

Torture in Iraq and the United Kingdom's indirect responsibility under CAT

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Abstract

The occurrence of torture has been widespread in Iraq since the invasion by the coalition in 2003. Back in 2005, preceding the Iraqi parliamentary elections, evidence emerged that the Iraqi Interior Ministry was subjecting prisoners to torture and ill treatment. This article analyses State responsibility in the context of the 2005 'incident'. It looks at the circumstances under which the United Kingdom, as part of the coalition, can be held accountable for acts of torture inflicted in Iraqi prisons by Iraqi officers. The question throughout is not whether the UK is responsible directly for those acts of torture but instead whether the UK have some form of residual responsibility for not preventing the occurrence of torture in Iraq. Indeed, torture requires States to 'prevent acts of torture'.

The author focuses on responsibility under the Convention against Torture (CAT) to which the UK is a party, after a brief analysis of the status of the prohibition of torture under international law. She then moves on the criteria under which the torture occurring in Iraq could be attributable to the UK, as, for a state to be responsible, the act or omission must not only be in breach of an international obligation but must also be attributable to the state. To do so, the International Draft Articles on State Responsibility are applied to the situation in Iraq.

Finally, this article underlines the circumstances under which the Convention against Torture can be applied to the situation in Iraq, analysing the extraterritorial applicability of the convention through the jurisprudence of other international and regional human rights and international law mechanisms. The author asserts that as authority and control by a state over persons abroad can be established through the acts and omissions of its agents abroad, when some conditions are met the UK's obligations under CAT extend to the territory of Iraq. While recognizing that the UK's responsibility for acts of torture by the Iraqi government would be hard to establish in the 'incident' described, the author nevertheless points at circumstances under which the UK could engage its international responsibility under CAT for torture occurring in Iraq.

1. Introduction

In the weeks leading up to Iraq's parliamentary elections, held on 15 December 2005, evidence emerged that the Iraqi Interior Ministry was subjecting detainees in some of its detention facilities to torture and ill-treatment.¹ In November 2005, the discovery of 170 detainees, many of whom claimed they had been tortured in a detention facility controlled by

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¹ Amnesty International Report, *Beyond Abu Ghraib: detention and torture in Iraq*, AI Index: MDE 14 /001/2006, March 2006

the Interior Ministry in the al-Jadiriya district of Baghdad, was followed in December 2005 by the inspection by United States forces of another detention facility in Baghdad controlled by the Interior Ministry. As recently as April 2007, the United Nations Assistance Mission for Iraq (UNAMI) reiterated its concerns at the use of torture in detention centres under the authority of the Iraqi Ministries of Interior and Defence.² Those findings are particularly troubling considering that around twenty thousand persons are being held in detention across Iraq by Iraqi authorities.³

Following the start of the invasion in 2003, the Coalition Forces were deployed throughout Iraq. As part of the Coalition, the United Kingdom has sent up to 10,000 troops. (This figure has been reduced to 7,000 and is due to decrease by thousands more in 2007.) The Nuremberg Tribunal concluded that '[c]rimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'⁴ But to enforce international law, individual responsibility is not enough. Indeed, states are the signatories to international treaties and are the ones whose responsibility should be engaged for violations of those treaties' provisions.

Does the presence of UK troops on the ground engage the UK's responsibility for the torture inflicted in Iraqi Interior Ministry prisons? Does this amount to a violation of an international obligation for the UK? This paper addresses that question not with respect to torture inflicted directly by UK soldiers but asks what responsibility could arise for the UK in its failure to prevent the occurrence of torture in Iraq.

As a state party to the Convention against Torture the UK has undertaken to 'prevent torture in any territory under its jurisdiction'. The issue of state responsibility for violations of human rights obligations abroad is at the centre of recent developments in human rights law. This is evident in the current appeal before the House of Lords in the Al-Skeini Case, where the UK's responsibility is being determined for deaths occurring in Iraq. As J. Cerone states, one can say that

a state's human rights obligations may apply with respect to its treatment of non-nationals abroad, where such individuals find themselves under its control, whether directly, through that state's armed forces, or through a subordinate local administration. Further, the legality of the state's presence abroad or whether that state is acting alone or with the acquiescence of the state in whose territory the violation occurs is irrelevant.⁵

What then is the scope of application of the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT)? As a party to CAT since December 1988⁶ the UK is bound to implement it in accordance with the general principles of international law, such as good faith⁷ and *pacta sunt servanda*.⁸ If the Convention is

² UNAMI Human Rights Report, 01/01-31/03/2007, available at <http://www.uniraq.org/FileLib/misc/HR%20Report%20Jan%20Mar%202007%20EN.pdf>, last accessed 16 June 2007

³ *Ibid*, at 21

⁴ Trial of the Major War Criminals before the International Military Tribunal, Nürnberg, 14 Nov. 1945-1 Oct. 1946, in (1950) II Yearbook of the International Law Commission 364, para 98-99

⁵ J. Cerone, 'Minding The Gap: Outlining Kfor Accountability In Post-Conflict Kosovo', (2001) 12 European Journal of International Law 469; P. Rowe also address this aspect in P. Rowe, *The impact of human rights law on armed forces* (Cambridge, UK: Cambridge University Press, 2006), at 228-235

⁶ With no reservation relevant for the analysis undertaken in this paper

⁷ Nuclear Tests Case (Australia v. France), International Court of Justice Reports, 1974, para. 46; 1970 Declaration on principles of International Law concerning Friendly relations and Co-operation among states, UNGA resolution 2625.

applicable to its actions in Iraq then it may give rise to some responsibility for the UK. Could it extend to the failure to prevent torture by other states? This issue is all the more relevant in the current context of states being present on the territory of another through peace support operations or, as is the case here, following an request from another sovereign state. Do states that are witnessing gross human rights violations such as torture have a duty to act? Could other states have an interest in ensuring that the UK prevents torture? What is the status under international law of the prohibition of torture? Some obligations under international law are owed to the international community as a whole. The fact that torture occurs in Iraq is not unknown to the UK government. Can that make the UK complicit?

Those are just a few questions that arise in the context of state intervention abroad and I will analyse in this paper the scope of the UK's obligation to prevent torture, particularly in the framework of CAT, as well as the potential extraterritorial applicability of such an obligation in the context of the UK's presence in Iraq.

