THE EVOLUTIONARY DEFINITION OF TORTURE AND LEGAL CERTAINTY

R. v Reeves Taylor [2019] UKSC 51, [2019] 3 W.L.R. 1073 concerned the correct interpretation of the term "person acting in an official capacity" in s.134(1) of the Criminal Justice Act 1988 ("CJA"):

> "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."

The appellant had been arrested in the United Kingdom in 2017, charged with one count of conspiracy to commit torture, contrary to s.134 CJA. These charges related to events which took place in the early stages of the first Liberian civil war in 1990, when an armed group of which she was a senior member, the National Patriotic Front of Liberia ("NPFL"), had taken control of parts of the country. The leader of the NPFL, Charles Taylor, subsequently became president of the country in 1997.

The prosecution's case was that, although it was only later that the NPFL attained the headship of the country, the group was, at the time of the alleged offences, Liberia's *de facto* military government, with effective control of the area in question. The NPFL therefore acted "in an official capacity". The appellant asserted that she had not acted in an official capacity: she made an application to dismiss the charges.

The judge concluded that s.134 applies, in the context of of armed conflict, to individuals who act in a non-private capacity as part of an entity that wields authority. The Court of Appeal, dismissing the appellant's appeal, determined that s.134 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, whether in peace time or during armed conflict. The appellant appealed the decision to the Supreme Court. Lord Lloyd-Jones, with whom Lady Hale, Lord Wilson and Lord Hodge agreed, substantially agreed with the conclusion of the Court of Appeal; Lord Reed, dissenting, did not.

Lord Lloyd-Jones began by setting out (at [16]) that s.134 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, December 10, 1984, 1465 U.N.T.S. 85. Article 1(1) is in the following terms:

> "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 from, inherent in or incidental to lawful sanctions."

His Lordship turned to the principles governing the interpretation of treaties, codified in arts.31–32 of the Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.S. 331 ("VCLT"). The "general rule of interpretation" set out in art.31 provides in its first paragraph that "[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". Lord Lloyd-Jones took the view that the ordinary meaning to be given to the terms at issue was a person performing official administrative or governmental functions: it provided no suggestion that those functions must be performed on behalf of the government of a State (at [25]). In Lord Lloyd-Jones' view the conduct of rebels exercising governmental functions over the civilian population of territory under its control was properly the concern of the international community and therefore fell within this rationale (at [36]).

Lord Lloyd-Jones further took account of the decisions of the UN Committee Against Torture ("CAT"), a group of experts of recognised competence in the field of human rights, which, among other things, considers communications from individuals who claim to be victims of a violation of the provisions of the Convention by a State Party that has recognized the competence of the Committee to consider such communications (at [40]). Lord Lloyd-Jones considered, entirely correctly as a matter of international law (see *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)* I.C.J. Rep. 2010, p. 639, 664), that these decisions were in principle "entitled to respect" (at [41]). There was, as he explained, a series of decisions of the CAT relating to persons who might be in danger of being subjected to torture. These decisions were, however, highly inconsistent. Decisions from 1996, 1998, and 2002 were to the effect that an act could not rise to being torture under the Convention if it had been carried out by non-governmental entities: decisions from 1999, 2002, and 2003 were to the opposite effect. Lord Lloyd-Jones concluded that this line of authority provided, despite its "manifest inconsistencies", "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" (at [52]).

His Lordship concluded that "a person acting in an official capacity" in s.134(1) CJA 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 (at [76]). Such a person could, in principle, be convicted for "torture".

Lord Reed's dissent began with the ordinary meaning to be given to the phrase at issue, which did not in his view extend to a member of an insurgent group engaged in armed insurrection against the government of the country: the core idea was rather that the person is acting on behalf of the State (at [83]). This interpretation was supported by the context of the terms to be interpreted: for example, the reference to "lawful sanctions" later in art.1 supported the view that it is concerned with conduct for which the State bears responsibility (at [84]). The problem the Convention was intended to address was the reluctance of States to investigate and prosecute torture in which their authorities were themselves involved (at [87]–[88]). Lord Reed conceded that there appeared in recent times to have been a development in the CAT's interpretation of art.1. But, even if art.1 might at present be interpreted as extending to the actions of non-state entities, if the current approach of the Committee to the interpretation of the Convention departed from the meaning which might have been envisaged when it was drafted, if that interpretative "development might perhaps be argued to be an example of evolutionary interpretation" (at [96]), it did not follow that it should be interpreted in the same way when considering the criminality of actions that took place in 1990. Criminal legislation the meaning of which is unclear must be given a restrictive, rather than an expansive, interpretation (at [98]).

