

EXTRA-TERRITORIAL TORTURE AND INHUMAN TREATMENT TOWARDS SUSPECTED TERRORISTS COMMITTED BY THE U.K. AND THE U.S. MILITARY ACTIONS *

Mahfud¹

Abstract

Since the attack to the World Trade Centre in 11 September 2001, the world has raised their awareness to any of serious allegation of terrorist activities. Many steps have been taken by the United Nations and the states to make such legislatives in their national and international level in order to prevent and combat terrorism. The hatred of terrorists brings many actions brought by the nations, especially the United States, as a revenge of the painful feeling of those who were left by the victims. It often leads to the act of torture and inhuman treatment done by the official to the terrorist detainees. This paper will focus on the prohibition of torture and inhuman treatment both in the United States and the United Kingdom and the United States extra-territorial actions in Guantanamo Bay and Abu Ghraib prisons and also the United Kingdom's extra-territorial conducts in treating prisoners in Iraq in relation to Al-Skeini case.

Sejak serangan World Trade Centre pada 11 September 2001, dunia telah meningkatkan kewaspadaannya pada setiap ancaman serius dari aksi terorisme. Banyak tahap yang telah dilakukan oleh PBB dan negara lain untuk membentuk suatu peraturan ditingkat nasional maupun internasional dalam rangka mencegah dan melawan terorisme. Rasa kebencian akan teroris membuat banyak tindakan yang dilakukan oleh negara-negara, khususnya Amerika Serikat, sebagai pembalasan atas rasa yang dialami oleh para keluarga yang ditinggalkan oleh korban. Sering kali terjadi aksi penyiksaan dan perlakuan tidak manusiawi yang dilakukan para aparat kepada para tahanan teroris. Tulisan ini akan memfokuskan pada larangan penyiksaan dan tindakan tidak manusiawi baik di Amerika Serikat dan di Inggris dan wilayah ekstra teritorial Amerika Serikat di Guantanamo Bay dan penjara Abu Ghraib dan juga aksi ekstra teritorial Inggris dalam memperlakukan tahanan di Iraq terkait kasus Al-Skeini.

Keywords: *terrorist, United States, torture, inhuman treatment.*

I. INTRODUCTION

The issue of terrorism has been well known in each country around the world in the wake of the violent attacks against the World Trade

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¹ Lecturer at the Faculty of Law University of Syiah Kuala. Sarjana Hukum (S.H.), Universitas Syiah Kuala (2004); Master of European Legal Studies (LL.M.), The University of Cardiff, Wales, the United Kingdom (2009). The author can be reached at: mahfudsh@yahoo.com. Any errors in this article are completely the responsibility of the author.

Centre, and the Pentagon, the United States of America, on 11 September 2001. This has caused the United Nations and states to take seriously allegations of the terrorist activities so as to secure innocent people from being victims by enacting special legislation preventing such dangerous threats.

As a result of the attacks, the Security Council adopted resolution 1373 (2001) requiring all States to take a wide range of legislative, procedural, economic, and other measures to prevent, prohibit, and criminalize terrorist acts. The purpose of the resolution as stated in its preamble is "the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts."

This paper will focus on the prohibition of torture and inhuman treatment both in the United States and the United Kingdom and the United States extra-territorial actions in Guantanamo Bay and Abu Ghraib prisons and also the United Kingdom's extra-territorial conducts in treating prisoners in Iraq in relation to *Al-Skeini* case. Both actions of the states might be considered as a violation of national and international human rights rules because of the existence of torture in treating the terrorist detainees during their military operations. Therefore, it is important to examine whether human rights law applies extra-territorially to such violations. This study would apply the Convention Against Torture and Other Cruel Inhuman, or Degrading Treatment or Punishment (CAT) 1984, the International Covenant on Civil and Political Rights (ICCPR) 1966 and the Inter-American Commission of Human Rights (IACHR) with respect to the United States actions and the European Convention on Human Rights (ECHR) 1950, the CAT and the ICCPR for the United Kingdom's actions.

II. TERRORISM, TORTURE, INHUMAN TREATMENT AND HUMAN RIGHTS

Actually, a significant response as a precautionary measure to anticipate terrorist threats had been taken by the International Convention for the Suppression of the Financing of terrorism at the end of the twentieth century, and this provision was adopted by the United Nations General

Assembly in December 1999.² The convention includes the first general meaning of terrorism in an international treaty.³

According to the convention, terrorism is defined as the act deliberately causing death or extreme physical injury to a civilian or to a non combatant aimed at intimidating or forcing people, a government and international institutions to do or prevent them from doing any act.⁴ Moreover, after 9/11, the Security Council defines terrorism as criminal acts that are broader than above definition which not only against civilian, a government or international organisations as above definition but also including taking hostage in order to provoke a state of terror in the general public or in a group of persons or particular persons which has the same aims as above definition, or all other criminal acts recognised as offences in the context of international conventions and protocols relating to terrorism which are under no circumstances justifiable because of political, philosophical, ideological, racial, ethnic, religious or other similar nature.⁵

Saul argues that such definitions have no clear indications "which element(s) must be present for a phenomenon to be qualified as terrorism and which elements are merely regularly accompanying features of the phenomenon."⁶ Saul explains that the definitions suggested by the General Assembly resolutions are ambiguous in terms of whether terrorism is random or indiscriminate rather than purposed might be useful in describing and differentiating different types of terrorist activities, however, it should not be decisive in the legal meaning of the act.⁷ On the one hand, comprehensive responses both on international and national levels in terms of combating terrorism and protecting public from being the victims of such subversive activities after 9/11 and its aftermath are obviously necessary. On the other hand, such conducts might be very controversial issues due to the fact that those might result

² H.J. Steiner and others (eds), *International Human Rights in Context: Law, Politics, Morals: Text and Material*, Oxford University Press, New York, 2008, p.376

³ *Ibid*

⁴ *Ibid*

⁵ *Ibid*, p.377

⁶ B. Saul, *Defining Terrorism in International Law*, Oxford University Press, New York, 2006, p.57.

⁷ *Ibid*

in a new problem concerning the violation of human rights towards terrorist detainees or suspects. As Feyter stated: "After 9/11, however, new concerns emerged. The human rights that Amnesty had traditionally defended – the prohibition of torture, freedom of expression – were under threat."⁸

There is the fact that the 9/11 attacks have become the trigger for the armed interventions in Afghanistan and in Iraq and these military operations have arguably been a serious violation of human rights.⁹ Unlike suspects of the other international subversive violence regulated in various treaties, the terrorist suspect might not be prosecuted in the territory of one of the convention states, but they might be detained in and deported to other countries.¹⁰ Similarly, Marks and Clapham believed that the involvements of the U.S. in transferring terrorist prisoners from Afghanistan and elsewhere to its military base at Guantanamo Bay in Cuba and the U.S. detention practices in the base toward terrorist suspects might be a serious violation of human rights, as well as (in some cases) raising questions under international humanitarian law.¹¹

The suspects were detained in extremely severe conditions without charge and a restricted access to lawyers and the outside the world, they were deprived for over two years of the chance to challenge the legality of their detention.¹² At the same time, the special procedures for the eventual trial of detainees before military commissions were unfair, and there was the possibility of the imposition of the death penalty.¹³ Furthermore, according to leaked International Committee of the Red Cross (ICRC) Report on Abu Ghraib, the detainees deemed to have an intelligence value was "deprived of their liberty supervised by the military intelligence were subjected to a variety of ill-treatments ranging from insults and humiliation to both physical and psychological coercion that in some cases might amount to torture in order to force them

⁸ K.D. Feyter, *Human Rights: Social Justice in the Age of The Market*, Fernwood Publishing, Nova Scotia, 2005, p.66.

⁹ *Ibid*, p.69

¹⁰ S. Marks and A. Clapham, *International Human Rights Lexicon*, Oxford University Press, New York 2005, p.347.

¹¹ *Ibid*, p.348

¹² *Ibid*

¹³ *Ibid*

to corporate with their interrogators.”¹⁴

As a result, “human rights lose credibility as universal values around which actors upholding human dignity and social justice can rally when states take up human rights only when their national interest is at stake”¹⁵. In addition, the conduct of detention that involves torture or cruel, inhuman or degrading treatment or punishment by both the United States and the United Kingdom would be an infringement of Articles 5 of the Universal Declaration of Human Rights (UDHR) (1948), 2 of the CAT, 7 of the ICCPR, and 3 of the ECHR.

Evans describes such contentious issue as “torture debates” because the absolute standards in international human rights obliging the convention states to conduct themselves according to the conventions would be influenced by other legal factors that must not be ignored, such as questions of criminal responsibility, the admissibility of evidence, questions of jurisdiction, immunity, due process and fair trial.¹⁶

Article 3 of the European Convention on Human Rights does not have qualification or exceptions, and no limitations on the rights guaranteed.¹⁷ It only states that the prohibition is absolute even in time of war or public emergency, it does not provide a detailed definition of torture or inhuman treatment.¹⁸ According to the Declaration in 1975, the United Nations General Assembly defines torture as an aggravated and deliberate form of cruel, inhuman and degrading treatment or punishment.¹⁹

In addition, Article 1(1) of the CAT defines torture as an act that must be specifically intended to inflict severe physical or mental pain or suffering.²⁰ The Report of the Commission of Human Rights in the *Greek*

¹⁴ Report of the International Committee of the Red Cross (ICRC) On the Treatment By the Coalition Forces of Prisoners of War and Other Protected Persons By the Geneva Conventions in Iraq during Arrest, Internment, and Interrogation. February 2004, p.13

¹⁵ see note 7, p.73

¹⁶ M.D. Evans, ‘Editorial:Torture’ (2006) EHRLR 101, p.102.