This paper does not try to prove that the UK is accountable for the infliction of torture in Iraq by Iraqi forces, but rather looks at what circumstances could render the UK responsible. To shed some light on the numerous questions arising, I will first discuss the UK's responsibility internationally for an eventual breach of its obligations under CAT, looking at the *erga omnes* character of the prohibition of torture, as well as the requirements of attributability of international wrongful acts and whether the failure to protect could apply in this case. Then I will analyse whether the Convention can apply extraterritorially, taking into account the UN approach as well as international and regional approaches on that question. I will then look at the possibility of accountability in front of the Treaty-based mechanisms of the Committee against Torture.

2. The prohibition of torture as an obligation *erga omnes* in the context of the UK's responsibility under CAT and International Law of State Responsibility

Under the International Law Commission (ILC) Draft Articles on State Responsibility, the invocation of responsibility falls primarily under the claim of an 'injured state'.⁹ However, it also indicates that states other than an injured state are entitled to invoke responsibility if 'the obligation breached is owed to a group of states including that state, and is established for the protection of a collective interest of the group; or [if] the obligation breached is owed to the international community as a whole,'¹⁰ i.e. an *erga omnes* obligation. Therefore it is necessary to analyse to what extent the prohibition of torture is an obligation *erga omnes* and consequently why any state could bring a claim against the UK and if the acts of torture by Iraqi forces can be attributed to the UK.

2.1 The prohibition of torture as an obligation *erga omnes*

First, under Article 1 of CAT torture is defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or

⁸ As Iraq is not a party to CAT, it cannot be held accountable for violations of CAT. However, this does not mean that it is not bound by customary international law with regard to torture.

⁹ ILC Draft Articles on State Responsibility, art. 42, 2001

¹⁰ Ibid., art. 48, 2001

suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity... .

Moreover, the prohibition of torture requires states not only to refrain from acts of torture but also to 'prevent acts of torture'. It is now considered one of the most important of states' human rights' obligation.

As early as 1970 the International Court of Justice (ICJ) recognised that there exist obligations of a state 'toward the international community as a whole' adding that 'given the importance of the rights involved all states can be held to have a legal interest in their protection, they are obligation *erga omnes*.'¹¹ In this specific judgment, torture was not part of the list of obligations *erga omnes* but it seems clear that it can fall within the 'principles and rules concerning the basic rights of the human person'.¹² The same idea was mentioned by Judge Jessup in his dissenting opinion in the South West Africa Case¹³ when he stated that 'states may have a general interest - cognizable in the international court- in the maintenance of an international regime adopted for the common benefit of the international society.'

Then, in 1980, a US Court of Appeals recognised that 'the torturer has become [...] *hostis humani generis*, an enemy of all mankind.'¹⁴ CAT itself recognises the prohibition of torture as absolute and non derogable.¹⁵

Finally, more than a treaty provision,¹⁶ international law has given the prohibition of torture the status of *erga omnes* obligation and of peremptory norm of international law.¹⁷ The peremptory character of the prohibition of torture has been widely discussed; however at this point it is worthwhile spending some time on the consequences of such a characterization, in that with regard to the possibility for states to bring a claim against an alleged violating state, it withdraws the requirement of injury.

It has been shown that torture amounts to an obligation *erga omnes* but under what circumstances does its breach entitle a third state to bring a claim? The Court in the South West Africa Case followed a restrictive approach under which the interest of the claiming state needs to be 'personal and direct'.¹⁸ However, in the *Blaskic Case*¹⁹, the International Criminal

¹¹ *Barcelona Traction, Light and Power Company Limited, Second Phase, Judgment*, ICJ Reports 1970, at para. 33. 'The passage on obligation *erga omnes* attracted the support of all judges': M. Ragazzi, *The concept of International Obligation Erga Omnes* (Oxford: Clarendon Press, 1997) at 11

¹² *Ibid.*, at para. 34; the third Restatement in the US provides that 'a state violates international law if, as a matter of state policy, it practices, encourages or condones . . . (d) torture or other cruel, inhuman or degrading treatment or punishment', *The American Institute, Restatement Third, Restatement of the Foreign Relations Law of the United States*, (St Paul: American Law Institute Publishers, two vols, 1987) at 641 and 561 at section 702; also see n. 52 below, para. 2 which states that "rules concerning the basic rights of the human person' are *erga omnes* obligations'.

¹³ Dissenting opinion of Judge Jessup, *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment (2nd phase), 18 July 1966, 325-440 at 373

¹⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), 30 June 1980, on remand, 577 F.Supp. 860 (EDNY 1984), 10 Jan. 1984 at 890

¹⁵ See L. Wendland, *A Handbook on States obligation under the UN Convention against torture*, (Geneva: Association for the Prevention of Torture, May 2004) at 32

¹⁶ Art 1. CAT; art. 7 ICCPR; art. 3 ECHR.

¹⁷ See the international jurisprudence recognizing torture as peremptory norm: *Prosecutor v. Furundzija*, ICTY, IT-95-17/1-T (10 Dec. 1998), para. 153-157; *ICTY, Prosecutor v Delalic Case no IT-96-21-T*, judgment of 16 Nov. 1998, para. 454; *Kunarac, Kovac and Vokovic*, (Appeals Chamber), 12 June 2002, para. 466; *Al-Adsani v. The UK*, ECHR, 21 Nov. 2001, para. 30; *R. v. Bow Street Metropolitan Magistrate, ex parte Pinochet Ugarte (No.3)*, UK House of Lords, 24 Mar. 1999.

¹⁸ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment (2nd phase), 18 July 1966, paras. 455-456

Tribunal for the Former Yugoslavia (ICTY) introduced the notion of 'treaty based obligation erga omnes' under which some treaty provisions amount to obligations erga omnes toward the State Parties.²⁰ It seems to indicate that with regard to the prohibition of torture under CAT, not only are all States Parties entitled to bring a case to the Committee (under some conditions, as will be seen in Part 3.), but they could also be entitled to bring a case in front of the ICJ. Indeed, subject to possible reservations, Article 30 of CAT recognises the possibility for States Parties to bring their disputes in front of the ICJ. Applying the concept of obligation erga omnes partes, the requirement of being injured by the claiming state could be dropped in favour of a less strict approach under which all State Parties have a legal interest in the matter. It follows that a State Party to CAT, claiming that the UK is in breach of its obligation, could possibly bring an international claim on the basis that the prohibition of torture is an obligation erga omnes partes.

