THE FURUNDZIJA JUDGMENT AND ITS CONTINUED VITALITY IN INTERNATIONAL LAW

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I. INTRODUCTION

In the Roman Catholic tradition, the Mass community recites Confiteor, in which the Mass community generally acknowledges an individual's faults and pleas to Mary, the angels, saints, and others in the community to pray to God for that individual's forgiveness.1 One significant line of the Confiteor acknowledges faults "in what I have done, and in what I have failed to do."2 The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia's ("Yugoslavia Tribunal") landmark judgment in the Prosecutor v. Furundzija3 case not only ultimately addressed faults of what Anto Furundzija actually physically committed during a torture-filled interrogation in the Lašva Valley in Bosnia-Herzegovina in May 1993. The decision also addressed faults of what Furundzija failed to do as a military commander of a unit whose soldiers raped a Muslim woman and beat her Croatian friend in his presence while he continued his interrogating.

The Furundzija decision not only declared several significant holdings in the Yugoslavia Tribunal's jurisprudence, but expanded ac-
countability and liability for certain grave violations of international law, not only violations of commission, but of omission as well. First, the Yugoslavia Tribunal reaffirmed the Tadic Jurisdiction holding and found a state of armed conflict existed when the alleged interrogations, torture, and rape occurred. Second, the Yugoslavia Tribunal concretely affirmed that the crime of torture attained the status of a jus cogens (peremptory) norm of international law that allows no derogation by States in any circumstances. Third, the Yugoslavia Tribunal clarified the definition of rape under international law, and the Furundzija decision was Yugoslavia Tribunal's first decision to consider war crimes charges solely stemming from rape. Fifth and finally, the Yugoslavia Tribunal finely distinguished between "perpetrator" liability for torture and "aiding and abetting" liability for torture, and expanded the scope of "perpetrator liability" for torture to those individuals who may not have even physically participated in the infliction of severe physical or mental pain.

The landmark Furundzija decision is now over a decade old, but its legacy remains strong. In this Article, this Author not only addresses Furundzija decision's holdings and its implications in the international sphere, but specifically analyzes the Furundzija decision's legacy on United States domestic cases involving the Alien Tort Statute. The Alien Tort Statute provides that the "district courts shall have original jurisdiction of any civil action by an alien for a tort only,

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5. Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995). The Tribunal stated an armed conflict "exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State."
7. Id. ¶ 153.
8. Id. ¶ 185. The Tribunal defined the crime of rape as: "(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person."
10. Furundzija, Case No. IT-95-17/1 ¶¶ 256-257.
11. Id. ¶ 252.
12. Id. ¶ 256. "It follows, inter alia, that if an official interrogates a detainee while another person is inflicting severe pain or suffering, the interrogator is as guilty of torture as the person causing the severe pain or suffering, even if he does not in any way physically participate in such infliction. Here the criminal law maxim quis per alium facit per se ipsum facere videtur (he who acts through others is regarding as acting himself) fully applies." Id.
committed in violation of the law of nations or a treaty of the United States." 14 While Furundzija certainly contributed to the expansion of criminal liability under international law, its legacy is not only limited to the international criminal sphere, but applies to civil tort liability through the standard of "aiding and abetting" liability under the Alien Tort Statute. This Author argues that the adoption of Furundzija's "aiding and abetting" liability standard will make it more likely that individuals will be kept not only criminally responsible for their faults of commission, but of omission as well. In addition, the standard will keep private actors acting in a non-private capacity responsible in the United States for actions committed in concert with foreign governments that commit grave violations of the law of nations. With this legacy, Furundzija stands as one of the most important international judicial decisions of this generation.

II. THE LANDMARK FURUNDZIJA JUDGMENT

A. BACKGROUND

On July 3, 1992, the Croatian Community of Herzog-Bosna declared itself an independent political entity within the Republic of Bosnia and Herzegovina. 15 The Croatian Community of Herzog-Bosna's military units (the "HVO") soon engaged in conflict with the Army of Bosnia and Herzegovina ("ABiH") and began attacking mostly Bosnian Muslim villages in the Lašva River Valley. 16 Anto Furundzija, only in his early twenties, served as a local commander of a special unit of the HVO military police known as the "Jokers." 17

On April 16, 1993, fighting between the HVO and ABiH broke out in Vitez and Ahmici. 18 As such, the HVO searched apartments and houses in the region and subsequently expelled and detained prominent Muslim civilians from their homes. 19 Soon thereafter, two critical witnesses in the Prosecutor v. Furundzija 20 decision, Witness A (a Muslim woman who was tortured and raped) and Witness D (a Croatian soldier who the Jokers interrogated and tortured) were transported to and interrogated in Nadioci. 21

In mid-May 1993, Witness A was taken to the "Bungalow," which served as the Joker's headquarters, and into a room with forty

14. Id.
15. Furundzija, Case No. IT-95-17/1, ¶ 51.
16. Id.
17. Id.
18. Id. ¶ 54.
19. Id.
21. Id. ¶ 66.
Soon Furundzija entered the room and started interrogating Witness A, asking her about her children who the Jokers suspected were ABiH soldiers, her visits to the Muslim parts of Vitez, and the reason why certain Croats had assisted her when she was a Muslim. During the interrogation, a Joker drew his knife over Witness A and threatened to cut out her private parts if she did not cooperate. Furundzija grew upset with Witness A’s responses, and in Furundzija’s presence, the Joker, who had earlier threatened Witness A, subjected her to multiple rapes, sexual assaults, and physical abuse in the Bungalow.

After the events in the Bungalow, Witness A was taken to the pantry where she was confronted with Witness D. Furundzija interrogated both in the pantry, and he accused both of working for the ABiH. Witness D was then physically beaten during the interrogation. Witness A was raped, forced to perform oral sex on one of the guards, and also made to lick the penis clean of the guard, before collapsing of exhaustion.

