

Sonja C. Grover

# The Torture of Children During Armed Conflicts

The ICC's Failure to Prosecute and the  
Negation of Children's Human Dignity

 Springer

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and the Negation of Children's  
Human Dignity

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*This book is dedicated with much love to the  
memory of my brother Albert Gazan*

# Preface

It has been remarked by legal scholar Sanford Levinson (2005) that:

Those of us who discuss “torture,” “cruel, inhuman, or degrading activities,” and “highly coercive interrogations” *must* climb down into the muck and confront the “facts on the ground,” rather than merely doing what we do best, which is to proffer (and take refuge in) place-holding abstraction.

In this book we will do both. That is: (i) we will study the facts on the ground with regard to mass atrocities rising to the level of torture committed against children in particular (here understood as persons under age 18) during selected contemporary armed conflicts (given that the cases to date brought before the ICC have involved armed conflict). We will “climb down into the muck and confront the facts”; very abominable facts at that but yet facts that must be looked at; and (ii) we will consider how these facts relate to the elements of the crime of torture as defined under the Rome Statute (the elements of the ICC crime of torture as a war crime, a crime against humanity and/or as a crime occurring in the context of genocide) and address when the individual perpetrator conduct in question is prosecutable as torture under the Rome Statute. There is no intent here to redefine or reinterpret the elements of the crime of torture under the Rome Statute (either more restrictively or more liberally). Rather the objective is in part to highlight and substantiate through ICC case law the indubitable fact that the ICC to date has not been prepared to prosecute torture as a separable ICC crime (even were systematic and/or widespread) in cases where the victims were children in particular. This has been the pattern notwithstanding the fact that some of the ICC cases in question had as their focus child victims of *other* Rome Statute delineated international crimes (i.e., the cases involved the Rome Statute defined crime of recruitment and use of child soldiers and/or Rome Statute defined sexual violence crimes perpetrated against children). At times the ICC has rejected cumulative charges even where, on the view here, torture charges in addition to others such as rape as a war crime were warranted. This is the current state of ICC case law where children in particular are the targeted victims of torture as part of a common plan during armed conflict. This despite the fact that, on the view here, the elements of the crime of torture as set out in one or more of the relevant articles of the Rome Statute have been met in various of the cases brought before the ICC where children were in particular the targeted victims. Of course the analyses here regarding the criminal

liability under the Rome Statute of any individual discussed in what follows who has not yet been found guilty by the ICC of the international crime of torture—if they would be so at all—is a matter of the current author’s interpretation and opinion on the facts and the law and nothing more. This point is not repeated in the text but should be ‘read into’ that text or, to put it differently, simply kept in mind.

The ultimate goal in writing this book is then in part to raise awareness that *in practice* there has been a reluctance of the ICC to consider and prosecute the crime of torture (as defined in the Rome Statute) where the victims are children in particular. This has been the case even where the Prosecutor is pursuing other ICC charges for crimes perpetrated against child victims specifically as, for instance, in the Lubanga and Kony cases. The hope is that bringing this issue to light will in small part contribute to: (i) an increased likelihood that the current ICC OTP and future ICC Prosecutors will acknowledge, where it has occurred, the torture of children as particularized targets in the cases brought by the OTP before the ICC on information, for instance, initially provided by direct or indirect victims, NGOs or UN personnel on the frontlines, etc., or in cases developed by the Prosecutor from situations referred by the State or UN Security Council and that (ii) the ICC Prosecutor will be more likely to pursue prosecution for the crime of torture which involved targeting of children in particular and thus hold responsible for that grave violation of a fundamental *jus cogens* norm those individuals who engaged in or who contributed in some other substantial way to the torture of children as part of a common plan during armed conflict. This might involve: (i) bringing separate torture charges (in addition to other charges) where children are the prime target for certain *forms of torture* (i.e., through rape and sexual enslavement of children as the high priority targeted victims, the physical and psychological torture of children through child soldiering etc.) and (ii) considering the torture, in whatever form, of children in particular as an aggravating factor during sentencing.

Generally in ICC cases, the torture of children often coincides with the torture of one or both parents and other family members and especially of the women of the household or other community members. This book, however, is limited in scope with a special focus on: (i) ICC cases where the OTP pursued prosecution of various Rome Statute crimes perpetrated specifically against child victims but failed to address the Rome Statute delineated crime of torture perpetrated against those same child victims and (ii) those ICC cases where torture of adults is prosecuted but child victims of torture are overlooked or their victimization is minimized in some way.

