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Torture in International Human Rights and International Humanitarian Law: The Actor and the Ad Hoc Tribunals

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Abstract

In seeking to define torture in international humanitarian law, the ICTY and ICTR have turned to the definition of torture contained in the UN Convention against Torture for guidance. The Convention definition contains a requirement that the actor be a public official or other person acting in an official capacity. The ad hoc tribunals have put forward various views as to whether this is an element of the definition of torture in international humanitarian law. This article examines these views. Potentially more significant are the pronouncements of the tribunals on the actor element of the definition of torture in international human rights law. This article also explores these pronouncements. It compares them with the drafting history of the Convention against Torture and with the jurisprudence of the Committee against Torture, the European Court of Human Rights and the UN Human Rights Committee. It questions whether the approach of the ad hoc tribunals is part of a trend towards a wider reading of 'the actor' in international human rights law.

Key words

Torture; definition of torture; non-state actors; convention against torture; ad hoc tribunals; human rights; humanitarian law

1. Introduction

The judgment of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Kvocka* et al.[1] is the latest in a series of cases which has considered the definition of torture in international humanitarian law. As no international humanitarian law instrument contains a definition of torture, the ICTY and the International Criminal Tribunal for Rwanda (ICTR) have often turned to the principal international instrument on the subject, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture, or, Convention),[2] for guidance. One of the elements

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1. *Prosecutor v. Miroslav Kvocka, Mlado Radic, Zoran Zigic and Dragoljub Prcac*, Case No. IT-98-30/1-A, Judgment, 28 February 2005 (*Kvocka*).
2. 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85.

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of the Convention definition is that the act 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'.[3] A recurring question before the ad hoc tribunals has been whether this is a required element of the definition of torture in international humanitarian law. The various Trial and Appeal Chambers of the ad hoc tribunals have offered no less than four different answers to this question. They have held that torture for the purposes of international humanitarian law requires the participation of a public official or other person acting in an official capacity; a public official or an official of a non-state party to the conflict; a public official or a person who acts in a non-private capacity; and no specific actor.

In deciding whether the definition of torture in international humanitarian law includes a specific actor requirement, the tribunals have made a number of pronouncements on the actor element of the definition of torture in international human rights law. It is these pronouncements that are the subject of this article. Part 2 considers the conflicting approaches of the ad hoc tribunals to the actor required for torture in international humanitarian law. Part 3 considers the approach of the ad hoc tribunals as regards the actor required for torture in international human rights law. In particular, it places the jurisprudence of the ad hoc tribunals in context, comparing it with the definition contained in the Convention against Torture and with recent developments emanating from the Committee against Torture, the United Nations Human Rights Committee and the European Court of Human Rights. Part 4 concludes by questioning whether the pronouncements of the ad hoc tribunals are part of a wider trend towards a broader reading of the actor requirement under the Convention.

2. The approach of the ad hoc tribunals to the actor required by international humanitarian law

The question whether an act, in order to be classified as torture for the purposes of international humanitarian law, requires the participation of a specific actor has been the subject of some controversy in recent years within the jurisprudence of the ad hoc tribunals. The case law presents two lines of reasoning. The first considers the definition of torture in the Convention against Torture to represent customary international law,[4] and hence for there to be a specific actor requirement.[5] The second considers the Convention definition merely to be 'an interpretational aid' rather than a statement of customary international law regardless of the context and for the public actor requirement to be 'contentious'.[6]

3. Ibid., Art. 1.
4. *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, Case No. IT-96-21-T, Judgment, 16 November 1998 *(Celebici)*, para. 459; *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998 *(Furundzija* Trial Judgment*)*, para. 160.
5. *Celebici*, *supra* note 4, para. 473; *Furundzija* Trial Judgment, *supra* note 4, para. 162; *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-A, Judgment, 21 July 2000 *(Furundzija* Appeal Judgment*)*, para. 111; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998 (*Akayesu*), para. 594.
6. *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001 (*Kunarac* Trial Judgment), para. 482.

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Before proceeding, it should be noted that the drafters of the Convention against Torture intended to limit its definition to the Convention itself. Hence the caveat that the definition applies only 'for the purposes of this convention' and that it is 'without prejudice to any international instrument or national legislation which does or may contain provisions of wider application'.[7] Regardless of the intention behind these provisions, the Convention definition has definite implications outside the confines of the Convention. The Convention definition, contained as it is in the principal thematic instrument on the subject, sets the standard. It is used as a tool for interpreting instruments that do not contain a definition of torture,[8] and is of considerable weight when assessing the customary international law on the subject.[9] The weight afforded to such limitations in general is best illustrated by observing that the Declaration against Torture definition was used as the starting point for the drawing up of the Convention against Torture definition despite it stating explicitly that it was '[f]or the purpose of this Declaration'.[10]

