that could reach the degree of severity required for the CAH of torture.[154]

6 The Pain or Suffering Cannot Arise Only from Lawful Sanctions

Under international customary law, the pain or suffering arising *only* from lawful sanctions cannot amount to torture. Indeed, according to Art. 1 of the Torture Convention, torture 'does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'.[155] Similarly, according to Art. 2 of the Inter-American Convention to Prevent and Punish Torture, 'the concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures'.[156]

The absolute character of the prohibition of torture was also affirmed by the ECHR which recognised that torture 'has achieved the status of peremptory norm in international law.'[157] This Court stated that there can never be a justification for torture under the Convention or under international law because, under Article 3, no derogation is permissible,[158] not even 'in the event of a public emergency threatening the life of the nation or in the most difficult circumstances, such as the fight against terrorism and organised crime.'[159]

The ECHR's approach has been adopted in the ICTs' jurisprudence. For instance, in *Prosecutor v. Musema*, the ICTR Trial Chamber explicitly held that torture 'does not include

[154] ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, Trial Chamber, Judgement, 2 November 2001, paras. 148–149.
[155] Torture Convention, Art. 1. *See also* Tate, *supra* note 2.
[156] Inter-American Convention to Prevent and Punish Torture, December 1985, Art. 2.
[157] ECHR Registry, *Guide on Article 3 of the European Convention on Human Rights*, August 2022, p. 7.
[158] ECHR, *Al-Saadoon and Mufdhi v. The United Kingdom*, Application No. 61498/08, Court (Fourth Section), 02 March 2010, para. 121.
[159] ECHR, *Khlaifia and Others v. Italy*, Application No. 16483/12, Court (Grand Chamber), 15 December 2016, para. 158; *see also* ECHR, *Tomasi v. France*, Application No. 12850/87, Court (Chamber), 27 August 1992, para. 78.

pain or suffering only arising from, inherent in or incidental to, lawful sanctions'.[160] As to the ICC, Art. 7(2)(e) of the Rome Statute explicitly states that torture 'shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions'[161] - mirroring the definition given in Art. 1 of the Torture Convention. In conformity with these provisions, in *Prosecutor v. Ongwen*, the ICC Pre-Trial Chamber stated that torture requires that the pain or suffering did not arise from, and was not inherent or incidental to, lawful sanctions.[162]

As to the exact meaning of the term "lawful sanctions", the ECHR explained that lawful sanctions are all those treatments that are a 'reasonable' or 'unavoidable part of a penal system' and do not 'unreasonably violate a person's physical or mental integrity.'[163] It is particularly crucial that this distinction, although it implies tolerance towards certain lawful sanctions, 'does not give "carte blanche" to States to simply create legislation permitting sanctions which amount to acts of torture and other forms of ill-treatment.'[164] Moreover, Boot suggests that the term lawful sanctions refers to national law which is consistent with international law and standards.[165] I believe that this author is correct since it is generally accepted that lawful sanctions are only those sanctions that conform to internationally accepted standards and 'constitute practices widely accepted as legitimate by the international community, such as deprivation of liberty through imprisonment, which is common to almost all penal systems'.[166] Similarly, with regards to the term "lawful" within the context of the RS, Hall correctly argued that the term *lawful* 'refers to international law or national law,

[160] ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Trial Chamber, Judgement, 27 January 2000, para. 285.
[161] Rome Statute, Art. 7(2)(e). *See also* Klamberg, *supra* note 7, pp. 48–49; Bassiouni, *supra* note 10, pp. 443–445; McCormack, *supra* note 10, p. 193.
[162] ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber, Judgement, 4 February 2021, para. 2703.
[163] Association for the Prevention of Torture, *supra* note 98, p. 24.
[164] *Ibid.*
[165] *See* M. Boot, 'Article 7: Crimes against humanity', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Nomos, Baden-Baden, 1999), p. 106.
[166] *See* Report of the UN Special Rapporteur on Torture, U.N. Doc. E/CN.4/1991997/7, 1997, para. 8.

which is consistent with international law and standards'.[167] Thus, the lawful sanctions include corporal punishments and the death penalty, which might be imposed exclusively by competent tribunals in the States where they are not yet outlawed.[168]