An examination is also made of several torture cases adjudicated by the Inter-American Court of Human Rights (IACtHR), the Special Court of Sierra Leone (SCSL) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) involving child victims. This with a view to lessons to be learned regarding legal issues in analyzing child torture as an international crime and fundamental human rights matter (i.e., one lesson being the need to analyze the case with reference not simply to a particular court or tribunal’s enabling statute but also in the broader international human rights and humanitarian law and international customary law (ICL) context). There are lessons to be learned from all these cases: First and

foremost there is a lesson about the urgent need of the international community through its international judicial system to prioritize acknowledgment of and judicial redress for the despicable practice of perpetrators during armed conflict of targeting children in particular for torture. In the international human rights court context redress would be pursued from the State that was complicit in the torture of children and/or which failed to protect the child victims of torture. That redress might include a finding that torture was committed by agents of the State; and financial reparations and other forms of remedy such as institutional changes regarding the policy and practice of national security or armed forces that mandates humane treatment of all detainees consistent with ICL, etc. Through the International Criminal Court or an international criminal tribunal; the surviving victims, if any, and their immediate relatives, as well as the international community, seek an international criminal law remedy to be imposed on the individual perpetrators found to be guilty of the international crime of torture. There is both a pressing need and obligation to pursue criminal accountability of individual perpetrators through international criminal forums (including the ICC where necessary) for the violation of the *jus cogens* prohibition against torture also where children are the particularized victim targets. Note that litigation against the State in an international human rights court is *not* a bar to ICC prosecution of the individual perpetrators most responsible for torture. Criminal accountability is vital for maintaining respect for the international rule of law. This is especially the case where the use of torture of children in particular and of others is widespread and systematic and part of an intentional strategy and common plan during armed conflict.

There is an international legal responsibility under international customary law, humanitarian treaty law and international criminal law to hold the individual perpetrators of torture, including those who committed the particularized torture of children; criminally accountable. This may be accomplished via prosecution by the ICC or another international criminal tribunal where a domestic judicial forum is not a realistic or practical option. Universal jurisdiction is also applicable allowing any State that is able to detain the perpetrators to prosecute for torture. In addition, States must be held civilly to account where there was (i) State complicity in the torture of children and/or (ii) a reckless disregard of the plight of the children who were at risk of torture as a common plan during armed conflict and who suffered this fate; or (iii) in situations where the torture of children in particular as a crime against humanity and/or war crime occurred due to the State's inability to protect. The torture of children as particularized high priority targets during armed conflict and as part of a common plan carried out with impunity symbolizes in a most profound way utter chaos. This then undermines international peace and security as the populace in the jurisdictions affected loses what little confidence in the possibility of the rule of law and in international criminal justice these civilians initially may have clung to fervently in understandable desperation.

The book is organized as follows:

**Chapter 1** considers the legal concept of torture under the Rome Statute and ambiguities regarding what constitutes torture under international criminal law.



**Chapter 2** considers selected ICC cases involving facts revealing the systematic torture of children in particular as part of a common plan during armed conflict but where torture was not charged.

**Chapter 3** considers, in contrast, selected ICC cases where torture was charged as a crime under the Rome Statute but the special targeting of children for torture as part of the common plan was not addressed.

**Chapter 4** considers some landmark Inter-American Court of Human Rights cases regarding the targeting of children in particular for torture during internal conflict and the instructive lessons regarding the Court's legal analysis (i.e., the value of considering the broader international human rights and humanitarian legal context, recognizing various incarnations of or vehicles for torture etc.).

**Chapter 5** examines 'enforced disappearance' as in itself constituting psychological torture for the direct victims and their family members as well as the relation of 'enforced disappearance' to physical and psychological torture and murder.

**Chapter 6** discusses the fact that: (i) no charges to date have been brought for 'enforced disappearance' of children or adults in any cases brought before the ICC and that (ii) the relation between 'enforced disappearance' and torture has not been addressed by the ICC. This despite it being the case that 'enforced disappearance' is part of the *modus operandi* of groups such as the LRA and FPLC as they frequently abduct children for child soldiering and/or sexual enslavement. Most often the families of these child victims have no idea where their children are as they move with the forces or even whether the disappeared children are still alive.

**Chapter 7** examines extra-judicial executions and wilful killings of civilians as a strategy of war and a form of physical (depending on how the killing occurred) and/or psychological torture.

**Chapter 8** concerns the international legal responsibility to provide justice to child victims of torture where: (i) that suffering consequent to torture was inflicted through conduct that incorporates the elements of torture as a war crime and/or crime against humanity or act of genocide and where (ii) torture was for instance used as a component of a common plan during armed conflict. The latter chapter includes also an examination of the issue of UN peacekeepers, while on a UN operational mission, acting as perpetrators of torture against children and the possibility for ICC prosecution even where these are comparatively isolated incidents. Those prosecutions of UN peacekeeper perpetrators would be advanced given the gravity of the crime and the significant adverse impact on the local populace and the international community of the international crime of the torture of children especially when carried out by UN peacekeepers.

**Chapter 9** includes a concluding comment regarding the need to dispel faulty stereotypes of who are the typical victims of torture as part of a common plan during armed conflict. That stereotype is one of a male adult who, for instance, perhaps has some vital information sought to be extracted through interrogation by torture and/or who is part of an opposition group being repressed through torture and other international crimes. The ingrained overly restrictive conceptual prototype of the typical torture victim during armed conflict does not include the image of an infant or child victim targeted in particular; the latter a child who may or

may not be politically active. Also discussed in [Chap. 9](#) is the ongoing crisis in Syria marked in part by the horrific targeting in particular of children for torture in various forms by the Bashar al-Assad regime as a component of a common plan. To date the regime's physical and psychological torture of targeted civilians including children in particular (for example the torture of those persons including children held in detention centers for that purpose and then not infrequently murdered) has been carried out with complete impunity insofar as criminal liability is concerned as with the other atrocities attributable to the Bashar al-Assad regime.

