CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

INTRODUCTION TO INTERNATIONAL CRIMINAL LAW

MOOC taught by Professor Michael P. Scharf

Module #7:

Pre-Trial Issues

Self-Representation, Plea Bargaining, and Exclusion of Torture Evidence

International Criminal Law
Module #7
Pre-Trial Issues: Self-Representation, Plea Bargaining, and Exclusion of Torture Evidence

I. Self-Representation and Plea Bargaining

On-Line Simulation #1. Assume the following facts:

1. Serbia has recently surrendered Ratko Mladic (the most-wanted former Bosnian Serb General) and Mira Milosevic (the wife of former Serb leader Slobodan Milosevic, who was said to be the "real power behind the throne") to the Yugoslavia Tribunal. Assume both have been indicted for Genocide, Grave Breaches of the Geneva Conventions, and Crimes against Humanity (under theories of joint criminal enterprise and command responsibility) in relation to the killing of 7,000 civilians at the UN Safe Area of Sebrenica in 1995.

2. Mira Milosevic has filed a motion to represent herself at trial. The Prosecution opposes the motion, and has asked the Tribunal to appoint counsel to represent Milosevic over her objection. During a press conference, Milosevic says:

   "I plan to represent myself like my husband and Seselj have done. I have an absolute right under international law to do so, and I will use the televised trial to convince the Bosnian Serb people to take up arms once again against the Islamic traitors in Bosnia. I will turn the trial into a three ring circus, just like Saddam Hussein did at the Iraqi High Tribunal."

3. The Prosecution desires to enter into a Plea Agreement with Rako Mladic, under which he will testify against Mira Milosevic, and plead guilty to violating the Geneva Conventions, if the Prosecution drops the charges of Genocide and Crimes Against Humanity, and if the Prosecution recommends a sentence of no more than 5 years.

4. The Yugoslavia Tribunal has scheduled a hearing to decide (a) whether to allow Mira Milosevic to represent herself in light of her pre-trial statements, and (b) whether to approve the Mladic Plea Agreement.

Directions: Based on these stipulated facts and the reading materials below, members of **Group A** (last names that begin with the letters A-H) are invited to upload a submission,

representing the Defense, arguing in favor of Mira Milosevic's right to self-representation and/or opposing the plea agreement that would enable Ratko Mladic to testify against Mira Mira.

Members of **Group B** (last names that begin with the letters I-Z) are invited to upload a submission, representing the Prosecution, opposing Mira Milosevic's request to be allowed to represent herself and/or arguing in favor of the Ratko Mladic plea agreement.

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for "on-line simulations." The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.

Ratko Mladic

Mira and Slobodan Milosevic

READINGS:

LIMITS TO THE RIGHT OF SELF-REPRESENTATION BEFORE INTERNATIONAL WAR CRIMES TRIBUNALS

By Michael P.Scharf

JOURNAL OF CRIMINAL JUSTICE 31-46 (Oxford University Press, 2006) (footnotes omitted).

I. INTRODUCTION

Echoing the wording of Article 14 of the International Covenant on Civil and Political Rights, the statutes of the ICTR and all of the other modern war crimes tribunals provide that the defendant has the right "to defend himself in person or through legal assistance of his own chosing." Relying on this language, former leaders standing trial for war crimes may seek to act as their own lawyers in order to transform the proceedings into a political stage. Is this a necessary evil attendant to the right to a fair trial under conventional and customary international law, as Judge Richard May, who presided over the trial of Slobodan Milosevic, concluded?" Or can the Covenant, customary international law, and the statutes of the international tribunals be read as permitting a war crimes tribunal to appoint counsel over the objections of the defendant as the ICTR held in the *Barayagwiza Case*?

How war crimes tribunals answer this question in the future will have a significant affect on their ability to contribute to peace, reconciliation, and the rule of law by establishing a historic record of atrocities committed by the former regime that is accepted by the target population. In the case of Slobodan Milosevic, for example, the tactic of self-representation enabled the former Serb leader to: generate the illusion that he was a solitary individual pitted against an army of foreign lawyers and investigators, when in fact he had a squadron of legal counsel assisting him from behind the scenes; make unfettered caustic speeches throughout the trial which were not restricted by the rules of relevance or subject to cross-examination by the prosecution; repeatedly challenge the legitimacy of the proceedings and treat the witnesses, prosecutors, and judges in a manner that would earn ordinary defense counsel expulsion from the courtroom. These tactics weren't going to help Milosevic obtain an acquittal, but opinion polls in Serbia indicate that they have had the affect of convincing a majority of the Serb people that his trial was unfair and that he was not guilty of the charges.

Self-representation has thus enabled Milosevic to cloud the historic record and to transform himself into a martyr, rather than a discredited war criminal. What if someone like Saddam Hussein were permitted to do the same thing at his trial? The thought of the former Iraqi leader appearing on the nightly news throughout the Middle East, riling against the illegal invasion of Iraq, insisting that the Western countries were complicit in war crimes against Iran, and encouraging his followers to commit acts of violence against the newly elected Iraqi government, is indeed frightening, especially in light of the stakes involved.

Given these grave implications, we must ask whether self-representation is indeed a fundamental right enshrined in international law. To that end, this article explores the negotiating record, scholarly commentary, and international jurisprudence related to the self-representation provision of the International Covenant on Civil and Political Rights on which the self-representation language of the statutes of the several war crimes tribunals is based. Next, it explores the two main reasons why a court in a major war crimes trial should be able to require the defendant to work through counsel: (1) the likelihood that a defendant will act in a disruptive manner; and (2) the unique need in a complex war crimes case for an orderly trial. Finally, it examines the conflicting positions taken by the ICTR, SCSL, and ICTY on this issue. The analysis contained herein suggests that the underlying purpose of the defendant's right "to defend himself in person or through legal assistance of his own choosing" is to ensure a fair trial, an objective that can best be met in cases of former leaders accused of international crimes by assigning the defendant a highly qualified attorney who is vigilantly committed to representing his client's interests.

II. ARTICLE 14(3)(D) OF THE ICCPR: NEGOTIATING RECORD, SCHOLARLY COMMENTARY, AND JURISPRUDENCE

It is helpful to examine the drafting history of Article 14(3)(d) of the ICCPR in order to locate the origins of the provision and its true meaning. The United States provided the first substantive contributions to the First Session of the Drafting Committee of the Universal Declaration of Human Rights, held from June 9–25, 1947. These provisions later became part of Article 14 of the ICCPR, but were originally aimed to be included in the proposed Articles 6 and 27 of the Declaration. It is noteworthy that the initial proposal for the text that eventually became Article 14 of the ICCPR included only the right to consult with and be represented by counsel; there was no mention of a right to self-representation. At the Second Session of the Drafting Committee, the United States introduced a revised draft Article, which provided that everyone is entitled to the aid of counsel. It was not until the draft wording at the end of the Committee's Fifth Session that the eventual Article 14 of the ICCPR added that, in the determination of any criminal charge, one is entitled "[t]o defend himself in person or through legal assistance which shall include the right to legal assistance of his own choosing, or, if he does not have such, to be informed of his right and, if unobtainable by him, to have legal assistance assigned."

At the Sixth Session, the United States stressed that, in its legal system, the defendant has the right to refuse the assigned counsel and ask for another if the assigned counsel does not perform properly. According to the official records, no discussion ensued concerning an absolute right to represent oneself; rather the delegates were solely concerned about the right to access counsel, the choice of counsel, and who pays for counsel if the defendant is indigent. This evinces the limited weight the drafters placed on the wording which the *Milošević* Trial Chamber has interpreted as creating a right to self-representation.

It is noteworthy that distinguished scholars in the field have not read this clause as requiring a right of self-representation. According to Professor Cherif Bassiouni, "the right to self-representation complements the right to counsel and is not meant as a substitute thereof." The purpose of the right to self-representation is to assure "the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense *under certain circumstances*." But this right is not unqualified as, Bassiouni continues, "representation of counsel is not only a matter of interest to the accused, but is also paramount to due process of the law and to the integrity of the judicial process." Accordingly, this can be accomplished only by ensuring that such self-representation is adequate and effective. It logically follows that a court "should appoint professional counsel to supplement self-representation; conversely, whenever it is in the best interest of justice and in the interest of adequate and effective representation of the accused, *the court should disallow self-representation and appoint professional counsel*."

It is also important to recognize that while most common law countries recognize a right of self-representation, civil law countries including France, Germany, and Belgium, among others, do not feel compelled to permit a defendant to represent himself. In civil law countries, defense counsel can be imposed on the defendant in serious cases, which

happen to be most criminal cases with the potential for long sentences. In France, during a trial, the presence of a lawyer is required before the *Cour d'Assises*, which has jurisdiction to try felonies (offenses punished by imprisonment with hard labor, for life, or for a fixed period of time). Germany similarly requires mandatory defense counsel in certain situations, including where the defendant is charged with a serious offense, where the presiding judge finds that the assistance of defense counsel appears necessary because of the difficult factual or legal situation, or where it is evident that the defendant cannot defend himself. In Belgium, the President of the court must verify whether the defendant has selected counsel of his choice to represent him in front of the *Cour d'Assises*; if the defendant has not so selected, the President must designate counsel for the defendant.

Given the contrary widespread practice of the civil law countries, it would be difficult to properly conclude that the right to self-representation has in fact attained the level of customary international law, as Judge May concluded in the *Milošević* case. Moreover, the jurisprudence of the European Court of Human Rights provides further evidence that Judge May was mistaken. Interpreting a clause in the European Convention with the same language as Article 14(d)(3) of the ICCPR, the European Court has "taken a relatively restrictive stance and affirmed the right of States to assign a defense counsel against the will of the accused in the administration of justice." Judge May dismissed the importance of this precedent because of the fact that the nature of the proceedings at the ICTY is adversarial, and the imposition of defense counsel is a feature of the inquisitorial system, which is most prevalent among the European states. However, international and hybrid courts such as the ICTY, ICTR, ICC, SCSL, and IST are *sui generis*, representing a blending of the common law and civil law approaches. Thus, the practice of the civil law countries should not be discounted.

III. THE RATIONALE FOR REQUIRING A FORMER LEADER TO ACT THROUGH COUNSEL

A. *Likelihood that the Defendant Will Act in a Disruptive Manner*

The likelihood that a defendant will act in a disruptive manner may be inherent with certain types of defendants, especially former leaders who publicly challenge the court's authority to try them. It is particularly useful then to examine U.S. jurisprudence on limiting the right of self-representation in the case of disruptive defendants.

In *Faretta v. California*, the United States Supreme Court held that a defendant has a Sixth Amendment right to conduct his or her own defense in a criminal case. However, it is important to recognize that the Supreme Court qualified this pronouncement by stating that such a "right of self-representation is not a license to abuse the dignity of the courtroom." As discussed below, since *Faretta*, several courts have found that self-representation may be terminated if the defendant acts in a disruptive manner.

Under American jurisprudence, the right to counsel is the paramount right in relation to the right to self-representation. As the United States Court of Appeals for the First Circuit

has reasoned, "if [the right to counsel is] wrongly denied, the defendant is likely to be more seriously injured than if denied his right to proceed *pro se*." In *Tuitt v. Fair*, the appellant, convicted of armed robbery and carrying a firearm without lawful authority, alleged that his right to counsel was infringed when he was denied his requests for a continuance and for a substitution of counsel, or for permission to proceed unrepresented. On appeal, the First Circuit held that "[t]he right to counsel is subject to practical constraints," such that "the right of an accused to choose his own counsel cannot be insisted upon in a manner that will obstruct reasonable and orderly court procedure." Similarly, in *United States v. Mack*, the United States Court of Appeals for the Ninth Circuit stated that a defendant's right to self-representation does not overcome the court's right to maintain order in the courtroom. The court further reasoned that "[a] defendant does not forfeit his right to representation at trial when he acts out. He merely forfeits his right to represent himself in the proceeding." The United States Court of Appeals for the Second Circuit in *United States v. Cauley* refused to allow a disruptive defendant to dismiss his legal aid lawyer and proceed unrepresented. The court found that his "behavior in court was that of an easily angered man," and noted that the defendant "interrupted the cross-examination . . . with shouted obscenities." He also refused to answer questions posed to him. In *United States v. West*, the United States Court of Appeals for the Fourth Circuit held similarly. The appellant in that case attacked the court's "integrity and dignity by characterizing it as the 'home team' on the side of the government." The court held that the lower court was correct in finding that the appellant forfeited his right to self-representation by "flouting the responsibility" given to him. Most recently, in *United States v. Harris*, the federal district court in New Jersey turned down a defendant's request to self-representation. As justification for this, the court found that the defendant refused to acknowledge the authority of the court, showed disrespect for the court, and that his attempts to proceed unrepresented were meant to disrupt the court.

The above forms of disruption have accompanied the cases of former leaders before war crimes tribunals. As the description of Miloševic's antics in the introduction illustrates, such individuals openly question the legitimacy of the court, act disrespectfully to the judges, make speeches during cross-examination, and browbeat witnesses. In the ordinary case, the judges would threaten to expel from the courtroom, impose fines or prison time, or to suspend the license of an attorney who acted in such a manner, but these modes of discipline are not available to the judges with respect to a defendant who is serving as his own attorney. This type of inherently disruptive behavior, then, justifies appointment of defense counsel over the objection of the accused in war crimes trials.

