

The practice of abduction and its application to the Ongwen's case*

I. Introduction

Dominic Ongwen was born in Uganda in 1975. At the age of ten he was abducted by members of the Lord's Resistance Army (LRA)¹, who trained him to fight against the Ugandan government. Due to his military skills, 30 years after his abduction, he became the Sinia brigade's commander—one of the most important operational units in the LRA hierarchy— and a key element to the leader of the organization, Joseph Kony.

The background factors in which Ongwen was involved triggered a non-international armed conflict between the LRA and the Ugandan Government, in which he perpetrated crimes against humanity and war crimes². As a result, on March 2016, the Pre-Trial Chamber II issued a decision confirming 70 charges against Ongwen, concerning the facts that occurred between the 1th of July 2002 and the 31th December 2005 in northern Uganda.

Many of the events in which Dominic Ongwen and his subordinates, directly or indirectly committed crimes under the ICC jurisdiction, were initially executed based on a practice that, according to the facts, can be distinguished by the following:

- i. An act that implies the deprivation of liberty of children under 15 years against their will.

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¹. "Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen", Justice and Reconciliation. July 2008, http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP_FN7_Dominic-Ongwen.pdf. (accessed November 11, 2017)

² International Criminal Court; Pre-Trial Chamber II, Case No. ICC-02/04-01/15, (The Prosecutor v. Dominic Ongwen) Decision on the confirmation of charges, 23 March 2016, para. 60-64.

- ii. The act separates the children from their family or the environment in which they live.
- iii. The act is carried out through violence or deception.³

The length of the children's deprivation of liberty varied considerably. Sometimes the deprivation of liberty was long because it was followed by other ICC crimes, such as conscription in the LRA or sexual slavery. Other times, the deprivation of liberty did not last long because the children were released, or managed to escape, immediately after they were abducted.⁴ Having regard to the foregoing, the practice of abduction will be considered as an act of violence in itself, without taking into account what happened to the victim after being abducted.

It is noteworthy to mention that, first, this practice does not constitute an autonomous crime, not only in the ICC Statute but generally in International Criminal Law. Second, within the framework of comparative law this practice is recognized as a crime under different terms; in some cases, it is considered as abduction (see article 2.4, Chapter XXIV, in the Ugandan criminal code), whilst in others it is considered as kidnapping (see title 18, section 1201, US model penal code). For the purposes of this paper the term 'abduction' will be used to refer to the practice detailed above.

³ Regarding the first element, the Confirmation of Charges in the Ongwen Case reaffirms that the members of the LRA deprived civilians of their freedom by means of abduction and leading them to military custody. In addition, a report by the Office of the Special Representative of the Secretary General for Children and the Armed Conflict has established that abduction is an act carried out against the will of the children or their guardians. Further, in relation to the second element, Amnesty International has said that "*Abducted children embark on a journey in hell. Abduction is itself an act of violence, ripping terrified children from the security of their families. It is often accompanied by killings, rape and severe beating*".

The testimonies and reports on the situation in northern Uganda show that the Lord's Resistance Army had as its strategy the immediate transfer of children once they had been abducted, in order to keep them as far away from their homes as possible.

Moreover, definitions as established by the Ugandan penal code emphasizes the need for abduction to be carried out through deception or violence towards the victim. And finally, according to a study examined by the ICC---based on the book *The Lord's Resistance Army, Myth and Reality*--- it has been concluded that the length of the abduction is not determinative for its perpetration.

⁴ These cases were reported in a document presented by Amnesty International, in which, based on the statements made by the victims, it concludes: "[T]hose that are too small are set free; they are not strong enough to carry looted goods or to use weapons. It also seems that LRA units are given conscription targets that change according to need and objective". "Uganda. Breaking God's commands": the destruction of childhood by the Lord's Resistance Army", Amnesty International, (September 18, 1997). <https://www.amnesty.org/download/Documents/156000/afr590011997en.pdf>

Considering this, in September of 2017, the ICC Office of Public Counsel for the Victims asked the International Law Clinic of the International Law Clinic to conduct research on the following question:

“[W]hether abduction could be understood as included in, either one of the crimes already charged [to Dominic Ongwen], or any other crimes mentioned in the Rome Statute. For instance, but not exclusively: enforced disappearance of persons (article 7(1)(i)), compelling service of hostile force (article 8(2)(a)(v)), (unlawful) deportation of forcible transfer of population (article 7(1)(d) and 8(2)(a)(vii)-1), taking hostages (Article 8(2)(a)(viii) and Article 8(2)(c)(iii))”

To resolve the issue, the Clinic will, firstly, delimit the object of study to the abductions committed only against children by the Lord’s Resistance Army. Secondly, the Clinic will exclude possible crimes initially considered by the OPCV for the reasons explained afterwards.

The scope of study was defined by the Clinic based on the evidence found in the statements of the witnesses and other data collected from studies in Northern Uganda.⁵ The information provided shows that the LRA is an army that feeds on children. They follow a systematic policy of targeting children, namely because they are easier to control and transform physiologically and physically.

The figures shown by the expert witness Tim Allen,⁶ seem to indicate that the rebels are under instruction from the commander to target a group of adolescents aged between 12 and 16.⁷ According to the World Vision Uganda, *“for over 3,000 former LRA soldiers,*

⁵ The Lord’s Resistance Army, Myth and Reality, Tim Allen, (2010), Page 138.

⁶ The Lord’s Resistance Army, Myth and Reality, Tim Allen, (2010), Page 138.

⁷ The figures presented by The Lord’s Resistance Army, Myth and Reality, Tim Allen, (2010), pg 138.

The author shows that “of those males abducted before age 30 over two-thirds were under 18 and over three-quarters were under 21 [...] The distribution of abduction age indicates that four times as many males aged 14 were abducted as those aged 9 or 23. The study provides that “from 1998 to 2004 a 14 years old youth in the study population had an average of a 5 per cent chance of abduction (20 the level of risk faced by one aged either 9 or 23).