B. CHARGES AND DEFENSES

On November 10, 1995, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (“Yugoslavia Tribunal”) charged Anto Furundzija with individual criminal responsibility for grave breaches of the Geneva Conventions and war crimes, including three individual counts of torture and inhumane treatment, torture, and outrages upon personal dignity including rape. On December 18, 1997, the NATO Stabilization Force in Bosnia-Herzegovina

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22. Id. ¶ 72.
23. Id. ¶ 82.
24. Id.
25. Id. ¶ 83.
26. Id. ¶ 84.
27. Id. ¶ 86.
28. Id.
29. Id. ¶¶ 87-88.
30. Id. ¶ 42. Article 7(1) of the Statute of the International Tribunal provides: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime.” Id.
31. Id. ¶ 43.
32. Id. ¶ 44. “The Prosecution contends that by his conduct under the factual circumstances alleged, the accused, acting in his official capacity as a uniformed soldier on duty, intentionally inflicted severe physical or mental pain or suffering on Witness A, a non-combatant, during an interrogation for the purpose of obtaining information and for the purpose of intimidation, thereby committing torture.” Id.
33. Id. ¶ 44. “The Prosecution further submits that the accused is individually criminally responsible for the alleged acts under article 4(2)(e) of Additional Protocol II to the Geneva Conventions . . . . which prohibits ‘outrages upon personal dignity, in
THE FURUNDZIJA JUDGMENT

("SFOR") arrested Furundzija and transferred him to the detention unit of the Yugoslavia Tribunal to await trial.\(^3\)

In response, the defense filed motions to dismiss two counts which the prosecution pursued on the ground that the Yugoslavia Tribunal lacked subject-matter jurisdiction for trial, arguing the Yugoslavia Tribunal had no jurisdiction because no armed conflict was present.\(^4\) The Trial Chamber denied the motions.\(^5\) On June 8, 1998, Furundzija's trial began with six prosecution witnesses testifying and four exhibits being admitted into evidence.\(^6\)

The defense's case-in-chief began on June 15, 1998, with two witnesses appearing for the case, including one expert witness, and twenty-two exhibits being admitted into evidence.\(^7\) The defense did not argue that the atrocities committed against Witness A and Witness D did not occur;\(^8\) rather, the defense argued that Furundzija did not witness the assaults and attacked the reliability of Witness A's memory of the events which occurred in the Bungalow and pantry.\(^9\)

C. THE FIRST HOLDING: REAFFIRMATION OF TADIC JURISDICTION DECISION

The defense contended the conflict between the Croatian Community of Herzog-Bosna's military units (the "HVO") and Army of Bosnia and Herzegovina ("ABiH") did not qualify as an "armed conflict" which was required to confer subject matter jurisdiction under the Statute of the International Tribunal.\(^10\) The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia ("Yugoslavia Tribunal") noted many violent acts that occurred in the Lašva River Valley region in April and May of 1993: a "concerted attack" by the HVO on the towns of Vitez and Ahmici on April 16, 1993,\(^11\) a forced removal and detainment of Muslims from their homes,\(^12\) and the arson committed on the house of one of the witnesses.\(^13\)

particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault." \(^14\) Id.

33. Id. \(\S\) 2.
34. Id. \(\S\) 3.
35. Id. \(\S\) 14, 43.
36. Id. \(\S\) 14.
37. Id. \(\S\) 17.
38. Id. \(\S\) 20.
39. Id. \(\S\) 68.
40. Id. \(\S\) 48.
41. Id. \(\S\) 47.
42. Id. \(\S\) 53.
43. Id. \(\S\) 54.
44. Id. \(\S\) 55.
The defense argued for a narrow view of "armed conflict," stating that no armed conflict existed because there were no front-line and military objectives present, but only that there were attacks by the HVO on civilians in the region.45 However, the Yugoslavia Tribunal applied the test from the Tadic Jurisdiction46 case, which recognizes an armed conflict exists where "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State,"47 and found "clear evidence" that in mid-May 1993 an armed conflict existed between the HVO and ABiH.48

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

The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia ("Yugoslavia Tribunal") next addressed the status of the prohibition against torture in international law. First, the Yugoslavia Tribunal stated the Geneva Convention of 1949 and two Additional Protocols to the Geneva Conventions explicitly prohibited torture during an armed conflict.49 In addition, the Yugoslavia Tribunal noted that Article 142 of the Penal Code of the Socialist Federal Republic of Yugoslavia domestically prohibited torture as a war crime.50 Furthermore, the Republic of Bosnia and Herzegovina's law punished such torture.51

With numerous treaties and domestic legislation as evidence, the Yugoslavia Tribunal held52 that the prohibition against torture had crystallized into a norm of customary international law.53 It particularly not only found almost universal participation by States to treaties prohibiting torture, but also examined state practice and found that no State has ever claimed the authority to practice torture in an armed conflict.54 In addition, the Yugoslavia Tribunal also held that

45. Id. ¶ 58.
48. Furundzija, Case No. IT-95-17/1 ¶ 59.
49. Id. ¶ 134.
50. Id. ¶ 136.
51. Id. ¶ 136.
52. Id. ¶ 138.
53. North Sea Continental Shelf (F.R.G. v. Neth.), 1969 I.C.J. ¶¶ 74-75 (February 20). To crystallize into a rule of customary international law, there must be consistent and extensive "State practice" to the rule in question and it must be followed also out of a sense of "legal obligation."
54. Furundzija, Case No. IT-95-17/1, ¶¶ 138, 140.
the prohibition against torture is a nonderogable, "absolute right" under international law.\(^5\)