However the ICJ has made it clear that 'the erga omnes character of a norm and the rule of consent to jurisdiction are two different things [...] [and the Court] has jurisdiction only to the extent that [states] have consented thereto.'²¹ As Iraq is not a party to CAT, the ICJ would have to rule first on Iraq's responsibility to be able to then rule on the UK's responsibility. In this context only a claim brought against both states and based on customary international law (or peremptory norms), provided both states recognised the jurisdiction of the Court, would have a chance to be admissible.

2.2 Attributability and responsibility

This section will examine under what circumstances, if any, the conduct of the Iraq Forces can be attributable to the UK for the purpose of state responsibility under international law.

The ILC requires two elements to define an 'internationally wrongful act of a state': first, that the 'conduct constitute[s] a breach of an international obligation of the state', and second that the same conduct or omission be 'attributable to the state under international law'.²²

Under the ILC Draft Articles, the conduct of an organ placed at the disposal of one state by another is considered an act of the former state.²³ The same applies when a person or group of persons is acting on the instructions of or 'under the direction or control of that state' in carrying out the conduct.²⁴ However, in the situation discussed in this paper it is difficult to assume that the Iraqi personnel in the prisons are acting under the direction or control of the UK forces. J. Crawford correctly concludes that 'article 6 is not concerned with ordinary situations of interstate cooperation or collaboration, pursuant to treaty or otherwise.'²⁵ Indeed, even if in the Tadic Case²⁶ the notion of 'overall control' goes further than the one of 'effective

¹⁹ Prosecutor v. Tihomir Blaskic (Appeal judgment), ICTY, 29 Oct. 1997, para. 25

²⁰ This aspect is discussed by C.J. Tams in C.J. Tams, *Enforcing obligations erga omnes in International Law*, (Cambridge, UK: Cambridge University Press, 2005) at 119

²¹ East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995, para. 29; Case Concerning armed activities on the territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda) Request for the indication of provisional measures, ICJ, 10 July 2002 para. 71; Case Concerning armed activities on the territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda) Jurisdiction of the Court and Admissibility, 3 Feb. 2006, para. 125

²² ILC Draft Articles on State Responsibility, n. 9 above, art. 2

²³ Ibid., art. 6

²⁴ Ibid., art. 8

²⁵ J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge, UK: Cambridge University Press, 2002) at 103

²⁶ The prosecutor v. Dusko Tadic, ICTY, Appeals Chamber, 15 July 1999, paras 115-145.

control', as stated in the Nicaragua Case²⁷, it cannot be said that the UK has overall control over Iraq anymore.²⁸

Then, even if Iraq is the primary actor responsible for acts of torture by its forces against its population, the International Commission on Intervention and State Sovereignty's position is noteworthy. It has stated that:

while the state whose people are directly affected has the default responsibility to protect, a residual responsibility lies with the broader community of states [...] [it is] activated when a particular state is clearly either unwilling or unable to fulfil its responsibility to protect or is itself the actual perpetrator of crimes or atrocities.²⁹

Article 9 of the Draft Articles enunciates the same principle whereby responsibility can arise when a person or a group of person acts 'exercising elements of the governmental authority in the absence or default of the official authorities [...]' This argument is worth making in the context of continuing violence on the ground in Iraq. What is the level of authority needed to establish that the Iraqi government is able to ensure its citizens are not tortured? Furthermore, if as stated above, a residual responsibility is engaged for the international community, what level of responsibility could be found with regard to one state (the UK) being present in another state (Iraq) unable to prevent torture within its own borders?

In Iraq, instability can lead to an absence of the official authorities in some areas. But it probably goes too far to argue that the UK forces are exercising elements of the governmental authority. J. Crawford recognises that it may apply to 'cases where the authority is being gradually restored, e.g., after foreign occupation'. However, the presence of an interim government, the election of a new Parliament, and recognition by the Security Council that the occupation has ended all serve to argue against the idea that Iraq is at a stage that does not enable it to exercise sufficient authority to satisfy Article 9 requirements. On that basis, the infliction of torture by the Iraqi forces cannot be attributed directly to the UK.

The ILC Draft Articles state the circumstances in which the conduct of a state not acting as an organ or agent of another state, could still involve the former state's responsibility 'even though the wrongfulness of the conduct lay in the breach of the international obligation of the former'.³⁰ For the ILC, a state can be implicated in the internationally wrongful conduct of another state if it provides aid or assistance in order to facilitate the commission of a wrongful act³¹, if the acting state is 'subject to the power of direction or control of another state',³² or when coercion led to the wrongful conduct of the other state.³³

²⁷ Military and Paramilitary activities in and against Nicaragua (Nicaragua v. USA) Judgment, ICJ reports 1986, para. 115 : 'For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.'

²⁸ The comparison with the US' possible responsibility for the acts of the Northern Alliance forces in Afghanistan gives the same conclusion in saying that 'the US had [no] legal responsibility for the care of Taliban prisoners in Northern Alliance hands.' J. Ross, 'Jurisdictional aspects of international Human Rights and Humanitarian Law in the war on terror', in F. Coomans and M. T. Kamminga (eds.) *Extraterritorial application of Human Rights Treaties* (Oxford: Intersentia, 2004) 9-24, at 12.

²⁹ The responsibility to protect: report of the International Commission on Intervention and State Sovereignty, [co-chairs, G. Evans and M. Sahnoun] (Ottawa: International Development Research Centre, 2001) para 2.31 at 17.

³⁰ Nicaragua v. USA, n. 27 above, at 5.

³¹ ILC Draft Articles on State Responsibility, n. 9 above, art.16.

³² Ibid., art.18, 2001

³³ Ibid.

Coercion is not relevant for our case and the Iraqi troops or police cannot be said to be under the direction and control of the UK as they depend on the Iraqi government directly. But the application of the first principle can still be discussed. Indeed it implies a causal link between the provision of aid or assistance and the breach of obligations but also the knowledge by the sending state that its aid and assistance are going to be used for the commission of an international wrongful act. It would presuppose the deliberate help of the UK in the infliction of torture. In the present circumstances, nothing shows that the UK is on the ground with the specific intent of facilitating torture by the Iraqi forces.