*approximately 47% were aged between 11 and 16 when taken. A further 36% were between 17 and 22 years old. Approximately 30% of abducted people seen by World Vision have been female; of these 54% have been aged between 11 and 16”.*⁸

Therefore, age was the main criterion in the abduction of civilians by the LRA due to the effectiveness of indoctrination and control, which gives an advantage to the Army. In this respect, the practice of abduction is critically based on children as the Clinic will explain in this research.

A second subject to be addressed is the exclusion of crimes considered in the initial request of the OPCV in which the practice studied may fit, including a set of behaviors that have no relation whatsoever with the abduction as described in this memorandum, such as murder⁹, enslavement¹⁰, property-related crimes¹¹, war crimes of compelling services in hostile forces, enforced disappearance¹² and taking hostages¹³.

⁸ Figures presented by World Vision Uganda to a conference on Challenges to Reconciliation and the Protection of Human Rights in Gulu, on 7 July 1997, organized by the Foundation for Human Rights Initiative.

⁹ First, the crime against humanity of murder implies that the perpetrator killed one or more persons, as the first element of the elements of the crimes of the Rome Statute has established, taking that into account it is clear that abduction does not always lead to the murder of the victim. In fact, even if some abductions lead to the murder of the victim, in that scenario we are facing a later act that constitutes a crime and as we have already explained it goes beyond the scope of this investigation.

¹⁰ Analyzing the crime of enslavement as a crime against humanity, the conclusion that we arrived at was that, even though the perpetrator of the practice of abduction exercises a certain type of control over the victim, it does not entail the powers attaching to the right of ownership.

¹¹ Those crimes related to the property such as pillaging and destruction of property, could be committed while the practice of abduction is taking place, but they do not resemble this practice in any way.

¹² The consideration of the crime against humanity of the enforced disappearance of persons was dismissed, because, even though the first element of the crime includes the verb “to abduct”, the second element requires a “refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons”. In other words, for this crime to be committed, a demand of an answer about the whereabouts of the victim must exist, followed by the negative response of the individual or organization responsible of the abduction. Regarding the fourth element of the crime of enforced disappearance, it requires that the abduction “was carried out by, or with the authorization, support or acquiescence of, a State or a political organization”. Nevertheless, in the context of the abduction of children in Northern Uganda, the practice object of analysis was committed by members of the Lord’s Resistance Army, which discards in all ways the authorization, acquiescence, or support of the State. Bearing in mind that neither the *actus reus*, nor the *mens rea* (the awareness of the refusal) is fulfilled in the practice studied in this paper, it can be concluded that the conduct of abduction cannot be considered to fit in the crime against humanity of the enforced disappearance of persons.

Therefore, the Clinic will evaluate the possibility to include abduction as crimes against humanity, specifically persecution (article 7(1)(h)) and other inhumane acts (article 7(1)(k)). From the perspective of the Clinic, abduction could be recognized and included into these two pre-existing crimes. As a result, not all the crimes under the ICC Statute will be under examination, since some of them consider the practice of abduction as a preparatory act to commit the crime, namely, the war crime of recruiting, enlisting or using children under the age of 15 in the armed forces to participate actively in hostilities¹⁴ and some gender and sexual based crimes.¹⁵

Finally, turning to deportation or forcible transfer, this crime is understood on the basis of civilians being transferred from a place where they are legally established to another. In both crimes, there is a deprivation of liberty and they contain within their elements the transfer of individuals from one place to another. The Chamber in the Blaskić's case defines it by establishing "*The deportation or forcible transfer of civilians means 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law'*"¹⁶. Although these crimes are similar to the *actus reus* of abduction, in this behavior there is no certainty if the individual abductees are transferred from one place to another.

¹³ The practice of abduction does not amount to the elements of the war crimes of compelling service in hostile force and taking hostages. In the first place, the former demands that the perpetrator coerces one or more persons, by act or threat, to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power. For the scope of this research, however, the practice of abduction is committed without taking into account any purpose or mental element of the perpetrator. Secondly, the crime of taking hostages also demands a mental element which is that the perpetrator intends to compel a State, International Organization, natural or legal person, or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons who are detained.

¹⁴ Regarding the war crime of "conscripting children under the age of fifteen years into armed forces or using them to participate actively in hostilities", this crime requires the specific intent of conscription or using the victim to participate actively in the hostilities. In this sense, as abduction itself does not require that specific purpose, it could not be included in this crime.

¹⁵ Sexual and gender based crimes were dismissed by the International Law Clinic, bearing in mind that these type of crimes are actions that may happen after the practice of abduction. Although it is certain that in a huge number of the commissions of these crimes, the practice of abduction is usually a prior step to their fulfillment, when analyzing the conduct alone, it cannot be concluded that a sexual crime always takes place in this context.

¹⁶ International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No. IT-95-14-T, (The Prosecutor v Blaškić), Judgement, 3 March 2000.

According to the present cases, the ICTY understands deportation as an objective element of the crime of persecution. Therefore, kidnapping, which would also be a forced violation of freedom, could constitute a breach in the objective elements of the crime of persecution.

In conducting its research, the Clinic, according to article 21 of the ICC Statute, has first looked into the ICC Statute, the Elements of the Crimes and their interpretation by the ICC case law. Subsequently, as provided for in article 21 (b)(1) of the ICC Statute, the Clinic has analyzed the customary law developed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL). Finally, the Clinic has also considered the works of some international organizations.

It is important to highlight that from the study of the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the International Criminal Tribunal for Rwanda (ICTR), no relevant information to the Clinic's research was found. Regarding the latter, even though the background factors suggest that the practice of abduction was one of the acts carried out in the Rwandan conflict, the ICTR studied only the heinous crimes committed after the abduction.

