Michaelmas Term
[2019] UKSC 51
On appeal from: [2018] EWCA Crim 2843

JUDGMENT

R *v* Reeves Taylor (Appellant)

before

Lady Hale, President
Lord Reed, Deputy President
Lord Wilson
Lord Hodge
Lord Lloyd-Jones

JUDGMENT GIVEN ON

13 November 2019

Heard on 24 and 25 June 2019

Appellant
Steven Powles QC
Tatyana Eatwell
Margherita Cornaglia

(Instructed by Bark & Co)

Respondent
David Perry QC
Paul Rogers
Kathryn Howarth
Emilie Pottle

(Instructed by CPS Counter Terrorism Division (Westminster))

Intervener (Redress)
Sudhanshu Swaroop QC
John Bethell

(Instructed by Hogan Lovells International LLP)

LORD LLOYD-JONES: (with whom Lady Hale, Lord Wilson and Lord Hodge agree)

1. The appellant, Reeves Taylor, who was arrested in the United Kingdom on 1 June 2017, is charged with one count of conspiracy to commit torture (count 1) and seven counts of torture (counts 2-8). The substantive offence alleged in each case is that of torture contrary to section 134, Criminal Justice Act 1988 ("CJA"). The charges relate to events in Liberia in 1990, in the early stages of the first Liberian civil war, when an armed group, the National Patriotic Front of Liberia ("NPFL"), sought to take control of the country and to depose the then President, Samuel Doe. The leader of the NPFL was Charles Taylor REDACTED. The NPFL eventually succeeded in taking control of Liberia and Charles Taylor became President in 1997.

2. This is an appeal pursuant to section 36, Criminal Procedure and Investigations Act 1996 ("CPIA") and section 33(1), Criminal Appeal Act 1968. It arises out of a ruling on a question of law made within a preparatory hearing under section 32(3) CPIA which was amalgamated into a decision on an application for dismissal under the Crime and Disorder Act 1998, Schedule 3 paragraph 2(2). The Criminal Division of the Court of Appeal (Lord Burnett CJ, Popplewell and Whipple JJ) has certified the following point of law of general public importance:

> "What is the correct interpretation of the term 'person acting in an official capacity' in section 134(1) of the Criminal Justice Act 1988; in particular does it include someone who acts otherwise than in a private and individual capacity for or on behalf of an organisation or body which exercises or purports to exercise the functions of government over the civilian population in the territory which it controls and in which the relevant conduct occurs?"

<u>The prosecution case</u>

3. REDACTED

4. The prosecution maintains that at the time and place of the alleged offences, the NPFL was the de facto military government or government authority and that Charles Taylor and those acting for and with him, including the appellant, were acting in an official capacity for, and on behalf of, the NPFL and had effective control of the area where the various alleged offences occurred at the time they occurred.

5. The prosecution's expert witness acknowledges that identifying a specific date when a particular town fell under NPFL control is difficult. Territory changed hands quickly during the early months of the war. Both the NPFL and the government of Liberia made misleading statements regarding which towns were under their control. During its advance across Nimba County the NPFL did not have a clearly defined military structure, although Charles Taylor was universally recognised as leader of the group during this period. Commanders moved with the fighting and exercised influence based on the number of soldiers they were able to recruit and train.

6. The prosecution's expert witness indicates that within days of falling under NPFL control, villages and towns usually received a visit from an NPFL commander and a detachment of fighters, although the NPFL did not maintain a permanent presence in all locations. Further, he states that his own research suggests that all of Nimba County including the major towns and cities was under NPFL control by early May 1990.

7. In a memorandum served by the prosecution after the hearing before the Court of Appeal, the prosecution's expert clarifies that his use of the term "control" refers to military rather than administrative control over the area. He states that the NPFL offensives in early 1990 caused the Armed Forces of Liberia ("AFL") to withdraw from nearly all areas of Nimba County and consolidate their forces in military bases located in strategic towns. This withdrawal created a situation in which NPFL forces had freedom of movement throughout the County. As a result, the NPFL was the de facto military authority in the area. Such military control is said to be very different from administrative control. He states that before June 1990 the NPFL did not have a sustained presence in much of Nimba County. It did not assign officials to oversee towns or deploy forces to provide security. NPFL forces passed through towns and villages on an *ad hoc* basis; there was no sustained or coordinated occupation. Much of the population lived in a 'no man's land', areas without any consistent administrative authority, but with the occasional presence of NPFL fighters.

8. REDACTED

9. Following her arrest on 1 June 2017, the appellant denied involvement in the offences. In her Defence Case Statement, she asserts that at no time did she act in an official capacity for the NPFL and she disputes that the NPFL was the de facto government authority in the relevant locations and at the relevant times.

<u>The proceedings</u>

10. The appellant made an application to dismiss the charges pursuant to the Crime and Disorder Act 1998, Schedule 3, paragraph 2. The application came before Sweeney

J at the Central Criminal Court in two stages. The parties agreed that the judge should first hear argument as to the correct legal test of official capacity with the intention that, once that ruling had been delivered, the defence could consider whether to continue with a submission that there was no case to answer. The application proceeded on the basis that a submission of no case to answer may include the calling of evidence by the prosecution or the defence and that the determination of such a submission would be a matter of law. The first part of the dismissal application was heard on 26 and 27 March 2018. In his ruling dated 30 July 2018, Sweeney J concluded that section 134 "applies, not only to acting for entities either tolerated by, or acting under the authority of the government of a state, but also, in situations of armed conflict, to individuals who act in a non-private capacity and as part of an authority-wielding entity". Following this ruling, the second part of the defendant's dismissal application was heard on 4 October 2018. On 10 October 2018 Sweeney J ruled that there was a case to answer on all counts. In his reasons given in writing on 29 October 2018 the judge explained that, while the questions whether the appellant was acting in a non-official capacity on behalf of the NPFL and whether the NPFL was an authority-wielding entity would ultimately be for the jury, the dismissal application turned on whether the evidence, taken at its highest, was sufficient for a jury properly to so conclude. He held that it was.

11. The appellant appealed against the ruling dated 30 July 2018, made again within the context of the preliminary hearing on 29 October 2018, to the Court of Appeal which dismissed the appeal on 21 December 2018. It held that the category of perpetrator defined as "a public official or person acting in an official capacity" in section 134 CJA is not confined to those acting on behalf of a recognised state but "covers any person who acts otherwise than in a private and individual capacity for or on behalf of an organisation or body which exercises or purports to exercise the functions of government over the civilian population in the territory which it controls and in which the relevant conduct occurs. Furthermore, it covers any such person whether acting in peace time or in a situation of armed conflict." (para 69) The Court of Appeal noted that it had expressed its conclusion in slightly different language from that of Sweeney J in his ruling, but it considered that the test he adopted and applied was not materially different on the facts of the case and that his subsequent ruling on the factual submission of no case to answer was not affected by the difference. Accordingly, the appeal was dismissed.

12. On 13 February 2019 the Supreme Court (Lady Hale, Lord Reed and Lord Kerr) granted permission to appeal.

The UN Convention against Torture and its implementation

13. It is necessary to identify and apply the law as it existed at the dates on which it is alleged that the offences in the indictment were committed.

14. Section 134 CJA provides in relevant part:

> "134. Torture
>
> (1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.
>
> (2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if -
>
> (a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence -
>
> (i) of a public official; or
>
> (ii) of a person acting in an official capacity; and
>
> (b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.
>
> …
>
> (6) A person who commits the offence of torture shall be liable on conviction on indictment to imprisonment for life."

15. Section 134 CJA came into effect on 29 September 1988. It applies to conduct committed after that date. Section 135 provides that prosecutions under section 134 require the consent of the Attorney General. Such consent was given in this case on 2 June 2017.

16. Section 134 CJA implements in domestic law certain obligations of the United Kingdom pursuant to the United Nations Convention against Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, (1991) (Cm 1775), 1465 UNTS 85 ("UNCAT"). Article 1 defines "torture" for the purposes of UNCAT:

> "Article 1
>
> 1. For the purposes of this Convention, '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 an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

Under UNCAT each State Party is required to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction (article 2). No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture (article 3). Each State Party is required to ensure that all acts of torture are offences under its criminal law (article 4) and to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him (article 5). In such cases each State Party is obliged, if it does not extradite the alleged offender, to submit the case to its competent authorities for the purpose of prosecution (article 7). Each State Party also undertakes to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (article 16).

17. UNCAT entered into force on 26 June 1987, in accordance with article 27(1). It currently has 166 State Parties.

Torture in international humanitarian law

18. Torture for the purposes of UNCAT must be distinguished from discrete concepts of torture in international humanitarian law where torture may form the basis of a war crime or a crime against humanity. I would draw attention, in particular, to the following matters.

(1) Article 3, common to each of the four Geneva Conventions of 1949, prohibits torture in non-international armed conflicts and establishes protections for persons who do not or who no longer take an active part in hostilities. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits, Judgment)* ICJ Rep 1986, 14 at 113-4, para 218, the International Court of Justice held that Common Article 3 establishes minimum guarantees that apply in all armed conflict.

(2) The statutes of the ad hoc international tribunals for the former Yugoslavia ("ICTY") and Rwanda ("ICTR") conferred jurisdiction to try offences of torture committed during armed conflict without defining the offence. The Tribunals produced their own definitions, based heavily on UNCAT.

(3) Under the Rome Statute of the International Criminal Court ("ICC"), 17 July 1988, torture is capable of constituting (1) a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population (article 7(1)(f)); (2) a war crime when committed in an armed conflict whether international or not of an international character (articles 8(2)(a)(ii) and 8(2)(c)(i)).

19. A vital distinction for present purposes between torture under UNCAT and torture in international humanitarian law is that torture under UNCAT is limited to cases where "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 an official capacity". Although the ICTY initially considered that there was a requirement in respect of torture in an armed conflict that "at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, eg as a de facto organ of a State or any other authority-wielding entity" (*Prosecutor v Furundžija*, Trial Chamber Judgment, 10 December 1998, para 162; see also Appeal Chamber Judgment, 21 July 2000, para 111), it later took the contrary view (*Prosecutor v Kunarac*, Trial Chamber Judgment, 22 February 2001, para 496; Appeals Chamber Judgment, 12 June 2002, para 148). It is now established that there is no such requirement in the case of war crimes or crimes against humanity in international humanitarian law. In particular, there is no such requirement in the case of torture as a war crime or a crime against humanity under the Statute of the ICC. As a result, it is necessary to exercise caution

when referring to materials and authorities on international humanitarian law for the purpose of ascertaining the scope of article 1 of UNCAT.