B. *The Complexity of the Case and the Need for an Orderly Trial*

War crimes tribunals are initiated in response to some of the gravest of atrocities committed in the history of mankind. Cases involving former leaders accused of war crimes are particularly complex. Consequently, the right to self-representation may be inherently incompatible with war crimes trials involving such defendants in four respects. First, war crimes tribunals prosecute violations of international humanitarian law, and have the overwhelming obligation of bringing the perpetrators to justice. The gamut of legal

skills used in ordinary domestic criminal cases is insufficient for the trial of an accused war criminal. Defense counsel must be fluent in substantive and procedural legal aspects of international humanitarian law, comparative law, and trial and written advocacy skills. Second, international courts such as the ICTR, ICTY, SCSL ICC, and IST are *sui generis*, representing a blending of the common law and civil law approaches. The judges are from both systems, and the procedural and substantive outcomes will depend on a mixture of the two legal systems. Even though the procedure tends to be closer to an adversarial model, characteristic of common law countries, the international courts can be characterized as hybrid, creating unique challenges to even the most experienced and skilled international lawyer. Third, mounting a defense to a war crimes charge has proven to be quite daunting. In the first ICTY case of *Prosecutor v. Tadi_*, for example, defense counsel was already spending 12 to 14 hours a day, 6 days a week in preparation for cross-examinations and direct examinations of witnesses. Finally, due to the nature of the crimes and the geographic location of the courts in relation to the actual "crime scenes," access to the sites, evidence, and witnesses is especially challenging.

Although domestic courts in common law countries do not impose defense counsel on an unwilling defendant in the absence of disruptive conduct, some courts have propounded on the matter of competent self-representation in complex cases and offer useful commentary. The Supreme Court of India, for example, has found that the fairness of a trial may be implicated in circumstances where a self-represented defendant cannot understand all the legal implications of the trial and appellate proceedings, as intricate questions of law and fact are involved which require the skillful handling of a competent lawyer, especially when the best of the public prosecutors appear on the other side of the courtroom. The Australian High Court has similarly opined that defendants do not have the right to represent themselves on appeal because "the most important part of the oral discussion—the testing of the arguments by a Socratic dialogue—is rarely effective in the case of applicants who are without legal representation . . . because they generally lack the experience and legal knowledge to respond effectively to the justices' questions."

The concept of "equality of arms" further supports the position that a defendant in a trial for war crimes should not have the absolute right of self-representation. Article 19(1) of the ICTR Statute and Article 20(1) of the ICTY Statute firmly embrace the right to "equality of arms." The jurisprudence of both tribunals has dealt extensively with the issue of "equality of arms" between the prosecution and the defense. Thus, in *Prosecutor v. Tadi_*, the Appeals Chamber took the view that "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case." To that end, these international tribunals make provision for specific rules on the appointment, qualifications, and assignment of defense counsel in the Rules of Procedure, as well as codes of conduct and directives for the assignment of defense counsel. It seems at odds with a system that makes such an effort to promote "equality of arms" and extensive qualifications upon defense counsel to accept that potentially unqualified defendants would be allowed to defend themselves. After all, the most legally gifted of defendants, such as

Miloševic, would, notwithstanding their own training, have difficulty following the rules of procedure of an international court, as well as standard international criminal law practices.

IV. THE CASE LAW OF THE ICTR, SCSL, AND ICTY

A. *The International Criminal Tribunal for Rwanda*

The ICTR was the first international tribunal to face the question of a defendant's right to self-representation, holding in the case of Jean-Bosco Barayagwiza that defense counsel could be assigned over the objection of the accused. Barayagwiza, like Milosevic, was a lawyer by training and a former high level government official. The ICTR Trial Chamber took the right to self-representation as articulated in the Statute as a starting point, but noted that according to international (and some national) jurisprudence, this right is not absolute.

The Registrar declined Barayagwiza's request on January 5, 2000 for the withdrawal of his counsel, J.P.L. Nyaberi. Barayagwiza sought the withdrawal citing reasons of "lack of competence, honesty, loyalty, diligence, and interest." The Registrar's decision was confirmed by the President of the ICTR on January 19, 2000, but on January 31, 2000, the Appeals Chamber ordered the withdrawal of Barayagwiza's defense counsel, J.P.L. Nyaberi, and ordered the assignment of new counsel and co-counsel for Barayagwiza. Barayagwiza declined to accept the assigned counsel, and instructed them not to represent him at the trial. The ICTR Trial Chamber ordered counsel to continue representing Barayagwiza. Counsel filed a motion to withdraw on October 26, 2000, given their client's instructions not to represent him at trial, which was denied on November 2, 2000, on the basis that the ICTR Trial Chamber had to ensure the rights of Barayagwiza.

The ICTR Trial Chamber held Barayagwiza's behavior to be "an attempt to obstruct proceedings. In such a situation, it cannot reasonably be argued that Counsel is under an obligation to follow them, and that [sic] not do so would constitute grounds for withdrawal." It referred to the "well established principle in human rights law that the judiciary must ensure the rights of the accused, taking into account what is at stake for him." The ICTR Trial Chamber further noted that assigned counsel "represents the interest of the Tribunal to ensure that the Accused receives a fair trial. The aim is to obtain efficient representation and adversarial proceedings." In a separate concurring opinion, Judge Gunawardana [stressed] the effect a decision to grant the withdrawal of counsel would have on the administration of justice of the trial. He submitted that Article 20(4)(d), the provision founded on ICCPR Article 14(3)(d), is "an enabling provision for the appointment of a 'standby counsel,'" and in such circumstances the ICTR should make use of court-appointed standby counsel.

B. *The Special Court for Sierra Leone*

The Special Court for Sierra Leone (SCSL) Statute has a similar provision concerning the right to counsel. In a recent decision, a SCSL Trial Chamber found that the defendant Samual Hinga Norman could not represent himself without the assistance of standby counsel. Norman, who like Milosevic is a lawyer by training and a former high level government official, indicated in a letter of June 3, 2004, after the opening statement of the prosecutor, that he wished to represent himself and that he was dispensing of his defense counsel that had been acting on his behalf since March 2003.

In requiring the appointment of standby counsel, the SCSL Trial Chamber sought to distinguish Norman's situation from that of *Miloševic* in two respects: First, the SCSL noted that Norman is being tried with two co-defendants. Second, Norman did not signal his intention to represent himself from the outset. The SCSL Trial Chamber then turned to the characteristics of the trial that made it impossible for Norman to represent himself. According to the SCSL Trial Chamber, the right of counsel is an essential and necessary component of a fair trial. Without counsel, the judges are forced to be a proactive participant in the proceedings instead of the arbiter, which is one of the greatest characteristics of an adversarial proceeding. The SCSL Trial Chamber turned to the complexity of the case and the intricacies of international criminal law, as well as the national and international interest in the "expeditious completion of the trial." The trial judges were also concerned with the impact on the court's timetable.

C. *The ICTY: Milosevic Revisited*

On September 22, 2004, with the *Miloševic* trial about to begin the defense phase, the Trial Chamber (now composed of Patrick Robinson, O-Gon Kwon, and Iain Bonomy who replaced the deceased Richard May) decided to revisit Judge May's ruling that Slobodan Milosevic had a right to represent himself in the courtroom. As discussed above, there were two independent grounds upon which Judge May's ruling could potentially have been reversed. First, the Trial Chamber might have held that the language of the ICTY Statute does not in fact give the defendant the right to self-representation. The language from the Yugoslavia tribunal statute originally comes from an identically worded clause contained in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights. The negotiating record of these treaties indicates that the drafters' concern was with effective representation, not self-representation. In other words, the drafters felt that a defendant should have a right to either be represented by a lawyer or to represent himself; they did not state that each defendant must be asked to choose between the two. Unlike Britain and the United States, most countries of the world do not allow criminal defendants to represent themselves under any circumstances, and this has been deemed consistent with international law by the European Court of Human Rights."

Second, even if Judge May was correct in his reading of the law, as providing a right to self-representation, the Trial Chamber could find that he was wrong to treat that

right as absolute. As authority for his position, Judge May cited the U.S. Supreme Court's 1975 ruling in *Faretta v. California*, which held that there was a fundamental right to self-representation in U.S. courts. But the U.S. high court also added a caveat, which Judge May overlooked, stating that "the right of self-representation is not a license to abuse the dignity of the courtroom." U.S. appellate courts have subsequently held that the right of self-representation is subject to exceptions—such as when the defendant acts in a disruptive manner or when self-representation interferes with the dignity or integrity of the proceedings.

In its ruling on September 22, the Trial Chamber focused on this second ground, ruling that Miloševic's poor health, which repeatedly disrupted the trial, justified appointment of counsel to represent him in court for the remainder of the proceedings. In its view:

> If at any stage of a trial there is a real prospect that it will be disrupted and the integrity of the trial undermined with the risk that it will not be conducted fairly, then the Trial Chamber has a duty to put in place a regime which will avoid that. Should self-representation have that impact, we conclude that it is open to the Trial Chamber to assign counsel to conduct the defense case, if the Accused will not appoint his own counsel.

Following the Trial Chamber's decision of September 22, Miloševic refused to cooperate in any way with assigned counsel. Believing that they could not adequately represent the defendant without such cooperation, assigned counsel brought an interlocutory appeal to the ICTY Appeals Chamber (consisting of Theodor Meron, Fausto Pocar, Florence Mumba, Mehmet Guney, and Innes Monica Weinberg de Roca).

The Appeals Chamber decision, which was authored by Judge Meron, represented an obvious attempt at compromise. Based on the language of the ICTY Statute (without any analysis of the negotiating record of the international instruments from which the language originated), the Appeals chamber agreed that defendants have "a presumptive right to represent themselves before the Tribunal." The Appeals Chamber also agreed with the Trial Chamber that the right was subject to limitations. According to the Appeals Chamber, the test to be applied is that "the right may be curtailed on the grounds that a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial." Applying this test, the Appeals Chamber concluded that the Trial Chamber had not abused its discretion in deciding to restrict Miloševic's right to self-representation.

However, the Appeals Chamber felt that the Trial Chamber's order requiring Miloševic to act through appointed counsel went too far, and that the proportionality principle required that a more "carefully calibrated set of restrictions" be imposed on Miloševic's trial participation. Under these, when he is physically able to do so, Miloševic must be permitted to take the lead in presenting his case—choosing which witnesses to present,

questioning those witnesses, giving the closing statement, and making the basic strategic decisions about the presentation of his defense. "If Miloševic's health problems resurface with sufficient gravity, however, the presence of Assigned Counsel will enable the trial to continue even if Miloševic is temporarily unable to participate."

V. CONCLUSION

This article has demonstrated the fallacy of Judge May's conclusion in the *Miloševic* Case that a defendant in a war crimes trial has an absolute right to self-representation under conventional and customary international law. In contrast to Judge May's position in *Miloševic*, the ICTR in *Barayagwiza* and the SCSL in *Norman* each recognized that assignment of counsel to an unwilling defendant is permissible under international law and is sometimes necessary to safeguard the legitimacy of the proceedings. After three years of Miloševic's disruptions, the ICTY finally reversed Judge May's ruling and required the former Serb leader to be represented by counsel over his objection.

It is noteworthy that in doing so, the *Miloševic* Appeals Chamber concluded that self-representation was a fundamental (though qualified) right. In issuing that determination, the Appeals Chamber impliedly overruled the reasoning of the ICTY Trial Chamber in the case of *Prosecutor v. Šešelj*, which had ordered that the defendant Vojislav Seselj be represented by "standby counsel." In order to rein in the defendant's disruptive behavior in the courtroom, the *Šešelj* Trial Chamber had taken the position that ICCPR Article 14(3)(d), and similar provisions in the ICTY statute do not declare that the right to work through legal counsel is derivative of the primary right to represent oneself. As the *Šešelj* Trial Chamber observed: "It would be a misunderstanding of the word 'or' in the phrase 'to defend himself in person or through legal assistance of his own choosing' to conclude that self-representation excludes the appointment of counsel to assist the Accused or vice versa." As justifying its decision to appoint counsel over the defendant's objection, the Šešelj Trial Chamber concluded that "[t]he complex legal, evidential and procedural issues that arise in a case of this magnitude may fall outside the competence even of a legally qualified accused, especially where that accused is in detention without access to all the facilities he may need. Moreover, the Tribunal has a legitimate interest in ensuring that the trial proceeds in a timely manner without interruptions, adjournments or disruptions.

In contrast to the Šešelj Trial Chamber's position that the ICCPR language does not require that a defendant be given a right to choose self-representation if appointed counsel is available, by interpreting the phrase as creating a presumptive right of self-representation, the ICTY Appeals Chamber decision may inadvertently fuel a spate of cases before the European Court of Human Rights, challenging the practice throughout Europe of requiring defendants to act through counsel.

It is also unfortunate that the ICTY Appeals Chamber focused only on Miloševic's health as the source of disruption justifying restriction on his right of self-representation.

