The Furundzija Judgment and its Continued Vitality in International Law

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In the Roman Catholic tradition, the *Confiteor* is a recited prayer and general acknowledgement by the community during the Mass of one’s faults and is a plea to Mary, the angels, saints, and to others in the community to pray to God for one’s forgiveness. One significant line of the prayer acknowledges faults “in what I have done, and in what I have failed to do.” The landmark judgment of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Furundzija* case ultimately addressed faults not only of what Anto Furundzija actually physically committed during a torture-filled interrogation in the Lašva Valley in Bosnia-Herzegovina in May 1993, but faults of what he failed to do as a commander of a military unit whose soldiers raped a Muslim woman and beat a Croatian friend in his presence while he continued his interrogating.

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3 The current version of the *Confiteor*, approved in 1973 by the International Commission on English in the Liturgy, is as follows: “I confess to almighty God, and to you, my brothers and sisters, that I have sinned through my own fault, in my thoughts and in my words, in what I have done, and in what I have failed to do, and I ask blessed Mary, ever virgin, all the angels and saints, and you, my brothers and sisters, to pray for me to the Lord our God.” The website for the International Commission on English in the Liturgy is at: http://www.icelweb.org.
The Furundzija judgment not only declared several significant holdings to the jurisprudence of the International Criminal Tribunal, but expanded accountability and liability for certain grave violations of international law, not only violations of commission, but of omission as well. The Tribunal reaffirmed the holding of Tadic Jurisdiction decision and found a state of armed conflict existed during the time of the alleged interrogations, torture, and rape in the case. Second, the Tribunal also concretely affirmed that the crime of torture attained the status of a jus cogens (peremptory) norm of international law that allows no derogation from by States in any circumstances. The Tribunal also expanded the definition of rape under international law, and the Furundzija case was the first by the International Criminal Tribunal for the Former Yugoslavia to consider war crimes charges solely stemming from rape. Finally, the Tribunal made a fine distinction between “perpetrator” liability for torture and “aiding and abetting” liability for torture and expanded the scope of “perpetrator liability” for

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4 Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (October 2, 1995). The Tribunal stated an armed conflict “exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.”

5 Prosecutor v. Furundzija, Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 59 (December 10, 1998).

6 Id. at ¶ 153.

7 Id. at ¶ 185. The Tribunal defined the crime of rape as: “(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.”


9 Furundzija, supra note 4 at ¶ 256-257.

10 Id. at ¶ 252.
torture to those who may not have even physically participated in the infliction of severe physical or mental pain.\textsuperscript{11}

The landmark \textit{Furundzija} decision is now over a decade old, but its legacy remains strong. In this essay, I not only address \textit{Furundzija}'s holdings and its implications in the international sphere, but specifically analyze the legacy of the \textit{Furundzija} judgment on U.S. domestic cases involving the Alien Tort Statute. The Alien Tort Statute provides that the “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”\textsuperscript{12} While the \textit{Furundzija} judgment has certainly contributed to the expansion of criminal liability under international law, \textit{Furundzija}'s legacy is not only limited to the international criminal sphere, but to civil tort liability through the standard of “aiding and abetting” liability under the Alien Tort Statute. I argue that the adoption of \textit{Furundzija}'s “aiding and abetting” liability standard should not only keep individuals criminally responsible for their faults of commission, but of omission as well, and keep private actors acting in a non-private capacity responsible in the United States for actions committed in concert with foreign governments that egregiously violate the law of nations. With this legacy, the \textit{Furundzija} judgment stands as one of the most important international judicial decisions of this generation.

\section*{II. THE LANDMARK \textit{FURUN}D\textit{ZIJA} JUDGMENT}

\textsuperscript{11} \textit{Id.} at \textsuperscript{\S} 256. “It follows, inter alia, that if an official interrogates a detainee while another person is inflicting severe pain or suffering, the interrogator is as guilty of torture as the person causing the severe pain or suffering, even if he does not in any way physically participate in such infliction. Here the criminal law maxim \textit{quis per alium facit per se ipsum facere videtur} (he who acts through others is regarded as acting himself) fully applies.”

\textsuperscript{12} 28 U.S.C. \textsuperscript{\S} 1350.
A. Background

On July 3, 1992, the Croatian Community of Herzog-Bosna declared itself an independent political entity within the Republic of Bosnia and Herzegovina. Its military units, the HVO, soon engaged in conflict with the Army of Bosnia and Herzegovina (“ABiH”) and began attacking mostly Bosnian Muslim villages in the Lašva River Valley. Mr. Anto Furundzija, only in his early twenties, served as a local commander of a special unit of the HVO military police known as the “Jokers.”

On April 16, 1993 fighting between the HVO and ABiH broke out in Vitez and Ahmici, resulting in the search of apartments and houses in the region by the HVO and subsequent expelling and detention of prominent Muslim civilians from their homes. Soon thereafter, two critical witnesses in the case, Witness A (a Muslim woman who was tortured and raped) and Witness D (a Croatian soldier who was interrogated and tortured by the Jokers) were transported to and interrogated in Nadioci.