Furthermore, the Yugoslavia Tribunal also noted that the prohibition against torture exhibits three important features: The prohibition (1) covers even "potential breaches," (2) imposes obligations \textit{erga omnes},\(^5\) and (3) has reached the status of \textit{jus cogens}\(^5\) in international law.\(^5\) First, the Yugoslavia Tribunal held that the prohibition against torture reached even potential breaches of the norm, declaring that "States are obliged not only to prohibit and punish torture, but also to forestall its occurrence."\(^5\) Subsequently, the Yugoslavia Tribunal also declared that the prohibition against torture imposed \textit{erga omnes} obligations upon States and conferred obligations and rights to all other States.\(^5\) Finally, the Yugoslavia Tribunal stated that the norm had evolved and acquired the status of \textit{jus cogens} and holds a higher rank than customary international law or even treaty law.\(^5\)

The Yugoslavia Tribunal then outlined the elements that constituted the crime of torture in international criminal law in a state of

\(^{55}\) Id. \(\S\) 144.

\(^{56}\) "\textit{Erga Omnes}" obligations refer to obligations States owe to the international community as a whole, as opposed to those owed to only another State. The term has been explained by the International Court of Justice as follows:

"When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising \textit{vis-à-vis} another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations \textit{erga omnes}.


\(^{57}\) "\textit{Jus cogens}" norms of international law are norms that are considered as "fundamental" or "cardinal" in the international legal system. The term has been defined by the International Court of Justice as follows:

"A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of \textit{jus cogens}.

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14, \(\S\) 190.

\(^{58}\) \textit{Furundzija}, Case No. IT-95-17/1 \(\S\) 147.

\(^{59}\) Id. \(\S\) 148.

\(^{60}\) Id. \(\S\) 151.

\(^{61}\) Id. \(\S\) 153.
armed conflict: Torture requires (1) an act or omission, which inflicts severe pain or suffering, either physical or mental; (2) the act or omission must be intentional; (3) the act or omission must be directed toward an impermissible purpose (such as obtaining of information or a confession, or punishing, humiliating, or coercing the victim or a third person); (4) the act or omission must be linked to an armed conflict; (5) at least one of the persons involved in the torture must be a public official or be acting in a non-private capacity.62

Examining the facts of the case and the definition of torture, the Yugoslavia Tribunal found that Furundzija was present both in the Bungalow and in the pantry while he interrogated Witness A while she was in a state of nudity.63 The Tribunal also found Furundzija had the intent to obtain information from Witness A that would benefit the Croatian Community of Herzog-Bosna's military units (the "HVO"),64 and also had that same intent to obtain information from Witness A by causing her severe physical and mental suffering.65 The Yugoslavia Tribunal therefore found Furundzija guilty as a co-perpetrator of Witness A's torture.66 The Yugoslavia Tribunal also made the same finding with regard to Witness D.67

E. THE THIRD HOLDING: THE CRIME OF RAPE IN INTERNATIONAL LAW

Despite finding no definition of rape in international law,68 the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia ("Yugoslavia Tribunal") found international treaty law prohibited rape in a time of war.69 Further, the Yugoslavia Tribunal found rape violated customary international law,70 and similar to torture was "... a violation of personal dignity, and rape in fact constitute[d] torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other persons acting in an official capacity."71

The Yugoslavia Tribunal noted that a trend could be found among States that have broadened the definition of torture to include acts,

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62. Id. ¶ 162.
63. Id. ¶¶ 264, 266.
64. Id. ¶ 265.
65. Id. ¶ 267.
66. Id. ¶ 267(i).
67. Id. ¶ 267(ii).
68. Id. ¶ 175.
69. Id. ¶ 165. The Tribunal noted that rape in a time of war is explicitly prohibited by the Geneva Conventions of 1949, Additional Protocol I of 1977, and Additional Protocol II of 1977. Id.
70. Id. ¶ 168.
71. Id. ¶ 176.
such as forcible oral penetration by the penis, which were once considered as less serious forms of sexual assault.\textsuperscript{72} It stated that forced oral penetration by the penis “constitutes a most humiliating and degrading attack upon human dignity.”\textsuperscript{73} The Yugoslavia Tribunal defined the elements of rape as: (1) sexual penetration of the vagina, anus, or mouth of the perpetrator by the penis or the vagina or anus of the victim by an object used by the perpetrator, and 2) by coercion or force or threat of force against the victim or a third party.\textsuperscript{74}

Applying this definition of rape, the Yugoslavia Tribunal held that Witness A was a rape and sexual assault victim and that these incidents occurred in Furundzija’s presence, while he conducted his interrogation.\textsuperscript{75} Since Furundzija did not personally rape Witness A, he could not have been considered a co-perpetrator to the rape.\textsuperscript{76} However, since Furundzija was present and continued his interrogation during Witness A’s rape and sexual assault, his presence “encouraged” the guard who raped Witness A and “substantially contributed” to the criminal acts committed by the guard.\textsuperscript{77} For these actions, the Yugoslavia Tribunal held Furundzija guilty as an aider and abettor pursuant to war crimes charges of outrages upon personal dignity, including rape.\textsuperscript{78}