However, if those cases continue to occur, it would be interesting to look at how, facing the widespread practice of torture in a country where it is on the ground providing help and assistance, the UK's responsibility can be engaged and to what extent it could amount to complicity. Cohen puts it thus – 'great power donors often [provide] aid to a [...] friend. With or without the donor's approval, the friend may use this aid to violate international law. Suppose the donor knows of these violations and continues to provide aid. Should a donor escape legal responsibility for complicity?'³⁴ Complicity is related to the notion of facilitating the offence, as seen above with the ILC Draft Article 16. However, it is worth asking whether negligence or 'reckless disregard' by the UK to the practice of torture by the Iraqi forces could amount to complicity. It would extend state's responsibility, but the argument does not sufficiently satisfy the criteria above to amount to a breach by a state of its obligations. Moreover, complicity requires that the aid given be a 'substantial factor' in the commission of the breach.³⁵ While the technical and military help provided by the UK is important, it remains that it is not a substantial factor in the infliction of torture by Iraqi forces.

Finally, one should be careful in trying to compare the notion of complicity under International Criminal Law (ICL)³⁶ and the one in the law of state responsibility. Indeed, the notion of complicity in torture exists under ICL but is not the focus of this paper.³⁷ What raises a difficulty under the law of international state responsibility is the extent to which the failure to prevent torture by a state in the territory of another state can amount to complicity and whether the first state bears any responsibility for this failure.

The prohibition of torture extends to both direct and indirect measures.³⁸ This means that even if the UK soldiers in Iraq do not actively take part in acts of torture by the Iraqi forces, indirect involvement or a lack of action could still engage their responsibility. Indeed, an international wrongful act can consist in actions but also in omissions (positive obligation).³⁹ Moreover the wording of CAT expressly spells out that state parties 'shall take effective legislative, administrative, judicial or other measures (emphasis added) to prevent acts of torture

³⁴ M.P. Cohen, 'US legal involvement in violations of Palestinian rights', in (1989) 18 *Journal of Palestine Studies* 3, 76-95 at 76

³⁵ *Ibid.*, at 79

³⁶ The notion has been defined under the ICTR and ICTY case law: *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, 2 Sept. 1998; *Prosecutor v. Milomir Stakic*, Case No. IT-97-24-T, Decision on Rule 98 (31 Oct. 2002)

³⁷ Under Art. 4 of CAT States have a duty to criminalize complicity or participation in torture as a different crime from torture.

³⁸ Centre for Human Rights and Global Justice, *Torture by Proxy : International Law applicable to 'extraordinary renditions'*, briefing paper, New York University School of Law, Dec. 2005.

³⁹ ILC Draft Articles on State Responsibility, n. 9 above, art.1. Moreover, with regard to torture the ICTY has stated that 'States are obliged not only to prohibit and punish torture but also to forestall its occurrence [...] states are bound to put in place measures that may pre-empt the perpetration of torture.' *Prosecutor v. Furundzija*, see n. 17 above, at para. 148.

[...]⁴⁰ J. Crawford has analysed the extent to which acts or omissions can be regarded as imputable to a state,⁴¹ and in our case omission may provide a basis to hold the UK troops accountable for failure to act. However, it would be necessary to show with strong evidence that they knew, or ought to have known, that the Iraqi forces were torturing civilians, and were able to prevent it. This is difficult, given that what the UK forces knew or not is not all in the public domain. One thing remains clear: the numerous press releases from the BBC, the UN Assistance Mission to Iraq's reports as well as reports from human rights NGOs have highlighted the torture phenomenon in Iraq on several occasions and the UK government would find it hard to deny knowledge of a widespread practice of torture in Iraq. However, in this specific case it seems too early to conclude that the failure to prevent Iraqi forces from torturing detainees can amount to a breach of the UK's obligations under international law, with the level of control of the UK over the Iraqi forces being insufficient to have enabled it to prevent the infliction of torture. A. Clapham states that 'there is a volunty today to extend the limit of international criminal responsibility beyond those who perpetrate international crimes to those who facilitate such crimes [...].'⁴² It will need to be seen whether the same trend applies to state responsibility.

It appears that the ILC Draft articles provide a good basis on which to determine state responsibility, however it is non-binding. Moreover in the absence of a state injured and with little prospect of a state acting in the collective interest under ILC Article 48, the Committee against Torture still has a primary role in highlighting states' responsibility for infliction of torture.⁴³ As stated above, the UK (contrary to Iraq) is a Party to CAT.

3. Extraterritorial application of CAT and UK responsibility in Iraq.

This section now discusses whether the Convention is applicable to the omissions of a state's armed forces that take place outside the territory of that state.

Under Article 2(1) of CAT, States are obliged to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction [emphasis added].' Furthermore, under Article 5(1)(a), State parties should establish jurisdiction over acts of torture 'when the offences are committed in any territory under its jurisdiction [...]'. This phrasing seems to limit the scope of the obligation and for the purpose of examining the UK's responsibility under CAT it is necessary to understand what is meant by 'territory under its jurisdiction' and whether it involves obligation for states to prevent torture in areas outside their territory and under which conditions. It is worth at this stage highlighting that, during

⁴⁰ CAT, Art. 2

⁴¹ *Nicaragua v. USA*, n. 27 above, at 81-82; *United States Diplomatic and Consular Staff in Tehran. (US v. Iran)*, 24 May 1980, ICJ Report 1980 at 3; *Dickson Car Wheel Company, RIAA*, Vol IV 669 (1931) at 678; *Corfu Channel case(UK-Albania) (MERITS)*.ICJ, Judgment of 9 April 1949

⁴² A. Clapham, 'Issues of complexity, complicity and complementarity : from Nuremberg trials to the dawn of the new International Criminal Court', in P. Sands (ed.) *From Nuremberg to the Hague, the future of international criminal justice* (Cambridge: Cambridge University Press, 2003) 30-68 at 51

⁴³ See the parallel with the protection of refugees by the UNHCR in G.S.Goodwin-Gill, 'State responsibility and the "good faith" obligation in International Law', in M.Fitzmaurice and D.Sarooshi (eds.), *Issues of State Responsibility before the International Judicial Institutions, The Clifford Chance Lectures, Vol.7*, (Oxford and Portland: Hart Publishers, 2004) 75-105 at 83; *Prosecutor v. Furundzija*, n. 17 above, para. 152 says : 'Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfil its international obligations.'

