The question remains: did all this have to happen? It is impossible to avoid the impression that the Polish Supreme Court deliberately sought a preliminary ruling on the questions analyzed above in the hope that the CJEU would make a forceful statement regarding judicial independence. This is evidenced by the fact that the proceedings before the Polish Supreme Court regarding retirement could have been resolved in the light of the subsequent amendment to the law and reinstatement of the judges. Yet, the referring court chose to continue the reference to the CJEU. It had the right to do so, and the response provided, although narrowed to a specific case, has since formed the basis for subsequent statements of courts and legal doctrine.

However, this solution cannot be considered typical. It is true that national courts have the right to ask the CJEU about the interpretation of EU law, but this question went far beyond an individual case. The purpose of the question asked was to provoke the CJEU to make a general statement, to interpret institutional solutions regarding the system of judiciary in an EU member state. According to Polish legal tradition, such issues should have been the subject of analysis of the Constitutional Tribunal, which assesses the compliance of statutes with ratified international agreements and the Constitution.[16] The problem is, however, that the Tribunal had already been the object of personnel changes and is now staffed almost exclusively by judges nominated by the ruling coalition in the Parliament. The widely held view in the Polish legal establishment is that the Constitutional Tribunal, hollowed out to an unprecedented degree, does not currently guarantee independence.

In this situation, the CJEU preliminary ruling analyzed here and the Court's subsequent opinions are important as never before. One could even say that they are an attempt to defend the Polish state against itself.

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United Kingdom Supreme Court—United Nations Convention Against Torture—universal jurisdiction—international criminal law—liability of nonstate actors

R v. Reeves Taylor (Appellant). [2019] UKSC 51. *At* https://www.supremecourt.uk/cases/uksc-2019-0028.html.
UK Supreme Court, November 13, 2019.

The First Liberian Civil War (1989–1996), in which Charles Taylor's National Patriotic Front of Liberia (NPFL) waged an ultimately successful military campaign to depose President Samuel Doe, was characterized by widespread atrocities.[1] During this period,

[16] In Poland, the Constitutional Tribunal decides, among other things, on the incompatibility of national statutory solutions with international law (including the European law).

[1] *See* Human Rights Watch, *Liberia at a Crossroads: Human Rights Challenges for the New Government* (Sept. 30, 2005). Later, Charles Taylor was convicted of multiple crimes including war crimes and crimes against humanity

Agnes Reeves Taylor, known as "The Mother of the Revolution" and at the time Charles Taylor's wife, allegedly committed multiple acts of torture in her capacity as a high-ranking member of the NPFL. After moving to the United Kingdom, Agnes Taylor was charged in 2017 with seven counts of torture and one of conspiracy to commit torture under Section 134 of the UK Criminal Justice Act 1988 (CJA), which domesticates aspects of the UN Convention Against Torture 1984 (CAT)[2] and asserts universal jurisdiction over torture. During the prosecution, a question over a key definitional element of the crime was appealed to the UK Supreme Court (Supreme Court): whether nonstate actors could be liable under the statute, which requires that torture be carried out by a "public official or person acting in an official capacity" (para. 14). The Court gave a qualified answer in the affirmative, holding that this definition includes individuals acting for a nonstate body that exercises control over territory and carries out governmental functions in this territory. As the first apex court decision extending liability for torture to de facto authorities, the Supreme Court decision is likely to have significant jurisprudential influence well beyond the United Kingdom.

Echoing the central aspects of the international definition of torture in CAT Article 1, CJA Section 134(1) defines torture as follows: "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." Agnes Taylor's alleged conduct occurred in 1990 at a stage of the conflict before the NPFL had deposed the government. Thus, the question for the Supreme Court was whether acting on behalf of an insurrection force could potentially satisfy the element of being a "person acting in an official capacity," as the law stood in 1990.