II. Other inhumane acts as a crime against humanity

II.1. International Criminal Court

The crime of other inhumane acts pursuant to article 7(1)(k) of the ICC Statute is considered as a residual category aimed to include conduct that does not amount to any other crime against humanity under the ICC Statute.¹⁷ The elements of the crime against humanity of other inhumane acts are the following:

¹⁷International Criminal Court; Pre-Trial Chamber, Case number ICC-01/09-02/11, (The Prosecutor v. Uhuru Muigai Kenyatta). Decision on the confirmation of charges, 23 January 2012, para. 269 *"The Chamber understands that other inhumane acts are a residual category within the system of article 7(1) of the Statute. Therefore, if a conduct could be charged as another specific crime under this provision, its charging as other inhumane acts is impermissible. Secondly, the Chamber opines that the language of the relevant statutory provision and the Elements of Crimes, as well as the fundamental principles of criminal law, make it plain*

1. *The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.*
2. *Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.*
3. *The perpetrator was aware of the factual circumstances that established the character of the act.*
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*

The Clinic understands that, out of the five elements stated above, the first two are the most relevant for the purpose of this work. With regard to the first, in the Lubanga case—where massive abductions and recruitments of minors were committed—the Trial Chamber cited two studies. They state that the abduction of children under 15 causes serious traumatic consequences on the mental health of the victims¹⁸, which in the long-term can hinder their normal and healthy development.¹⁹

In the same judgement, the Chamber stresses that in order to protect minors from the risks associated with the armed conflict, their physical and psychological well-being should be ensured. That includes offering protection not only during combat, but also against potential traumas that may accompany the recruitment, including separating from their

that this residual category of crimes against humanity must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity”.

¹⁸International Criminal Court; Trial Chamber I, Case No. ICC-01/04-01/06, (The Prosecutor v. Thomas Lubanga) Decision on Sentence pursuant to Article 76 of the Statute. 10 July 2012, para. 41 “*Studies indicate that abduction and the consequent trauma have a negative impact on their education and cognitive abilities. It was stated in the report that "psychological exposure and suffering from trauma can cripple individuals and families even into the next generations".*

¹⁹ *Ibidem.* para. 39 “*Child war survivors have to cope with repeated traumatic life events, exposure to combat, shelling and other life threatening events, acts of abuse such as torture or rape, violent death of a parent or friend, witnessing loved ones being tortured or injured, separation from family, being abducted or held in detention, insufficient adult care, lack of safe drinking water and food, inadequate shelter, explosive devices and dangerous building ruins in proximity, marching or being transported in crowded vehicles over long distances and spending months in transit camps. These experiences can hamper children's healthy development and their ability to function fully even once the violence has ceased”.*

families, the disruption in their education, and exposure to an environment of violence and fear.²⁰ Consequently, as established by the Chamber, abduction fulfills the first element of other inhumane acts.

With regard to the second element, in the Decision on Confirmation of Charges against Katanga, the Pre-Trial Chamber stated that the conduct of causing mental or physical injury constitutes a serious violation of international customary law and is of a similar nature and gravity to the crimes referred to in article 7 (1). However, the Chamber points out that a set of facts must be taken into account in order to meet the requirements of article 7 (1) (k). This criteria relate to the nature of the act, the context in which it occurred, the personal circumstances of the victim, (age, gender, and health), and the physical, mental, and moral effects that the act caused on them.²¹

Accordingly, it is necessary to analyze each criterion outlined by the Chamber in order to establish whether the gravity of the acts in the Ongwen's case may be similar to any of the acts referred to, in Article 7, paragraph 1 of the Statute.

As a result of this analysis, the following conclusions can be reached. First, the practice of abduction takes place in the context of internal armed conflict in northern Uganda, from 2002-2005. Second, the victims of this practice are usually children under the age of 15. Finally, the practice causes serious repercussions on the mental health of children, as the studies in the Lubanga case have shown. Thus, it can be concluded that in the Ongwen's case the seriousness of the acts of abduction may be similar to any other act referred to in

²⁰ *Ibidem*, para. 58 “As the Chamber described in the Judgment, the principal historical objective underlying the prohibition against the use of child soldiers is to protect children under the age of 15 from the risks that are associated with armed conflict, and particularly they are directed at securing their physical and psychological wellbeing. This includes not only protection from violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment, including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear”.

²¹ International Criminal Court; Pre-Trial Chamber I, Case No. ICC-01/04-01/07, (The Prosecutor v. Germain Katanga), Decision on the confirmation of charges, 30 September 2008, para. 449 “[T]he conduct of intentionally causing serious physical or mental injury constitutes a serious violation of international customary law and of human rights of a similar nature and gravity to the crimes referred to in article 7(1) of the Statute.”

article 7, paragraph 1 of the Statute, and therefore can constitute as crimes of other inhumane acts.

II.2. Special Court for Sierra Leone²²

From the outset, it is important to mention that although the working group on the Statute of the Special Court of Sierra Leone proposed the autonomous crime of abduction of children under the age of 15 for the purpose of using them actively in the hostilities, it was not finally included in the SCSL Statute.²³

Concerning the crime of other inhumane acts, it is established in the SCSL Statute in a similar way to how it is stated in the ICC Statute. Firstly, the elements one and two of other inhumane acts in the SCSL Statute are identical to the first two elements of the ICC

²² Even though the SCSL was created in 2000—just after the crimes under its jurisdiction were committed—there is no violation of the principle of *nullum crimen sine iure*, provided that the Court has jurisdiction over crimes that existed in customary law at the time of their perpetration.

²³ During the creation of the Special Court for Sierra Leone, the working group on a draft Statute had incorporated an article that included as part of "other serious violations of international humanitarian law" (i) the abduction of children under 15 for the purpose of using them to actively participate in hostilities, as well as (ii) the forced recruitment of them for the purpose of using them to actively participate in hostilities. (Information consulted at "Sierra Leone: Recommendations on the draft Statute of the Special Court", Amnesty International, (November 14, 2000). https://www1.essex.ac.uk/armedcon/story_id/000143.html (accessed on November 12, 2017)

Taking this into account, the Chamber I in Charles Taylor's case mentioned the Report of the Secretary-General for the creation of a Court for Sierra Leone, where the question whether the abduction could be considered as an autonomous crime under common article 3 of the Geneva Conventions, was avoided by the Security Council. In this regard, the reference of the Chamber affirms the following: "*While the definition of the crime as 'conscripting' or 'enlisting' connotes an administrative act of putting one's name on a list and formal entry into the armed forces, the elements of the crime under the proposed Statute of the Special Court are: (a) abduction, which in the case of children of Sierra Leone was the original crime and is in itself a crime under common article 3 of the Geneva Conventions; [...]. This proposal was however rejected by the Security Council*" (See footnote 1056 of the Judgment of the Trial Chamber in the Charles Taylor Case, page 156).