This book is in the final analysis an attempt to bring increased attention to: (i) the targeting of children in particular for torture as a part of a common plan during armed conflict as well as to (ii) the absence *in practice* of criminal liability before the ICC to date for the international crime of torture where children were amongst the victims *targeted in particular* in cases that were already before that Court involving other charges. The book further is a call for criminal accountability before the ICC (where the case is admissible and the court has jurisdiction), regardless of the official status of the individual perpetrators, where the accused are those most responsible for committing the grave international crime of torture during armed conflict against children in particular.

Thunder Bay, June 2013

Sonja C. Grover

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# Contents

<b>1</b>	<b>Contentious Issues Regarding What Constitutes Torture</b> . . . . .	1
1.1	The Torture of Children by Any Other Name is Still Torture. . . . .	1
1.1.1	Torture as an International Crime: Remaining Ambiguities in the Legal Concept. . . . .	5
1.2	‘Child Abuse’ vs. ‘Child Torture’ as Legal Concepts Under International Law . . . . .	9
1.3	More on the Indeterminacy in the Legal Concept of Torture as an International Crime . . . . .	13
1.4	Children as the Particularized Targets for Torture During Armed Conflict . . . . .	26
1.5	The UN Designated Six Grave Crimes Against Children . . . . .	29
1.5.1	The Six Grave Crimes Against Children and the Syrian Conflict . . . . .	31
1.5.2	The UN Designated Six Grave Crimes Against Children as Torture . . . . .	35
	References. . . . .	43
	Materials . . . . .	44
	Cases . . . . .	45
<b>2</b>	<b>Selected ICC Cases Involving the Systematic Torture of Children Where Torture was Not Charged.</b> . . . . .	47
2.1	The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo, and Dominic Ongwen. . . . .	47
2.2	LRA Atrocities Perpetrated Against Children as Constituting Torture . . . . .	49
2.3	The Backlash Against the Kony 2012 YouTube Video: Inconvenient Truths Regarding Barriers to Justice for Child Torture Victims under International Criminal Law . . . . .	61
2.4	The Prosecutor v Thomas Lubanga Dyilo . . . . .	70
2.4.1	FPLC Child Soldiering: Torture as a War Crime . . . . .	72
2.4.2	Sexual Violence Perpetrated Against the FPLC Child ‘Recruits’: Torture as a War Crime. . . . .	76
2.5	Situation in the Republic of Cote D’Ivoire in the Case of the Prosecutor v Simone Gbagbo. . . . .	79

2.6	The Situation in the Central African Republic in the Case of the Prosecutor v Jean-Pierre Bemba Gombo . . . . .	82
2.6.1	Bemba Gombo: Selected Excerpts from the Pre-trial Chamber II Confirmation Decision (15 June, 2009) . . . . .	82
2.6.2	Mass Rape as ‘Torture’ and an ‘Outrage on Personal Dignity’: The Cumulative Charging Issue . . . . .	87
	References . . . . .	95
	Literature . . . . .	95
	Materials . . . . .	96
	Cases . . . . .	97
<b>3</b>	<b>Selected ICC Cases in which Torture Charges Were Brought but the Special Targeting of Children for Torture Not Addressed . . . . .</b>	<b>99</b>
3.1	Situation in the Democratic Republic of Congo in the Case of the Prosecutor v Sylvester Mudacamura . . . . .	99
3.2	Commentary on the Prosecutor v Sylvester Mudacamura . . . . .	101
3.3	Situation in Darfur and the Prosecutor v Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”) . . . . .	102
	References . . . . .	106
	Literature . . . . .	106
	Cases . . . . .	106
	Materials . . . . .	107
<b>4</b>	<b>Lessons From the Inter-American Court of Human Rights: Addressing Child Torture . . . . .</b>	<b>109</b>
4.1	Case of the Gómez-Paquiyaui Brothers v. Peru . . . . .	111
	References . . . . .	125
	Materials . . . . .	126
	Cases . . . . .	126
<b>5</b>	<b>The Enforced Disappearance of Children as Torture . . . . .</b>	<b>127</b>
5.1	Introduction . . . . .	127
5.2	Additional IACtHR Cases Re the ‘Enforced Disappearance’ of Children . . . . .	130
5.2.1	Excerpts from Molina Theissen v Guatemala . . . . .	130
5.3	‘Enforced Disappearance’ of Children as Torture Gone Unacknowledged by the ICC . . . . .	134
5.4	A Case Example: ‘Enforced Disappearance’ in Darfur . . . . .	136
5.5	Some History on the Prosecution of ‘Enforced Disappearance’ Under International Criminal Law . . . . .	138
5.6	The Connection between the International Crimes of ‘Enforced Disappearance’, Torture and Murder . . . . .	140
5.7	The Continuous Nature of the Crime of ‘Enforced Disappearance’ of Children . . . . .	142

