

CHAPTER 22: TORTURE

Summary of subject-matter of updates:

1. Importance of a Clear Definition
2. ICC Definition of Torture
3. Torture Act applies in wartime
4. Torture Pursuant to Government Orders

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1. The Importance of a Clear Definition

Chapter 22, Page 1094, end of first paragraph:

In *United States v. Belfast*, 611 F.3d 783, 823 (11th Cir. 2010), the Eleventh Circuit affirmed Taylor's, rejecting his attempt to rely on the Torture Memos as follows:

Emmanuel ... argues that his convictions should be overturned because the district court erred in failing to compel the government to produce then-classified Department of Justice memoranda that defined torture and described the limits of lawful interrogation techniques (the "Torture Memos"). Yet, in seeking to compel production of those classified documents, Emmanuel never explained how they would assist him in his own case. He does not claim that he relied on the classified memoranda in determining whether to commit his acts of torture, nor is it clear how any of his conduct—which included acts of branding, scalding, severe beating, decapitation, the administration of electrical shocks, and the extended confinement of individuals with infected wounds in rancid water-filled pits—is in any way similar to the conduct described in the Torture Memos, which discuss waterboarding and exposure to extreme temperatures.

Nor is it clear why Emmanuel would have needed those classified documents to define the meaning of the term torture as it is used in the Torture Act. The Torture Act contains a specific and unambiguous definition of torture that is derived from the definition provided in the CAT. The language of that statute—not an executive branch memorandum—is what controls the definition of the crime. Accordingly, the Torture Memos were, as the district court found, irrelevant to Emmanuel's defense. ...

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2. ICC Definition of Torture

Chapter 22, page 1098, replace Note 8 with the following:

8. CAT and the Torture Act differ in that Article 1(1) of the CAT requires that torture be intentionally inflicted on another person

for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind,

whereas the Torture Act does not require the government to prove the defendant's motive.

The Eleventh Circuit has held that “this difference, however, is simply not material” in affirming the torture conviction of Roy M. Belfast, Jr. *United States v. Belfast*, 611 F.3d 783, 807 (11th Cir. 2010). It explained the reason for the “purpose” requirement as follows:

The list provided in the CAT, which is prefaced by the phrase “for such purposes as,” is not integral to the definition of torture. Rather, as courts have recognized in the context of other federal statutes that adopt the CAT's definition of torture, the CAT independently requires that torture be committed “intentionally,” CAT, art. 1(1), and the “for such purposes” language serves only to “reinforce” that requirement—i.e., “that torture requires acts both intentional and malicious.” The “for such purposes” language is meant merely “to illustrate the common motivations that cause individuals to engage in torture ... [and to] ensure[] that, whatever its specific goal, torture can occur ... only when the production of pain is purposive, not merely haphazard.”

Furthermore, the congressional definition of torture contained in the Torture Act fully embodies the considerations that the CAT's “for such purposes” language is intended to “reinforce.” Congress properly understood the thrust of this language to require intentionality on the part of the torturer:

The requirement of intent is emphasized in Article 1 by reference to illustrate motives for torture: obtaining information of a confession, intimidations and coercion, or any reason based on discrimination of any kind. The purposes given are not exhaustive, as is indicated by the phrasing “for such purposes as.” Rather, they indicate the type of motivation that typically underlies torture, and emphasize the requirement for deliberate intention or malice.

The Torture Act in no way eliminates or obfuscates the intent requirement

contained in the offense of torture; instead, the Act makes that requirement even clearer by stating that the proscribed acts must have been “specifically intended” to result in torture. 18 U.S.C. § 2340(1).

Id. at 807-808.

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Chapter 22, Page 1100, Note 10:

In *United States v. Belfast*, 611 F.3d 783, 807 (11th Cir. 2010), the Eleventh Circuit held that “there is no distinction between the meaning of the phrases ‘under the color of law’ and in ‘an official capacity.’”

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Chapter 22, page 1102, add a note 15 before the beginning of Section 3 (“Application: The Bybee and Levin Memos”):

15. In its confirmation decision in *Prosecutor v. Bemba*, ICC-01/05-01/08-424 (2009), PTCII identified the elements of the crime against humanity of torture in the ICC as follows. (Ultimately, however, PTCII declined to confirm the torture charge because it was based on the same rapes that were the subject of a separate rape charge; the Chamber, applying the test discussed in the update to Chapter 23 (Sexual Violence), *infra*, decided “that the act of torture is fully subsumed by the count of rape.” *Id.* ¶ 205.)