20. Torture as a crime against humanity and torture as a war crime, as defined in the Statute of the ICC, are both offences contrary to UK law by virtue of sections 50 and 51, International Criminal Court Act 2001. As a result, torture committed in certain circumstances may be prosecuted here as a war crime or a crime against humanity. However, the alleged conduct which gives rise to the current charges against the appellant could not be prosecuted in the United Kingdom on either of these bases, even if the elements of these offences were otherwise established, because section 65A of the International Criminal Court Act 2001, inserted by section 70 of the Coroners and Justice Act 2009, which deals with retrospective application, provides that the relevant sections apply to acts committed on or after 1 January 1991, which is later than the date on which the instant offences are alleged to have been committed.

The submissions of the parties

21. On behalf of the appellant Mr Steven Powles QC submits that section 134 CJA and the term "person acting in an official capacity" apply only to those acting for or on behalf of the government of a State. He submits that this is the ordinary meaning of both section 134 CJA and article 1, UNCAT, in light of the object and purpose of UNCAT, that this is also supported by the travaux preparatoires and that this is further demonstrated by the pronouncements of the UN Committee against Torture. He submits that, as a result, section 134 CJA does not apply to the conduct of an alleged member of an armed opposition group fighting against or seeking to overthrow the government of a State.

22. On behalf of the prosecution Mr David Perry QC submits that section 134(1) CJA covers any person who acts otherwise than in a private and individual capacity for or on behalf of an organisation or body which exercises the functions of government over the civilian population in the territory which it controls and in which the relevant conduct occurs. Furthermore, it covers any such person whether acting in peace time or in a situation of armed conflict. He submits that the concept of official capacity in the Convention extends beyond any formal State structure and even beyond actors who had been invested with authority by the State. It covers all those who exercise a form of public authority over individuals in a manner which might be similar to the authority of a State. Thus, he submits, it would extend to armed groups who seek to depose the government and to exercise State power and would certainly extend to those who in their quest for authority have displaced the legitimate government in those areas where they operate.

The approach to interpretation of section 134 CJA and article 1, UNCAT

23. Section 134 CJA was intended to give effect to UNCAT in domestic law. As a result, the words "person acting in an official capacity" must bear the same meaning in section 134 as in article 1, UNCAT. (See *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* ("*Pinochet No 3*") [2000] 1 AC 147 per Lord Browne-Wilkinson at p 200A-B.) The principles of international law governing the interpretation of treaties are to be found in articles 31 and 32, Vienna Convention on the Law of Treaties, 23 May 1969, (1980) (Cm 7964), 1155 UNTS 331.

> "Article 31. General Rule of Interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable."

Ordinary meaning

24. On behalf of the appellant, Mr Powles submits that the ordinary meaning of both article 1, UNCAT and section 134 CJA is such that section 134 applies only to those acting for or on behalf of the government of a State. He points out, correctly, that while article 1(2) UNCAT is without prejudice to national legislation which does or may contain provisions of wider application, section 134 is not drafted in terms of wider application than article 1. The offence contrary to section 134(1) can be committed only by a "public official or person acting in an official capacity". He further draws attention to the fact that both subsections 134(1) and (2) provide that the public official or person acting in an official capacity must be acting in the performance or purported performance of their official duties. He points to the fact that the definition applies to torture both in the United Kingdom and elsewhere and submits that it is hard to envisage that anyone could, in the United Kingdom, commit an act of torture in the performance of their "official duties" unless they were acting for or on behalf of the State. Anyone not acting either for or on behalf of the State is, he submits, by definition, acting in a private and individual capacity and such conduct, in the United Kingdom, would fall within the jurisdiction of ordinary domestic criminal law and be prosecuted accordingly.

25. The difficulty with the appellant's approach is that it seeks to impose a gloss on the ordinary meaning of the words of the two provisions. Those words are apt to

describe a person performing official administrative or governmental functions but provide no suggestion that those functions must be performed on behalf of the government of the State concerned. The dichotomy drawn by the provisions is between official conduct and purely private conduct, not between State and non-State activity. While in most normal circumstances, such as those prevailing in the United Kingdom to which the appellant refers, official conduct will usually be performed on behalf of a State, it is necessary to consider the applicability of the Convention in less stable situations, including those where more than one body may be performing administrative or governmental functions within the territory of the State. Unhappily, examples of such situations arise not infrequently. In my view the words used do not support a limitation of the kind proposed. On the contrary, the words "person acting in an official capacity" are apt to include someone who holds an official position or acts in an official capacity in an entity exercising governmental control over a civilian population in a territory over which it holds de facto control.

Object and purpose

26. It is well established that a treaty should be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (Vienna Convention on the Law of Treaties, article 31(1)). It is necessary, however, to sound a cautionary note at this point. While the object of UNCAT was undoubtedly, in one sense, to end impunity for perpetrators of what might be termed "official torture" it does not follow that the reading of the Convention which would best avoid impunity must be adopted in all circumstances. It is, rather, necessary to give effect to the words used in the light of the object and purpose of the scheme created by the State parties to the Convention. Similarly, the mere fact that a particular reading may be seen as a desirable development of the law is not of itself a valid reason for adopting it. It is not for national courts engaged in interpreting a treaty to seek to force the pace of the development of international law, however tempting that may be. There is an analogy to be drawn here with the consideration by national courts of potential rules of customary international law, addressed by the House of Lords in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening) ("Jones v Saudi Arabia")* [2006] UKHL 26; [2007] 1 AC 270 where Lord Hoffmann observed (at para 63):

> "It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states."

Lord Bingham noted, similarly, (at para 22) that one swallow does not make a rule of international law.

27. The principal purpose of UNCAT is not to outlaw torture and other cruel, inhuman or degrading treatment or punishment. On the contrary the Convention is based upon the recognition that such practices are already outlawed under international law and the principal aim of UNCAT is to strengthen the existing prohibition by a number of supportive measures (Burgers and Danelius, *The United Nations Convention against Torture - A Handbook on the Convention against Torture*, (Martinus Nijhoff 1988), p 1). Thus, Lord Browne-Wilkinson observed in *Pinochet (No 3)* at p 199C:

> "The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal - the torturer - could find no safe haven." (See also Lord Hutton at pp 260F-261B)

As Judge Crawford points out, UNCAT, in common with similar treaties relating, for example, to the unlawful seizure of aircraft or the taking of hostages, does not impose criminal responsibility directly upon individuals, but rather requires contracting States to prevent and punish the conduct in question.

> "The enforcement of such norms occurs at the domestic rather than the international level, as the treaties envisage punishment only by domestic courts. In addition to obliging states parties to criminalize certain conduct, such treaties generally require them to prosecute or extradite accused persons to other states parties that are willing to prosecute them (*aut dedere aut iudicare*). … While the enforcement of these norms is dependent on domestic legal systems either prosecuting or extraditing accused persons, various treaty bodies - such as the Committee against Torture - often play an important role in monitoring the implementation of the treaty norms at the domestic level. (James Crawford, *Brownlie's Principles of Public International Law*, 9th ed (2019), p 663.)"

It can be seen therefore that the object of UNCAT has been to make torture as defined in article 1 a criminal offence of universal jurisdiction enforceable by domestic courts and, by virtue of very extensive State participation in the Convention, to establish a machinery capable of reducing the likelihood of perpetrators of "official torture" escaping justice before national courts.

28. Article 1 of UNCAT therefore defines a criminal offence which contracting States are required to criminalize and punish within their respective legal systems. The fact that UNCAT is a human rights treaty imposing obligations in international law on the contracting States is not a good reason for limiting the scope of that offence to

conduct attributable to the State itself. It does not follow that the reference in the Convention to public officials and those acting in an official capacity must be taken to refer to State actors as opposed to non-State actors.

Travaux preparatoires

29. We have been referred by the parties to records of the drafting history of article 1, UNCAT and to commentaries on the Convention, including Burgers and Danelius (above) and Nowak and McArthur, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OUP, 2008). Both parties submit that these materials are admissible as a supplementary means of interpretation under article 32, Vienna Convention on the Law of Treaties and support their respective interpretations of the words "a public official or other person acting in an official capacity" in article 1, UNCAT.

30. The UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 3452 (XXX) of 9 December 1975 (the "1975 Declaration") defined "torture" in article 1 in terms which required that it be inflicted by or at the instigation of a public official. By Resolution 32/62 of 8 December 1977, the UN General Assembly requested the Commission on Human Rights to draw up a draft convention against torture. The Commission examined the matter at its 34th session and invited comments on the draft articles from the governments of member states of the United Nations and its specialized agencies in advance of its 35th session. The comments received are summarised in three documents published by the Commission on Human Rights (E/CN.4/1314, 19 December 1978; E/CN.4/1314/Add 1, 18 January 1979; E/CN.4/1314/Add 2, 31 January 1979). At that stage, the definition of torture in draft article 1 required that it be inflicted "by or at the instigation of a public official". In its response the Austrian Government proposed that the concept of "public official" be expanded, for example by using the words "persons, acting in an official capacity" (E/CN.4/1314, para 43). The United States proposed that the term "public official" be defined in order to clarify the breadth of the concept and to make clear that both civil and military officials are included (E/CN.4/1314, para 45). The United Kingdom proposed that, in order to amplify the definition, the phrase "or any other agent of the State" be inserted after "public official" (E/CN.4/1314/Add 1, para 3). The observation of the Federal Republic of Germany was summarised as follows:

> "… in particular, it should be made clear that the term 'public official' contained in paragraph 1 refers not only to persons who, regardless of their legal status, have been assigned public authority by State organs on a permanent basis or in an individual case, but also to persons who, in certain regions or under particular conditions, actually hold and exercise authority over others and whose authority is comparable to

> governmental authority or - be it only temporarily - has replaced government authority or whose authority has been derived from the aforementioned persons." (E/CN.4/1314/Add 2, para 2)

Clearly, the German proposal was not implemented in terms. (See Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement*, (Martinus Nijhoff 1999), pp 27-28; Wendland, *A Handbook on State Obligations under the UN Convention against Torture, Association for the Prevention of Torture*, (2002), p 29.) Nevertheless, it may have influenced the expansion of the concept of "public official". Nowak and McArthur summarise the matter as follows:

> "116. Severe pain or suffering only counts as torture in the understanding of the Convention if it is 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. The formulation in the 1975 Declaration and the original Swedish draft ('by or at the instigation of a public official') reflects the traditional view that States can only be held accountable for human rights violations committed by State actors. Since the main purpose of the Convention was to require States parties to use domestic criminal law for the purpose of punishing perpetrators of torture, several governments, such as France, Barbados, Panama and Spain, advocated an extension of the definition covering also private individuals. Germany did not go as far but wished to include also non-State actors who exercise authority over others and whose authority is comparable to government authority. Since other governments, including the United States, United Kingdom, Morocco and Austria, insisted on a traditional State-centred definition, the Working Group finally agreed on a US compromise proposal which extended State responsibility to the consent or acquiescence of a public official. Since the delegations could not agree on a definition of the term 'public official', the Austrian proposal to add the phrase 'or other person acting in an official capacity' was adopted." (footnotes excluded)

On this basis Mr Powles submits that the compromise was the inclusion of non-State actors who act with the consent or acquiescence of a public official and not the expansion of the definition of "person acting in an official capacity" beyond persons or entities who in fact act for or on behalf of the State.