the preparatory work of the Convention, the UK repeatedly stated that 'it would find it difficult to accept even a limited degree of extraterritorial jurisdiction' and systematically proposed to replace 'jurisdiction' by 'territory'.⁴⁴ However, in their handbook, J.H.Burgers and H. Danelius explain that 'the obligation to establish jurisdiction is not limited to a state's land territory [...] it also applies to [...] any territories over which a state has factual control.'⁴⁵

3.1 Scope of jurisdiction under CAT: the UN approach through the Committee against Torture and the Human Rights Committee (HRC)

To see whether the UK took the necessary effective measures to prevent the occurrence of torture in Iraq or whether it would be possible to bring a claim in the UK for the torture of Iraqis by Iraqi forces, the Convention's provisions need to be applicable to the UK in the context of its presence in Iraq. Indeed, for a state to be in breach of a treaty obligation, it needs to be established that it is bound by the treaty and that the treaty applies in the specific situation. As we will now see, the UN approach to the extraterritorial application of CAT in situations other than one of occupation and of physical control over persons abroad, does not give a clear answer as to whether the UK's responsibility can be engaged for its failure to prevent acts of torture by Iraq.

The UK's position to the Committee against Torture has moved towards the recognition of some extraterritorial applicability of the Convention. Indeed it has assured the Committee that the 'United Kingdom Armed Forces, military advisers, and other public servants deployed on operations abroad are "subject at all times to English criminal law" including the prohibition on torture and ill-treatment.' However, it has refused to recognise the applicability of the Convention to its actions in Iraq and Afghanistan. The Committee's own interpretation with regard to the UK's actions in Iraq recognises its responsibility for violations of the Convention in 'all territories under [its] jurisdiction and considers that this principle includes all areas under the de facto effective control of the state party's authorities.'⁴⁶ It is necessary to remember in this context that the legal situation may have changed since 2004. Indeed, following Resolution 1619 (August 2005), followed by Resolution 1637 (November 2005), the Security Council has 'reaffirmed the independence, sovereignty, unity, and territorial integrity of Iraq',⁴⁷ which seems to indicate the end of the occupation.⁴⁸ Nevertheless the Committee against Torture, when considering the US report in 2006, maintained its position that State Parties should recognize and ensure that the 'provisions of the Convention [...] apply to and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.'⁴⁹ Consequently, the question remains as to whether the UK could still be held accountable for failure to prevent torture in Iraq on the sole basis that it is present on the ground with Iraq's consent, and may exercise in some part of the country de facto control. The problem arising from this situation is that the Committee would have first to rule on Iraq's responsibility. Indeed, even if the UK may share a part of the responsibility, Iraq as the sovereign state

⁴⁴ J.Herman Burgers and H.Danelius, *The United Nations Convention against Torture, a handbook on the Convention against Torture and other cruel, inhuman or degrading treatment or punishment*, (The Netherlands: Martinus Nijhoff Publishers, 1988) at 40 and 66

⁴⁵ *Ibid.*, at 131 and 133

⁴⁶ Concluding Observations/Comments CAT/C/CR/33/3, 10 Dec. 2004

⁴⁷ SC Res 1619 (11 Aug. 2005) S/RES/1619 (2005) and SC Res 1637 (8 Nov. 2005) S/RES/1637 (2005)

⁴⁸ The affirmation by the Security Council that the occupation has ended has been criticized, especially with regard to the Hague Regulation IV art. 42 definition of occupation. However, even if the argument is worth being made, it is not the purpose of this paper to analyse it.

⁴⁹ Committee Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations: USA*, UN Doc. CAT/C/USA/CO/2, 25 July 2006, para. 15.

remains the primary State with the obligation to prevent the occurrence of torture. However, with Iraq not being a party to CAT, it is doubtful that the Committee would examine its responsibility to determine the UK's. Finally, the ICJ, in the East Timor Case, reiterated the findings of the Monetary Gold Case⁵⁰ which states that 'the court can only exercise jurisdiction over a state with its consent.'⁵¹

Turning to the Human Rights Committee, it has recognised the extraterritorial application of the International Covenant on Civil and Political Rights (ICCPR) for cases of effective control over foreign territory. In its General Comment 31, it stated that 'a State Party must respect and ensure the rights [...] to anyone within the power or effective control of that state party, even if not situated within the territory of the state party.' It continues by saying that 'this principle also applies to those within the power or effective control of the forces of a state party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.'⁵² Indeed, it followed this approach with regard to Israel and the occupied territories.⁵³ However, other cases seem to go in the direction that, out of a situation of occupation, Iraq would be the one the Committee would consider accountable, and it is not sure that the presence of the UK and its 'control' over some areas would be considered enough to discharge Iraq from its obligations and charge the UK for them. In its Concluding Observations on Cyprus in 1998, the HRC accepted that Cyprus could not 'ensure the application of the Covenant in areas not under its jurisdiction'.⁵⁴ But in the case of Moldova⁵⁵ and the Transdnestrrian region as well as with Yugoslavia⁵⁶ in 1992, the threshold to be exempted from applying the Covenant seemed higher. Indeed, the existence of links between the government and the persons in charge of the areas claimed not to be in its control was, in the latter case, ruled sufficient to involve Yugoslavia's responsibility. With regard to the notion of control by a state, the HRC developed its position in its Concluding Observations on Belgium in 1998. It recognised the applicability of the Covenant to the Belgian troops deployed in Somalia under a peace keeping mission⁵⁷, and in 2006 the HRC urged the United States to interpret the Covenant in good faith, in particular by acknowledging its applicability 'for individuals under its jurisdiction but outside its territory...'.⁵⁸ It follows that the application of the Covenant to UK soldiers for their actions would apply, but, with regard to the action of the Iraqi police, to draw such a conclusion seems dubious and not in the line of the Committee's previous decisions. Indeed, the notion of effective control applied by the HRC does not go as far as 'overall control' or 'influence' and it would be difficult to sustain an argument that the UK is exercising effective control over Iraq since the end of the occupation as acknowledged by the Security Council. As the acts looked at are omissions rather than direct actions, it is difficult to assess what level of control would entail a responsibility to prevent.

