CHAPTER 4

LAW RELATING TO TORTURE IN USA, UK AND CANADA

Torture is inherently shameful, something that, if practiced, is done in the shadows. International human rights law and institutions that have been constructed since World War II are not more than basic prohibition than the ban on torture. Even the right to life admits exceptions, such as the killing of combatants is allowed in wartime. But torture is forbidden unconditionally, whether in time of peace or war, whether at the local police precinct or in the face of a major security threat.

Torture as well as cruel, inhuman or degrading treatment is prohibited by treaties such as the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Geneva Conventions. All these treaties are widely ratified; none permits any exception to these prohibitions, even in the time of war or a serious security threat.

The United States Law on Torture

The prohibitions against torture are so fundamental that the Restatement of the Foreign Relations Law of the United States, the most authoritative United States treaties on the matter, lists them as peremptory *jus cogens* norms, meaning they bind Governments as a matter of customary international law, even in the absence of a treaty. Breach of these prohibitions gives rise to a crime of universal jurisdiction, allowing the perpetrator to be prosecuted in any competent tribunal anywhere.

The Eighth Amendment to the Constitution prohibits the use of torture as punishment. Torture is also prohibited under the Due Process Clause of the Fifth Amendment and other conduct that ‘shocks the conscience’ introduced at trial.  

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2 *Ibid*.
4 Amendment V111 of the US Constitution.
Supreme Court has stated that statements obtained by coercion not only are inherently unreliable but also offend the community’s sense of fair play and decency and are universally condemned by the law. The Due Process clause also prohibits torture even when no information is ever introduced at trial. The Fifth Amendment provides privilege against self-incrimination, prohibits the use of statements at trial involuntarily obtained from the accused, including statements obtained through coercion. United States Military Law similarly prohibits the mistreatment of individuals in United States custody. The United States Army Interrogation Field Manual has outlawed the use of force, mental torture, threats, insults or exposure to unpleasant and inhuman treatment of any kind.

The Manual also provides that the “use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts and can induce the source to say whatever the interrogator wants to hear.” The Uniform Code of Military Justice also prohibits the use of evidence secured by coercion in court-martial.

In the United States, torture was commonly viewed as the barbaric practice, yet it was never eliminated. On the contrary the use of physical and mental abuse to obtain confessions remained an important part of law enforcement in the United States. In 1931, the National Commission on Law Observance and Enforcement (known as Wickersham Commission) concluded that “the third degree that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions is widespread” based upon its examination of the conduct of law enforcement officers. As the Wickersham Commission and numerous cases thereafter showed police often beat and abused suspects to obtain confessions.

The United States began its formal domestic efforts to eradicate torture when Congress adopted the Joint Resolution regarding opposition of the United States to the practice of torture by foreign Governments in 1984. The Joint Resolution affirmed a

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7 Supra note 5 at 173.
12 Ibid.
13 David Hope, Torture 809-10 (2004).
15 Supra note 10.
continuing policy of the United States Government to oppose the practice of torture by foreign Governments through public and private diplomacy and to oppose the acts of torture wherever they occur, without regard to ideological or regional considerations.\textsuperscript{16}

On 26 June 2004 on International Day in Support of Victims of Torture, President Bush reaffirmed US commitment to worldwide elimination of torture as follows: “America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction”\textsuperscript{17}. In its second periodic report to the United Nations Committee against Torture on 29 June 2005, the United States Government stressed its unequivocal opposition to the use and practice of torture:

“No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture. This is a longstanding commitment of the United States, repeatedly reaffirmed at the highest level of the US Government.”\textsuperscript{18}

The United States Criminal Code provides federal criminal jurisdiction over an extraterritorial act or attempted act of torture if (1) the alleged offender is a national of the United States or (2) if the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

**Torture as Federal Crime**

The United States signed the Convention against Torture, on 18 April 1988. The Senate advised and consented to the ratification of the Convention against Torture on 27 October of the same year and the ratifying documents were deposited to the United Nations on 21 October 1994. Thirty days later, the Convention against Torture entered into force in the United States. The United States adopted the Convention against Torture subject to a number of understandings mainly (1) add the term ‘specific’ to the intent language, (2) define mental pain, (3) apply the torture definition only to acts directed against persons in

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the offender’s custody or physical control, (4) define lawful sanctions and (5) define acquiescence by a public official\textsuperscript{19}.

To implement Articles 4 and 5 of the Convention against Torture, Congress did not enact a new provision to criminalize acts of torture committed within the jurisdiction of the United States. It was presumed that such acts would be covered by existing applicable federal and State Statutes, such as those criminalizing assault, manslaughter and murder. However, the United States add a chapter 113C to the United States Criminal Code\textsuperscript{20} (Federal Torture Statute) which criminalizes acts of torture that occur outside the United States.

S2340 of the United States Criminal Code defines torture as an act must be specifically intended to inflict severe pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from:

- the intentional infliction or threatened infliction of severe physical pain or suffering,
- the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality,
- the threat of imminent death, or
- the threat that another person will imminently be subjected to death, severe physical pain or suffering or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality\textsuperscript{21}.

S2340A of the United States Criminal Code makes it a criminal offence for any person outside the US to commit or attempt to commit torture. Any person who commits or attempts to an act of torture outside the United States is generally subject to a fine and/or imprisonment upto 20 years. In cases where death results from the prohibited conduct, the offender may be subjected to life imprisonment or the death penalty. A person who conspires to commit an act of torture to be committed or attempted outside

\textsuperscript{19} Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Reservations, Understandings and Declarations Made by the United States of America, available at: http://www.unhchr.ch /tbs/doc.rsf10 /527 ce66547377b1i +802567fd00565533/opendocument (visited on 12 March 2011).


\textsuperscript{21} Ibid.
the United States is generally subject to the same penalty faced by someone who commits or attempts to commit acts of torture inside the United States, except that he cannot receive the death penalty for such an offence\textsuperscript{22}.

The Bybee Memorandum of August 2002 provided a detailed legal analysis of the various elements included in the S 2340 definition of torture\textsuperscript{23}. On the basis of its ordinary or natural meaning as found in various dictionaries, Bybee concluded that the adjective ‘severe’ means that “the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure”\textsuperscript{24}. Bybee suggested that ‘severe pain’ as used in S 2340, must rise to a similarly high level – the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure or serious impairment of body functions in order to constitute torture\textsuperscript{25}. Bybee further stated that, in short, reading the definition of torture as a whole, ‘it is a pain that the term encompasses only extreme acts’\textsuperscript{26}. The Bybee Memorandum, which was widely used as a legal basis for far-reaching interrogation methods explicitly authorized against terrorist suspects, concluded by stating that “even if an interrogation method might violate S 2340, necessary or self-defense could provide justifications that would eliminate any criminal liability”\textsuperscript{27}.

The Bybee Memorandum further examined the text of Article I of Convention against Torture, recalled that the US Government proposed inserting the word ‘extremely’ before the words “severe pain or suffering”\textsuperscript{28}. Bybee Memorandum used the US position, taken during the drafting of Article I of the Convention against Torture, to arrive at the wrong conclusion that “Convention against Torture’s text, ratification history and negotiating history all confirm that S 2340 reaches only the most heinous acts”\textsuperscript{29}.

In December Memorandum, Secretary Rumsfeld explicitly authorized interrogation techniques such as the use of stress positions upto four hours, detention in isolation upto thirty days, interrogation up to twenty hours, hoinding, forced grooming,

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\textsuperscript{22} 18 U.S.C. S 2340 A.
\textsuperscript{25} \textit{Supra} note 23 at 6.
\textsuperscript{26} \textit{Ibid}.
\textsuperscript{27} \textit{Ibid}.
\textsuperscript{29} Bybee Memorandum, 2002.
\end{flushleft}
deprivation of light and auditory stimuli, removal of clothing and all comfort items, and the use of phobias to induce stress. On the contrary, Alberto Mora, General Counsel of the Navy, labeled these interrogation techniques as cruel, inhuman or degrading treatment that could, in particular circumstances, amount to torture. Secretary Rumsfeld used the Bybee Memorandum as the legal basis and justification for these interrogation techniques applied to suspected terrorists.

Secretary Rumsfeld, on 15 January 2003, rescinded the December Memorandum and established a Working Group on Detainee Interrogation headed by Air Force General Counsel Mary Walker. Deputy Director John Yoo drafted a Memorandum and submitted it to Working Group. Based on the Working Group report, interrogation techniques were slightly revised. These techniques include exposure to extreme temperatures, deprivations of light and auditory stimuli, environmental manipulation, sleep adjustment, removal of comfort items and isolation.