31. It seems clear from this account by Nowak and McArthur that, in the result, the intention was at least to exclude from the definition the conduct of private individuals acting in a private capacity. The question is whether it was intended to go further and to include within the definition acts of de facto authorities exercising governmental

functions. On behalf of the appellant, Mr Powles draws particular attention to the reference by Nowak and McArthur to insistence "on a traditional State-centred definition" and submits that it supports the view that conduct in an official capacity must be attributable to the State. It is not entirely clear, however, what is meant by this term. A later passage in Nowak and McArthur, on which the prosecution relies, suggests that it may be intended simply to exclude perpetrators acting entirely in a personal capacity.

> "118. The term '*other person acting in an official capacity*' goes, however, clearly beyond State officials. It was inserted on the proposal of Austria in order to meet the concerns of the Federal Republic of Germany that certain non-State actors whose authority is comparable to governmental authority should also be held accountable. These de facto authorities seem to be similar to those 'political organizations' which, according to article 7(2)(i) ICC Statute, can be held accountable for the crime of enforced disappearance before the ICC. One might think of rebel, guerrilla or insurgent groups who exercise de facto authority in certain regions or of warring factions in so-called 'failing States'.
>
> 119. In the case of *Elmi v Australia*, the Committee had to decide whether the forced return of a Somali national belonging to the Shikal clan to *Somalia*, where he was at a substantial risk of being subjected to torture by the ruling Hawiye clan, constituted a violation of the prohibition of *refoulement* pursuant to article 3. The Committee found a violation of article 3 and explicitly rejected the argument of the Australian Government that the acts of torture the applicant feared he would be subjected to in Somalia would not fall within the definition of torture set out in article 1: …" (original emphasis, footnotes omitted)

Article 7(2)(i), ICC Statute, to which Nowak and McArthur refer, provides:

> "'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts so those persons, with the intention of removing them from the protection of the law for a prolonged period of time."

32. On its face, this passage from Nowak and McArthur strongly supports the prosecution's submission. Mr Powles, however, criticises Nowak and McArthur's statement that the term "other person acting in an official capacity" was inserted in order to meet the concerns of the Federal Republic of Germany that certain non-State actors whose authority is comparable to governmental authority should also be held accountable. He points to the sequence in which comments were submitted, which seems to show that the Austrian amendment was proposed before the German observation was made. On the information presently available to us, it can nevertheless be said that the German observation was under consideration by the Working Group before the amendment proposed by Austria was agreed and the sequence does not necessarily mean that the amendment does not reflect Germany's concern. (In this regard, Mr Perry, on behalf of the prosecution, also draws our attention to the fact that section 312a of the Austrian Criminal Code provides that "public officials within the meaning of this provision shall also be those who, in the event of the absence or default of the public authorities, are effectively acting as officials". The significance of this as an aid to interpreting article 1, UNCAT is, however, much reduced by the fact that article 1(2) provides that article 1 is without prejudice to any national legislation which does or may contain provisions of wider application. In other words, UNCAT does not prohibit gold plating by contracting States. Furthermore, although Austria ratified UNCAT in 1987 this amendment to the Austrian Criminal Code was not introduced until 2013.) In the result, therefore, the commentary by Nowak and McArthur and the legislative history to which they refer can be said to provide some support for the interpretation for which the prosecution contends.

33. Mr Powles also relies on passages in Burgers and Danelius concerning the drafting history in support of his reading of article 1.

> "There were different opinions on the question as to whether or not the definition of torture in the convention should be limited to *acts of public officials*. It was pointed out by many States that the purpose of the convention was to provide protection against acts committed on behalf of, or at least tolerated by, the public authorities, whereas the State could normally be expected to take action according to its criminal law against private persons having committed acts of torture against other persons. However, France considered that the definition of the act of torture should be a definition of the intrinsic nature of the act of torture itself, irrespective of the status of the perpetrator.
>
> Although there was little support for the French view on this matter, most States agreed that the convention should not only be applicable to acts committed by public officials, but also to acts for which the public authorities could otherwise be considered to have some responsibility." (Burgers and Danelius (above) at p 45, original emphasis)

In a further passage, Burgers and Danelius state:

> "In principle, the common element of the purposes referred to in the definition should rather be understood to be the existence of some - even remote - connection with the interests or policies of the State and its organs. It is important to note, in this context, that the primary objective of the *Convention* is to eliminate torture committed by or under the responsibility of public officials for purposes connected with their public functions. Precisely because the public interest is sometimes seen in such cases as a justification, the authorities may be reluctant to suppress these practices. The provisions of the *Convention* are intended to ensure that torture does not occur in such cases or that, if it occurs, action is taken against the offender." (Burgers and Danelius (above), at pp 118-119)

While these passages may be read as providing some support for the appellant's case, it is important to bear in mind that neither was addressing the specific question which arises in these proceedings. The first was addressing the distinct questions of whether torture under the Convention should include private acts of torture and whether it should extend beyond acts committed by public officials. The second was addressing the requirement that torture should be committed for a specific purpose connected to the actor's public function. As a result, these passages cast little light on the meaning of the words "acting in an official capacity".

34. The same is true of the following statement by the Chairman-Rapporteur, Mr J H Burgers in his report of the Working Group dated 25 March 1983 addressing whether the offence of torture should attract universal jurisdiction:

> "Most speakers were in favour of the principle of universal jurisdiction, holding it to be essential in securing the effectiveness of the Convention. Territorial jurisdiction would not suffice to punish torture effectively as a State policy, under the definition of article 1." (E/CN.4/1983/63 at para 21)

35. While these aspects of the travaux preparatoires may be inconclusive as to the meaning of the words "public official or other person acting in an official capacity" in article 1, they do, however, cast some light on certain objectives of the Convention. Two points, in particular, emerge with some clarity.

36. First, it was the intention that the offence defined in article 1 should not include purely private acts of torture with no official character or connection. While the representatives of some States in the Working Group considered that the offence should

not be limited to the conduct of public officials since the purpose of the Convention was to eradicate any and all activities which result in torture, others considered that such purely private acts were not matters of particular interest to the international community and that each State could normally be expected to take action according to its criminal law against private persons who had committed such private acts of torture so that there was no need for its regulation by an international convention. The prevailing view was that acts of torture committed by or under the responsibility of public officials for purposes connected with their public functions were different in nature from, and inherently more serious than, those inflicted by a private person, and that the elimination of the former category of torture should be the primary target of the Convention. (See Nowak and McArthur, paras 33, 40; Burgers and Danelius, pp 45, 118-120; E/CN.4/1314, 19 December 1978, para 29.) Thus, international action was primarily designed to cover situations where national action was otherwise least likely (E/CN.4/L.170, 12 March 1979, paras 17, 18). To the extent that the words "a public official or other person acting in an official capacity" in article 1 were intended to achieve that result, they should not exclude conduct by rebels, outside the authority of the State, exercising governmental functions over the civilian population of territory under its control. On the contrary, such conduct is properly the concern of the international community and requires international regulation, albeit implemented at national level. Official torture is as objectionable and of as much concern to the international community when it is committed by a representative of a de facto governmental authority as when it is committed on behalf of the de jure government.

37. Secondly, there is likely to be reluctance on the part of States to bring to justice perpetrators of torture who have acted in an official capacity, where torture is a State policy, not least because the public interest may be claimed as a justification. (See Burgers and Danelius, pp 45, 118-120; E/CN.4/1982/L.40, para 26; E/CN.4/1983/63, para 21.) As a result, the bringing to justice of perpetrators could not be left to the territorial jurisdiction of the State concerned and a primary objective of the Convention was to establish universal jurisdiction for this reason. To the extent that the words "a public official or other person acting in an official capacity" in article 1 were intended to achieve that result, the point can fairly be made on behalf of the appellant that this rationale does not apply to torture perpetrated by rebels acting outside the authority of the State. While a case for establishing universal jurisdiction may be made out in such circumstances, its basis would be the inability and not the reluctance of the State to act.

Subsequent practice

38. Article 31(2)(b) Vienna Convention on the Law of Treaties provides that in interpreting a treaty there shall be taken into account, together with the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. In this regard, the appellant relies on the report by the Special Rapporteur dated 19 February 1986 and both parties rely on the decisions and General Comments of the UN Committee Against Torture ("CAT").

Kooijmans Report, 19 February 1986

39. UNCAT was adopted on 10 December 1984 and entered into force on 26 June 1987. In his report of 19 February 1986 (E/CN.4/1986/15) the Special Rapporteur, Mr P Kooijmans, made the following reference to the text of article 1.

> "Article 1, para 1, of the Convention reads as follows '… 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 an official capacity'. The Convention was again following the Declaration of 1975, but developing it by adding the phrases 'or with the consent or acquiescence of' and 'or other person acting in an official capacity'. Consequently, State responsibility is apparent even when the authorities resort to the use of private gangs or paramilitary groups in order to inflict 'severe pain or suffering' with the intention and purposes already mentioned. However, private acts of brutality - even the possible sadistic tendencies of particular security officials - should not imply State responsibility, since these would usually be ordinary criminal offences under national law." (at para 38)

In this passage Mr Kooijmans is focussing on the circumstances in which a State may be responsible for acts of torture. He emphasises the distinction between official and private acts and the extension of the State's responsibility in cases of consent or acquiescence within article 1. Contrary to the appellant's submission, this passage does not support the proposition that a "state-nexus requirement" is inherent in the term "official capacity", such that the term only applies to persons acting on behalf of the State. The relevance of state responsibility to the present issue is considered below.