⁵⁰ Monetary Gold Removed from Rome in 1943, Judgment, ICJ Reports 1954, p. 32

⁵¹ Case concerning East Timor (Portugal v. Australia), ICJ, 30 June 1995, para. 34.

⁵² General Comment 31, 29 Mar. 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10

⁵³ UN Doc. CCPR/C/79/Add.93, in 1998, para. 10; UN Doc. CCPR/C/CO/78/ISR (2003) para. 11

⁵⁴ UN Doc. CCPR/C/79/Add.88, para. 3

⁵⁵ UN Doc. CCPR/CO/75/MDA

⁵⁶ UN Doc. CCPR/C/79/Add.16

⁵⁷ UN Doc. CCPR/C/79/Add.99, para. 14

⁵⁸ Concluding Observations of the Human Rights Committee: USA, UN Doc. CCPR/C/USA/CO/3/Rev.1, 18/12/2006, paras. 3 and 10

In the *Lopez Case*,⁵⁹ the HRC recognised Uruguay's responsibility for acts of its agents abroad, stating that if a state exercises power and authority over persons then its responsibility is engaged. It stated that states can be held accountable 'for violations of rights under the Covenant which its agents commit upon the territory of another state, whether with the acquiescence of the Government of that state or in opposition to it.'⁶⁰ However with regard to types of conduct that do not fall within the two previous categories, the HRC has not yet had an occasion to express its position, as no such case has been brought before it.⁶¹ Of interest on this point is the debate opposing D. McGoldrick and M. Sheinin on the possible extraterritorial application of the Covenant in situations such as the one in the *Bankovic Case*, where a claim was brought to the European Court of Human Rights (ECtHR) against members of the North Atlantic Treaty Organization (NATO) for the bombing of a television station in Belgrade during the NATO operation in Yugoslavia. While D. McGoldrick concludes that 'rights should not be interpreted to extend to individuals unless the state is in a position to give effect to the rights',⁶² M. Sheinin adopts a broader view of the extraterritorial application of the Covenant and ends by quoting the 2003 HRC Concluding Observations on Israel, where the approach is not effective control any more but 'conduct by [state]'s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant [...]'.⁶³ The debate could go on further but the lack of clear cut decisions on that matter and the divisions amongst academics lead us to turn to the positions of the ICJ and of the ECtHR and see if, under their approach, UK responsibility could be engaged.

3.2. International and regional approaches of the ICJ and of the ECHR

It is instructive to briefly examine the position of the ICJ, which recognised in the *Wall Case*⁶⁴ that the provisions of ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child applied to the occupied territories and that 'the ICCPR is applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory.'⁶⁵ However, this statement is highly contextual as the Court implied that the West Bank and Gaza were 'part of the territory of Israel for the purposes of the application of the Covenant'.⁶⁶ Then, the ICJ position is clear on the fact that the protection of the ICCPR does not cease in time of war.⁶⁷ It follows that the debates concerning whether the situation in Iraq amounted to a non-international armed conflict, internal disturbances or else is of no relevance for the applicability of the prohibition of torture under CAT in our case. Indeed, Article 2(2) of CAT makes it clear that 'no exceptional circumstances whatsoever,

⁵⁹ *Lopez Burgos v. Uruguay*, Report of the Human Right Committee, UN Doc. A/36/40,176 (1981)

⁶⁰ *Ibid.*, para. 12.3

⁶¹ F.Coomans and M. T. Kamminga, 'Comparative Introductory comments on the extraterritorial application of Human Rights Treaties', in F.Coomans and M. T. Kamminga (eds.) *Extraterritorial application for Human Rights Treaties*, (Oxford: Intersentia, 2004), 1-9 at 4

⁶² McGoldrick, 'Extraterritorial application of the ICCPR', in F. Coomans and M. T. Kamminga (eds.) *Extraterritorial application of Human Rights Treaties* (Oxford: Intersentia, 2004) 41-73, at 46

⁶³ M. Sheinin, 'Extraterritorial effect of the ICCPR', in F.Coomans and M. T. Kamminga (eds.) *Extraterritorial application for Human Rights Treaties*, (Oxford. Intersentia: 2004) 73-82 at 81

⁶⁴ *Legal Consequences of the Construction of a wall in the occupied Palestinian Territory*, AO, ICJ, 9 July 2004, paras. 134 and 137

⁶⁵ *Ibid.*, para. 111

⁶⁶ M. J. Dennis, 'Application of Human Rights Treaties extraterritorially in times of armed conflict and military occupation', (2005) 99 *American Journal of International Law* 1, at 123

⁶⁷ *Legality of the Threat or Use of Nuclear Weapons*, AO, ICJ, 8 July 1996, para. 25.

whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.’

Moreover, in the *Bosnia Case*⁶⁸, the ICJ indicated that ‘the obligation [...] to prevent and punish the crime of genocide is not territorially limited by the Convention.’ In the same judgment the ICJ recognised the status of obligation *erga omnes* to the crime of genocide. However the Court emphasized that the Convention itself did not have any territorial limitation. It seems to mean that in the case of CAT, the reference to ‘territories within its jurisdiction’ in the text of the treaty would limit the obligation of the UK to implement CAT’s provisions to territories abroad.

When it comes to regional systems⁶⁹ and with regard to the UK, in order to identify the scope of jurisdiction the European Convention on Human Rights (ECHR) system provides some support. Under the ECHR, to which the UK is a party, the issue of extra-territorial jurisdiction has given rise to an interesting jurisprudence. Indeed, responsibility for acts of the British authorities in Berlin was not found in the *Ilse Hess v. the UK* case; however, the possibility of liability for acts of its authorities abroad was not excluded.⁷⁰ In the *Cyprus v. Turkey* case, concerning allegations of abuses by Turkey in the occupation of Northern Cyprus, the Commission stated that effective control by the armed forces of a state over persons and property abroad engaged the state’s responsibility for their actions and omissions.⁷¹

First, it is important to recall that under ECtHR’s jurisprudence, jurisdiction has been defined as ‘primarily territorial’.⁷² However, it is also recognised that in exceptional circumstances, it could apply extraterritorially.⁷³ It has been suggested that the existence of a ‘direct and immediate link between the extraterritorial conduct of a state and the alleged violation of an individual’s right, [would bring the individual] within the jurisdiction [...] of the state concerned.’⁷⁴ However, it does not help in the case of Iraq, as no direct and immediate link exists between the UK troops and the acts of torture, the UK troops being not directly involved. In the Court case law some of the exceptions to the principle of territorial jurisdiction include ‘acts of [...] authorities which produced effects or were performed outside their own territory’⁷⁵ as well as when the [state], through effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government.⁷⁶

⁶⁸ *Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, ICJ Reports 1996, para 31.