F. \textsc{The Fourth Holding: Defining “Aiding and Abetting” Liability}

Finally, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (“Yugoslavia Tribunal”) examined whether Furundzija’s presence, during the assaults on Witness A and D, sufficiently constituted the \textit{actus reus} and \textit{mens rea} of “aiding and abetting” liability.\textsuperscript{79} The Yugoslavia Tribunal examined case law from several jurisdictions and found that the assistance required to establish aiding and abetting liability could be either physical or in the form of “moral support.”\textsuperscript{80} The Yugoslavia Tribunal held that the \textit{actus reus} of aiding and abetting liability “requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”\textsuperscript{81}

\begin{thebibliography}{99}
\bibitem{72} Id. \textsect 179.
\bibitem{73} Id. \textsect 183.
\bibitem{74} Id. \textsect 185.
\bibitem{75} Id. \textsect 270.
\bibitem{76} Id. \textsect 273.
\bibitem{77} Id.
\bibitem{78} Id. \textsect 275.
\bibitem{79} Id. \textsect 191.
\bibitem{80} Id. \textsect 229.
\bibitem{81} Id. \textsect 235.
\end{thebibliography}
The Yugoslavia Tribunal then faced the difficult question of the requisite \textit{mens rea} for aiding and abetting liability. Two options were present: One view stated that the accomplice must share the same \textit{mens rea} of the principal to meet the requisite \textit{mens rea} for aiding and abetting liability, while the other view stated that simple knowledge that one’s actions assist the perpetrator in committing the crime met the requisite \textit{mens rea}. The Yugoslavia Tribunal endorsed the latter view, noting that the aider and abettor need not have knowledge of the exact crime which was intended and how it would be committed. Instead, the aider and abettor needed only knowledge that a crime would probably be committed to have sufficient knowledge as an aider and abettor.

Perhaps most importantly, the Yugoslavia Tribunal outlined a fine distinction between “perpetrator” liability for torture and “aiding and abetting” liability. The Yugoslavia Tribunal stated that to find “perpetrator” liability, the individual who takes part in the torture needed only to partake in the “purpose” behind the torture and need not to have directly inflicted the torture. The Yugoslavia Tribunal stated in strong terms that since nation states so widely condemned the crime of torture that “all those who in some degree participate in the crime and in particular take part in the pursuance of its underlying purpose, are equally liable.” In contrast, an aider and abettor “must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place.” Therefore, the Yugoslavia Tribunal essentially adopted a position that those individuals who take part through a “direct participation” in torture would be held liable as principals.

G. Furundzija’s Conviction, Appeal, and Imprisonment

For his guilty conviction to the crime as a co-perpetrator to torture, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (“Yugoslavia Tribunal”) sentenced Furundzija to ten years imprisonment; the Yugoslavia Tribunal also sentenced Furundzija to eight years imprisonment for his guilty conviction as an aider and abettor to outrages upon personal dignity, with both convictions to be served concurrently. Furundzija appealed his conviction,
but the Yugoslavia Tribunal denied all grounds of appeal in 2000.90 On September 22, 2000, Furundzija was transferred to Finland from the Hague to serve the remainder of his sentence.91 After nearly seven years in prison, Furundzija received an early release on July 29, 2004.92

III. TORTURE UNDER INTERNATIONAL LAW

THE FURUNDZIJA JUDGMENT'S LEGACY

Significantly, Prosecutor v. Furundzija93 broadened the definition of torture under international law and affirmed its status as a *jus cogens* norm. This broadening of the definition of torture not only ensured that the lacuna present (the lack of a definition of torture) in the Statute of the International Tribunal94 ("Statute") would be filled, but also ensured the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia ("Yugoslavia Tribunal") would address and counteract one of the purposes of torture, which is often to humiliate the victim and degrade that victim’s fundamental human dignity. The Yugoslavia Tribunal’s *Furundzija* decision not only properly recognized faults and crimes of *commission*, but also those of *omission*. Thus, the Yugoslavia Tribunal placed responsibility on those individuals who have authority to stop the grave crime of torture from occurring in that individual's presence. Finally, and arguably most importantly, the Yugoslavia Tribunal’s statement of the prohibition against torture as a norm of *jus cogens* ensured that no international action, not even by international treaty, could ever legitimize the use of torture.

The international community generally agreed with the proposition that torture is abhorrent, repulsive, and contrary to the fundamental human dignity of the person. As the Yugoslavia Tribunal noted in its judgment,95 the United States Court of Appeals for the Second Circuit Court stated in its landmark *Filartiga v. Peña-Irala*96 decision that “the torturer has become, like the pirate and the slave

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92. Id.
96. 630 F.2d 876 (2d Cir. 1980).
trader before him, hostis humani generis, an enemy of all mankind.\textsuperscript{97} However, the question of jurisdiction over crimes of torture often arises under international law.

If one looked only at the Statute's text to address the question of jurisdiction over crimes of torture, the Yugoslavia Tribunal would not have jurisdiction because torture is not specifically prohibited under Article 3 of the Statute.\textsuperscript{98} However, the Yugoslavia Tribunal held that Article 3 constituted an "umbrella rule" that incorporated all rules of international humanitarian law, including the prohibition against torture.\textsuperscript{99} Thus, by giving full effect to the object and purpose of Article 3, the Yugoslavia Tribunal filled an inexplicable lacuna in the Statute, gave full effect to Article 3, and incorporated norms arising under customary international law, particularly those norms of a \textit{jus cogens} character which are binding upon all nation states.

Also importantly, the Yugoslavia Tribunal went beyond the Convention Against Torture's\textsuperscript{100} definition of torture when formulating a definition for international criminal law purposes. Article 1(1) of the Convention Against Torture defines torture as the following:

\begin{quote}
For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in his official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.\textsuperscript{101}
\end{quote}

However, Johan van der Vyver notes the Convention Against Torture only addresses state obligations and state actors.\textsuperscript{102} He also aptly remarks that "the prohibition of torture should not be limited to acts of torture committed only by state actors."\textsuperscript{103}
The Yugoslavia Tribunal noted that the International Criminal Tribunal for Rwanda ("Tribunal for Rwanda") in its *Prosecutor v. Akayesu*\(^\text{104}\) decision applied the definition outlined in the Convention Against Torture.\(^\text{105}\) If the Tribunal for Rwanda adopted the more restrictive definition of torture, which applied only to public officials, then a non-public official who acted in a non-private capacity would not fall within the definition of torture; in contrast, the definition of torture adopted by the Yugoslavia Tribunal in *Furundzija* foressees this exact situation of a private individual acting in a non-private capacity.\(^\text{106}\)

Moreover, by addressing humiliation in its definition of torture,\(^\text{107}\) the Yugoslavia Tribunal best addressed one of the more insidious purposes of torture, specifically that torture is not only an act which violates the physical integrity of the human person, but also has the insidious effect of humiliating and breaking down the victim's will and unique personality.\(^\text{108}\) European Court of Human Rights (the "Court") case law also affirmed the trend that actions which lead to a victim's humiliation and personality breakdown are recognized as torture.

