Neutral Citation Number: [2018] EWCA Crim 2843

Case No: 201804553 C4

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE CENTRAL CRIMINAL COURT**
**The Honourable Mr Justice Sweeney**
**T201707209**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2018

**Before:**

**THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON**
**THE LORD CHIEF JUSTICE OF ENGLAND AND WALES**
**THE HONOURABLE MR JUSTICE POPPELWELL**
and
**THE HONOURABLE MRS JUSTICE WHIPPLE DBE**

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**Between:**

**R** — **Respondent**

**- and -**

**TRA** — **Appellant**

(Transcript of the Handed Down Judgment.
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**Courtenay Griffiths QC** and **Steven Powles** (instructed by **Bark & Co.**) for the **Appellant**
**Paul Rogers**, **Kathryn Howarth** and **Emilie Pottle** (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing dates: 11th December 2018

Judgment
As Approved by the Court


**Reporting Restrictions apply to this judgment until the conclusion of the trial in accordance with s. 37 Criminal Procedure and Investigations Act 1996**

**The Lord Burnett of Maldon:**

1. The sole issue in this appeal concerns the meaning of the words "public official or person acting in a official capacity" in section 134(1) of the Criminal Justice Act 1988 ("the 1988 Act").

2. On 30 July 2018 Sweeney J gave a ruling which he incorporated into a further ruling dated 29 October 2018 on a preparatory hearing held pursuant to section 35(1) of the Criminal Procedure and Investigations Act 1996. The appellant contended that section 134 applies only to those acting for entities either tolerated by, or acting under the authority of, the government of a state. Sweeney J held that it was not so limited, and extended, in situations of armed conflict, to individuals who act in a non-private capacity and as part of an authority-wielding entity. He gave leave to appeal on the question.

**The charges**

3. This case concerns events which took place in Liberia in 1990 in the early stages of the first Liberian civil war, when an armed group called the National Patriotic Front of Liberia ("NPFL") sought to take control of the country and depose the then President, Samuel Doe. The leader of the NPFL was Charles Taylor. [redacted] The uprising was ultimately successful in taking control of the country and Charles Taylor became President in 1997. [redacted]

4. We have given only the briefest summary of the accusations, without much of the accompanying detail, which is sufficient to convey the nature and gravity of the conduct alleged. We emphasise that these are no more than accusations, which are denied by the appellant. Whether they are proved will be a matter for the jury in due course, subject to the outcome of this appeal. The issue of law in this appeal is not whether such conduct, if proved, constitutes torture within the meaning of section 134(1); plainly it does, and of a serious kind. The issue of law is whether the appellant falls within the class of perpetrators of torture whose conduct is made criminal by section 134(1).

**The domestic legislation**

5. It is common ground that section134 was enacted in order to give effect to the obligations of the United Kingdom under the UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 1984 ("the Torture Convention"). Article 1 of the Torture Convention is in the following terms:

> "1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person

acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

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

> "**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 of 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.
>
> ……."

7. Torture is also one aspect of conduct which may be a criminal offence if committed as a war crime or a crime against humanity. The International Criminal Court was established pursuant to The Rome Statute of the International Criminal Court, which came into force on 1 July 2002, and gave that court jurisdiction over, amongst other things, crimes against humanity (article 7) and war crimes (article 8). Under that jurisdiction, torture as a war crime arises only when committed in armed conflict, whether international or internal. Torture as a crime against humanity arises only when committed as part of a widespread or systematic attack directed against a civilian population. By section 51 of the International Criminal Court Act 2001 those were made offences under domestic law, whether committed here or abroad. By the Coroners and Justice Act 2009 section 70, those domestic offences were applied retrospectively to acts committed on or after 1 January 1991. The conduct of the appellant which is the subject matter of the current prosecution predates even that retrospective application. Accordingly, it is criminal as a matter of domestic law only if it falls within section 134 of the 1988 Act.

**The ruling**

8. The Judge set out in detail the rival submissions of the parties, which included reliance by the Prosecution on the reasoning and conclusions of Treacy J, as he then

was, in a ruling dated 7 April 2004 in *R v Zardad* (unreported, Case T2203 7676). Sweeney J indicated that he accepted the Prosecution submissions and the conclusions expressed at [38] of the ruling of Treacy J.

9. In *Zardad*, Treacy J was concerned with a prosecution for offences under section 134 in relation to conduct in the south of Afghanistan between 1992 and 1996 when the recognised Rabbani government controlled the north of the country from Kabul, but not the area in which the offences were alleged to have been committed. Zardad was alleged to have been the chief commander of the Hezb-I-Islami faction in control of that province. Treacy J said at paragraph 38:

> "I have construed the wording of Section 134(1) as not only applying to those who are *de jure* officials but those who are *de facto* officials. I have construed it, having had regard to the purpose of the Convention and the international authorities which have been drawn to my attention, as including in the phrase "person acting in a public capacity", those 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. To hold otherwise would be to ignore the latter part of the phrase in Section 134(1), namely "or person acting in a public capacity", which is plainly intended to deal with situations which arise *de facto* as opposed to *de jure*. To adopt the construction contended for the Defence would be to leave a substantial loop-hole in the enforcement of an international obligation, and in the attempt to penalise the international crime of torture where it is committed by those who are in authority either under the force of the law, or who are in reality in authority as a result of a situation which has come about or which they have created."

