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By: James Hendry

The United Kingdom Supreme Court (UKSC) held in *R v. TRA* that ‘persons acting in an official capacity’ who engage in torture contrary to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), as implemented in the UK by s. 134 of the Criminal Justice Act 1988 (CJA) as required by article 2(1) of the CAT, need not be State officials, but can be persons acting on behalf of non-State organizations which administer a locale in the capacity of de

facto ‘governments. The case goes some way to support the extension of the prohibition of torture to non-State actors. This is a very important development in times when non-international conflicts result in ‘governmental’ administration of areas by organizations, even in the face of a central government that cannot impose its authority over the area. The case has already been the subject of many interesting analyses see here in EJIL: Talk!

Context

The National Patriotic Front of Liberia (NPFL) supported Charles Taylor in the Liberian civil war that began in 1989 when Taylor attempted to displace the government. He was ultimately successful when elected president after a peace agreement was brokered by the UN and the Economic Community of West African States. He and the NPFL had gained control of much of the country.

This case arose from a ruling on the question of law whether TRA, who was arrested in the UK in 2017 and charged with conspiracy to commit torture and torture contrary to s. 134 of the CJA, was properly charged under that provision as a ‘person acting in an official capacity’ in Liberia in 1990. Her name and identifying details were subject to a publication ban. She had belonged to the NPFL. The prosecution case was that the NPFL under Charles Taylor and his subordinates including TRA had effective control in the area the alleged offences occurred and that they were acting in an official capacity for and on behalf of the NPFL which was the *de facto* military government or governmental authority over the area. The prosecution expert later clarified that the NPFL had military rather than administrative control over the area at the time.

Lower courts

The Central Criminal Court and the Court of Appeal both held that ‘person acting in an official capacity’ was not confined to State officials but extended to persons acting on behalf of an organization exercising the functions of government over the civilians in an area it controlled (para. 11).

Relationship to war crimes and crimes against humanity

The UKSC distinguished the concept of torture under CAT from the war crime and crime against humanity of torture and their interpretation. Torture under CAT is limited to cases where the conduct involves a public official or a person acting in an official capacity, whereas this is not a requirement in international criminal law, citing *Kunarac (ICTY, AC), para. 148* and noting the absence of the requirement in the *Rome Statute* (para. 19). Torture as a war crime and crime against humanity are offences against UK law pursuant to the International Criminal Court Act 2001 which did not apply here because the impugned acts were committed prior to January 1, 1991 (para. 20).

Treaty interpretation

The Court then looked to articles 31 and 32 of the *Vienna Convention on the Law of Treaties* for the rules by which to interpret s. 134 of the CJA which was intended to give effect to the CAT in domestic

law. Discerning the ordinary meaning of the offence in the CJA which could only be committed by 'public official or person acting in an official capacity', the Court held that this distinguished between private acts and official conduct which was not restricted to acts performed on behalf of the government of the State. The words were apt to apply to those acting in an official capacity in an entity exercising governmental control over a civilian population it has *de facto* control over (para. 25). The Court then observed that the object of the CAT was to make torture a criminal offence of universal jurisdiction enforceable in domestic courts by defining an offence which contracting States had to criminalize and punish within their legal systems. Thus, it made sense to interpret the scope of the offence as one broader than acts committed by State officials alone (para. 28). The Court found that the *travaux préparatoires* to CAT revealed at least two relevant points: first, torture should not include purely private acts of torture because some States thought that there was no need for its regulation by international convention as these were a domestic matter. The prevailing view was that acts of torture committed for public functions were different and more serious than those committed by private persons and less likely to be the subject of domestic sanction. This suggested that "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." (para. 36). Second, universal jurisdiction was necessary because States might not bring its own public officials to justice for torture on public interest grounds, though the Court conceded that this rationale did not apply to rebels acting outside the authority of the State where the case for universal jurisdiction would rest on the State's inability to act (para. 37).