The Security Council, based on the recommendation of Amnesty International, considered that the article's draft, was deficient since it implied that the prosecution would be carried out only if a child was abducted or specifically recruited with the purpose of being an active combatant in hostilities. However, this purpose is not required by common Article 3. This also means that the abduction of children could not been a crime if it was done with the purpose of carrying out other tasks such as carrying items, cooking, carrying out housework, or being used as sexual slaves. (Information consulted at Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, Security Council, U.N. Doc. S/2000/915, 4 October 2000). Given these legislative precedents, it was not found that there was any decision by the SCSL that reevaluates the position finally adopted in the preparatory work, that is to say, the position of not considering the abduction remains independent of the purpose of using them in hostilities as an autonomous crime. This is why abduction is studied in the SCSL as a crime against humanity.

Statute.²⁴ Second, the crime referred to is also considered as a residual category and includes acts that are not expressly included as crimes against humanity under the SCSL Statute²⁵. Third, it understands the crime by analyzing the result of the act (that is, causing great suffering affecting the physical integrity or mental health of the victim). Therein, the Appeals Chamber of the SCSL stresses that in order to qualify an act as other inhumane act, the analysis must be made on a case-by-case basis taking into account the aforementioned criteria established in the ICC case law.²⁶

III. Persecution as a crime against humanity

III.1. International Criminal Court

The crime against humanity of persecution under Article 7 (1) (h) of the Statute requires, with regard to the mental element, to be committed with the intent to discriminate the victims on grounds that are prohibited under international law. However, this element will not be addressed since this is a question that goes beyond the object of the query.

The material elements of the crime against humanity of persecution are the following:

²⁴ *Ibidem*. para.198 “(i) inflict great suffering, or serious injury to body or to mental or physical health; (ii) are sufficiently similar in gravity to the acts referred to in Article 2.a to Article 2.h of the Statute; and (iii) the perpetrator was aware of the factual circumstances that established the character of the gravity of the act. The acts must also satisfy the general chapeau requirements of crimes against humanity”.

²⁵ The Appeals Chamber of the SCSL in the AFRC case has specifically ruled the crime of other inhumane acts established in Article 2 (i) of its Statute in the sense that this crime: “[...] is intended to be a residual provision so as to punish criminal acts not specifically recognised as crimes against humanity, but which, in context, are of comparable gravity to the listed crimes against humanity. It is therefore inclusive in nature, intended to avoid unduly restricting the Statute’s application to crimes against humanity. The prohibition against “Other Inhumane Acts” is now included in a large number of international legal instruments and forms part of customary international law” Special Courts of Sierra Leone; Appeals Chamber, Case No. SCSL-2004-16-A .(The Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu), Judgment, 22 February 2008, para. 183.

²⁶ *Ibidem*. para. 184. “[In] effect, the determination of whether an alleged act qualifies as an “Other Inhumane Act” must be made on a case-by-case basis taking into account the nature of the alleged act or omission, the context in which it took place, the personal circumstances of the victims including age, sex, health, and the physical, mental and moral effects of the perpetrator’s conduct upon the victims”.

1. *The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.*
2. *The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.*
3. *Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.*
4. *The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.*
5. *The conduct was committed as part of a widespread or systematic attack directed against a civilian population.*
6. *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.*

In light of the question raised by the OPCV, the Clinic considers that only the first and fourth elements are relevant for the study and therefore should be addressed. Concerning the first element, it is noted that, even though abduction is not expressly included as one of the crimes specified in Article 7, it has a significant similarity with respect to the fundamental rights violated in other acts that do expressly constitute a crime against humanity. Examples of these are deportation and forcible transfer (consisting of the forcible displacement of civilians from an area where they are legitimately located, to another place through expulsion or coercive acts, without grounds permitted under international law), as well as acts of imprisonment or any other serious deprivation of liberty. These acts constitute a serious violation of the fundamental right to liberty, that when carried out with a discriminatory purpose, are considered a crime of persecution.²⁷

²⁷ International Criminal Court; Pre-Trial Chamber II, Case No. ICC-01/04-02/06, (The Prosecutor v. Bosco Ntaganda), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, 9 June 2014, para. 65. “*The evidence shows that during the First Attack, UPC/FPLC soldiers evicted the civilian population from Mongbwalu. Due to its strategic importance in the gold market, the UPC/FPLC’s goal was to provide security for the mostly Hema, Gegere and Nande traders and ‘to push out the Lendu in Mongbwalu’. As a result of the assault on Mongbwalu, a considerable number of civilians, mostly Lendu, were forced to leave the area and to take refuge in the surrounding villages. Some of them were injured by machetes or by bullets. Displaced civilians were forced to live in the bush ‘de façon quasi permanente [...] dans l’insécurité la plus complète’. Civilians displaced from Mongbwalu would have been killed had they attempted to return to their houses. Similarly, civilians displaced from Nzebi as a result of the First Attack by*

In order to prove the fourth element of persecution, which requires the connection of abduction with any other crime against humanity or with any crime within the ICC jurisdiction, the Clinic will analyze two possible perspectives.

The first one aims to identify if that other crime—referred to as the fourth element—is committed against the same victim simultaneously to the abduction. This approach could be proven on a case-by-case basis by analyzing whether, in addition to having been taken by force, they were victims of another crime. For instance, at the time of the abduction the victim had also been subject to *inter alia* mutilations, murder of family members, looting or humiliation.

According to the second perspective, a connection of abduction with other ICC crimes also exists when there is a systematic pattern of violations of other victims within the same environment. Hence, it is sufficient to identify that, at the time of the abduction of certain persons other members of the community were also victims of other crimes under the ICC jurisdiction.