5.8	The IACtHR Serrano Cruz Sisters Case: Enforced Disappearance as a Continuous Crime . . . . .	146
5.8.1	Excerpts from the Dissenting Opinion of Judge Cancado Trindade: IACtHR Judgement in Serrano Cruz Sisters Case . . . . .	147
	References . . . . .	153
	Materials . . . . .	153
	Cases . . . . .	153
<b>6</b>	<b>The Non-Materialization of ICC Charges of ‘Enforced Disappearance’ . . . . .</b>	<b>155</b>
6.1	On ‘Enforced Disappearance’ in Darfur: Re-Examining the View of Former ICC Prosecutor Mr. Moreno-Ocampo . . . . .	155
6.1.1	Child Recruitment and Deployment . . . . .	156
6.1.2	Armed Groups: . . . . .	156
6.1.3	Armed Groups in Darfur . . . . .	157
6.1.4	Chadian-Backed Sudanese Armed Opposition Groups . . . . .	157
6.1.5	Lord’s Resistance Army (LRA): . . . . .	157
6.2	Situation in the Libyan Arab Jamahiriya: Prosecutor v Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi . . . . .	158
	References . . . . .	159
	Cases . . . . .	159
<b>7</b>	<b>‘Murder’, ‘Wilful Killing’ or ‘Extra-Judicial Killings’ of Children as Conflict Strategy and a Form of Torture . . . . .</b>	<b>161</b>
7.1	Extra Judicial Killing: Inter-American Commission of Human Rights Report No. 33/04 in Jailton Neri Da Fonseca v Brazil 11 March, 2004 . . . . .	161
7.2	‘Murder’ and ‘Wilful Killing’ as Psychological Torture: The ICC Case of Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Democratic Republic of Congo) . . . . .	163
	References . . . . .	170
	Literature . . . . .	170
	Materials . . . . .	170
	Cases . . . . .	170
<b>8</b>	<b>The International Legal Responsibility to Child Victims of Systematic Torture During Armed Conflict . . . . .</b>	<b>171</b>
8.1	Preliminary Comments . . . . .	171
8.2	Lessons Yet to be Learned Given the Failure of the ICC to Acknowledge the Systematic Widespread Torture of Children During Armed Conflict . . . . .	173
8.2.1	Child Soldiering for Perpetrator Armed Forces as Torture . . . . .	173

- 8.2.2 The Rape of Children by Perpetrator Armed Forces as Torture . . . . . 179
- 8.2.3 Torture Under the Rome Statute and the Young Age of the Victims . . . . . 185
- 8.2.4 Children’s Juridical Personality, Their Right to the Full Measure of International Criminal Justice and to Reparations for Torture Suffered During Armed Conflict . . . 186
- 8.2.5 The Widespread and Systematic Targeting of Children for Torture as Intimidation of the Populace: A Cautionary Tale on the ‘International Responsibility to Protect’ the Vulnerable. . . . . 188
- 8.3 Speaking of Torture and the Complicity of the International Community. . . . . 190
- 8.4 UN Peacekeepers and the Torture of Children as an International Crime . . . . . 191
  - 8.4.1 On the Issue of the Number of Victims and Gravity of the International Crime: UN Peacekeepers as Victims . . . 191
  - 8.4.2 The Prosecutor v Abdallah Banda Abaeker Nourain and Saleh Mohammed Jerboa Jamus . . . . . 193
  - 8.4.3 UN Peacekeepers as Perpetrators: The Torture and Murder of Shidane Abukar Arone by Canadian UN Peacekeepers as a Case Example . . . . . 194
  - 8.4.4 Gender-Based International Crimes Perpetrated by UN Peacekeepers . . . . . 198
  - 8.4.5 Prosecuting UN Peacekeepers at the ICC for Torture and Other Grave International Crimes Perpetrated Against Children. . . . . 200
- References. . . . . 211
  - Literature . . . . . 211
  - Materials . . . . . 212
  - Cases . . . . . 213
- 9 Conclusion . . . . . 215**
  - 9.1 A Final Comment. . . . . 215
  - References. . . . . 223
- Index. . . . . 225**

# Chapter 1

## Contentious Issues Regarding What Constitutes Torture

### 1.1 The Torture of Children by Any Other Name is Still Torture

Human solidarity manifests itself not only in a spatial dimension—that is, in the space shared by all the peoples of the world,—but also in a *temporal* dimension—that is, among the generations who succeed each other *in time*... The search for the truth constitutes the starting-point for the liberation as well as the protection of the human person; without truth (however unbearable it might come to be) one cannot be freed from the torment of uncertainty, and it is not possible either to exercise ... protected rights... The prevalence of the right to truth is essential to the struggle against impunity, and is ineluctably linked to the very *realization* of justice, and to the guarantee of non-repetition of ...[human rights] violations....[O]ne of the great truths of the human condition [is] that the fate of one is ineluctably linked to the fate of the others. One cannot live in peace in face of the disgrace of a beloved person. And peace should not be a privilege [only] of the dead.<sup>1</sup>

It is known from the empirical evidence that children in armed conflict situations in many State jurisdictions are not spared from torture and that generally the same extremely cruel torture methods are used on children as on adults. Hence no mercy is shown to children in this regard by a vast array of perpetrators of international crime worldwide. However accurate estimates of the numbers of children who have been tortured worldwide are not available. Further, the stark reality of children as the particularized victims of torture as part of a common plan during armed conflict has not for the most part yet entered the general public consciousness:

Torture of children is a significant worldwide problem, but there are not official or reliable independent statistics to measure the magnitude of the problem.<sup>2</sup>

**Children have not only been targeted as part of the civilian population, but have also been deliberately targeted specifically because they are children.** For example, in the former Yugoslavia, elite snipers intentionally shot children in public places to intimidate

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<sup>1</sup> Inter-American Court of Human Rights Case of *Bámaca Velásquez versus Guatemala*, Judgment of 25, November 2000, (Separate Opinion of Judge A.A. Cançado, para 23, 29, 32, 40).