**The arguments of the parties**

10. The argument for the appellant may be summarised as follows. The term "person acting in an official capacity" is limited to those acting for or on behalf of a government authority of a recognised state. That is the clear meaning of the wording of section 134. It is supported by the drafting history of the Torture Convention; the decisions and General Comments of the UN Committee Against Torture; and Statements of the UN Rapporteur Against Torture. *Zardad* was wrongly decided, and the international authorities on which Treacy J relied have diminished import when put in their proper context by subsequent decisions.

11. In supporting the Judge's conclusion, the Prosecution argue that section 134 covers the conduct of non-state actors who seek to depose a government and who exercise *de facto* authority over individuals in the territory which they control. They submit that the interpretation accepted by the Judge was supported by the terms of the Torture Convention; by its object and purpose; by its drafting history; by the State Responsibility principles reflected in article 10 of the UN General Assembly

Resolution 56/83 of 12 December 2001; by the decision of Treacy J in *Zardad*; by the jurisprudence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("ICTY"); and taking into account international humanitarian law as the *lex specialis* in armed conflicts.

**Analysis**

*The approach to construction*

12. The definition of the class of perpetrators of torture is essentially the same in both section 134(1) and article 1 of the Torture Convention: "a public official or [other] person acting in an official capacity". In *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet (No 3)* [2000] 1 AC 147, Lord Browne-Wilkinson said that the meaning of the expression must be the same in both instruments. We accept that proposition. The Crown argued that section 134 is to be regarded as wider because of the differences in the wording relating to the purposes for which torture is inflicted: article 1 identifies those 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"; whereas in section 134 there is no such list, and the only limitation on the purpose of the conduct is that it must be "in the performance of his official duties". However, the list of purposes in article 1 is non-exhaustive ("...such as…"), and by the last expression ("… any reason based on discrimination of any kind") is wide enough to cover a very wide category of purposes. The *travaux préparatoires* relating to the Torture Convention reveal that the UK Government was not in favour of a non-exhaustive list. Section 134 does not include any such list. But in our judgment, that does not make it any wider than article 1. It is just drafted differently. Moreover, even if we are wrong about that and the category of *proscribed purposes* of conduct constituting torture was intended to be wider in the domestic legislation than in the Torture Convention, that would afford no grounds for thinking that the category of *perpetrator* in domestic law was intended to be widened, at least in relation to the issues relevant to this appeal.

13. The approach to construction of section 134 is therefore informed by the approach to construction of article 1 of the Torture Convention. That exercise is governed by articles 31 and 32 of the Vienna Treaty on the Interpretation of Treaties. What is required is an interpretation 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 (article 31.1). The context includes the preamble (article 31.2) and any agreement between the parties in connection with its conclusion of the treaty (article 31.2(a)). In addition, it is to be construed in accordance with relevant rules of international law (article 31.2(c)). The *travaux préparatoires* may be used to confirm the meaning reached in accordance with these principles, or where they lead to an ambiguous, obscure, unreasonable or absurd result (article 32). Moreover, it is an English law principle of the approach to interpretation of international instruments that they are to be construed in accordance with principles of international law: see for example *Pinochet (No 3)* per Lord Hope at pp. 243E-F.

*The international law background to the Torture Convention*

14. Following the Nazi atrocities and the Nuremberg trials, international law has increasingly recognised a number of offences as being international crimes. One of the earliest to be recognised was torture. In armed conflicts the torture of persons not taking part in hostilities was absolutely prohibited under the Geneva Conventions of 1949, common article 3 of which prohibits acts of torture in internal armed conflicts. Article 5 of the Universal Declaration of Human Rights of 1948, article 3 of the European Convention on Human Rights of 1950, and article 7 of the International Covenant on Civil and Political Rights of 1966 each provided that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The latter was described by Lord Sumption in *Mohamed (Serdar) v Ministry of Defence (No 2)* [2017] AC 821 at [42] as the paradigm statement of internationally recognised human rights. The same provision is found in the Inter-American Convention to Prevent and Punish Torture ratified in 1978 (article 1), and the African Charter on Human and Peoples' Rights (article 5), the text of which was approved at the Organisation of African Unity General Assembly in 1981. The Declaration of the UN General Assembly on 9 December 1975, which provided the impetus for the Torture Convention, proclaimed the desire to make the struggle against torture more effective throughout the world.