Committee Against Torture

40. Part II of UNCAT establishes the CAT which consists of "ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity" (article 17(1)). The States Parties are required to submit to the CAT reports on the measures they have taken to give effect to their undertakings under UNCAT and the CAT may make general comments on the reports (article 19). In addition, a State Party may declare that it recognises the competence of the CAT to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. The CAT is required to consider such communications and to forward its views to the State Party and the individual concerned (article 22).

41. The decisions and General Comments of the CAT are clearly entitled to respect. However, in considering the work of the CAT as part of subsequent practice in the application of UNCAT it is necessary to bear in mind the particular status of the Committee. In *Jones v Saudi Arabia* Lord Bingham observed, at para 23, with regard to a General Comment made by the CAT on the issue of effective measures of redress:

> "… [T]he committee is not an exclusively legal and not an adjudicative body; its power under article 19 is to make general comments; the committee did not, in making this recommendation, advance any analysis or interpretation of article 14 of the Convention; and it was no more than a recommendation. Whatever its value in influencing the trend of international thinking, the legal authority of this recommendation is slight."

General Comments of the CAT

42. The CAT has published four General Comments on UNCAT. In these proceedings, particular reliance has been placed on General Comment No 2: Implementation of article 2 by States Parties, 24 January 2008 (CAT/C/GC/2) and General Comment No 4: Implementation of article 3 of the Convention in the context of article 22, 4 September 2018 (CAT/C/GC/4).

43. The appellant submits that the CAT has consistently defined "official capacity" according to whether the person or entity is carrying out a public function on behalf of the State. In this regard, she relies, in particular, on the following passage in General Comment No 2:

> "The Convention imposes obligations on States parties and not on individuals. States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors and others acting in an official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law." (at para 15)

It is, of course, correct that UNCAT is binding on the Contracting States in international law and that it does not itself impose obligations on individuals. Rather, it imposes on each State party an obligation to create and enforce in its domestic law an offence which conforms with the definition in article 1. However, it is not possible to derive from this the conclusion that torture within article 1 is limited to conduct attributable to the State as suggested by the appellant. Furthermore, this passage is not necessarily intended to be an exclusive description of the scope of article 1.

44. The appellant also relies on the following passage in General Comment No 4 on the implementation of the non-refoulment obligation in article 3:

> "… States parties should refrain from deporting individuals to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-State entities, including groups that are unlawfully exercising actions that inflict severe pain or suffering for the purposes prohibited by the Convention, and over which the receiving State has no or only partial de facto control, or whose acts it is unable to prevent or whose impunity it is unable to counter." (at para 30)

This passage accurately describes the non-refoulment obligation. However, it does not address the question whether the conduct of such non-State entities might constitute torture within article 1 if they are quasi-governmental entities performing governmental functions. More generally, the General Comments do not provide any support for the reading of article 1 for which the appellant contends.

45. It is also necessary to address a submission on behalf of the prosecution that the General Comments taken as a whole demonstrate that the actions of non-State actors can be considered as acts impermissible under UNCAT. Here it is submitted that "if the interpretation of article 1 advanced by the appellant is correct (namely that it only applies to State actors or those acting with the approval or acquiescence of the State) then there would be no obligation on the State to punish acts of torture *which violate the Convention* committed by non-State officials in areas outside the State's control" (emphasis in original). The prosecution relies in particular on the following passage in General Comment No 2:

> "18. The Committee has made clear that where State authorities or others acting in an official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States

> parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking."

In this regard the prosecution further relies on passages in the CAT's initial report on Iraq, 7 September 2015 (CAT/C/IRQ/CO/1, paras 11-12) and its second periodic report on Afghanistan, 12 July 2017 (CAT/C/AFG/2, para 7). On this basis it submits that it is envisaged that it is not only State agents who should be prosecuted and punished pursuant to the State parties' obligations under the Convention but also perpetrators from non-State party groups or organisations operating on the territory of the State party.

46. This submission cannot be accepted. Although the matter is awkwardly expressed, in General Comment No 2, para 18, the CAT is stating the proposition that a State's failure to fulfil its obligation under the Convention to prevent, investigate, prosecute and punish inhuman treatment committed by "non-State officials or private actors" will amount to the State's consent to or acquiescence in those acts within the definition in article 1. It is that consent or acquiescence and not the status of the actor which gives the conduct its "official" character. This is a principle familiar in the fields of State responsibility and human rights. The State is responsible not because the acts of the individuals concerned are attributable to the State but because of its own failure to act in accordance with its obligations under the Convention. As a result, this passage does not assist the prosecution in establishing that acts of a de facto authority are within the scope of article 1. Indeed, the submission proves too much for, if correct, it would entirely negate the requirement that the conduct be that of a public official or other person acting in an official capacity.

47. As a result, I consider that the General Comments of the CAT cast little light on the present issue.

Decisions under article 22(7), UNCAT

48. A series of decisions of the CAT under article 22(7) UNCAT addresses the obligation on State Parties under article 3 not to expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. In these decisions the statements by the CAT in relation to the present issue are inconsistent. In *SV v Canada* (15 May 1996; Communication No 49/1996; UN Doc CAT/C/26/D/49/1996 (2001)) the authors complained that they were at risk of torture by the Sri Lankan authorities, but also complained that they were at risk of torture by the Liberation Tigers of Tamil Eelam ("LTTE") a rebel organisation which, the decision recorded, had in 1990 taken control

of the Tamil region. The CAT, having referred to the definition in article 1, rejected the latter complaint.

> "The Committee considers that the issue of whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention. Consequently, the issue, on which the authors base part of their claim that they would suffer torture by LTTE or other non-governmental entities on return to Sri Lanka, cannot be considered by the Committee." (para 9.5)

Similarly, in *GRB v Sweden* (19 June 1998; CAT/C/20/D/83/1997 at para 6.5) (where the author complained that if returned to Peru she would be at risk of torture both by the State authorities and by Sendero Luminoso) and in *MPS v Australia* (30 April 2002; CAT/C/28/D/138/1999 at para 7.4) (concerning the risk of torture by the LTTE in Sri Lanka) the CAT repeated this conclusion in almost identical terms.

49. By contrast, in *Elmi v Australia* (14 May 1999; CAT/C/22D/120/1998) the author, a Somali national of the Shikal clan, claimed that his forced return to Somalia would constitute a violation of article 3 because he was a risk of torture at the hands of the Hawiye clan. The CAT concluded:

> "6.5 The Committee does not share the State party's view that the Convention is not applicable in the present case since, according to the State party, the acts of torture the author fears he would be subjected to in Somalia would not fall within the definition of torture set out in article 1 … The Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase 'public officials or other persons acting in an official capacity' contained in article 1.
>
> …

> 6.7 The Committee further notes, on the basis of the information before it, that the area of Mogadishu where the Shikal mainly reside, and where the author is likely to reside if he ever reaches Mogadishu, is under the effective control of the Hawiye clan, which has established quasi-governmental institutions and provides a number of public services."

50. Three years later, however, in *HMHI v Australia* (1 May 2002; CAT/C/28/D/177/2001) the CAT distinguished *Elmi* on the ground that "in the exceptional circumstance of State authority that was wholly lacking, acts by groups exercising quasi-governmental authority could fall within the definition of article 1, and thus call for the application of article 3" (at para 6.4). It considered that:

> "… with three years elapsing since the *Elmi* decision, Somalia currently possesses a State authority in the form of the Transitional National Government, which has relations with the international community in its capacity as central government, though some doubts may exist as to the reach of its territorial authority and its permanence. Accordingly, the Committee does not consider this case to fall within the exceptional situation in *Elmi* and takes the view that acts of such entities as are now in Somalia commonly fall outside the scope of article 3 of the Convention." (at para 6.4)

51. The CAT has considered the matter more recently still, in *SS v The Netherlands* (19 May 2003; CAT/C/30/D/191/2001). The complainant argued that he would be in danger of being tortured by the LTTE if returned to Sri Lanka. Referring to the definition of torture in article 1, the Netherlands submitted that acts by non-State entities such as the LTTE could not, for the purposes of the Convention, be considered to constitute torture (para 4.6). The CAT rejected that submission, observing that:

> "… the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention, unless the non-governmental entity occupies and exercises quasi-governmental authority over the territory to which the complainant would be returned." (at para 6.4)

52. The basis on which the CAT sought to distinguish *Elmi* in *HMHI* is, with respect, unconvincing. If acts by rebel groups exercising de facto authority are capable of falling within the definition of torture in article 1 at all, then that should be the case regardless of whether there exists a central government. Furthermore, the suggestion on behalf of

the appellant that once there was a central government, notwithstanding doubts as to the reach of its territorial authority and permanence, the risk of torture fell outside the scope of the Convention, cannot be accepted. The decision in *Elmi* did not turn on the notion that refoulement would violate the Convention because there was no effective government in Somalia to protect individuals from non-State actors. Rather, the decision in *Elmi* made clear that the Hawiye were a quasi-governmental institution performing functions comparable to those normally performed by legitimate governments and that it was that de facto status which brought its conduct within the scope of article 1. By contrast with *HMHI*, the ruling on this point in *SS* makes eminent sense. It reaffirms that acts of a de facto authority are capable of falling within the definition in article 1 and it does so in terms which free it from the unprincipled restriction apparently imposed in *HMHI*. Despite its manifest inconsistencies, therefore, this line of authority does provide some support for the view that the conduct of non-State actors exercising de facto authority over territory which they occupy can fall within article 1 of UNCAT.

Context of international law

53. Article 31(2)(c) of the Vienna Convention on the Law of Treaties provides that in interpreting a treaty there shall be taken into account, together with the context, any relevant rules of international law applicable in the relations between the parties. In this regard it is necessary to refer to the possible relevance of two matters: State responsibility and recognition of States and governments.

Relevance of State responsibility

54. Before the Court of Appeal the prosecution sought to rely on principles concerning the responsibility of an insurrectional movement which ultimately succeeds in replacing the government of a State, as the NPFL did in Liberia. The General Commentary to the International Law Commission Draft Articles on State Responsibility explains that whereas the conduct of an unsuccessful insurrectional movement is not in general attributable to the State, where the movement achieves its aims and installs itself as the new government of the State it would be anomalous if the new regime could avoid responsibility for conduct earlier committed by it. The continuity which exists between the new organisation of the State and that of the insurrectional movement leads to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle. As a result, article 10 of the Draft Articles provides for the attribution of the conduct of the successful insurrectional movement to the State (J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (2002), 117). This led the prosecution to submit before the Court of Appeal that it would be anomalous if torture committed by a public official of an insurrectional movement exercising governmental functions over territory in which it exercises de facto control

should be treated as outside the scope of the Torture Convention, so as to attract no individual responsibility, because the acts were not those of a de jure State, in circumstances where the very same acts would constitute acts of the State for which the State would assume responsibility, if the insurrectional movement was successful and became the de jure government.