Evidently, the Appeals Chamber did not believe that his trial tactics rose to the level of "substantial and persistent" disruption that would justify requiring him to act through defense-counsel. If adopted by other tribunals, the stringent test formulated by the ICTY Appeals Chamber will make it difficult for judges to maintain decorum in future war crimes trials. In particular, Saddam Hussein, whose war crimes trial is set to begin in 2006, is likely to cite the precedent in arguing that he, too, has a right to represent himself before the Iraqi Special Tribunal despite his obvious intentions to use self-representation as a means of undermining the dignity of the proceedings and disrupting the trial. If Hussein were allowed to follow Miloševic's playbook—using the unique opportunity of self-representation to launch daily attacks against the legitimacy of the IST—this would seriously undermine the goal of fostering reconciliation between the Iraqi Kurds, Shi'ites and Sunnis; the historic record developed by such a trial would forever be questioned; and the trial could transform Hussein and his subordinates into popular martyrs, potentially fueling violent opposition to the new Iraqi government.

In the final analysis, principles of justice and human rights require that former leaders like Miloševic and Hussein be given fair trials. This article has made the case that this can best be guaranteed by appointing distinguished counsel to defend them, not by permitting them to act as their own lawyers.

Trading Justice for Efficiency:
Plea Bargaining and International Tribunals
By Michael P. Scharf

2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 170-181 (Fall 2004) (footnotes omitted).

I. Introduction

"Plea bargaining" -- While no single definition of the term is universally accepted, the practice may encompass negotiation over reduction of sentence, dropping some or all of the charges, or reducing the charges in return for admitting guilt, conceding certain facts, foregoing an appeal, or providing cooperation in another criminal case. It is widely used in common law countries that employ the adversarial system; though far less common, there is a trend toward its increasing use (for less serious crimes) in a number of civil law countries that employ the inquisitorial system; and in 2001, the ad hoc international tribunals, based on a hybrid of the common law and civil law systems, began to experiment with the practice. Plea bargaining is also expected to play a role in the operation of other international and hybrid courts, including the Special Court for Sierra Leone, the permanent International Criminal Court, and the Iraqi Special Tribunal.

At its inception, the Yugoslavia Tribunal (ICTY), the first international criminal Tribunal since World War II, declared that plea bargaining was inconsistent with its unique purpose and functions. The crimes within the Tribunal's jurisdiction were simply seen as too reprehensible to be bargained over. Its sister ad hoc, the Rwanda Tribunal (ICTR) followed suit, sentencing Jean Kambanda, former prime minister of Rwanda, to life imprisonment despite the fact that he pled guilty to genocide, enabling the Tribunal to forego a lengthy and uncertain trial.

But as the case loads of the ad hoc tribunals expanded exponentially, pressure mounted for them to begin to employ plea bargaining. One of the first international plea bargains occurred in the case of Biljana Plavsic, who had served as deputy to Bosnian Serb leader Radovan Karadzic, and later replaced him as President of the Republika Srpska. Known as the "Serbian Iron Lady," Mrs. Plavsic had been charged with two counts of committing genocide and complicity in genocide, and six counts of committing crimes against humanity against Bosnian Muslims during the conflict in Bosnia. In return for her guilty plea on one count of persecution (a crime against humanity), the Prosecution agreed to drop all of the other charges and recommend a relatively light sentence. Though Mrs. Plavsic admitted responsibility for the killings of tens of thousands of civilians, and steadfastly refused to cooperate in any other way with the Tribunal (including turning down a request to testify against former Yugoslav President Slobodan Milosevic), the Trial Chamber sentenced her to all of eleven years imprisonment -- with full credit for time already served and the possibility of early release for good behaviour. Plavsic was sent to serve her term in a posh Swedish prison that reportedly provides prisoners with use of a sauna, solarium, massage room, and horse-riding paddock, among other amenities.

The Plasvic case engendered wildly divergent reactions. While some hailed the guilty plea as an important step toward reconciliation in war-torn Bosnia, others criticized the plea bargain as having edited history while elevating the interest in judicial economy over those of the victims. The Plasvic plea bargain thus presents an excellent case study in which to examine the costs and benefits of plea bargaining before international tribunals. This article begins with a short history of the policy on plea bargaining of the ad hoc tribunals. This is followed by an analyis of the pros and cons of plea bargaining, in the context of addressing three fundamental questions: First, does plea bargaining violate the treaty-based duty to prosecute and issue proportionate sentences for certain international crimes? Second, is plea bargaining necessary to conserve scarce judicial resources? And third, does plea bargaining generate a sufficient historic record? Drawing from this analysis, the article concludes with observations on how the practice of plea bargaining before international courts might be improved in the future.

II. From Rejection to Dependence: A Short History of Plea Bargaining Before the Ad Hoc War Crimes Tribunals

International war crimes tribunals differ from their domestic counterparts in many ways. Chief among these differences is the purpose they were designed to serve. Rather than focusing on the traditional objectives of criminal law (retribution, prevention, rehabilitation, and deterrence), the Security Council stipulated that the major purpose of the ad hoc international criminal courts was to contribute to the restoration and maintenance of peace and the rule of law in Yugoslavia and Rwanda.

Specifically, the creators of the Yugoslavia Tribunal (ICTY) and Rwanda Tribunal (ICTR) believed that by pinning prime responsibility on high-level officials and disclosing the way the people were manipulated by their leaders into committing acts of savagery on a mass scale, the trials before the tribunals would help break the cycle of violence that has long plagued the target countries. While this would not completely absolve the underlings

for their acts, it would make it easier for victims to eventually forgive, or at least, reconcile with former neighbors who had been caught up in the institutionalized violence. This would also promote a political catharsis in the targeted countries, enabling the new leadership to distance themselves from the discredited nationalistic policies of the past. The historic record generated from the trials would educate the target populations, long subject to nationalist propaganda, about what really happened, and help ensure that such horrific acts are not repeated in the future.

Would plea bargaining be compatible with these unique objectives of international criminal justice? In one of their first official acts, the judges of the ICTY firmly answered that question in the negative. In announcing the promulgation of the set of rules of procedure that would govern the new Yugoslavia Tribunal (and later the Rwanda Tribunal as well), the President of the Tribunal, Antonio Cassese of Italy, explained that the judges had decided to reject a U.S. Government proposal that would have permitted plea bargaining as a way of eliciting evidence against the most important defendants. As Judge Cassese explained:

> The question of the grant of immunity from prosecution to a potential witness has also generated considerable debate. Those in favour contend that it will be difficult enough for us to obtain evidence against a suspect and so we should do everything possible to encourage direct testimony. They argue that this is especially true if the testimony serves to establish criminal responsibility of those higher up the chain of command. Consequently, arrangements such as plea bargaining could also be considered in an attempt to secure other convictions. However, we always have to keep in mind that this Tribunal is not a municipal criminal court but one that is charged with the task of trying persons accused of the gravest possible of all crimes. The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be.

While the judges of the ICTY initially determined that plea bargaining would be incompatible with the unique purpose of the international war crimes tribunals, seven years later they reversed course and began to aggressively pursue plea bargains. This about face occurred shortly after Judge Gabrielle Kirk McDonald of the United States replaced Antonio Casesse as President of the Tribunal. Unlike Judge Cassese, Judge McDonald had been a federal judge in a country where ninety-five percent of criminal cases are decided by plea bargains. Moreover, there were just a few cases pending while Judge Cassese was President of the ICTY; in contrast, by the time Judge McDonald took over, the Tribunal found itself with far more defendants in its custody than it could handle with its scarce resources. In response, between 2001 and 2003, the Tribunal approved twelve plea bargains, clearing forty percent of the cases from its crowded docket.

Initially, plea bargains before the two ad hoc international tribunals involved promises by the prosecutor to recommend a lenient sentence in exchange for a guilty plea and substantial cooperation provided by the defendant (sentence bargaining). But beginning with the *Plavsic Case*, the plea bargains included the dropping of charges in return for the guilty plea (charge bargaining). The use of both types of plea bargains is likely to further accelerate in response to pressure from the U.N. .Security Council for the tribunals to wrap up their work by 2008.

III. The Pros and Cons of Plea Bargaining in the Context of International Justice

A. Are Plea Bargains Compatible with the Treaty-Based Duty to Prosecute and Impose Effective Sentences?

There are a handful of international criminal law treaties that are unique in that they not only provide the basis for States and international organizations to exercise universal jurisdiction to prosecute perpetrators, they also require that such persons be prosecuted and that the sentence imposed be proportionate to the gravity of the crime. Among these are the four Geneva Conventions of 1949, which require prosecution and proportionate punishment for certain specified "grave breaches" committed in an international armed conflict, the 1948 Genocide Convention, which requires prosecution and proportionate punishment for the crime of genocide, and the 1984 Torture Convention, which requires prosecution and proportionate punishment for those who commit the crime of torture. The provisions, negotiating record and commentary to these treaties indicate that the obligation to prosecute and carry out "effective penalties" which "take into account their grave nature" is absolute, meaning that grants of amnesty, immunity, token sentences, or pardons are not permitted with respect to these offenses.

Judge Cassese likely had these provisions in mind when he declared that plea bargaining would simply be inappropriate in the case of "persons accused of the gravest possible of all crimes." True, these provisions do not require a prosecutor to bring charges against all suspected perpetrators. Rather, they may be read to permit appropriate application of prosecutorial discretion in light of available resources to prosecute only those who are most culpable, who hold the highest positions, and as to whom the evidence is most compelling. In a similar vein, it would not violate the obligation to prosecute contained in these treaties where a plea agreement is made in order to obtain testimony or evidence for use in the case of a higher ranking or more culpable defendant. But where, as in the *Plavsic case*, the international tribunal has issued an indictment for genocide, it would seem to be incompatible with both the letter and spirit of these treaties for the tribunal to approve a plea bargain dropping this grave charge simply to expedite its case load.

A compelling counter argument can be made, however, that the statutes of the ad hoc international war crimes tribunals and permanent International Criminal Court incorporate only the substantive provisions of the Geneva Conventions, the Genocide

Convention, and the Torture Convention; and do not incorporate those procedural aspects of the treaties that require prosecution. Since the international tribunals have independent juridical personality from the states that are bound by these treaties, the obligations to prosecute do not flow to the tribunals. Thus, it may seem unseemly to some that Mrs. Plasvic, who was originally charged with genocide, ended up with a mere eleven-year sentence at a posh Swedish prison in return for her guilty plea, but such action may not technically violate the treaty-based duty to prosecute and render effective penalties.

B. Is Plea Bargaining Necessary to Conserve Scarce Judicial Resources?

It is noteworthy that the international tribunals have primarily justified plea bargaining in terms of conserving scarce judicial resources, rather than as a way of obtaining evidence from underlings for use in the prosecution of leadership figures. Thus, in the *Plavsic case*, the international tribunal observed the chief benefit of the practice was that: "a guilty plea before the beginning of the trial obviates the need for victims and witnesses to give evidence and my save considerable time, effort and resources." According to the current President of the ICTY, Judge Theodor Meron of the United States, now that the tribunal is "running at full steam," it "cannot try all the defendants." Extensive use of plea bargaining is simply "part of the court's coming of age."

This view reflects the experience of the United States where plea bargaining became increasingly prevalent as the number of criminal trials increased and as criminal proceedings became ever more complex, time-consuming, and expensive during the twentieth century. By 1971, the United States had become so dependent on plea bargaining as a means of managing its judicial case load that the U.S. Supreme Court observed that the practice "is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and Federal Government would need to multiply by many times the number of judges and court facilities."

In the early days of the ICTY, few defendants were in custody, and most were relatively low level offenders who happened to fall into the hands of government authorities outside the Balkans. Later, through the international community's use of financial incentives (including a deal to provide Serbia 1.5 billion dollars in return for the surrender of Slobodan Milosevic), Croatian, Serb, and Bosnian authorities were induced to transfer an increasing number of high level indicted war criminals to the Tribunal. A dozen others were apprehended and turned over to the Tribunal by NATO forces. As this article went to press, forty people have been tried, twenty-seven are in custody awaiting trial, and seventeen who have been indicted remain fugitives, chief among them the Bosnian Serb war time leaders Radovan Karadzic and General Ratko Mladic. The average ICTY trial takes over a year at a cost of about $50 million a piece. The numbers for the ICTR are roughly the same.

The ICTY's first response to its growing case load was to withdraw indictments against several lower-level officials. Next, it requested (and was given) the addition of

twenty-seven "Ad Litem Judges" to supplement the eleven judges initially assigned to the tribunal. It then implemented procedural elements found in continental systems in an effort to make Tribunal proceedings quicker and more efficient.

Despite these efforts, without substantial use of plea bargaining, the tribunal's docket was likely to remain overburdened. This is because compared to domestic trials, cases involving charges of genocide, war crimes, and crimes against humanity are inherently complicated, lengthy, and costly. This is in large part due to the difficulty of proving the "chapeau elements" of the international crimes. To prosecute genocide, for example, the prosecution must prove that a substantial portion of the victim population was attacked; to prove grave breaches of the Geneva Conventions, the prosecution must prove that the offenses took place in the context of an international armed conflict; and to prove crimes against humanity, the prosecution must prove that the attacks were systematic and widespread. Establishing these requires the introduction of hundreds of exhibits and the testimony of dozens of both eye witnesses and expert witnesses. This process could have been streamlined, however, had the tribunals adopted a less conservative approach to judicial notice; there would have been far less need to employ the practice of plea bargaining had the ICTY and ICTR ruled that subsequent trials could rely on the general factual findings of the earlier cases. Instead, under the current practice, each ICTY trial alleging grave breaches of the Geneva Conventions, for example, begins with several weeks of testimony from the same experts that the war in Bosnia was an international conflict rather than a civil war.