It is also particularly crucial that these lawful sanctions must also be consistent with 'the spirit of the absolute prohibition of torture'.[169] Furthermore, as specified in the Torture Convention, torture does not include pain or suffering arising only from lawful sanctions 'to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners'.[170] As a result, the authorisation by a State of certain treatments or punishments does not automatically exclude criminal responsibility for torture.[171] Hence, the fact that the penal code of a certain country recognises corporal punishments as lawful sanctions for breaking the law and that these sanctions are accepted under domestic law, does not automatically make them lawful in the sense of Art. 1 of the Torture Convention.[172] This is because the lawfulness of practices and sanctions authorised under domestic law should be measured under *both* national law and international law.[173]

One may argue that the fact that a mere State authorisation of certain treatments does not automatically exclude criminal responsibility for the CAH of torture is truly crucial since it affords remarkable protection for the victims of torture as it makes it harder for a perpetrator to justify the infliction of certain mistreatment on the grounds of being a lawful sanction. At the same time, it may be argued that the fact that lawful sanctions must

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[167] C. K. Hall, 'Article 7: Crimes against humanity, (e) 'Imprisonment or other severe deprivation of physical liberty', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, *Article by Article* (2nd edition, Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2008), p. 253.
[168] Boot, *supra* note 165, p. 170.
[169] Association for the Prevention of Torture, *supra* note 3, p. 175.
[170] Torture Convention, Art. 1 *citing* the United Nations Standard Minimum Rules for the Treatment of Prisoners, August 1955.
[171] Boot, *supra* note 165, p. 106. *See also* Klamberg, *supra* note 7, pp. 48–49; Bassiouni, *supra* note 10, pp. 443–445.
[172] *See* Report of the UN Special Rapporteur on Torture, U.N. Doc. E/CN.4/1988/17, 1998, para. 42.
[173] A. Byrnes, 'Torture and Other Offences Involving the Violation of the Physical or Mental Integrity of the Human Person', in G. K. McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: Commentary* (Brill, 2023), p. 218.

constitute practices widely accepted as legitimate by the international community, must comply with internationally accepted standards and be consistent with the spirit of the absolute prohibition of torture and with the Standard Minimum Rules for the Treatment of Prisoners is beneficial for the victims of torture since it grants meaningful protection against the infliction of torture masked as a lawful sanction. For instance, the idea that the application of punishments such as stoning, flogging or amputations can be considered lawful simply because the punishment was authorised 'in a procedurally legitimate manner, i.e. through the sanction of legislation, administrative rules or judicial order' has been rejected by the UN Special Rapporteur on Torture.[174] According to the Special Rapporteur, accepting such an idea would mean accepting that any torturous and cruel practice, sanction or punishment can be considered lawful if the punishment has been 'duly promulgated under the domestic law of a State'.[175]

As to the ICC, in the Al Hassan case, the Pre-Trial Chamber has underlined that corporal punishments which meet the elements of Art. 7(2)(e) of the Rome Statute and inflict a severe degree of pain or suffering, such as flogging or amputation, cannot be qualified as legal sanctions.[176] Indeed, one may argue that a different interpretation of the "legal sanctions" clause would mean admitting that in order to escape prosecution for an act considered as torture it is sufficient to legalise certain prohibited acts in advance.[177] This, I believe, would have the particularly unfortunate effect of rendering purely formal and artificial the prohibition, contained in the RS, to perpetrate acts that could amount to torture and would empty Art. 7(1)(f) of its substance.[178] Likewise, in the Duch Case, the ECCC Trial

[174] Report of the UN Special Rapporteur on Torture, U.N. Doc. E/CN.4/1991997/7, 1997, para. 8.
[175] *Ibid.*, para. 8; *see also* UN General Assembly, Note of Secretary General, A/60/316, 30 August 2005, paras. 27–28.
[176] ICC, *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 13 November 2019, para. 248.
[177] *See* ICC, *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 13 November 2019, para. 249.
[178] ICC, *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 13 November 2019, para. 249.