Two Court cases illustrated this trend. In 1978, in *Ireland v. United Kingdom*,\(^\text{109}\) the Court examined the usage of "sensory deprivation" techniques, such as wall-standing, hooding, subjecting the victim to noise, and depriving the victim of sleep and food, before interrogations.\(^\text{110}\) The Court found these activities only constituted "cruel, inhuman or degrading treatment," not torture.\(^\text{111}\)

In contrast to the Court's decision in *Ireland v. United Kingdom*, more recent Court decisions affirm a broader definition of torture. To illustrate, in *Selmouni v. France*,\(^\text{112}\) the applicant endured physical blows which left marks on his body, was dragged by his hair, was urinated upon, and was threatened with a blowlamp and a syringe.\(^\text{113}\)

\(^{104}\) Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶¶ 593-94 (Sept. 2, 1998).

\(^{105}\) Prosecutor v. Furundzija, Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 147 (Dec. 10, 1998) (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶¶ 593-94 (Sept. 2, 1998)).

\(^{106}\) *Furundzija*, Case No. IT-95-17/1 ¶ 152.

\(^{107}\) Id. ¶ 162.


\(^{111}\) Id.


The Court noted the acts "were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance."\textsuperscript{114} In finding the \textit{Selmouni} defendant's actions constituted torture, the Court recognized that one of the purposes of torture is the victim's humiliation and personality breakdown.\textsuperscript{115} Furthermore, the Court directly stated that since the United Nations Convention Against Torture\textsuperscript{116} is a "living instrument":

[\textit{C}ertain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future. [The Court] takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.\textsuperscript{117}]

The \textit{Furundzija} decision also established that an omission, which inflicts severe pain or suffering on a victim, constitutes torture.\textsuperscript{118} In fact, the Yugoslavia Tribunal even held that States are required to prohibit even potential breaches of a norm, and that it is "insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed."\textsuperscript{119} In that case, Furundzija not only served as a local commander who could have prevented the occurrence of Witnesses A and D's tortures, he actively participated in those tortures very purpose.

While the Yugoslavia Tribunal failed to explicitly discuss the doctrine of command responsibility,\textsuperscript{120} that doctrine's general principles support the Yugoslavia Tribunal's holding that an omission should be punishable under the definition of torture. Three requirements are necessary for command responsibility to be present: (1) the existence of a superior-subordinate relationship, (2) the requisite mens rea, and (3) a failure to take reasonable measures within his or her power to prevent or repress his or her commission or to submit the matter to the competent authorities for investigation and prosecution.\textsuperscript{121} In the

\textsuperscript{114} Id. \textsection 99 (emphasis added).
\textsuperscript{115} Id. \textsection 101.
\textsuperscript{117} Id.
\textsuperscript{118} \textit{Furundzija}, Case No. IT-95-17/1 \textsection 256-257.
\textsuperscript{119} Id. \textsection 148.
\textsuperscript{120} ROBERT CRYER, HAKKAN FRIMAN, DARRYL ROBINSON, & ELIZABETH WILMSHURST, \textit{AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW} 320 (Cambridge Univ. Press 2007).
\textsuperscript{121} CRYER, FRIMAN, ROBINSON, & WILMSHURST, supra note 119, at 322.
Prosecutor v. Oriæ, the Yugoslavia Tribunal outlined four factors in determining whether a superior could be punishable for a failure to prevent torture:

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

Although the Yugoslavia Tribunal rendered the Oriæ Judgment in 2006, the facts of Furundzija decision would likely meet these four factors and therefore, the Yugoslavia Tribunal likely could have imposed liability on Furundzija for command responsibility in addition to liability for his failure to prevent the atrocities in the Lašva Valley. First, Furundzija, as commander of the unit, appeared to have effective control over the Jokers. Second, Furundzija failed to take any positive measures to stop the interrogation, rather he was a direct participant. Third, the crimes of torture and outrages upon personal dignity, including rape, are especially grievous under international law and mandated an attentive and quick response by Furundzija. Fourth and finally, Furundzija likely could have stopped the guard, who was under his command, from physically and sexually assaulting Witness A, and physically assaulting Witness D.