¹⁷ R.White and C. Ovey, The European Convention on Human Rights, Oxford University Press, New York, 2006, p.74.

¹⁸ *Ibid*, p. 75

¹⁹ *Ibid*

²⁰ Article 1(1) of the CAT: For the purpose of this Convention, the term ‘torture’

case on 5 November 1969 regarding a violation of Article 3 states that:

*"All torture must be inhuman and degrading treatment, and inhuman and inhuman treatment also degrading. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation, is [unjustifiable]. The word 'torture' is often used to describe inhuman treatment, which has a purpose such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment."*²¹

In *Ireland v. United Kingdom* case, the Court had the same view as the Commission regarding inhuman or degrading treatment by concluding that the five techniques conducted in combination, namely wall standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink, considered as inhuman treatment within the meaning of Article 3 because the treatments resulted in intense physical and mental suffering to the detainees and also caused acute psychiatric disturbances during interrogation. The Court also held that the techniques used were also degrading treatment since such conduct aimed at arousing feelings of fear, anguish, and inferiority, and were capable of humiliating and debasing and possibly destroying physical or moral resistance of the victims. By referring to the Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975 as had been quoted in the *Greek* case cited above, the Court held that such treatment "did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood".²² Therefore, it can be concluded that although such practice constitutes inhuman or degrading treatment, it does not mean such conduct can be

means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining from him or a third person information or 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.

²¹ The Greek case, Report of 5 November 1969, (1969) 12 Yearbook 186-510.

²² *Ireland v. United Kingdom*, Judgement of 18 January 1978, Series A, No.25; (1979-80) 2 EHRR 25

classified as torture. To interpret such practice as torture, only if it has reached an aggravated and deliberate forms of cruel.

The ECHR, for the first time, held a State liable for conducting torture in *Aksoy v. Turkey*.²³ The applicant was stripped naked, his hand tied behind his back and strung up by his arms; this is recognised as Palestinian hanging.²⁴ By affirming what it has been applied in *Ireland v. United Kingdom* that torture only exists if there is a deliberate inhuman treatment causing very serious and cruel suffering, the Court had the same view as the Commission's conclusion that such treatment amounted to torture because it could only have been deliberately inflicted; a certain amount of preparation and exertion would have been required to carry out and it would seem to have been arranged with the purpose of attaining admissions or information from the applicant.²⁵ Thus, it is a violation of Article 3 of the ECHR.

The comparison between inhuman treatment and torture, White and Ovey note that "inhuman treatment must meet a minimum level of severity."²⁶ Furthermore, unlike torture, inhuman treatment need not necessarily be intentional; all the conditions of the case must be considered.²⁷ It is clear that the main distinction between torture and inhuman treatment is the deliberate action conducted by torturer causing very serious and cruel suffering that could not be found in inhuman treatment. Nevertheless, both practices are absolutely prohibited by Articles 3 of the ECHR, 5 of the UDHR, 2 of the CAT, and 7 of the ICCPR.

III. THE EXTRA-TERRITORIAL TORTURE AND INHUMAN TREATMENT BY THE UNITED STATES

As Marks and Clapham stated that the United States detention practices in Guantanamo Bay, Cuba, in a facility known as Camp X-Ray in terms of a war on terrorism might be a serious violation of human

²³ *Aksoy v. Turkey* (App.21987/93), Judgement of 18 December 1996; (1997) 23 EHRR 553

²⁴ *Ibid*, p.585

²⁵ *Ibid*

²⁶ see note 16, p.80.

²⁷ *Ibid*

rights attracting questions under international law that results from the extremely bad condition of the detainees without charge and they were restricted from accessing counsel and the outside the world, deprived for over two years of the chance to challenge the legality of their detention.²⁸ The torture that occurred at this prison toward terrorism suspects is not an anecdotal story, it has even been corroborated by a United States appeals court when proceeding the prisoners' claims regarding the existing of the human rights abuse in the prison that "the torture of the detainees is foreseeable... and that detainees under the sole control of the US government have no constitutional rights."²⁹

According to Rasul, the former Guantanamo detainee, during his detention he was tortured physically and mentally, such maltreatment included constant beating, extended placement time in the interrogation rooms when he was so stressed, isolation for months, and abuse of religious rights feared what was going to happen to him.³⁰ Moreover, according to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment reported by Nowak, one of the chairpersons at the Economic and Social Council of the Commission on Human Rights regarding the situation of detainees in the United States Naval Base at Guantanamo Bay, it has been revealed that torture and inhuman treatment known as interrogation techniques had occurred in this prison.³¹

As provided in Army Field Manual FM 34-52 approved by the Secretary of Defence on December 2002, there are several techniques, namely: the use of stress positions (like standing) for a maximum of four hours, detention in isolation up to 30 days, a hood placed over the head during transportation and questioning, deprivation of light and auditory stimuli, removal of all comfort items, forced grooming (shaving

²⁸ see note 9, p. 348

²⁹ J.A. Menon, "Guantanamo Torture Litigation", *Journal of International Criminal Justice*, Vol. 6(2) Year 2008, p.323.

³⁰ "Ex Guantanamo Detainee: Wrong Place, Wrong Time", CNN Access, 13 June 2006 (Interview of Shafiq Rasul by Wolf Blitzer), available at http://www.cnn.com/2006/US/06/13/rasul/index.html?Section1/4cnn_world (accessed 15 August 2009).

³¹ The Commission on Human Rights of the Economic and Social Council of the United Nations Report regarding situation of detainees at Guantanamo Bay, 15 February 2006, para.49

of facial hair, etc), removal of clothing, interrogation for up to 20 hours and using detainees' individual phobias (such as fear of dogs) in order to induce stress. Although such conducts had been nullified by memorandum on 15 January 2005, the Secretary of Defence on 16 April 2005 still approved to the following techniques:

- Incentive/Removal of Incentive i.e. comforts items;
- Change of Scenery Down might include exposure to extreme temperatures and deprivation of light and auditory stimuli.
- Environmental Manipulation: Altering the environment to create moderate discomfort (e.g. adjusting temperature or introducing an unpleasant smell).
- Sleep adjustment; adjusting the sleeping times of the detainees (e.g. reversing sleep cycles from night to day)
- Isolation: The technique aims at isolating the detainees from other detainees while still complying with basic standards of treatment.³²

Such techniques also have been corroborated by the requests of the Major General Michael B. Dunlavey on 11 October 2002, Commander of the Joint Task Force 170 at Guantanamo, to General James T Hill, Commander of the United States Southern Command regarding the use of interrogation techniques divided into categories II and III.³³ The Category II consisted of the use of dogs, removal of clothing, hooding, stress positions, isolation for up to 30 days, 20 hour interrogation and deprivation of light and auditory stimuli.³⁴ The Category III composed of use of scenarios aimed at convincing the detainee that "death or severely painful consequences are imminent for him and/or his family, exposure to cold weather or water, use of a wet towel and dripping water to induce the misperception of suffocation, and use of mild, non injurious physical contact."³⁵

On 2 December, the Secretary of Defence Donald Rumsfeld by considering recommendation provided in the Dunlavey Memo had agreed

³² *Ibid.*, para.50

³³ S. Said, "Guantanamo Bay-Five Years On", *Journal Of Immigration, Asylum, and Nationality*, Vol. 21(2) Year 2007, p.114.

³⁴ *Ibid.*, p.115

³⁵ *Ibid.*

with the requests although in accordance with the Geneva Convention and other international provisions such techniques applied toward Guantanamo's detainees are illegal.³⁶ Apart from such techniques, there were other kinds of maltreatment exist at the prison, such as brutal beating, water boarding, stress positions for prolonged periods of time, applying electric shocks to a person, mock execution, sexual assault, threats of rape, physical restraint of detainees in very painful conditions, witnessing the torture of other detainees, and keeping detainees naked in cells, allowing medical untrained military personnel to attempt inserting intravenous into detainee, being injected with syringes of unknown medicines, being threatened with electrocution and drowning, beaten while blindfolded, being shackled for prolonged periods causing the detainee urinated on himself, forcing detainees to urinate and defecate on themselves.³⁷

There is also a reliable source from Federal Bureau Investigation documents corroborating such interrogations above provided by a letter from T.J. Harrington, Deputy Assistant Director, FBI Counterterrorism Division, to Major General Donald J. Ryder showing "highly aggressive interrogation techniques" viewed by FBI agents at Guantanamo Bay in late 2002.³⁸ The conducts included sexual humiliation, sexual assault, "intense isolation" and using a dog in an aggressive manner in order to fear the detainees.³⁹

Nowak concludes that such techniques above might be defined as torture in accordance with Article 1 (1) of the CAT due to the fact that such techniques involve four of the five criteria of the torture definition as mentioned in the Convention. The conducts above were perpetrated by government officials, clearly purposed of certain objectives i.e. gathering intelligence, extracting information, committed intentionally, and

³⁶ *Ibid*

³⁷ *Ibid*

³⁸ The American Civil Liberties Union (ACLU), 'Dimming the beacon of freedom: U.S. violations of the International Covenant on Civil and Political Rights' (2006 A Shadow Report by the American Civil Liberties Union Prepared for the United Nations Human Rights Committee on the occasion of its review of the United States of America's Second and Third Periodic Report to the Committee) available at : http://www2.ochr.org/english/bodies/hrc/docs/Final%20ICCPR_Shadow_Report_June20.doc; accessed 14 August 2009, p. 38.