Nor would plea bargaining be seen as quite so necessary if the U.N. Security Council, pressured by the United States, had been less insistent that the ICTY and ICTR wrap up their work by 2008. At a cost of more than one hundred million dollars for each tribunal per year, international justice might seem exorbitantly expensive, justifying clamors from financial endorsers like the United States, which pays one quarter of their bill, to bring the project to a close. But in light of the number of victims, complexity of the cases, and contribution to peace and security, the cost figure is actually quite reasonable. To put these amounts in perspective, consider the price of trials in the United States involving hundreds of victims (in contrast to ICTY/R trials involving hundreds of thousands). The 1992 trial of New York mob boss John Gotti, for example, cost the United States seventy million dollars, while the 1997 trial of Oklahoma City bomber Timothy McVeigh cost the United States Government fifty million dollars. Moreover, the price of international justice is a fraction of the costs of operating a single U.N. peacekeeping mission. If the ad hoc tribunals were given an additional five years to complete their mandate, the need for plea bargaining could have been avoided. The question then is whether it would be worth an extra five hundred million dollars to avoid the drawbacks of plea bargaining. The answer to that depends largely on the effect of plea bargaining on the two ad hoc tribunals' efforts to establish an accurate historic record.

C. Does Plea Bargaining Distort the Historic Record?

The creators of the ad hoc international tribunals viewed them as a potentially significant instrument of peace-building through their ability to generate an accurate historic record of responsibility for atrocities. If, to paraphrase George Santayana, a society is condemned to repeat its mistakes if it does not learn the lessons of the past, then a reliable record of those mistakes must be established in order to prevent their recurrence. Michael Ignatieff recognizes that the "great virtue of legal proceedings... is that their evidentiary rules confer legitimacy on otherwise contestable facts. In this sense, war crimes trials make it more difficult for societies to take refuge in denial – the trials do assist the process of uncovering the truth.

The chief prosecutor of Nuremberg, U.S. Supreme Court Justice Robert Jackson, underscored the logic of this proposition when he reported to President Truman that one of the most important legacies of the Nuremberg trials following World War II was that they documented Nazi atrocities "with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people." Indeed, in recent times, there has been a movement to deny that the Holocaust actually happened, but the trial record from Nuremberg has served as an effective counter to such fantastic revisionism.

As with Nazi Germany, the need for an accurate accounting is particularly compelling in the cases of countries like Yugoslavia and Rwanda, whose nationalist leaders employed propaganda to generate hatred of the victims and support for the government's genocidal policies. Thus, the ad hoc tribunals were designed to generate a comprehensive record of the nature and extent of crimes against humanity and genocide in the target states, how they were planned and executed, the fate of individual victims, who gave the orders and who carried them out. By carefully proving these facts one witness at a time on a level playing field in the face of vigilant cross examination by distinguished defense counsel, the founders of the tribunals expected the international trials to produce a definitive account that could pierce the distortions generated by official propaganda, endure the test of time, and resist the forces of revisionism.

Let us consider, then, whether the plea bargain in the *Plavsic case* advanced or hindered the truth-telling function of the ad hoc tribunal. The tribunal itself believed that Mrs. Plavsic's plea agreement made it more likely that the historic record of her crimes would be accepted by the people of Serbia and Bosnia. It is noteworthy in this regard that not only did Plavisic plead guilty to the charge of persecution, but she also admitted the facts supporting the charge in a five-page document that was appended to the plea agreement. Whereas a defendant in a full criminal trial usually maintains her innocence to the end (thereby setting the stage for endless debates about the correctness of the court's ruling), "an admission of guilt proffered by a defendant with such sterling nationalist credentials as the Serbian Iron Lady ... provides strong evidence to counteract the self-serving histories that still hold sway among Serbs."

Indeed, one of the modern myths of Nuremberg is that the German people immediately accepted the findings of the International Military Tribunal because the defendants were convicted over their feeble denials on the strength of their own meticulously kept incriminating documents. Opinion polls conducted by the U.S. Department of State from 1946 through 1958, however, indicate that a large majority of West Germans did not believe the historic record developed at the Nuremberg trial as legitimate, and believed instead that the defendants were in fact innocent of the charges upon which they were convicted. That view changed only after Germany conducted its own domestic war crimes trials in the 1960s. Thus, from the perspective of developing a generally accepted historic record, a plea bargain may be more effective than a judgment developed via a full international trial in the face of the denials of the defendant.

On the other hand, there are several aspects of the Plavsic plea bargain that significantly undercut the effort to establish an accurate and full historic account of her involvement in atrocities. First, Mrs. Plavsic only admitted facts relevant to the one charge of persecution; she did not provide evidence related to the dropped genocide charges, and the dropping of those charges may be errouneously viewed in Serbia as an admission by the prosecutor that those crimes did not take place. Second, the document appended to the plea agreement was a scant five-pages long, enough for only the merest bare bones history of her involvement in atrocities. A full blown trial, in contrast, would have produced a judgment containing several hundred pages of factual findings and hundreds of thousands of pages of trial records, including witness statements, official documents, forensic evidence, and crime scene photographs. Third, despite Mrs. Plavsic's expressions of remorse, her plea bargain was not widely viewed as an act of truth telling, but rather a majority of Serbs saw it as an act of treachery and betrayal in return for generous benefits.

IV. Conclusion

The ad hoc international tribunals were right initially to be skeptical that plea bargaining could be employed consistent with their unique mission and in light of the grave nature of the international crimes involved. In her companion piece in this issue of the *Journal of International Criminal Justice*, Professor Damaska concludes that "arguments supporting bargained justice, other than those of practical utility, have a much lesser force in the international than in the domestic arena." If practical utility is the only valid justification, it may not be sufficient to warrant the international adoption of the practice. While it is true that international trials are inherently complex and time consuming, it does not necessarily follow that plea bargaining was a functional necessity for these institutions or, in Judge Meron's words, a reflection of their maturity.

Rather, the need for plea bargaining at the international level could have been avoided if: (1) the international prosecutors had been more selective in issuing indictments, charging only a handful of the highest level perpetrators instead of so many foot soldiers, prison guards, and mid-level military personnel; (2) the tribunals had adopted a broader notion of judicial notice, so that generally applicable facts would not have to be re-

established from scratch in every case; and (3) the Security Council had not been so anxious to prematurely close down the ad hoc tribunals purportedly due to the high cost of international justice. Yet, regardless of the validity of the justifications for its adoption, now that plea bargaining has been employed by the ad hoc tribunals, the precedent will undoubtedly prompt the permanent international criminal court and hybrid tribunals to adopt the practice as well.

As plea bargaining before international tribunals goes, sentence bargaining is far less controversial than charge bargaining, since the historic record is not affected by the deal. The ad hoc tribunals, which are said to be sui generis, represent a blending of the common law/adversarial and civil law/inquisitorial approaches. In adopting charge bargaining in the *Plavsic case*, the Trial Chamber tried to address the issue of establishing an accurate historic record by mixing elements from both approaches. Consistent with the common law system, Mrs. Plavsic was permitted to enter a guilty plea in return for the prosecutor's agreement to drop more serious charges and to recommend a lenient sentence. Consistent with the civil law system, Mrs. Plavsic was required to append to her plea bargain a statement admitting the facts underlying the charge to which she pled guilty.

In light of the goals of international justice, the addition of the confession element from the civil law approach is an improvement over using the pure common law model of charge bargaining. But as demonstrated above, even with this innovation, plea bargaining that results in the dropping of charges has the effect of editing out the full factual basis upon which a conviction rests, and thus has the potential to distort the historic record generated by the Tribunal.

In assessing the validity of a plea agreement, the international tribunals are required by their rules to ensure that the plea has been made voluntarily, that it has been made on an informed basis, that it is not equivocal, and that the existence of the crimes themselves and the participation of the particular accused in those crimes have an adequate factual basis. In light of the unique objectives of international justice, in cases of charge bargaining, the tribunal should require that the defendant append a signed document detailing the facts underlying the original charges (not just the reduced charges as in the *Plavsic case*). Similar to the full admissions that were required as a condition for receiving immunity from prosecution by the South Africa Truth and Reconciliation Commission, this would ensure that the full truth about the perpetrator's involvement in atrocities is revealed, while at the same time providing a benefit to the defendant in exchange for her admission and guilty plea. In the interest of fairness, if the court rejects the plea agreement, the defendant must be allowed to withdraw both her plea and the appended factual stipulation which cannot subsequently be used against her at trial.

II. Exclusion of Torture Evidence

On-Line Simulation #2

This simulation is based on the following article about application of the exclusionary rule contained in Article 15 of the Torture Convention. For this simulation, assume the International Prosecutor of the Cambodia Genocide Tribunal wants to submit the following evidence in the trial of Kang Ling (a Khmer Rouge guard at the Choeng Ek concentration camp), Nuan Chea (one of the leaders of the Khmer Rouge), and Leng Sary (another leader of the Khmer Rouge):

1. Self-incriminatory biographical statements about the role that the Defendant Kang Ling played as a guard at the Choeng Ek concentration camp from 1977-1978 which were provided by the defendant to Khmer Rouge officers just prior to Ling's interrogation at the Tuol Sleng torture facility in 1979. Defendant was not abused prior or during this preliminary interview, but he knew that he would be subjected to electric shocks and whipping during the interrogation that was to follow.

The Prosecutor asserts that this information should be admissible because it was provided prior to the commencement of torture.

2. Statements incriminating Defendant Nuan Chea that were provided by Defendant Kang Ling to Khmer Rouge officers during interrogation at the Tuol Sleng torture facility. Defendant Kang Ling had been subject to electric shocks and whipping during the interrogation resulting in these statements.

The Prosecutor asserts that this information should be admissible under the "silver platter doctrine" because the Tribunal's personnel had not been involved in the torture and under the "exception for evidence against the torturer" since Nuan Chea was one of the Khmer

Rouge leaders responsible for establishing the Tuol Sleng torture facility and directing that suspected spies be sent there for harsh interrogation.

3. Statements incriminating co-Defendant Leng Sary which were provided by Defendant Kang Ling to investigators of the Cambodia Tribunal during Ling's pre-trial detention at the Tribunal's facility. Kang Ling was not apprised of his right to remain silent and was not provided a lawyer during the eight-hour interrogation resulting in these statements.

The Prosecutor asserts that this information should be admissible because, though the Tribunal's personnel were involved in the interrogation, mere failure to apprise a defendant of his rights or to provide a lawyer does not trigger the Torture Evidence Exclusionary Rule.

Directions: The Defense moves to exclude the evidence under the Torture Evidence Exclusionary Rule. Based on these stipulated facts and the article below, members of **Group A** (last names that begin with the letters A-H) are invited to upload a submission, representing the Prosecution, arguing in favor of admission of the evidence in one or more of the three scenarios described above. Members of **Group B** (last names that begin with the letters I-Z) are invited to upload a submission, representing the Defense, arguing that the evidence in one or more of the scenarios should excluded be under the Torture Evidence Exclusionary Rule.

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for "on-line simulations." The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.

Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?

Michael P. Scharf

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It is one thing to condemn torture, as we all do. It is another to find a solution to the question that this case raises which occupies the moral high ground but at the same time serves the public interest and is practicable. Condemnation is easy. Finding a solution to the question is much more difficult.

Lord Hope of Craighead, British House of Lords, 2005

I. Introduction

This article examines whether there should be expanded exceptions to the torture evidence exclusionary rule, and if so, how those exceptions should be crafted to avoid abuse. Rather than explore the question in the hotly debated context of terrorist prosecutions, this article uses a very different kind of case study which presents the issue in a fresh light that challenges the general assumptions about the morality, efficacy, and legality of admitting evidence obtained by torture.

In October 2006, the author of this article was invited to help lead the first training session for the investigative judges and prosecutors of the U.N.'s newly established Cambodia Genocide Tribunal, known as the Extraordinary Chambers in the Courts of Cambodia. One of the most contentious issues that arose during the session was the question of whether the Cambodia Tribunal could admit evidence of the Khmer Rouge command structure that came from interrogation sessions at the infamous Toul Sleng torture facility. What makes the issue novel is that the evidence the Tribunal is interested in is not the substance of the victims' torture-induced confessions but the background biographical information provided by the victims at the start of their interrogation, such as the location and type of work they did for the regime, as well as the names and the responsibilities of their superiors and subordinates.

While in Phnom Penh, the author was given a tour of the Tuol Sleng facility, which has been maintained by the Cambodian government as a memorial exactly as it was the day the Khmer Rouge regime fell in January 1979. Each dank room at Tuol Sleng contains a rusty metal bed frame with large manacles and assorted implements of torment, under which can be seen the faded brownish stain from pools of blood, and above which hang large black and white photos of the anguished faces and broken bodies of the last occupant of that room the day the facility was liberated by the Vietnamese army. Over 17,000 people are documented to have entered Tuol Sleng for interrogation; only six are known to have survived.