This last approach can be better explained by analyzing the case against William Somei Ruto. He was accused of the crime of persecution as it was found a connection to the crimes of murder and forcible transfer in the same population. The latter two were committed against different victims from those who were victims of persecution, but they were sharing a common context.

As a result, the Clinic understands that if at the time the abduction was carried out there existed other crimes under the ICC jurisdiction (either against the victim or as part of a

the UPC/FPLC soldiers would have been killed had they attempted to return to their houses". International Criminal Court; Pre-Trial Chamber I, Case No. ICC-02/05-01/12 1, (The Prosecutor v. Abdel Raheem Muhammad Hussein), Warrant of Arrest, 1 March 2012, p.6. , "Persecution constituting a crime against humanity under article 7(1) (h) of the Statute, namely (a) the persecution of the primarily Fur population of the Kodoom villages and surrounding areas in the Bundis Administrative Unit of Wadi Salih Locality in West Darfur by acts of murder, attacking the civilian population, destruction of property and forcible transfer, from on or about 15 August 2003 to on or about 31 August 2003".

systematic pattern), the fourth element of persecution as a crime against humanity would also be met.

Keeping in mind the above, it is possible to affirm that abduction may constitute the crime against humanity of persecution.

2. Persecution in the International Criminal Tribunal for the Former Yugoslavia

The International Criminal Tribunal for the Former Yugoslavia does not refer to the crime of abduction as it is not a criminal offense under its Statute. Nor was it relevant for the analysis of the cases before the tribunal, since the facts that occurred in the former Yugoslavia differ substantially compared to those that occur in the Onwgen's case. Consequently, the Clinic focused its study on the crimes against humanity of persecution under Article 5 of the ICTY Statute.

The crime of persecution has been defined by the ICTY case law as: “[An] act or omission that (a) discriminates in fact and (b) denies or infringes upon a fundamental right laid down in customary international law or treaty law. (...) The crime against humanity of persecution requires intent to discriminate on political, racial, or religious grounds.”²⁸

As the ICTY has stated, regarding the material element,²⁹ the crime of persecution may incorporate acts as crimes against humanity established in the ICTY Statute, or other acts that violate a fundamental right.³⁰ Therefore, the ICTY case law extends the definition of

²⁸ International Criminal Tribunal for the former Yugoslavia; Trial Chamber I, Case No. IT-00-39-T, (The Prosecutor v. Momcilo Krajisnik) Judgement, 27 September 2006, para. 734.

²⁹ International Criminal Tribunal for the former Yugoslavia; Trial Chamber I, Case No. IT-95-16-T, (The Prosecutor v. Kupreškić et al.), Judgement, 14 January 2000, para. 621.

³⁰ International Criminal Tribunal for the former Yugoslavia; Trial Chamber, Case No. IT-98-30/1-T, (The Prosecutor v. Kvočka et al.), Judgement, 2 November 2001, para. 185. *International jurisprudence has recognized that persecution can be carried out through acts that violate fundamental rights, such as the denial of educational and employment opportunities, the destruction of religious or cultural buildings and the destruction of property.*

persecution to a wide range of conducts that violate political, economic or social rights, and even to acts of humiliation and psychological abuse.³¹

The ICTY has also indicated that any act considered as a crime of persecution, must reach a similar level of gravity to the crimes listed under Article 5 of the ICTY Statute.³² Therein, the ICTY regard deportation and forcible transfer as a crime against humanity of persecution.³³ Similarly to these crimes, the practice of abduction deprives the liberty of children and requires their transfer from one place to another against their will and without the authorization of international law. Thus, the level of gravity of the practice of abduction is similar to those crimes under the ICTY Statute.

Finally, regarding the requirement for the relevant conduct to be committed in connection with any act referred to in the ICC Statute, the ICTY believes that, since that element is not addressed by the international customary law, it is not mandatory to meet that connection.³⁴

IV. Additional considerations

In this section, the Clinic will refer to the statements made by the Inter-American Court of Human Rights and the United Nations, in order to demonstrate the widespread rejection to the abduction of children by the international community. It is also noteworthy to mention article 35 of the Convention on the Rights of the Child³⁵, which includes a provision that aims at the prevention of the abduction of children by any armed group.

³¹ Fausto Pocar, "Persecution as a Crime Under International Criminal Law" *Journal Of National Security Law & Policy* 2 (April 2008): 355-365.

³² International Criminal Tribunal for the former Yugoslavia; Trial Chamber I, Case No. IT-95-16-T, (The Prosecutor v. Kupreškić et al.), Judgement, 14 January 2000, para. 618-619.

³³ International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-95-14-A, (The Prosecutor v. Blaškić), Judgement, 29 July 2004, para.135.

³⁴ International Criminal Tribunal for the former Yugoslavia; Trial Chamber I, Case No. IT-95-16-T, (The Prosecutor v. Kupreškić et al.), Judgement, 14 January 2000, para. 577.

³⁵ Convention on the rights of the Child, Art.35, adopted 20 November of 1989, United Nations, Treaty Series, vol. 1577, p. 3. "States Parties must take all appropriate national, bilateral and multilateral measures to prevent the abduction, sale and trafficking of children for any purpose and in any way."

On one hand, in the Inter-American human rights system, the IACHR, in the case of *Contreras et al. v. El Salvador*, has investigated offenses that violate fundamental rights of children when they are separated from their families³⁶, namely, their dignity and personal integrity. The pronouncements stated in this case and the references made in the judgment to the 1996 U.N. Machel Report³⁷ revealed widespread concern about the psycho-social effects of violence against children in armed conflicts, usually caused by the “*feelings of loss, abandonment, intense fear, uncertainty, anguish and pain*”³⁸.

On the other hand, the Office of the Special Representative of the U.N. Secretary-General for Children and Armed Conflict (the Office) has stated that “*the abduction of children against their will and the will of their adult guardians, either temporarily or permanently, is illegal under international law*”. The Office also considers that this act “*can constitute a serious violation of the Geneva Conventions and even a crime against humanity or a war crime*”³⁹.