Turning to the first line of reasoning, that international humanitarian law requires the participation of a specific type of actor, differences exist as to the precise nature of this actor. In the case of *Akayesu*, a Trial Chamber held that one of the essential elements of torture was that the perpetrator was 'an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity'.[11] This should be compared with the *Furundzija* case, in which both the Trial and Appeal Chambers found the definition contained in the Convention against Torture to reflect customary international law and one of the elements of the crime of torture committed in an armed conflict to be 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, e.g. as a de facto organ of a state or any other authority-wielding entity'.[12] Different again was the holding of the Trial Chamber in *Celebici*, where it was stated that the Convention definition had customary status but that, in the context of international humanitarian law, the official actor 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'.[13] The *Celebici* Trial Chamber also considered the definition to encompass 'officials who take a passive attitude or turn a blind eye to torture, most obviously by failing to prevent or punish torture under national penal or military law, when it occurs'.[14]

The second line of reasoning, as espoused by a Trial Chamber in the case of *Kunarac*, is that the Convention definition only serves as 'an interpretational aid'

7. Convention against Torture, *supra* note 2, Art. 1(2).
8. See e.g. with respect to the European Convention on Human Rights, *Selmouni v. France*, Judgment of 28 July 1999, [1999] ECHR at 181–2; with respect to the Statutes of the ICTY and ICTR, see *infra*.
9. *Furundzija* Trial Judgment, *supra* note 4, para. 160.
10. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 December 1975, Art. 1.
11. *Akayesu*, *supra* note 5, para. 594.
12. *Furundzija* Trial Judgment, *supra* note 4, paras 160, 162; *Furundzija* Appeal Judgment, *supra* note 5, para. 111.
13. *Celebici*, *supra* note 4, para. 473.
14. Ibid., para. 474.

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and not as a statement of customary international law irrespective of the context in which it is applied.[15] The Trial Chamber noted that the 'definition of an offence is largely a function of the environment in which it develops' and highlighted differences between international human rights and international humanitarian law.[16] Turning to the official actor requirement, it stated that 'the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law'.[17] Rather, the 'characteristic trait of the offence in this context is to be found in the nature of the act committed rather than in the status of the person who committed it'.[18] This line of reasoning has been followed by Trial Chambers in the cases of *Kvocka*,[19] *Krnojelac*,[20] *Simic*,[21] and *Brdanin*.[22]

The Appeals Chamber in *Kunarac* attempted to resolve these conflicting lines of reasoning, considering the issue *proprio motu* in order to clarify any inconsistencies within the Tribunal's jurisprudence.[23] The Appeals Chamber reasoned that the Convention against Torture definition, including the public actor requirement, represents customary international law 'as far as the obligation of states is concerned'.[24] States are required to prosecute acts of torture 'only when those acts are committed by "a public official . . . or any other person acting in a non-private capacity"'.[25] The *Furundzija* Appeals Chamber was speaking in this context and was thus correct. However, the customary international law definition 'as far as the obligation of States is concerned, must be distinguished from an assertion that this definition wholly reflects customary international law regarding the meaning of the crime of torture generally'.[26] In relation to individual criminal responsibility for an act of torture outside the framework of the Convention against Torture, 'the public official requirement is not a requirement under customary international law'.[27] Thus, the Trial Chamber in *Kunarac* was also correct. The Appeals Chamber went on, however, to introduce a caveat, namely that the appellants in that case 'did not raise the issue as to whether a person acting in a private capacity could be found guilty of the crime of torture; nor did the Trial Chamber have the benefit of argument on the issue of whether that question was the subject of previous consideration by the Appeals Chamber', suggesting the matter may yet be re-opened.[28]

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15. *Kunarac* Trial Judgment, *supra* note 6, para. 482.
16. Ibid., paras. 469–70.
17. Ibid., para. 496.
18. Ibid., para. 495.
19. *Prosecutor v. Miroslav Kvocka, Mlado Radic, Zoran Zigic and Dragoljub Prcac*, Case No. IT-98-30/1-T, Judgment, 2 November 2001, para. 139.
20. *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgment, 15 March 2002, para. 187.
21. *Prosecutor v. Blagoje Simic, Miroslav Tadic and Simo Zaric*, Case No. IT-95-9-T, Judgment, 17 October 2003, para. 82.
22. *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-T, Judgment, 1 September 2004, paras. 488–9.
23. *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, (*Kunarac* Appeal Judgment), para. 145.
24. Ibid., para. 147.
25. Ibid., para. 146.
26. Ibid., para. 147.
27. Ibid., para. 148.
28. Ibid.