At first blush, the Tuol Sleng interrogation statements would seem plainly to be barred by the international exclusionary rule, contained in Article 15 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 15 of the Torture Convention provides: "Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

The problem for the Cambodia Tribunal is that the Tuol Sleng evidence is believed to be critical to proving command responsibility and/or joint criminal enterprise liability of the half dozen Khmer Rouge leaders being tried by the Tribunal. Under these circumstances, must the international rule excluding admission of torture evidence be mechanically applied, with the result that the prosecution of those responsible for mass

torture in Cambodia will be frustrated; or does some principled argument exist under which the evidence can be admitted in harmony with international law?

In addressing this question, this article begins by setting out the history and policies behind the international exclusionary rule for torture evidence and provides background about the importance of the Tuol Sleng evidence to the Cambodia Tribunal prosecutions. This is followed by an analysis and critique of three possible arguments for admission of the evidence: (1) that evidence resulting from preliminary questioning before the application of actual torture is not covered by the torture evidence exclusionary rule; (2) that the torture evidence exclusionary rule does not apply to evidence obtained by third-party authorities; and (3) under cannons of statutory construction and principles of treaty interpretation, the exception contained in Article 15 of the Torture Convention should be interpreted broadly to apply to evidence used against the superiors of the perpetrators as well as the perpetrators themselves, so as not to undermine the object, purpose, and spirit of the Convention. The concluding section cautions that there are potentially significant negative long-term consequences that flow from judicial application of these arguments and, to minimize these, proposes specific criteria that a court should employ before admitting torture evidence in such a case.

II. Background

A. History of the Torture Evidence Exclusionary Rule

There was a time when evidence obtained by torture was not barred, but rather specifically authorized to be used in judicial proceedings. For example, four hundred years ago, when Guy Fawkes was arrested as he was preparing to blow up the British Parliament building, King James I sent orders authorizing torture to be used to persuade Fawkes to confess and reveal the names of his co-conspirators. The king's order stated that "the gentler tortours" were first to be employed, and that his torturers were then to proceed to

the worst until the information was extracted from Fawkes. Shortly thereafter, Fawkes signed a confession and provided the names of seven co-conspirators, all of whom were convicted on the basis of Fawkes' torture-induced confession.

Although England banned the practice of relying on torture evidence in British trials in 1640 when the Star Chamber was abolished, the admission of coerced confessions, including those elicited by violent means, was authorized for use in the special "Diplock Courts" employed by British authorities in terrorism trials in Northern Ireland as late as the 1980s. In the United States, during the twentieth century, Supreme Court precedent gradually expanded the exclusionary rule to prohibit confessions elicited by means of torture. However, like the British Diplock Courts, in 2005 the United States created an exception for evidence extracted under "cruel, inhuman or degrading treatment" used in military commissions to prosecute members of the al Qaeda terrorist organization interned at detention facilities in Guantanamo Bay.

In an effort to eliminate world-wide use of torture, the members of the United Nations negotiated the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted in 1984 and entered into force on June 26, 1987. Today, this is one of the most widely ratified of multilateral treaties, with 144 parties, including Cambodia. Article 15 of the Torture Convention contains the first international codification of the exclusionary rule for evidence obtained by torture. No state party has made a reservation to Article 15.

In 1992, the UN Special Rapporteur on Torture, Mr. Peter Koojimans, in his report to the UN Commission on Human Rights, explained the rationale for the exclusionary rule, observing that judicial acceptance of statements obtained under torture was responsible for the "flourishing of torture" and that the exclusion of such evidence would make torture "unrewarding and therefore unattractive." In addition to the public policy objective of removing any incentive to undertake torture anywhere in the world, the exclusionary rule has been justified on the basis of the unreliability of evidence obtained as a result of torture, and on the need to preserve the integrity of the judicial process.

Unlike the Rules of other international and hybrid tribunals, the Internal Rules of the Cambodia Tribunal do not contain an exclusionary rule mirroring Article 15 of the Torture Convention. Even though Cambodia is a party to the Torture Convention, the hybrid Tribunal as a separate legal personality is not itself bound by the treaties to which Cambodia is a party. However, both the Agreement between Cambodia and the United Nations which authorizes the Tribunal, and the Cambodia domestic statute which establishes it, contain provisions requiring the Chambers of the Cambodia Tribunal to "exercise their jurisdiction in accordance with international standards of justice." These standards arguably include the rule prohibiting the admission of torture evidence. Moreover, Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides that when "interpreting a treaty a party shall take into consideration, together with the context, any relevant rules of international law applicable in the relations between the parties"

which would include the Torture Convention. At the very least, the Cambodia Tribunal would not want to be perceived as flouting the proscriptions of the Torture Convention, as this would erode its legitimacy and international support.

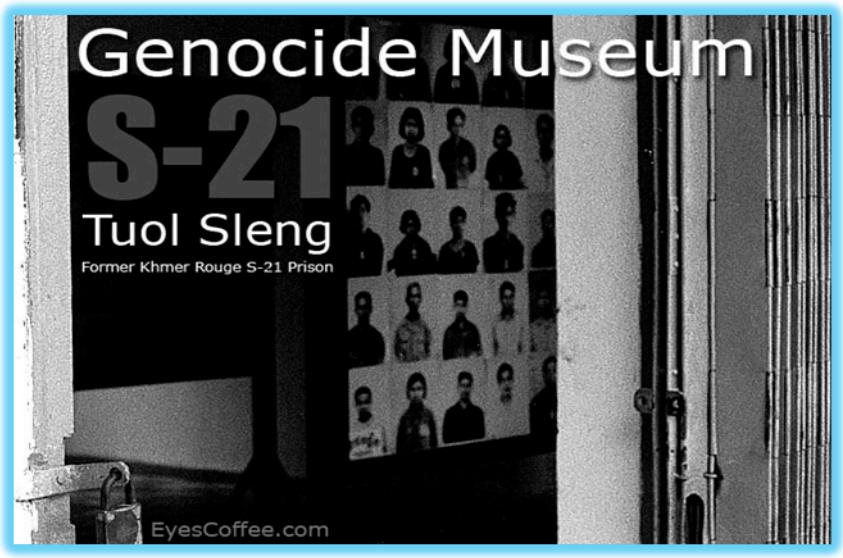
B. The Importance of the Tuol Sleng Evidence

To enable the reader to comprehend the significance of the Tuol Sleng evidence which lies at the heart of this case study on whether there should be exceptions to the torture exclusionary rule, this section provides background about the atrocities committed by the Khmer Rouge in Cambodia in general, and at Tuol Sleng in particular.

In April 1975, after a protracted guerilla campaign, the Khmer Rouge, led by Pol Pot, captured Phnom Penh and consolidated its control over the whole of Cambodia. Immediately after completing its take-over of Cambodia, the Khmer Rouge emptied the cities into the countryside in their quest to transform Cambodia into a completely agrarian communist state. The Khmer Rouge then persecuted and murdered many of the deported townspeople (referred to as "the new people") who tended to be more educated than the peasantry. The Khmer Rouge also expelled 150,000 Vietnamese residents from Cambodia, killed all 10,000 who remained in Cambodia, and carried out a larger, if less systematic, genocidal campaign against the country's Chinese and Muslim minorities."

During Pol Pot's four-year reign of terror, the Khmer Rouge regime caused the deaths of approximately 1.7 million people in Cambodia. This number represents a full fifth of Cambodia's pre-1975 population. At the same time as Cambodia's rice fields were being converted into the killing fields for hundreds of thousands of Cambodians, political prisoners and their families were meeting a terrible fate inside Khmer Rouge interrogation centers, where between 500,000 and one million Cambodians were tortured to death or executed. The most infamous of these centers, codenamed "S-21," was located in the abandoned Phnom Penh high school of Tuol Sleng (translation: "hill of the poisoned tree").

Many of those executed within the Khmer Rouge's interrogation centers were, in fact, members of the Khmer Rouge. In 1976, Pol Pot and members of the Khmer Rouge Central Committee became convinced that a vast conspiracy against their leadership existed within the lower levels of Khmer leadership and rank and file. The Central Committee subsequently adopted a policy of interrogating anyone not above suspicion, and executing all those within the party "found" to have been involved in this conspiracy. Tuol Sleng became the central location for implementation of this policy.



Tuol Sleng quickly earned a dark reputation for stunning brutality. The sole purpose of Tuol Sleng was to extract confessions from political prisoners, who were then executed and buried in mass graves outside of the capital near the farming village of Choeung Ek. Prisoners interrogated at Tuol Sleng were chained to iron beds, where they were tortured using electric shocks, water treatment, scorpions, beatings, and whippings. During the Khmer Rouge rule, some 17,000 people were interrogated and killed at Tuol Sleng/Choeung Ek.

The Khmer Rouge regime was peculiar among revolutionary governments in that, beyond its constitution, the regime issued no decrees and passed no laws. This reticence to document its orders, decisions, and command hierarchy is emblematic of the fact that the Khmer Rouge leadership intentionally kept its members as well as their individual responsibilities veiled in a shroud of secrecy. As one Khmer Rouge leader reportedly proclaimed: "Through secrecy [ ] we can be masters of the situation and win victory over the enemy, who cannot find out who is who." Because of the Khmer Rouge's policy of intense secrecy, the identities of the Khmer Rouge leadership, as well as individual culpability for the regime's crimes have been obscured.

The little documentation that the Khmer Rouge produced, which would have tied individuals to the regime's crimes, the Khmer Rouge burned as they retreated from Phnom Penh in the face of Vietnam's 1979 invasion. There was one exception: the extensive archives of Tuol Sleng were captured intact. In a 1999 interview, Kaing Guek Eav, also known as Duch (pronounced "Doik"), the Khmer Rouge's security chief who oversaw the operation of Tuol Sleng, explained that he had not been informed that the Vietnamese were on the verge of taking Phnom Penh, and thus had no time to destroy the records of the torture committed at Tuol Sleng.

Among the documents that Duch failed to destroy were the testimonial biographies of each of the prisoners who were interrogated at Tuol Sleng. These biographies are the primary source of information from which scholars have been able to construct a detailed understanding of the command structure of the Khmer Rouge. Before being questioned about their loyalty, prisoners were asked preliminary questions about where they worked, who served as their superiors and subordinates, and what their job entailed. In the absence of documentary evidence or witness testimony linking the Khmer Rouge defendants to particular atrocities, the Tuol Sleng evidence is seen as critical for their successful prosecution before the Cambodia Tribunal, which is set to commence in 2008.

III. An Analysis of Three Possible Grounds for Admitting the Tuol Sleng Evidence

A. An Exception for Preliminary Questions

At Tuol Sleng, Khmer Rouge members were forcibly brought to a place widely known as a torture facility. The biographical information the Cambodia Tribunal is interested in, however, was obtained from the victims immediately before, rather than during the actual torture sessions. As indicated above, these statements consisted of background information such as the name and age of the person questioned, location and type of work they did for the regime, as well as the names and the responsibilities of their superiors and subordinates. The Tribunal is not interested in the substantive statements made by the detainees during actual physical torture. Since many of the 17,000 people interrogated at Tuol Sleng ended up "admitting" that they were a traitor or a CIA/Vietnamese/Soviet spy, those confessional statements are obviously unreliable. The preliminary biographical statements made as to the command structure of the Khmer Rouge, on the other hand, are in no way self-incriminatory and tend to corroborate one another to a high degree, suggesting that this information is highly reliable and probative.

That the preliminary biographical information might be reliable does not, however, mean that that the statements were not the product of offenses under the Torture Convention. As victims were led into the blood-stained rooms of Tuol Sleng and asked these preliminary questions, they knew that certain pain, suffering, and likely death would follow. Anyone who visits Tuol Sleng, as the author did in 2006, can attest to the overpoweringly coercive and oppressive atmosphere of the setting. On the other hand, the Torture Convention recognizes a spectrum of abusive interrogation, ranging from cruel, inhuman and degrading treatment on one side to outright torture on the other. While the Convention prohibits both types of abuses, the distinction between the two is important, as the Convention's exclusionary rule by its terms only applies to the latter, a point recently highlighted by England's highest court in *A and Others v. Secretary of State for the Home Department.*

1. *Torture Verses Cruel, Inhuman, and Degrading Treatment*

The preliminary biographical information from the Tuol Sleng interrogations resulted from psychological pressure immediately before obvious physical abuse was going to commence. The principle question here is whether the knowledge that actual physical torture was about to begin is of sufficient gravity to constitute the level of mental pain and suffering that constitutes torture, thus triggering the Torture Convention's exclusionary rule. The Torture Convention defines torture as an act that is intentionally inflicted on a person by which *severe* pain or suffering, either physical or mental, is used to obtain information from that person.