The Office has created a list that identifies six grave violations against children during armed conflict, including the abduction of children.⁴⁰ The criteria used to identify them are

³⁶ That is the case of the enforced disappearance of children, that has as the first element the deprivation of freedom, usually carried out through abduction and therefore, implies the separation and removal of children from the sphere of care of their parents. Inter-American Court of Human Rights, (Case *Contreras et al. vs. The State*), Decision on Reparations and Costs of the Judgment, 31 August 2011, para. 82. “*This characterization is consistent with other definitions contained in different international instruments that indicate as constitutive elements of enforced disappearance: a) the deprivation of liberty; (b) the direct intervention of state agents or their acquiescence; and c) the refusal to acknowledge the arrest and reveal the fate or whereabouts of the person concerned*”.

³⁷ The Impact of Armed Conflict on Children, Report of the Secretary-General's expert, Ms. Graça Machel, U.N. Doc. A / 51/306, 26 August 1996.

³⁸ *Ibidem*, par. 85

³⁹ Office of the Special Representative of the Secretary-General for Children and Armed Conflict, “The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation”, October 2009 (Updated 2013). “*Abducting or seizing children against their will or the will of their adult guardians either temporarily or permanently and without due cause, is illegal under international law. It may constitute a grave breach of the Geneva Conventions and in some circumstances amount to war crimes and crimes against humanity*”. https://childrenandarmedconflict.un.org/publications/WorkingPaper1_SixGraveViolationsLegalFoundation.pdf (accessed March 12, 2018)

⁴⁰ Office of the Special Representative of the Secretary-General for Children and Armed Conflict, The Six Grave Violations Against Children During Armed Conflict, are: a) *Recruitment and use of children*; b) *Killing or maiming of children*; c) *Sexual violence against children*; c) *Attacks against schools or hospitals*; d) *Abduction of children*; e) *Denial of humanitarian access*.

the magnitude of the atrocities of the acts and the serious consequences they create in children's lives.

Furthermore, in 2013, the Office published a report which affirms that the act of abduction during an armed conflict can constitute a serious violation of International Humanitarian Law and of Common Article 3 of the Geneva Conventions. The Office states in its report that the demand for humane treatment of civilians constitutes an implicit prohibition against the abduction of children.⁴¹

Subsequently, the U.N. Security Council issued a resolution⁴² which, first, asserts the urgency in giving special relevance to this act due to an increased incidence of children being abducted—especially in Northern Uganda. Second, it rejects violations against Human Rights and International Humanitarian Law committed by armed groups, including massive abductions.

Considering the arguments of this section, it is clear that abduction itself constitutes an act of extreme gravity that leads to its rejection by the international community, regardless of the purposes behind the abduction or what happens after its perpetration⁴³.

⁴¹ Office of the Special Representative of the Secretary-General for Children and Armed Conflict, "The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation", October 2009 (Updated 2013). "The Geneva Conventions Common Article 3 requirement of humane treatment for civilians implicitly but undeniably prohibits the abduction of children". https://childrenandarmedconflict.un.org/publications/WorkingPaper1_SixGraveViolationsLegalFoundation.pdf (accessed March 12, 2018)

⁴² Security Council of United Nations, Res. 2225 13, U.N. Doc S/RES/2225, 18 June 2015. "Gravely concerned by the human rights abuses and violations of international humanitarian law committed by non-state armed groups, in particular violent extremist groups, including mass abductions, rape and other forms of sexual violence such as sexual slavery, particularly targeting girls, which can cause displacement and affect access to education and healthcare services, and emphasizing the importance of accountability for such abuses and violations."

⁴³ In addition, based on the reports and resolutions set out in this section, the possibility to incorporate the practice of abduction to the war crime of outrages upon personal dignity, arises. The elements listed for this crime are: I) *The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.* II) *The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.* III) *The conduct took place in the context of and was associated with an international armed conflict.* IV) *The perpetrator was aware of factual circumstances that established the existence of an armed conflict.* For the relevant question the first two elements will be addressed. It should be noted that the second one may be argued on the general recognition of humiliating treatment as an outrage against personal dignity, as has been found in the latter section. However, regarding the first element and following the ICC case law, it is important to point out that the analysis has generally

In this respect, when considering the position of the aforementioned international organizations in light of the abduction of children in the Ongwen's case, it is noteworthy to mention that, first, one of the elements of the crime against humanity of other inhumane acts—according to which the perpetrator must have caused great suffering or a serious attack on physical integrity or mental or physical health through an inhumane act—is restated. Second, these pronouncements confirm the contravention of international law required by the first material element of the crime of persecution, concerning the practice of abduction in northern Uganda.

V. Conclusions

In light of our research, the Clinic concludes that the first element of the crimes against humanity of other inhumane acts and persecution is met by the practice of abduction carried out by the subordinates of Ongwen. Moreover, this practice fulfils the second element of the crime against humanity of other inhumane acts due to the gravity of the mental and physical harm caused to the children, which reaches the same level of gravity as the other acts referred to in article 7 of the Rome Statute.

The Clinic also concludes that, as long as the subordinates of Ongwen committed the practice of abduction of children for one of the prohibited grounds under article 7 (1)(h) of the ICC Statute, it may also amount to the crime against humanity of persecution. The reason is that such practice (i) constitutes a serious violation of the children's fundamental right to freedom and is connected to other crimes provided for in the ICC Statute (i.e. the crimes against humanity of deportation, forcible transfer or arbitrary detention); and (ii) is

been made based on the jurisprudence of other courts. An example of this is found in the Katanga Case (decision of confirmation of charges), as it shows how the Chamber study the elements (i) and (ii) jointly. The criterion used to meet both elements has been the pronouncements of the Human Rights Committee, as well as the Ad hoc tribunals for the former Yugoslavia and Rwanda, leading the ICC to conclude that the act in the particular case could be considered an attack against the personal dignity generally recognized as such. Nevertheless, there is no case law precedent to conclude that the practice of abduction may amount the war crime of outrages against personal dignity.

connected to other crimes under the ICC jurisdiction committed against the same victims or against other victims with whom the victims of abduction share a common context.

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ANNEX I

CAN THE PRACTICE OF ABDUCTION AMOUNT TO THE CRIME AGAINST HUMANITY OF TORTURE?