In mid-May 1993, Witness A was taken to the “Bungalow,” which was the headquarters of the Jokers, and into a room with 40 soldiers. Soon Mr. Furundzija entered the room, and started interrogating Witness A, asking her about her children (who were suspected by the Jokers to be ABiH soldiers, visits to the Muslim parts of Vitez, and

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13 Furundzija, supra note 4 at ¶ 51.
14 Id.
15 Id.
16 Id. at ¶ 54.
17 Id. at ¶ 66.
18 Id. at ¶ 72.
why she had been assisted by certain Croats when she was Muslim.\textsuperscript{19} While the interrogation occurred, one of the Jokers drew a knife over her body and thigh and threatened to cut out her private parts if she did not cooperate.\textsuperscript{20} Mr. Furundzija became upset with her responses, and in his presence, the Joker who threatened to cut out her private parts, subjected her to multiple rapes, sexual assaults and physical abuse in the Bungalow.\textsuperscript{21}

After the events in the Bungalow, Witness A was taken to the pantry where she was confronted with Witness D.\textsuperscript{22} They were both interrogated in the pantry by Furundzija, and accused of working for the ABiH.\textsuperscript{23} Witness D was then physically beaten during the interrogation,\textsuperscript{24} and Witness A was forced to perform oral sex on one of the guards, raped vaginally and anally, and made to lick the penis clean of the guard,\textsuperscript{25} until she collapsed of exhaustion.\textsuperscript{26}

\textit{B. Charges and Defenses}

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\textsuperscript{19} \textit{Id.} at ¶ 82.

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} \textit{Id.} at ¶ 83.

\textsuperscript{22} \textit{Id.} at ¶ 84.

\textsuperscript{23} \textit{Id.} at ¶ 86.

\textsuperscript{24} \textit{Id.}

\textsuperscript{25} \textit{Id.} at ¶ 87.

\textsuperscript{26} \textit{Id.} at ¶ 88.
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On November 10, 1995, Anto Furundzija was charged with individual criminal responsibility\(^27\) for grave breaches of the Geneva Conventions and war crimes, including three individual counts of torture and inhumane treatment, torture\(^28\), and outrages upon personal dignity\(^29\), including rape.\(^30\) On December 18, 1997, Furundzija was arrested and transferred to the detention unit of the International Tribunal to await trial.\(^31\)

In response, the Defense filed motions to dismiss two counts which the Prosecution pursued on the ground that the Court lacked subject-matter jurisdiction for trial, arguing an armed conflict was not present to confer jurisdiction of the International Tribunal.\(^32\) The Trial Chamber denied the motions.\(^33\) On June 8, 1998, the trial began with six Prosecution witnesses testifying and four exhibits being admitted into evidence.\(^34\)

The Defense case-in-chief began on June 15, 1998, with two witnesses appearing for the case (including one expert witness) and 22 exhibits being admitted into evidence.

\(^{27}\) Id. at ¶ 42. Article 7(1) of the Statute of the International Tribunal provides: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”

\(^{28}\) Id. at ¶ 43. “The Prosecution contends that by his conduct under the factual circumstances alleged, the accused, acting in his official capacity as a uniformed soldier on duty, intentionally inflicted severe physical or mental pain or suffering on Witness A, a non-combatant, during an interrogation for the purpose of obtaining information and for the purpose of intimidation, thereby committing torture.”

\(^{29}\) Id. at ¶ 44. “The Prosecution further submits that the accused is individually criminally responsible for the alleged acts under article 4(2)(e) of Additional Protocol II to the Geneva Conventions …. which prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”

\(^{30}\) Id. at ¶ 2.

\(^{31}\) Id. at ¶ 3.

\(^{32}\) Id. at ¶ 14.

\(^{33}\) Id.

\(^{34}\) Id.
The Defense did not argue that the atrocities committed against Witness A and Witness D did not occur; rather, the Defense argued that Mr. Furundzija was not present for the assaults and attacked the reliability of Witness A’s memory of the events which occurred in the bungalow and pantry.

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**C. The First Holding: Reaffirmation of Tadic Jurisdiction Decision**

The Defense contended the conflict between the HVO and ABiH was not an “armed conflict” which was required to confer subject matter jurisdiction under the Statute of the International Tribunal. The Tribunal noted many acts of violence that occurred in the Lašva River Valley region in April and May of 1993: a “concerted attack” by the HVO on the towns of Vitez and Ahmici on April 16, 1993, Muslims were forced from their homes and detained, and the house of one witness was set on fire.

The Defense argued for a narrow view of “armed conflict,” stating that no armed conflict existed because there were no front-line and military objectives present, but only that there were attacks by the HVO on civilians in the region. However, the Tribunal applied the test from the *Tadic Jurisdiction* case, which recognizes an armed conflict is there is “protracted armed violence between governmental authorities and organised

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35 *Id.* at ¶ 20.
36 *Id.* at ¶ 68.
37 *Id.* at ¶ 48.
38 *Id.* at ¶ 47.
39 *Id.* at ¶ 53.
40 *Id.* at ¶ 54.
41 *Id.* at ¶ 56.
42 *Id.* at ¶ 58.
armed groups or between such groups within a State,” and found “clear evidence” that in mid-May 1993 an armed conflict existed between the HVO and ABiH.

D. The Second Holding: The Crime of Torture in International Law

The International Tribunal next addressed the status of the prohibition against torture in international law. First, the Tribunal stated that torture during an armed conflict is explicitly prohibited by the Geneva Conventions of 1949 and the two Additional Protocols to the Geneva Conventions. In addition, the Tribunal noted that torture was prohibited as a war crime in domestic legislation both under Article 142 of the Penal Code of the Socialist Federal Republic of Yugoslavia and made punishable by law in the Republic of Bosnia and Herzegovina.