In 2004, after the Abu Ghraib torture scandal, the Bybee Memorandum and the Yoo Memorandum was officially withdrawn. The Department of Justice withdrew the Yoo Memorandum in June 2004 and replaced the Bybee Memorandum with a new memorandum called Levin Memorandum. Levin Memorandum responded to harsh criticism, both from within the US Government and from other sources and explicitly disagreed with statements in the Bybee Memorandum limiting ‘severe pain’ to serious physical injury, such as organ failure, impairment of bodily function or even death. The Levin memorandum also rejected the assertion that severe mental pain or suffering must necessarily cause prolonged mental harm. Additionally, the Levin Memorandum stressed the distinction between specific intent and motive. “There is no exception under the Statute permitting torture to be used for a ‘good reason’. Thus, a defendant’s motive (to protect national security, for example) is not relevant to the question whether he has acted

30 Memorandum from William J. Haynes 11, General Council Department of Defense, on ‘Counter-resistance Techniques’ to Secretary of Defense Donald Rumsfeld (27 November 2002).
33 Memorandum from Donald Rumsfeld, Secretary of Defense, United States Department of Defense for Commander US Southcom, Subject: Counter-Resistance Techniques in the war on Terrorism (16 April 2003).
35 Levin Memorandum.
with the requisite intent under the Statute’’\textsuperscript{36}. The Levin Memorandum also assumed that the decisive criterion for distinguishing torture from cruel inhuman or degrading treatment is the intensity of the pain or suffering inflicted on the victim.

**Other United States Law Relating to Torture**

**The Federal Death Penalty Act (FDPA), 1994**

The Federal Death Penalty Act (FDPA), 1994 authorizes a sentencing jury to consider as an aggravating factor, the fact that an offence committed is ‘especially heinous, cruel or depraved manner in that it involved torture or serious physical abuse to the victim’’\textsuperscript{37}. The Courts at time of interpreting the FDPA has not relied on the definition given under S2340. In *United States v Sampson*,\textsuperscript{38} a United States District Court applied a definition from Black’s Law Dictionary, under which an act is ‘torture’ only if committed with an intent to punish, or with intent to exact a confession or information or for sadistic pleasure. These purposes were found to be necessary under the FDPA even though S 2340 does not require specific purposes. In *United States v Chanthadara*,\textsuperscript{39} the United States Court of Appeals for the Tenth Circuit refused to apply the S2340 torture definition in an FDPA case. The Court responded that S2340 can’t be applied because the FDPA is not part of the same chapter as S2340. Unlike S 2340, the FDPA is not limited to persons acting under color of law. Without explanation, the Court held that the mental harm caused by torture under the FDPA need not be prolonged as required by S2340.

**Torture Victim Protection Act, 1991**

The Torture Victim Protection Act (TVPA), 1991 authorized civil suits in cases of torture. According to the Act\textsuperscript{40} –

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  \item the term torture means any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
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\textsuperscript{36} Ibid.
\textsuperscript{37} 18 U.S.C. S 3591
\textsuperscript{39} 230 f.3d 1237, 1262 (10th Cir. 2000).
\textsuperscript{40} S 3(b) of the Torture Victim Protection Act, 1991.
mental pain or suffering refers to prolonged mental harm caused by or resulting from
a) the intentional infliction or threatened infliction of severe physical pain or suffering;
b) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
c) the threat of imminent death; or
d) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

The TVPA uses a modified version of the CAT and S2340 definition of torture. The TVPA definition is essentially the S2340 definition, absent the words, ‘specifically intended’ and including the CAT purpose requirement. In case of Sinaltrainal v Coca Cola Co\textsuperscript{41}, the Court held that a corporation is a ‘person’ and so can commit torture. The Court observed that the law often treats corporations as persons, ‘it is reasonable to conclude that; had Congress intended to exclude corporations from liability under the TVPA, it could and would have expressly stated so’.

In Xuncax v Gramajo\textsuperscript{42} a Federal District Court found that combination of the following acts of abuse during interrogation by the military constitute to be torture including blindfolding, repeated acts of rape, burning with cigarettes, beating and lowering into a foul-smelling pit. In this case the Court also analyzed the requirement that the victim be in the offender’s ‘custody or physical control’. The defendant argued that the custody requirement was not met because the plaintiff was never actually in his ‘personal custody’. Relying on the relevant Senate Report, the Court found that, as ‘a higher official need not have personally performed or ordered the abuses in order to be held liable’, having the authority and discretion to order an individual’s release can establish ‘custody’ for the purposes of defining torture.

In Hilao v Estate of Marcos,\textsuperscript{43} the Court without explanation identified the combination of the following acts as torture: interrogation coupled with blindfolding, beating while handcuffed and fettered, denial of sleep, threats of electric shock and death, shackling limbs to a cot while towel was placed over nose and mouth, and pouring water down nostrils to trigger a drowning sensation.

\textsuperscript{41} 256 F.Supp.2d 1345(S.D. Fla.2003).
\textsuperscript{42} 162, 174, 178 (D.Mass, 1995).
\textsuperscript{43} 103 F.3d 789, 790-91 (9\textsuperscript{th} Cir.1996).
In *Mehinovic v Vuckovic* the Court concluded that interrogations coupled with severe beating on all parts of the body, including dislocating a finger and beating genitals constituted torture and instilling fear of death during beatings and prolonged mental harm amount to torture.

The Court in *Daliberti v Republic of Iraq* found that physical and mental harm from threats of death, cutting off fingers, pulling out fingernails and electric shocks to the testicles constituted torture.

**Alien Tort Claims Act 1789**

The Alien Tort Statute (ATS), called as Alien Tort Claims Act (ATCA) provides the Federal Courts with jurisdiction over ‘any civil action by an alien for a tort only, committed in violation of the law of nation or a treaty of the United States’.

In case of *Filartiga v Pena-Irala* a Paraguayan citizen sued former Paraguayan Officials for the acts of torture causing death of the plaintiff’s son. Filartiga Courts have heard suits seeking redress for human rights violations such as torture, kidnapping and extrajudicial killings. The Court held that ATCA does not in itself define or prohibit torture. Thus it would likely utilize the Convention against Torture for a relevant definition of torture.

In *Kadic v Karadzic* it was held that the Act could apply to private parties ‘provided that their conduct is undertaken under the color of the State authority or violates a norm of international law that is recognized as extending to the conduct of private parties’. In *Sosa v Alvarez-Machain* the Supreme Court ruled that the ATCA is jurisdictional in nature and does not in itself provide a course of action.

In January, 2008, in *Rasul v Rumsfeld*, the district court dismissed the claim on the basis that ‘torture is a foreseeable consequence of the military’s detention of suspected enemy combatants’, and that ‘even if torture and religious abuse were illegal, defendants were immune under the Constitution because they could not have reasonably known that detainees at Guantanamo had any constitutional rights’.

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47 630 F.2d 876 (2d Cir. 1980).
48 70 F.3d 232 (2d. Cir. 1995).
In 2005, the US Report to Committee against Torture claimed that the Courts would adopt ‘a restrictive interpretation of the range of civil actions that could be brought under this Statute consistent with the intent of the legislators who originally enacted it’.\(^5\)

**The Foreign Sovereign Immunities Act, 1976**

The Foreign Sovereign Immunities Act (FSIA) was enacted in 1976 and amended in 1996 to include torture as an exception to jurisdictional immunity of a foreign state. The FSIA explicitly adopts the TVPA’s definition of torture\(^5\). In *Cicippio v Islamic Republic of Iran*\(^5\) the Court held that plaintiffs were tortured by members of an Iranian paramilitary organization controlled by the Government; they were taken hostage, interrogated, blindfolded, chained, given poor food, regularly beaten, threatened with castration and imminent death, shackled in stopped positions and subjected to electric shock, causing severe depression and mental anguish. Courts have made clear that torture under the FSIA is a special term- torture does not automatically result whenever individuals in official custody are subjected even to direct physical assault. Not all police brutality, not every instance of excessive force used against prisoners, is torture under the FSIA\(^5\). Yet Courts have not specified how to draw the definitional line.

In *Simpson v Socialist People’s Libyan Arab Jamahiriya*,\(^5\) the plaintiff was interrogated, held incommunicado, threatened with death, separated from her husband and unable to learn of her husband’s welfare. It was held that plaintiff was not tortured under the meaning of FSIA.

In *Price v Socialist People’s Libyan Arab Jamahiriya*,\(^5\) the Court required factual evidence for the exact method of infliction of pain. There, allegations of physical abuse were insufficient because they lacked details regarding the frequency and duration of beatings, parts of the body at which beatings aimed and weapons used to carry out these. Such information was deemed essential to determine if the acts were actually torture or just ‘police brutality that falls short of torture’.

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54 *Price v Socialistic People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir.2002).
56 Supra note 54.
**Torture Victim Relief Act of 1998**

The Torture Victim Relief Act (TVRA), 1998 authorizes the President to provide grant for the ‘rehabilitation of victims of torture’. The TVRA includes a descriptive definition of torture that means, ‘torture is the deliberate mental and physical damage caused by Government to individuals to destroy individual personality and terrorize society. The effects of torture are long term. Those effects can last a lifetime for the survivors and effect future generations’. The TVRA explicitly adopts the S2340 of the Code definition of torture, with one addition, ‘the use of rape and other form of sexual violence by a person acting under color of law upon another person under his custody or physical control’.