This supplementary document aims to show the position of the Clinic concerning the crime of torture as a crime against humanity under the ICC Statute and the scope of the practice of abduction within this crime. With this purpose, the Clinic will analyse the elements of the crime, the mental element of torture as a war crime and as a crime against humanity, the special requirement of an important level of severity of the pain inflicted to the victim(s). Finally, the assessments made by other international tribunals concerning this crime will be addressed.

1. The crime against humanity of Torture under the Rome Statute

The crime of torture established in article 7 (1) (f) of the Rome Statute has the following elements:

- “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.”⁴⁴*

From the analysis made of the elements of the crimes, the Clinic notices that the practice of abduction could fit in to the crime of torture as a crime against humanity. With regard to the first element, the physical or mental pain, can be proved based on the study cited by the

⁴⁴ International Criminal Court; Rome Statute, 1998. Art. 7 (1) (f).

Trial Chamber in the Lubanga case⁴⁵, in which the expert witness affirms that this practice causes serious consequences to the body or to mental health. Regarding the second element, the custody or control upon the victim(s), is met at the time the perpetrator abducts the victim(s), regardless of whether the victim came to escape or is released. Finally, the suffering and pain caused to the victim(s) is not associated with a legal sanction, it is, in fact, a practice carried out by an armed group.

The crime of torture, either as a crime against humanity or as war crime, requires a severe and high degree of the pain or suffering inflicted upon the victim. Therefore, torture sets as a different crime from similar but lesser offences related to bodily integrity and human dignity, such as the war crime of inhumane treatment⁴⁶ or the crimes against humanity of other inhumane acts and persecution.⁴⁷

Broadly speaking, torture under the ICC Statute requires the infliction of physical or mental pain or suffering which must attain a minimum level of severity. This approach based on the severity of the crime has been developed in different international treaties, international tribunals⁴⁸, and followed after by the ICC Statute.⁴⁹ Nevertheless, the jurisprudence in the

⁴⁵ International Criminal Court; Trial Chamber I, Case No. ICC-01/04-01/06, (The Prosecutor v. Thomas Lubanga) Decision on Sentence pursuant to Article 76 of the Statute. 10 July 2012, para. 41 “*Studies indicate that abduction and the consequent trauma have a negative impact on their education and cognitive abilities. It was stated in the report that “psychological exposure and suffering from trauma can cripple individuals and families even into the next generations”.*

⁴⁶ “The concept of inhumane treatment, which is set out in common article 3 of the Geneva Conventions, has been described as ‘the umbrella under which the remainder of the listed “grave breaches” in the Conventions fall’. They involve acts or omissions that do not necessarily rise to the same level of gravity as torture: ‘The degree of physical or mental suffering required to prove either one of those offences is lower than the one required for torture, though at the same level as the one required to prove a charge of “willfully causing great suffering or serious injury to body or health”.

⁴⁷ “Several war crimes deal with offences related to bodily integrity and human dignity. These offences resemble some of the crimes against humanity, notably torture, persecution, and (p. 244) other inhumane acts, although of course the contextual elements are not the same as those applicable to war crimes”.

⁴⁸ Ireland v. United Kingdom, 18 January 1978, Series A 25, (1978) ECHR 1 para. 167; Selmouni v. France, 28 July 1999, ECHR Appl. No. 25803/94 (1999) 29 EHRR 403 para. 105; Aydin v. Turkey (1998) 25 EHRR 251 para. 82.

⁴⁹ According to Pre-Trial Chamber II, “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”. Bemba (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 193.

Court concerning the crime of torture is very limited.⁵⁰

In order to meet the severity of the crime, the Court must study both the objective severity of the harm committed, and the subjective criteria on a case-by-case basis. Those elements include “the nature and context of the infliction of pain, the premeditation and institutionalization of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim, the physical or mental effect of the treatment upon the particular victim, the victim’s age, sex, or state of health. The extent that an individual has been mistreated over a prolonged period of time will also be relevant”.⁵¹

Concerning the subjective element, the crime of torture as a crime against humanity does not require a specific purpose to commit the crime. As a result, the absence of evidence to prove that abduction aims to obtain information or a confession, provide punishment, intimidation or coercion, or discriminate against the victims, is not a decisive factor.⁵²

By contrast, the crime of torture as a war crime, enshrined in articles 8 (2)(a)(ii) and 8(2)(c)(i)⁵³, requires a purpose to commit the crime and does not require that the perpetrator take the control upon the victim. For this reason, the practice of abduction could fit only in to the crime of torture in the form of a crime against humanity.

2. Other International Tribunals

2.1 International Criminal Tribunal for the former Yugoslavia

⁵⁰ Arrest warrants in two of the Sudanese cases, Bashir⁵⁰ (ICC-02/05-01/09) and Hussein⁵⁰ (ICC-02/05-01/12), and the Confirmation of Charges against Dominic Ongwen in Northern Uganda.

⁵¹ According to a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia: Kvočka et al. (IT-98-30/1-T), Judgment, 2 November 2001, paras 142–3.

⁵² In the Clinic’s view, abduction is not a practice based on a purpose of obtaining information or a confession. In addition, even when the LRA targeted the IDP camps based on the belief that “all civilians who resided in such IDP camps were supporting the government”⁵², there is no evidence to affirm that there was a purpose of punishment or discrimination when the practice of abduction was committed.

⁵³ International Criminal Court; Elements of Crimes, 2011. Art (2)(a)(ii), 8(2)(c)(i).