15. The prohibition on torture exists not merely as a treaty obligation, but as a customary rule of international law: see the decision of ICTY in *Prosecutor v Furundzija* 10 December 1998 Case IT-95-17/1-T at [138] and [139] and the sources there cited, including the decision of the International Court of Justice in 1986 in Nicaragua *v USA* 1986 I.C.J. Reports 14 at [218].

16. The customary international law prohibiting torture has the character of *jus cogens*, that is to say a peremptory norm: see per Lord Browne-Wilkinson in *Pinochet No 3* at p198B approving *Furundzija* at [153] and [154] and reliance on the cases there cited. The effect of such high status in the hierarchy of rules of international law is that there can be no derogation from the rule by treaty or anything less than a subsequent *jus cogens*: see article 53 of the Vienna Convention.

17. This was the position in relation to torture, both within and outside armed conflicts, at the time at which the 1984 Torture Convention was concluded, and by the time the 1988 Act gave effect to it: see *Pinochet (No 3)* per Browne-Wilkinson at p. 198G; Lord Hope at p. 247C-G; Lord Hutton at p. 261B; Lord Saville at p. 266B; and Lord Millett at pp. 272H-275E, 276E. The Torture Convention therefore falls to be construed against the background that such torture was already an international crime under a *jus cogens* customary rule of international law.

18. The existing settled status of this rule of international law is confirmed by Burgers and Danelius, respectively the Chairman of the UN Working Group and the draftsman of the first draft of the Torture Convention, in their 1998 work *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. They record on page 1 that any assumption that the Torture Convention was designed to outlaw torture is misplaced; they say that the Torture Convention is based on the recognition that the practice of torture is already outlawed under international law and the principal aim of the Convention is to strengthen the existing prohibition of such practices by supportive measures. As Lord Browne-Wilkinson said 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."

19. We have confined ourselves so far to the human rights aspects of torture in international law. Torture is also prohibited by a *jus cogens* of international humanitarian law when committed in the context of crimes against humanity and war crimes. This was so before the reflection of such law in the Rome Statute of the International Criminal Court of July 2002 and the elements of crimes enumerated thereunder: see *Furundzija* at [134] to [142]. Indeed, the human rights rule against torture is itself said to have had its origins in the international law concerned with war crimes in armed conflicts. In *Pinochet (No 3)* Lord Browne-Wilkinson said at p. 197G-198B:

> "In the early years state torture was one of the elements of a war crime. In consequence torture, and various other crimes against humanity, were linked to war or at least to hostilities of some kind. But in the course of time this linkage with war fell away and torture, divorced from war or hostilities, became an international crime on its own: see *Oppenheim's International Law*, vol. I, 9th ed. (1992) (ed. Sir Robert Jennings Q.C. and Sir Arthur Watts Q.C.), p. 996; note 6 to article 18 of the International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind; *Prosecutor v. Furundzija* (unreported), 10 December 1998, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/1-T 10. Ever since 1945, torture on a large scale has featured as one of the crimes against humanity: see, for example, U.N. General Assembly Resolutions 3059, 3452 and 3453 passed in 1973 and 1975; Statutes of the International Criminal Tribunals for the Former Yugoslavia (article 5) and Rwanda (article 3)."

20. Each of these two rules of international law has a different scope of application, although they may overlap in any given case and may both be engaged by the same conduct, for example by torture in the course of an armed conflict. The human rights rule applies both within and outside the context of armed conflict. It applies to a single incident of torture. By contrast war crimes only occur in the context of armed conflict; and crimes against humanity only occur when the conduct is committed as part of a widespread or systematic attack directed against a civilian population. A further distinction is that war crimes and crimes against humanity can be committed by anyone, whereas the category of perpetrator of torture *per se*, as an international rather than domestic human rights violation, is limited to a narrower category which excludes private individuals.

21. It is important to keep in mind that the Torture Convention was intended to give effect to, and support, the human rights *jus cogens* against torture, not the international humanitarian law rule. That is clear from its origin, preamble and content. It applies irrespective of whether there is an armed conflict or a widespread or systematic attack directed at a civilian population. It recognises the criminality of a single incident of torture outside the context of armed conflict.

22. It follows that it is the international human rights law which the Court must primarily take into account in interpreting the Torture Convention, in accordance with article 31.3(c) of the Vienna Convention. On behalf of the Prosecution, Mr Rogers argued that the Convention must also be interpreted in accordance with the international humanitarian law applicable in times of armed conflict. Whilst we accept that it is to be interpreted so far as possible in accordance with all rules of international law, its scope is not informed by those laws which only apply in the case of armed conflict or crimes against humanity. The scope of the Torture Convention and section 134 is in some respects wider (because it criminalises isolated incidents and applies outside the context of armed conflict) and in some respects narrower (because the category of perpetrator is circumscribed). It is accepted by the Prosecution that the category of perpetrator in article 1 must receive the same interpretation whether the torture is committed in times of war or of peace. Accordingly, although the human rights *jus cogens* may have had its origins in armed conflicts, the interpretation of the Torture Convention, as a human rights instrument, must take its colour from the human rights law to which it gives effect. Concepts which only apply in international humanitarian law in the context of armed conflicts are of little assistance in the interpretation of an instrument whose operation is not confined to times of hostilities.