³⁹ *Ibid*

the detainees in Guantanamo prison were in a position of powerlessness, however, he contended that in order to satisfy the definition of torture as worded in the Convention, severe pain or suffering, physical or mental, must be inflicted.⁴⁰

He also provided that treatment led to victims being humiliated might amount to inhuman treatment or punishment, for which intensive pain or suffering is not necessary.⁴¹ He realises that it would be difficult to scrutinise it generally whether this is the case relating to conduct such as the force-undressing, however, stripping detainees naked, particularly in the presence of women and taking into account cultural sensitivities, can in individual cases cause serious psychological pressure and it would also be amounted to torture.⁴² Similarly, extremely severe pain and suffering would also resulted from using dogs to fear the detainees-especially if it is clear that there is an individual phobia of the detainee, letting them be exposed in extreme temperatures for a long time, depriving from asleep for several consecutive days, and extending isolation.⁴³ He strongly believes that the simultaneous practice of these techniques is even more likely to subject to torture.⁴⁴

Steyn, based on a report of 16 March 2003 reported officials, describes the techniques of interrogation as not quite torture, but it seems that 'stress and duress' tactics of depriving sleep and forcing prisoners to stand for extended periods that have been used by United States interrogators in Guantanamo Bay might be defined as torture. A supportive comment to Nowak's view on torture in Guantanamo Bay also comes from European Community. The Parliamentary Assembly of the Council of Europe held that the United States Government must be liable for subjecting detainees to inhuman treatment amounting to torture because their participation in conducting such maltreatment is systematically and with their awareness.⁴⁵ Lord Hope of Craighead also has similar point of view to the European Council that some of the practices authorised for use in Guantanamo Bay by the United States authorities

⁴⁰ see note 30, para. 51.

⁴¹ *Ibid*

⁴² *Ibid*

⁴³ *Ibid*

⁴⁴ *Ibid*

⁴⁵ *Ibid*

would shock the conscience if they were ever to be authorized for use in our own country.⁴⁶

In spite of the ambiguity of the United States rules regarding authorisation of the interrogation techniques and its military reason for the war on terror,⁴⁷ it has not admitted that such maltreatment amounts to torture or inhuman or degrading treatment.

However, the United Nations, the European Community and many humanitarian organisations have clearly concluded that such maltreatment would amount to torture or inhuman or degrading treatment as prohibited in the ICCPR, the CAT, governing prohibition of torture or inhuman or degrading treatment.⁴⁸ Such simultaneous use of techniques permitted by the Department of Defence in order to interrogate Guantanamo's detainees would be a violation of Articles 7 of the ICCPR and 16 of the CAT⁴⁹ due to the fact that such techniques might have resulted in torture or inhuman or degrading treatment.

Moreover, despite the fact that it might be acceptable to put prisoners in the particular place because of order and security reasons, such reasons are used to counter resistance and cause stress.⁵⁰ In addition, according to the Jurisprudence of the Human Rights Committee, extended solitary confinement and equal measures aimed at causing stress toward the detainees might not only be a breach of Article 7 of the ICCPR but also a breach of Article 10(1) of the ICCPR⁵¹ because such maltreat-

⁴⁶ *Ibid*, para.52

⁴⁷ *Ibid*, para.48

⁴⁸ *Ibid*, para.41

⁴⁹ Article 16 of the CAT: (1) Each state party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment (2) The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

⁵⁰ see note 30, para.53

⁵¹ Article 10 of the ICCPR: All person deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of human person

ment techniques were lack of humanity's sense.

Furthermore, in relation to torture, the Commission has also concluded that the excessive violence considered as torture has been conducted in many cases during the transportation of the prisoners by the IRF when it held military operations, and force-feeding of prisoners on hunger strike must also be defined as torture. As a consequence, it would be a violation of Article 1(1) of the CAT.

Regarding such maltreatment practices at Guantanamo prison, the Inter-American Commission on Human Rights had shown its serious concern for the State's extra-territorial torture practice. On 12 March 2002, the Commissions certified precautionary measures in favour of terrorist prisoners being detained by the United States at Guantanamo.⁵² Such request based on the legal obligation of the United States as a contracting state of the American Declaration of the Rights and Duties of Man particularly regulating the right to a fair trial, the right to protection from arbitrary arrest, and the right to due process of law.⁵³ The request claimed that the detainees were at risk of irreparable harm because the United States rejected to treat the detainees as prisoners of war until a competent tribunal determined.⁵⁴ The claim was caused by the fact that the detainees had been held arbitrarily, incommunicado and for a prolonged period of time and had been interrogated without access to lawyer, they were at risk of trial and the possibility of sentencing to death before military commissions. Such acts would be a serious infringement of international law principles. The request required the United States to take the urgently necessary measures to have the legal status of the detainees determined by a competent tribunal.⁵⁵

In addition, the Commission also asked for information to be informed by the State within 30 days on compliance with the Commission's measures and thereafter on a periodic basis, however, in com-

⁵² "Precautionary Measures Granted by the Inter-American Commission on Human Rights during 2002", Annual Report of the Inter-American Commission on Human Rights 2002, p.1.

⁵³ C. Byron, "A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies", *Virginia Journal of International Law*, Vol. 47 Year 2007, p.863.

⁵⁴ see note 51

⁵⁵ *Ibid*

munications dated 11 April 2002 and 15 July 2002, the State disputed the Commission's jurisdiction to adopt the precautionary measures.⁵⁶ In response to this, the Commission explained that it could apply humanitarian law as a *lex specialis* given that the test for evaluating the observance of a particular right, such as the right to liberty, in a situation armed conflict may be distinct from that applicable in time of peace.⁵⁷ The Commission kept maintaining its request, and it reaffirmed its request for being informed by the United States regarding the measures taken to implement the Commission's request. The Commission also expressed its concern regarding additional information provided by the Petitioners indicating that the manner in which certain detainees were captured raised reasonable doubts concerning whether they belong to the enemy's armed forces or related groups.⁵⁸ The Commission stated that although the United States' denial of the involvement of the Commission as a human rights body by requesting for precautionary measures because it had no jurisdiction in terms of the application of humanitarian law as *lex specialis*, "this does not mean that the Commission has no competence to consider the situation of potential victims of human rights violations in such situations."⁵⁹

The Commission reiterated that based on international law, it might be necessary to infer the application of human rights standard by reference to international humanitarian law and the absolute prohibition principle of certain human rights in all circumstances remains applicable and subject to supervision by the Commission.⁶⁰ The Commission indicated that without more, this information raised further serious concerns regarding the legal status of each of the detainees at the prison and the international rights and protections to which they may have been entitled.⁶¹ In the hearing meeting held by the Commission attended by the United States and the petitioners which both provided written and oral arguments and answers of the questions posed by the Commission concerning the measures, the State still refused to comply with the re-

⁵⁶ *Ibid*

⁵⁷ see note 52

⁵⁸ see note 51

⁵⁹ see note 52

⁶⁰ *Ibid*

⁶¹ see note 51

quest of the commission.⁶²

There is also American participation in committing torture or inhuman or degrading treatment in Abu Ghraib prison. The presence of the United States was as a part of the Coalition Forces of the Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment, and Interrogation. The maltreatment practice has been revealed by the leaked International Committee of the ICRC Report on the prison, the prisoners deemed to have intelligence value had been deprived their liberty because of military intelligence supervision and they were subjected to a variety of ill-treatment ranging from insults and humiliation to both physical and psychological coercion that in some cases might amount to torture in order to cooperate with the interrogators⁶³. Moreover, the ICRC while visiting the prison also witnessed such deprived practice toward prisoners; they were stripped completely in totally empty concrete cells and in total darkness, it seemed the practice was held for several consecutive days⁶⁴. Such practices were part of the process of the interrogation and aiming at gathering information. "The military intelligence officer in charge of the interrogation explained that this practice was "part of the process". The process appeared to be a give and take policy whereby the prisoners deprived of their liberty were "drip-fed" with new items (clothing, bedding, hygiene articles, lit cell etc) in exchange for their "cooperation".⁶⁵ The ICRC also attended other prisoners deprived of their liberty held in the cells without any light altogether, others in dimly lit cells, who had been permitted to dress following periods during which they had been stripped, and the ICRC also viewed several prisoners that had been given women's underwear to wear under their jumpsuit (men's underwear was not provided), which such practice humiliated the prisoners physiologically.⁶⁶ Moreover, the ICRC also recorded other practice of maltreatment which usually incorporated in such treatment above, including threats, insults, verbal violence, sleep deprivation resulted from the playing of loud music or constant light in cells devoid window,

⁶² *Ibid*

⁶³ see note 13, p.13.

