

# 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

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The Torture of Children During Armed Conflicts  
The ICC's Failure to Prosecute and the Negation of  
Children's Human Dignity

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2014, XVIII, 228 p., Hardcover

ISBN: 978-3-642-40688-1