⁶⁹ The inter-American system provides some jurisprudence with regard to the scope of jurisdiction; however, the UK not being part of it, it seems, for the issue at stake in this paper, that the analysis of the ECHR jurisprudence is more relevant to what can be expected from the UK with regard to the extraterritorial application of its human rights obligations.

⁷⁰ *Hess v. the United Kingdom*, 28 May 1975, Decisions and Reports (DR) no. 2, at 73

⁷¹ *Cyprus v. Turkey* (Appl.No.6780/74 and 6950/75), ECommHR, 26 May 1975, paras. 125-136

⁷² *Bankovic and others v. Belgium and others*, 12 Dec. 2001, ECHR, Admissibility, para. 59

⁷³ *Ibid.*, para. 57

⁷⁴ R.Lawson, ‘Life after Bankovic: on the extraterritorial application of the ECHR’, in F.Coomans and M. T. Kamminga (eds.) *Extraterritorial application for Human Rights Treaties*, (Oxford: Intersentia, 2004) 83-124 at 104; *Zehnalova and Zehnal v. Czech Republic* (Appl No.38621/97), ECHR, 14 May 2002

⁷⁵ *Droz and Janousek v. France and Spain*, (1992), Series A no.240, para. 91

⁷⁶ N. 72 above, at para. 71; *Loizidou v. Turkey*, (1995) (preliminary objections), Series A no 310; *Loizidou v. Turkey*, judgment of 18 Dec. 1996 (merits), Reports 1996-VI; *Cyprus v Turkey* (2001) [GC], no. 25781/94, ECHR

Then, the approach taken in *Ilascu and others v. Moldova and Russia* is of some interest to the situation in Iraq. Indeed, following the break up of the Union of Soviet Socialist Republics (USSR), Moldova faced a separatist movement, the 'Moldavian Republic of Transdniestria' (MRT) which was, according to Moldova, assisted by Russia. Following allegations of mistreatment of prisoners, a case was brought against both States. It is interesting here to note that even if Moldova was found responsible for failure to fulfil its positive obligation to prevent torture under the Convention, Russia was also found responsible as well, as the Court ruled that the *de facto* control Russia had over the MRT brought it under its jurisdiction. The Court found that, even if Moldova was the legitimate government of the whole territory, it did not exercise authority over the MRT. The reasoning in this case is confusing, as, after having stated that Moldova did not exercise authority over the MRT, the Court went further, saying that it still had positive obligations under the Convention with regard to the MRT. Turning to Russia's jurisdiction, the Court applied the same approach and stated that 'the MRT [...] remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation' and that 'applicants therefore come within the jurisdiction of the Russian Federation [...] and its responsibility is engaged with regards to the acts complained of.'⁷⁷

The same principle applied to the situation in Iraq could imply the UK's responsibility as being present on the ground and Iraq still being under the 'decisive influence' of the Coalition Forces and of the International Community. The level of control needed to fulfil the *Ilascu Case* threshold would be met. However, Iraq is not a party to the ECHR (or CAT), whereas in the precedent case both states were parties to the Convention. Moreover, in the *Ilascu Case* it was a matter of a state influencing a separatist movement enough to be held accountable for its acts. The UK is in Iraq with its consent and to support the official government; it seems difficult to push the comparison as far as saying that, whether the supported party is a state or a separatist movement, the same level of responsibility is engaged.

Still, in the *Ilascu Case* the Court restates its approach with regard to jurisdiction, which is that 'overall control'⁷⁸ of an area can engage a state's responsibility. It even goes further when it highlights that 'where a Contracting State exercises overall control over an area outside its national territory, its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support.'⁷⁹ This approach seems to suggest that, even if the UK is no longer an occupying power in Iraq, if it can be shown that in some areas it has overall control and that the local administration survives there only by virtue of its support, then its responsibility can be engaged. This argument is worth making in the context of violence occurring in Iraq. Indeed, while many argue as to whether it is a 'civil war' or not, the simple fact that in some localities the local authorities would not be able to maintain order without the UK troops' help could bring those areas under the UK's jurisdiction as understood by the *Ilascu Case*. In *R. Lawson's* view no

impossible or disproportionate burden should be imposed, that is one should not expect state agents to secure all Convention rights and freedoms where they are simply not in a position to do so. On the other

⁷⁷ *Ilascu & Others v Moldova & Russia*, Appl No.48787/99, Judgment, 8 July 2004, paras. 333-335 (for Moldova) and paras. 392-394 (for Russia)

⁷⁸ *Ibid.*, para. 315

⁷⁹ *Ibid.*, para. 316

hand, to the extent that they assume de facto control over individuals and interfere with their lives they should take measures within the scope of their powers [...].⁸⁰

Nevertheless, as pointed out by Judge Kovler in his dissenting opinion, 'it is only where, behind a personal situation, systematic violations can be perceived that a foreign state's objective responsibility can be engaged.'⁸¹ It would be necessary, for the UK to be responsible, to show that its failure to act is systematic and under the present circumstances the argument cannot (yet?) be made.