The policy supporting the abrogation of immunity for senior state officials in instance of heinous violations of international law, including war crimes, crimes against humanity, torture, and genocide, applies strongly in the Furundzija decision. Immunity, such as head of state immunity and diplomatic immunity, exist under international law largely to ensure that all States can effectively represent their nations and perform their functions in the international community. However, this immunity is limited and several courts have abrogated

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122. Case No. IT-03-68-T, Trial Chamber Judgment, ¶ 329 (June 30, 2006).
124. Furundzija, Case No. IT-95-17/1 ¶ 65.
this immunity for former heads of State when they have been charged with grave crimes under international law.\footnote{Regina v. Bartle, (1998), 37 ILM 1302 (H.L.); Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶¶ 43-59 (May 31, 2004).}

Since, pursuant to international law, military officers can be brought to criminal trial for violations of grave crimes, some international law scholars have strongly argued that those with responsibility as heads of state and the power to authorize and direct military operations should not escape accountability for their actions or omissions. As Antonio Cassese, a prominent international law scholar, writes:

As no one denies that soldiers and other military personnel may be brought to trial for war crimes (but also for crimes against humanity or genocide), one would come to the preposterous conclusion that lower-ranking state agents could be punished for such crimes, while those in power (heads of states or governments, senior members of cabinet, senior military commanders), who are endowed with greater power and normally bear greater responsibility for international crimes, would be absolved of any liability for participation in such crimes, \textit{only on account of their seniority}.\footnote{Antonio Cassese, \textit{When May Senior State Officials Be Tried for International Crimes? Some Comments on the Belgium v. Congo Case}, 13 Eur. J. Int’l L. 853, 874 (2002).}

Therefore, all officials, whether those officials are lower-ranking military officers, senior officials, or even heads of government, should not escape prosecution simply on the grounds that they did not have knowledge of what was occurring or were not present during the crimes which occurred. The \textit{Furundzija} decision strongly affirms this emerging international law principle, which holds that presence at the scene of a grave violation of international law, in addition with an intent to share in that violation's purpose and an omission to act, is and should be criminally actionable.

One of the Yugoslavia Tribunal's most critical holdings in \textit{Furundzija} was the characterization of the prohibition against torture as a \textit{jus cogens} norm of international law.\footnote{\textit{Id.}} By characterizing the prohibition against torture as a \textit{jus cogens} norm, the Yugoslavia Tribunal affirmed that the norm is of a higher significance than ordinary customary rules or even treaty law.\footnote{\textit{Furundzija}, Case No. IT-95-17/1 ¶ 153.} The Yugoslavia Tribunal further referred to the prohibition against torture "as one of the most fundamental standards of the international community."\footnote{\textit{Id.} ¶ 154.} Importantly, this statement assures that no international action, not even
action by treaty, can avoid the reality that torture is a grave crime of international law that cannot be legitimiz in any circumstance – nor justified for any reason, at any time, for any purpose.

IV. THE FURUNDZIJA DEFINITION OF “AIDING AND ABETTING” LIABILITY – NOW ADOPTED IN UNITED STATES COURTS

*Prosecutor v. Furundzija*¹³⁰ not only stands as a landmark case in international criminal law today, but its legacy extends to civil cases in United States domestic courts. Through the Alien Tort Statute,¹³¹ several United States courts have adopted the Furundzija standard of “aiding and abetting” liability (“practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime”)¹³² as a part of customary international law.¹³³ In this section, this Author briefly addresses the Alien Tort Statute’s history, discusses several cases that applied the Furundzija standard, and argues that its adoption fulfills the object and purpose of the Alien Tort Statute to ensure that egregious violations of international law are civilly actionable in United States courts.

A. A BACKGROUND OF THE ALIEN TORT STATUTE

The Alien Tort Statute,¹³⁴ codified at 28 U.S.C. section 1350 and enacted in 1789, provides that the “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹³⁵ In 1980, after being relatively inactive for nearly two-hundred years, the Alien Tort Statute received great attention as a result of *Filartiga v. Peña-Irala*,¹³⁶ a seminal case decided by United States Court of Appeals for the Second Circuit. In *Filartiga*, Dr. Joel Filartiga, a Paraguayan doctor and prominent opponent of the dictatorial regime of President Alfredo Stroessner, brought a claim under the Alien Tort Statute against the Inspector-General of the Police of Asuncion, Paraguay, for the torture and murder of his son, Joelito.¹³⁷ The Second Circuit held that official torture constituted a “violation of the law of nations.”¹³⁸

¹³⁰ Case No. IT-95-17/1, Trial Chamber Judgment (Dec. 10, 1998).
¹³² Furundzija, Case No. IT-95-17/1 ¶ 235.
¹³⁶ 630 F.2d 876 (2nd Cir. 1980).
¹³⁷ Filartiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
¹³⁸ Filartiga, 630 F.2d at 884.
Since the landmark *Filartiga* decision, the lower federal courts have reached varying conclusions as to which torts and norms of international law are actionable under the Alien Tort Statute. However, in 2004, the Supreme Court of the United States in *Sosa v. Alvarez-Machain*,\(^{139}\) provided some guidance on the question of which norms of international law are actionable under the Alien Tort Statute and held that a claim based upon a violation of the "law of nations" must meet three requirements: (1) the violation must rest on a norm of an international character; (2) the norm must be accepted by the civilized world; and (3) the norm must be defined with specificity.\(^{140}\)

B. **THE FURUNDZIJA DEFINITION OF "AIDING AND ABETTING" LIABILITY IN UNITED STATES ALIEN TORT STATUTE CASES**

Before and after *Sosa v. Alvarez-Machain*,\(^{141}\) United States courts held that a theory of "aiding and abetting" liability may be pleaded under the Alien Tort Statute\(^{142}\) to apply to individuals and corporate actors. Three federal cases extensively discussed *Prosecutor v. Furundzija*\(^{143}\) and its standard of aiding and abetting liability, specifically the decisions in *Doe I v. Unocal, Inc.*,\(^{144}\) *Presbyterian Church of Sudan, Inc., v. Talisman Energy, Inc.*,\(^{145}\) and most recently, *Khulumani v. Barclay National Bank, Ltd.*\(^{146}\) discussed the Furundzija standard.