The reasoning of Lord Reed's judgment is to be preferred for its cogency to that of Lord Lloyd-Jones'. This is so for four reasons. First, there is agreement between leading international law authorities that the interpretation relied on by Lord Reed is the correct one: "a public official or other person acting in an official capacity" means that a State official must have been involved. As Judge Gaja has said the Torture Convention prohibits torture "only to the extent that a State official is involved" ("The Protection of General Interests in the International Community" (2013) 364 Hague *Recueil* 9, 152); as Judge Crawford has written, torture, as defined by the Torture Convention, is "a treaty crime which is specifically linked to the State" (2006) 319 *ibid.* 325, 462.

Second, the CAT interprets the Torture Convention not with a view to establishing criminal liability on the part of a wrongdoer but with a view to establishing whether or not, under the terms of the Torture Convention, a person has been the victim of torture or at risk of becoming one (at [40] and [48]–[52]). It is a category mistake to apply, in a criminal case such as the instant one, the rules of treaty interpretation with the emphases preferred by human rights bodies, such as the CAT, in their interpretation of their instrument. Although the rules to be applied in the interpretation of treaties are the same whatever the nature of the treaty to be interpreted, the accent put on the particular means of interpretation will in a field such as criminal law be a different one. If treaty interpretation "must be based above all upon the text of the treaty" (*Territorial Dispute (Libya/Chad)* I.C.J. Rep. 1994, p. 6, 22), that is all the more so within the field of international criminal law. Thus international criminal tribunals have applied the general rules of treaty interpretation, but always overlaid by criminal law principles such as the principle of specificity or *nullum crimen sine lege* (*In re Goering et al* (1946) 13 I.L.R. 203, 208; *Prosecutor v Furundžija* (1998) 121 I.L.R. 213, 269, 342), or that of strict construction of the provisions of a criminal statute (*Prosecutor v Delalić et al*, Judgment, IT-96-21, November 16, 1998, at [413]). Article 22(2) of the Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 3, accordingly provides that:

> "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

Third, it is worth noting that when the International Court of Justice set out, in *Diallo*, why it was correct for a court to "ascribe great weight to the interpretation adopted" by independent UN treaty bodies established specifically to supervise the application of the human rights conventions, it stressed that the reason was:

> "to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled" (I.C.J. Rep. 2010, p. 639, 664).

When, however, the body of decisions of the Committee in question is as fine a mess as the decisions at issue here, displaying "manifest inconsistencies" (at [52]), it is far from clear that

the interests of legal security and the clarity and consistency of international law would be at all well served by that body of decisions, or a chosen strand of it, being relied on against an individual. As inconsistent a body of decisions as those of the CAT in this case surely cannot be opposed to a defendant in a criminal case, even if the decisions displayed a tendency, over time, to coalesce increasingly clearly around the conclusion that the Convention would apply to the conduct of insurgent forces within territory under their control.

The fourth reason concerns the delimitation of the temporal sphere of application of legal rules: that which has been called, in domestic and international law alike, the intertemporal law. At the time of the commission of the acts in question, 1990, the CAT had not yet suggested that the Convention would apply to the conduct of insurgent forces within territory under their control; it was only in the late 1990s that this interpretation was mooted. It is, as Lord Rodger once observed, a fundamental principle of the common law that "the legal consequences of situations should be judged according to the law in force at the time" when the situation arose, and on the basis of "contemporary standards and beliefs", rather than on the basis of the potentially very different standards of later years ("A Time for Everything under the Law: Some Reflections on Retrospectivity" (2005) 121 L.Q.R. 57, 63). With a view to "preserving the principle of legal stability which is an essential part of any juridical system", observed Sir Gerald Fitzmaurice,

> "the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules of law that are contemporaneous with it" ("The intertemporal problem in public international law" (1975) 56 *Ann. de l'Inst. de dr. int.* 536, 537).

The common thread in what has been said above is the fundamental value of legal certainty, a principle that operates in this field of the law to safeguard the rule of law; as Lord Reed admonished in his dissenting judgment (at [98]), "the fact that considerations of policy might be better served by a broad construction do not justify a departure from that principle".

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