**The Detainees Treatment Act, 2005**

In 2005, Senator John McCain proposed an amendment to the Defense Appropriation Act that would set US Army Field Manual as the basis for any interrogation conducted by the military and would ban all CIDTP despite geographic considerations. This amendment eventually became the Detainee Treatment Act (DTA). However, the DTA in its final form was significantly different from what was originally intended. S1003 of the Detainee Treatment Act of 2005 prohibits cruel, inhuman or degrading treatment or punishment of persons under the United States Control. S 1003 states: *cruel, inhuman, or degrading treatment or punishment*

“(e) In this Section, the term cruel, inhuman, or degrading treatment or punishment means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984."

The DTA contained a legal defence for CIA and military interrogators entitled ‘Protection for US Government personnel’. The legal defense available to these individuals is that they did not know that certain practices were unlawful and it does not

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57 Section 2(2) of Torture Victim Relief Act of 1998.
58 Section 3 of Torture Victim Relief Act of 1998.
allow private actions. For example, an Iraqi prisoner, died, in only seventy five minutes of interrogation by a CIA officer in Abu Ghraib in 2005. In this case US personnel at Abu Ghraib were protected as they claimed that they did not know what was and was not permitted during interrogation. In another case in December 2002 American guards in Afghanistan hung two Afghans from ceiling chains by their wrists and beat them to death. The army lawyer who investigated one soldier argued for their leniency because the Government failed to present any evidence of what were approved tactics, techniques and procedures of detainee operations. The soldier in question was, however, found guilty, though not under the DTA and received only a letter of reprimand as punishment for the torture and death of the two men.

The DTA also contains the amendment that would prevent detainees from filing writs of habeas corpus in US Courts and allowing the use of evidence from coercive interrogations. It specifies that the US does not include Guantanamo Bay. President Bush stated that, ‘this Government does not torture’. Then Attorney – General Alberto – Gonzalez argued that the DTA would not render acts such as water boarding illegal and Bush issued a ‘signing statement’ which preserved executive ability to do ‘whatever was necessary’ in national security interests.

The DTA uses the Army Field Manual as its source of interrogation techniques and therefore does not indicate any ‘special tactics’ or techniques unique to the fight against torture. It also prohibits the use of CIDT on anyone in custody or under the control of the US Government, regardless of nationality or locations.

**Military Commission Act, 2006**

In case of *Hamden v Rumsfeld* the five member majority held that the President’s Military Commission violated the Uniform Civil Code of Military Justice. The Court also determined that the Commission violated Article 3 of the Geneva Conventions, which requires that all trials be conducted by regularly constituted Courts affording all the judicial guarantees recognized as indispensable by civilized peoples. In July, 2006 soon

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62 *Supra* note 60.


after that Supreme Court ruled that detainees are entitled, at a minimum, to the rights reflected in Common Article 3 of the Geneva Conventions, President Bush signed a new executive order reauthorizing unlawful interrogation tactics such as water-boarding and the ‘cold-cell’ while furthering his program of coercive interrogation and secret detention 66. Military Commission Act (MCA) was a response to the ruling in Hamden’s case. The Manual for Military Commission states torture as 67:

An act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within the actor’s custody or physical control. Severe mental pain or suffering is defined as the prolonged mental harm caused by or resulting from:

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;
(B) administration or application or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
(C) the threat of imminent death; or
(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or administration of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

The MCA prohibits the admission of any statement obtained by the use of torture 68, except as evidence against the person accused of torture.

“Section 948r, Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements:

(a) In General – No person shall be required to testify against himself at a proceeding of a military commission under this chapter.
(b) Exclusion of Statements Obtained by Torture – A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.
(c) Statements Obtained Before Enactment of Detainee Treatment Act of 2005- A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that-
(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and
(2) the interests of justice would best be served by admission of the statement into evidence.

66 Supra note 3.
67 The Manual for Military Commission, Rule of Evidence 304(b) (3).
68 Supra note 20.
(d) Statements Obtained After Enactment of Detainee Treatment Act of 2005- A statement obtained on or after December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that –

1. the totality of the circumstances renders the statement reliable and possessing sufficient probative value;
2. the interests of justice would best be served by admission of the statement into evidence; and
3. the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by § 1003 of the Detainee Treatment Act of 2005.

In the first judicial ruling to interpret the Military Commission Act, 2006, Judge James Robertson of the United States District Court ruled that a habeas corpus petition brought by Guantanamo detainee Saloni Ahmed Hamden was clearly barred by the ‘jurisdiction-stripping’ language of the Act and he had no Constitutional entitlement to habeas corpus jurisdiction in the habeas statute.

In David Mathew Hicks’s case, David an Australian was the first person to be tried under the Military Commission Act, 2006. David was captured in Afghanistan in December 2001 and under the MCA he was charged by the prosecutors with providing material support for terrorism and attempted murder in violation of the law of war. The charge of attempted murder was dropped by the US military and on 27 March 2007, David pleaded guilty to the charge of providing material support for terrorism. In the plea agreement Hicks agreed to the following:

1. He would not communicate with the media regarding his alleged illegal conduct and the specifics of his capture or detention for one year.
2. He was required to state that no person or persons made any attempt to force or coerce him into making the offer to plead guilty and that his decision to plead guilty was made freely and voluntarily.
3. He was required to state that he had never been illegally treated by any person or persons while in custody and control of the United States including his capture in Afghanistan and detention at Guantanamo Bay.
4. He was required to state that his capture and detention was lawful and was done pursuant to the law of armed conflict.

69 Supra note 65.
(5) He had to agree not to make, participate in or support any litigation, in any form against the United States or any of its officials, whether uniformed or civilian, in their personal or official capacities with respect to his capture, treatment, detention or prosecution.

(6) He had to agree that for the remainder of his natural life, if the United States were to determine that he engaged in any further conduct proscribed by the offenses codified in the Military Commissions Act, the United States could immediately detain and try him under the Military Commissions Act if he were outside the nation of Australia. At the end of the day, Hicks’ actual sentence was only nine months, to be served in an Australian prison.

It is submitted that the Congress enacted quick-fix legislation that will do little to repair the legal defects that the Hamden decision exposed in the Administration’s approach to Military Commission. The MCA gave the President maximum flexibility to indefinitely detain alleged terrorists without having to charge them and providing him with the authority to unilaterally reinterpret the Geneva Conventions. The Act redefines unlawful enemy combatant to include any person who engages in hostilities against the United States or who purposely and materially supported hostilities against the United States.

Implementation of the Convention against Torture in the United States

The US signed the CAT on 18 April 1988 and ratified the Convention and deposited it on 21 October 1994, subject to certain declarations, reservations and understandings. The United States included a declaration in its instruments of ratification that CAT Article 1 through Article 16 were not self-executing, which means that implementing legislation was required to fulfill US international obligations under CAT and such implementing legislation was necessary for CAT to be given effect domestically. The justification by the State Department given for this declaration within the US felt that it already had sufficient legislation applicable to acts committed within the US to prohibit torture.71

At the time of providing consent to CAT, the Senate also provided a list of understanding concerning the scope of the Convention’s definition of torture. As in the CAT, mental torture is not specifically defined; the US understands such actions to refer to prolonged mental harm caused or resulted from (1) the intentional infliction or

71 Available at: www.1.umn.edu/humannts/usdocs/tortes.html (visited on 15 March 2011).
threatened infliction of severe physical pain and suffering, (2) the administration of mind-altering substances or procedures to disrupt the victim’s senses, (3) the threat of imminent death or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.  

During the drafting of Article 1 of Convention against Torture, States generally agreed that only conduct causing severe pain or suffering, whether physical or mental amounts to torture. The word ‘severe’ can be found in the 1975 Declaration as well as in both the Swedish and International Association of Penal law drafts. The US and UK Governments pushed to strengthen the required intensity of pain or suffering by adding the word extremely before ‘severe’. Finally, the Swiss Government advocated that no distinction should be made between torture and inhuman treatment with respect to severity of suffering.

In the Northern Ireland Case, the Court concluded that severity of suffering, and not the specific purpose of the actor, as assumed by the Commission, was the decisive criterion for distinguishing torture, to which a ‘special stigma’ is attached, from other forms of inhuman or degrading treatment. In its reasoning, the Court also made reference to the last sentence of Article 1 of the 1975 Declaration, according to which torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment. This sentence was deleted during the drafting of Article 1 of the Convention against Torture. Similarly, the UK and the US proposals to qualify the intensity as “extremely severe pain or suffering” were defeated. These facts indicate that the UN wished to follow the approach taken by the European Commission over the approach taken by the Court which moreover, was subjected to strong criticism in the public and in legal literature.

Article 1 of the Convention against Torture requires that the perpetrator intentionally causes severe pain or suffering before the treatment qualifies as torture. Purely negligent conduct, therefore, can never be considered torture, for example, when a

74 Ibid.
detainee is forgotten by prison guards and slowly starves to death, the detainee certainly endures severe pain and suffering, but the conduct lacks intention and purpose and therefore, can ‘only’ be qualified as cruel or inhuman treatment. During the drafting of Convention against Torture, the US argued for the stronger requirement of ‘deliberately and maliciously inflicting extremely severe pain or suffering’. Since the US proposal was not adopted, the US Government ratified the Convention with the explicit ‘understanding’ that, ‘in order to constitute torture an act must be specifically intended to inflict severe pain or suffering’.