*The ordinary meaning of article 1 and section 134*

23. The expression "[other] person acting in an official capacity" must cover those who are not public officials, who are already within article 1, if it is to have any meaning at all. Article 10 of the Convention gives non-exhaustive examples of functionaries whose activities may fall within the scope of the Convention. Public officials are merely one of the categories listed there. The additional categories must provide examples of those who may be acting in an official capacity. They include "law enforcement personnel, civil or military, medical personnel … and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment." These may not be public officials if they are not directly employed by the state, but they are included because they are examples of those who may commit torture otherwise than in a private and individual capacity when carrying out governmental functions, e.g. private prison guards.

24. As a matter of language, the expression "public official" seems designed to define a person's status, whereas "acting in an official capacity" defines his or her activity. What is common to both is that the status or activity is an official one. The word "official" originates as something pertaining to an office. An office necessarily implies that there is some duty to be performed (per Cockburn CJ in ***Heartley v Banks*** (1858) 5 CBNS 55). This is reinforced in the wording of section 134 which requires the conduct in question by a person in either category to have been "in the performance or purported performance of his official duties". The concept of an "office" may not entirely capture the sense of what is "official", in modern language. What is "official" may better be understood by its antithesis, namely that the person must not be acting in a private and individual capacity.

25. The only category of perpetrator apparently excluded by the definition in section 134 is someone acting in a private and individual capacity rather than in performance or purported performance of official duties. There is no express requirement that they should be acting or purporting to act on behalf of a recognised state. The only word which might be relied upon to import a requirement of statehood is the word "public"

in "public official", but that is in our view capable of applying to a person with public official status in a *de facto* government as much as in a recognised *de jure* government. In any event, there is no "public" element in the subsidiary wording of acting in an official capacity. There is nothing in that wording to suggest that the individual must be acting on behalf of a recognised state.

26. The wording is therefore very wide and excludes only activity in a private and individual capacity. The ordinary and natural meaning of the words is apt to include someone who holds an official position or acts in an official capacity in an entity exercising governmental authority over a civilian population in a territory over which it holds *de facto* control.

*Object/purpose*

27. Since the Convention was intended to strengthen the enforcement of the human rights prohibition on torture which was already the subject matter of an international *jus cogens* at the time of the Convention, it is helpful to identify the rationale for restricting the class of perpetrator to which such rule applied.

28. All torture was regarded as abhorrent, whoever carried it out, and the international instruments identified above which had already outlawed torture as a violation of human rights did so without limitation as to the perpetrator. However, when torture is committed by an individual in a private and individual capacity, it is an example form of the infliction of physical or psychological injury, other forms of which make up the canon of serious crimes which are expected to be dealt with under the domestic criminal code of individual states. What elevated some torture to the international human rights plane is the particular gravity which attaches to it being used as an official instrument of government and the consequent improbability of the government in question taking or enforcing measures to prevent, deter, investigate or punish its own behaviour, or behaviour carried out under its authority. It was "the very official or governmental nature of the acts" which was the essential element which made torture an international crime: per Lord Millett in *Pinochet No 3* at p. 273B and 277E.

29. The authors of *Cassese's International Criminal Law* 3rd ed. state at p. 133 that the rationale for the restrictive class of perpetrator in the international law rule "stems from (i) the fact that in this case torture is punishable under international rules even where 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." They go on to say at p. 135:

> "As noted, the UN Torture Convention's definition contains a State official requirement to leave out infliction of severe pain or suffering by a private individual for personal purposes. Such conduct was considered a matter of domestic rather than international concern. 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 being elevated to a crime of international concern."

30. Professor Gaeta captures the same point in her article *When is the Involvement of State Officials a Requirement for the Crime of Torture*, JICJ 6 (2008) 183 at 190:

> "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 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."

31. A similar analysis, that private acts of brutality are to be excluded because they would usually be criminal offences under national law, is contained in the Report by the Special Rapporteur, Mr P. Kooijmans, appointed under Commission on Human Rights resolution 1985/33 of 19 February at [38].

32. Accordingly, it is apparent that the relevant dichotomy is not between state and non-state behaviour as such, but between official and purely private conduct. The two associated elements which elevate the conduct to a *jus cogens* of international law are (1) conduct by someone other than in a private and individual capacity and (2) conduct on behalf of (or with the acquiescence or connivance of) an entity purporting to exercise the functions of government over a civilian population.