With numerous treaties and domestic legislation as evidence, the Tribunal held that the prohibition against torture had crystallized into a norm of customary international law. It particularly not only found almost universal participation by States to treaties prohibiting torture, but also examined state practice and found that no State has ever claimed the authority to practice torture in an armed conflict. In addition, the Tribunal

43 Tadic, supra note 3.

44 Furundzija, supra note 4 at ¶ 59.

45 Id. at ¶ 134.

46 Id. at ¶ 136.

47 Id. at ¶ 138.

48 North Sea Continental Shelf (F.R.G. v. Neth.), 1969 I.C.J. 74-75 (February 20). To crystallize into a rule of customary international law, there must be consistent and extensive “State practice” to the rule in question and it must be followed also out of a sense of “legal obligation.”

49 Furundzija, supra note 4 at ¶ 140.
held that the prohibition against torture is an “absolute right” and is nonderogable by States.\textsuperscript{50}

Furthermore, the Tribunal also noted that the prohibition against torture exhibits three important features: that it covers even “potential breaches,” that it imposes obligations \textit{erga omnes}, and has also reached the status of \textit{jus cogens} in international law.\textsuperscript{51} First, the Tribunal held that the prohibition against torture reaches even potential breaches of the norm, declaring that “States are obliged not only to prohibit and punish torture, but also to forestall its occurrence.”\textsuperscript{52} Subsequently, the Tribunal also declared that the prohibition against torture imposes \textit{erga omnes} obligations upon States and confers obligations and rights to all other States.\textsuperscript{53} Finally, the Tribunal stated that the norm has evolved and acquired the status of \textit{jus cogens} and holds a higher rank than customary international law or even treaty law.\textsuperscript{54}

The Tribunal then outlined the elements that constitute the crime of torture in international criminal law in a state of armed conflict: torture requires 1) an act or omission, which inflicts severe pain or suffering, either physical or mental; 2) the act or omission must be intentional; 3) the act or omission must be directed toward an impermissible purpose (such as obtaining of information, a confession, or punishing, humiliating, or coercing the victim or a third person); 4) the act or omission must be

\textsuperscript{50} \textit{Id.} at ¶ 144.

\textsuperscript{51} \textit{Id.} at ¶ 147.

\textsuperscript{52} \textit{Id.} at ¶ 148.

\textsuperscript{53} \textit{Id.} at ¶ 151.

\textsuperscript{54} \textit{Id.} at ¶ 153.
linked to an armed conflict; 5) at least one of the persons involved in the torture must be a public official or be acting in a non-private capacity.\textsuperscript{55}

Examining the facts of the case and the definition of torture, the Tribunal found that Mr. Furundzija was present both in the bungalow and in the pantry while he interrogated Witness A while she was in a state of nudity,\textsuperscript{56} had the intent to obtain information from Witness A that would benefit the HVO,\textsuperscript{57} and had that same intent to obtain information from Witness A by causing her severe physical and mental suffering.\textsuperscript{58} It therefore found Furundzija guilty as a co-perpetrator of torture on Witness A;\textsuperscript{59} it made the same finding with regard to Witness D.\textsuperscript{60}

\textit{E. The Third Holding: The Crime of Rape in International Law}

Despite the fact that no definition of rape could be found in international law,\textsuperscript{61} the Tribunal found that rape in a time of war is prohibited by international treaty law,\textsuperscript{62} is a violation of customary international law,\textsuperscript{63} and similar to torture “is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation

\textsuperscript{55} \textit{Id.} at ¶ 162.
\textsuperscript{56} \textit{Id.} at ¶ 264, 266.
\textsuperscript{57} \textit{Id.} at ¶ 265.
\textsuperscript{58} \textit{Id.} at ¶ 267.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.} at ¶ 175.
\textsuperscript{62} \textit{Id.} at ¶ 165. The Tribunal noted that rape in a time of war is explicitly prohibited by the Geneva Conventions of 1949, Additional Protocol I of 1977, and Additional Protocol II of 1977.
\textsuperscript{63} \textit{Id.} at ¶ 168.
of or with the consent or acquiescence of a public official or other persons acting in an official capacity.”

The Tribunal noted that a trend could be found among States that have broadened the definition of torture to include acts, such as forcible oral penetration, which were once considered as less serious forms of sexual assault. It stated that forced oral penetration “constitutes a most humiliating and degrading attack upon human dignity.” The Tribunal defined the elements of rape as: 1) sexual penetration of the vagina, anus, or mouth of the perpetrator by the penis or the vagina or anus of the victim by an object used by the perpetrator, and 2) by coercion or force or threat of force against the victim or a third party.

Applying this definition of rape, the Tribunal held that Witness A was a victim of rape and serious sexual assaults in Mr. Furundzija’s presence while he conducted his interrogation. Since Mr. Furundzija did not personally rape Witness A, he could not have been considered a co-perpetrator to the rape; however, since he was in the presence of Witness A while he continued the interrogation, his presence “encouraged” the guard who raped Witness A and “substantially contributed” to the criminal acts committed by the guard. For these actions, the Tribunal held Mr. Furundzija guilty under war crimes charges of outrages upon personal dignity, including rape, as an aider and abettor.