<sup>2</sup> Quiroga (2009), p. 70.



the civilian population. In Sierra Leone, rebels amputated the arms and legs of civilians, including many children, as part of a deliberate strategy to spread terror. Many recent conflicts have also involved the pretence of claims of ‘ethnicity’ in which the enemy is defined through identification with a different group, focusing on children as the ‘other’ group’s hope for the future. **Targeting children**—for extermination, torture, rape and use as sex slaves—is **increasingly being used by parties to a conflict as an effective means of subduing the civilian population as a whole** (emphasis added).<sup>3</sup>

The focus of this book is on making more visible (i) the issue of the torture of children as an international crime under the Rome Statute; (ii) the specific targeting of children for torture by various State and non-State entities and forces and (iii) the lack of accountability before the ICC for the torture of child victims as specific targets in cases brought before the ICC involving international crimes such as child soldiering, gender-based crimes and attacks against civilian populations. In sum the ICC jurisprudence<sup>4</sup> insofar as the *torture* of children as particularized targets as part of a common plan during armed conflict is concerned does not at all reflect the fact that:

the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind.<sup>5</sup>

The lack of attention specifically given by the ICC to children as the particularized victims of torture (as reflected in the failure to charge torture in respect of mental and physical sufferings imposed on children during armed conflict that amount to intentional torture) is all the more inexcusable considering that:

**Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community.** Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate (emphasis added).<sup>6</sup>

To date international crimes *specifically targeting* children (save for child soldiering) have been subsumed by international courts under charges concerning the civilian population as a whole. This pattern of neglecting the torture of children as specifically targeted high priority victims (i.e. such that perpetrators are

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<sup>3</sup> Bedont and Sandvik-Nylund (2002), p. 30.

<sup>4</sup> There is both (i) a failure of the ICC OTP to prosecute for torture when children are systematically targeted in particular for torture during armed conflict and (ii) a failure of the OTP and the ICC Chambers to legally characterize the facts (i.e. extreme sexual violence, child soldiering with a perpetrator group committing mass atrocities, widespread mutilations of children, enforced disappearance of children etc. all used as part of an intentional common plan during armed conflict) as supporting torture charges in addition to other charges based on the same facts (cumulative charging).

<sup>5</sup> *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980).

<sup>6</sup> *The Prosecutor v Antonio Furundzija Trial Judgment ICTY* (10 December, 1998), p. 59 para 154.

not charged with the targeting of children for torture as a separable crime in the international court system including the ICC) is longstanding:

**crimes committed against children have not received due attention in previous and current international justice ... mechanisms, most often being mentioned only as part of atrocities committed against the civilian population in general** (emphasis added).<sup>7</sup>

This sidestepping essentially of the issue of the torture of children as particularized targets is entirely inconsistent with the fact that:

This revulsion [in the international community regarding the use of torture], as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination.<sup>8</sup>

The failure to prosecute before the ICC the widespread and systematic torture of children as particularized targets in armed conflict situations (the focus of this inquiry) belies the UN Security Council's repeated pronouncements on the importance of protecting children during armed conflict. Note that the UN Security Council can refer situations to the ICC such that if these situations meet Rome Statute jurisdictional and gravity criteria and other conditions (such as those relating to admissibility in regards to the complementarity principle); the situation will be developed into cases for ICC prosecution. The UN Security Council Resolution 1314 for instance, by implication, refers to the fact that children are vulnerable to becoming high priority targets for international crimes during armed conflict as it refers to the "deliberate targeting of... children":

**...the deliberate targeting of civilian populations or other protected persons, including children, and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law, including that relating to children, in situations of armed conflict may constitute a threat to international peace and security, and in this regard [the Security Council] reaffirms its readiness to consider such situations and, where necessary to adopt appropriate steps** (emphasis added).<sup>9</sup>

In regards to children as particularized targets, it is noteworthy that in fact:

It is ... possible for the Security Council to find *that a situation characterized by crimes committed against children* is a threat to international peace and security, and, acting under Chapter VII of the UN Charter, refer that situation to the ICC. The Security Council has the power to refer situations to the ICC regardless of where the crimes have occurred and the nationalities of the alleged perpetrators, thereby overriding jurisdictional thresholds that apply to any other case brought to the ICC. *Thus, the ICC has the potential*

<sup>7</sup> Bedont and Sandvik-Nylund (2002), p. 12.

<sup>8</sup> The Prosecutor v Antonio Furundzija Trial Judgment ICTY (10 December, 1998), p. 56 para 147.

<sup>9</sup> Security Council Resolution 1314 (11 August, 2000) at para 9.