The requirement of a specific purpose is the most decisive criteria distinguishing torture from cruel or inhuman treatment and ill-treatment only amounts to torture if it serves a specific purpose deemed to be uncontroversial during the drafting of Article 1 of the Convention against Torture. Switzerland wished to add non-therapeutic medical or scientific experiments, Portugal wanted the use of psychiatry for the purpose of prolonging confinement of a person and the UK delegation wished to include gratuitous torture and delete discrimination as a specific purpose. Most delegations argued that the list of purposes in Article 1 of the Convention against Torture was meant to be indicative rather than exhaustive. But the General Assembly did not adopt the US proposal that any purposes or motives, regardless of whether or not they were mentioned in Article 1 of the Convention against Torture, would suffice.

Article 2 of the Inter-American Convention to Prevent and Punish Torture has wider application than Article 1 of Convention against Torture because it adds the words ‘or for any other purpose’. A proposal to add this clause to the definition of torture in the 1975 UN Declaration was defeated. These words are also missing in Article 1 of the Convention against Torture despite efforts of the US and other delegations to broaden the definition.

The State Department in its analysis of Convention against Torture stated that ‘torture’ should include only such universally condemned methods as ‘sustained

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79 Supra note 77.
82 Supra note 76.
systematic beating, application of electric currents to sensitive parts of the body and hanging positions that cause extreme pain. The US’s specification of certain acts as torture may restrict the Convention’s application by leaving some acts out.

The Convention’s definition of torture includes not only acts committed by public officials, but also those acts to which they acquiesced. According to US understanding on this point, a public official to acquiesce to an act of torture, that official must, “prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity”83.

The prohibition of Cruel, Inhuman and Degrading Treatment applies to the use of force by the police and military force outside the situation of detention and direct control and the principle of proportionality applies to such use of force. The question arises whether the principle of proportionality should be equally applied to detainees in ticking bomb or similar extreme scenarios84. Do the interrogation methods authorized by Secretary Rumsfeld against suspected terrorists for the purpose of obtaining information about future terrorist attacks not cause less severe pain or suffering than shooting into the legs of person for the purpose of preventing his or her escape from prison.

US officials usually refer to US reservation concerning Article 16 of the Convention against Torture and Article 7 of the International Covenant on Civil and Political Rights, according to which cruel, inhuman or degrading treatment should be interpreted in the same manner that cruel and unusual punishment is treated by the Fifth, Eighth and/or Fourteenth Amendment of the US Constitution85.

The US reservations concerning Article 16 of the Convention against Torture and Article 7 of the International Covenant on Civil and Political Rights are incompatible with the object and purpose of both treaties and have, therefore, been declared null and void by the respective UN treaty monitoring bodies i.e. the Human Rights Committee and the Committee against Torture86.

The Rumsfeld’s interrogation techniques explicitly authorized in April 2003 includes ‘exposure to extreme temperatures and deprivation of light and auditory stimuli. Such techniques lack any precise definition as to possible limits’. What did deprivation of

83 Supra note 71.
84 Manfred Nowak, “Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment”, 23 Neth. Q. Hum. Rts. 674 (2005)
85 Supra note 72.
light and auditory stimuli mean? Could a detainee be locked in a completely dark cell? And for how long? A month? Longer? Similarly, exposure to ‘extreme temperatures’ for a prolonged period of time can certainly cause severe pain and suffering amount to torture.

Most of the interrogation techniques authorized by Rumsfeld in December 2002 and April 2003 respectively, whether applied alone or in combination with other methods, carrying the potential of inflicting severe pain or suffering can amount to torture. This explicit authorization, based on flawed legal analysis by the office of legal counsel of the department of justice, violated the obligations of the US under Articles 7 and 10 of International Covenant on Civil and Political Rights as well as Articles 1, 2 and 16 of Convention Against Torture.

It is submitted that in the ‘war against terror’ the US Government adopted various strategies to circumvent the absolute prohibition of torture and cruel, inhuman or degrading treatment under international human rights law. Examples of such strategies include the practice of enforced disappearance in secret places of detention, the establishment of detention facilities outside US territory for the purpose of avoiding the applicability of constitutional and international human rights standards, the ‘extraordinary rendition’ of suspected terrorists to countries known for their systematic torture practice or the outsourcing of interrogation functions to private companies.

Another strategy of circumventing the absolute prohibition of torture is the attempt of the US Government to restrict the concept of torture by means of legally unsound official opinions by the office of legal counsel, such as the Bybee and Yoo Memoranda. On the basis of misleading and incorrect interpretations, the US Government created the wrong impression that only extremely severe ill treatment that leads to serious physical injuries or long-lasting mental harm amounts to torture. The respective Memoranda, which clearly contradict the case law and practice of the competent international and regional human rights bodies, were explicitly withdrawn by the Department of Justice in the aftermath of Abu Ghraib torture scandal.

A fair balance must be struck between the danger posed by suspected terrorists and the interrogation techniques used.

87 Report on the Situation of detainees at Guantamo Bay, Submitted by the Chairperson – Rapporteur of the working group on Arbitrary detention.
88 Supra note 31.
89 Supra note 87.
The United Kingdom Law on Torture

International human rights law imposes a duty on States to investigate and prosecute violations committed within their jurisdictions. Yet often violators are not brought to justice in their own countries and victims of torture and other abuses are left without a remedy. Human suffering on a massive scale during the twentieth century gave new impetus to international efforts to combat impunity. Accountability for the worst human-rights violations is increasingly viewed as a matter of concern for the international community as a whole. The importance of the right not to be tortured is among those violations so highly valued that all States have a duty to ensure its protection. In addition to these international mechanisms, international law imposes a duty on States to do their part to combat impunity. The ratification of an international treaty places State under a binding obligation, as a matter of international law, to act in accordance with its treaty obligations. The European Convention has been incorporated into UK Law by the Human Rights Act, 1998 and part of the provisions of the Convention against Torture has been incorporated by Section 134 of Criminal Justice Act, 1988. The International Covenant on Civil and Political Rights has been ratified by the UK but not incorporated into English Law.

International instruments which include provisions against torture and UN General Assembly Resolutions indicate that the absolute prohibition on torture has become a norm of customary international law. Lord Lloyd in Pinochet (No.1) stated that, “we apply customary international law as part of the common law, and we give effect to our international obligations so far as they are incorporated in our Statute Law”.

The Court in Nulyarimme expressed surprise that in Pinochet (no.3), it had not been suggested that Pinochet could have been tried for the international crime of torture directly under customary international law. Whitlam J., said, “Notwithstanding that no one had suggested to their Lordships that before Section 134 of the Criminal Justice Act 1988 came into effect, torture committed outside the United Kingdom was a crime under United Kingdom Law, Lord Millett held that by 1973 English Courts already possessed

extraterritorial jurisdiction in respect for the crime charged against Senator Pinochet and did not require the authority of statue to exercise it\textsuperscript{92}.

Certain internationally recognized rights are regarded so fundamental that they have achieved the states of \textit{jus cogens}. The International Criminal Tribunal for the Former Yugoslavia stated that, ‘the prohibition of torture is the international hierarchy than treaty law or even customary rules’\textsuperscript{93}.

In \textit{Pinochet} (No. 3), Lord Millett distinguished individual acts of torture, which he regarded as being subject to customary international law from crimes against humanity, which he believed had the status of \textit{jus cogens}. But Lord Braone-Wilkinson stated that, ‘Ever since 1945, torture on a large scale has featured as one of the crimes against humanity. The \textit{jus cogens} nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed’\textsuperscript{94}.

\textbf{Definition of Torture under Criminal Justice Act, 1988}

The definition of torture under Section 134 of the Criminal Justice Act is based on as contained in the Article 1 of the Torture Convention.

\textit{Section 134 Torture:}

\begin{itemize}
  \item[(1)] A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.
  \item[(2)] A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if –
    \begin{itemize}
      \item[(a)] in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence –
        \begin{itemize}
          \item[(i)] of a public official; or
          \item[(ii)] of a person acting in an official capacity; and
        \end{itemize}
      \item[(b)] the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.
    \end{itemize}
  \item[(3)] It is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or an omission.
  \item[(4)] It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct.
\end{itemize}

\textsuperscript{92} \textit{R v Bow Street Metropolitan Stipendiary Magistrate, Exparte Pinochet Ugarte} (1999) 2 WLR 827.

\textsuperscript{93} \textit{Prosecutor v Furundzila} Case No. IT-95-17/1-T10 (Unreported).