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64 Id. at ¶ 176.
65 Id. at ¶ 179.
66 Id. at ¶ 183.
67 Id. at ¶ 185.
68 Id. at ¶ 270.
69 Id. at ¶ 273.
F. The Fourth Holding: Defining “Aiding and Abetting” Liability

Finally, the Tribunal examined whether Mr. Furundzija’s presence during the assaults on Witness A and D was sufficient to constitute the *actus reus* and *mens rea* of “aiding and abetting” liability. The Tribunal examined caselaw from several jurisdictions and found that the assistance required to establish aiding and abetting liability could be either physical or in the form of “moral support.” It held that the *actus reus* of aiding and abetting liability “requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”

The Tribunal then faced the difficult question of the requisite *mens rea* for aiding and abetting liability. Two options were present – one view is that the accomplice must share the same *mens rea* of the principal, the other that simply knowledge that his actions assist the perpetrator in committing the crime. The Tribunal endorsed the latter view, noting that the aider and abettor need not have knowledge of the exact crime which was intended and how it would be committed – the aider and abettor needs only knowledge that a crime will probably be committed to have sufficient knowledge as an aider and abettor.

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70 *Id.* at ¶ 275.
71 *Id.* at ¶ 191
72 *Id.* at ¶ 229.
73 *Id.* at ¶ 235.
74 *Id.* at ¶ 236.
75 *Id.* at ¶ 245.
76 *Id.* at ¶ 246.
Perhaps most importantly, the Tribunal outlined a fine distinction between “perpetrator” liability for torture and “aiding and abetting” liability. The Tribunal stated that to find “perpetrator” liability, the individual who takes part in the torture needs only to partake in the “purpose” behind the torture, not necessarily directly inflicting it.\(^77\) It stated in strong terms that since the crime of torture is so widely condemned that “all those who in some degree participate in the crime and in particular take part in the pursuance of its underlying purpose, are equally liable.”\(^78\) In contrast, an aider and abettor “must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place.”\(^79\) Therefore, the Tribunal essentially adopted a position in which those who take part through a “direct participation” in torture “should all be held to be principals.”\(^80\)

**G. Furundzija’s Conviction, Appeal, and Imprisonment**

For his guilty conviction to the crime as a co-perpetrator to torture, Anto Furundzija was sentenced to 10 years imprisonment; Furundzija was also sentenced to 8 years imprisonment for his guilty conviction as an aider and abettor to outrages upon personal dignity, with both convictions to be served concurrently.\(^81\) Mr. Furundzija appealed his conviction, but all grounds of appeal were denied in 2000.\(^82\) He was

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\(^77\) *Id.* at ¶ 252.

\(^78\) *Id.* at ¶ 254.

\(^79\) *Id.* at ¶ 257.

\(^80\) *Id.*

\(^81\) *Id.* at ¶ 296.

\(^82\) Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Appeals Chamber Judgment, (July 21, 2000).
transferred to Finland from the Hague to serve the remainder of his sentence on September 22, 2000, and after nearly seven years in prison, received an early release on July 29, 2004.

III. TORTURE UNDER INTERNATIONAL LAW

A. Furundzija’s Legacy

One of the significant legacies of the Furundzija decision was that it broadened the definition of torture under international law and affirmed its status as a *jus cogens* norm. This broadening of the definition of torture not only ensured that the lacuna present (the lack of a definition of torture) in the Statute of the International Tribunal would be filled, but also ensured the Tribunal would address and counteract one of the purposes of torture, which is often to humiliate the victim and degrade his or her fundamental human dignity. The Tribunal’s decision not only properly recognizes faults and crimes of *commission*, but also those of *omission*, placing responsibility and accountability for the grave crime of torture on those who have authority to stop it from occurring if it is in their presence. Finally, and arguably most importantly, the Tribunal’s statement of the prohibition against torture as a norm of *jus cogens* ensures that no international action, not even by international treaty, can ever legitimize the use of torture.

There is not much debate in the international community over the proposition that torture is abhorrent, repulsive, and contrary to the fundamental human dignity of the

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84 *Id.*
person; as the Tribunal noted in its judgment,\footnote{\textit{Furundzija}, supra note 4 at ¶ 147.} the Second Circuit Court of Appeals of the United States stated in the landmark \textit{Filartiga v. Peña-Irala} case that “the torturer has become, like the pirate and the slave trader before him, hostis humani generis, an enemy of all mankind.”\footnote{\textit{Filartiga v. Peña-Irala}, 630 F.2d 876, 890 (2nd Cir. 1980).} However, the question of jurisdiction over crimes of torture often arises under international law.

If one looked only at the text of the Statute of the International Criminal Tribunal alone to address the question of jurisdiction over crimes of torture, the Tribunal would not have jurisdiction because torture is not specifically prohibited under Article 3 of the Statute.\footnote{\textit{Furundzija}, supra note 4 at ¶ 158.} However, the Tribunal held that Article 3 constitutes an “umbrella rule” that incorporates all rules of international humanitarian law, including the prohibition against torture.\footnote{\textit{Id.} at ¶ 133.} Thus, by giving full effect to the object and purpose of Article 3, the Tribunal filled an inexplicable lacuna in the Statute and gave full effect to the Article and incorporated norms arising under customary international law, particularly those norms of a \textit{jus cogens} character which are binding upon all States of the world.