The leading case focusing on the distinction between torture and cruel, inhuman or degrading treatment is *Ireland v. United Kingdom*, decided by the European Court of Human Rights in 1978. In that case, the European Court found that the five techniques in question (wall standing, hooding, subjection to noise, deprivation of sleep, and reduced diet) constituted cruel, inhuman and degrading treatment, but did not rise to the level of torture under the European Convention. In subsequent cases, the European Court for Human Rights has been extremely reluctant to attach what it calls the "special stigma to deliberate inhuman treatments causing very serious and cruel suffering" which accompanies a finding of "torture." In *Soering v. United Kingdom,* for example, the court determined that waiting on death row with the ever-present specter of death hanging over one's head created "mounting anguish" constituting cruel, inhuman and degrading treatment, but did not amount to torture. If the fear of impending death at issue in *Soering* is viewed as analogous to that with which the Tuol Sleng detainees were faced during their preliminary questioning, than the biographical information obtained from the Tuol Sleng detainees would not be barred by the Torture Convention's exclusionary rule.

In more recent cases, however, the European Court of Human Rights appears to have lowered its very high threshold for finding "torture." Thus, in the 1996 case of *Aksoy v. Turkey*, the European Court determined that subjecting the accused to prolonged hanging by the arms, which resulted in temporary paralysis of both arms, constituted torture; in the 1997 case of *Aydin v. Turkey*, the European Court found that rape by an official during incarceration constituted torture; and in the 1999 case of *Selmouni v. France*, the European Court found that blows to the body, sexual humiliation, and threats of bodily harm with a blowtorch constituted torture. In making these determinations, the European Court stated that the European Convention (which contains the same definition of torture as the Torture Convention) was a "living instrument" and that the *Ireland v. United Kingdom* severity test must be adapted to reflect contemporary understanding and evolution of the law."

Also relevant is the case law of the Inter-American Commission and Court of Human Rights, which have applied a lower threshold for finding torture than the European Court of Human Rights did in the case of *Ireland v. United Kingdom*. They have found the following measures to constitute torture: "prolonged incommunicado detention, keeping detainees hooded and naked in cells, interrogating them under the drug pentothal, holding a person's head in water until the point of drowning, standing or walking on top of

individuals, cutting with pieces of broken glass, putting a hood over a person's head and burning him or her with lighted cigarettes, rape; mock burials, mock executions, beatings, deprivation of food and water, threats of removal of body parts, and death threats."

The UN Human Rights Committee has found similar acts or conduct to constitute torture, including: electric shocks, mock executions, forcing prisoners to remain standing for extremely long periods of time, and holding persons incommunicado for more than three months while keeping that person blindfolded with hands tied together resulting in limb paralysis, leg injuries, substantial weight loss, and eye infection. The UN Special Rapporteur on Torture has listed several acts determined to be torture, including beating; extraction of nails or teeth; burns; electric shocks; suspension; suffocation; exposure to excessive light or noise; sexual aggression; prolonged denial of rest or sleep, food, sufficient hygiene, or medical assistance; total isolation and sensory deprivation; and simulated executions.

While the trend in the case law of human rights bodies reflects a lowering of the threshold for finding torture, it is not clear that preliminary questions prior to commencement of a torture session would meet even the reduced standard, unless death was explicitly or implicitly threatened during the preliminary questioning.

2. ***An Analogy to the Booking Questions Exception under the Miranda Rule***

The Torture Convention's exclusionary rule was designed to prevent torture-induced confessions or other substantive information from being used in judicial proceedings. In distinguishing the biographical information elicited from the Tuol Sleng detainees from their subsequent torture-induced statements, an analogy might be made to the "booking questions" exception under the American "Miranda Rule."

The Supreme Court's opinion in *Miranda v. Arizona* established the basic guidelines for protecting a suspect's rights by requiring certain procedural safeguards during a custodial interrogation. Similar to the exclusionary rule of the Torture Convention, in the United States, statements made in violation of the Miranda safeguards are deemed inadmissible in court. The *Miranda* rule applies when a person in custody is subjected to either "express questioning or its functional equivalent." The functional equivalent to express questioning refers to "any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Notably, courts in the United States have determined that the *Miranda* rule does not apply to information gained from "routine" booking questions. Such questions involve requesting information for basic identification purposes to secure the "biographical data necessary to complete booking" of the accused regardless of whether it occurred during custodial interrogation. U.S. courts have distinguished questions intended to elicit mere biographical data from lines of questioning intended to yield substantive evidence.

Similarly, the Tuol Sleng statements which the Cambodia Tribunal is interested in using were elicited at an early stage of the interrogations and are biographical in nature. The interrogators' preliminary questions were not intended to establish the guilt or innocence of those being interrogated, but rather were merely an attempt to gain basic background information. The analogy is not perfect, however, since evidence about the command structure of the Khmer Rouge may cross the line from processing information, identifying the detainee, to substantive testimonial evidence because it is disclosing the names of the detainee's superiors and colleagues.

3. Should the Exclusionary Rule Apply to Cruel, Inhuman and Degrading Treatment as well as Torture?

The original draft of the Torture Convention had provided that "Each State Party shall ensure that any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment shall not be invoked as evidence against the person concerned or against any other persons in any proceedings." However, at the suggestion of the United Kingdom, Austria, and the United States, the final text of what would become Article 15 of the Convention was substantially narrowed, by deleting the phrase "or other cruel, inhuman or degrading treatment," and inserting the phrase "except against a person accused of obtaining that statement by torture."

Although the final wording of Article 15 mentions only evidence obtained by torture, and not evidence procured by cruel, inhuman or degrading treatment, the U.N. has subsequently sought to expand the scope of the exclusionary rule through *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, which was approved by the U.N. General Assembly and adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in September 1990. Principle 16 requires prosecutors to refuse to use as evidence statements obtained "by torture or other ill treatment except in proceedings against those who are accused of using such means."

Four years later, when the International Criminal Tribunal for the Former Yugoslavia was established, the judges adopted a rule rendering inadmissible evidence which was "obtained directly or indirectly by means which constitute a serious violation of internationally protected human rights" – a phrase broad enough to apply to both torture and cruel, inhuman or degrading treatment. The rule was amended in 1995, and now reads: "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings." According to the Tribunal's second Annual Report, "The amendment to Rule 95, which was made on the basis of proposals from the Governments of the United Kingdom and the United States, puts parties on notice that although a Trial Chamber is not bound by national rules of evidence, it will refuse to admit evidence – no matter how probative – if it was obtained by improper means." Subsequently, similar

provisions were included in the rules governing the proceedings of the Rwanda Tribunal, the Special Court for Sierra Leone, the East Timor Tribunal, and the International Criminal Court.

It is noteworthy that the Cambodia Tribunal adopted a much narrower exclusionary rule than is present in the rules of the other international war crimes. Even if it had adopted the approach of the other international war crimes tribunals, however, it is significant that the rules of the various Tribunals do not automatically require exclusion of evidence obtained by techniques deemed to fall short of torture but to constitute cruel, inhuman, or degrading treatment. Rather, under what one noted commentator calls "the flexibility principle," the way the exclusionary rules of the other tribunals are written suggest that the Cambodia Tribunal should examine all of the circumstances of the case within the context of the purposes behind the exclusionary rule, including the fact that the Tuol Sleng biographical statements are corroborative (suggesting reliability) and are being used against the regime that committed the torture.

4. Application of the Doctrine of Necessity

Even if the Torture Convention's exclusionary rule were interpreted in light of subsequent developments to apply not only to torture but also to cruel, inhuman and degrading treatment, the Tuol Sleng evidence might nonetheless be admissible under the international law doctrine of "necessity." The doctrine is set forth in Article 33 of the International Law Commission's Draft Articles on State Responsibility, which provides:

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless: (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and (b) the act did not seriously impair an essential interest of the State toward which the obligation existed.
2. In any case, a state of necessity may not be invoked by a State for precluding wrongfulness: (a) if the international obligation with which

> the act of the State is not in conformity arises out of a peremptory norm of general international law; or (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or (c) if the State in question has contributed to the occurrence of the state of necessity.

The International Court of Justice affirmed in the *Gabcikovo-Nagymaros* case of 1997, and again in its *Advisory Opinion on Construction of a Wall* in 2004, that the doctrine of necessity as reflected in Article 33 constitutes customary international law.

In the instant case, the threshold question would be whether the use of the Tuol Sleng evidence is necessary to safeguard an essential interest. The successful prosecution of the former Khmer Rouge leaders is seen as essential to transitioning Cambodia to a country that respects the rule of law, to avoiding outbreaks of vigilantism, and to deterring the commission of future atrocities in the country. These are unquestionably significant interests.

The next step is to determine whether the threat to the State's interest rises to the level of grave and imminent peril. If the Cambodia Tribunal cannot successfully prosecute the former Khmer Rouge leaders without the Tuol Sleng evidence, then the entire project of establishing accountability for the Khmer Rouge atrocities may be in imminent jeopardy.

Third, even if exclusion of the Tuol Sleng evidence threatens an essential interest, a necessity claim will nonetheless fail unless the State had no lawful alternative available to protect the essential interest. In other words, "the peril must not have been escapable by any other means, even a more costly one, that could be adopted in compliance with international obligations." Investigators have opined that there are no available witnesses or documents that can paint a complete picture of the Khmer Rouge command hierarchy in the way the Tuol Sleng biographies do. Moreover, it is unlikely that any of the principal defendants can be induced to provide such information through the promise of a reduced sentence. Thus, there are no feasible alternatives to using the Tuol Sleng evidence.

Fourth, the doctrine of necessity requires a balancing of the interests in successfully prosecuting the Khmer Rouge leaders against the interest in generally deterring the use of torture to obtain evidence for use in judicial proceedings. An argument based on necessity will only succeed if the Tribunal decides that the former outweighs the latter. As one of the members of the British House of Lords (Britain's High Court) observed in *A and Others v. Secretary of State for the Home Department,* sometimes "the greater public good … lies in making some use at least of the information obtained [by ill-treatment], whether to avert public danger or to bring the guilty to justice."

Even if all the preconditions for the necessity doctrine set forth in Article 33(1) are satisfied, the doctrine cannot be used if one of the three exceptions set forth in Article 33(2) applies. First, the doctrine may not be invoked if doing so would violate a *jus cogens* norm, an issue that will be dealt with in detail below. Second, the doctrine is not available "if the issue of the competing values has been previously foreclosed by a deliberate legislative choice." The Torture Convention provides in Article 2: "No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." This non-derogation clause, however, applies only to torture. While State Parties must "undertake to prevent" cruel, inhuman, or degrading treatment, the "no exceptional circumstances" provision does not explicitly apply to such conduct. Thus, if the preliminary questioning at Tuol Sleng is deemed to be "inhuman or degrading treatment" but not "torture," then the language of the Convention does not foreclose reliance on the doctrine of necessity to justify admission of the evidence.

Finally, the doctrine is inapplicable in a "case in which the State invoking the state of necessity has, in one way or another, intentionally or by negligence, contributed to creating the situation it wishes to invoke as justification of its non-fulfillment of an international obligation." The situation does not arise out of any negligence of the Cambodia Tribunal's prosecutors or investigative judges, but because the Khmer Rouge regime made it a policy not to document its command structure and, with the exception of the Tuol Sleng biographies, the Khmer Rouge regime destroyed all of the evidence that could be used to prove command responsibility or joint criminal enterprise liability.

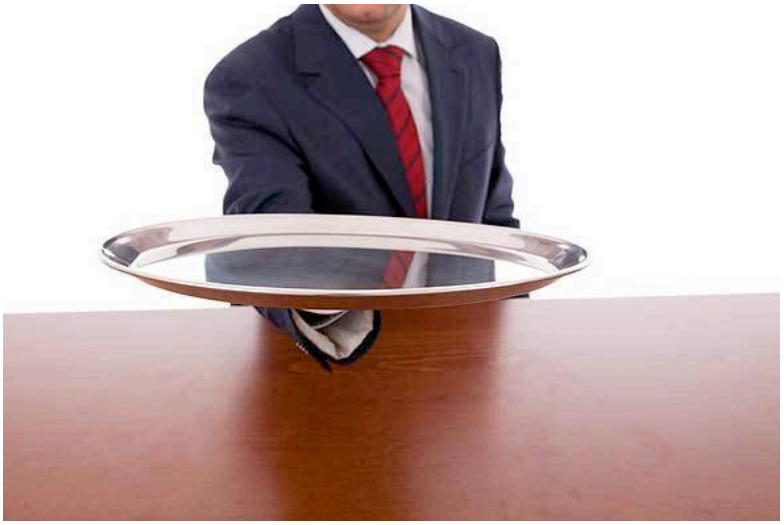
States have cited the necessity doctrine to justify departures from various human rights obligations in cases involving essential interests. For example, in 1995, when 50,000 Rwandan refugees and local Burundis fled to the border of Tanzania seeking safety after gunmen attacked a refugee camp in northern Burundi, Tanzania invoked the necessity doctrine as justification for deploying its army to keep the refugees from crossing into Tanzania in violation of its obligations under the Refugee Convention. Citing the necessity doctrine, both Israel and the United States have used the "ticking bomb" scenario to justify subjecting suspected terrorists to harsh interrogation techniques that fall short of actual torture but may constitute cruel, inhuman, or degrading treatment. This argument has been subject to much criticism, however, and human rights bodies have opined that notwithstanding the language of the Torture Convention, it should be interpreted as disallowing the necessity defense for cruel, inhuman, or degrading interrogation techniques, as well as for torture. It is therefore unlikely that courts would recognize a necessity exception to Torture Convention Exclusionary Rule.