\textsuperscript{94} \textit{Supra} note 92 at 841.
(5) For the purposes of this section “lawful authority, justification or excuse” means –
(a) in relation to pain or suffering inflicted in the United Kingdom, lawful authority, justification or excuse under the law of the part of the United Kingdom where it was inflicted;
(b) in relation to pain or suffering inflicted outside the United Kingdom –
(i) if it was inflicted by a United Kingdom official acting under the law of the United Kingdom or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law;
(ii) if it was inflicted by a United Kingdom official acting under the law of any part of the United Kingdom or by a person acting in an official capacity under such law, lawful authority, justification or excuse under the law of the part of the United Kingdom under whose law he was acting; and
(iii) in any other case, lawful authority, justification or excuse under the law of the place where it was inflicted.
(6) A person who commits the offence of torture shall be liable on conviction on indictment to imprisonment for life.

Section 134 (1) states that a public official or person acting in an official capacity, whatever their nationality, is guilty of an offence if they intentionally inflict severe pain or suffering on another person in the performance or purported performance of their official duties. The phrase ‘purported performance’ is an indication that the offence of torture may be committed even though such acts were disapproved of or forbidden by their superiors or might have been, had they known of them. The perpetrator must appear in all intents and purposes to be acting in their official capacity, as opposed to acting as a private individual.

Section 134(2) states that where a person, whatever his nationality, who does not come within subsection (1), that is, a private individual, intentionally inflicts pain at the instigation of or with the consent or acquiescence of a public official or a person acting in an official capacity, they will also be guilty of an offence. This provision corresponds to Article 4(1) of the Convention against Torture which requires State parties to ensure that ‘an act by any person which constitutes complicity or participation in torture’ is an offence under domestic Criminal Law.

The Convention against Torture provides that Government officials at all levels may be held responsible if they fail to act to stop torture where it occurs. Failure of the authorities to act to prevent torture being inflicted could well be interpreted as, at the last, acquiescence. Indeed, as if to ensure that the Torture Convention extends beyond the actual committing of acts of torture, Article 4(1) of the Torture Convention provides that
both, an attempt to commit torture and an act which constitutes complicity or participation in torture are required to be considered criminal offences. In *R v Muller’s*\(^{95}\) case, UK law recognizes that a person who assists in the carrying out of torture at the time when the crime is committed, or assists or encourages the act prior to its commission, may be convicted as a party to the crime.

Section 134(2) requires an element of knowledge by a public official means that it could be argued that any official who instigated, consented or acquiesced to acts of torture would be involved in a joint enterprise and would be considered to have been aiding, abetting, counseling or procuring an offence.

A public official who ordered but did not commit any acts of torture alleged could be tried for torture and conspiracy to torture was confirmed in *Pinochet’s* (No.3) case. An official may be held responsible if they fail to take reasonable steps to prevent subordinates from committing torturous acts\(^{96}\).

The International Military Tribunal for the Far East, stated that, a person in a position of a superior authority should be held individually responsible for failure to deter the unlawful behaviour of subordinates; if he knew they had committed or were about to commit crimes; yet failed to take the necessary and reasonable steps to prevent their commission or to punish those who had commanded them\(^{97}\).

Article 1 of the Torture Convention as well as Section 134 (3) of the Criminal Justice Act states that torture does not just involve physical suffering. The European Court observed in *Ireland v UK*\(^{98}\) that the interrogation methods highlighted, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also acute psychiatric disturbances during interrogation.

In *Pinochet’s case*\(^{99}\) Courts have recognized that, ‘severe pain or suffering’ is a vague term. When considering whether the treatment to which an individual has been subjected amounts to torture, the European Court has grouped together incidents if they are part of a systematic assault on a person. In *Ireland v UK*\(^{100}\), the Court held that, ‘A practice incompatible with the Convention consists of an accumulation of identical or

\(^{95}\) (1970)2 QB 54.
\(^{96}\) Supra note 92.
\(^{98}\) (1979-80) 2 EHRR 25.
\(^{99}\) Supra note 92.
\(^{100}\) Supra note 98.
analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system.’

The European Courts have not categorized each individual act of ill-treatment, although it recognized some specific acts that amount to torture. For example it confirmed that a rape of a detainee by a State official involves a level of pain and suffering which would always be classified as torture\textsuperscript{101}.

It is the severity of the pain rather than the identification of resulting injuries that should be considered when deciding upon the category under which the abuse fits, although evidence of the injury may provide an indication of the extent of the pain inflicted. Some techniques can cause extreme pain without leaving visible marks on the victim. For example, in the practice of ‘falaka’, involves beating on the soles of the feet of the victim. Victims are often told to walk on salt in order to reduce the swelling and the marks. When done ‘expertly’, it leaves no outwardly visible traces of violence, and the victim will often be able to move around after a few days. The use of this practice can often be proved by a medical process known as bone scintigraphy and neuro-physiological diagnostic tests such as electromyography\textsuperscript{102}.

Section 134 (4) and (5) provides defence that the officials had lawful authority, justification or excuse for their conduct. These defences are wider than those referred to in the Convention against Torture, which states that torture, does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions and specifies that superior orders may not be invoked as a justification for torture.

The Commission’s inclusion of the concept of justifiability in its definition of torture in the ‘Greek Case’\textsuperscript{103} gave rise to considerable controversy. Therefore, the Commission in the Ireland Case clearly stated that it did not have in mind the possibility that there could be a justification for any treatment in breach of Article 3 of the European Convention. The Commission concluded that prohibition of torture is an absolute one and there can’t be, under the Convention or under international law, a justification for acts in breach of the provision prohibiting torture or other ill-treatment\textsuperscript{104}.

\textsuperscript{101} Aydin v Turkey, (1997) 25 EHRR 251.
\textsuperscript{104} Supra note 98.
In case of *Chahal v UK*\(^{105}\), where the European Court refused to allow deportation of the applicant to his country of origin, because it was likely that he would face risk of ill treatment contrary to Article3 of European Convention against Torture.

There is no provision in the English Law for the defence that the torturer was acting under the orders of a superior. Article 8 of the Nuremberg Charter states that, ‘the fact that the defendant acted pursuant to orders of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment’.

**Jurisdiction**

The Courts in England and Wales work under the general rule that they will only exercise criminal jurisdiction in respect of acts done or omissions made by person within the territorial jurisdiction. However, there are certain exceptions to this general rule. Section 134 of the Criminal Justice Act 1988: Section 134 (1) provides that a person commits the offence of torture if he commits certain acts in the United Kingdom or elsewhere. The Geneva Conventions of 1949 were incorporated in part, into English law by the Geneva Conventions Act, 1957.

>“Any person, whatever his nationality, who, whether in or outside of the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach … shall be guilty of an offence”\(^{106}\).

The definition of ‘grave breaches’ includes ‘torture or inhuman treatment’ and ‘willfully causing great suffering or serious injury’ to body or health. However, the Geneva Conventions require that Universal Jurisdiction be exercised only for offences committed in international armed conflict and not armed conflict. However, the Statute of International Criminal Tribunal for Rwanda, being concerned with atrocities, arising out of internal armed conflict, includes a specific provision giving the Tribunal Jurisdiction over such violations\(^{107}\).

In 1995, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia held that customary international law does impose criminal liability for violations of common Article 3\(^{108}\). It is submitted that UK is also required to amend law as per the developments in international law and to provide a specific legislative basis.

\(^{105}\) (1996) 23 EHRR 413.

\(^{106}\) Article 1 of the Geneva Conventions Act, 1957.

\(^{107}\) The Statute of the International Criminal Tribunal for Rwanda was adopted by UN Security Council Resolution 955 of 8 November 1994

for exercising universal jurisdiction for serious violations of the Geneva Conventions committed in internal armed conflict.

**Retrospectivity**

Whether the universal jurisdiction applies retrospectively, where the torturous acts were committed prior to the date when the UK had incorporated the Torture Convention or the other relevant Conventions into UK law; the general rule is that, in the absence of express words to the contrary, no person may be held guilty of any criminal offence which did not constitute such an offence under national or international law at the time when it was committed.

However, in the Parliamentary debate on the issue of retrospectivity held during the passage of the War Crimes Bill, it was concluded that if the acts of an individual were contrary to international law and the law of most countries; the principles of non-retrospectivity should not prevent them from being prosecuted.\(^{109}\)

In *Pinochet*\(^{110}\) (No.3), the House of Lords decided that the rule of non-retrospectively meant that Augusto Pinochet could not be extradicted to Spain for acts of torture committed before the UK had incorporated the Convention against Torture in 1988. But Lord Millett challenged the role of non-retrospectively on the basis that it was outweighed by the need for Universal Jurisdiction because of the nature of the crimes. According to the Section 134 of the Criminal Justice Act, 1988, a person could not be prosecuted for acts committed prior to the date the relevant provisions came into force.

**Extradition**

The Extradition Act, 1989 applies to all of the UK’s extradition arrangements other than with the Republic of Ireland and deals with extradition both to and from the UK. Section 2 defines extradition crime as

(a) conduct in the territory of a foreign State, a designated commonwealth country or a colony which, if it occurred in the United Kingdom, would constitute an offence punishable with imprisonment for a term of 12 months, or any greater punishment, and which however described in the law of the foreign state, commonwealth country or colony, is so punishable under the law.