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And so the matter was re-opened. Before the Appeals Chamber in *Kvocka*, one of the appellants argued that the Trial Chamber erred in finding him responsible for the torture of detainees since the physical perpetrators were not public agents.[29] The *Kvocka* Appeals Chamber affirmed the conclusion of the *Kunarac* Appeals Chamber, stating that the appellant's argument was 'bound to fail, regardless of the precise status' of the physical perpetrators.[30]

Following the judgment of the Appeals Chamber in *Kvocka*, with the benefit of argument from the parties, it can now be considered settled jurisprudence that, as regards individual criminal responsibility for an act of torture outside the Convention against Torture, no specific actor is required. The physical perpetrator may be a member of an armed opposition group, a private military contractor, a mercenary, even a purely private individual with no organizational affiliation. In so deciding, the Appeals Chamber in *Kunarac* effectively overruled its earlier judgment in *Furundzija* on this point. Although it presented the issue as one of the Appeals Chamber in *Furundzija* speaking of the obligation of states and not the criminal responsibility of individuals,[31] a reading of the relevant passages readily reveals that neither the Trial Chamber nor the Appeals Chamber was speaking in any such context. The Trial Chamber stated that while the definition contained in the Convention against Torture 'applies to any instance of torture, whether in time of peace or of armed conflict, it is appropriate to identify or spell out some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts'.[32] One such element was a specific actor. The Appeals Chamber subsequently found that the Trial Chamber correctly identified the elements of the crime of torture 'in a situation of armed conflict'.[33]

Regardless, the conclusion of the Appeals Chamber in *Kunarac* must be correct. First, the historical foundations of international human rights and international humanitarian law and the differing role of the state therein suggest that the two bodies of law are not going to be identical.[34] Second, on the whole, international humanitarian law instruments consider that an act of torture is not restricted to a certain class of person.[35] As the International Committee of the Red Cross Commentary to Article 4 of Additional Protocol II states: 'the act of torture is reprehensible in itself,

29. *Kvocka*, *supra* note 1, paras 278–280.
30. Ibid., para. 284.
31. See *Kunarac* Appeal Judgment, *supra* note 23, paras 146–8.
32. *Furundzija* Trial Judgment, *supra* note 4, para. 162.
33. *Furundzija* Appeal Judgment, *supra* note 5, para. 111.
34. See *Kunarac* Trial Judgment, *supra* note 6, para. 470.
35. See Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, Article 12; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, Article 12; Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, Articles 17 and 87; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Article 32; Article 3 Common to the four Geneva Conventions of 12 August 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Article 11; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (Additional Protocol II), Article 4.

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regardless of its perpetrator, and cannot be justified in any circumstances.'[36] Third, it would be anomalous were genocide, crimes against humanity and war crimes to be able to be committed by any individual, whether a state official or a private individual,[37] but one of the underlying offences within them to be limited to a certain class of person.[38] Fourth, the Rome Statute does not require the actor to have official capacity. Although not necessarily representative of customary international law during the period in question, the Rome Statute is considered by the ICTY to be a useful instrument in clarifying the content of customary international law.[39] What is not settled is the 'official' status of the actor in international human rights law.

3. The approach of the ad hoc tribunals to the actor required by international human rights law

It will be remembered that the Appeals Chamber in *Kunarac* confined the observations it made on the actor in *Furundzija* to an act of torture within the framework of the Convention against Torture. In so doing, it affirmed the proposition that, so far as the obligation of states to prosecute acts of torture are concerned, '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'. The precise meaning to be attributed to this phrase will be examined in this section. It will be compared with the definition of torture contained in the Convention against Torture and will be considered against relevant jurisprudence from other international bodies.

3.1. The Convention against Torture

Article 1 of the Convention against Torture states:

> 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.[40]

In ascertaining the meaning to be given to the phrase 'public official or other person acting in an official capacity', the general statement of treaty interpretation

36. Y. Sandoz, C. Swinarski, and B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at 1373–4.
37. See 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 278, Article 6; *Kunarac* Trial Judgment, *supra* note 6, para. 493; G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005), 272–8.
38. Although it should be noted that Article 7(2)(i) of the Rome Statute limits the 'enforced disappearance of persons' to 'persons by, or with the authorization, support or acquiescence of, a state or a political organization'.
39. *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgment, 15 July 1999, para. 223; *Furundzija* Trial Judgment, *supra* note 4, para. 227; *Kunarac* Trial Judgment, *supra* note 6, fn 1210.
40. Emphasis added.