Chamber explained that 'it is not possible to authorize torture via a legislative, administrative or judicial act' since the prohibition on torture 'acquired the status of a peremptory or non-derogable principle of international law'.[179]

Therefore, it is particularly crucial that even those States that did not ratify international treaties explicitly prohibiting torture cannot use it 'against anyone, anywhere'[180] because the prohibition against torture is 'absolute and non-derogable in any circumstances'.[181] Thus, the fact that the prohibition of torture is so 'universally accepted that it is now a fundamental principle of customary international law' means that torture is impermissible in any case, including war, public emergency or terrorist threat.[182] As a consequence, the prohibition of torture 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'.[183]

7 The Influence of the ECHR's Jurisprudence on the Case Law of the ICTs Dealing with Torture

As the analysis conducted above has shown, in cases concerning torture, the ICTs have often referred to the European Convention of Human Rights and to the ECHR's jurisprudence[184] which gave a fundamental contribution to the development of the concept of

[179] ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Judgement, 26 July 2010, para. 352.
[180] Association for the Prevention of Torture, *supra* note 3, p. 2.
[181] ICTY, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, para. 454.
[182] Association for the Prevention of Torture, *supra* note 3, p. 6.
[183] ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgement, 10 December 1998, para. 154.
[184] *See, e.g.,* ICC, *Prosecutor v. Ongwen*, Trial Chamber, Judgement, paras. 2179 and 2748; ICC, *Prosecutor v. Al Hassan*, Decision on the Confirmation of Charges, paras. 230–232, 245, 254, 260, 367, 374, 377, 379, 380–381; ICTY, *Prosecutor v. Blagojevic*, Case No. IT-02-60-T, Trial Chamber, Judgement, 17 January 2005 para. 592; ICTY, *Prosecutor v. Kvočka*, Case No. IT-98-30/1, Trial Chamber, Judgement, 2 November 2001,

torture and its characteristics within ICL.[185] This was due to the absence of any definitions of torture either in the Statute of the ICTR or the Statute of the ICTY which, together with the 'fragmentary character of international criminal justice',[186] created serious issues of interpretation in the early days of these Tribunals with regards to torture.[187]

Overall, it appears that the ECHR's jurisprudence had a significant deal of influence on the ICTs' 'understanding, definition and interpretation of acts of torture'.[188] For instance, the ICTY often referred to ECHR's jurisprudence to define the constitutive elements of torture which were not defined by the Statute of the ICTY.[189] Indeed, it is particularly meaningful that the ICTY referred to the ECHR's jurisprudence when dealing with two fundamental concepts related to the crime of torture: the threshold of pain or suffering required for an act to amount to torture and the principle of relative assessment of the treatment.

In fact, while dealing with the concept of threshold of pain or suffering, the ICTY quoted in detail four ECHR's cases - the Greek case, the Northern Ireland case, *Aksoy v. Turkey* and *Aydin v. Turkey* - when stating that a certain mistreatment can 'provide the requisite material element' if the pain inflicted 'meets the required level of severity' and that 'mistreatment that does not rise to the threshold level of severity necessary to be characterised as torture may constitute another offence.'[190] At the same time, it is significant that, while dealing with the assessment of the mistreatments, the ICTY endorsed the principle

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para. 71; ICTY, *Prosecutor v. Kunarac*, Case No. IT-96-23, Trial Chamber, Judgement, 22 February 2001, paras. 16, 42–43, 183–184, 372.

[185] On the contribution of the ECHR's jurisprudence and IHRL in general on the development of ICL *see* A. Skander Galand, 'The Systemic Effect of International Human Rights Law on International Criminal Law', in M. Scheinin (ed.), *Human Rights Norms in 'Other' International Courts* (Cambridge University Press, Cambridge, 2019) 87–131, p. 87. According to this author 'it is undeniable that international human rights law (IHRL) has greatly contributed to the progressive development of international criminal law (ICL)'.

[186] Maculan, *supra* note 8, p. 475

[187] On this point *see* de Frouville, *supra* note 93, p. 645.

[188] On this point *see* Farrell, *supra* note 37, p. 2.