UN Committee Against Torture

In considering practice of States that the *Vienna Convention* confirms should be considered to show agreement of parties to its interpretation, the Court noted that it would respect the General Comments of the UN Committee Against Torture (UNCAT) but treat them according to the jurisprudence of the UKSC as 'recommendations' (para. 41). The Court reasoned that the CAT required States to create and enforce domestic offences against torture in conformance with article 1, but a limitation to conduct attributable to the State could not be derived from this purpose (para. 43). The Court found that the General Comments of the UNCAT unhelpful to the extent that they were argued to support a requirement for a strong State connection to torture or for a State's responsibility for torture of non-State bodies that it did not attempt to stop (para. 46).

The Court then considered a series of decisions by the UNCAT under article 22(7) of the CAT allowing it to communicate its views on individual communications alleging a breach of the terms of CAT, in particular, on the obligation not to return a person to torture by a State. The Court noted the inconsistency of the UNCAT's decisions. In *SV v Canada* the individuals complained they were at risk of torture by the Sri Lankan government and the rebel organization, the Liberation Tigers of Tamil Eelam (LTTE) controlling the Tamil region. The UNCAT rejected the latter claim because the LTTE was acting without the consent or acquiescence of the government. The Court also noted the contrasting view of the UNCAT in *Elmi v. Australia* para. 6.5 in which it decided that the CAT applied

where a person was at risk of torture on return to Somalia by a faction that exercised ‘certain prerogatives that are comparable to those normally exercised by legitimate governments’ where there was no central government. The Court observed that UNCAT changed its mind when it appeared that there was State authority in Somalia a few years later in *HMHI v. Australia* and said the ‘exceptional circumstances’ in *Elmi* no longer applied. The Court observed in the more recent case of *SS v. The Netherlands*, para. 6.4, that the UNCAT wrote: “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,” though in the end the case was decided on the basis that there was insufficient risk of torture. The Court viewed the distinction of *Elmi* in HMHI as unconvincing because the existence of a central government should be irrelevant and that *Elmi* did not turn on the lack of central government, but that the faction involved was a quasi-governmental authority performing governmental functions giving it *de facto* status that brought it within article 1 of CAT (para. 52). It held that the SS decision made ‘eminent sense’ and provided some support for the proposition that non-State entities exercising authority over a territory can be encompassed by article 1 of the CAT.

In considering ‘any relevant rules of international law applicable in the relations between the parties’ as required by the *Vienna Convention*, the Court focused on two questions: State responsibility and recognition of States and governments (para. 53). The Court agreed with the prosecution that the position in *The General Commentary to the International Law Commission Draft Articles on State Responsibility* that would attribute conduct by an insurrectional group to the State only if the insurrection succeeded was rightly excluded from the argument before it. First, it noted that the question of State attribution was different from the responsibility of individuals under international law and here, under this domestic implementing legislation. Second, the Court stated that it would be unsatisfactory to apply the definition of torture under the CAT only where the perpetrators’ organization succeeded in replacing the government (paras. 54-5). With respect to the issue of the relevance of the recognition of governments to the interpretation, the Court held that the offence in article 1 of the CAT applies to both recognized and unrecognized States because it would be anomalous for the political decision not to recognize a State to immunize the conduct of an unrecognized regime (para. 56). Further, it asked itself how would a court determine the question of recognition in a highly conflicted context? There was no uniform standard arising from State practice in the recognition of States to provide a uniform standard for the application of the CAT. The *Elmi* ruling was not useful in determining whether the CAT applied because where the impugned conduct was performed by a body exercising *de facto* control over an area, so what point was served by the existence of an impotent central government (para. 59)?

Jurisprudence

The Court then turned to UK authority. It found considerable assistance in *R v. Zardad*, a decision of Treacy J of the Central Criminal Court involving a charge of conspiracy to torture in Afghanistan. Zardad was a commander with Hezb-I-Islami the faction in military control of the area of Sarobi where the conduct occurred. Treacy J had held that 'person acting in a public capacity' included those acting for an entity with de facto effective control over an area and was exercising governmental functions. He held that a jury could conclude that Zardad was such a *de facto* public official in an area totally controlled by his organization that exercised long-term functions of a state authority (para. 63). That case also listed indicators of what constitutes a public official on a *de facto* basis: Zardad was akin to Military Governor, a general of a structured occupying force, in control of prisons, the only law enforcer in the region, a meditator of disputes, the person to whom international organizations would make representations if equipment was held up at the border of the occupied area and recipient of complaints of torture, ill-treatment and hostage-taking in that area. Treacy J concluded that it was open to a jury to find that Zardad was a *de facto* public official in the occupied area in which his faction exercised the functions of a state authority (para. 65).