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to be found in the Vienna Convention on the Law of Treaties should be recalled. Article 31(1) states, '[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'. Article 32 provides that in certain instances, '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion'. One such instance is when the Article 31 interpretation 'leaves the meaning ambiguous or obscure'.[41]

The ordinary meaning to be attributed to the terms contained in the Convention very much depends on the object and purpose of the treaty and the context in which it was drafted.[42] This is not obvious even from a close reading of the treaty. If the object and purpose of the Convention against Torture was more effectively to eradicate torture in all its forms then it may reasonably be expected that the term 'person acting in an official capacity' would be given a broad interpretation. On the other hand, if the rationale behind the Convention was more effectively to combat solely governmental torture, then the phrase may be interpreted narrowly. These are not the only choices. For example, the aim of the Convention against Torture may have been to commence by focusing on governmental torture, gradually extending in competence until all forms of torture, regardless of the actor, have been extinguished. Further, even the relatively limited notion of governmental torture is not a uniform concept. The phrase encompasses torture personally committed by government officials at one end and torture implicitly tolerated by governments at the other. Thus there are in fact two variables at play, the actor and the method of acting. Exactly where the Convention lies is somewhat ambiguous. The resolution to which the Convention against Torture was annexed simply states that the General Assembly was '*Desirous* of achieving a more effective implementation of the existing prohibition under international and national law of the practice of torture and other cruel, inhuman or degrading treatment or punishment'.[43] A similar such desire is contained in the preamble to the Convention.[44] The various possible rationales behind the Convention and the differing meanings to be attributed to the phrase under discussion make it necessary to turn to the supplementary means of interpretation.

In order to determine the object and purpose of the Convention against Torture, it may be helpful to consider its precursor. The first international instrument to contain a definition of torture was the Declaration against Torture. This stipulated that the act be 'inflicted by or at the instigation of a public official'.[45] The General Assembly resolution to which the Declaration was annexed stated that the Declaration is a 'guideline for all states and other entities exercising effective power'.[46] Seemingly, therefore, the Declaration would cover acts 'inflicted by or at the instigation of' public officials of states as well as public officials of entities exercising effective power.

41. 1969 Vienna Convention on the Law of Treaties, (1969) 8 ILM 679, Art. 32(a).
42. A. Aust, *Modern Treaty Law and Practice* (2000), 188.
43. UN Doc. A/RES/39/46 (10 December 1984), preambular para. 5.
44. Convention against Torture, *supra* note 2, preambular para. 6.
45. Declaration against Torture, *supra* note 10, Art. 1.
46. UN Doc. A/RES 3452 (XXX) (9 December 1975).

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There was no elaboration in the resolution as to who these 'other entities exercising effective power' were. The use of such wide terminology encompasses both inter-non-state entities such as the United Nations when engaged in the administration of territories as well as intra-non-state entities such as certain corporations, national liberation groups and armed opposition groups. Although, at first sight, the reference to '*states* and other entities' rather than to '*Governments* and other entities' suggests that the entities referred to are inter-non-state actors rather than intra-non-state actors, this is unlikely true. After all, it is not the abstract concept of the state that exercises effective power, rather an entity within it, usually the government. Thus, when the resolution refers to the state, it is also referring to the embodiment of the state, namely the government. Hence it refers to bodies exercising power and control within the state and thus intra-non-state entities. In considering to which such entities the resolution refers, in grouping 'states' together with 'other entities', it is likely that the latter should be analogous to the former. Thus, the Declaration would not be applicable to all entities that exercise effective power but only those whose power extends such that they may be considered state-like. This has been considered to include 'political entities that may not necessarily be governments but do exercise effective control over substantial populations'.[47] Whatever the full extent of this phrase, it is evident that even the narrow Declaration against Torture goes beyond public officials of merely states.

The Declaration against Torture definition constituted the basis of the original Convention against Torture definition that was sent to states for their comments and suggestions.[48] Among the proposals received were the substitution of the original formulation with 'by or with the consent or acquiescence of a public official',[49] or with 'by or at the instigation of or with the acquiescence of a person acting in an official capacity',[50] as well as for reference to a 'public official or any other agent of the state'.[51]

The drafting of the Convention evidenced a tension between those that considered its purpose to be the eradication of torture in all its forms and those that considered the aim as being focused on state-sponsored torture.[52] The former considered that the definition should be limited to the act rather than the act coupled with a specific actor, while the latter assumed that the state would 'take action according to its criminal law against private persons having committed acts of torture against other persons' and that the Convention was 'intended to deal with situations where national remedies are not likely to be provided'.[53]

47. N. Rodley, *The Treatment of Prisoners under International Law* (1999), 30. See also N. Rodley, 'Can Armed Opposition Groups Violate Human Rights?', in K. Mahoney and P. Mahoney (eds.), *Human Rights in the Twenty-First Century: A Global Challenge* (1993), 297, at 298.
48. A. Boulesbaa, *The U.N. Convention on Torture and the Prospect for Enforcement* (1999), 5.
49. Proposal of the United States cited in J. Burgers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988), 41.
50. Text submitted by the Chairman cited ibid., at 43.
51. Proposal of the United Kingdom cited ibid., at 45.
52. Boulesbaa, *supra* note 48, at 23–6.
53. Burgers and Danelius, *supra* note 49, at 45; Boulesbaa, *supra* note 48, at 23–4.