Also importantly, the Tribunal went beyond the definition of torture provided by the Convention Against Torture in formulating a definition for international criminal law purposes. Article 1(1) of the Convention Against Torture defines torture as:

“For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or

\footnote{\textit{Furundzija}, supra note 4 at ¶ 147.}
suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in his official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

However, as Johan van der Vyver has noted, as influential as the Convention Against Torture is as a statement of customary international law, it only address state obligations and state actors; he aptly remarks that “the prohibition of torture should not be limited to acts of torture committed only by state actors.”

The Tribunal noted that the International Criminal Tribunal for Rwanda in the Akayesu judgment applied the definition outlined in the Convention Against Torture. If the more restrictive definition of torture, applying only to public officials, was adopted by the Tribunal, then a non-public official who is acting in a non-private capacity would not be covered by the definition; in contrast, the definition of torture adopted by the Tribunal in Furundzija foresees this exact situation of a private individual acting in a non-private capacity. Also, the text of the Torture Convention explicitly states the definition of torture is “For the purposes of this Convention;” by adopting a broader definition based on a wider range of international instruments the Tribunal successfully averted any question as to the application of the Convention Against Torture outside of what the Convention itself provides.


91 Id. at 433.

92 Furundzija, supra note 4 at ¶ 160.

93 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶¶ 593-594 (September 2, 1998).

94 Furundzija, supra note 4 at ¶ 152.

95 Id. at ¶ 160.
Moreover, by addressing humiliation in its definition of torture\textsuperscript{96}, the Tribunal best addressed one of the more insidious purposes of torture – that torture is not only an act which violates the physical integrity of the human person, but also has the insidious effect of humiliating and breaking down the will and unique personality of the victim.\textsuperscript{97} Caselaw from the European Court of Human Rights also affirms the trend of recognizing actions which lead to humiliation and a breakdown of the personality of the victim are torture.

Two European Court of Human Rights cases illustrate this trend. In 1978, in the \textit{Ireland v. United Kingdom} case, the Court examined the usage of “sensory deprivation” techniques during interrogations such as wall-standing, hooding, subjection to noise, sleep deprivation, and deprivation of food before the interrogation.\textsuperscript{98} However, the Court found activities only constituted “cruel, inhuman or degrading treatment,” not torture.\textsuperscript{99}

In contrast, more recent decisions affirm a broader definition of torture. In \textit{Selmouni v. France}, the Court noted that the applicant, who endured physical blows which left marks on his body, was dragged by his hair, was urinated upon, and threatened with a blowlamp and a syringe\textsuperscript{100} were acts that “were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and

\begin{itemize}
\item \textsuperscript{96} \textit{Id.} at ¶ 162.
\item \textsuperscript{99} \textit{Id.}
\end{itemize}
possibly breaking his physical and moral resistance”\textsuperscript{101} (emphasis added). In finding the actions which occurred in this case to constitute torture, the Court not only recognized that one of the purposes of torture is humiliation and breakdown of the personality of the victim, but directly stated that since the United Nations Convention Against Torture is a “living instrument,” “certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in the future. It [the Court] takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.”\textsuperscript{102}

The *Furundzija* decision also now importantly establishes that an omission which inflicts severe pain or suffering is a violation that constitutes torture. In fact, the Tribunal even held States are required to prohibit even potential breaches of a norm, and that it is “insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed.”\textsuperscript{103} In *Furundzija*, Anto Furundzija not only served as a local commander who could have prevented the occurrence of the torture of Witnesses A and D, he actively participated in its very purpose.

\textsuperscript{101} Id. at ¶ 99.

\textsuperscript{102} Id. at ¶ 101.

\textsuperscript{103} *Furundzija*, supra note 4 at ¶ 148.
While the Tribunal did not explicitly discuss the doctrine of command responsibility\textsuperscript{104} in the \textit{Furundzija} case, its general principles support the holding of \textit{Furundzija} that an omission be punishable under the definition of torture. Three requirements are necessary for command responsibility to be present: 1) the existence of a superior/subordinate relationship, 2) the requisite \textit{mens rea}, and 3) a failure to take reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.\textsuperscript{105} In the \textit{Orić} Judgment, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia outlined four factors in determining whether a superior could be punishable for a failure to prevent:

1) “As a superior cannot be asked for more than what is in his or her power, the kind and extent of measures to be taken ultimately depend on the degree of effective control over the conduct of subordinates at the time a superior is expected to act;”
2) “A superior must undertake all measures which are necessary and reasonable to prevent subordinates from planning, preparing, or executing the prospective crime;”
3) “The more grievous and/or imminent the potential crimes of subordinates appear to be, the more attentive and quicker the superior is expected to react;”
4) “Since a superior is duty bound only to undertake what appears appropriate under the given conditions, he or she is not obliged to do the impossible.”\textsuperscript{106}

Although the \textit{Orić} Judgment was rendered in 2006, applying these factors to the \textit{Furundzija} case the four factors would likely be met to impose liability on Anto Furundzija for command responsibility as well and a failure to prevent the atrocities in the Lašva Valley. With regard to the first factor, Mr. Furundzija appeared to have

\textsuperscript{104} R. CRYER, H. FRIMAN, D. ROBINSON, and E. WILMSHURST, AN INTRODUCTION TO CRIMINAL LAW AND PROCEDURE 320 (2007). The text describes command responsibility as a “board form of liability, which is justified by the privileges, honours and responsibilities that command entails.”