The Court also found assistance in *Kadic v. Karadzic (1995), USCA 2nd Cir.* where the court held at page 245 that allegations of atrocities and torture committed in the self-proclaimed Bosnian-Serb Republic of Srpska could be violations of the law of nations for the purposes of the *Alien Tort Act* because: "…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." (para. 66).

Academic commentary

The Court also considered academic commentary. It highlighted the point that the requirement of 'state official' in international law existed to ensure that acts by private individuals were not elevated to the international level (para. 71).

The Court's conclusion

In its conclusion, the Court attached particular significance to the ordinary meaning of 'person acting in an official capacity' as including conduct on behalf of *de facto* governments in conformance with the purpose of the regime for the regulation of 'official torture' as opposed to private acts of individuals. Torture perpetrated on behalf of a de facto government clearly comes within proper international concern. The Court expressed the principle it deduced from its analysis as: "'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." (para. 76). It emphasized that the exercise of governmental functions is a core requirement. It

also distinguished governmental functions from purely military ones, while observing that a military force might exercise governmental functions while fighting the central government (para. 78). Finding a governmental authority meant examining the circumstances to assess whether the entity had sufficient organization and actual control over the area in which the conduct occurred and whether it exercised the kind of functions that a government would be expected to fulfil. "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." (para. 79) The Court did reject the requirement from *Zardad* that the de facto government have some permanence because the temporal issue had no bearing on the kind of authority it exerted at the specific relevant time.

Finally, the Court noted that the prosecution's expert evidence that explained that the expert's use of the concept of 'control' referred to military rather than administrative control. This required remand to the judge to assess the evidence about the nature of the control exerted by the NPFL at the time of the impugned conduct.

The dissent

Lord Reed dissented. He thought that the concept of 'public official' was reasonably confined to a person acting on behalf of the State (para. 83). He seized on the exclusion of 'lawful sanctions' from the definition of torture which are tied to the lawful State, the fact that the obligations imposed on States Party to CAT to take 'effective measures' to prevent torture in article 2 would be meaningless in relation to organizations that were beyond the control of that State. He also gave greater weight to the decisions of UNCAT than the majority of the Court, finding that changes in that jurisprudence occurred too recently to be applied to the conduct in issue in 1990.

Conclusion

The highly respected Court's liberal interpretation of the concept of 'persons acting in an official capacity' in UK domestic law created to implement universal jurisdiction for the offence of torture under the CAT should prove quite influential in the interpretation of similar implementing legislation by courts in the Commonwealth which are used to giving the rulings of the highest court in the former British empire great weight. The fact that the ruling is consistent with the most recent decision of the UNCAT coheres with the international interpretation of CAT. The interpretation makes good sense not only from the point of view that there are now more non-international conflicts than international conflicts. But it strengthens the fight against impunity by extending the prohibition of torture to *de facto* governments that should not be 'providing' torture along with whatever other governmental services they provide. It also supports the goal of providing recourse against those who inflict grievous suffering on the inhabitants of localities overrun and 'administered' by militias that assume the guise of governments.

On December 6, 2019, the Central Criminal Court dismissed the case against TRA on the grounds that the prosecution had failed to prove that the NPFL had the level of de facto control over the territory specified by the UKSC.

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Image: Armed Independent National Patriotic Front of Liberia soldiers drive past the American Embassy on United Nations Drive 1990, Source: On Mamba Station: US Marines in West Africa 1990-2003, Authors: James G. Antal, R. John Vanden Berghe, Public Domain, material from the US Marine Corps.