33. The second is particularly apposite in the context of article 1 of the Torture Convention. The problem being addressed, at least in part, was that governments practising torture are unlikely to take steps to deter, prevent, investigate or punish it. One of the main objectives of the Torture Convention was to achieve such deterrence and punishment by creating a framework of universal extra-territorial jurisdiction. This was justified because, as it was put in *Demjanjuk v Petrovsky* (1985) 603 F.Supp. 1468; 776 F.2d 571:

> "the offenders are common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution."

34. This point is reflected in a passage at p. 119 to 120 of the Burgers and Danelius *Handbook*:

> "Another question which caused some discussion during the travaux préparatoires was whether or not an act of the kind referred to in article 1 should be regarded as torture irrespective of who committed the act. The conclusion was, however, that

> only torture for which the authorities could be held responsible should fall within the article's definition. If torture is committed without any involvement of the authorities, but as a criminal act by private persons, it can be expected that the normal machinery of justice will operate and that prosecution and punishment will follow under the normal conditions of the domestic legal system.
>
> 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".

35. This rationale behind the rule against torture at an international level applies as much to torture being used as an instrument of government by those exercising the functions of government through *de facto* control as to those exercising *de jure* governmental control as recognised states. The abhorrence of the international community towards torture as an instrument of government is no less when committed by officials of an entity exercising *de facto* control over a territory, and exercising the functions of government within such territory, than it is when committed by officials of a *de jure* government. And the imperative for dealing with it on the plane of international law applies in the same way to such entities as to recognised states, because the state in question which has *de jure* jurisdiction over the territory will not be able to exercise domestic criminal jurisdiction in order to prevent, deter, investigate or punish it. The recognised government of a fractured state in which a rebel force holds and governs a large part of the territory will not be in a position to punish perpetrators of torture which has been used as an instrument of government by that rebel force. Yet it is clearly within the purpose of the Convention that their conduct should be regarded as torture for which they should have no safe haven should they travel to another state. It is precisely because the recognised state will be powerless to punish them that the Convention should enable the international community to do so.

36. The object and intention of the Torture Convention must therefore have been to include this class of perpetrator in the machinery for punishment for which the Convention provides. The Preamble to the Torture Convention provides that the State Parties are "Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world." We do not believe that it would be consistent with this purpose that those who perpetrate torture as an instrument of government over the civilian population in a territory over

which they exercise *de facto* control should escape the universal jurisdiction of the community of nations to punish them which is being put in place by the Convention, and applies to state actors.

*Travaux préparatoires*

37. In our view, the *travaux préparatoires* point to a similar conclusion. They provide a legitimate guide to the meaning of the Convention, and therefore section 134, because article 32 of the Vienna Convention permits recourse to them to confirm the meaning derived by application of the principles in article 31 (ordinary meaning in context and in the light of the purpose of the treaty).

38. The extant materials demonstrate that the expression "public official or other person acting in an official capacity" came to be included in the Convention by the following process.

39. Following the Declaration of the UN General Assembly of 9 December 1975, on 8 December 1977 the General Assembly specifically requested the Commission on Human Rights to draw up a draft convention against torture and other cruel, inhuman or degrading treatment or punishment, in the light of the principles embodied in the Torture Declaration (resolution 32/62). The Commission on Human Rights began its work on this subject at its session in February and March 1978. A working group was set up to deal with this item, and by the time of the first session the draft under consideration was that proposed by Sweden on 18 January 1978. It referred to conduct of "a public official" simpliciter, as had previous drafts and the annex to the 1975 Declaration itself. During each of the subsequent years until 1984 a similar working group was set up to continue the work on the draft convention. For the purposes of the 1979 session, the UN Secretary General produced a summary of the comments by the state participants in a document dated 19 December 1978 (E/CN.4/1314.). Before the session, it was supplemented by two addenda as further representations from states were received, dated respectively 18 January and 31 January 1979.

40. The summary dated 19 December 1978 recorded contributions from, amongst others, Austria, the German Democratic Republic and the United States of America, but not at that stage the United Kingdom. The two suggestions which are relevant for present purposes were from the Governments of Austria and the USA recorded in these terms:

    1) With regard to the concept of "public official", the Austrian Government believes that this concept could be expanded, for example by using the words "persons acting in an official capacity". (para 43)

    2) The United States proposes that the term "public official" be defined in article 2 in order to clarify the breadth of the concept and to make clear that both civil and military officials are included. Any person vested with exercise of some official power of the State may well have sufficient authority to coerce another individual, and could escape prosecution under national law because of his public office. The definition proposed was that "A public official is any person vested with some official power of the State, either civil or military". (para 45)

41. The UK's suggested amendment to the wording was recorded in paragraph 3 of Addendum No 1 on 18 January 1979: "In order to amplify the definition, it is suggested that after "public official" … the phrase "or any other agent of the State" should be inserted."

42. Addendum No 2 dated 31 January 1979 recorded at paragraph 2 a suggestion by the Federal Republic of Germany in the following terms, which had not been included in its original submission:

> "The Federal Government felt that, 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 government authority or – be it only temporarily – has replaced government authority or whose authority has been derived from the aforementioned persons."