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A compromise formula was worked out to read in relevant part 'acts committed by, or at the instigation of, or with the consent or acquiescence of a public official or any other person acting in an official capacity'.[54] It is thus clear that the definition of torture contained in the Declaration against Torture has been extended. It has been extended in two significant aspects – by the extension of the manner in which an individual may be held responsible to include 'consent or acquiescence', and by the extension of the actor to encompass 'any other person acting in an official capacity'.

While clearly evidencing an intention to broaden the actor and the ways in which the actor may act, the *travaux préparatoires* also indicate that a specific actor was intended to be an important component of the definition of torture. Though the drafters intended to limit their regulation to official involvement in torture, that is torture for which the authorities themselves could be held responsible, they sought to restrict any and all forms thereof.[55] The object and purpose of the Convention against Torture can be put thus: to combat more effectively all forms of torture in which 'the responsibility of the authorities is somewhat engaged'.[56] The phrase 'public official or other person acting in an official capacity' must therefore relate to the situation in which the responsibility of the authorities may be engaged.

3.2. The Committee against Torture

The Committee against Torture, the body responsible for the monitoring of the implementation of the Convention against Torture by states parties,[57] has discussed the meaning to be given to the phrase 'public official or other person acting in an official capacity' in the context of Article 3 of the Convention, which prohibits the return of a person to a state in which there are 'substantial grounds for believing that he would be in danger of being subjected to torture'. In a line of early communications, the Committee stated 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'.[58]

A change occurred in *Elmi v. Australia*.[59] In that communication, Elmi argued that to send him back to Somalia, as Australia proposed to do, would violate Article 3 of the Convention. The question for the Committee was essentially whether the possibility of torture by non-state actors was covered within the principle of non-refoulement. The Committee observed 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.'[60] It further noted that the particular area in which Elmi

54. Boulesbaa, *supra* note 48, at 24.
55. See Burgers and Danelius, *supra* note 49, at 119; Boulesbaa, *supra* note 48, at 24.
56. Burgers and Danelius, *supra* note 49, at 120.
57. See Convention against Torture, *supra* note 2, Arts. 17–24.
58. *G.R.B. v. Sweden*, Communication No. 83/1997, UN Doc. A/53/44, Annex X, at 92, para. 6.5 (*G.R.B.*).
59. *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, UN Doc. A/54/44, Annex VII, at 109 (*Elmi*).
60. Ibid., para. 6.5.

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was likely to reside was under the effective control of a faction that had established quasi-governmental institutions and provided a number of public services.[61] On the basis of these factors, the Committee determined that 'de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments'.[62] Accordingly, the Committee held that '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'.[63]

Subsequently, the Committee has retreated somewhat, affirming the proposition it laid down in *G.R.B.* without as much as a mention of *Elmi*.[64] Then, in the case of *H.M.H.I. v Australia*, the Committee reconciled the two communications considering *Elmi* to apply only 'in the exceptional circumstance of state authority that was wholly lacking'.[65] According to the Committee, it was only in this situation that 'acts by groups exercising quasi-governmental authority could fall within the definition of Article 1'.[66] The Committee distinguished the factual background existing in Somalia at the time of the *H.M.H.I.* communication noting that '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'.[67]

The focus of the test in *Elmi* was whether the particular group exercises powers analogous to those normally exercised by governments. Indications as to the exercise of such prerogatives may be the functioning of an organized and structured entity, its effective control over a sizeable portion of territory and the population therein, and the creation of its own institutions to the exclusion of governmental ones. The control over territory would have to be for more than just the short term. Tacit acknowledgement by the legitimate government or the international community that the entity exercises effective control of a segment of the territory, for example in the form of negotiations relating to the formalization of the de facto status between the various concerned parties, would also be a useful factor.

It was further considered important under *Elmi* that the factions exercise their prerogatives to the exclusion of the legitimate government. Hence lack of governmental control is vital and the co-exercising of prerogatives would not suffice. Provided such is the case, it should not matter whether there exists no central government or whether the central government has merely lost control over a certain portion of the territory. For there is no relevant difference, as regards the situation at hand, between a country in which no central government exists and different factions control different provinces, and a country in which there is a central

61. Ibid., para. 6.7.
62. Ibid., para. 6.5.
63. Ibid.
64. See *V.X.N. and H.N. v. Sweden*, Communications Nos. 130/1999 and 131/1999, UN Doc. A/55/44, at 133, para. 13.8; *M.P.S. v. Australia*, Communication No. 138/1999, UN Doc. A/55/44, page 111, para. 7.4.
65. *H.M.H.I. v. Australia*, Communication No. 177/2001, UN Doc. A/57/44, at 146, para. 6.4 (*H.M.H.I.*).
66. Ibid.
67. Ibid.