55. This submission was not pursued before the Supreme Court, rightly in my view. The question of the attribution of conduct to States for the purposes of State responsibility is distinct from the responsibility of individuals whether under international law (article 58 of the Draft ILC Articles) or, as in this case, under national law where it implements an international convention. It would, moreover, be an unsatisfactory state of affairs if the question whether conduct constituted torture within article 1 of UNCAT were to depend on whether the entity to which the perpetrators belonged subsequently succeeded in replacing the government of the State concerned.

Relevance of recognition of States and Governments

56. The appellant's suggested reading of article 1 gives rise to a number of difficulties and anomalies concerning issues of recognition of States and governments. First, before the Court of Appeal the appellant submitted that the term "person acting in an official capacity" is limited to a person acting for or on behalf of a government authority of a recognised State, a submission which was rejected by the Court of Appeal. At the hearing before the Supreme Court that submission was no longer maintained. For present purposes it is not necessary to embark on a consideration of the relevance, if any, of recognition to statehood in international law. It is sufficient to refer to the following observation of Chief Judge Newman in the US Court of Appeals, Second Circuit in *Kadic v Karadic* 70 F 3d 232 (2d Cir 1995), at 245 with which I respectfully agree.

> "The customary international law of human rights, such as the proscription of official torture, applies to states without distinction between recognized and unrecognized states … It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavour with a foreign regime - sometimes due to human rights abuses - had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors."

57. This observation applies with equal force to the scope of the offence defined in article 1 of UNCAT. While in the present case the statehood of Liberia is not in question, the issue nevertheless serves to demonstrate a difficulty inherent in the appellant's proposed reading of article 1 which must be capable of uniform application. As Mr

Swaroop QC, on behalf of the intervener, pointed out, it now seems to be accepted on behalf of the appellant that the offence defined in article 1 can apply in the case of a person acting on behalf of a de facto entity which is not recognised as a State.

58. Secondly, in a situation where two or more entities are competing and are both performing governmental functions within the territory of a State, the appellant's suggested reading of article 1 would require a determination as to which of them is, at any given time, to be regarded as constituting the government of the State ie which is to be regarded as the de jure government and which is merely exercising de facto control or authority. On the appellant's suggested reading of the provisions, only a person acting in an official capacity on behalf of the de jure government of the State could commit the offence defined in article 1. How is such an evaluation to be performed? At the oral hearing before us, Mr Powles stated that he was neutral as to whether recognition of the entity as the de jure government of the State was required and that while it could be relevant in some circumstances it is not relevant in this case. The practice of States in this regard varies enormously and often turns on policy as opposed to legal considerations. Whereas the United Kingdom has in the past recognised governments, it no longer does so (HL Debates, vol 48, cols 1121-1122, 28 April 1980; HC Debates, vol 983, Written Answers, cols 277-279, 25 April 1980 and HC Debates, vol 985, Written Answers, col 385, 23 May 1980; *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA* [1993] QB 54; C Warbrick, "The New British Policy on Recognition of Governments", (1983) 30 ICLQ 568). Resort to State practice in recognising or not recognising governments is, therefore, incapable of providing a uniform standard by which the Convention can be applied.

59. Thirdly, Mr Powles accepted that in one situation article 1 does apply to a quasi-governmental entity exercising de facto control over territory. He accepted that the decision of the CAT in *Elmi*, considered at paras 49 to 52 above, was correct in applying article 1 to a body exercising de facto control over territory in Somalia, but sought to distinguish this as an exceptional situation because in that case there was no central government. However, it is difficult to see any basis on which this situation can be distinguished from others in which governmental functions are being performed by bodies in de facto control of territory. As the Court of Appeal observed in the present case (at para 55), once it is accepted that the words "person acting in an official capacity" are wide enough to cover factions exercising governmental functions in territory over which they exercise de facto control, it is difficult to see why there should be any such limitation to the circumstances of *Elmi*, either as a matter of principle in international law or as a matter of the language of article 1 of UNCAT.

UK authorities

60. The appellant draws attention to the following passage in the speech of Lord Millett in *Pinochet (No 3)* as emphasising the governmental nature of the act of torture in article 1 UNCAT.

> "The definition of torture, both in the Convention and section 134, is in my opinion entirely inconsistent with the existence of a plea of immunity ratione materiae. The offence can be committed *only* by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is coextensive with the offence." (at p 277D-E)

So much is uncontroversial. What is more problematical is what constitutes acting in an official capacity, a matter on which, with one exception, the UK authorities provide little assistance.

61. The appellant relies on a line of authority concerning the relevant definition of torture for the purposes of immigration and asylum detention policy which, it is submitted, reveals a clear understanding that "person acting in an official capacity" in article 1 UNCAT refers to persons acting on behalf of the State. In *R (EO) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin), ACD 116 Burnett J concluded that "torture" in rule 35(3), Detention Centre Rules 2001 (SI 2001/238) ("DCR") and in certain policy documents had a broader meaning than the UNCAT definition. It was not confined to acts of public officials or other persons acting in an official capacity or in which they were complicit or acquiesced. Subsequent to *EO*, the Secretary of State introduced statutory guidance entitled "Adults at Risk in Immigration Detention" ("AARSG"). The definition of "torture" for the purposes of rule 35 of DCR and the AARSG is set out in Detention Services Order, DSO 09/2016 which sets out the definition in article 1 UNCAT but adds:

> "It includes such acts carried out by terrorist groups exploiting instability or civil war to hold territory."

In *R (Medical Justice) v Secretary of State for the Home Department* [2017] EWHC 2461 (Admin); [2017] 4 WLR 198, Ouseley J set out the history of these provisions and noted that:

> "The reference to acts carried out by terrorist groups is not part of the UNCAT definition, but was added following discussions between the SSHD and an NGO, Freedom from Torture; it was suggested by Sir Keir Starmer MP." (at para 33)

This, it is said on behalf of the appellant, demonstrates that the courts and the parties to these cases, including the Secretary of State, clearly understood that "person acting in an official capacity" for the purposes of article 1, UNCAT applies only to a person acting for or on behalf of a State. While this might, at first sight, appear to support the appellant's case, I am unable to attach any great weight to it. The precise question in issue here was not under consideration. Moreover, in the particular context of immigration detention it was clearly desirable to include such an express provision for the benefit of persons who, because of their history, should not be detained.

62. We were informed that this is only the third occasion on which a prosecution has been brought in the United Kingdom pursuant to section 134, CJA. In *R v Lama* [2014] EWCA Crim 1729; [2017] QB 1171 the present issue did not arise. However, in my view considerable assistance is to be found in the first instance decision of Treacy J in *R v Zardad*, Case No T2203 7676, 7 April 2004. Zardad was charged with a conspiracy to torture in Afghanistan in circumstances where the substantive charge would have been that contrary to section 134, CJA. The case concerned the period between 1992 and 1996 when the Hezb-I-Islami faction was in control of Laghman Province. During that period Zardad was a chief commander of Hezb-I-Islami and the military controller of the area of Sarobi. Zardad maintained that he was not a public official since there was a recognised government in Afghanistan at the relevant time and the group to which he belonged was not a part of that government and was actively opposed to it. The prosecution maintained that he was either a public official de jure or a person acting in an official capacity de facto.

63. At a preparatory hearing pursuant to section 29, Criminal Procedure and Investigations Act 1996, Treacy J considered that there was no evidence on which a jury could find that Zardad was a de jure public official. However, having surveyed the evidence of the degree of control exercised by Hezb-I-Islami, he continued:

> "It seems to me that what needs to be looked at is the reality of any particular situation. Is there sufficient evidence that Hezb-I-Islami had a sufficient degree of organisation, a sufficient degree of actual control of an area and that it exercised the type of functions which a government or governmental organisation would exercise? It seems to me that I have to take care not to impose Western ideas of an appropriate structure for government, but to be sensitive to the fact that in countries such as Afghanistan different types of structure may exist, but which may legitimately come within the ambit of an

> authority which wields power sufficient to constitute an official body." (at para 33)

He rejected a submission, based on *Elmi*, that the mere fact that there is a central government in existence precludes there being a de facto authority of which a person might be a public official or on whose behalf a person might act in a similar capacity. He considered that the words "person acting in a public capacity" included those acting for an entity which had acquired de facto effective control over an area of a country and was exercising governmental or quasi-governmental functions in that area. In his view, there was material on which a jury could conclude that Zardad was such a de facto public official in an area totally controlled by his organisation which exercised, with a degree of permanence, functions which would be functions of a state authority (at paras 34-38).

64. Mr Powles submits that *Zardad* is wrongly decided. However, I find the approach of Treacy J compelling and in conformity with the preponderant weight of material relevant to the interpretation of article 1, UNCAT.

65. *Zardad* is also instructive as to which features are indicative of governmental activity. There, in support of its contention that Zardad should be treated as a public official on a de facto basis, the prosecution maintained that Zardad was akin to a Military Governor in control of a province and that he was, accordingly, to be regarded as a quasi-official and amenable to the provisions of section 134 CJA. Treacy J drew attention, inter alia, to Zardad's admission that he was a general within Hekmatyar's army (Hekmatyar being the leader of the Hezb-I-Islami faction), which controlled the Sarobi area, and to the clear command structure within that force. The judge referred to the fact that prisons within the controlled area were run by Hezb-I-Islami which was the only law enforcement authority in the area and to the role of Hezb-I-Islami and Zardad personally in arresting and imprisoning lawbreakers and in mediating and resolving disputes between individuals. Representatives of international organisations and aid agencies would make representations to Zardad, as opposed to any central government authority, if equipment was seized or delayed at any of the checkpoints for which Zardad's force was responsible. Those who complained of ill-treatment, torture and hostage taking regarded Zardad and Hekmatyar as the only official authority in the area which was dominated and controlled by them. Against this background Treacy J concluded:

> "The material to which I have referred in this judgment leaves it open for a jury to conclude that Mr Zardad was a de facto public official in an area which was totally controlled by Hezb-I-Islami and controlled by them with a degree of permanence. There is no evidence to show that at any material time the central government exercised any governmental function over the area controlled by Hezb-I-Islami.