*to strengthen the role of the Security Council in enforcing the protection of children affected by armed conflict* (emphasis added).<sup>10</sup>

To date this has not occurred though in Syria,<sup>11</sup> for instance, the children of the opposition have become particularized targets of torture in various guises under the Bashar Al-Assad regime which has been engaged (at the time of writing) for the last 2 years in large part in an unfettered attack on the Sunni civilian population.

We will explore in the conclusion to this inquiry some possible explanations for the failure of the ICC to adequately address the torture of children as prioritized targets of perpetrator groups committing mass atrocities in an armed conflict situation. There has been to date a complete failure of the ICC to hold perpetrators accountable through *separate charges*, grounded on the facts, for the grave crime of torture committed against children as particularized targets during armed conflict. Note that the fact that torture is a grave crime under the Rome Statute and that the prohibition on torture has a high priority (among the highest in international humanitarian, human rights and criminal law as well as international customary law) has done little if anything to lead to ICC prosecution of the systemic and widespread torture of children as particularized targets in cases to date that have been brought before the ICC.<sup>12</sup> As the contemporary conflict situation in Syria under the Al-Assad regime attests, the lack of accountability in the international courts (i.e. ICC) for the specific targeting of children for torture contributes to the persistence of this practice as a tool for the suppression of the civilian populace more generally.<sup>13</sup>

In what follows in the sections concerning ICC case law we will consider and apply the concept of torture *as defined in the Rome Statute* to: (i) cases in which children have in fact been specifically targeted for torture but the torture of children has neither been acknowledged as such in the case nor the crime of torture against children prosecuted by the ICC Office of the Prosecutor (OTP) and to (ii) cases in which torture was charged by the ICC OTP but no reference was made to the particularized targeting of children nor to its legal implications under the Rome Statute. We must begin then with a consideration of what ostensibly constitutes torture under the Rome Statute.

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<sup>10</sup> Bedont and Sandvik-Nylund (2002), pp. 47–48.

<sup>11</sup> Syria is not a party to the Rome Statute thus the situation in Syria would have to be referred to the ICC by the UN Security Council. The referrals to the ICC to date by the UN Security Council have not focused on the plight of children as a key rationale for the referral.

<sup>12</sup> Note that the OHCHR has recognized in some instances “the vulnerability of the victim (age, gender, status, etc) should be taken into account to determine whether this case amounts to torture...” (Office of the High Commissioner for Human Rights 2011, p. 2).

<sup>13</sup> Note that in regards to the Torture Convention also “The majority of judgments and decisions about torture have been made in relation to adults.” Man (2000), p. 14.

### ***1.1.1 Torture as an International Crime: Remaining Ambiguities in the Legal Concept***

Despite having the elements of the various Rome Statute crimes, including torture as a war crime and torture as a crime against humanity, stipulated under the Rome Statute Elements of the Crimes,<sup>14</sup> as we shall see, the legal definition of torture remains elusive. This is in part due to the fact that other Rome Statute crimes not *labeled* ‘torture’ in the Rome Statute may be properly deemed by the ICC in a particular case before the Court to amount to torture depending on the specific fact pattern in the case<sup>15</sup>:

*Many acts, conducts or events may be viewed as torture in certain circumstances, while they will not be viewed as torture in some other situations... In fact, there is no single definition [of torture] existing under international law... It should be recalled that usually in legal dispositions, torture is linked with cruel, inhuman and degrading treatment or punishment or ill-treatment. Torture is not an act in itself, or specific type of acts, but it is the legal qualification of an event or behaviour, based on the comprehensive assessment of this event or behaviour. Therefore, the difference between these different qualifications, torture, cruel, inhuman and degrading treatment or punishment or ill-treatment depends on the specific circumstances of each case and is not always obvious (emphasis added).*<sup>16</sup>

The term ‘torture’ is specifically mentioned in the Rome Statute under Crimes against Humanity and the elements of that crime are as follows:

#### **1.1.1.1 Rome Statute Elements of the Crime: Article 7 (1)(f) Crime Against Humanity of Torture**

##### **Elements of the Crime of Torture as a Crime Against Humanity**

1. The perpetrator inflicted *severe physical or mental pain or suffering* upon one or more persons.
2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population (emphasis added).<sup>17</sup>

<sup>14</sup> Rome Statute Elements of the Crimes (2002).

<sup>15</sup> Thus the same set of facts could be classified both, for instance, as inhuman treatment and as torture depending on the specific context of the conduct as the Rome Statute elements for both crimes may have been met.

<sup>16</sup> Office of the High Commissioner for Human Rights (2011), p. 2. It is here contended that sometimes *depending on the circumstances*; inhuman, cruel or degrading treatment may also amount to torture.

<sup>17</sup> Rome Statute Elements of the Crimes (2002).