43. The Working Group of the Commission had meetings in February and March 1979, which resulted in the text adopting the definition which had been proposed by Austria, and which thereafter was carried into the Convention. The record of those discussions (E/CN.4/L.1470) does not reveal the reasoning for adopting that solution, save the view of some states that the Convention should extend to all individuals without limitation was rejected on the grounds that individual conduct should be covered by national law (see paras 17 and 18).

44. In *The United Nations Convention against Torture. A Commentary* by Nowak and McArthur, it is suggested at [118] that the Austrian proposed wording was adopted in order to give effect to the concern of the Federal Republic of Germany which specifically sought the application to non-state actors, albeit that the Austrian proposed wording preceded that of Germany. It is clear that the Austrian wording was preferred to that of the United Kingdom ("or any other agent of the State"), which would have been sufficient to meet the concerns expressed by the United States. On any view the intention was to capture a category of perpetrator which is wider than those acting as agents for the state. The drafting history shows that the intention was to include within the category some who were acting or purporting to act on behalf of something which is not a recognised state.

45. It is this which suggests that the wording adopted was indeed intended to include those within the category identified in the German suggestion; and which points to the intention to include not only perpetrators of torture acting or purporting to act on behalf of *de jure* recognised states, but also perpetrators exercising governmental functions in territories over which they exercise temporary or ad hoc control.

46. It is perhaps significant that in the passage at pp. 119-120 cited above from the Burgers and Danelius *Handbook*, the authors talk of its being intended to apply to "authorities" rather than "states", in circumstances where Mr Burgers was the chairman of the working group with a greater knowledge of the discussions than is revealed in the exiguous official report which survives.

*The Committee against Torture decisions*

47. The Torture Convention provides for the establishment of an elected Committee against Torture ("CAT") comprising ten experts of high moral standing and recognised competence in the field of human rights (article 16.1). Its functions include receiving regular reports from State Parties as to their compliance with the provisions of the Convention and responding thereto (article 19); investigating reports that torture is being systematically practised in the territory of a State Party (article 20); reporting on disputes between State Parties as to compliance where both have agreed they should do so (article 21); expressing its views on disputes between an individual and a State Party as to the latter's compliance, again where such State Party has agreed it should do so (article 22); and submitting an annual report to the General Assembly (article 24).

48. In *GRB v Sweden* (communication No 83/1997), 15 May 1998, the CAT held that the obligation on a State Party under article 3 not to extradite a person to a place where there are substantial grounds for believing that he would be subjected to torture did not apply to the complainant, who in that case claimed a risk of torture by Sendero Luminoso, a terrorist group controlling some territory in Peru. Its conclusion, briefly expressed in paragraph 6.5, was that this was a non-governmental entity and therefore fell outside the scope of those who could commit torture in accordance with the definition in article 1. There is no analysis or reasoning as to why such entity falls outside the scope of article 1. A similar conclusion was expressed in *SV v Canada* (Communication No 49/1996 15 May 1999) and *MPS v Australia* (Communication No 138/1999 30 April 2002), without any additional analysis or reasoning in either case.

49. In *Elmi v Australia* (Communication No 120/1998 14 May 1999), the CAT reached a different conclusion. It decided that the Convention did apply to the risk of torture by non-governmental forces in Somalia in circumstances where there was no central government and different factions controlled different territories.

50. In *HMHI v Australia* (Communication No 177/2001 22 January 2003) the CAT reaffirmed the decision in *Elmi*, explaining it as a case where there was an "exceptional circumstance of State authority that was wholly lacking". CAT considered that once there existed a Transitional National Government in Somalia, as was the position at the time it decided *HMHI*, there was no longer the "exceptional situation in *Elmi*" and thus that the acts of entities unconnected to the government fell outside the scope of the Convention.

51. In *SS v Netherlands* (Communication No 191/2001 19 May 2003) the CAT stated at paragraph 6.4 that article 1 *did* encompass a non-governmental entity if it occupied and exercised quasi-governmental authority. In that case return was to Sri Lanka where the LTTE were exercising such quasi-governmental authority. However, the complainant could in that case be returned to a territory other than that under the control of LTTE so that article 3 was not engaged for that reason. This supports rather than undermines the Prosecution case.

52. We have not found these cases of great assistance for the purposes of the issue we have to decide. The CAT is not made up exclusively of judges or lawyers and does not have an adjudicative function; and there is no detailed analysis or reasoning on the

point in issue; cf *Jones v Minister of Interior of Saudi Arabia* [2007] 1 AC per Lord Bingham at [23]. Moreover, as the above summary indicates, the reports do not provide a consistent or coherent body of opinion. It is also difficult to identify any point of principle to justify the exception drawn in *Elmi* and *HMHI*. Nor is there anything of substance to support the appellant's submissions in the General Comment No 2 of CAT (CAT/C/GC/2) at [15] upon which reliance was placed.