> Such evidence as there is tends to show that Hezb-I-Islami had total control of the area in question. There is evidence that the Hezb-I-Islami faction exercised functions which could be functions of a state authority." (at para 35)

US authorities

66. The appellant relies on a number of US authorities concerning the Alien Tort Claims Act ("ATCA"). First, reliance is placed on certain passages in the judgment of Chief Judge Newman in *Kadic v Karadzic* (above). The plaintiffs sought remedies against Karadzic, the president of a three-man presidency of the self-proclaimed Bosnian-Serb Republic of Srpska in respect of alleged atrocities including torture committed in Bosnia-Herzegovina. The complaints alleged that Karadzic acted in an official capacity, either as titular head of Srpska or in collaboration with the government of the recognised nation of the former Yugoslavia. Subject matter jurisdiction was grounded, inter alia, in ATCA and the Torture Victim Protection Act of 1991 ("TVPA"). A motion for dismissal succeeded in the District Court, inter alia, on the ground of lack of subject matter jurisdiction. The Court of Appeals considered that the requirement of ATCA that the tort be "committed in violation of the law of nations" was satisfied. With regard to torture, the Court of Appeals observed, at p 243:

> "However, torture and summary execution - when not perpetrated in the course of genocide or war crimes - are proscribed by international law only when committed by state officials or under color of law."

and then recited the definition in article 1, UNCAT. In a passage cited earlier in this judgment at para 56 the Court of Appeals held that the proscription of official torture applied without distinction to both recognised and non-recognised States and continued, at p 245:

> "Appellants' allegations entitle them to prove that Karadzic's regime satisfies the criteria for a state, for purposes of those international law violations requiring state action. Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law. Moreover, it is likely that the state action concept, where applicable for some violations like 'official' torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded

> internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists."

67. On behalf of the appellant it is submitted that the Court of Appeals here placed considerable emphasis on the need for the entity under consideration to possess significant State-like qualities. Moreover, it is said that the State-like qualities possessed by Srpska were of a considerably different order from those of NPFL as it existed during the relevant period of 1990 in Liberia. However, in common with most of the other US authorities relied on by the appellant, *Kadic* concerns the distinct question of actionability under ATCA. Furthermore, to the extent that it may be relevant, *Kadic*, notwithstanding the use of the language of statehood, does not support the appellant's reading of article 1, UNCAT. On the contrary, the Court of Appeals apparently considered that official torture required "merely the semblance of official authority" and could be committed by "a person purporting to wield official power" who had exceeded internationally recognised standards of civilised conduct. In the result, the conduct of a de facto governmental authority was held to constitute official torture.

68. The same is true of a further US decision on which the appellant relies, *Mehinovic v Vuckovic*, 198 F Supp 2d 1322 (2002) (US District Court, N D Georgia, Atlanta Division). The plaintiffs sued a former soldier in the Bosnian Serb Army alleging, inter alia, acts of torture. The District Court held that it had jurisdiction under both ATCA and TVPA. With regard to ATCA, it noted that official torture violated obligatory norms of customary international law and, after referring to the definition in article 1, UNCAT observed that

> "… the beatings carried out by Vuckovic and his accomplices were clearly perpetrated, instigated, and acquiesced in, by persons acting in an official capacity as part of the police or military forces of Republika Srpska." (at p 1346)

The appellant relies in particular on the following passage:

> "… Vuckovic clearly committed abuses against plaintiffs under official authority. In light of the de facto governmental authority of the Republika Srpska, under which Vuckovic served as a soldier, and the control exerted over it by the Serbian government, Vuckovic may be considered <u>also</u> to have been acting under the authority of a 'foreign nation'." (at p 1347) (Emphasis added)

In this second passage, the court was considering whether the claim also satisfied the requirement of TVPA that the torture be "under actual or apparent authority, or color of law, of any foreign nation". This does not detract in any way from the court's earlier

conclusion that the conduct was that of persons acting in an official capacity. On the contrary, the court's reasoning supports the view that conduct of a de facto governmental authority can constitute official torture within article 1, UNCAT.

69. The appellant also relies on further US cases concerning the scope of application of ATCA, in particular the requirement that the tort alleged should have been committed "in violation of the law of nations". *Tel-Oren v Libyan Arab Republic*, 726 F 2d 774, 233 US App DC 384 (1984), a decision which pre-dated UNCAT, concerned the murder of civilians in a terrorist attack on a bus in Israel in March 1978. The three members of the court, for different reasons, provided support for the view that torture claims against non-State actors were not within the jurisdictional grant of ATCA. In particular, Judge Edwards considered that the Palestine Liberation Organisation was not a recognised member of the community of nations and that there was insufficient consensus in 1984 that torture by private actors violated international law. In *Ali Shafi v Palestinian Authority* 642 F 3d 1088 (2011), the US Court of Appeals, Second Circuit endorsed this approach concluding, similarly, that in 2011 the appellants in that case had not demonstrated a consensus in the law of nations that torture by private actors violates international law. These cases were concerned with whether under ATCA there is a cause of action for torture against non-State actors. Neither case was directly concerned with the question whether the conduct of an individual acting on behalf of a quasi-governmental entity which is in de facto control of territory may give rise to official torture under UNCAT. Nor, in my respectful view, does the decision of the US Supreme Court in *Sosa v Alvarez-Machain* 542 US 692 (2004) on the scope of ATCA cast any light on the present issue.

70. Finally, in this regard, I should refer to *United States of America v Belfast* (US Court of Appeals, 11th Circuit, 15 July 2010) which concerned a series of constitutional challenges to the Torture Act, 18 USC para 2340-2340A. In rejecting a challenge brought on the ground that the official conduct requirement of the Act used the phrase "under color of law" rather than the phrase "in an official capacity" as found in UNCAT, the Court of Appeals referred to the view of the Senate Executive Committee charged with evaluating UNCAT that there is no distinction between the phrases.

> "The scope of the Convention is limited to torture 'inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity'. Thus, the Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in US law, it applies to torture inflicted 'under color of law'."

The appellant points to the fact that the Court of Appeals then went on to draw attention to the definition of "under color of law" in the different context of 42 USC para 1983

("[t]he traditional definition of acting under color of state law requires that the defendant … have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law'": *West v Atkins*, 487 US 42, 49 (1988) quoting in turn from *United States v Classic*, 313 US 299, 326 (1941)). Notwithstanding this equiparation of official conduct under UTCA and acting "under color of law" in a different context, the statement by the Senate Executive Committee and its adoption by the Court of Appeals makes clear that the distinction both sought to draw was between "torture that occurs in a the context of governmental authority" and "torture that occurs as a wholly private act". Furthermore, *Belfast* was concerned solely with conduct which took place in Liberia after Charles Taylor had established himself as President of that State. Accordingly, it was not directly concerned with the question whether the conduct of a person acting on behalf of a quasi-governmental entity which is in de facto control of territory may give rise to official torture.

Academic commentators

71. We have been referred to academic commentary which tends to support the reading of article 1 for which the prosecution contends. Thus, for example, Professor Paola Gaeta (When is the Involvement of State Officials a Requirement for the Crime of Torture?, Journal of International Criminal Justice 6 (2008), 183) explains that, whereas criminal law is usually the prerogative of each State, exceptionally international law is used by States for criminal issues as a tool to achieving stronger cooperation in judicial matters, when they want to oppose forms of trans-national criminality jeopardizing their collective interests.

> "This premise, …, helps clarify why the Torture Convention sets out the requirement of the involvement of state officials for torture. … The requirement of a 'state official' is therefore needed to avoid that under international law a single conduct - although consisting of an infliction of severe mental or physical pain or suffering - be considered criminal when it is carried out by private individuals for private purposes. Such conduct is not of international concern and is therefore not covered by the Convention. In other words, the state official requirement constitutes what one could term the *quid pluris*, transforming an 'ordinary' criminal offence into an international crime. It simply serves the purpose of precluding every single wicked act carried out by private individuals against other private individuals from being elevated to the international level." (at p 190)

Similarly, Burgers and Danelius (above) observe (at p 1) that UNCAT "does not deal with cases of ill-treatment which occur in an exclusively non-governmental setting. It only relates to practices which occur under some sort of responsibility of public officials or other persons acting in an official capacity."

72. Other writers go further in addressing the particular issue with which we are concerned. Reference has been made above (at para 31) to the commentary by Nowak and McArthur in which they conclude that the conduct of rebel, guerrilla or insurgent groups which exercise de facto authority in certain regions or of warring factions in so-called "failing States" would fall within the scope of article 1. Similarly, the editors of *Cassese's International Criminal Law*, 3rd ed (2013) state:

> "Finally, under the UN Torture Convention, the 'pain and suffering' that is a necessary ingredient of torture must be inflicted 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. The need for this sort of participation of a de jure or de facto state official stems from: *i)* the fact that in this case torture is punishable under international rules even when it constitutes a single or sporadic episode; and *ii)* the consequent necessity to distinguish between torture as a common or 'ordinary' crime (for example, torture of a former intimate partner by a sadist) and torture as an international crime covered by international rules on human rights." (at p 133)

73. Professor Gaeta returns to this issue in Clapham and Gaeta, Torture by Private Actors and "Gold Plating" the Offence in National Law, in Guzman et al (eds), *Arcs of Global Justice: Essays in Honour of William Schabas*, (OUP 2018), Ch 15, which is a dialogue between Professor Gaeta and Professor Andrew Clapham. While Professor Gaeta's contributions largely address the extent to which States may choose to exceed the scope of article 1 UNCAT, Professor Clapham in the following passage is clearly addressing the scope of article 1.

> "But I would go further than you - one does not even need the involvement of a state official under the Convention. The Convention uses the expression 'official capacity' in contrast to 'state official'. As you know, in the *Zardad* case in the UK this was interpreted to cover a person working against the state as part of a rebellion. One could not say that the state acquiesced in the torture, and yet the defendant was convicted and sentenced to 20 years. The judge said that in Afghanistan there may be 'different types of structure' which may 'come within the ambit of an authority which wields power sufficient to constitute an official body'. It seems to me that one can have torture by an authority even where that 'authority' is fighting against the state. I admit that this is just one case. But as we know it is more likely that prosecutions will be brought for international crimes against non-state actors than against state actors. I have not found many national prosecutions for torture by state actors." (at p 292, footnotes omitted)

74. The only unequivocal academic statement of the contrary view to which we were referred was that of Professor Roger O'Keefe, *International Criminal Law*, OUP, 2015, Ch 7. Having referred to the decision of the CAT in *Elmi* he continued:

> "The committee stressed in the later *HMHI v Australia*, in which it distinguished *Elmi* on the facts, that its finding in *Elmi* as to 'groups exercising quasi-governmental authority' was restricted to 'the exceptional circumstances of state authority that was wholly lacking'. But notwithstanding what the Committee reiterated was 'the exceptional situation in *Elmi*', the Committee's view is open to doubt. Even more doubtful is the ruling in the English criminal case of *R v Zardad (Faryadi)* that, even where there exists a government within a state, the expression 'a public official or other person acting in an official capacity' in article 1 of the Torture Convention can extend to 'people who are acting for an entity which has acquired de facto effective control over an area of a country and is exercising governmental or quasi-governmental functions in that area'." (at para 7.121, footnotes omitted)

Unfortunately, however, in the absence of any further explanation it is difficult to understand the basis of the author's objection.