⁶⁴ *Ibid*

⁶⁵ *Ibid*

⁶⁶ *Ibid*

tight handcuffing with flexi-cuffs causing lesions and wounds around the wrists, and punishment forms were forced to walk in the corridors by being handcuffed or stripped, putting women's underwear over the head and they were handcuffed and naked to the bed bars or the cell door⁶⁷. As a result, the ill treatment above had seriously detrimental effect on the prisoners both physical and psychological that might be amounted to torture. According to the examination held by the medical delegation of the ICRC, the prisoners shown signs of concentration difficulties, memory problems, verbal expression difficulties, illogical speech, severe anxiety reactions, abnormal behaviour and suicidal tendencies, and the delegation also found a person in isolation which was unresponsive to verbal and painful stimuli, his heart rate was 120 beats per minute and his respiratory rate 18 per minute. He was diagnosed as suffering from somatoform (mental) disorder, specifically a conversion disorder, most likely due to the ill-treatment he was subjected to during interrogation⁶⁸.

Furthermore, the Torture Abolition and Survivor Support Coalition International provides that there is another kind of the psychological tortures utilised by the U.S., known as abduction and abuse of relatives of the detainees, and according to this organisation, such practice would be perhaps the cruellest kind of the psychological torture⁶⁹. The prisoner's family kidnapped are not suspected of any crime, and their detention and mistreatment inflicts great anguish on the prisoner⁷⁰. There are several reports concerning this technique. In Khaled Sheikh Mohammad case, one of the Abu Ghraib's prisoners, his elementary school age children were held within access of the U.S military, and in Iraqi general case, the U.S. interrogators forcing him to watch while his weak adolescent son was soaked with icy water and left to shiver uncontrollably in the cold⁷¹.

⁶⁷ *Ibid*

⁶⁸ *Ibid*

⁶⁹ The Torture Abolition and Survivor Support Coalition International, "Torture by the United States of America: the Survivors' View Point" (submitted to the United Nations Human Rights Committee in response to the 28 November 2005 Report of the United States of America, 15 June 2006) available at: http://www2.ochr.org/english/bodies/hrc/docs/ngos/final_ICCPR_tasscreport.doc; accessed 17 August 2009, p.5.

⁷⁰ *Ibid*

⁷¹ *Ibid.*

Therefore, there is no doubt that such maltreatment practice in Abu Ghraib prison amounting to torture or inhuman or degrading treatment is also a breach of Article 7 of the ICCPR due to the fact that it resulted from an extreme physical or mental pain for both the detainees and their relatives. The abuse of the relative often also results in physical torture, or at the least, cruel and degrading treatment prohibited by Article 10⁷² of the ICCPR. In addition, the kidnapping and detention of family members is a serious violation of Article 9⁷³ of the ICCPR.

Despite the fact that according its second report, the United States has prohibited the extraterritorial torture by its Extra-territorial Criminal Torture Statute – 18 USC §§ 2340 and 2340A which provides Federal Criminal Jurisdiction power to prosecute the offenders which their nationality are American, the practice of extraterritorial torture by its state at Guantanamo and Abu Ghraib prisons seemed.⁷⁴

⁷² Article 10 of the ICCPR (1): All person deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person (2) (a) Accused person shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted person (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication (3) The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

⁷³ Article 9 of the ICCPR (1): Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law (2) Anyone who is arrested shall be informed, at the same time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceeding before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful (5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

⁷⁴ The Committee Against Torture - The United Nations Human Rights-Office of the High Commissioner for Human Rights, 'Consideration of reports submitted by States Parties under Article 19 of the CAT (Second periodic report of the United States

As discussed earlier, such provisions could not be enforced unless maltreatment applied towards terrorist detainees in both prisons fell within the torture definition as interpreted by the United States and according to the Bybee Memo, these interrogation techniques were not construed as torture but inhuman or degrading treatment in spite of the fact that Bybee Memo was superseded by Levin Memo which withdrawn the limited definition of torture. It is clear that pursuant to Article 1 of the CAT, the limited interpretation of torture in the Statute had caused the absence of the federal crime of torture because the sections prevent the federal criminal jurisdiction from prosecuting the offenders of extra-territorial cases.⁷⁵ The Committee against Torture regrets that, in spite of the occurrence of extra-territorial torture cases towards the terrorist prisoners, no offenders have been held liable for committing torture as breaching Articles 1, 2, 4, and 5 of the Statute.⁷⁶ Regarding the limited interpretation of torture, the Committee reaffirmed its previous recommendation that the United States should enact a federal crime of torture as ordered by Article 1 of the CAT that should include proper punishment in order to comply with the CAT in preventing and eradicating all form acts of torture resulting in severe pain and suffering, either physical or mental.⁷⁷ Concerning the ambiguity of the legal provisions that might be an infringement of the CAT, the Committee recommends that in order to comply with paragraph 2 of Article 2 of the CAT, the United States should adopt clear legal provisions to apply the principle of absolute prohibition of torture in its domestic law without any possible derogation by not limiting criminal responsibility of the violation.⁷⁸ Therefore, the United States should not conduct interrogation rules, instruction or method that are incompatible with

of America, submitted on 6 May 2006), available at: <http://daccessdds.un.org/doc/UNDOC/GENG0641846/PDFG0641846.pdfOpenElement>; accessed 30 August 2009, para.13.

⁷⁵ The Committee Against Torture - The United Nations Human Rights-Office of the High Commissioner for Human Rights, 'Consideration of reports submitted by states parties under Article 19 of the CAT (Conclusions and Recommendations of the Committee against Torture towards the second report of the United States of America, submitted on 19 May 2006), available at: <http://daccessdds.un.org/doc/UNDOC/GENG0643225/PDFG0643225.pdfOpenElement>; accessed 31 August 2009, para.13

⁷⁶ *Ibid*

⁷⁷ *Ibid*

⁷⁸ *Ibid*, para.19

the principle of the absolute prohibition of torture. Furthermore, the Committee urged the United States that in terms of interpreting psychological torture, the States should not limit it to prolonged mental harm but the States should consider that such mental harm might constitute a wider category of practices causing severe mental suffering regardless their prolongation or its duration.⁷⁹ Therefore, it can be seen that the Committee did not accept the reasons provided by the United States regarding its limited interpretation of torture in order not to prosecute the perpetrators and the Committee strongly recommended that the United States should investigate, prosecute and punish the offenders under its federal extra-territorial criminal torture statute.

Moreover, it had positive impact on protecting the detainees from being tortured by the United States because the Congress had passed the Detainee Treatment Act of 2005 (DTA) banning the use of cruel inhuman or degrading treatment towards person in the custody or under the physical control of the of the United States Government without regard to nationality or physical location in order to comply with the CAT.⁸⁰ Nevertheless, the amendment of the DTA had been contended by human rights and other leading civil liberties organisations because President Bush issued a signing statement stating that the executive branch shall understand the Act in the scope of the constitutional authority of the President and in accordance with the constitutional limitations on the judicial power, which will help achieving the shared objective of the congress and the president for the purpose of protecting the American people from further terrorist attacks.⁸¹ As a result, the President's opinion had also negative impact on protecting the absolute rights of the Guantanamo prisoners because in pursuant to Section 1005 of the DTA, they were restricted from bringing *habeas corpus* petitions in the United States Courts.⁸²

Furthermore, the United States had also found another way to circumvent its extra-territorial torture by excluding the enforcement of the CAT from its extra-territorial torture and inhuman or degrading treatment practice conducted by its soldiers. Concerning such exclusion,

⁷⁹ *Ibid*, para.13

⁸⁰ *Ibid*

⁸¹ see note 32, p.110-111

⁸² *Ibid*

the United States provided that such military conducts were governed by the law of armed conflict as the *lex specialist* rule, hence, in this situation the CAT could not be applied because it caused an overlap of the different treaties that would undermine the purpose of eliminating torture.⁸³ In response to this opinion, the Committee recommends that the United States should accept and ensure that the Convention is implemented at all times, whether in peace, war, or armed conflict, in any territory under its jurisdiction and that the application of the Convention provisions are without prejudice to the provisions of any other international instrument, pursuant to paragraph 2 of its articles 1 and 16.⁸⁴

In addition, by referring to Articles 2, 5,⁸⁵ 13,⁸⁶ 16, the Committee states that the refusal of implementation the CAT by the United States towards all areas under *de facto* effective control by its military authorities is regrettable due to the fact that the provisions of the CAT does not only apply to *de jure* jurisdiction but also *de facto* jurisdiction because of its effective control under its authorities of whichever type and wherever located in world.⁸⁷

In spite of the fact that the United States denied applying the CAT towards Guantanamo Detainees because of armed conflict circumstance,

⁸³ see note 74, para.14

⁸⁴ *Ibid*

⁸⁵ Article 5 of the CAT (1): Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state; (b) when the alleged offender is a national of that State; (c) when the victim is a national of that State if that State considers it appropriate (2) Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this article (3) this Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

⁸⁶ Article 13 of the CAT: Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Step shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

⁸⁷ see note 74, para.15

it is can be concluded that international humanitarian law had to be applied in this situation by the United States, and the relevant provision is the Convention Relative to the treatment of prisoners of war of 12 August 1947 (the third Geneva Convention III) containing the specific provisions protecting prisoners of war.⁸⁸ Concerning the war on terror considered as a war fights against Taliban, Steyn assumed that the Taliban troops arrested at Guantanamo Bay are on a literal interpretation not covered by the Third Geneva Convention due to the fact that they did not wear uniforms on the battlefield.⁸⁹