**Prosecutor v. Jean-Pierre Bemba Gombo,
[Decision Confirming Charges Pursuant to Article 61]
ICC-01/05-01/08-424 (2009) (Pre-Trial Chamber II)**

(i) The law and its interpretation

aa) *Actus reus*

191. Article 7(2)(e) of the Statute defines torture as:

(...) the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

192. The Elements of Crimes add with regard to article 7(1)(f) of the Statute that:

1. [t]he perpetrator inflicted severe physical or mental pain or suffering upon one or more persons;

2. [s]uch person or persons were in the custody or under control of the perpetrator;
3. [s]uch pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

193. As to the objective element, the *actus reus*, the Chamber is of the view that, although there is no definition of the severity threshold as a legal requirement of the crime of torture, it is constantly accepted in applicable treaties and jurisprudence that an important degree of pain and suffering has to be reached in order for a criminal act to amount to an act of torture.²⁶⁸

bb) Mens rea

194. The subjective element, the *mens rea*, is the intent as expressly mentioned in article 7(2)(e) of the Statute. Bearing in mind that article 30(1) of the Statute is applicable “unless otherwise provided,” and taking into account that the infliction of pain or suffering must be “intentional,” the Chamber finds that this excludes the separate requirement of knowledge as set out in article 30(3) of the Statute. In this respect, the Chamber believes that it is not necessary to demonstrate that the perpetrator knew that the harm inflicted was severe. This interpretation is consistent with paragraph 4 of the General Introduction to the Elements of Crimes.²⁶⁹ To prove the mental element of torture, it is therefore sufficient that the perpetrator intended the conduct and that the victim endured severe pain or suffering.

195. The Chamber notes that under the Statute, the definition of torture as a crime against humanity, unlike the definition of torture as a war crime, does not require the additional element of a specific purpose. This is also clarified in the Elements of Crimes.²⁷¹

cc) Nexus requirement

196. The Prosecutor must demonstrate the nexus between the acts of torture and the attack, thus proving that acts of torture were committed by MLC troops as part of a

²⁶⁸ See in this respect, article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/39/46: “Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

²⁶⁹ Paragraph 4 of the General Introduction to the Elements of Crimes provides: “With respect to mental elements associated with elements involving value judgment, such as those using the terms (...) ‘severe,’ it is not necessary that the perpetrator personally completed a particular value judgment unless otherwise indicated.”

²⁷¹ The Elements of Crimes provide in fn 14 to article 7(1)(f) of the Statute that it is understood that no specific purpose need be proved for this crime. The Chamber, however, is well aware that other international instruments establish a different legal framework than the one before the Court.

widespread or systematic attack directed against the CAR civilian population from on or about 26 October 2002 to 15 March 2003.

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3. Torture Act applies in wartime

Chapter 22, page 1118, section 1 (“Lex Specialis”):

In *United States v. Belfast*, 611 F.3d 783, 809 (11th Cir. 2010), the defendant argued that “the Torture Act was unconstitutional because it applies during armed conflicts,” a claim the Eleventh Circuit was “easily rejected.” The court reasoned as follows:

The CAT itself says that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” CAT, art. 2(2). Referring to that provision, the Senate Executive Report explained that

[t]he use of torture in wartime is already prohibited within the scope of the Geneva Conventions, to which the United States and virtually all other countries are Parties, and which in any event generally reflect customary international law. The exclusion of public emergency as an excuse for torture is necessary if the Convention is to have significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms.

Accordingly, there is no merit to Emmanuel’s contention that the CAT, or legislation authorized by the CAT, cannot apply during armed conflicts.

Id.

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4. Torture Pursuant to Government Orders

Chapter 22, page 1108, add a Note 10, as follows:

10. In *United States v. Belfast*, 611 F.3d 783, 812 (11th Cir. 2010), the Eleventh Circuit affirmed Taylor’s conviction, holding, *inter alia*, as follows:

[T]he entire premise of Emmanuel’s argument—that a conspiracy to commit torture is permissible whenever its object is to preserve governmental power—is unacceptable under the CAT. Official torture is most likely to occur precisely when an illegitimate regime perceives a threat to its dominance from dissenters. In recognition of this reality, the CAT itself unambiguously provides

that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” CAT, art. 2(2). The CAT thus anticipated prosecutions such as this one, where torture is committed by a regime in order to maintain its brutal control over an unhappy populace. The conspiracy prosecution here was fully consistent with the mandate that such acts may be prosecuted.

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