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\(^{110}\) *Supra* note 92.
(b) an extra-territorial offence against the law of a foreign state, designated Commonwealth country or a colony which is punishable under that law with imprisonment for a term of 12 months, or any greater punishment, and which satisfies –

(i) the condition specified in subsection (2) below; or
(ii) all the conditions specified in subsection (3) below.”

Subsection (2) requires that “in corresponding circumstances equivalent conduct would constitute an extraterritorial offence against the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment.”

The conditions specified in subsection (3) are:

(a) that the foreign state, Commonwealth country or colony bases its jurisdiction on the nationality of the offender;
(b) that the conduct constituting the offence occurred outside the United Kingdom; and
(c) that, if it occurred in the United Kingdom, it would constitute an offence under the law of the United Kingdom punishable with imprisonment for a term of 12 months, or any greater punishment.

Torture and related offences such as conspiracy to torture or aiding and abetting torture would fulfill the above requirements, whether the crime was committed in the State requesting extradition or in another State in circumstances in which the requesting State is exercising extraterritorial jurisdiction. Torture is a crime for which UK law affords extraterritorial jurisdiction and it is one for which the penalty is life imprisonment.

Section 6 of the Extradition Act, 1989 provides a number of exceptional situations in which a person’s extradition from the UK will be refused. One of these is that the offence of which that person is accused or was convicted is an offence of a political character. The first notable human rights case involving an extradition one is the 1989 Judgment of European Court of Human Rights (ECHR) in Soering v United Kingdom. Soering was a German national detained in the UK whose extradition was sought by the US to face charges of murder in Virginia, a State with the death penalty. In response to UK Government’s request, the District Attorney for the Courts of Virginia where Soering was to be tried swore an affidavit certifying that the UK Government’s request will be made known to the judge at the time of sentencing. In his complaint to the European

111 11 EHRR 439.
Court of Human Rights, Soering argued that, if convicted, the assurance received by the British Government was inadequate to prevent the application of the death penalty and consequently a violation of his right to freedom from torture. The Court held that UK’s obligation under Article 3 towards Soering was not limited merely to preventing his ill treatment in or by the UK. It would breach Soering’s right under Article 3 for the UK to allow his extradition to a third country where he would face a real risk of ill-treatment.

In *Chahal v United Kingdom*¹¹², the Court held that the prohibition on torture under Article 3 of ECHR was absolute and made no exception for suspects who were deemed to pose risk to national security. The Court found that Mr. Chahal faced a ‘real risk’ of ill treatment contrary to Article 3 if returned to India, notwithstanding the assurance given by the Indian Government that he would not be ill-treated. In *Youssef v Home Office*¹¹³, the British Government again sought to negotiate assurances against ill-treatment. In respect of the return of the four Egyptian suspected of involvement in terrorism, the British Embassy in Cairo was instructed to seek written assurances from the Egyptian Government included that, the suspects being guaranteed the right to legal advice, due process, a fair trial, regular inspection by the British authorities and independent medical personnel while in detention and of course a guarantee against any ill-treatment ‘whilst in detention’. The Egyptian Government politely declined the British request for an assurance relating to prison visits on the ground that they would constitute interference in scope of the Egyptian Judicial system and an infringement of national sovereignty. On the UK Prime Minister’s view to seek one assurance from Egyptians that, if those individuals are deported to Egypt, they would not be subjected to torture, the Home Secretary wrote to the Prime Minister that the single assurance would be insufficient to commence deportation proceedings against the four men.

In February 2008, the Grand Chamber of ECHR held in case of *Saadi v Italy*¹¹⁴ that Italy’s proposed deportation of Saadi, a Tunisian national, would breach Article 3 of ECHR, notwithstanding the assurances of the Tunisian authorities. In this case, UK Government had intervened to invite the Grand Chamber to reverse its earlier decision in *Chahal’s* case, arguing that rigidity of the principle had caused many difficulties for the contracting States by preventing them in practice from enforcing expulsion measures. UK Government argued that, the ECHR should allow the risk of ill-treatment under Article 3

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¹¹² Supra note 105.
¹¹⁴ Application No. 37201/06, Judgment 28 February 2008.
ECHR to be balanced against the threat to national security proposed by a suspect. The Grand Chamber rejected the UK submissions and held that, the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practice resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.

The UK Government tried to redress the problems posed by individuals whose deportation could fall foul of international obligations by seeking memorandums of understanding with their countries of origin.

The UK firstly concluded the Memorandum of Understanding (MOU) with Jordanian and provides the template for all subsequent movements against the ill-treatment negotiated by the British Government. It provided eight specific assurances. However, six of the eight ‘specific’ assurances do no more than restate Jordan’s existing obligations under the Convention against Torture and the International Covenant on Civil and Political Rights, namely the right of those returned to due process, a fair trial, and religious freedom. The prohibition against ill-treatment is not referred directly but instead expressed in terms of a positive obligation on Jordan to provide the detainee adequate accommodation, nourishment and medical treatment, and to be treated in a human and proper manner, in accordance with internationally accepted standards.

The MOU makes no provision for adjudication, enforcement or sanction for breach of any kind, except that either State may withdraw from the arrangement by giving six months notice, but is obliged to continue to apply the terms of the arrangement to any person returned under its provisions. Again, there is no provision for what may happen if this requirement is also breached.

**Double Criminality**

The double criminality principle, which applies in extradition cases, holds that nobody can be extradited to a foreign country unless the conduct alleged constitutes a crime under both the law of the foreign country and the law of the UK. In order to constitute an ‘extradition crime’, the crime concerned be one which can be prosecuted extraterritorially both in the requesting State and in the UK.

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116 Ibid.
In *Pinochet’s case* (No.3),\textsuperscript{118} House of Lords held that the relevant date was the date on which the conduct took place. Lord Brawne- Wilkinson stated that the acts of torture amounted to a violation of *jus cogens*, but the Extradition Act, 1989 made it clear that the double criminality rule required the conduct to be criminal under English law at the date of conduct and not the date when the extradition was requested.

**Evidence Obtained By Torture**

The Anti-terrorism Crime and Security Act, 2001, gives the Secretary of State for the Home Department the power to issue a certificate authorizing the indefinite detention of ‘suspected international terrorist’, without charge of trial, if he or she reasonably believes ‘that the person’s presence in the United Kingdom is a risk to national security, and if he or she suspects that the person is a terrorist.\textsuperscript{119} House of Lords in an earlier litigation concerning the same applicants declared that Section 23 of the Act was incompatible with Articles 5 and 14 of European Convention on Human Rights. The Anti-terrorism Crime and Security Act, 2001, provide that a detained ‘suspected international terrorist’ has the right to appear against the issuance of a certificate before a Special Immigration Appeals Commission. On such an appeal, the Commission is to cancel the certificate if it considers that there are no reasonable grounds for a belief or suspicion. In an appeal, the Special Immigration Appeals Commission held that whether evidence had or might have been procured for the torture inflicted by foreign officials without the complicity of the British authorities was relevant to the weight of the evidence but did not render it legally inadmissible.\textsuperscript{120} Its decision sustained by a majority of the Court of Appeal, whose judgment was then challenged before the House of Lords. Lord Bingham referred to the ‘*the jus cogens erga omnes*’ nature of the ‘prohibition of torture’, saying that it required States to ‘do more than eschew the practice of torture’.\textsuperscript{121}

Lord Bingham, who was one of the three judges of the minority on the issue of evidentiary burden, argued that, requiring an applicant to establish on a balance of probabilities that torture had been carried out ‘is a test which, in the real world, can never

\textsuperscript{118} *Supra* note 92.
\textsuperscript{119} Section 21(1) of the Anti-terrorism, Crime and Security Act, 2001.
\textsuperscript{120} *Ibid*.
\textsuperscript{121} *A et. al v Secretary of State for the Home Department, X et. al v Secretary of State for the Home Department*, (2005)2 AC 68.
be satisfied.122 The House of Lords has ruled unanimously that evidence obtained by torture in another country by foreign authorities is inadmissible in anti-terrorist proceedings before the British Courts. But the burden of proof lay with the applicant to provide that any evidence has been obtained is a result of torture.123

**Civil Law Relating to Torture**

International human rights law provides for a right to an effective remedy for those whose rights are violated. Article 14 (1) of the Convention against Torture provides that, “Each State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.”

In case of *Osman v UK*124 Court held that there is a duty on the English legal system to ensure that claimants who seek to pursue legitimate civil actions within the jurisdiction have access to a court and receive a fair trial under Articles 6 and 13 of the European Convention. In the case of *Al-Adsani v UK*,125 it was argued that this is the case even if the act of torture was not committed within the jurisdiction.

In the United States, the Alien Tort Claims Act, 1789 and the Torture Victim Protection Act, 1991 provides a legislation basis for victims who have suffered torture in another country to sue their torturers in US Courts. There is no specific tort of torture, not any special basis for extraterritorial jurisdiction under UK Civil Law.