Steyn explained that regardless of the detainees' status, Article 75 of the First Protocol Additional to the Geneva Conventions 1947, dated 8 June 1977, regulates more far-reaching provisions to protect prisoners caught during armed conflicts; "whatever their status such prisoners are entitled to humane treatment."⁹⁰ Despite the fact that the United States has not ratified this Protocol yet, it is generally recognise that Article 75 reflects customary international law, hence, the United States was bound over by Article 75 of the Protocol to treat the detainees humanly.⁹¹ Article 75 of the Protocol prohibits the use of torture and inhuman or degrading treatment and of coercive interrogation techniques in order to gather information from prisoners, and although the article allows the authorities to question a prisoner, it is not compulsory for the prisoners to answer the question.⁹² Therefore, it is misconceived that international humanitarian law do not protect the prisoners of war from being tortured because the United States considered that human rights law could not be implemented in the armed conflicts. Concerning such issue, Byron states that "the protection offered by human rights conventions does not cease in case of armed conflict."⁹³ Thus, the United States' reason for not applying the CAT and others human rights law in order to derogate such law would not be able to prevent it from being held liable for breaching human rights law. Moreover, she explained that Inter-American Commission on Human Rights had dealt with this

⁸⁸ J. Steyn, "Guantanamo Bay: the Legal Black Hole". *International and Comparative Law Quarterly*, Vol. 53 No. 1. 2004, p.5.

⁸⁹ *Ibid*

⁹⁰ *Ibid*

⁹¹ *Ibid*

⁹² *Ibid*

⁹³ see note 52, p.848

problem by stating that in order to review the legality of a State Party's derogation during a time of armed conflict "it must also determine whether the rights affected by these measures are similarly guaranteed under applicable humanitarian law treaties as rights, so guaranteed, could not be the subject of derogations."⁹⁴ It can be concluded that the extra-territorial torture conducted during a time of armed conflict would be a violation of Article 75 of the Protocol. It is also important to note that despite the fact that it refused to implement the CAT regarding the armed conflicts circumstance, Article 2(2) of the CAT does also consider the absolute prohibition of torture in terms of the state of war.

Apart from the denial of implementing the CAT in terms of extra-territorial torture, the United States did not comply also with the ICCPR by stating that the Convention could not be applied towards individuals under its jurisdiction but outside its territory, nor in time of war.⁹⁵ It is clear that the United States had contended the opinions and established jurisprudence of the Human Rights Committee and the International Court of Justice in compliance with the Covenant by committing extra-territorial torture through its interrogation techniques towards the prisoners considered as an infringement of Article 7 of the ICCPR.⁹⁶ The objection of the United States to abolish the extremely cruel interrogation techniques in its Army Manual Field as recommended by the Human Rights Committee because of armed conflict with Al-Qaida might be a real ignorance of the acknowledgement of the human dignity.⁹⁷

⁹⁴ *Ibid*, p.858

⁹⁵ Human Rights Committee-The United Nations Human Rights-Office of the High Commissioner for Human Rights, "Consideration of reports submitted by states parties under Article 40 of the International Covenant on Civil and Political Rights (concluding observation of the Human Rights Committee towards the United States of America", submitted on 18 December 2006), available at: <http://daccessdds.un.org/doc/UNDOCGENG0645961PDFG0645961.pdfOpenElement>; accessed 1 September 2009, para.10.

⁹⁶ *Ibid*, para.13

⁹⁷ Human Rights Committee-The United Nations Human Rights-Office of the High Commissioner for Human Rights, "Consideration of reports submitted by states parties under Article 40 of the International Covenant on Civil and Political Rights" (comments by the Government of the United States of America on the concluding observations of the Human Rights Committee, submitted on 12 February 2008) available at: <http://daccessdds.un.org/doc/UNDOCGENG0840460PDFG0840460.pdfOpenElement>; accessed 1 September 2009, para.13

Such non-compliance response can be found on the second and third periodic reports of the United States of America which provided that:

*"the United States did not consider questions concerning the war on terrorism, detention and interrogation outside the United States territory to fall within the scope of the Covenant...measures taken to combat terrorism should not compromise human rights principles."*⁹⁸

Such consideration might result from the fact that the 9/11 attacks on the United States by Al-Qaida considered as a global threat did not correspond to existing legal categories, hence, in fighting against such terrorist, it had only to comply with the United States constitution, its laws and its international obligations (international humanitarian law).⁹⁹ The United States reports admitted that concerning a democracy matter, it was a difficult to balance security and liberty.¹⁰⁰ In my view, if the United States' Government had acted in good faith by respecting for human dignity in terms of complying with its own constitution or laws and the Third Geneva Convention in fighting terrorism, it would not have had infringed of the ICCPR and other international human rights rules. The absolute prohibition of torture worded both in national legislation and interpreting it without good faith or deliberately enacting and applying ambiguous domestic rules should not circumvent international rules.

IV. THE EXTRA-TERRITORIAL TORTURE AND INHUMAN TREATMENT BY THE UNITED KINGDOM

The involvement of the United Kingdom in committing torture and inhuman treatment could be found in *Al-Skeini* case,¹⁰¹ the case which the House of the Lords was asked to consider whether or not the European Convention on Human Rights and Human Rights Act (HRA)

⁹⁸ Human Rights Committee-The United Nations Human Rights-Office of the High Commissioner for Human Rights, "Summary Record of the 2380th Meeting" (the second and third periodic reports of the United States of America, submitted on 27 July 2006) available at: <http://daccessdds.un.org/doc/UNDOC/GEN/G0643177PD-FG0643177.pdf?OpenElement>, accessed on 1 September 2009, para.2

⁹⁹ *Ibid*, para.2

¹⁰⁰ *Ibid*, para.2

¹⁰¹ *R (Al-Skeini) v. Secretary of State for Defence* [2007] 3 WLR 33

1998 could be said to apply to the activities of British forces in Basrah City, Iraq in late 2003.¹⁰² The case is about the death of six Iraqi civilian who were killed during military operations held by British troops which in the first five cases the victims had been shot in separate armed incidents while in the sixth case the victim had been detained by British forces and taken into custody at a British military base where he died allegedly because of torture committed by British soldiers at the base.¹⁰³ Therefore, this chapter will only consider the last case, Baha Mousa, as this is the only one relevant to the issue of torture. In terms of this extra-extraterritorial torture causing death of the last victim, the sixth claimant - the sixth deceased relative, claimed that such conducts were incompatible with Section 6(1) of the HRA 1998,¹⁰⁴ Articles 2¹⁰⁵ and 3 of the ECHR.

There is the fact that the sixth victim, Baha Mousa, a receptionist at a hotel in Basra, was working when British soldier entered the hotel on the morning of 14 September 2003 and seized and arrested him then took him to a British military base in Basra.¹⁰⁶ The victim was severely beaten by British troops at the base before he died resulting from the extremely bad injuries during the night of 15 September 2003.¹⁰⁷ Based on the fact above, there would be no doubt that the British troops' act inflicting severe physical and mental pain causing the death of the victim would amount to torture.

The Divisional Court concluded that the ECHR and the HRA 1998

¹⁰² F.D. Londras, "Guantanamo Bay: Towards Legality", *Modern Law Review*, Vol. 71 (1) Year 2008, p.56.

¹⁰³ see note 100, p.33

¹⁰⁴ Article 6(1) of Schedule I to the Human Rights Act 1998: It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

¹⁰⁵ Article 2 of the ECHR: (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

¹⁰⁶ see note 100, p.41

¹⁰⁷ *Ibid*

did not apply to the cases of the first five claimants, however, the HRA 1998 applied to the case of the sixth claimant resulting in the United Kingdom's had violated its obligations under Articles 2 and 3 of the ECHR.¹⁰⁸ In its judgement the Divisional Court held that Mr Mousa's case fell within article 1 because a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities, and containing arrested suspects, falls within even a narrowly limited exception exemplified by embassies, consulates, vessels and aircraft, and in *Hess v United Kingdom* 2 DR 72, a prison.¹⁰⁹ Although the Court of Appeal had not decided yet whether it violated Articles 2 or 3 the ECHR or not because of remitting it to the Divisional Court to decide it, the Court reaffirmed the decision of the Divisional Court by concluding that the HRA 1998 could have extra-territorial application allowing the narrow exception applied in the sixth claimant and dismissed both the first five claimant's appeals and the Secretary of State's cross-appeal.¹¹⁰ The Court of Appeal affirmed this decision because Baha Mousa was under the control and authority of the United Kingdom from the time he was detained at the hotel to he was deprived from his freedom at the hand of British soldiers.¹¹¹

However, Lord Bingham disagreed with such decision by concluding that the 1998 Act has no extra-territorial application and reiterated that the Act does not apply against the Secretary of State based on Acts or omission of British forces outside the United Kingdom.¹¹² He explained that British forces committing crime outside the United Kingdom only could be punished under the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957, and if they commit crimes relating to genocide, crimes against humanity and war crimes they would be prosecuted under the International Criminal Court Act 2001.¹¹³

Unlike the decision given by Lord Bingham, Lord Rodger, Lord Baroness Hale, Lord Carswell and Lord Brown concluded that accord-