What is especially noteworthy about the ICC crime of torture as a crime against humanity under Article 7 is that: (a) no specific purpose in perpetrating the torture must be proved (as the ICC notes in footnote 14 to Article 7 (1)(f) of the Elements of the Crime); (b) the victims need not necessarily be under *State* custody or control but only in the custody or under the control of the perpetrator; (c) the torture consists of “*severe* physical or mental pain or suffering;” (d) the torture can exist whether there is one or more than one victim; (e) the pain or suffering is not to be a correlate to or inherent in or incidental to “lawful sanctions” (the latter element clearly reflecting State interests in the drafting of the Rome Statute definition of torture as an ICC crime against humanity); (f) the severe pain or suffering inflicted must be committed by a perpetrator as part of a systematic attack on civilians or intended to be a part of such an attack and (g) the crime of torture as a crime against humanity can occur in peace time or in the context of armed conflict (the same is true for torture as an act that formed part of a pattern directed to perpetrating genocide). Clearly some or all of the other crimes against humanity designated in the Rome Statute could also potentially meet the criteria for torture as a crime against humanity depending on the specific factual circumstance. For instance, the crime against humanity of extermination (Article 7(1)(b) could cause and is likely to cause severe mental and likely also physical suffering depending on the vehicle used to effect that extermination and whether the victims had any forehand knowledge that they were to be exterminated. The crime against humanity of rape may cause severe mental suffering not only as a direct consequence of the degradation and humiliation arising from such victimization but also due to the rejection of the rape victim by his or her community (i.e. it often occurs in some jurisdictions that it is the victim who is blamed for his or her own misfortune in being a rape victim and not the perpetrator or that blame is assigned to both victim and perpetrator). Rape may also cause severe physical pain and suffering rising to the level of torture as when permanent damage is done to the reproductive organs for instance as a consequence of gang rape and/or the victim contracts HIV. The foregoing are only two of many further possible examples of other Rome Statute crimes against humanity (aside from Article 7 (1)(f) which explicitly refers to the crime against humanity of torture) where in fact these additional crimes also can be conceptualized as torture<sup>18</sup> under the Rome Statute criteria depending on the specific fact pattern involved.

Despite the seemingly clear cut listing of the Rome Statute elements of the crime of torture; there are in fact remaining legal ambiguities. This is the case notwithstanding the lack of ambiguity of what is perceived as constituting torture for those on the receiving end of such perpetrator conduct. For instance; the section

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<sup>18</sup> Thus the perpetrator might be charged by the ICC OTP, for instance, with ‘rape’ and ‘torture’ both as crimes against humanity based on the same fact pattern as each crime charged captures another dimension of the perpetrator’s intent and the impact of the perpetrator’s conduct on the victim.

titled “General Introduction” to the Rome Statute Elements of Crimes document includes the following item:

4. With respect to mental elements associated with elements involving value judgement, *such as* those using the terms inhumane or severe, it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated (emphasis added).<sup>19</sup>

The above item suggests that what constitutes ‘severe’ or ‘inhumane’ perpetrator treatment of the victim is a value judgment (though there is not necessarily always a requirement that the perpetrator him or herself will have completed such a value assessment). Dewulf points out further that the notion of psychological torture is also particularly vague with no clear definition in international law.<sup>20</sup> For instance; threats of death to the victims or their family members, and a certain level of intimidation have been found in some instances by the ICTY to constitute psychological torture and in others cases threats to take life, for instance, have been relegated to the category of ‘cruel and inhuman treatment’ as distinct from ‘torture’ by the same ICTY court.<sup>21</sup>

We will return later to this question of legal ambiguity regarding what constitutes ‘serious’, ‘severe’ or ‘inhumane’ or ‘degrading’ perpetrator conduct and consider in detail the implications for acknowledging and prosecuting the torture of children before the International Criminal Court. Given the imprecision of the terms ‘serious’, ‘severe’ or ‘inhumane’; it is even more likely that various other crimes against humanity can rise to the level of torture as conceptualized under the Rome Statute depending on the specific facts of the case.

What follows are only selected potential examples of perpetrator conduct that might be classified as inflicting torture, physical and/or psychological, depending on the Chamber’s assessment of the facts:

#### 1.1.1.2 Rome Statute Elements of the Crime: Article 6(b) Genocide by Causing Serious Bodily or Mental Harm

Torture is also an ICC crime considered as one possible vehicle for perpetrating genocide via inflicting “*serious* bodily or mental harm to one or more persons” in an attempt to destroy in whole or in part a particular national, ethnical (interpreted as ethnic), racial or religious group. Thus, the Rome Statute Elements of the Crimes document specifically mentions at footnote 3 to Article 6(b) ‘Genocide by causing **serious** bodily or mental harm’ that: “This conduct may include, but is not necessarily restricted to, *acts of torture*, rape, sexual violence or inhuman or degrading treatment (emphasis added).” It is not required as an element that

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<sup>19</sup> Rome Statute Elements of the Crimes (2002).

<sup>20</sup> Dewulf (2011), p. 180.