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government but an armed group controls one particular province.[68] Indeed, in the United Kingdom House of Lords case of *R v. Secretary of State for the Home Department, ex parte Adan*, Lord Steyn stated that 'there is no material distinction between a country where there is no government (like Somalia) and a country when the government is unable to afford the necessary protection to citizens (such as Algeria)'.[69]

To determine the precise scope of the *Elmi* test, a useful analogy can be drawn with Article 9 of the International Law Commission (ILC)'s Articles on Responsibility of States for Internationally Wrongful Acts. Indeed, the ILC changed the wording of Article 9 subsequent to the decision in *Elmi*.[70] Article 9 provides that the 'conduct of a person or group of persons . . . exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority' shall be considered an act of the state. The Commentary thereto is revealing. It stresses the exceptional nature of the situation, noting that the occasions in which this may take place are rare, namely 'during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative' or 'where lawful authority is being gradually restored, e.g., after foreign occupation'.[71] This would seem to fit with the *Elmi* formulation. More interestingly, the Commentary goes on to observe that the absence or default of official authorities covers both the 'total collapse of the State' and the 'partial collapse of the State or its loss of control over a certain locality'.[72] This corresponds with the suggested scope of the *Elmi* principle.

Such an interpretation would also correspond with the proposal made by the Federal Republic of Germany at the time of the drafting of the Convention against Torture. The representative of the Federal Republic of Germany proposed that the term 'public official' include 'persons who, in certain regions or under particular conditions, actually hold and exercise authority over others and whose authority is comparable to government authority – all be it only temporarily – has replaced government authority or whose authority has been derived from such persons'.[73] This raises the interesting question of whether a proposal rejected during the drafting of a convention may replace the actual meaning adopted when it is subsequently reached by an authoritative body interpreting the relevant convention.[74]

68. As noted by R. McCorquodale and R. LaForgia, 'Taking off the Blindfolds: Torture by Non-State Actors', 1(2) *Human Rights Law Review* 189, 204–5: 'Whilst *Elmi* dealt with the situation where there was no government at all, other cases have applied these obligations where there is a government but that government was not able to protect individuals from violations of the prohibition on torture.'
69. *R v. Secretary of State for the Home Department, ex parte Adan*, [2001] 1 All ER 593 at 608 (HL) cited in McCorquodale and LaForgia, *supra* note 68, at 204–5.
70. McCorquodale and LaForgia, *supra* note 68, at 213.
71. International Law Commission, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN Doc. A/56/10 (2001), Chapter 4, commentary to Art. 9, para. 1.
72. Ibid., para. 5.
73. Burgers and Danelius, *supra* note 49, at 45.
74. Given that human rights instruments are 'living' instruments and adapt to changed circumstances (see e.g., *Tyrer v. United Kingdom*, Judgment of 25 April 1978, [1978] ECHR at 15; *Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights*, Inter-American Court of Human Rights, Advisory Opinion, para. 37), it is suggested that the answer is in the affirmative.

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The Committee in *H.M.H.I.* did not interpret *Elmi* in this way. Instead, it focused on the presence of a government, one with whom the international community is engaged in dealings. It essentially dismissed any requirement that there be an effective government, noting as it did the limited reach and temporary nature of the particular government in place. This dismissal suggests that all that is needed is a government on paper. It does not matter whether the government is in exile or sitting in the country in which it is supposed to govern, or whether it has control of its entire territory or only parts thereof. All that is required is the presence of a government with which the international community has dealings. The focus on these dealings suggests that the external linkages of the authority take precedence over its internal attributes. Regardless of this unnecessary encroachment on the *Elmi* principle, the Committee against Torture has made clear that in certain circumstances non-state actors may satisfy the Article 1 requirement of the Convention against Torture.

3.3. Other international bodies

Although neither the European Convention on Human Rights nor the International Covenant on Civil and Political Rights (ICCPR) contain definitions of torture, regard may nevertheless be had to the jurisprudence of the European Court of Human Rights and the UN Human Rights Committee. For its part, the European Court of Human Rights has stated that it 'does not rule out the possibility that Article 3 of the Convention [the prohibition on torture] may also apply where the danger emanates from persons or groups of persons who are not public officials'.[75] The Court was rather firmer in the case of *A v. United Kingdom* when it affirmatively required that states 'take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals'.[76] This should not come as a surprise given that a proposal for the Convention to state that 'all forms of physical torture, whether inflicted by the police, military authorities or members of private organizations, are offences against heaven and humanity and must be prohibited'[77] was withdrawn after assurance was given that the substance of the proposals was encompassed in the language that was to be used.[78]

The UN Human Rights Committee, in its General Comment to Article 7 of the ICCPR regarding the prohibition on the use of torture, has stated that '[i]t is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity'.[79] The Human Rights Committee has further stated that also

75. *H.L.R. v. France*, Judgment of 29 April 1997, [1997] ECHR at 758.
76. *A v. United Kingdom*, Judgment of 23 September 1998, [1998] ECHR at 2699.
77. A. Cassese, 'Prohibition of Torture', in R. St. J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (1993), 226.
78. Ibid.
79. UN Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), UN Doc. HRI/GEN/1/Rev.7 (2004), para. 2.