¹⁰⁸ *Ibid*, p.33

¹⁰⁹ *Ibid*, p.53

¹¹⁰ *Ibid*, p.33

¹¹¹ *Ibid*, p.53

¹¹² *Ibid*, p.51

¹¹³ *Ibid*

ing to Article 1 of the ECHR,¹¹⁴ the HRA 1998 might have extra-territorial application concerning the sixth claimant's case.¹¹⁵ Lord Rodger contended the opinion given by Lord Bingham that the interpretation of Article 1 of the Convention was done by domestic courts. Lord Rodger reiterated that "what is meant by "within their jurisdiction" in Article 1 is a question of law and the body whose function to answer that question definitively is the European Court of Human Rights."¹¹⁶ Moreover, Lord Rodger described that any conduct causing death held by a contracting state in a building on its own territory would be violation of Article 2 of the Convention.¹¹⁷ Such decision is relevant to the ECHR's decision in *Issa v Turkey*.¹¹⁸ The Court held that a contracting state must be held liable for breach of the Convention rights and freedom of persons who are outside its territory but they are under controlled by a contracting state either lawfully or unlawfully.¹¹⁹ However, the Court explained that such responsibility as mentioned in Article 1 of the Convention should not be defined as allowing a contracting state to violate the Convention rights on the another state's territory due to the fact that a state is not allowed to perpetrate it in its own territory. It can be seen that based on such ECtHR's decision, a contracting state is still obliged to secure the rights of the Convention despite the fact that a state party is outside its territory. Thus, in *Al-Skeini*, the Lords, except Lord Bingham, held that although the Convention applies only within the legal space of the contracting states as worded in Article 1, it might apply to outside of jurisdiction as an exception by requiring special justification in the particular circumstances of individual cases.¹²⁰ A contracting state is obliged to secure the Convention rights only where a contracting state has effectively controlled another territory in order to enable it to provide the full package of rights and freedom guaranteed by section 1 of the ECHR to everyone within that area, hence, despite the fact that

¹¹⁴ Article 1 of the ECHR: The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention

¹¹⁵ see note 100, p.34

¹¹⁶ *Ibid*, p.62

¹¹⁷ *Ibid*, p.63

¹¹⁸ *Issa v. Turkey* [2005] 41 EHRR 27

¹¹⁹ *Ibid*, p.588

¹²⁰ see note 100, p.34

the United Kingdom did not exercise such control in Iraq, the narrow exception by referring to embassies and consular agents could by analogy apply to the military base where the sixth victim was being detained.¹²¹ By its consideration, the Secretary of State accepted that this extra-territorial torture and inhuman treatment causing the death of the sixth victim engaged the liability of the United Kingdom because the maltreatment took place in the British detention unit considered as falling within the jurisdiction of the United Kingdom referring to Article 1 of the ECHR.¹²² The final conclusion of the case is the House of Lords dismissed the appeals of the first five claimants and the cross-appeal by the Secretary of Defence regarding the applicability of the HRA 1998 to the sixth claimant's case, and the House of Lords agreed with the Court of Appeal's order that Baha Mousa's case should be remitted to the Divisional Court for its decision in the context of the violation of the HRA 1998 not the ECHR because the Court had up to date evidence and amended pleading.¹²³

Concerning the House of Lords' decision regarding a state's jurisdiction in *Al-Skeini* case, Milanovic has the same view as Lord Rodger's interpretation of Article 1 of the Convention. Milanovic provides that jurisdiction is not a single concept because it might encompass at least two, and perhaps three, different sets of powers.¹²⁴ According to Milanovic, the first type of jurisdiction is jurisdiction to prescribe, known as legislative jurisdiction, this type of jurisdiction is adduced by the state's authority to create legal rules, and however, the second is the jurisdiction to enforce or known as executive jurisdiction, the jurisdiction is related to the state's authority to apply or enforce the rules which have been previously enacted.¹²⁵ The last jurisdiction is called judicial jurisdiction referring to the power of its courts to solve legal disputes, however, this jurisdiction might safely be combined under the first and the second jurisdiction.¹²⁶ Based on the jurisdiction to enforce, the Unit-

¹²¹ *Ibid*, p.34

¹²² *Ibid*, p.61

¹²³ *Ibid*, p.84

¹²⁴ M. Milanovic, "From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties", *Housing Law Report*, Vol. 8(3) Year 2008, p.420.

¹²⁵ *Ibid*

¹²⁶ *Ibid*

ed Kingdom should not exercise its enforcement jurisdiction in Iraq unless the United Kingdom had consent for this from the Iraqi authority. Therefore, if the United Kingdom ignored this rule, it would be an unlawful exercise of enforcement jurisdiction. Nevertheless, the United Kingdom would have lawfully exercised its enforcement jurisdiction in Iraq through its consular, or its military personnel bases, both of which must be consented to the Iraqi authority. This second jurisdiction would result in the United Kingdom's practice in committing torture or inhuman or degrading treatment in its military base camp considered as a breach of the HRA 1998 and also the ECHR. However, the problem with this argument is that at the time of the relevant incident Britain had invaded and was occupying Southern Iraq. There was no Iraqi authority to consent or to object as they had been deposed and the whole country was under an occupation. It can be concluded that although Milanovic states that the liability of a contracting state would only arise if the state has a lawful exercise over its extra-territorial jurisdiction by having consent from the local authority, in case of the whole occupation of Iraq, according to Article 1 of the ECHR as interpreted by Lord Rodger, a state party might also be held liable for breaching the HRA 1998 and the ECHR, regardless its lawful exercise over another state territory.

Although the House of Lords decided that "the ECHR did not apply in the area of Iraq controlled by UK forces, except in the very limited circumstances of British-run military prison"¹²⁷, the House and the lower courts did not apply the ECHR.¹²⁸ Nevertheless, the Court applied the HRA 1998 because this statute had introduced the ECHR into British domestic law.¹²⁹ Such consideration raised to questions that why the House did not apply the ECHR to the appellant and whether the HRA 1998 gave domestic effect to the appellant.¹³⁰ Lord Bingham considered that the general presumption of the HRA 1998 was misconceived because the Parliament did not legislate for territory outside the United Kingdom.¹³¹ However, most of the Lords argued that:

¹²⁷ T. Thienel, "The ECHR in Iraq: the Judgment of the House of Lords in *R (Al-Skeini) v Secretary of State for Defence*", *Journal of International Criminal Justice*, vol. 6(1) year 2008, p.115.

¹²⁸ *Ibid*, p.116

¹²⁹ *Ibid*

¹³⁰ *Ibid*

¹³¹ *Ibid*

"every statute is interpreted ... so as not to be inconsistent with the comity of nations or the established rules of international law ... [, and because] [i]t would usually be ... objectionable in terms of international comity ... for Parliament to assert its authority over the subjects of another sovereign who are not within the United Kingdom."¹³²

According to Lord Rodger, Lord Baroness Hale and Lord Carswell, the application of the HRA 1998 outside the United Kingdom territory would not be a problem in international law because the HRA 1998 only applied against British public authorities, and the Act providing remedies for extra-territorial acts of the United Kingdom authority is not considered as offending against the sovereignty of the other state.¹³³ Regarding this contentious issue, the House of Lords only had authority to apply domestic law - i.e. the HRA 1998, but held that it would apply if the ECHR would have applied to the case. It is clear that why the Lords considered all the ECHR jurisprudence. It can be seen that the extra-territorial application of the HRA 1998 has purpose of making the ECHR applicable in British courts rather than only in Strasbourg Court. In other words, the application of the Act is as same as the application of the ECHR because of this extra-territorial effect.

The inconsistency of the House of Lords' consideration is resulted from the inconsistency of the decisions given by the ECtHR relating its interpretation towards the most relevant European cases *Cyprus v. Turkey*,¹³⁴ and *Bankovic and Others v. Belgium and Others*.¹³⁵ In *Cyprus v Turkey*, Cyprus claimed that during the Turkish occupation of the area of Northern Cyprus when it established the Turkish Republic of Northern Cyprus (TRNC), Turkey had violated some of the convention rights of the Greek Cypriot.¹³⁶ However, Turkey rejected the allegations by stating that the ECHR had no jurisdiction over Turkish actions.¹³⁷ The Court by referring to *Loizidou v Turkey*,¹³⁸ held that:

¹³² *Ibid*

¹³³ *Ibid*, p.116

¹³⁴ *Cyprus v. Turkey* (2002) 35 EHRR 30, 731

¹³⁵ *Bankovic and Others v. Belgium and Others* (2001) 11 BHRC 435

¹³⁶ see note 133, p.762

¹³⁷ *Ibid*, p.736

¹³⁸ *Loizidou v. Turkey* (1997) 263 EHRR 513

“Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or official in Northern Cyprus but must be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. In terms of Article 1 of the Convention, Turkey’s “jurisdiction” must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.”¹³⁹

Conversely, the concept of extended jurisdiction of the Article 1 of the Convention as held in *Cyprus* case above was not consistently applied in *Bankovic and Others v. Belgium* case that the case relating to against the NATO bombing of the Federal Republic of Yugoslavia in March 1999, which alleged the respondent states of breaching Articles 2, 10 and 13 of the ECHR.¹⁴⁰ The ECHR stated that Article 1 of the ECHR should be considered to present the ordinary and essentially territorial notion of jurisdiction as is held in public international law and was demonstrated in the preparatory works, hence, the extra-territorial liability of a state party is only considered in exceptional circumstances that when the State has effective control of the territory and, thus it can exercise public powers normally exercised by a government.¹⁴¹ Moreover, the Court also noted that Article 1 of the Convention is limited by its Article 15,¹⁴² but it must be noted that in accordance with Article 15(2) of the ECHR,¹⁴³ Articles 2, 3, 4 and 7 are non-derogable rights even in time of war or other public emergency threatening the life of the contracting states.