First of all, the crime of torture was not defined under the ICTY Statute; nevertheless, it was considered a violation of the laws or customs of war under Article 3 of the ICTY Statute, and as a crime against humanity under Article 5 of this Statute. To find a definition the Trial Chamber researched instruments and practices developed under international law of human rights and international humanitarian law, (always bearing in mind the differences between those two legal corpses). In the Furundžija Judgement the Trial Chamber pointed out the three elements that define torture:

- (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.*
- (ii) The act or omission must be intentional.*
- (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.⁵⁴*

These elements have been repeated in other ICTY decisions such as Krnojelac, Delalic and Kvočka. In the Krnojelac case, the Tribunal established that:

Torture as a criminal offence is not a gratuitous act of violence; it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose. Thus, in the absence of such purpose or goal, even very severe infliction of pain would not qualify as torture pursuant to Article 3 or Article 5 of the Tribunal's Statute.⁵⁵

Concerning the severe pain or suffering: for the crime of torture to be considered under the ICTY case law it has to reach a certain threshold of gravity; however, that threshold of gravity has not been clearly defined. In spite of that, some acts, such as rape, which involve

⁵⁴ Prosecutor v. Furundžija, Case IT-95-17/1-T, Judgement, 10 Dec 1998, par 162.

⁵⁵ Prosecutor v. KRNOJELAC, Case IT-97-25-T, Judgement, 15 March 2002, par 180.

a severe enough infliction of suffering to constitute the offence of torture, have been considered as torture.⁵⁶

Although a debate between the three Chambers existed whether torture should be linked to state actors, it was concluded that participation of state officials was not necessary.⁵⁷ As a result, what mainly distinguishes the approaches by the ICTY and the ICC to the crime of torture as a crime against humanity is the requirement by the ICTY case law of a prohibited purpose.

2.2 Special Court for Sierra Leone

The Statute of the Special Court of Sierra Leone ('SCSL') includes torture as one of the nine "crimes as part of a widespread or systematic attack against any civilian population" or crimes against humanity. Also, the Statute gives the SCSL's jurisdiction "to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions" and the Additional Protocol II, which include torture as a form of violence under article 3 of the aforementioned Statute.

As for the case-law of the SCSL, the SCSL bases its understanding of the crime of torture on what had been established in other ad hoc tribunals, especially the ICTY. This includes the requirement that the acts of torture must aim at one of the prohibited purposes. Moreover, the SCSL has emphasized the degree of gravity required to differentiate torture from "other inhumane acts", which has to be examined on a case by case basis, in the interest of not confusing an act of pure "physical violence" with the acts that may constitute torture⁵⁸.

As a result, the practice of abduction has not been understood by the SCSL as constituting the crime of torture, but as part of the acts that constitute other crimes against humanity,

⁵⁶ Ibidem.

⁵⁷ Prosecutor v. Kvočka et al, Case No. IT-98-30/1-T, Judgment, 2 Nov 2001.

⁵⁸ Special Courts of Sierra Leone; Trial Chamber II, Case No. SCSL-04-16-T (Prosecutor against Alex Tamba BRIMA, Brima Bazzy KAMARA, Santigie Borbor KANU). Judgement, 20 June 2007, para. 726.

such as sexual slavery⁵⁹ and other inhumane acts⁶⁰.

2.3 International Criminal Tribunal for Rwanda

The Statute of the International Criminal Tribunal for Rwanda ('ICTR') includes torture as a crime against humanity under article 3.⁶¹ Furthermore, the ICTR shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions, and of Additional Protocol II.⁶²

The Trial Chamber in the Akayesu case relied on the definition of torture found in the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment⁶³.

Also, the ICTR bases its understanding of torture on what has been said by the ICTY Appeals Chamber. The chamber found that while the definition contained in the

⁵⁹ In the case *Brima and others*, the Trial Chamber established: "[...] so-called "forced marriages" involved the forceful abduction of girls and women from their homes or other places of refuge and their detention with the AFRC troops as they attacked and moved through various districts. The girls and women were taken against their will as "wives" by individual rebels" (para.711). Later, Trial Chamber concludes "[...] the evidence adduced by the Prosecution is completely subsumed by the crime of sexual slavery and that there is no lacuna in the law which would necessitate a separate crime of <<forced marriage>> as an 'other inhumane act'" (para. 713). Special Courts of Sierra Leone; Trial Chamber II, Case No. SCSL-04-16-T (Prosecutor against Alex Tamba BRIMA, Brima Bazy KAMARA, Santigie Borbor KANU), Judgement, 20 June 2007.

⁶⁰ The Appeals Chamber in the case against *Brima and others*, established: "The Appeals Chamber is convinced that society's disapproval of the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread or systematic attack against the civilian population, is adequately reflected by recognising that such conduct is criminal and that it constitutes an "Other Inhumane Act" capable of incurring individual criminal responsibility in international law". Special Courts of Sierra Leone; Appeals Chamber, Case No. SCSL-2004-16-A ((Prosecutor against Alex Tamba BRIMA, Brima Bazy KAMARA, Santigie Borbor KANU), Judgement, 22 February 2008.

⁶¹ Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), art. 3 (f).

⁶² Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), art. 4(a).

⁶³ In the case *Akayesu*, The Tribunal interprets the word 'torture'. . . in accordance with the definition of torture set forth in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." "The Chamber defines the essential elements of torture as: (i) The perpetrator must intentionally inflict severe physical or mental pain or suffering upon the victim for one or more of the following purposes:(a) to obtain information or confession from the victim or a third person;(b) to punish the victim or a third person for an act committed or suspected of having been committed by either of them;(c) for the purpose of intimidating or coercing the victim or the third person; (d) for any reason based on discrimination of any kind.(ii) The perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity.ICTR; Trial Chamber, Judgement, TC, para. 593-595.

Convention Against Torture is reflective of customary international law in relation to the obligations of States, it is not identical to the definition of torture as a crime against humanity. In particular, the ICTY Appeals Chamber has confirmed that, outside the framework of the Convention Against Torture, the "public official" requirement is not a requirement under customary international law in relation to individual criminal responsibility for torture as a crime against humanity⁶⁴.

The ICTR Chamber, in the case against Laurent Semanza, asserts that torture involves the intentional infliction of severe mental or physical pain for the purpose of obtaining information or a confession; or punishing, intimidating or coercing the victim or a third person; or discriminating, on any ground, against the victim or a third person.⁶⁵

In this regard, it can be concluded that a prohibited purpose for torturing a victim is a necessity in the ICTR, as well as in the ICTY and the SCSL.

⁶⁴ The Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, par 342.

⁶⁵ The Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, par 544.