The Supreme Court largely agreed with the first and second instance decisions of the High Court[3] and Court of Appeal,[4] which had held against Taylor. However, after examining a wide range of international and domestic legal authorities, as well as academic commentary, the majority decision of Lord Lloyd-Jones narrowed the test that had been established by the Court of Appeal for when de facto authorities could be said to be acting in an official capacity for the purposes of the definition of torture. As discussed in more detail below, the Supreme Court emphasized the need not only for the nonstate group to be in control of the territory in which the crimes were committed, but also for the group to be conducting governmental functions in that territory (paras. 76–79). As such, the majority granted the appeal on this narrow basis, and remitted the case to the High Court to determine whether there was sufficient evidence to support the charges in light of this new test (para. 81). In contrast, the sole dissenting opinion of Lord Reed would have upheld the appeal and dismissed the charges against Taylor, arguing that any widening of liability for torture to include nonstate entities was an "evolution" of the definition of torture that, at best, occurred long after the commission of the alleged crimes in question (if at all), and which could not therefore be applied in this case.

by the Special Court for Sierra Leone. The Prosecutor v. Charles Ghankay Taylor, SCSL-03-01-A, Appeals Judgment (Sept. 26, 2013).

[2] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85.

[3] R v. TRA, Unreported Judgement (Central Crim. Ct. July 30, 2018) (UK).

[4] R v. TRA [2018] EWCA Crim 2843 (UK).

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This was only the third prosecution brought under CJA Section 134. The sole previous UK case directly considering the position of nonstate actors in Section 134 was a first instance decision in *Zardad*.[5] There, the defendant was charged with torture committed in Afghanistan, acting not as a public official, but as part of a group that was actively opposing the Afghan government. The High Court had held that CAT Article 1 included both de jure and de facto public officials if the entity the latter belonged to "had acquired de facto effective control over an area of a country and was exercising governmental or quasi-governmental functions in that area" (para. 63). This proved to be highly influential on the Supreme Court in *Taylor*. By contrast, the Supreme Court did not extensively engage with the UK House of Lords' *Pinochet* decision[6]—perhaps the most famous domestic court decision on torture—as it had concerned liability of a former head of state.

Both the majority and dissent agreed that Section 134 should be interpreted in the same way as CAT Article 1, to which it was intended to give effect in domestic law (para. 23; dissent, para. 83). The Court therefore applied the Vienna Convention on the Law of Treaties' rules on treaty interpretation: the ordinary meaning of the words, read in their context, in light of the object and purpose of the treaty, and subsidiary means including subsequent practice that establishes the meaning of the treaty. Yet, the majority and dissent disagreed at the first stage of this interpretative task. The majority held that the ordinary meaning of CAT Article 1 included de facto authorities: "the words 'person acting in an official capacity' are apt to include someone who holds an official position or acts in an official capacity in an entity exercising governmental control over a civilian population in a territory over which it holds de facto control" (para. 25). The dissent, in contrast, argued that the ordinary meaning only extends beyond government officials to include those acting on behalf of the state, for instance, private actors to whom public functions were outsourced (dissent, para. 83). Thus, while the majority's reading would include "officials" of rebel groups exercising governmental control over territory, the dissent's would not.

In terms of the treaty's object and purpose, the majority and dissent agreed on its basic content, but diverged as to its impact on the proper interpretation of Article 1. Both viewed CAT's aim as imposing human rights-based obligations on states to criminalize and punish torture through domestic prosecution, including on the basis of universal jurisdiction, and thus to prevent impunity for official torture (see paras. 27–28; dissent, para. 86). For the majority, a crucial element was when torture could be considered to be of "international concern." Parsing diplomatic records and academic commentary, it held that the *travaux préparatoires* did not definitively settle the scope of "official capacity." However, it was clearly the drafters' intention to exclude purely private acts of torture. The drafters considered that acts of torture in connection with public functions were qualitatively different from and more serious than private acts and were least likely to be punished. Such acts therefore were of greatest international concern. This rationale, according to the majority, indicated that the actions of de facto authorities in territory under their control should be included within CAT Article 1. As put by the majority, "official torture is as objectionable and 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.

[5] R v. Zardad, Case No. T2203 7676, Judgment (Central Crim. Ct. Apr. 7, 2004) (UK).

[6] R v. Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No. 3) ("Pinochet No. 3") [2000] 1 AC 147 (UK).

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36). Lord Reed, however, argued that Article 1 was "confined to situations where the responsibility of state authorities is engaged," since states were much more likely to act against torture committed by nonstate actors, rather than their own government officials—and therefore international regulation is most needed in those latter instances (para. 89).