C. **DOE I v. UNOCAL, INC. – THE NINTH CIRCUIT ADOPTS FURUNDZIJA**

In *Doe I v. Unocal, Inc.*,\(^{147}\) the United States Court of Appeals for the Ninth Circuit became the first United States court to hold that, pursuant to the Alien Tort Statute,\(^{148}\) a plaintiff may plead a theory of aiding and abetting.\(^{149}\) In that case, the defendant Unocal Inc. ("Unocal") was alleged to have acted with the military government in Burma and subjected villagers in the Tenasserim region to forced labor, murder, rape, and torture during the time Unocal assisted in building a gas pipeline through the region.\(^{150}\) The Ninth Circuit en-

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143. Case No. IT-95-17/1, Trial Chamber Judgment (Dec. 10, 1998).
144. 395 F.3d 932 (9th Cir. 2002).
146. 504 F.3d 254 (2d Cir. 2007).
147. 395 F.3d 932 (9th Cir. 2002).
149. Doe I v. Unocal, Inc., 395 F.3d 932, 953 (9th Cir. 2002).
150. Doe I, 395 F.3d at 936.
endorsed and extended the approach of the United States Court of Appeals for Second Circuit in *Kadic v. Karadzic*\(^{151}\) and found that private liability could be imposed upon Unocal for its activities in the region and that state action was not required.\(^{152}\)

The Ninth Circuit then outlined the *Prosecutor v. Furundzija*\(^{153}\) standard of aiding and abetting liability ("knowing practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime").\(^{154}\) The Ninth Circuit then noted that the "Tribunal clarified that in order to qualify, assistance need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal."\(^{155}\)

The *Unocal* court then adopted a "slightly modified"\(^{156}\) *Furundzija* standard of aiding and abetting liability; while it endorsed the "substantial practical assistance" and "substantial encouragement" tests, it declined to do so for "moral support."\(^{157}\) The Ninth Circuit concluded:

In particular, given that there is . . . sufficient evidence in the present case that Unocal gave assistance and encouragement to the Myanmar Military, we do not need to decide whether it would have been enough if Unocal had only given moral support to the Myanmar Military. Accordingly, we may impose aiding and abetting liability for knowing practical assistance or moral encouragement which has a substantial effect on the perpetration of the crime, leaving the question whether such liability should also be imposed for moral support, which has the required substantial effect to another day.\(^{158}\)

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

A year after *Doe I v. Unocal, Inc.*,\(^{159}\) the United States District Court for the Southern District of New York also endorsed the *Prosecutor v. Furundzija*\(^{160}\) definition of aiding and abetting liability in its *Presbyterian Church of Sudan, Inc., v. Talisman Energy, Inc.*\(^{161}\) case. The *Presbyterian Church of Sudan* case concerned a Canadian energy

\(^{151}\) 70 F.3d 232 (2d Cir. 1995).

\(^{152}\) *Id.* at 945-46 (citing Kadic v. Karadzic, 70 F.3d 232, 242-43 (2d Cir. 1995)).

\(^{153}\) Case No. IT-95-17/1, Trial Chamber Judgment (Dec. 10, 1998).

\(^{154}\) *Id.* ¶ 951.

\(^{155}\) *Id.* ¶ 950 (quoting *Prosecutor v. Kunarac*, IT-96-23-T & IT-96-23/1-T, ¶ 391 (Feb. 22, 2001)).

\(^{156}\) *Id.* ¶ 951.

\(^{157}\) *Id.*

\(^{158}\) *Id.*

\(^{159}\) 395 F.3d 932 (9th Cir. 2002).

\(^{160}\) Case No. IT-95-17/1, Trial Chamber Judgment (Dec. 10, 1998).

\(^{161}\) 244 F. Supp. 2d 289 (S.D.N.Y. 2003).
company, Talisman Energy, Inc. ("Talisman"), which allegedly collaborated with the Republic of Sudan in oil exploration activities and the alleged involvement in "ethnically cleansing civilian populations surrounding oil concessions located in southern Sudan in order to facilitate oil exploration and extraction activities." Specifically, it was alleged that Talisman violated international law through extrajudicial killing, forcible displacement, war crimes, confiscation and destruction of property, kidnapping, rape, and slavery.

The Presbyterian Church of Sudan court specifically cited the definition of aiding and abetting provided in Furundzija. It applied the Furundzija standard to the facts of the case and found the plaintiff's complaint properly alleged:

That Talisman aided and abetted or conspired with Sudan to commit various violations of the law of nations . . . . The Amended Complaint includes allegations that Talisman worked with Sudan to carry out acts of "ethnic cleansing"; that Talisman encouraged Sudan to do so; and that Talisman provided material support to Sudan, knowing that such support would be used in carrying out such unlawful acts.

E. THE KHULUMANI DECISION: THE SECOND CIRCUIT ENDORSES FURUNDZIJA

Most recently, in Khulumani v. Barclay National Bank, Ltd., the United States Court of Appeals for the Second Circuit affirmed the Prosecutor v. Furundzija decision's standard, with modifications. In that case, survivors and representatives of those injured by the apartheid regime in South Africa brought Alien Tort Statute claims against twenty-three companies charging those companies with apartheid related atrocities, crimes against humanity, and forced labor practices. The Second Circuit specifically noted that aiding and abetting liability is "recognized and enforced in international tribunals" and addressed the mens rea and actus reus components of aiding and abetting liability.