*Anomalous consequences of the appellant's interpretation*

53. The interpretation which the appellant seeks to put upon the relevant wording gives rise to a number of inconsistencies and anomalies.

54. First, it imports a requirement that it is only conduct of a *recognised* state which qualifies. Yet recognition is not a requirement of statehood under the four-fold test in the Montevideo Convention of 1933, and Mr Powles was unable to articulate what number or nature of recognitions would be sufficient for a state to qualify. There is force in the observation by Chief Judge Newman in the US Second Circuit Appeals Court case of *Kadic v Karadic* 70 F.3d 232 64 USLW 2231 at 245, in a passage cited by Treacy J at [27] in *Zardad*:

> "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 disfavor 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.
>
> 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."

55. Secondly, it became apparent in the course of argument that the appellant's case is that the class of perpetrators in article 1 is *not* confined in all circumstances to state actors because Mr Powles accepted as correct the report of the CAT in *Elmi* that the article applies to quasi-governmental institutions exercising *de facto* control over territory in Somalia in that case. He submitted that it was only applicable in the exceptional circumstances of that case, namely where there is no central government

in control. But once it is accepted that the words "or 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 "exceptional" circumstances identified, either as a matter of principle in international law or as a matter of the language of the article.

56. Thirdly, article 3 provides that no State Party shall 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. Suppose that in a fractured state a victim of torture escapes from the territory of the *de facto* rebel government of part of the territory to that of a Torture Convention State Party. If the appellant be right, the State Party is not precluded from returning him to that territory where he is at risk of further torture because torture, as defined, cannot be perpetrated by that *de facto* government. Mr Powles described the result as harsh. In our view it is simply inconsistent with the purpose of the Torture Convention to strengthen the struggle against torture. As has been seen, it is a conclusion from which the CAT has retreated in *Elmi v Australia* and *SS v The Netherlands*.

57. Fourthly, where a rebel force has established *de facto* control over part of a state's territory and is exercising similar governmental functions over that part as is the state in the remaining territory which it controls, an official acting for the rebel force in the occupied sector would not be guilty of torture if the appellant be right, whereas where his counterpart official acting for the *de jure* government in the state territory would. This would be the case despite each indulging in identical torture as an instrument of government over the people they were governing. One would enjoy a safe haven from prosecution if he went to a State Party to the Torture Convention, where the other would not. This is not merely anomalous but contrary to the avowed purpose of the Torture Convention to support the struggle against torture.

58. Fifthly, as Treacy J observed, the construction favoured by the appellant leaves a loophole in the law against torture. Mr Powles' argument was that such loophole is filled by the international humanitarian law which was given domestic retrospective effect by the International Criminal Court Act 2001 and the Coroners and Justices Act 2009. However, that is not so: those humanitarian law provisions do not criminalise torture as an instrument of government in a time of peace (save where part of a systematic and widespread attack directed at the civilian population and so a crime against humanity). It is a function of the human rights law to which the Torture Convention gives effect that it applies in times of peace. An armed conflict may be followed by a cessation of hostilities for months or years during which the non-state faction exercises quasi-governmental control over part of the territory. The appellant's construction would allow governmental torture to be practised with impunity in this territory unless it reached the scale of a crime against humanity. That is indeed a loophole which cannot have been intended by the Torture Convention.

*The ICTY jurisprudence*

59. We do not consider that the ICTY jurisprudence assists in providing the answer to the issue on this appeal, although it provides helpful illumination of the international law principles in play.

60. Under its Statute, the ICTY has jurisdiction to try cases involving grave breaches of the Geneva Conventions of 1949 (article 2), war crimes (article 3), genocide (article 4), and crimes against humanity (article 5). In *Furundzija*, the Trial Chamber examined international humanitarian law at [134] to [142] and international human rights law at paragraphs [143] to [146]. Having identified the definition of torture in article 1 of the Torture Convention at [159], it concluded that the same definition applied to torture during armed conflicts. On that basis it included in its definition of the necessary ingredients at [162(v)] the following: "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 e.g. as a *de facto* organ of a State or any other authority-wielding entity." It is apparent that this is the origin of the language adopted by Sweeney J in his ruling under appeal.

61. The formulation by the Trial Chamber was approved by the Appeals Chamber (IT-95-17/1-A) at paragraph 111.

62. In *Prosecutor v Kunarac* 22 February 2001 (IT-96-23 & IT-96/23/1-A), the Trial Chamber re-examined the relationship between torture as a violation of international human rights law and torture as a breach of international humanitarian law. It concluded that whilst the restriction on perpetrators applied to the former, there was no such restriction in relation to the latter; and that accordingly when the ICTY was exercising its humanitarian law jurisdiction under its statute over torture committed in the context of breaches of the international humanitarian rules against grave breaches of the Geneva Conventions, genocide, war crimes and crimes against humanity, there was no restriction of any kind on the category of perpetrator who could commit torture. The restriction in article 1 of the Torture Convention was to torture *per se* as a human rights breach. That conclusion was endorsed by the Appeals Chamber in its decision of 12 June 2002 (IT-96-23 & IT-96/23/1-A) at [145] to [148].