Conclusion

75. It is time to draw the threads together.

76. First, I am persuaded that the prosecution is correct in its interpretation of article 1 UNCAT and section 134 CJA. I consider that the words of those provisions in their ordinary meaning support this reading. They are sufficiently wide to include conduct by a person acting in an official capacity on behalf of an entity exercising governmental control over a civilian population in a territory over which it exercises de facto control. In particular, I can see no justification for imposing the limitation on those words for which the appellant contends, which would require the conduct to be on behalf of the government of the State concerned. On the contrary, the words in their ordinary meaning are apt to include conduct on behalf of a de facto authority which seeks to overthrow the government of the State. This reading also conforms with the object and purpose of the provisions. Here I attach particular significance to the purpose of the Convention in seeking to establish a regime for the international regulation of "official" torture as opposed to private acts of individuals. Torture perpetrated on behalf of a de facto governmental authority is clearly a matter of proper concern to the international community and within the rationale of the scheme. In addition, some support for this conclusion can be found in the decisions of the CAT under article 22(7), UNCAT and

it is favoured by the preponderant weight of academic comment. I would express the principle in the following terms.

> "'A person acting in an official capacity' in section 134(1) of the Criminal Justice Act 1988 includes a person who acts or purports to act, otherwise than in a private and individual capacity, for or on behalf of an organisation or body which exercises, in the territory controlled by that organisation or body and in which the relevant conduct occurs, functions normally exercised by governments over their civilian populations. Furthermore, it covers any such person whether acting in peace time or in a situation of armed conflict."

77. Secondly, I would emphasise, that exercise of governmental functions is a core requirement. It will be noted that the formulation of the principle set out above differs from that of the Court of Appeal, which referred to a person acting "for or on behalf of an organisation or body which exercises or purports to exercise the functions of government …". Section 134(1) refers to a person acting "in the performance or purported performance of his official duties". In the Court of Appeal's formulation, however, the adjective "purported" has been transposed so as to refer to the function being exercised by the organisation or body. This is an error as the functions being exercised by the organisation or body must be governmental in character. Purporting to exercise such functions would not be sufficient.

78. Thirdly, the exercise of a governmental function must be distinguished from purely military activity not involving any governmental function. I note that, in this regard, Treacy J in *Zardad* distinguished governmental functions from "the activities of a rebel faction which has not acquired a sufficient degree of control, permanence, authority or organisation to fulfil criteria sufficient for it to be recognised as an authority wielding official or quasi-official powers" (at para 36). However, insurrectional forces engaged in fighting the forces of the central government of a State may nevertheless exercise sufficient governmental authority over territory and persons under their control for acts done on their behalf to be official acts for this purpose. Thus, in *Zardad* the area controlled by Hezb-I-Islami was controlled essentially by military force but the group also exercised governmental functions. The failure to take account of the distinction between governmental and military activity leads me to the view that the formulation adopted by Sweeney J in the present case - "in situations of armed conflict, … individuals who act in a non-private capacity and as part of an authority-wielding entity" - is too broad. It is also necessary to bear in mind that there are circumstances in which torture might constitute a crime against humanity or a war crime contrary to UK law, whether or not performed by a public official or a person acting in an official capacity. However, for reasons explained at para 20 above, that is not so with regard to the alleged facts in the present case.

79. Fourthly, it is necessary to say something about what may be the indicative features of governmental authority in any particular case. I consider that Treacy J in *Zardad* correctly identified the required approach when he observed that it is necessary to look at the reality of any particular situation and to consider whether, at the relevant time, the entity in question had a sufficient degree of organisation and actual control over an area and whether it exercised the type of functions which a government or governmental organisation would exercise. This will require examination of evidence as to the position on the ground. In doing so it will be necessary to make allowance for the particular conditions which may make administration difficult and for different views of appropriate structures of government. The question will be whether the entity has established a sufficient degree of control, authority and organisation to become an authority exercising official or quasi-official powers, as opposed to a rebel faction or a mere military force. The one reservation I have about the approach of Treacy J. in *Zardad* is his view that the entity would be required to establish itself with a degree of permanence. This, it seems to me, is likely to be a flexible concept and the fact that the long-term survival of an entity may be an unlikely prospect should not prevent it from being considered a de facto government provided that it has effectively established itself as such. Furthermore, it is clear that the continued existence of a central government would not prevent an entity exercising the authority described above from being a de facto government in respect of the territory under its control. The application of this approach to the particular facts in *Zardad* has been considered at para 65 above.

80. Fifthly, if this matter proceeds to trial, the question whether the appellant acted in an official capacity as alleged in the indictment will be a matter for the jury and it will be open to the defence to argue that the evidence does not come up to the mark. However, this appeal arises out of a ruling at a preparatory hearing under section 31(3) CPIA and the issue for the judge at that hearing was the correct interpretation of the words "person acting in an official capacity" in section 134 CJA. The Court of Appeal expressed its conclusion on the legal test in different terms from those of Sweeney J but, nevertheless, considered that the test the judge applied was not materially different on the facts of the case and that his ruling on the factual submission of no case to answer was not affected. Since the hearing in the Court of Appeal, however, the prosecution has served a further memorandum in which its expert witness clarifies that his use of the term "control" in his evidence refers to military rather than administrative control over the area. In particular, he states that NPFL were the de facto military authority but that military control is very different from administrative control. (See para 7, above.) This is a matter of some importance for the reasons expressed at para 79, above. Furthermore, for the reasons set out in para 77 above, I would modify the test adopted by the Court of Appeal. Accordingly, in these circumstances, I consider that it is necessary for this matter to be remitted to the judge for him to reconsider it in the light of these further developments and in the light of further expert evidence.

81. I would, therefore, on this narrow basis, allow the appeal, quash the determination of the Court of Appeal and remit the matter to the judge for further consideration in the light of the new evidence from the prosecution expert and the

judgment of this Court. For this purpose, I would make an order under rule 9.16(5), Criminal Procedure Rules that the appellant be permitted to make, within 28 days from the date on which judgment is given in this appeal, a new application to dismiss.

LORD REED: (dissenting)

82. I regret that I am unable to agree with the careful reasoning of Lord Lloyd-Jones. Bearing in mind in particular that this court's decision may be considered in other jurisdictions, it is right that I should indicate briefly the reasons why I find more persuasive the arguments advanced on behalf of the appellant.

83. First, article 31(1) of the Vienna Convention on the Law of Treaties sets out the general rule of interpretation of treaties:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Applying that general rule to article 1 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), the ordinary meaning of the phrase "a public official or other person acting in an official capacity" does not in my opinion extend to a member of an insurgent group engaged in armed insurrection against the government of the country. That point does not admit of much elaboration. The ordinary meaning of the words "a public official" is reasonably clear, and would not in my opinion apply to such a person. The words "or other person acting in an official capacity" would, in their ordinary meaning, extend to persons who were not public officials but who were acting in a similar capacity, by reason for example of the outsourcing of public functions to private agencies. The core idea seems to me to be that the person in question is acting on behalf of the state. I have difficulty in applying the words "acting in an official capacity" to persons participating in an armed insurrection against the government.

84. Secondly, article 31(1) of the Vienna Convention requires the terms used in a treaty to be given their ordinary meaning "in their context". The context, so far as UNCAT concerns the position of the state where the torture occurs, includes in the first place the final sentence in article 1, which excludes from the definition of torture "pain or suffering arising only from, inherent in or incidental to lawful sanctions". The reference to "lawful sanctions" supports the view that article 1 is concerned with conduct for which the state bears responsibility. It is far from obvious how the exclusion of lawful sanctions is to be applied if the conduct of insurgents controlling an area of territory falls within the scope of article 1. Are they to be regarded as being in a position

to impose lawful sanctions, despite their lack of any lawful authority for their conduct? If so, by what standards is the lawfulness of any sanctions they might impose to be judged? But if not, can no distinction be drawn between punishment which falls within the scope of UNCAT and punishment which does not?

85. The context also includes article 2(1):

> "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

The territory under the jurisdiction of a state would ordinarily be understood as being the territory over which it has de jure control. If torture carried out by insurgents in territory under their de facto control falls within the scope of UNCAT, it follows that article 2(1) imposes an obligation on states with which they cannot comply: they cannot take "effective" measures in relation to territory which they do not control. UNCAT cannot sensibly be interpreted in a way which would have the effect of imposing an obligation on states with which they cannot comply: lex non cogit ad impossibilia. That strongly suggests that article 2(1) cannot have been intended to apply in those circumstances, which in turn implies that the definition of torture in article 1 cannot have been intended to apply to torture committed by insurgent forces, without the consent or acquiescence of the state in question.

86. Thirdly, article 31(1) of the Vienna Convention requires a treaty to be interpreted "in the light of its object and purpose". UNCAT is intended, as its preamble recites, "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world". Nevertheless, by the time UNCAT was concluded, the prohibition of torture was already recognised as a peremptory norm of international law, enshrined in article 7 of the International Covenant on Civil and Political Rights (ICCPR). The objective of UNCAT, as appears from its substantive provisions, was more specific: to impose obligations on states actively to prevent and punish torture, including by means of universal jurisdiction. Thus, as I have explained, article 2 requires states to take effective measures to prevent acts of torture, as defined in article 1, in any territory under their jurisdiction. Article 3 prohibits states from expelling, returning or extraditing persons to other states where they are liable to be tortured. Articles 4 to 9 make provision for states to exercise an extra-territorial jurisdiction in respect of acts of torture, requiring them to prosecute persons within their jurisdiction who are alleged to be responsible for torture, wherever it occurred, and to punish them if convicted. It is for the purpose of those obligations that article 1 adopts a definition of torture which is specifically concerned with the conduct of public officials and other persons acting in an official capacity: a definition which is narrower than the concept of torture in the ICCPR (or in other international law instruments, such as common article 3 of the Geneva Conventions, the Rome Statute of the International

Criminal Court, or the statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda).