[189] *See*, e.g., ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25, Trial Chamber, Judgement, 15 March 2002, paras. 181, 183; ICTY, *Prosecutor v. Kvocka*, Case No. IT-98-30/1 Trial Chamber, Judgement, 2 November 2001, paras. 142–143; ICTY, *Prosecutor v. Kunarac*, Case No. IT-96-23, Trial Chamber, Judgement, 22 February 2001, paras. 478–479, 534; ICTY, *Prosecutor v. Mucić et al.*, Case No. IT-96-21, Trial Chamber, Judgement, 16 November 1998, paras. 465–466.

[190] ICTY, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, para. 468.

of relative assessment of the treatment - a principle affirmed by the ECHR in its jurisprudence - and underlined that the assessment of the mistreatment should 'depend on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical effects and, in some instances, the sex, age and state of health of the victim'.[191] Hence, with regard to the crime of torture, the 'interpretative strategies' developed by the ECHR had a considerable impact on the case law of the ICTs and on the RS.[192]

Maculan correctly argues that the reason why the ECHR's jurisprudence has been the 'primary source of reference' for the ICTs while they were dealing with torture is that the ECHR 'dealt more often and more thoroughly with a range of interpretive issues related to the definition of torture and under a broader perspective'.[193] In fact, the ICTs referred to the ECHR's jurisprudence often because of the 'relatively high number of cases' where this Court dealt with the crime of torture and its characteristics.[194]

However, one may argue that the fact that the ECHR has dealt more often, more thoroughly and under a broader perspective with the interpretive issues connected to torture is only one of the two main reasons why the ICTs referred to the ECHR's jurisprudence quite often. The second important reason is that, since at the beginning, humanitarian law did not define torture while previous 'historical international criminal tribunals offered little' in that regard,[195] the *ad hoc* Tribunals had to deal with 'a lack of precedents for interpreting notions deriving fundamentally from IHL'.[196] As a result of this lack of precedents, to fill the gap, these Tribunals 'decided to examine human rights case law, on the basis of the 'resemblance'

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[191] ICTY, *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Trial Chamber, Judgement, 16 November 1998, para. 536 quoting ECHR, *A. v. The United Kingdom*, Case. No. 25599/94, Court (Chamber), Judgement, 23 September 1998, para. 20. Although the ICTY 'referred not only to the European Convention on Human Rights and to the ECtHR's case law, but also to other human rights bodies' case law. Particular attention has been devoted to the International Covenant on Civil and Political Rights (ICCPR) as the main relevant instrument at the universal level, and to the 'views' of the Human Rights Committee (HRC) as the body in charge of the interpretation of the ICCPR': de Frouville, *supra* note 93, p. 641.
[192] *See* Farrell, *supra* note 37, p. 6.
[193] Maculan, *supra* note 8, p. 476.
[194] *Ibid.*, p. 474.
[195] Farrell, *supra* note 37, pp. 9–10.
[196] *Ibid.*

between ICL and IHRL'[197] and thus 'adopt significant aspects of the reasoning on torture' from the ECHR.[198]

Maculan also argues that the attempt to define torture before the ICTs 'posed a set of challenging interpretive issues' for these Tribunals which managed to solve such issues 'by making extensive reference to international instruments, other than the applicable Statute, and to human rights case law', in a process known as 'cross-fertilisation'.[199] Similarly, Farrell correctly points out that it is not surprising that the ICTs referred to IHRL 'where there was not only a definition of torture but also plenty of judicial interpretation of the term and its distinction from other forms of ill-treatment.'[200] Through this process, 'human rights reasoning found its way in to international criminal law and jurisprudence including the Rome Statute.'[201]

Crucially, however, at some point, once the 'the constituent elements' of the crime of torture were defined and the ICTs had 'enough case law for self-reliance', then 'self-reference prevailed' in the case law of these Tribunals which finally managed to develop their own independence.[202] Thus, ICL became 'fully autonomous … in the sense that the international tribunals have progressively discovered the crimes' constituent elements under international customary law, drawing from a great diversity of sources and precedents' including IHRL instruments and case law.[203] Such autonomy allowed the ICTs to 'refer to a corpus of precedents in the field of ICL, making it unnecessary to have recourse to other domains of international law, such as IHRL.'[204]