B. An Exception for Evidence Obtained by Third Parties

Even assuming that the Tuol Sleng biographical statements were the product of actual torture, or that the torture evidence exclusionary rule should be read to apply to evidence obtained through cruel, inhuman or degrading techniques that fall short of torture,

this section analyzes whether the evidence should nevertheless be admitted on the grounds that the Tribunal's personnel were not involved in the unlawful interrogations.

1. The Silver Platter Doctrine



Since the exclusionary rule is based largely on the principle of deterring the misconduct of the state's authorities, the rule has generally been applied only when the state's authorities are themselves involved in the breach. As the U.S. Supreme Court has said, "[i]t is well established, of course, that the exclusionary rule, as a deterrent sanction, is not applicable where a private party or a foreign government commits the offending act." This has become known in the United States as the "international silver platter doctrine," which applies to evidence supplied by foreign authorities unless "the United States agents' participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials."

There is a compelling argument for applying the silver platter doctrine to the Cambodia Tribunal. Since the authorities seeking to use the Tuol Sleng evidence (the international Co-Prosecutors) are part of a separate legal system than the authorities that procured the statements by torture (the Khmer Rouge regime), there is no deterrent value to excluding the evidence from proceedings before the Cambodia Tribunal. The regime that employed torture is in no way benefiting from its misconduct; rather the evidence is being used against the regime's former leaders in their prosecution by a war crimes Tribunal established by the United Nations.

Moreover, application of the silver platter doctrine by the Cambodia Tribunal would be consistent with the case law of other U.N.-established war crimes tribunals. Although they have not dealt squarely with the question of the admissibility of torture evidence, both the International Criminal Tribunal for the former Yugoslavia and the

International Criminal Tribunal for Rwanda have applied a version of the silver platter doctrine to admit evidence obtained in violation of attorney-client privilege, through warrantless searches, or through illegal wiretaps where the Tribunal's personnel or agents were not involved in the breaches. Thus, in refusing to exclude unlawful wiretap evidence obtained by Bosnian authorities, the Yugoslavia Tribunal stated: "[t]he function of this Tribunal is not to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence."

Some courts, however, apply an exception to the international silver platter doctrine where the acts of the foreign authorities "shock the judicial conscience." A leading case is *United States v. Fernandez-Caro*, in which the U.S. federal court found that the conduct of Mexican police "shocked the conscience" and therefore excluded statements that the Mexican police had obtained by severely beating the defendant, pouring water through his nostrils while he was bound and gagged, and applying electrical shocks to his wet body. The reason for this exception is that in addition to serving a deterrent function, the torture evidence exclusionary rule serves an important secondary function: to preserve the integrity of the judicial process and the honor of the judicial system.

In deciding not to apply the silver platter doctrine to torture evidence procured by foreign authorities in the case of *A and Others v. Secretary of State for the Home Department,* the British House of Lords stressed that "the rule must exclude statements obtained by torture anywhere, since the stain attaching to such evidence will defile [the] court whatever the nationality of the torturer." As two of the Law Lords in that case put it, "torture is torture whoever does it." Yet, that is not exactly true, since the Torture Convention does not apply to the conduct of private parties. Therefore, the exclusionary rule cannot really be justified on the grounds that a court can never admit torture evidence without degrading the administration of justice, since evidence obtained from private acts of torture would not be excluded by the Torture Convention, though using such evidence would seem to be equally defiling.

It is also noteworthy that the defendant in *Fernandez-Caro* was merely charged with narcotics trafficking in a domestic court and the petitioners in *A and Others v. Secretary of State for the Home Department* were alleged to have been part of a terrorist organization by an immigration court. In contrast, international war crimes tribunals have balanced the gravity of the alleged crimes against the severity of the mistreatment of the defendant in fashioning an appropriate remedy. Thus, in *The Prosecutor v. Nikolic*, the Appeals Chamber of the Yugoslavia Tribunal, departing from the approach of the European Court of Human Rights and numerous national courts, declined to dismiss a case where it was established that individuals in collusion with the NATO-led Stabilization Force in Bosnia had abducted and mistreated the defendant in violation of human rights law. Although the *Nikolic* case did not deal specifically with the admission of evidence gained by torture, by analogy it suggests that the Cambodia Tribunal could follow a more flexible approach in light of the fact that the defendants have been charged with the gravest crimes known to mankind by an international war crimes tribunal. The Tribunal could, for

example, deal with the problem of using third-party torture evidence by expressly discounting the weight to be accorded it, rather than excluding it altogether.

C. An Expanded Exception for Cases against the Torturer

1. Cannons of Statutory Construction and Principles of Treaty Interpretation

Article 15 of the Torture Convention contains a specific exception to the general prohibition of admitting evidence obtained from torture. The exception permits evidence gained from torture to be used "only against a person accused of torture as evidence that the statement was made." This exception was inserted during the final stages of the negotiation of the Convention at the urging of the United Kingdom, Austria, and the United States. According to Burges and Danelius, the leading authorities on the negotiating history of the Convention, the purpose of the exception to the exclusionary rule was "not to prove that the statement is a true statement," but to prove that a statement was said under torture.

The inclusion of this single specific exception would ordinarily trigger the cannon of statutory construction known as *expressio unius exclusio alterius,* meaning the inclusion of one thing implies the exclusion of another. In the case of the Torture Convention, the maxim would mean that a court should presume that since the drafters decided to include a single, specific exception to the exclusionary rule, they must have intended to exclude all other possible exceptions.

On its face, *expressio unius* supports the contention that there can be but one narrow exception to the Torture Convention's exclusionary rule, namely that evidence gained from torture can be used to prove the existence of torture in a case against the torturer. The Tuol Sleng evidence would not be admissible under this narrow exception for two reasons: first, it would be used against high ranking members of the Khmer Rouge regime rather than the actual Tuol Sleng torturers; and second, it would be used to provide details about the command structure of the Khmer Rouge regime rather than to prove that the victims were tortured at Tuol Sleng.

However, *expressio unius* is limited by context, as when strict adherence to the text in a given case will lead to an absurd or unreasonable result. According to the Vienna Convention on the law of Treaties, which is the codification of the law of treaty interpretation, treaties "shall be interpreted in good faith in the light of their object and purpose." In the instant case, strict adherence to a literal construction of Article 15 could convert the Torture Convention into a shield to protect high-ranking members of the Khmer Rouge from successful prosecution for committing acts of torture -- a result that would frustrate the object and purpose of the Convention. To avoid this unreasonable result, the limitation to the *expressio unius* maxim could be used to support a broader interpretation of the exception in Article 15, one that would permit the use of evidence of

the command hierarchy obtained by torture to be used in a case against the regime superiors who were responsible for the policy of torture and other atrocities.

The leading case that illustrates application of the limitation to the *expressio unius* maxim is *Church of The Holy Trinity v. United States*. In *Holy Trinity,* an Episcopal Church in New York City petitioned the United States Supreme Court to overturn its conviction for hiring an English citizen as rector, in violation of the Alien Contract Labor Act. Under the Alien Contract Labor Act, it was unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States for the purposes of labor. Despite its broad language, the actual purpose of the Alien Contract Labor Act was only to prevent an influx of unskilled labor into the United States. In overruling the petitioner's conviction for violating the Alien Contract Labor Act, the Supreme Court made two important points: First, the Court noted: "[a] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." Second, the court observed: "[i]f a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."

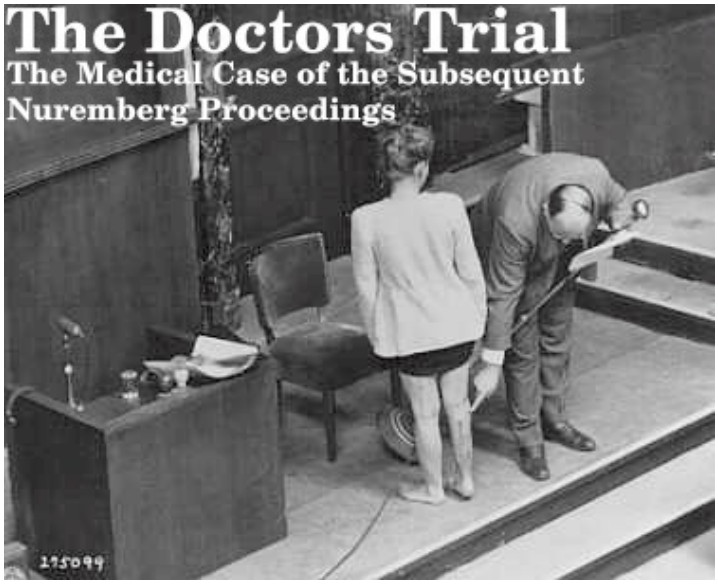
Applying these principles -- first that a statute or treaty may contain language that is specific and yet undermines its purpose, second that a treaty is to be interpreted in light of its object and purpose, and third, that literal construction that leads to an unreasonable conclusion is to be avoided -- the exception contained in Article 15 of the Torture Convention could be interpreted to permit admission of the Tuol Sleng evidence in order to establish the command structure of the Khmer Rouge. If it is permissible under Article 15 to use evidence obtained through the use of torture against those that committed the torture to prove the torture occurred, then it should also be permissible to use the same evidence against those higher up in the chain of command that were responsible for the policies resulting in the torture, especially where there is no other evidence available for this purpose. Rather than undercut the deterrent function of the torture evidence exclusionary rule, this interpretation will provide an added incentive for regimes to forego torture. If the members of the leadership of a regime know that evidence derived through the use of torture can be used against them, it will be a more difficult decision for them to sanction the use of torture.

Support for this expanded interpretation of Article 15 may be found in the subsequent practice of the members of the United Nations, consistent with Article 31(3)(b) of the Vienna Convention on the Law of Treaties. As mentioned above, three years after the Torture Convention entered into force, the United Nations General Assembly approved *The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 16 of which requires prosecutors to refuse to use as evidence statements obtained "by torture or other ill treatment except in proceedings against those who are accused of using such means." This subsequent reformulation of the exception to the torture evidence exclusionary rule drops the strict requirement that the statements can

only be used "as evidence that the statement was made," thus permitting the use of evidence obtained by torture for any purpose in a case against those responsible for the torture.

2. An Analogy to the Use of Unethically Obtained Medical Data

The main argument against broadening the interpretation of Article 15 of the Torture Convention to permit the use of torture evidence to establish command responsibility or joint criminal enterprise liability in a case against the leaders responsible for torture is that as a matter of morality a court should never use such tainted evidence, regardless of its reliability or the public need. During the discussions at the judicial training sessions in Phnom Penh, an analogy was drawn to the controversy over whether the data from the infamous Nazi medical experiments during World War II could subsequently be used to help save lives or benefit society.



Following World War II, twenty-three leading Nazi doctors were tried for participating in crimes against humanity by the American Military Tribunal at Nuremberg. The Nuremberg "Doctors Trial" revealed evidence of sadistic human experiments conducted without the consent of the victims at the Dachau, Auschwitz, Buchenwald and Sachsenhausen concentration camps. These included freezing experiments where subjects were forced to remain in a tank of ice water for periods of up to three hours and then re-warmed; phosgene gas experiments where subjects were exposed to various concentrations of the poison gas and then autopsied; malaria experiments where subjects were deliberately infected with malaria to investigate immunization procedures; sulfanilamide experiments where subjects were deliberately wounded, infected with bacteria such as streptococcus, tetanus, and gangrene, and then treated with sulfanilamide to determine its effectiveness; and typhus experiments where subjects were deliberately infected with spotted fever virus.

The Nazi doctors defended their actions by arguing that first, human experimental research was necessary during war; and second, that prisoners were frequently used as research subjects around the world. At the conclusion of the eight-month-long trial, the Tribunal rejected these defenses and convicted sixteen of the Nazi doctors, sentencing seven to death.

In addition to documenting these atrocities, the primary legacy of the Doctors Trial has come to be known as the "Nuremberg Code" -- a judicial codification of ten prerequisites for the moral and legal use of human beings in medical experiments. The most important of these is the requirement of informed and voluntary consent, which was subsequently codified in the International Covenant on Civil and Political Rights. It is noteworthy, however, that the Nuremberg Tribunal did not consider the possible future use of Nazi medical data, and neither the Nuremberg Code nor the Covenant on Civil and Political Rights stipulate that the data from the Nazi experiments must never be used or cited in the future. Moreover, although the Prosecutor and prosecution witnesses at Nuremberg convincingly argued that the Nazi methods were inefficient, unscientific, and unsystematic, and that "the experiments performed added nothing of significance to medical knowledge," in subsequent decades, researchers who have examined the Nazi data have opined that "at least some data might provide [useful] information unobtainable from ethical research." Since the Doctors Trial, at least 45 articles in reputable medical journals have included data from the Nazi medical experiments. According to Arthur Caplan, Director of the Department of Medical Ethics at University of Pennsylvania, over the years the data from the Nazi medical experiments "have been studied, cited, and absorbed into mainstream science with little comment."