The Court’s approach to *Bankovic* has been seriously criticized. Firstly, the claim that a State would not be bound to apply the ECHR unless it had “effective control” over extra-territory controlled through

¹³⁹ *Ibid*, p.736

¹⁴⁰ S. Williams and S. Shah, “Bankovic and others v Belgium and 16 other contracting states”, *European Human Rights Law Review*, Volume 6 Year 2002, p.775.

¹⁴¹ *Ibid*, p.779

¹⁴² *Ibid*

¹⁴³ Article 15(2) of the ECHR: No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

by occupying or exercising public powers consented by the Government.¹⁴⁴ It must be noted that the aim of the term of jurisdiction under the ECHR is to be a tool for examining whether the ECHR is enforceable or not in terms of the refusal of a state party to be held liable for the allegation of violating the ECHR by claiming that its extra-territorial violation is not under its jurisdiction.¹⁴⁵ Therefore, in order to avoid the circumvention of the responsible state party, the term of jurisdiction should be interpreted widely.¹⁴⁶ It is also difficult to reconcile the effective control test with *Drozd* case because the case only required that the acts caused effects outside of the State's own territory.¹⁴⁷ Secondly, the decision in *Bankovic* that "jurisdiction over the rights and freedom of the ECHR could not be "divided and tailored" according to the situation would surely lead to unsupportable distinction between when the ECHR is applied and when it is not."¹⁴⁸ Therefore, it would make the uncertainty of the application of the ECHR outside a contracting state territory, or if the Court refers to *Bankovic*'s decision, it would not have had jurisdiction over any alleged infringements of the ECHR despite the fact that in *Bankovic* case it violated the right to life, the highest right granted to human being. Furthermore, Erik Roxstrom, Mark Gibney, and Terje Einersen argued that according to theoretical grounds, the consideration that the Convention rights could not be "divided and tailored", firstly, is might be irrelevant to the Vienna Convention on the Law of Treaties because the aim of the ECHR is to protect human rights, which are possessed by all humans.¹⁴⁹ Therefore, although the ECHR only protects and imposes legal obligations on its region, contracting state's obligations could not be assumed to end at their borders because the ECHR also protects universal rights.¹⁵⁰ Secondly, the member states are obliged not to kill arbitrarily and torture everyone and everywhere, however, the convention states might not undertaken their positive obligations under human rights law outside its territory.¹⁵¹

¹⁴⁴ see note 52, p.871

¹⁴⁵ *Ibid*

¹⁴⁶ *Ibid*, p.871-872

¹⁴⁷ *Ibid*

¹⁴⁸ *Ibid*

¹⁴⁹ *Ibid*, p.873

¹⁵⁰ *Ibid*

¹⁵¹ *Ibid*

Finally, they contended that the Court in *Bankovic* seemed to exonerate a State party from human rights obligation under the ECHR.¹⁵²

Therefore, it could be concluded that extra-territorial liability of a state party as worded in Article 1 of the Convention would only have effect outside the territory of the European Council when a contracting state has an effective control over that foreign territory. Nevertheless, in *Al-Skeini*, although there was the fact that the United Kingdom had an effective control over its military base in Iraq where the sixth victim was tortured resulting his death during his detention, the House of Lord did not conclude that such maltreatment conduct by British soldiers causing the death of the sixth victim was a breach of Articles 2 and 3 of the ECHR. The courts only held that the case would be assessed in the scope of the HRA 1998. The House of Lords held that the territorial scope of the HRA is not limited to the boundaries of the United Kingdom and should be defined with reference to the concept of jurisdiction as it is construed under Article 1 of the Convention.¹⁵³

In terms of such Lords' conclusion, Lewis states that the obligation of national courts is to follow the ECHR's jurisprudence as regulated in *Cyprus v Turkey* regarding Turkish's effective control over Northern Cyprus.¹⁵⁴ It could be construed that such a decision is derived from the main purpose of the HRA 1998 introduction aiming at bringing rights home by incorporating the rights set out in the Convention into domestic law.¹⁵⁵ According to the Government White Paper, this was predominantly practical, in that it had purpose of preventing the litigants from spending a lot of money and of time litigating their rights before the Strasbourg court.¹⁵⁶ Similarly, Lord Bingham stated that in spite of intending to avoid delay and expense of resort to Strasbourg court, it would not give victims better compensation than they could claim in Strasbourg court.¹⁵⁷ In addition, Lord Rodger considered that the reason for bringing the convention rights into the HRA 1998 was to "increase

¹⁵² *Ibid*

¹⁵³ K. Altiparmak, "Human Rights Act: Extra-Territorial Application". *Journal of Criminal Law*. Vol. 72 No. 1. 2008, p.1.

¹⁵⁴ J.Lewis, "The European Ceiling on Human Rights", *Public Law*, Year 2007, p.720

¹⁵⁵ *Ibid*, p.721

¹⁵⁶ *Ibid*

¹⁵⁷ *Ibid*

the range of provisions available in or domestic law to ensure that people within the jurisdiction enjoyed those rights and freedoms.¹⁵⁸

The House of Lords and the lower courts differentiated the *Mousa* claim from the others five claims because in terms of the *Mousa* case, he was tortured and killed in British military custody.¹⁵⁹ It has raised the United Kingdom's jurisdiction over *Mousa* on the narrow basis derived from analogy with the extra-territorial exception made for embassies, and by this stance, it can be seen that the House implicitly applied the authority and control test.¹⁶⁰ Moreover, in terms of the application of the ECHR over state parties' action abroad, the ECtHR had applied such regional human right provision in *Drozdz v. France*.¹⁶¹ The Court decided that "[t]he term 'jurisdiction' is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory."¹⁶² This decision had been adopted in *Loizidou* case as discussed before.

On the other hand, the House of Lords decision in *Bankovic* seemed that it has been inconsistent with the *Mousa* case concerning the application of the effective control of an area principle due to the fact that the House required a very high threshold to define overall effective control, however, the Strasbourg case law does not suggest that such high threshold should be established in order to determine the effective control of an area.¹⁶³ The way of the House of Lords interpreted the United Kingdom's jurisdiction in *Al-Skeini*, especially for the torture case of *Mousa* in order to avoid impunity for perpetrators of serious international crimes from being prosecuted might have been compatible with Article 5(1) of the CAT. According to Nowak and McArthur, Article 5(1) of the CAT obliges a contracting state to establish jurisdiction over torture committed in any territory under its jurisdiction.¹⁶⁴ They believe

¹⁵⁸ *Ibid*

¹⁵⁹ see note 152, p.4

¹⁶⁰ *Ibid*

¹⁶¹ *Drozdz v. France* (1991) 240 Eur.Ct. H.R (ser.A), p.29

¹⁶² see note 52, p.869

¹⁶³ see note 152, p.4

¹⁶⁴ M. Nowak and E. McArthur, "Publication Review: The United Nations Convention Against Torture: A Commentary" Reviewed by A. Orakhelashvili, *European Jour-*

that this includes the territory under the military occupation or similar legal or *de facto* control of the contracting state, and this rule also covers the flag principle, by which the state's obligation to establish jurisdiction applies to ships and aircraft regardless of the exact location where the crime is committed.¹⁶⁵

By the decision of the House of Lords in *Al-Skeini* concerning the admissibility of the *Mousa* case falling within the United Kingdom's jurisdiction; it is incontrovertible proof that the United Kingdom must be held responsible for committing extra-territorial torture. Therefore, such maltreatment practice is a violation of Article 3 of Schedule 1 to the HRA 1998,¹⁶⁶ and this would also be an infringement of Articles 3 of the ECHR, 2 of the CAT, and 7 of the ICCPR. Moreover, there is an international consensus that the prohibition against torture is absolute, hence this is non-derogable right, and both customary and conventional rules of international humanitarian law have prohibited such maltreatment in all forms of armed conflicts.¹⁶⁷ Apart from Article 15(2) of the ECHR, the absolute prohibition of torture can be seen from Articles 5 of the ICCPR,¹⁶⁸ and 2(2) of the CAT.¹⁶⁹ Therefore, the war on terror or other military operation causing extra-territorial torture by the United Kingdom would cause serious condemnation from international humanitarian or international human rights law.

According to comments by the Government of the United Kingdom of Great Britain and Northern Ireland to the conclusions and recommendations of the Committee against Torture that the United Kingdom

nal of International Law, Vol. 20(2) Year 2009, p.458

¹⁶⁵ *Ibid*

¹⁶⁶ Article 3 of Schedule 1 to the Human Rights Act 1998 : No one shall be subjected to torture or to inhuman or degrading treatment or punishment

¹⁶⁷ see note 32, p.117.

¹⁶⁸ Article 5 of the ICCPR (1) Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant (2) There shall be no restriction upon or derogation from any of the fundamental human rights recognised or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent.