\textsuperscript{105} \textit{Id.} at 322.

\textsuperscript{106} Prosecutor v. Naser Orić, Case No. IT-03-68-T, Trial Chamber Judgment, ¶ 329 (June 30, 2006).
effective control of the Jokers as commander of the unit. With regard to the second, Mr. Furundzija did not take any positive measures to stop the interrogation, rather he was a direct participant. On the third factor, the crimes of torture and outrages upon personal dignity, including rape, are especially grievous under international law which mandated an attentive and quick response by Mr. Furundzija; and finally, it certainly does not appear it would have been “impossible” for Mr. Furundzija to take the measure of stopping the guard, one of the soldiers in his unit he commanded, from physically and sexually assaulting Witness A, and physically assaulting Witness D, when he was directly in the presence of the atrocities which occurred.

Furthermore, the policy behind the abrogation of immunity for senior state officials for particularly heinous violations of international law, including war crimes, crimes against humanity, torture, and genocide applies strongly in the Furundzija case as well. Immunity such as head of state immunity and diplomatic immunity exist under international law largely to ensure that all States can effectively represent their nations and perform their functions in the international community. However, this immunity is limited and has been abrogated for former heads of State in several courts for those who have been charged with grave crimes under international law.

Since military officers can be brought to criminal trial under international law for violations of grave crimes, it is strongly argued that those with responsibility as heads of state and the power to authorize and direct military operations should not escape

107 Furundzija, supra note 4 at ¶ 65.

accountability for their actions or omissions. As Antonio Cassese, a prominent scholar of international law, writes:

“As no one denies that soldiers and other military personnel may be brought to trial for war crimes (but also for crimes against humanity or genocide), one would come to the preposterous conclusion that lower-ranking state agents could be punished for such crimes, while those in power (heads of states or governments, senior members of cabinet, senior military commanders), who are endowed with greater power and normally bear greater responsibility for international crimes, would be absolved of any liability for participation in such crimes, only on account of their seniority.”

Therefore, all officials, whether they be lower-ranking military officers, senior officials, or even heads of government, should not escape prosecution simply on the grounds that they “did not have knowledge what was occurring” or were “not present during the crimes which occurred.” Furundzija strongly affirms this strongly emerging principle under international law that presence at the scene of a grave violation of international law, plus an intent to share in its purpose, and an omission to act, is and should be criminally actionable.

One of the most critical holdings of the Tribunal in Furundzija is the characterization of the prohibition against torture as a jus cogens norm of international law. By characterizing it as a jus cogens norm, the Tribunal affirmed that the norm is of a higher rank of significance than ordinary customary rules or even treaty law. The prohibition against torture was also referred to “as one of the most fundamental standards of the international community.” Importantly, this assures that no international action, not even action by treaty, can avoid the reality that torture is a grave crime of

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110 Furundzija, supra note 4 at ¶ 153.

111 Id. at ¶ 153.

112 Id. at ¶ 154.
international law that cannot be legitimized in any circumstance – nor justified for any reason at any time for any purpose.

IV. THE FURUNZIJA DEFINITION OF “AIDING AND ABETTING” LIABILITY – NOW ADOPTED IN U.S. COURTS

Furundzija not only stands as a landmark case in international criminal law today, but its legacy extends to civil cases – in U.S. domestic courts. Through the Alien Tort Statute, the Furundzija standard of “aiding and abetting” liability (“practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime”\(^\text{113}\)) has been affirmed by several courts in the United States as a part of customary international law. In this section, I briefly address a history of the Alien Tort Statute, discuss several cases which have applied the Furundzija standard, and argue that its adoption fulfills the object and purpose of the Statute to ensure that egregious violations of the law of nations are civilly actionable in U.S. courts.

A. A Background of the Alien Tort Statute

The Alien Tort Statute, codified at 28 U.S.C. § 1350 and enacted in 1789, provides that the “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”\(^\text{114}\) In 1980, the Statute received great attention after being relatively inactive for nearly 200 years in the seminal Second Circuit Court of Appeals case of Filartiga v.

\(^{113}\) Furundzija, supra note 4 at ¶ 235.

Peña-Irala.\textsuperscript{115} In the Filartiga case, Dr. Joel Filartiga, a Paraguayan doctor and prominent opponent of the dictatorial regime of President Alfredo Stroessner, brought a claim under the Alien Tort Statute against the Inspector-General of the Police of Asuncion, Paraguay, for the torture and murder of his son, Joelito.\textsuperscript{116} The Second Circuit Court of Appeals held that official torture constitutes a “violation of the law of nations” and is actionable under the Statute.\textsuperscript{117}

Since the landmark Filartiga decision, the lower federal courts have reached varying conclusions as to which torts and norms of international law are actionable. However, in 2004, the United States Supreme Court in the Sosa v. Alvarez-Machain case provided some guidance on this question and held that a claim based upon a violation of the “law of nations” must meet three requirements: 1) the violation must rest on a norm of an international character, 2) the norm is accepted by the civilized world, and 3) the norm is defined with specificity.\textsuperscript{118}

\textbf{B. The Furundzija Definition of “Aiding and Abetting” Liability in U.S. Alien Tort Statute Cases}

Before and after the Sosa decisions, courts in the United States have held that a theory of “aiding and abetting” liability may be pleaded under the Alien Tort Statute to apply to individuals and corporate actors. Three federal cases have extensively discussed the Furundzija decision and its standard of aiding and abetting liability: 1) Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002); 2) Presbyterian Church of Sudan, Inc., v. Presbyterian Church of Sudan, Inc., v. Presbyterian Church of Sudan, Inc., v. Presbyterian Church of Sudan, Inc., v. Presbyterian Church of Sudan, Inc., v. Presbyterian Church of Sudan, Inc., v.