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implicit in Article 7 is the obligation on states parties 'to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power'.[80] The Committee considered such to be the case given that the obligations of states parties would only be satisfied if individuals are protected 'not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities'.[81] The right to be free from torture was obviously considered to be one such right. It has thus been said that 'references to "private capacity" . . . leave no doubt that Article 7 of the Covenant has now been interpreted as covering the private sphere'.[82]

There are, however, a multitude of differences relating to the obligations on states parties resulting from the European Convention on Human Rights and the ICCPR on the one hand and the Convention against Torture on the other. Neither the European Convention nor the ICCPR 'bind the state to provide penal sanctions, facilitate extradition, accept universal penal jurisdiction, or ensure compensation for the victims of torture'.[83] As such, they are likely to be interpreted more widely than the Convention against Torture. The reluctance of the Committee against Torture to interpret the definition widely may also be due in part to the obligation to exercise universal jurisdiction.[84] Since the European Convention and the ICCPR only relate to state responsibility, unlike the Convention against Torture which is a hybrid instrument containing both elements of state responsibility and individual criminal responsibility, any comparison with these treaties must be undertaken with caution.

3.4. The ad hoc tribunals

It is against this background that the pronouncements of the ad hoc tribunals must be viewed. The Trial Chamber in *Celebici* did not speak of the actor in international human rights law, confining itself to a consideration of torture committed in armed conflicts.[85] In *Akayesu*, a Trial Chamber purported to define the offence of torture for all situations, including international human rights law. It required that the perpetrator was 'an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity'.[86] This largely corresponds with the phrase used in the Convention against Torture, though *Akayesu* uses the term 'official' rather than the term 'public official'.

80. UN Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. HRI/GEN/1/Rev. 7 (2004), para. 8.
81. Ibid., para. 8.
82. A. Clapham, *Human Rights in the Private Sphere* (1993), 109.
83. M. Tardu, 'The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment', 56 *Nordic Journal of International Law* 303, 306.
84. A. Byrnes, 'The Committee against Torture', in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (1992), 518, n 35.
85. *Celebici*, *supra* note 4, para. 473.
86. *Akayesu*, *supra* note 5, para. 594.

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For its part, the Appeals Chamber in *Kunarac* held that as far as the obligation of states is concerned, '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'.[87] If this is compared to the Convention against Torture definition, it becomes clear that a person acting in an 'official capacity' is being equated with a person acting in a 'non-private capacity'. 'Official' is thus treated as synonymous with 'non-private', yet equating the two is somewhat problematic. A person is able to act outside their official capacity without necessarily acting in a private capacity.[88] Similarly, a person may act in a non-private manner without acting in an official manner. That 'official' cannot be equated with 'non-private' has been recognized by the UN Human Rights Committee.[89] Its General Comment on Article 7 of the ICCPR notes the existence of three categories of person – those acting in an official capacity, outside their official capacity and in a private capacity. 'Non-private' by definition means persons who are not acting in their private capacity, thus including the acts of persons acting in an official capacity and those acting outside their official capacity. In light of this, it is evident that the *Kunarac* notion of a person acting in a 'non-private' capacity actually encompasses both persons who are acting in an official capacity and persons who are acting outside their official capacity, thus broadening the scope of the Convention definition.

The notion that there are only two types of actor – those acting in an official capacity and those acting in a private capacity – does find support from the ILC's Articles on State Responsibility. However, this results from '[c]ases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions' being included in the meaning of 'official'.[90] This is to be distinguished from 'cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals'.[91] The question then raised is whether an act of torture is considered a mere excess, hence falling within the notion of official, or whether it is considered egregious and thus falls within the private. Acts of torture, while certainly not official functions,[92] cannot automatically be so removed from the scope of official functions either. To categorize them as such would mean that they would fall outside the scope of the Convention against Torture entirely. This problem should not arise, at least not in this context,[93] given that the very words of the Convention against Torture limit it to those persons 'acting *in* an official capacity'.[94] The *Kunarac* approach is thus wider than the original Convention definition.

The Appeals Chamber in *Kunarac* did not consider any person acting in a non-private capacity to fall within the Convention definition. This is clear from the

87. *Kunarac* Appeal Judgment, *supra* note 23, para. 147. See also *Furundzija* Trial Judgment, *supra* note 4, para. 162; *Furundzija* Appeal Judgment, *supra* note 5, para. 111.
88. A. Roberts, 'False Dichotomies in International Law' (unpublished LL.M. thesis).
89. General Comment No. 20, *supra* note 79, para. 2.
90. Report of the ILC, *supra* note 71, Commentary to Art. 7, para. 7.
91. Ibid.
92. *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3)*, [2000] 1 AC 147, per Lord Browne-Wilkinson.
93. A similar problem was faced in the context of official acts for the purposes of immunity. See S. Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v Belgium Case', 13 EJIL 877, at 891.
94. Convention against Torture, *supra* note 2, Art. 1 (emphasis added).