Finally, looking briefly at the UK case law on the applicability of the Convention, the Court in *R. (on the application of Al-Skeini) v. Secretary of State for Defence*⁸² (currently under appeal in the House of Lords)⁸³ affirmed that 'the essential and primary nature of Article 1 jurisdiction and therefore of the scope of the Convention is territorial' explaining that the previous 'broad personal jurisdiction approach' had been replaced by the 'special exception of the doctrine of effective control of an area.'⁸⁴ In that case the Court recognized the applicability of the Convention to the person who had been detained by the UK troops in Iraq but refused to apply it to the persons killed in the streets of Basra City, explaining that the UK was not in control of the city as understood by the ECtHR. However, in the *Issa Case* the ECtHR had concluded that 'as a consequence of military action, [states] could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory....'⁸⁵ Moreover, in the *Isaak Case* the ECtHR indicated that authority and control by a state over persons abroad could be established through the acts and omissions of its agents abroad.⁸⁶ It follows that, even if the concept of jurisdiction seems not to encompass the situation dealt with in this paper, the recent developments in the jurisprudence of the ECtHR open the way to a broader recognition of extraterritorial applicability of the Convention which might lead to a future recognition of responsibility for states present on the ground in another sovereign state. If this approach were to be followed in the future, with regard to the applicability of CAT, one could see some possibilities for claiming that the UK is in violation of its obligation to prevent torture in Iraq. In such a case, the Convention, through its review mechanisms, could provide an avenue to determine the exact responsibility of the UK and hold the UK accountable.

3.3 CAT remedies

Under CAT, there exist four avenues of review of a state's conduct, the first one being the examination of the reports submitted by the state,⁸⁷ the second the possibility of individual complaints,⁸⁸ then inter-states complaints,⁸⁹ and finally inquiries launched by the Committee

⁸⁰ Lawson, n. 74 above, at 106.

⁸¹ *Ilascu & Others v Moldova & Russia*, n. 77 above, Dissenting opinion of Judge Kovler; see also *Ireland v. the United Kingdom*, judgment of 18 Jan. 1978, Series A no. 25, para. 159

⁸² *R.(on the application of Al-Skeini) v. Secretary of State for Defence*(QBD (Admin)) Queen's Bench Division (Administrative Court), (2004), para. 245

⁸³ The hearing took place in April 2007, with the judgment expected later this year.

⁸⁴ *Al-Skeini*, n. 82 above, para. 258; para 285 states that 'it would drive a coach and horses through the narrow exceptions illustrated by such limited examples, and it would side-step the limitations we have found to exist under the broader (albeit still exceptional) doctrine of "effective control of an area". Although Art. 2 claims are of course a matter of particular and heightened concern, if jurisdiction existed in these five cases, there would be nothing to stop jurisdiction arising, or potentially arising, across the whole range of rights and freedoms protected by the Convention.'

⁸⁵ *Issa and Others v Turkey*, ECtHR (2004), Appl. no. 31826/96. para. 74

⁸⁶ *Isaak and Others v Turkey*, ECtHR (2006), Decision on admissibility, Appl. no. 44587/98

⁸⁷ Art. 19

⁸⁸ Art. 22

⁸⁹ Art. 21

on its own initiative.⁹⁰ We have seen that, through the examination of states' reports, the Committee has stressed the extraterritorial applicability of the Convention under some circumstances. However, the Committee in that regard can only make recommendations. Moreover, with the UK having made a declaration of recognition only with regard to inter-state complaints, no individual petition can be made in this case. It needs to be highlighted here that, if the Convention can be found to apply to the UK in respect to torture inflicted by Iraqi police on Iraqis, the prospects of inter-state complaint are dim. Indeed, it would require that the state making the complaint also make a declaration recognising the Committee's competence under Article 21, and then it is unlikely that states would start such a procedure for political reasons.

However, it is interesting to note that no requirement of injury is needed for a state to bring a claim under the inter-state complaint mechanism. Indeed, Article 21 enables any State Party which claims that another State Party is not fulfilling its obligations under the Convention to bring a claim. Consequently, any State Party having recognised the competence of the Committee to receive interstate complaints is entitled to bring the matter to the attention of the Committee. Finally, with regard to the possibility of the Committee undertaking an 'inquiry', it should be noted that the text of Article 20 speaks about torture 'systematically practised in the territory of a State Party'. It follows that, Iraq not being in the territory of the UK, this provision does not apply to the present case.

4. Conclusion

In conclusion, we have seen that the prohibition of torture and the positive obligation to prevent its occurrence are obligations *erga omnes*, implying that any State Party to the Convention is theoretically entitled to bring a claim if it determines that the UK is violating its obligations. Moreover, if it can be established that the Convention applies to the specific situation discussed in this paper, then the UK can be held accountable if the 'act or omission which constitutes the internationally wrongful act is attributable to [it].'⁹¹ However, looking at the position of international law on the responsibility of a state for the wrongful acts of another, it is difficult to establish that the present situation would engage the UK's direct responsibility. Moreover, if the argument of 'failure to prevent' provides an opening for the UK's responsibility, it does not seem that it would be engaged until it can be proved 'beyond reasonable doubt' that the UK systematically failed to prevent the occurrence of torture while being in a position to do so. With regard to the extraterritorial applicability of CAT for the UK in Iraq, it appears that under the UN approach as well as the international and regional ones (through ECtHR), attributing responsibility to the UK for its failure or omission to act in cases of torture by the Iraqi forces would be extremely difficult. Nevertheless, while responsibility for the acts of torture which occurred in Baghdad's prisons would be hard to establish as UK troops are not present in force in the area, in other areas of Iraq where UK troops are more involved the threshold needed to establish control could be met under the criteria highlighted in this paper. It is worth noting that if state's

⁹⁰ Art. 20. The UK having made no declaration at the time of ratification to opt out of this mechanism under art. 28, it is applicable.

⁹¹ N. 28 above, at 43.

responsibility in cases similar to the UK's presence in Iraq were to be recognized, it would not be without raising issues with regard to the principle of non-intervention.⁹²

⁹² This issue has been raised by Ahcene Boulesbaa in her book *The U.N. Convention on Torture and the Prospects for Enforcement*, *International Studies in Human Rights*, vol 51, (The Netherlands: Martinus Nijhoff Publishers, 1999) at 127 and at 232-35; This aspect has not been discussed here but it is important to restate the Declaration on Principles of International Law concerning Friendly Relations and cooperation among States which says : 'No state or group of State has the right to intervene directly or indirectly for any reason whatever in the internal or external affairs of any other State.' UN GA Resolution 2625 (XXV) 24 Oct. 1970. Indeed, how to respect Iraq's sovereignty if the UK can be held accountable for Iraq's violation of international law by being on the ground? Could that justify interference from the UK in the internal affairs of Iraq on the basis that, if it shares responsibility, it has a right to a certain level of authority? How far can international responsibility go without creating new obligations for states in order to make sure they respect their commitment to prevent the occurrence of torture?

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