It is most likely that actions will be brought for acts committed by State officials. However, where torture is perpetrated by private individuals, State authorities will not be able to absolve themselves of their positive obligations to prevent and punish acts of torture where the encouragement, consent or acquiescence of State officials results in the violations of the fundamental right of not to be tortured. Those officials should also be the subject of civil proceedings.126 Where a tort has taken place abroad but may be tried

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122 A(FC) and Others (Appellants) v Secretary of State for the Home Department (Respondent) (2004), A and Others (Appellants) (FC) and Others v Secretary of State for the Home Department (respondent). (Conjoined Appeals), House of Lords (United Kingdom), 2005 UK HL 71, 8 December 2005.
123 Ibid.
125 Application No. 35763/67.
in England, then English Courts will apply their own rules of procedure to cases brought before their forum, that is, *lex fori*.\(^{127}\)

In the absence of a tort of torture, claims relating to acts of torture will usually be made under the torts of assault, battery and false imprisonment. In the case of *Al-Adsani*, the claimant sued for the tort of intimidation as a result of threats which he claimed to have received in the UK following his revelations about the torture which he had suffered in Kuwait\(^ {128}\).

The claimant need not be a national domiciled or resident in England. An asylum seeker can bring an action while awaiting a decision on their application for asylum. It is also possible for a person who resides in another country to bring an action against an alleged torturer who is presently residing in England\(^ {129}\).

Allegations of torture may generally be made against:

- individuals who carry out torture;
- those in authority who acquiesced to or ordered the committal of the acts and;
- possibly the State, where it oversees, allows or sponsors torturous acts\(^ {130}\).

International Law has classified freedom from torture as the absolute and non-derogable right of every man and woman. It reflects the universally held view that such crimes are abhorrent. A consequence of this is that a duty is placed on States to ensure that perpetrators found in their jurisdiction, no matter where they carried out their crimes, will be either prosecuted or extradited to stand trial elsewhere.

The English Courts have played a significant role in bringing torturers to account. The decision of House of Lords in the *Pinochet* case that a former head of State is not entitled to claim immunity for international crimes such as torture. Section 134 of the Criminal Justice Act, 1988 criminalizes acts of torture and confers exceptional extra-territorial jurisdiction on UK Courts to hear such cases.

It is submitted that the relatively small number of criminal and civil actions in the UK highlights the practical difficulties involved in bringing to court, the cases relating to torture committed in another jurisdiction. There is a need to enact legislation to enable the UK to ratify the International Criminal Court Statute. There is no specific statutory basis

\(^{127}\) *Ibid.*

\(^{128}\) *Supra* note 125.

\(^{129}\) *Clawes v Hillard*, (1876) 4 (Ch.D.413).

\(^{130}\) *Supra* note 126.
for bringing civil actions for torture committed abroad under the present provisions of Law. Civil redress for torture would not only provide survivor with damages and the funds for rehabilitation, but the awarding of judgment against those responsible for torture could help to act as a deterrent.

Canada’s Law on Torture

Canada adopted the Convention against Torture on 24 June 1987 and it entered into force on 24 July 1987. The Parliament of Canada then passed legislation to criminalize torture, even when committed abroad, in accordance with the Convention. Since ratification Canadian Courts have frequently looked towards Convention to interpret domestic law on torture. Canada is not part of any regional Convention against torture. There are several Inter-American Conventions, but Canada has chosen to regulate this matter through National Avenues, with the consideration of the international bodies which it recognized as binding.\(^{131}\)

Canada has a federal legal system. The Constitution Act, 1867 divides the legislation and executive powers between the federal and provincial spheres. Criminal law falls under federal jurisdiction and it is applied uniformly all over Canada. Both local and federal institutions must comply with the international standards for conditions in prisons and with the Canadian constitutional provisions regarding human rights.\(^{132}\) The Standard for correction applied in Canada is the Standard Minimum Rules for the Treatment of Prisoners.\(^{133}\) Article 2 of the Canadian Bill of Rights, enacted in 1960 stated that law can, ‘impose or authorize the imposition of cruel and unusual treatment and punishment’. The Bill is still in force today, but the authority in human rights has become the Canadian Charter of Rights and Freedoms, as part of the Constitution Act.\(^{134}\) Section 12 of the Charter states that, ‘everyone has right not to be subjected to any cruel and unusual treatment or punishment’. Human rights so being part of the Constitution can only be invoked when a law is challenged on the grounds of unconstitutionality. It means that constitutional provisions cannot be invoked by themselves as a ground for alleged violations in most countries. But in Canada, although human rights are part of the

\(^{132}\) Constitution Act, 1867 (UK).
\(^{134}\) Canadian Bill of Rights, S.C. 1960, c44.
Constitution, Section 12 can by itself be invoked before national Courts and if the judges consider it is infringed, a remedy may be granted.

Canada has also ratified the International Covenant on Civil and Political Rights which includes Article 7 (against torture) and the Convention on the Rights of the Child which includes Article 37a (against the torture of children). Amendments to the Criminal Code, enacting Sections 269.1 and 7(3.7) implemented Convention obligations to prosecute State officials for torture committed anywhere by or against anyone.

Section 269.1 defines Torture as:

269.1(1) Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Definitions
(2) for the purposes of this Section ‘Official’ (Functionaire)
‘Official’ means
(a) a peace officer
(b) a public officer
(c) a member of the Canadian forces, or
(d) any person who may exercise powers, pursuant to a law in force in a foreign State, that would in Canada, be exercised by a person referred to in paragraph (a), (b) and (c), whether the person exercises powers in Canada or outside Canada,

‘torture’
‘torture’ means any act or omission by what severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:
(a) for the purpose including;
(i) obtaining from the person or from a third person information or a statement.
(ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and
(iii) intimidating or coercing the person or a third person, or
(b) for any reason based on discrimination of any kind, but does not include any act or omission arising only from, inherent or incidental to lawful sanctions.

No defence
(3) It is no defence to a charge under this Section that the accused was ordered by a superior or a public authority to perform the act or omission that forms the subject-matter of the charge or that the act or omission is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency.

Evidence

135 Section 269.1, Criminal Code, RSC 1985 cC-46.
(4) In any proceedings over which parliament has jurisdiction, any statement obtained as a result of the commission of an offence under the Section is inadmissible in evidence, except as evidence that the statement was so obtained.

The Canadian Criminal Code provides a definition of torture which is in accordance with the definition contained in Article 1 of the Convention against Torture. It is not a defence to a charge of torture that the accused was ordered by a superior or a public authority to perform an act of torture or that the torture is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency. The Canadian Government does not sanction torture or cruel, inhuman or degrading treatment. Canada is committed to international efforts to prevent and eliminate torture.\(^{136}\)

Under Sections 21 and 22 of the Code, liability extends to persons who commit an offence and those who aid, abet, form a common intention to carry out, counsel, procure, solicit or incite another person to be party to the offence.\(^{137}\) Section 7 (3.7) of the Criminal Code\(^ {138}\) was enacted to comply with Article 5 of the Convention, which imposes on Canada a duty to expand the jurisdiction to prosecute alleged torturers wherever the torture occurred, whatever the nationality of the victim and whatever the residence or nationality of the alleged perpetrator when inter alia:

(c) the person who commits the act or omissions is Canadian Citizen;

(d) the complainant is a Canadian Citizen or

(e) the person who commits the acts or omission is, after the commission thereof, present in Canada.

When any of these conditions exist, the suspect will be deemed to commit that act or omission (torture) in Canada. Section 7(5) provides that a prosecution for torture committed outside Canada ‘may be commenced in any territorial division in Canada and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in the territorial division.’

Torture is a crime, in the Crimes against Humanity and War Crimes Act. Section 7 of the Act places special responsibility on ‘military commanders’ and other ‘superiors’ for crimes committed by their subordinates that they knew of, or were criminally

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\(^{136}\) Introductory Speech at the Presentation of Canada’s fourth and fifth reports to the Committee against Torture, 4 May 2005.

\(^{137}\) Sections 21 and 22 of Criminal Code, RSC 1985.

\(^{138}\) Section 7(3.7) of Criminal Code, RSC 1985, cC-46.
negligent in failing to know of, and with respect to which they did not take necessary and reasonable steps to prevent\textsuperscript{139}. The Supreme Court stated that the prospect of torture induces fear and its consequences may be divesting, irreversibly indeed fatal. Torture may be meted out indiscriminately or arbitrarily for no particular offence. Torture has as its end, the denial of a person’s humanity. This end is outside the legitimate domain of a terror and not of justice\textsuperscript{140}.

When Canada adopted the Charter in 1982, it affirmed the opposition of the Canadian people to Government sanctioned torture by prescribing cruel and unusual treatment or punishment in Section 12. A punishment is cruel and unusual if it is so excessive as to outrage standards of decency\textsuperscript{141}.

Lomer, J. stated in Smith’s case, “Some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency, for example, the infliction of corporal punishment” So torture is seen in Canada as fundamentally unjust\textsuperscript{142}.

Canadian Law, through provisions in the Criminal Code and the Crimes against Humanity and War Crimes Act, provides for universal jurisdiction and thus allows domestic prosecution of persons for crimes committed outside its territory which are not linked to Canada by the nationality of the suspect or the victims or by harm to Canada’s own national interests. However, since Canadian Criminal Law was amended to allow the possibility, there has never been a universal jurisdiction prosecution for torture launched and there have been only two criminal prosecutions initiated since the Crime against Humanity and War Crimes Act came into force\textsuperscript{143}.