\textsuperscript{115} Filartiga, supra note 85 at 876.

\textsuperscript{116} Id. at 878.

\textsuperscript{117} Id. at 884.


C. Doe v. Unocal – The 9th Circuit Adopts Furundzija

In 2002, the Ninth Circuit Court of Appeals in the Doe v. Unocal case became the first U.S. court to hold that a plaintiff may plead a theory of aiding and abetting liability under the Alien Tort Statute.\(^{119}\) In Doe, the Defendant Unocal Inc. was alleged to have acted with the military government in Burma and subjected villagers in the Tenasserim region to forced labor, murder, rape and torture during the time they assisted in building a gas pipeline through the region.\(^{120}\) The Ninth Circuit Court of Appeals endorsed and extended the approach of the Second Circuit Court of Appeals in the Kadic v. Karadzic\(^{121}\) case and found that private liability could be imposed upon Unocal, Inc., for its activities in the region and that state action was not required.\(^{122}\)

The Court then outlined the Furundzija standard of aiding and abetting liability (“knowing practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime”).\(^{123}\) It then noted that the “Tribunal clarified that in order to qualify, “assistance need not constitute an indispensable element, that is, a condition sine qua non for the acts of the principal.””\(^{124}\)

\(^{119}\) Doe I v. Unocal, Inc., 395 F.3d 932, 953 (9th Cir. 2002).

\(^{120}\) Id. at 936.

\(^{121}\) Kadic v. Karadzic, 70 F.3d 232, 242-243 (2nd Cir. 1995).

\(^{122}\) Doe I, supra note 118 at 946.

\(^{123}\) Id. at 951.

\(^{124}\) Id. at 950.
The Court in *Doe* then adopted a “slightly modified”\(^{125}\) *Furundzija* standard of aiding and abetting liability; while it endorsed the “substantial practical assistance” and “substantial encouragement” tests, it declined to do so for “moral support.”\(^{126}\) It concluded, “In particular, given that there is … sufficient evidence in the present case that Unocal gave assistance and encouragement to the Myanmar Military, we do not need to decide whether it would have been enough if Unocal had only given moral support to the Myanmar Military. Accordingly, we may impose aiding and abetting liability for knowing practical assistance or moral encouragement which has a substantial effect on the perpetration of the crime, leaving the question whether such liability should also be imposed for moral support which has the required substantial effect to another day.”\(^{127}\)

**D. Presbyterian Church of Sudan v. Talisman Energy, Inc.**

Just a year after the *Doe* decision, the Southern District of New York also endorsed the *Furundzija* definition of aiding and abetting liability in the *Presbyterian Church of Sudan* case. The *Presbyterian Church of Sudan* case concerned a Canadian energy company, Talisman Energy, Inc., which allegedly collaborated with the Republic of Sudan in oil exploration activities and was involved in “ethnically cleansing” civilian populations surrounding oil concessions located in southern Sudan in order to facilitate oil exploration and extraction activities.\(^{128}\) Specifically, the plaintiffs in the case alleged

\(^{125}\) *Id.* at 951.

\(^{126}\) *Id*

\(^{127}\) *Id.*

the following violations of international law: extrajudicial killing, forcible displacement, war crimes, confiscation and destruction of property, kidnapping, rape and slavery.\textsuperscript{129}

The Court specifically cited the definition of aiding and abetting given by \textit{Furundzija}.\textsuperscript{130} It applied the standard to the facts of the case and found the plaintiff’s complaint properly alleged “that Talisman aided and abetted or conspired with Sudan to commit various violations of the law of nations ..... the Amended Complaint includes allegations that Talisman worked with Sudan to carry out acts of “ethnic cleansing”; that Talisman encouraged Sudan to do so; and that Talisman provided material support to Sudan, knowing that such support would be used in carrying out such unlawful acts.”\textsuperscript{131}

\textbf{E. The Khulumani Decision: The Second Circuit Court of Appeals Endorses Furundzija}

Most recently, in 2007 the Second Circuit Court of Appeals affirmed the \textit{Furundzija} standard, with modifications, in \textit{Khulumani v. Barclay National Bank, Ltd.} In \textit{Khulumani}, survivors and representatives of those injured by the apartheid regime in South Africa brought Alien Tort claims against 23 companies charging them with apartheid related atrocities, crimes against humanity, and forced labor practices.\textsuperscript{132} The Court specifically noted that aiding and abetting liability is “recognized and enforced in

\begin{itemize}
\item \textsuperscript{129} \textit{Id.} at 296.
\item \textsuperscript{130} \textit{Id.} at 324.
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Khulumani v. Barclay National Bank, Ltd.}, 504 F.3d 254, 258 (2nd Cir. 2007).
\end{itemize}
international tribunals" and addressed the mens rea and actus reus components of aiding and abetting liability.