The debate made front-page news, however, in 1988 when Robert Pozos, Director of the Hypothermia Laboratory at the University of Minnesota School of Medicine, sought to analyze for publication the Nazi doctor Sigmund Rascher's freezing and re-warming data, which Pozos felt filled an important void in modern hypothermia research, saying "it could advance my work in that it takes human subjects farther than we're willing." In these experiments, the Nazi doctors, who were trying to increase the survival rates of Luftwaffe pilots shot down over the North Sea, immersed Dachau concentration camp subjects into vats of ice water at sub-zero temperatures. As the prisoners excreted mucus, fainted and slipped into unconsciousness, Rascher's assistants meticulously recorded the changes in their body temperature, heart rate, muscle response, and urine. In experimenting with re-warming techniques on these victims, Rascher documented that re-warming in hot liquids was, contrary to the popularly accepted method of slow passive re-warming, the most efficient means of revival. When Dr. Pozos sought to republish the Nazi data in the *New England Journal of Medicine*, however, the Journal's Editor-in-Chief, Arnold Relman, publicly refused to publish Pozo's article.

The issue made national headlines again a year later, when the Environmental Protection Agency (EPA) was promulgating air quality regulations for "phosgene," a toxic gas used in the manufacture of pesticides and plastic across the United States. The gas was

also believed to be in the arsenal of Iraqi leader Saddam Hussein. The EPA scientists used animal experiments to predict the effect of the gas on humans, since there was no human data available to them. Todd Thorslund, Vice President of ICF-Clement, an environmental consulting firm that was assisting the EPA, suggested using the Nazi data from their experiments on fifty-two French prisoners who were subjected to the toxic gas in an effort to develop a means of protecting the German soldiers against chemical weapons. However, after receiving a letter signed by twenty-two EPA scientists protesting the use of Nazi data, the EPA Chief Administrator, Lee Thomas, decided that the agency should not even review the records from the Nazi experiment -- even if the Nazi phosgene data could potentially have saved lives of residents living near manufacturing plants or American troops stationed in the Persian Gulf.

On one hand, there are those like Arnold Relman and Lee Thomas who believe that "when the medical profession uses Nazi data, [as] when a court of law uses tainted evidence, legitimacy is indirectly conferred upon the manner by which the data/evidence was acquired." Analogizing the use of Nazi data to the inadmissibility of unconstitutionally obtained evidence, Harvard Medical School ethicist Henry Beecher stated, "this loss it seems, would be less important that the far reaching moral loss to medicine if the data were to be published."

Yet there are numerous exceptions to the American exclusionary rule, and other medical researches say they would like to use the Nazi data, partly to "salvage some good from the ashes." As lawyer and medical ethicist Baruch Cohen explains, "[a]though the data is morally tainted and soaked with the blood of its victims, one cannot escape confronting the dreaded possibility that perhaps the [Nazi] doctors actually learned something that today could help save lives or benefit society. … Absolute censorship of the Nazi data does not seem proper, especially when the secrets of saving lives may lie solely in its contents. … When the value of the Nazi data is of great value to humanity, then the morally appropriate policy would be to utilize the data, while explicitly condemning the atrocities."

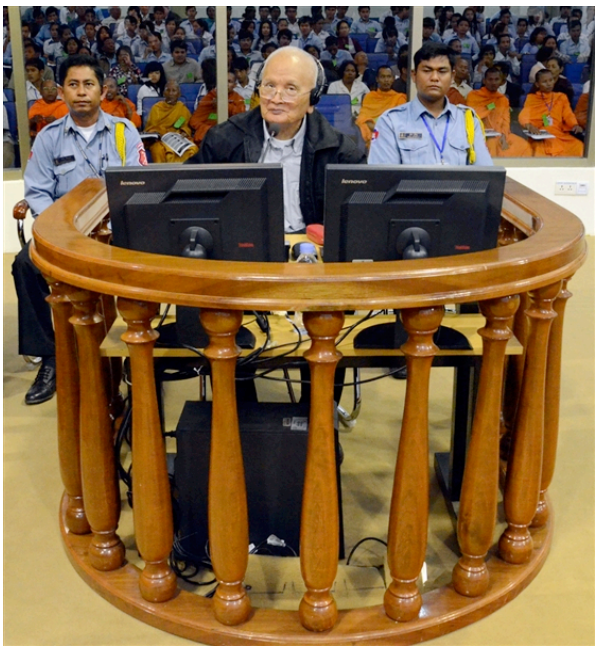
In considering Cohen's proposition, one should view the issue of Nazi medical research within the broader context of other uses of unethically obtained medical data for the public good. For example, even as the Nuremberg Tribunal was passing judgment on the Nazi doctors, a number of their colleagues were being recruited by the United States military via "Project Paperclip," through which the United States exploited the knowledge obtained through Nazi medical experiments by bringing these scientists to the United States to continue their work for government and private science facilities. The Nazis were not the only ones conducting unethical medical experiments during the war. The Japanese conducted biological warfare experiments on Allied prisoners at a site called Unit 731. Rather than prosecute these medical researchers at the post-war Military Commissions in Tokyo, the United States government granted them immunity in return for the data derived from their experiments. At the same time, the Australian Armed Forces Command conducted mustard gas and phosgene experiments on Australian soldiers to

develop effective protective gear for gas warfare. Meanwhile, British physicians deliberately infected Jewish refugees with malaria while interned in refugee camps in Australia in an effort to create a vaccine to protect British soldiers fighting on the Pacific front.

Nor has the use of unethically obtained medical data been confined solely to wartime. For example, from 1932 through 1972, physicians of the U.S. Public Health Service conducted the so-called "Tuskegee Syphilis Study," in Macon County Alabama, involving 399 African Americans afflicted with syphilis. Though the subjects thought they were under the medical care of the U.S. Public Health Service, they were not informed of the nature of their illness, that they were participating in an experiment to study the natural history of untreated syphilis, or that a potent treatment – penicillin – was available. Similarly, in the late 1940s and early 1950s, the United States tested new polio vaccines on institutionalized mentally retarded children. And in 1994, the U.S. Government acknowledged that during the Cold War, over 23,000 Americans, including prisoners and mental patients, had been involved in at least 1,400 different studies involving un-consented radiation experimentation. The objective of these experiments was to measure the biological effects of radioactive materials, including plutonium, whether injected, ingested, or inhaled, in order to develop ways to survive nuclear war. In the present decade, U.S. physicians have tested experimental AIDS vaccines on unwilling and uninformed patients in Africa. Despite criticism that these vaccine trials violate the Nuremberg Code, the general scientific community views this work as the most likely hope for stemming the global epidemic.

All of these cases are deplorable, and in using the data from these unethical medical studies the scientific community should provide more than a simple disclaimer. Medical ethicists propose that such tainted data should only be used "in circumstances where the scientific validity is clear and where there is no alternative source of information." Further, "the capacity to save lives must be evident," and "citations to the data must be accompanied with the author's condemnation of the data as a lesson in horror and as a moral aberration in medical science." These criteria would seem to be equally useful in the context of the admission of torture evidence in cases against leaders accused of crimes against humanity under an expanded interpretation of Article 15 of the Torture Convention.

III. Conclusion



Using the evidentiary challenge facing the Cambodia Tribunal as a case study, this article has established that there are several compelling arguments that could be made to justify the admission of statements obtained by torture or cruel, inhuman and degrading treatment under certain circumstances that go beyond the literal text of the narrow exception to the exclusionary rule contained in Article 15 of the Torture Confession. The aim of this article, however, was not to weaken the strong protections provided by the Torture Convention and its exclusionary rule, but instead to strengthen the Torture Convention itself. If Article 15 of the Convention is used as a bar to the successful prosecution of senior Khmer Rouge leaders, the purpose of the Torture Convention will not be served and respect for the Convention and the Cambodia Tribunal will be eroded.

The argument against judicial recognition of a broader reading of the exception to the Torture Convention's exclusionary rule rests on three assumptions: first, that exclusion of evidence obtained by torture is at all times necessary to render torture un-rewarding; second that exclusion is always warranted because evidence procured through torture is inherently unreliable; and third, that absolute exclusion is essential to protect the integrity of the judicial proceedings. The Tuol Sleng evidence at issue in this case study provides a severe test of those assumptions. Rather than undermine the deterrent function of the torture evidence exclusionary rule, admission of the Tuol Sleng biographical statements in cases against the leaders of the Khmer Rouge regime would provide an incentive for regimes to forego torture since regime leaders will know that evidence derived through the use of torture can be used against them. While confessions and other incriminating evidence obtained by torture are often unreliable, the thousands of biographical statements from the Tuol Sleng interrogations provided a great deal of corroboration with respect to information about the Khmer Rouge command structure and hierarchy, suggesting a high degree of reliability for that specific use. Finally, while some have argued that "the

admission of evidence obtained through the violation of human rights should be *per se* considered damaging to the integrity of the proceedings," this case study demonstrates why it is more appropriate to adopt a more flexible approach, taking into account such factors as the non-involvement of the Tribunal's personnel in the acts of ill-treatment; the fact that the evidence would be used against the regime leaders responsible for torture; the fact that the evidence is seen as crucial to successful prosecution; and the fact that the case involves charges of the gravest crimes known to humankind being tried by a tribunal established by the United Nations.

On the other hand, the author recognizes the wisdom in the adage "great cases, like hard cases, make bad law." There is clearly danger inherent in judicial recognition of any of the three exceptions to the torture evidence exclusionary rule that are examined in this article – the exception for preliminary biographical information, the exception for evidence obtained by third-parties, and the exception for evidence to be used against the leaders responsible for the torture. For, to paraphrase Justice Robert Jackson's dissent in *Korematsu v. United States*, once judicial approval is given to an exception to a fundamental principle of human rights, it "lies about like a loaded weapon ready for the hand of any authority" that can show an urgent need and bring forward a plausible claim. In particular, it is likely that if the Cambodia Tribunal applies one or more of these exceptions in justifying admission of the Tuol Sleng evidence, the precedent will subsequently be cited with respect to the admissibility of torture evidence in terrorism cases before military commissions and national courts across the globe.

To avoid pernicious use of these exceptions and to ensure that they are not applied in a manner that will undermine the purposes of the Torture Convention in future cases, four criteria should be satisfied before a court can consider evidence that was obtained by torture or cruel, inhuman or degrading methods of interrogation. First, evidence obtained by torture or cruel, inhuman and degrading means must never be used in a trial where the victim of such abuse is the defendant. Second, such evidence must never be used where the prosecuting authorities were directly or indirectly involved in the acts of ill-treatment. Third, evidence obtained through the use of such ill-treatment must not be considered unless it meets a high level of corroboration. Fourth, evidence derived from torture or cruel, inhuman or degrading treatment should not be admitted if, with reasonable efforts, the prosecution could obtain non-tainted evidence that would be effective in establishing criminal liability.

The first criterion, reflecting concerns about improper compulsion, recognizes that use of a defendant's confession which is extracted by torture or cruel, inhuman, or degrading treatment, would violate the defendant's right to a fair trial. In contrast, the Tuol Sleng evidence is sought for use not against the victims of the torture but rather against the leaders of the regime that committed the torture.

The second criterion is based on the international silver platter doctrine -- a doctrine which may be appropriate in cases involving the gravest crimes known to

mankind before international war crimes tribunals such as the Cambodia Tribunal. This criterion recognizes that the exclusion of torture evidence will not have a deterrent effect where the prosecuting authorities, themselves, were in no way involved in the acts of torture. Conversely, it recognizes that where there is involvement of the prosecuting authorities, admission of the evidence would render the court an accomplice in the torture and defile the judicial process.

The third criterion addresses one of the central concerns about the use of evidence derived from torture, namely the inherent unreliability of such evidence. In general, evidence obtained through torture is disdained, not only because of the immorality of using torture, but also because of the fact that an individual undergoing torture will answer in whatever manner the torturer wants. Thus, evidence obtained from the use of torture is often factually suspect. For this reason, evidence derived from torture must never be used unless there are strong indicia of its reliability, such as the extensive corroboration that exists in the case of the Tuol Sleng biographical statements. Even then, the court should explicitly give less weight to torture-induced statements than other types of evidence.

The fourth criterion recognizes that for moral reasons evidence obtained from torture must be used only as a last resort, when it is critical to proving criminal liability and there is no non-tainted evidence reasonably available that would serve the same purpose. Since there is no international version of the "fruit of the poisonous tree" doctrine, however, the investigative judges and prosecutors may use the torture evidence to lead to other evidence that will establish the same facts, which, if available, should be used instead of the torture evidence.

Finally, drawing from the debate concerning citations to unethically obtained medical data, if a tribunal or court were to admit evidence in a case that meets these criteria, it should specifically acknowledge that the evidence was obtained through torture or cruel, inhuman or degrading treatment, and would ordinarily have been excluded because of concerns about reliability, deterrence, and defiling the administration of justice. The Cambodia Tribunal is poised at the cutting edge of international criminal law. By applying this four-part test, and by acknowledging the tainted provenance of the evidence, the Cambodia Tribunal can simultaneously provide justice for the people of Cambodia and fulfill the promise of the Torture Convention.