¹⁶⁹ Article 2(2) of the CAT

should apply Articles 2 and 3 of the CAT towards its detainees in Iraq,¹⁷⁰ the Government stated that if the United Kingdom Forces were participated in violating the rights prescribed in the Convention, such as detainee abuse, anywhere in the world, they would be prosecuted under English Law. The United Kingdom contended that Article 2 of the CAT obliges it to guarantee that acts of torture are not committed by persons who are not subject to the United Kingdom's laws; as such an interpretation would be impossible to implement.¹⁷¹ Nevertheless, it does not mean the United Kingdom Government pays no attention to prisoner treatment; the Government has negotiated a Memorandum of Understanding with the Iraqi Government stating that prisoners handed to the Iraqi authority by the United Kingdom Forces should be treated humanely and not tortured.¹⁷² In terms of the United Kingdom's reason for believing that the Iraqi authorities were ignoring this agreement, the United Kingdom would stop handing the prisoners to the Iraqi Government as agreed in memorandum and the United Kingdom would bring the issue to the Iraqi authorities at senior level.¹⁷³ In the longer term, the United Kingdom is optimistic that a positive engagement with the Iraqi local authorities to improve conditions in places of detention is likely to be the most effective way of ensuring that standards are increased, and to date, the United Kingdom is taking positive action, for example the United Kingdom is providing training for the Iraqi prison service.¹⁷⁴ Furthermore, regarding its transfer of the internees and prisoners of war to the United States detention facilities, the United Kingdom retained liability for their welfare in accordance with the Geneva Conventions, and in particular, during the period from April to December 2003, when many prisoners were held in a United States facility at Camp Bucca, in Umm Qasr, a United Kingdom Monitoring Team and Prisoner Reg-

¹⁷⁰ The United Nations Human Rights-Office of the High Commissioner for Human Rights, 'comments by the Government of the United Kingdom of Great Britain and Northern Ireland to the conclusions and recommendations of the Committee against Torture' (Follow-up response by state party, submitted on 8 June 2006), accessed on: <http://daccessdds.un.org/doc/UNDOC/GEN/G06/425/34/PDF/G0642534.pdf?OpenElement>; accessed 24 August 2009, para.15

¹⁷¹ *Ibid*

¹⁷² *Ibid*, para.16

¹⁷³ *Ibid*

¹⁷⁴ *Ibid*

istration Unit was based at the facility to guarantee the welfare of the prisoners.¹⁷⁵

Furthermore, based on the decision of the House of Lords applying only the HRA 1998 as a duplication of the ECHR in *Al-Skeini*, it does not mean that the United Kingdom was more concerned with its obligation under the ECHR than the ICCPR in this extra-territorial torture case and ignored the ICCPR. The United Kingdom convinced the Human Rights Committee by stating that:

*"the United Kingdom did not view its obligations under international law in hierarchical terms but took all obligations equally seriously. While it was deeply committed to the European Convention because of its historic role in drafting the instrument, it also fully supported the Covenant and promoted its universal ratification."*¹⁷⁶

There is no doubt that in order to comply with the ICCPR, the United Kingdom also takes serious concern relating to its obligations under the ICCPR, however, the United Kingdom has no plans to introduce the Convention into its domestic law.¹⁷⁷ Unlike some countries, the United Kingdom would not introduce treaties and international conventions directly into the United Kingdom domestic law, and if it requires any amendment of the law in order to comply with a treaty or convention, or if the domestic law is not compatible with treaty or convention, the Government would introduce a bill drafted to give effect to the relevant articles of the treaty or convention.¹⁷⁸ Due to its long history of

¹⁷⁵ The United Nations Human Rights-Office of the High Commissioner for Human Rights (n.239), para.18

¹⁷⁶ Human Rights Committee-The United Nations Human Rights-Office of the High Commissioner for Human Rights, 'Summary record of the 2542nd meeting (the sixth periodic report of the United Kingdom, submitted on 28 July 2008) available at: <http://daccessdds.un.org/doc/UNDOC/GEN/G0842917/PDF/G0842917.pdf?OpenElement.pdf>; accessed on 4 September 2009, para.3.

¹⁷⁷ Human Rights Committee - The United Nations Human Rights-Office of the High Commissioner for Human Rights, 'replies to the list of issues (CCPR/C/GBR/Q/6) to be taken up in connection with the consideration of the sixth periodic report of the Government of the United Kingdom of Great Britain and Northern Ireland (Reply to the list of issues by State Party, submitted 13 June 2008), accessed on: <http://daccessdds.un.org/doc/UNDOC/GEN/G0842594/PDF/G0842594.pdf?OpenElement.pdf>; accessed 4 September 2009, para.1.

¹⁷⁸ Human Rights Committee - The United Nations Human Rights-Office of the High

protecting human rights, "it was not surprising that the enactment of new legislation was not always necessary to comply with its more recent obligations under international human rights instruments."¹⁷⁹ It is important to note that the United Kingdom examines any international treaty or convention first in order to know that whether its domestic law is compatible with the treaty or not before it enters to any treaty obligation.¹⁸⁰ The United Kingdom would not become a state party of the treaty unless its domestic law and practice are relevant to the treaty obligations. In certain circumstances, e.g. in terms of ambiguous provisions of legislation, the United Kingdom Courts might take account of its treaty obligations.¹⁸¹

Most of the rights in the ICCPR are duplicated in the ECHR, and they are protected in the HRA 1998 giving further effect to the rights in the ECHR, and while the rights in the ICCPR which have not been duplicated yet by the ECHR might be protected either directly or indirectly by means of various other statutory provisions.¹⁸² Because of indirect application of the ICCPR in the United Kingdom, Human Rights Committee indicates that several ICCPR rights are not included among the provisions of the ECHR that has been incorporated into the HRA 1998.

However, in terms of prohibition of torture and inhuman treatment, the wording of Article 7 of the ICCPR is almost completely similar to Article 3 of the ECHR. In addition, both treaties have also the same point of view that prohibition of torture and inhuman treatment is an absolute prohibition that shall not be derogated in any circumstance even in the time of public emergency or war, it can be found in Article 4(2) of the ICCPR and Article 15(2) of the ECHR.

Commissioner for Human Rights (n.245), para.2

¹⁷⁹ Human Rights Committee-The United Nations Human Rights-Office of the High Commissioner for Human Rights, 'Summary record of the 2542nd meeting (n.245), para.3

¹⁸⁰ Human Rights Committee-The United Nations Human Rights-Office of the High Commissioner for Human Rights, 'Summary record of the 2542nd meeting (n.245), para.3

¹⁸¹ Human Rights Committee - The United Nations Human Rights-Office of the High Commissioner for Human Rights (n.246), para.2

¹⁸² Human Rights Committee - The United Nations Human Rights-Office of the High Commissioner for Human Rights (n.246), para.2

It seems that such similar wordings between the ICCPR and the ECHR makes the ECHR become a barrier to implementing of the ICCPR by the United Kingdom. Interestingly, the ECHR itself has been copied by the HRA 1998, and such introduction of the ECHR into the United Kingdom domestic law might also make it possible for the United Kingdom to avoid applying the ECHR in its territory. Such consideration can be seen clearly from the United Kingdom court decision in the case of *Al-Skeini*.

V. CONCLUSION

There is no doubt that the events of 11 September 2001 has led to unavoidable practice of extra-territorial torture and inhuman treatment conducted by the United States and the United Kingdom that both are famous for their efforts in promoting and protecting human rights. There is the fact that international and regional human rights law prohibiting extra-territorial torture and inhuman treatment from being conducted by the state authorities have been introduced into both domestic state legislations. The United Kingdom has drawn the concept of extra-territorial torture under than the American. Such concept in the domestic legislations of the United States have been claimed to be ambiguous legislations in preventing the acts from being committed extra-territorially by the authorities in relation to the war on terror. The United States denied applying human rights law in terms of its extra-territorial torture in Guantanamo Bay and Abu Ghraib prisons because it claimed that the war on terror against Taliban regime and Al-Qaida fall within the meaning of the armed conflict. It resulted in inapplicable enforcement of human rights law, hence, according to the United States; humanitarian law should be applied in this situation. In terms of its compliance to humanitarian law, the Inter-American Commission on Human Rights, Human Rights Committee and the Committee Against Torture strongly recommended that the United States should also respect human rights law obligations under the CAT and the ICCPR. Actually, Article 75 of the First Protocol Additional to the Geneva Conventions itself obliges a State to treat the prisoners of war humanely. However, the United States ignored such recommendations. By its denial to comply with human right law, it seems that human rights law has no teeth to enforce its

instruments toward the United States that had infringed one of the non-derogable rights under the human rights law. Unlike the United States, the United Kingdom's compliance with human rights law concerning its extra-territorial torture has been evidenced by the application of the HRA 1998 in *Al-Skeini* case. The House of Lords and the lower courts considers that English Law applied outside the United Kingdom territory in terms of the State has effective control over another state territory. Despite the fact that The courts did not apply the CAT, the ICCPR and the ECHR directly in solving extra-territorial torture, the United Kingdom Government had clearly stated that the application of the HRA 1998 actually already represented such international and regional human rights provisions because the principle of the absolute prohibition of torture in such provisions has been fully adopted by the HRA 1998. It can be deduced that the United Kingdom's compliance with its domestic human rights law derived from the ECHR is a reflection that the ECHR is more enforceable on preventing a state party from violating absolute prohibition of torture.

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