With regard to the mens rea element, the Court endorsed the definition outlined by the Rome Statute which holds that a defendant is guilty of aiding and abetting if that person does it “for the purpose of facilitating the commission of the crime.” Although the Court stated that “international legislation is less helpful in identifying a specific standard” of the actus reus component of aiding and abetting liability, the Court adopted the Furundzija standard. In summary, the Court concluded that a violation for aiding and abetting would be actionable if the defendant “(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of the crime.”

F. Analysis of Aiding and Abetting Liability

One of the potential criticisms of importing the aiding and abetting liability standard is the criminal/civil distinction; while criminal Tribunals address criminal

133 Id. at 274.
134 Rome Statute of the International Criminal Court, art. 25.3(c)(d), July 17, 1998, 2187 U.N.T.S. 90. Article 25.3(c) and (d) provide:

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.

135 Khulumani, supra note 131 at 275.
136 Id. at 277.
137 Id.
standards, the domestic courts of the United States are applying a civil standard for use with an Alien Tort Statute that provides only for jurisdiction over claims in tort.

However, the Tribunal in *Furundzija* itself did foresee this possibility; as the Court in *Khulumani* remarked, “the ICTY has recognized the propriety of civil remedies for violations of international criminal law in certain circumstances.”138 Therefore, it appears entirely appropriate for federal courts here in the United States to apply the *Furundzija* or a similar standard in Alien Tort Statute cases in the future.

One noted commentator has also expressed concern that the *Furundzija* aiding and abetting standard applied by the majority in the *Doe v. Unocal* case would not pass the test defined by the U.S. Supreme Court in *Sosa* that a norm of liability under the statute be universal, specific, and obligatory.139 However, this conclusion is questionable since the Tribunal in *Furundzija* examined an extensive corpus of customary international law. To address this concern, I propose that the courts collapse the more controversial and vague “encouragement” and “moral” assistance tests under a definition of aiding and abetting liability under the Alien Tort Statute and instead focus on a “substantial practical assistance” inquiry; “practical” assistance would give the courts a bit more clarity with this issue and still offer the opportunity to address not only faults of commission under international law, but of omission as well.

Later judgments of the International Criminal Tribunal for the Former Yugoslavia have affirmed the proposition that the actus reus of “aiding and abetting” liability may be

138 Id. at 270.

139 Frank Christian Olah, *MNC Liability for International Human Rights Violations Under the Alien Tort Claims Act: A Review & Analysis of the Fundamental Jurisprudence and a Look at Aiding & Abetting Liability Under the Act*, 25 Q.L.R. 751, 796 (2007). Olah writes, “The Furundzija aiding and abetting standard applied by the Unocal majority (i.e., knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime) would not pass muster under the test for new causes of action articulated by the Sosa court.”
met through an act of omission, providing evidence of an emerging norm of customary international law for aiding and abetting liability. In the Blaskic Judgment, the Tribunal stated that “The actus reus of aiding and abetting may be perpetrated through an omission, provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite mens rea.”

Similarly, in the Vasiljevic Judgment in 2002, the Tribunal noted the assistance of an aider and abettor “may be either an act or an omission.” It now appears to be settled, at least in the International Criminal Tribunal for the Former Yugoslavia, that an omission is actionable under aiding and abetting principles.

In summary, the domestic courts in the United States appear to be headed toward a greater recognition and adoption of the Furundzija standard. This movement has the effect of making the Alien Tort Statute a much more vital instrument for addressing human rights concerns in the future and ensuring that the “United States not be a haven for human rights abusers.” However, while this is a progressive development in Alien Tort Statute litigation, there are still many procedural hurdles for plaintiffs to overcome, such as the standing, the exhaustion of local remedies doctrine, sovereign immunity, the

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140 Prosecutor v. Tihomir Blaskic, Case No. IT-95-14, Trial Chamber Judgment, ¶ 284 (March 3, 2000).

141 Prosecutor v. Mitar Vasiljevic, Case No. IT-98-32-T, Trial Chamber Judgment, ¶ 70 (November 29, 2002).

142 Id. at 752. In fact, Olah notes that the Alien Tort Statute fills a jurisdictional gap in international law where a multinational corporation’s home law cannot reach and the law of where the multinational corporation allegedly commits a human rights abuse does not address the concern. He states, “The ATCA succeeds in filling this gap by providing both federal jurisdiction and a cause of action for violations of international customary law.”

V. CONCLUSION

The Trial Chamber Judgment in the Furundzija case continues to be a vital part of a growing corpus of international law which assures that all actors – whether they be public officials, or private actors in a non-private capacity – are punished for their acts and omissions which lead to some of the most grave assaults on the human person. It also importantly affirmed the status of the prohibition against torture as a jus cogens norm of international law which can never be retreated or derogated from, and broadened the definition of torture to address the insidious purpose of torture – to break down the will of the victim and violate their innate personality. Its significance even reaches the courtrooms of the United States, and is likely to contribute to more jurisprudence concerning aiding and abetting liability under the Alien Tort Statute in the future. Most importantly, the Furundzija Judgment has helped move the international community toward the light of justice and out of a darkness of a time when torturers could escape prosecution and accountability for their grave crimes – and truly stands as one of the landmark international judicial decisions of this generation.

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