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[197] *See* de Frouville, *supra* note 93, p. 637.
[198] Farrell, *supra* note 37, pp. 9–10.
[199] Maculan, *supra* note 8, p. 479. This author also argues that such cross-fertilisation 'has been fostering a progressive harmonisation of the definition of the offence, against an especially fragmented normative framework. This positive contribution to the evolution of the concept of torture is confirmed by the Rome Statute, which in many aspects reaps the fruit of this judicial interpretation.'
[200] Farrell, *supra* note 37, p. 10.
[201] *Ibid*, p. 9.
[202] Farrell, *supra* note 37, p. 9; de Frouville, *supra* note 93, p. 645.
[203] *See* de Frouville, *supra* note 93, p. 646.
[204] *Ibid.*

On the basis of this autonomy, de Frouville claims that the use of ECHR's jurisprudence in the case law of the ICTs 'only happened in the early years of the tribunals' and that the ICC - together with the Special Court for Sierra Leone - at some point, stopped feeling 'compelled to refer to human rights case law' and 'no longer referred to the ECHR's jurisprudence' but rather to 'previous judgments of the other Chambers or of the Appeal Chamber.'[205] However, I disagree with de Frouville's claim which, I believe, is based on the case law existing at the moment when this author made such a claim (2011 circa).[206] In fact, one may argue that, although overall the references to the ECHR's jurisprudence have been steadily decreasing in the last years - and were sometimes made only indirectly - since the ICTs gathered 'their own settled case law about torture' and preferred to quote 'their own precedents' instead,[207] these tribunals still refer to the ECHR's jurisprudence in their case law and, specifically, their case law on torture.

Indeed, I believe that it is particularly meaningful that, only in the recent Al Hassan case, the ICC Pre-Trial Chamber cited the ECHR's decisions as many as six times. First, it referred to *Selmouni v. France* and *Aydin v. Turkey* when explaining that it is the acute nature of the pain or suffering that differentiates the crime of torture from other acts of ill-treatment and that this degree of pain can be achieved by means of a single act or a combination of acts taken as a whole.[208] It then cited *Ireland v. The United Kingdom* while stating that the severity of pain can only be assessed on a case-by-case basis, taking into account all the

[205] *Ibid.*, p. 645. De Frouville also writes that 'in its Katanga and Ngudjolo Chui decision on the confirmation of charges, the Pre-Trial Chamber only referred to the ICTY's and ICTR's case law when defining both outrage upon personal dignity and 'other inhumane acts'. Similarly, in the Bemba decision on the confirmation of charges, Pre-Trial Chamber II quoted Nigel Rodley's book on the status of prisoners in international law,'summing up' the case law of both the ECtHR and the Inter-American Court of Human Rights. When defining torture and outrage upon personal dignity, it cited Krnojelac but, in the end, considered the Elements of Crimes to be the ultimate reference.'

[206] De Frouville also states that 'this phenomenon of substitution becomes apparent in the judgments adopted in 2002–2003 and thereafter': *Ibid.*

[207] Maculan, *supra* note 8, p. 477.

[208] ICC, *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 13 November 2019, para. 230. Although the Court also referred to the Martinovic and Krnojelac cases in this paragraph.

circumstances of the case.[209] It subsequently cited *Selmouni v. France* and *Ireland v. The United Kingdom* when considering the criteria for the assessment of the acts charged as torture.[210] Additionally, while describing the different kinds of mistreatment that have been considered to amount to torture, it cited *Akkoç v. Turkey*, *Al-Nashiri v. Poland*, *Kurt v. Turkey*, and *Babar Ahmad and others v. The United Kingdom*.[211] Moreover, while pointing out that the qualification of torture must be reserved for the strongest degree of inhuman treatment, the same Chamber also cited *Al-Nashiri v. Poland*, *Selmouni v. France* and *Aydin v. Turkey*.[212] Finally, when specifying that threats of physical violence against the victim or their family members can also amount to torture, this Chamber referred to *Gäfgen v. Germany*.[213]

Therefore, the remarkable number of references to the ECHR's jurisprudence, in this case, shows that, although the ICTs now have enough case law for self-reliance and although self-reference does prevail quite often, the ECHR's jurisprudence is still an important source for the case law of these Tribunals, especially when dealing with interpretive issues connected with the CAH of torture. Thus, I believe that de Frouville's claim does not appear to be correct and, while it might have been accurate at the time his article was published, it does not appear to be valid anymore given the most recent developments in the jurisprudence on torture in cases before the ICC.