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examples it gave, namely 'a de facto organ of a State or any other authority-wielding entity'. Nevertheless, it is also evident from these examples that the actor is relatively broad. Even without the curtailment of *Elmi* by *H.M.H.I.*, the *Kunarac* approach is wider than the approach of the Committee against Torture.[95] While the Appeals Chamber's notion of a 'de facto organ of a State' may be largely analogous to the Committee's notion of 'de facto, those factions [that] exercise certain prerogatives that are comparable to those normally exercised by legitimate governments', the Appeals Chamber also considers an authority-wielding entity to fall within the Convention definition.

The nature of the authority to be wielded is not specified. In particular, it is not clear whether the authority has to be over territory or over individuals. The precise wording used coupled with the reference of the *Kunarac* Trial Chamber to an 'authority-wielding person', as opposed to entity, suggest that it is the latter. Quite how far this stretches is unclear. An interesting question is whether the notion of an 'authority-wielding entity' is wide enough to cover the perpetrator of domestic violence and thus include domestic violence within torture, since a persuasive case has been made for the victim being under the control and authority of the perpetrator,[96] and the erosion of the public/private distinction.[97] It is unlikely that the notion, as the Appeals Chamber meant it, stretches that far. The term 'authority-wielding entity' should not be read in isolation but in the context in which it was made, i.e. alongside the phrase 'de facto organ of a State'. This would not then seem to provide support for such a view and domestic violence as torture may best be considered under the notion of acquiescence.[98] However, if a shift away from territorial control towards control over individuals can be discerned, this would be of considerable significance since it may also signal a shift away from the state or state-like entities as the sole violators of international human rights law, towards a focus on sites of power. At any rate, as long as the person committing the torture belongs to an entity that wields authority, they would fall within the *Kunarac* interpretation of the Convention definition.

95. The fact that the Committee against Torture considered the issue in the context of non-refoulement while the ICTY considered it in the context of the obligation to punish should not make a difference for our purposes. To hold otherwise would be to argue for one definition for one part of the Convention against Torture and another definition for another part. The Convention itself makes no such distinction.

96. R. Copelon, 'Recognizing the Egregious in the Everyday: Domestic Violence as Torture', 25 *Colum. Hum. Rts. L. Rev.* 291, 344–9.

97. H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Approaches to International Law', 85 *AJIL* 613, at 629, note: '[t]he assumption that underlies all law, including international human rights law, is that the public/private distinction is real . . . By extending our vision beyond the public/private ideologies that rationalize limiting our analysis of power, human rights language as it currently exists can be used to describe serious forms of repression that go far beyond the juridically narrow vision of international law'. See generally, H. Charlesworth and C. Chinkin, *The Boundaries of International Law* (2000).

98. On domestic violence as torture, see Copelon, *supra* note 96; R. Copelon, 'Understanding Domestic Violence as Torture', in R. Cook (ed.), *Human Rights of Women: National and International Perspectives* (1994), 116; C. Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law', in R. Cook (ed.), *Human Rights of Women: National and International Perspectives* (1994), 116; C. MacKinnon, 'On Torture: A Feminist Perspective on Human Rights', in Mahoney and Mahoney, *supra* note 47, 21; A. Byrnes, *supra* note 84, at 509; A. Byrnes, 'The Convention Against Torture', in K. Askin and D. Koenig (eds.), *Women and International Human Rights Law*, Vol. 2 (2000), at 183; D. Thomas and M. Beasley, 'Domestic Violence as a Human Rights Issue', 58 *Alb. L. Rev.* 1119.

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4. Conclusion

The judgment of the Appeals Chamber in *Kvocka* has made clear the status of the required actor for an act of torture in international humanitarian law. There is none. The status of the actor required for an act of torture under international human rights law is somewhat more contentious. Conflicting pronouncements exist within the jurisprudence of the ad hoc tribunals. The Appeals Chamber in *Kunarac* opined that what is required is that the actor 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'.[99] A comparison with the definition contained in the Convention against Torture shows that the *Kunarac* approach has provided a broader interpretation of the actor requirement, including as it does persons acting in a non-private capacity. Comparison also reveals that the *Kunarac* approach is wider than the jurisprudence of the Committee against Torture since it encompasses authority-wielding entities. Arguably, it shifts the focus onto authority over individuals and away from control of territory. In so doing, it signals a shift away from a focus on the state and state-like entities. In this respect, the approach of the Appeals Chamber may be considered part of a continuing trend towards a more expansive interpretation of the relevant actor in international human rights law.

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99. *Kunarac* Appeal Judgment, *supra* note 23, paras. 146–7 affirming *Furundzija* Appeal Judgment, *supra* note 5, para. 111.

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