Both the majority and dissent also examined subsequent practice in the form of international and domestic legal authorities. Given the paucity of national court decisions interpreting this aspect of CAT Article 1, decisions of the UN Committee Against Torture (Committee) in response to individual complaints were given particular attention.[7] Still, the Supreme Court emphasized that the Committee's views were not binding, and thus had limited legal authority (para. 41). The Committee had issued several decisions concerning the scope of the obligation of *non-refoulement* to torture. In these, it gave conflicting interpretations of the scope of the "official capacity" requirement. The Committee's earlier decisions had, with one exception,[8] rejected all claimed violations of the *non-refoulement* obligation where the applicant had alleged torture or a risk of torture by nonstate rather than state actors.[9] Most recently, however, the Committee departed from its earlier approach, stating that the *non-refoulement* obligation applied to torture by a "non-governmental entity [which] occupies and exercises quasi-governmental authority over the territory to which the complainant would be returned" (para. 51).[10] The majority of the Supreme Court concluded that "despite its manifest inconsistencies . . . this line of authority does provide some support for the view that the conduct of non-State actors exercising *de facto* authority over territory which they occupy can fall within article 1 of CAT" (para. 52).

The dissent, however, viewed the Committee's decisions and its General Comments[11] as evidence of a recent "evolutionary interpretation" of the scope of CAT Article 1 to include certain nonstate actors, who were not included at the time of drafting. Lord Reed also cited examples of domestic legislation of CAT states parties that explicitly restricted the definition of torture to government officials and those that had only recently been amended to include de facto authorities. Thus, it was an impermissible violation of *nulla poene sine lege* to apply this expanded interpretation to crimes committed in 1990, long before this development had crystallized (paras. 90–98).

Finally, the majority examined the few UK authorities on CAT Article 1, noting that only the High Court decision in *Zardad*[12] was of direct relevance. Ultimately, the Supreme Court largely approved of Justice Treacy's reasoning in *Zardad* (para. 79). The Supreme Court concluded:

[7] The Court held that the Committee's four General Comments "cast little light on the present issue" (para. 47), as none directly addressed the question at bar (see paras. 42–47).

[8] Elmi v. Australia, Communication No. 120/98, UN Doc. CAT/C/22/D/120/1998 (May 25, 1999), later distinguished on its facts in HMHI v. Australia, Communication No. 177/2001, UN Doc. A/57/44, at 166 (May 1, 2002).

[9] SV v. Canada, Communication No. 49/1996, UN Doc. CAT/C/26/D/49/1996 (May 15, 2001); GRB v. Sweden, Communication No. 83/1997, UN Doc. CAT/C/20/D/83/1997 (May 15, 1998); MPS v. Australia, Complaint No. 138/1999, UN Doc. CAT/C/28/D/138/1999 (Apr. 30, 2002).

[10] SS v. The Netherlands, Communication No. 191/2001, UN Doc. CAT/C/30/D/191/2001, para. 6.4 (May 19, 2003).

[11] Lord Reed compared the Committee's General Comment No. 2: Implementation of Article 2 by States Parties, January 24, 2008, CAT/C/GC/2 with its later General Comment No. 4 (2017): Implementation of Article 3 of the Convention in the Context of Article 22, February 9, 2018, CAT/C/GC/4, arguing this showed a clear expansion in this regard (paras. 93–94).

[12] *R. v. Zardad*, *supra* note 5.

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> "A person acting in an official capacity" . . . 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. (Para. 76)

This narrowed the Court of Appeal's slightly broader construction, which had included those acting "for or on behalf of an organisation or body which exercises *or purports to exercise* the functions of government" (emphasis added). The Supreme Court held that "this is an error as the functions being exercised by the organisation or body must be governmental in character. Purporting to exercise such functions would not be sufficient" (para. 77).

The Supreme Court emphasized that mere military control of territory by the rebel or other nonstate group is insufficient to come within CJA Section 134; the group must exercise government functions in the territory in which the torture was carried out. Drawing further from *Zardad*, the Supreme Court recognized, however, that expectations of what constituted "government functions" must be adjusted depending on the context and the conditions on the ground. It summed up the test as follows: "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 mere military force" (para. 79). The Supreme Court noted that there was no need for the entity to be exercising such control on a long-term, let alone permanent, basis.[13] Thus, this standard could include cases where the nonstate group exercised de facto governmental control over territory in opposition to a central government, or where the central government had collapsed and no group had obtained the status of de jure government.