Finally, it is also worth noting that, in what it has revealed to be a rather interesting development, the ECHR has begun to refer to the jurisprudence of the ICTs in its own case law on torture, opening what Maculan has described as 'a new dynamic of

[209] ICC, *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 13 November 2019, para. 230.
[210] ICC, *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 13 November 2019, para. 230.
[211] ICC, *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 13 November 2019, para. 231.
[212] ICC, *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 13 November 2019, para. 232.
[213] ICC, *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18, Pre-Trial Chamber, Decision on the Confirmation of the Charges, 13 November 2019, para. 260.

cross-fertilisation.[214] This has happened, for instance, in *Al-Adsani v. The United Kingdom*, where the ECHR referred to the Furundzija case before concluding that 'the prohibition of torture has achieved the status of a peremptory norm in international law'.[215]

8 Conclusion

This article examined the element of "pain or suffering" in the CAH of torture and identified its characteristics and requirements by examining and comparing the case law of ICTs together with related conventions, reports and relevant literature. It also analysed the ECHR's jurisprudence and its approach towards fundamental concepts and characteristics of the crime of torture as well as its contribution to the definition of such concepts and characteristics within ICL. The analysis conducted in this article has determined that the ICTs tended to be consistent in their interpretation of the concept of pain or suffering and its severity while agreeing on the characteristics and requirements of this element and deciding not to steer away from the definition of torture contained in the Torture Convention. At the same time, it was determined that the characteristics and requirements of the pain or suffering were also recently confirmed by the ICC in the Ongwen and Al Hassan cases.

Nonetheless, this analysis has also revealed that, when compared with the ICTs and their jurisprudence, the ECHR's approach towards the determination of the severity of the mistreatment charged as torture presented certain differences because of this Court's important stress on the cruel, inhuman or degrading character of torture. Similarly, it was determined that, although the ICTs adopted the principle of relative assessment developed by

[214] Maculan, *supra* note 8 *citing* de Frouville, *supra* note 93, pp. 646–648.
[215] ECHR, *Al-Adsani v. The United Kingdom*, Application No. 35763/97, Court (Grand Chamber), 01 March 2000, para. 61. *See also* ECHR, *Jorgic v. Germany*, Application No. 74613/01, Chamber, 12 July 2007, where the ECHR referred to the Krstic and Kupreskic cases.

the ECHR, there are still noticeable differences between the criteria for the assessment of the severity of the pain taken into consideration by the ECHR and the ones considered by the ICTs. In fact, the analysis contained in this article has also revealed that these criteria varied greatly among different ICTs and even among different Chambers within the same ICT.

At the same time, it was shown that the focus on the victim's condition itself within the assessment also varied considerably among different cases with some Chambers focusing rather on objective criteria and other Chambers placing more emphasis on subjective criteria. The development of the process of recognition of the importance of the victim's role within the assessment of the acts charged as torture was also examined and it highlighted the increasing importance assigned to the victim's condition in cases of torture within ICL.

On the other hand, this article has also shown that all of the ICTs, together with the ECHR, have been consistent in stating that pain can be both physical and mental, that it does not need to be visible and that it cannot arise from lawful sanctions. Furthermore, the analysis conducted in this article has underlined the interactions between IHRL and ICL and the considerable extent of the ECHR's contribution to the definition of torture and its characteristics within ICL, including the definition of the concept of severity of the pain inflicted and the principle of the relative assessment of the severity of the pain. It has also underlined that, although the ICTs have collected enough case law for self-reliance and self-reference did indeed prevail, the ECHR's jurisprudence is still an important source of reference for the case law of the ICTs, especially when dealing with cases of torture.

Finally, this article has also highlighted that there is still a certain level of uncertainty as to the minimum degree of pain required to classify an act as torture. Indeed, the case law examined above has consistently failed to establish such a minimum degree and it will have to be seen whether in the future the ICC will decide to take a different approach and identify

the minimum threshold of pain required for an act to amount to torture. At the time of writing this article, the ICC has not yet come to such a determination.