<sup>21</sup> Dewulf (2011), p. 180.

the victim be in the custody or control of the perpetrator in order to violate Rome Statute Article 6(b) the elements being as follows:

**Article 6(b)**

**Genocide by causing serious bodily or mental harm**

1. The perpetrator caused serious bodily or mental harm to one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.<sup>22</sup>

‘Torture’ is in respect of Article 6(b) of the Rome Statute Elements of the Crimes then held by the ICC to be one possible manifestation of the perpetrator inflicting *serious* mental and/or physical harm. The wording “serious harm” is thus also used in the Rome Statute to describe the harms encompassed by torture. Thus reference to ‘torture’ in the Rome Statute is *not* restricted to the statutory terminology of “severe” harm as used, for instance, in Article 7 (1)(f) to delineate what constitutes torture as a ‘crime against humanity’ (where the nature of the physical pain or suffering involved is described as ‘severe’). Hence, under the Rome Statute arguably (and this is the position taken here); it is *not* necessary to distinguish conceptually between the terms ‘serious’ and ‘severe’ in referring to the level of suffering and pain inflicted when assessing whether the perpetrator conduct meets the requisite element as to intensity of harms inflicted for the perpetrator conduct to be considered as torture.<sup>23</sup> Also note that ‘torture’ is in the Rome Statute described both as a ‘grave’ breach of international law (Article 8(2)(a)(ii) and ‘serious’ breach (Article 8(2)(c)(i)). ‘Torture’ under the Rome Statute and as per all other international instruments that address torture then requires as an element some level of significant physical or mental pain or suffering and/or injury. At the same time, however, on the view here, one cannot legitimately attempt to define away ‘torture’ through the use of descriptors such as ‘serious’ or ‘great’ suffering or pain and/or injury, for instance, as opposed to ‘severe’ suffering or pain and/or injury.

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<sup>22</sup> Rome Statute Elements of the Crimes (2002).

<sup>23</sup> Dewulf (2011), pp. 92–93 argues also that the Rome Statute uses the term ‘serious’ to mean the same as the term ‘severe’ insofar as both can refer to the pain and suffering of torture under the Statute. Dewulf notes as support for this proposition that the Rome Statute Elements of the Crimes (2002) at Article 8(2)(a)(iii) defines “willfully inflicting great suffering” as “The perpetrator caused *great* physical or mental pain or suffering to, or *serious* injury to body or health of, one or more persons (emphasis added).” Dewulf points out however that the ICTY has held that the level of suffering in torture is greater than that required to meet the elements of the war crime of ‘willfully inflicting great suffering’ and greater than that involved for instance in the war crime of ‘cruel treatment’. The latter ICTY perspective is however not unassailable.

## 1.2 'Child Abuse' vs. 'Child Torture' as Legal Concepts Under International Law

Let us digress for a moment to consider that there are definite distinctions to be made between 'child abuse' as a *conceptual legal category* versus the 'torture' of children:

... while child abuse may cause severe pain or suffering that is not part of the definition. Physical or mental violence may be considered child abuse regardless of the degree of pain or injury caused. Indeed, treatment that offends a child's dignity may be considered child abuse, regardless of whether it causes pain or suffering (emphasis added).<sup>24</sup>

Furthermore; 'child abuse' implies that the maltreatment was inflicted by parents or someone with caretaker duties acting in *loco parentis*<sup>25</sup> while this is not a necessary or implied feature in respect of the legal concept of 'torture' of a child. 'Child abuse' and 'torture' then do *not* overlap on all legal characteristics (i.e. in respect of the elements of the crime/features of the legal concept) even if the level of suffering and/or pain and/or injury is equivalent for both 'child abuse' and 'torture' in certain instances.<sup>26</sup> In addition, the absolute prohibition on torture is part of international customary law unlike the situation for 'child abuse' where: (i) there is a greater impact of cultural relativism in the interpretation of what constitutes the treatment at issue in various States (that is, what maltreatment amounts to/rises to the level of 'child abuse') and for that reason in part (ii) there exists no universal *jus cogens* prohibition on 'child abuse'.<sup>27</sup> Notions of 'child abuse' to some extent then (and unfortunately on the view here) have been often impacted by cultural relativist presumptions while this is less so in regard to the definition of 'torture' (especially given now the Rome Statute listing of the elements of the

<sup>24</sup> O'Donnell and Liwski (2010), pp. 3–4. The current author would point out that insults to personal dignity can cause significant mental suffering depending on the nature of the affront to one's human dignity involved.

<sup>25</sup> O'Donnell and Liwski (2010).

<sup>26</sup> For instance, abduction by a *non-custodial* parent of their child to another State (where the *lawful custodial* parent is acting in the best interests of the child) is generally conceived as a form of 'child abuse' that may produce for the child and custodial parent who has lost the child *mental suffering* rising to the level of the severe suffering of torture. Nevertheless, the two legal categories ('child abuse' and 'torture') should not be conflated. There are important distinctions between the two legal concepts that arguably are worth maintaining such that a proper analysis of the facts in each case is required to determine whether the *elements of the crime of torture* of a child are actually met (i.e. abduction of the child by the non-custodial parent may or may not have been intended to cause severe mental suffering also to the child and not just to the lawful custodial parent who has lost the child; and the former element would have to be present for the conduct of the perpetrator parent to be properly considered legally as *torture of a child* as the direct victim).

<sup>27</sup> This is not at all to say that an absolute universal ban on child abuse with *jus cogens* status would not also be of utmost value. Note that Protocols I and II to the 1949 Geneva Conventions (which arguably have attained the status of international customary law) do incorporate prohibitions on child maltreatment during armed conflict that, depending on the facts in the specific situation, might be considered as child abuse or even as torture.