The modification of the Court of Appeal's test meant that the Supreme Court allowed Taylor's appeal on this narrow basis and ordered the remittance of the case to the Criminal Court to assess whether there was sufficient evidence to support the charges (para. 81). As described below, the threshold established by the Supreme Court—particularly the requirement that the NPFL exercise governmental, rather than mere military, control at the time of Taylor's crimes—ultimately proved fatal to the prosecution against Agnes Taylor.

* * * *

The Supreme Court's decision creates the potential for UK-based prosecutions of rebel leaders for torture committed around the world—and may also convince other CAT party states to adopt a similar definition, thereby enlarging the global scope of universal jurisdiction over torture. The Supreme Court, though, also recognized that "it is not for national courts engaged in interpreting a treaty to seek to force the pace of the development of international law, however tempting that may be" (para. 26). The Supreme Court's declared intention was thus not to establish an interpretation of torture "which would best avoid impunity," but rather "to give effect to the words used in the light of the object and purpose of the scheme

[13] This was the one respect in which the Supreme Court diverged from the articulation of the test in *Zardad*, in which Justice Treacy had held that the entity would have to establish itself with "degree of permanence" (para. 79).

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created by the State parties to the Convention" (*id.*).[14] The majority's reliance on international and comparative authorities bore this out.

While there are many aspects of the decision that merit detailed discussion, three warrant particular attention: the "governmental functions" test; the relevance of the *Pinochet* case; and the related issue of retroactivity. First, the Supreme Court's test for including nonstate actors within CAT Article 1 turns on a dichotomy between governmental and military functions. As noted above, the nonstate group on behalf of which the accused acts or purports to act must exercise, in the territory controlled by that organization or body and in which the relevant conduct occurs, "functions normally exercised by governments over their civilian populations" (para. 76). The exercise of military functions would be insufficient. The decision strikes a delicate balance between including de facto officials within CAT Article 1 without opening the floodgates to instances of physical mistreatment by purely private actors, contrary to the clear intention of the CAT's drafters.

At the same time, this is a demanding threshold that may be difficult to prove in future prosecutions. This standard will be met only in a narrow range of circumstances where nonstate actors have supplanted the government in certain territory. It also conditions the applicability of the prohibition of torture on the group's desire to exercise government functions—which may not be the aim of certain nonstate armed groups, even if they have sufficient control of territory to have the capability to do so.

The difficulty posed by the dichotomy between military and governmental functions is illustrated by the ultimate fate of the Taylor prosecution. After the case was remitted to the Central Criminal Court, the charges against Taylor were dismissed because there was insufficient evidence to show that the NPFL's control went beyond military functions at the time of Taylor's alleged crimes in Liberia.[15] According to the Central Criminal Court, although the NPFL exerted military control of territory—including by building a road for military reasons, establishing checkpoints, running detention centers (where detainees were allegedly tortured), and establishing connections with local leaders—none of its activities in the area constituted governmental functions, and so did not meet the necessary threshold.[16] Thus, even in the case of a rebel group as powerful as the NPFL, which controlled significant swathes of territory and which ultimately took control of the whole state, the test proved too onerous. It will often be the case, therefore, that impunity for torture by nonstate groups will persist.

Second, despite the extensive analysis of relevant domestic and international law authorities, the engagement with the House of Lords' *Pinochet* judgments—the only previous case in the UK's highest court concerning CJA Section 134—was surprisingly brief. As noted above,

[14] The Court noted this was similar to national courts' role in relation to customary international law, approving of the House of Lords' statement in *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia (Secretary of State for Constitutional Affairs intervening)* [2006] UKHL 26, at paragraph 63 that "it is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states." This can be contrasted with a recent decision of the South African Supreme Court of Appeal in *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre (867/15)* [2016] ZASCA 17, in which the Court denied the application of head of state immunity in the case, despite its recognition that its interpretation constituted a "progressive" violation of customary international law (para. 103).

[15] R v. Agnes Taylor, Judgment (Central Crim. Ct. Dec. 6, 2019) (UK) (unreported, on file with author).