87. Articles 4 to 9 of UNCAT, in requiring states to exercise a universal jurisdiction in respect of acts committed in other states and having no connection to themselves, are particularly significant in international law, since they make inroads into national sovereignty. Two implications follow. First, if there is a real doubt as to the interpretation of article 1, it is more likely, other things being equal, that the states parties will have intended a narrower rather than a more expansive reading, since they are unlikely to have intended to diminish their sovereignty further than they had made reasonably clear. Secondly, one would expect there to be a compelling justification for states to accept the presence in an international treaty of provisions having the effect of diminishing their sovereignty. Such a justification exists if article 1 is understood as applying to persons exercising official functions on behalf of the state, or at least acting with its consent or acquiescence, since states might be reluctant to prosecute such persons for acts committed in the course of their duties. There would be no reason to apprehend such reluctance, on the other hand, if torture were committed by persons who were unconnected with the state and had neither its authority nor consent, nor even its acquiescence.

88. That is indeed the explanation given in Burgers and Danelius, *The United Nations Convention against Torture - A Handbook on the Convention against Torture* (1988), p 120:

> "The problem with which the Convention was meant to deal was that of torture in which the authorities of a country were themselves involved and in respect of which the machinery of investigation and prosecution might therefore not function normally. A typical case is torture inflicted by a policeman or an officer of the investigating or prosecuting authority. But many variations are conceivable. It could be that the torturer is not directly connected with any public authority but that the authorities have hired him to help gather information or have at least accepted or tolerated his act. All such situations where the responsibility of the authorities is somehow engaged are supposed to be covered by the rather wide phrase appearing in article 1: 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'."

The two authors were actively involved in the preparation of UNCAT, Herman Burgers as chairman-rapporteur of the Working Group set up to draw up the text of the Convention, and Hans Danelius as the author of the initial draft of the Convention and as an active participant in all sessions of the Working Group.

89. Other respected experts in this field have also interpreted article 1 as being confined to situations where the responsibility of state authorities is engaged: that is my understanding of what is said, for example, in Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (1999), pp 27-28; in Gaeta, "*When is the Involvement of State Officials a Requirement for the Crime of Torture?*" (2008) 6 JICJ 183, 184 and 190, and in Gaeta and Clapham, "Torture by Private Actors and 'Gold Plating' the Offence in National Law: An Exchange of Emails in Honour of William Schabas", in de Guzman and Amann (eds), *Arcs of Global Justice: Essays in Honour of William Schabas* (2018), p 290; and, perhaps most emphatically, in O'Keefe, *International Criminal Law* (2015), Part Two, para 7.121.

90. Fourthly, it is apparent that while many states parties, including the United Kingdom, have followed the wording of article 1 when implementing UNCAT in their domestic law, there are also states which have adopted a definition based on the understanding that article 1 is confined to situations where the responsibility of state authorities is engaged. Examples include Norway (where section 174 of the Penal Code of 2005 imposes liability on "any public official", defined as "any person in central or local government service, or engaged by central or local government to perform a service or work"), Spain (where article 174(1) of the Criminal Code provides that "torture is committed by the public authority or officer who, abusing his office …"). Turkey (where article 94(1) of the Criminal Code imposes liability on "any civil servant …"; article 94(4) imposes an ancillary liability on "any other person found to have participated in this offence", who "shall be subject to the same punishment as the civil servant"). The implication of the respondent's argument is that those states parties have failed to implement UNCAT correctly. Counsel for the respondent emphasised that Austria, whose representatives had proposed the wording adopted in article 1, provides in the relevant provision of its Criminal Code (section 312a) that "public officials within the meaning of this provision shall also be those who, in the event of the absence or default of the public authorities, are effectively acting as officials". What is of greater interest, however, is that this provision was only introduced in 2013. Is it to be inferred that, until then, Austria had failed to implement correctly a provision of UNCAT which had been adopted at its own suggestion?

91. Fifthly, an interpretation of article 1 which confined it to situations where the conduct was the responsibility of the state was consistently adopted by the United Nations Committee Against Torture in its decisions prior to about 2003. In *GRB v Sweden*, Communication No 83/1997, 15 May 1998, para 6.5, the Committee stated:

> "The Committee considers that the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention."

The Committee went somewhat further in *Elmi v Australia*, Communication No 120/98, 14 May 1999, para 6.5, but in circumstances where there was no functioning state:

> "The Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase 'public officials or other persons acting in an official capacity' contained in article 1."

The following day, in *SV v Canada*, Communication No 49/1996, 15 May 1999, para 9.5, the Committee reiterated its established position:

> "The Committee considers that the issue of whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention."

That was repeated in *MPS v Australia*, Communication No 138/1999, 30 April 2002, para 7.4:

> "The Committee recalls its previous jurisprudence that the issue whether the state party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention."

The special nature of the *Elmi* case was made clear by the Committee in the case of *HMHI v Australia*, Communication No 177/2001, 1 May 2002, para 6.4:

> "The Committee recalls its jurisprudence that the State party's obligation under article 3 to refrain from forcibly returning a person to another State where there are substantial grounds of a risk of torture, as defined in article 1 of the Convention, which requires actions by 'a public official or other person acting in an official

> capacity'. Accordingly, in *GRB v Sweden*, the Committee considered that allegations of a risk of torture at the hands of Sendero Luminoso, a non-state entity controlling significant portions of Peru, fell outside the scope of article 3 of the Convention. In *Elmi v Australia*, the Committee considered that, in the exceptional circumstance of State authority that was wholly lacking, acts by groups exercising quasi-governmental authority could fall within the definition of article 1, and thus call for the application of article 3. The Committee considers that, with three years elapsing since the *Elmi* decision, Somalia currently possesses a State authority in the form of the Transitional National Government, which has relations with the international community in its capacity as central government, though some doubts may exist as to the reach of its territorial authority and its permanence. Accordingly, the Committee does not consider this case to fall within the exceptional situation in *Elmi*, and takes the view that acts of such entities as are now in Somalia commonly fall outside the scope of article 3 of the Convention."

92. A different approach was, however, adopted by the Committee in *SS v Netherlands*, Communication No 191/2001, 5 May 2003, para 6.4:

> "The Committee observes that the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention, unless the non-governmental entity occupies and exercises quasi-governmental authority over the territory to which the complainant would be returned."

The Committee's change of approach was neither acknowledged nor explained. On the contrary, the passages quoted above from *Elmi v Australia, SV v Canada* and *MPS v Australia* were cited as supporting this approach. The approach adopted by the Committee more recently in *MKM v Australia*, Communication No 681/2015, 10 May 2017, was seemingly more orthodox. It referred at para 8.6 to the failure of the state in question to provide protection from torture by non-state actors, and referred in para 8.7 to its General Comment No 2 (2008), discussed below, and to "the failure on the part of a state party to exercise due diligence to intervene and stop the abuses [by non-state actors] that are impermissible under the Convention, for which it may bear responsibility".

93. A parallel but slower development to that in *SS v Netherlands* can be seen in the Committee's General Comments. In its General Comment No 2: Implementation of article 2 by States Parties, 24 January 2008, CAT/C/GC/2, the Committee adopted an

approach which treated article 1 of the Convention as not normally applying to the actions of non-state actors. In that regard, it stated at para 15:

> "States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law."

The only situations in which the actions of non-state actors would be relevant were where the state consented or acquiesced in them, or failed in its duty under article 2 to take effective measures to prevent them. In that regard, the Committee stated at para 18:

> "… where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-state officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-state officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission."

Following that approach, UNCAT would not normally apply to the conduct of insurgent forces within territory under their control.

94. Ten years later, however, the Committee adopted a different approach in its General Comment No 4 (2017): Implementation of article 3 of the Convention in the context of article 22, 4 September 2018, CAT/C/GC/4. Citing *Elmi v Australia* and *MKM v Australia*, it stated at para 30:

> "States parties should refrain from deporting individuals to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture or other ill-treatment at the hands of non-state entities, including groups that are unlawfully exercising actions that inflict severe pain or suffering for purposes

> prohibited by the Convention, and over which the receiving State has no or only partial de facto control, or whose acts it is unable to prevent or whose impunity it is unable to counter."

95. There appears, therefore, to have been a development in the Committee's interpretation of article 1 in relatively recent times, which may be reflected also in the amendment of Austrian law mentioned earlier. Indeed, the Committee has in recent years been urging a number of states to amend their domestic law so as to conform to its current interpretation of article 1: see, for example, its Concluding Observations on the sixth periodic report on Austria dated 27 January 2016, CAT/C/AUT/CO/6, para 5(a), and its Concluding Observations on the seventh periodic report on the Netherlands dated 18 December 2018, CAT/C/NLD/CO/7, para 7.

96. This development may reflect wider changes. The period since the end of the Cold War has witnessed a proliferation of non-international armed conflict. In that context, the use of torture by non-state actors has become an increasingly serious problem. Against that background, to the extent that the Committee's current approach to the interpretation of UNCAT departs from the meaning which might have been envisaged in 1984, that development might perhaps be argued to be an example of evolutionary interpretation.

97. That there has been a development must however be borne in mind when considering the relevance of the Committee's interpretation to the present proceedings, which are concerned with events alleged to have occurred during 1990. An interpretation of UNCAT which was only adopted by the Commission in relatively recent times, long after the events in question, cannot be applied when assessing the criminality of those events, bearing in mind the fundamental principle, recognised in both international and domestic law, of nulla poena sine lege. That principle must be respected in relation to section 134 of the Criminal Justice Act 1988, having regard to the Human Rights Act 1998 and the Convention right arising under article 7 of the European Convention on Human Rights (ECHR). Accordingly, even if article 1 of UNCAT might now be interpreted, consistently with the Committee's recent statements, as extending to the actions of non-state entities exercising quasi-governmental functions over which the state has no control, it does not follow that it should be interpreted in the same way when considering the criminality of actions which took place in 1990.

98. Finally, it is essential, both under our domestic law and under international law (for example, article 7 of the ECHR and article 15 of the ICCPR), that the principle of legal certainty should be respected, above all in criminal proceedings. As the law of this country has long recognised, that means that criminal legislation whose meaning is unclear should be given a restrictive rather than an expansive interpretation. The fact

that considerations of policy might be better served by a broad construction do not justify a departure from that principle.

99. For the foregoing reasons, I would have allowed the appeal.