Despite the positive advance by Canada in its Report to the International Law Commission in 2009, recognizing the nature and importance of the universal jurisdiction provisions in the Canada Criminal Code, the Canadian Government prefers deportation, as evidenced by deportation of 30 individuals who had been found inadmissible to Canada on grounds they may have been responsible for war crimes or crimes against humanity and war crimes.

\textsuperscript{139} Section 7 of the Crime against Humanity and War Crimes Act, 2000.
\textsuperscript{140} Suresh v Canada (Minister of Citizenship and Immigration), 2002 S.C.C. 1.
\textsuperscript{141} Ibid.
humanity. The 30 men were all slated for deportation rather than extradition, surrender or prosecution\(^\text{144}\).

In a letter to Amnesty International dated 9 August 2011, the Minister of Citizenship and Immigration stated that the Canadian Government, ‘was not obliged to conduct full blown trials, at the cost of millions of taxpayer dollars, to prosecute every inadmissible individual for crimes committed in distant countries, often decades ago. Our main goal is defending Canada and upholding the integrity of our immigration system by enforcing these deportation orders\(^\text{145}\). Public Safety Minister of Canada gave the statement that, ‘Canada is not the UN. It’s not our responsibility to make sure each one of these faces justices in their own countries. What we are doing with is ensuring that Canadian Law is obeyed. These individuals have no right to be here and are being removed\(^\text{146}\).

This is contrary to the positive advanced by Canada in its Report to the International Law Commission in 2009, clearly recognizing the nature and importance of the universal jurisdiction provisions in the Canada Criminal Code.

**Immigration and Refugee Protection Act (IRPA), 2002**

The IRPA confers refugee protection on a person who has been determined by the Immigration and Refugee Board to be a Convention Refugee or a person in need of protection. Section 97 provides the conditions to be complied with in order for a person to be determined to need protection due to a danger of torture or to be a risk to life or a risk of cruel and unusual treatment or punishment.

Section 97(1) states: A person in need of protection is a person in Canada whose removal to his country or countries of nationality or, if he does not have a country of nationality, his country of former habitual residence, would subject him personally;

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention against Torture, or

(b) to a risk to his life or to a risk of cruel and unusual treatment or punishment if


(i) the person is unable or, because of that risk, unwilling to avail himself of the protection of that country.

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from the country.

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

The context of Section 97(1) suggests that nationality refers to citizenship. The reference to ‘removal to their country or countries of nationality’ indicates that a person with more than one nationality is required to prove the removal to any of his or her countries of nationality would expose him or her to a danger of torture within the meaning of Article 1 of Convention against Torture. The term ‘removal’ is not defined in IRPA. The removal order under the provisions of the IRPA indicates that it refers to an order to leave Canada.¹⁴⁷

A person must demonstrate that he or she would be subjected personally to a danger of torture. It is not sufficient to establish that torture is practiced in the country to which the person would be removed. A person presenting a claim based on Section 97(1) (a) must demonstrate that there exist substantial grounds to believe that he or she would be subjected personally to a danger of torture.

A risk may be considered to be personal if the individual alleging a risk of torture has a certain political profile is of a particular ethnicity or belongs to a professional or social group which is targeted or is in a situation similar to others who risk torture.¹⁴⁸

Although the term danger is not defined, it ordinarily refers to an exposure to harm. In ‘Suresh’¹⁴⁹ and ‘Ahani’s’ cases,¹⁵⁰ the Supreme Court equated ‘danger of torture’ with ‘risk of torture’. The burden of proving a danger of torture according to the requirements of Section 97(1) (a) rests with the person alleging such a danger.

According to the Committee against Torture, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable. The person must establish that he/she would be in

¹⁴⁹ Supra note 140.
¹⁵⁰ Ahani v Canada (Minister of Citizenship and Immigration), 2002 S.C.C. 2.
danger of being tortured and that the grounds for so believing are substantial in the way described and that such danger is personal and present. In Canada allegations of torture must be proved on a balance of probabilities151.

In case of Sinnappu v M.C.I.152, guidelines issued for Post-Determination Refugee claimants in Canada reviews, includes that allegations of a risk of torture as defined in the Convention against Torture, were determined to set the standard of proof at less than a clear probability, or even a balance of probabilities, but greater than a mere possibility.

In ‘Suresh’s’ case, the Federal Court of Appeal considered the question of the standard of proof set out by the phrase ‘substantial grounds believed to exist’ applicable to a danger of torture within the meaning of Article 1 of the Convention against Torture. The risk of danger of torture must be personal and present153. The Federal Court of Appeal stated in Ahani’s case, “the appellant must establish, on a balance of probabilities, that he would be exposed to torture at the hands of the Iranian authorities, or as set in Suresh’s case a ‘serious’ risk of harm”154.

In Adjei’s155 case, the Federal Court of Appeal had indicated that the phrase ‘substantial grounds for thinking’ seemed to suggest that the standard of proof was a balance of probabilities and this could not be used interchangeably with ‘serious possibility’ or ‘reasonable chance’.

Contrary to Federal Court’s decision in Adjei’s case, the UK Immigration Appeal Tribunal in Kacaj’s case156 held that ‘substantial ground for thinking,’ ‘reasonable chance’ and ‘serious possibility’ all conveyed the same meaning. The Supreme Court’s decision in Suresh’s case does not directly address the standard of proof nor comment on the Federal Court of Appeal’s findings on the issue. The Court equates ‘substantial grounds to believe that he would be in danger of being subjected to torture, with ‘substantial risk of torture’157.

Section 83 of IRPA provides that information ‘that is believed on reasonable grounds to have been obtained as a result of the use of ‘torture’ will not be relied upon in

153 Supra note 140.
154 Supra note 150.
157 Supra note 140.
immigration security certificate proceedings\(^{158}\). However, Canadian Law enforcement and security agencies may rely upon information that may have been obtained under torture in other circumstances, as in the course of intelligence activities. UN Special Rapporteur stated that, ‘the Canadian Government should adopt a policy prohibiting the use of information in the course of intelligence activities when it has been established that there is a real risk that the information was procured through resort to torture or other ill-treatment\(^{159}\).

Canadian law effectively bars victims of torture, whether citizens, landed immigrants or foreign nationals, from obtaining redress against foreign Governments responsible for their torture, through provisions of the State Immunity Act, 1985 which grants immunity to foreign Governments from the civil jurisdiction in any court in Canada except in law suits based on commercial activities or due to criminal activities, injuries or losses occurring in Canada.

In 2004, a case was filed by a Canadian citizen, Houshang Bouzar, claiming civil damages against the Government of Iran for torturing him in 1993, prior to his arrival in Canada. His counsel argued that the prohibition against torture constitutes a preemptory norm that overrides the civil immunity accorded to foreign states. Rejecting this argument, the Court held that under both customary international law and international treaty, there is today a balance struck between the condemnation of torture as an international crime against humanity and the principle that States must treat each as equals not to be subjected to each other’s jurisdiction. It would be inconsistent with that balance to provide a civil remedy against a foreign state for torture committed abroad\(^{160}\). The reasoning of this decision was followed in cases of Mahar Arar\(^{161}\) and Zahra Kazemi\(^{162}\).

In October 2002, Mahar Arar was subjected to extra-ordinary rendition and removed from the United States to Syria, where he was imprisoned for one year and subjected to torture. His ordeal was subject of a commission of inquiry in Canada which exonerated him from any wrong doing and found that the actions and omissions of

\(^{158}\) Section 83 (1.1) of Immigration and Refugee Protection Act, 2002.


\(^{162}\) Kazemi (Estate of) v Islamic Republic of Iran, 2011 QCCS 196.
Canadian officials contributed to the circumstances leading to his torture. In 2005, Mahar Arar brought a civil action for damages against Syria. The Supreme Court of Ontario dismissed the action and noted that, the Parliament of Canada has not yet amended the Act to exclude immunity for torture.

In Kazemi’s case, a suit was filed against the Iranian Government by the estate of deceased Canadian Citizen Zahra Kazemi, who died as a result of torture while imprisoned in Iran in 2003 and by her son in his own right. The Son’s claim for damages he suffered by way of emotional distress in Canada during his mother’s ordeal was allowed to proceed, but Zahra’s estate’s claim for the torture and death she experienced in Iran was not. The Court held that there are no exceptions to the general principle of State immunity other than those specifically mentioned.

As recommended by the Committee against Torture Canada should amend the State Immunity Act, 1985 to allow effective compensation to victims of international crimes such as torture. It is submitted that, although the Supreme Court of Canada ruled that Canadian Charter applies to everyone and Canada expanded the refugee definition to protect those facing threats to torture, still, in practice it does not. The Canadian Government has ignored interim measures the Committee against Torture asked for and deported individuals who might have faced torture.

All the provisions of the Convention against Torture are not incorporated in the Canadian domestic law. Under Canadian law it is not possible to argue or enforce international treaties in Canadian Courts unless they have been domestically incorporated.