163. Presbyterian Church of Sudan, 244 F. Supp. 2d at 296.
164. Id. at 323.
165. Id. at 324.
166. 504 F.3d 254 (2d Cir. 2007).
170. Khulumani, 504 F.3d at 274.
With regard to the *mens rea* element, the Second Circuit endorsed the definition outlined in the Rome Statute,\(^{171}\) which holds that a defendant is guilty of aiding and abetting if that person does it “for the purpose of facilitating the commission of the crime.”\(^{172}\) Although the Second Circuit stated that “international legislation is less helpful in identifying a specific standard” of the *actus reus* component of aiding and abetting liability, it adopted the *Furundzija* standard.\(^{173}\) In summary, the Second Circuit concluded that a violation for aiding and abetting would be actionable if the defendant “(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission that crime.”\(^{174}\)

F. ANALYSIS OF AIDING AND ABETTING LIABILITY

One of the potential criticisms of importing the aiding and abetting liability standard is the distinction between civil and criminal liability; while criminal Tribunals address criminal standards, the United States domestic courts apply a civil standard under the Alien Tort Statute,\(^{175}\) which only provides for jurisdiction over claims in tort. However, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia’s (“Yugoslavia Tribunal”) in *Prosecutor v. Furundzija*\(^ {176}\) foresaw this possibility; as the United States Court of Appeals for the Second Circuit remarked in *Khulumani v. Barclay National Bank, Ltd.* In *Khulumani*,\(^ {177}\) “the [Yugoslavia Tribunal] has recognized the propriety of civil remedies for violations of international criminal law in certain circumstances.”\(^ {178}\) Therefore, it appears entirely appropriate for United States federal courts to apply

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171. The Rome Statute of the International Criminal Court provides as follows:
(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
(ii) Be made in the knowledge of the intention of the group to commit the crime.


173. *Id.* at 277.

174. *Id.*


177. 504 F.3d 254 (2d Cir. 2007).

178. *Khulumani*, 504 F.3d at 270 n.5.
the Furundzija or a similar standard in future cases arising under the Alien Tort Statute.

One noted commentator, Frank Christian Olah, has also expressed concern that the Furundzija aiding and abetting standard, applied by the United States Court of Appeals for the Ninth Circuit in Doe I v. Unocal, Inc., would not pass the test defined by the Supreme Court of the United States in Sosa v. Alvarez-Machain that a norm of liability under the statute be universal, specific, and obligatory. However, this conclusion is questionable since the Yugoslavia Tribunal in Furundzija examined an extensive corpus of customary international law. To address this concern, this Author proposes that the courts collapse the more controversial and vague “encouragement” and “moral” assistance tests under a definition of aiding and abetting liability under the Alien Tort Statute and instead focus on a “substantial practical assistance” inquiry. “Practical” assistance would give the courts a bit more clarity with this issue and still offer the opportunity to address not only faults of commission under international law, but of omission as well.

Later judgments of the Yugoslavia Tribunal affirmed the proposition that the actus reus of “aiding and abetting” liability may be met through an act of omission, providing evidence of an emerging norm of customary international law for aiding and abetting liability. In the Prosecutor v. Blaskic, the Yugoslavia Tribunal stated that “[t]he actus reus of aiding and abetting may be perpetrated through an omission, provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite mens rea.” Similarly, in the 2002 Prosecutor v. Vasiljevic decision, the Yugoslavia Tribunal noted the assistance of an aider and abettor “may be either an act or an omission.” Therefore, it now appears to be settled, at least in the Yugoslavia Tribunal, that an omission is actionable under aiding and abetting principles.

179. 395 F.3d 932 (9th Cir. 2002).
181. Frank Christian Olah, MNC Liability for International Human Rights Violations Under the Alien Tort Claims Act: A Review & Analysis of the Fundamental Jurisprudence and a Look at Aiding & Abetting Liability Under the Act, 25 QUINNIPIAC L. REV. 751, 796 (2007). Olah writes, “The Furundzija aiding and abetting standard applied by the Unocal majority (i.e., knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime) would not pass muster under the test for new causes of action articulated by the Sosa court.” Id.
184. Case No. IT-98-32-T, Trial Chamber Judgment, ¶ 70 (Nov. 29, 2002).
In summary, the United States domestic courts appear to be headed toward a greater recognition and adoption of the *Furundzija* standard. This movement has the effect of making the Alien Tort Statute a much more vital instrument for addressing human rights concerns in the future.\(^{186}\) However, while this is a progressive development in Alien Tort Statute litigation, there are still many procedural hurdles for plaintiffs to overcome, including standing, the exhaustion of local remedies doctrine, sovereign immunity, the act of state doctrine, forum non conveniens, and the political question doctrine.\(^{187}\) Cases arising under the Alien Tort Statute in the near future will likely further resolve "aiding and abetting" liability questions which are still emerging in the growing collection of both international and domestic law.

V. CONCLUSION

The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia's ("Yugoslavia Tribunal") in *Furundzija*\(^{188}\) continues to be a vital part of a growing corpus of international law which assures that all actors, whether those actors are public officials or private actors in a non-private capacity, are punished for their acts and omissions which lead to some of the most grave assaults on humans. The *Furundzija* decision also importantly affirmed the status of the prohibition against torture as a *jus cogens* norm of international law which can never be retreated or derogated from, and broadened the definition of torture to address the insidious purpose of torture, specifically to break down the victim's will and violate the victim's innate personality. The *Furundzija* decision's significance even reaches United States courtrooms, and is likely to contribute to more jurisprudence concerning aiding and abetting liability under the Alien Tort Statute\(^{189}\) in the future. Most importantly, the *Furundzija* decision has helped move the international community toward the light of justice and out of a darkness of a time when torturers could escape prosecution and accountability for their grave crimes – and truly stands as one of the landmark international judicial decisions of this generation.

\(^{186}\) Olah, *supra* note 143, at 752. In fact, Olah notes that the Alien Tort Statute fills a jurisdictional gap in international law where a multinational corporation's home law cannot reach and the law of where the multinational corporation allegedly commits a human rights abuse does not address the concern. He states, "The ATCA succeeds in filling this gap by providing both federal jurisdiction and a cause of action for violations of international customary law." *Id.*


\(^{188}\) Case No. IT-95-17/1, Trial Chamber Judgment (Dec. 10, 1998).