[16] *Id.* at 153–59.

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Pinochet (No. 3) did not directly address the position of nonstate authorities within CAT Article 1, since the primary question was whether the immunity *ratione materiae* normally accorded to a former head of state under customary international law applied to charges of torture. Nonetheless, aspects of the decision are relevant to, and possibly problematic for, the Supreme Court's interpretation.

The Supreme Court gave short shrift to the appellant's argument that a passage of Lord Millet's decision in *Pinochet (No. 3)* militated against the inclusion of nonstate groups within the definition of "official capacity." Lord Millet had stated:

> The definition of torture, both in the Convention and section 134, is in my opinion entirely inconsistent with the existence of a plea of immunity *ratione materiae*. The offence can be committed *only* by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is coextensive with the offence.[17]

The Supreme Court simply responded that Lord Millet's statement was "uncontroversial" and the only question was "what constitutes acting in an official capacity" (para. 60).

However, this discounts the essence of Lord Millet's reasoning. The denial of Pinochet's immunity for charges of torture turned on the "coextensive" scope of the claimed immunity with the definition of the crime. This only holds true if liability for torture is restricted to those who would normally benefit from immunity *ratione materiae*—meaning those who perform official acts on behalf of the government. If torture is extended to include certain nonstate actors, then liability for torture is broader than the class of individuals normally entitled to the immunity under customary international law. That the immunity was coextensive with liability for torture was key to the House of Lords' rationale in denying Pinochet's immunity.[18] Thus, had the Supreme Court's interpretation in *Taylor* been adopted in *Pinochet (No. 3)*, Lord Millet's reasoning would not have been persuasive—and indeed, the House of Lords may have determined as a result that immunity should be maintained because there would still be a class of (nonstate) officials who could be prosecuted for torture despite the applicability of immunity *ratione materiae* to the crime.

This is not necessarily to say that the Supreme Court should have adapted its interpretation on this basis, but that there is a potential conflict with the House of Lords' reasoning in *Pinochet (No. 3)* that appears to have been overlooked and warrants explanation. Lord Millet's reasoning—that immunity cannot persist when it is coextensive with international crimes over which there is universal jurisdiction in treaty or customary international law—is an important foundation for the development of customary international law denying immunity for international crimes in general.[19]

This leads to the third issue for consideration, that of possible retroactivity. This is the most challenging aspect of Lord Reed's dissent, and one that has been a feature of commentary on

[17] *Pinochet No. 3*, *supra* note 6, at 277D–E.

[18] *See* Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 842 (2011).

[19] *Id.* at 843.

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judicial developments in international criminal law at least since the Nuremberg Trials.[20] If liability for torture in CJA Section 134 excluded nonstate actors at the time of *Pinochet (No. 3)*, as was seemingly assumed, this would have been the state of the law when Agnes Taylor's alleged crimes were committed. The changing international and comparative domestic practice cited by Lord Reed highlights the possibility that the majority's interpretation is currently correct in law, but may only have been established through subsequent practice under the treaty after the date of the crimes. Further, though the views of the Committee Against Torture are not legally binding (as the majority noted), it is difficult to rely on its later decisions to support the inclusion of nonstate actors within CAT Article 1, but to ignore those applicable to the time of the crimes that would have excluded nonstate actors. Given the clear human rights and procedural fairness issues, it is surprising that the majority did not address this issue directly.

Nonetheless, the *Taylor* decision makes a significant contribution to ensuring that international criminal law does not operate with an anachronistic vision of war and the conditions in which atrocities are committed. It adds to the body of recent decisions interpreting core international crimes so as to reflect the contemporary nature of armed conflict, which is now most commonly noninternational in character, including the International Criminal Court's decision confirming that perpetrators of crimes against humanity can include a wide range of nonstate groups.[21] The Supreme Court's approach is likely to influence the interpretation of CAT Article 1 in other state parties, and thus open the door more widely to domestic enforcement of the international crime of torture not only in the UK, but around the world.

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[20] *See, e.g.*, Charles E. Wyzanksi, *Nuremberg: A Fair Trial? A Dangerous Precedent*, ATLANTIC (Apr. 1946)
[21] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09 (Mar. 31, 2010).