63. We recognise the very substantial contribution of the ICTY decisions to an understanding of the international law in this area; various aspects of the careful analysis in *Furundzija* in particular, have often been cited and approved. However there is force in Mr Powles' submissions that [162(v)] of *Furundzija* is not a sure guide to the construction of the Torture Convention, because that case was decided at a time when it assumed there was a limited class of perpetrator for the purposes of the international humanitarian crimes in times of armed conflict. In that context the ICTY regarded the scope of the perpetrators as requiring a wider definition in times of war. The process of reasoning in *Furundzija* followed an earlier articulation in the case of *Prosecutor v Delalic* 16 November 1998 Case IT-96-21-T, at [473]:

> "Traditionally, an act of torture must be committed by, or at the instigation of, or with the consent or acquiescence of, a public official or person acting in an official capacity. In the context of international humanitarian law, this requirement must be interpreted to include officials of non-State parties to a conflict, in order for the prohibition to retain significance in situations of internal armed conflicts or international conflicts involving some non-State entities."

64. Once it is recognised – as the ICTY did in *Kunarac* - that the limit on the class of perpetrator has no part to play in the context of war crimes as such, so that in that

context there is no need for any expansive interpretation of the category of perpetrator which has to be defined for a human rights violation, there is force in Mr Powles' submission that this process of reasoning is no longer helpful in the human rights context of the Torture Convention. Put another way, the justification for widening the class of perpetrator to non-State actors was driven by the position in armed conflicts on the misunderstanding, subsequently corrected, that otherwise torture by the non-State side during armed conflict would not be a crime at all.

*Other arguments*

65. There are two other arguments advanced by the Prosecution which can be briefly disposed of.

66. Mr Rogers sought to argue that the international humanitarian law was *lex specialis* because the instant case arose in the context of armed conflict, and that this informed the interpretation of article 1 of the Torture Convention. He drew our attention to the judgment of Lord Sumption at [43] in *Mahmoud (No 2)*. This does not advance the argument. *Mahmoud (No 2)* was concerned with a situation in which a conflict arises between rights and obligations under different international instruments by which the United Kingdom is bound. In our case, it is accepted by Mr Rogers that the phrase in question must mean the same in the context of armed conflict as it does outside that context, both of which are circumstances to which the Torture Convention provisions apply. There is no prospect of a conflict if they are given their human rights law interpretation. If torture in some circumstances may also engage other international humanitarian law instruments, it is to those that reference must be made. If conduct in the context of armed conflict constitutes torture prohibited by international humanitarian law but not human rights law, that does not involve a conflict. They have different scopes of application. There is no question of applying one to the other as *lex specialis*.

67. Mr Rogers also sought to place some reliance on principles concerning the responsibility of insurrectional movements which become state governments. UN General Assembly Resolution 56/83 of 12 December 2001 set out annexed principles for Responsibility of States for Internationally Wrongful Acts. Article 10 provides that the conduct of an insurrectional movement which becomes the new government of a state, or the government of a new state, is to be considered to be an act of that state under international law. The commentary of the International Law Commission in the Yearbook of the International Law Commission 2001 Vol II pt 2 at p. 50 explains the rationale as lying in the continuity between the movement and the government. The predecessor state cannot be responsible for acts seeking to overthrow it, over which it has no control, whereas the new government should be required to assume responsibility for conduct committed with a view to its own establishment: see paragraphs (5) to (6). The Prosecution submits 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* state (as the NPFL ultimately did in Liberia).

68. However, article 58 makes clear that the principle is without prejudice to the responsibility of an individual under international law, and that the question of state responsibility for the acts of individuals is in principle distinct from the responsibility of the state. Mr Rogers' argument, which elides the two, therefore loses any force. Moreover, this instrument postdates the Torture Convention by some years and there is no basis for our being able to conclude that it comprised a customary rule of international law in existence at the time of the Torture Convention so as to form a legitimate aid to its construction.

*Conclusions*

69. The common language of section 134 and article 1 of the Torture Convention, their international law background, their object and purpose, the *travaux préparatoires*, and the anomalies and inconsistencies in the appellant's arguments all support the conclusion that the category of perpetrator defined as "a public official or person acting in an official capacity" in section 134 of the 1988 act is not confined to those acting on behalf of a recognised state. For the reasons we have identified, including the rationale for the international human rights *jus cogens* which the Torture Convention was designed to strengthen, it 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.

70. We have expressed this conclusion in slightly different language from that of Sweeney J in his ruling; but it is apparent that the test he adopted and applied is not materially different on the facts of the case, and that his subsequent ruling on the factual submission of no case to answer is not affected by the difference. Accordingly, the appeal must be dismissed.