

***Boumediene and Others v. Bosnia and Herzegovina***

Applications nos. 38703/06, 40123/06, 43301/06,  
43302/06, 2131/07 and 2141/07

**WRITTEN SUBMISSIONS OF INTERRIGHTS  
AND THE INTERNATIONAL COMMISSION OF JURISTS**

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## INTRODUCTION

These written comments are submitted by INTERIGHTS (the International Centre for the Legal Protection of Human Rights) and the International Commission of Jurists pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 of the Rules of Court.

These submissions will address the positive obligations of the High Contracting Parties to the European Convention on Human Rights (“the Convention”) in circumstances where the wrongful act of a Contracting State has led to a continuing deprivation of human rights by another State outside the jurisdiction of the Contracting State. Our analysis of these obligations will be informed by international law and practice and by the following established principles of interpretation of the Convention:

- The principle of ensuring the real and effective protection of Convention rights, and the purposive interpretation of the Convention to achieve this;<sup>1</sup> reflecting this principle, the need to ensure that the right to a remedy, fundamental to all rights in the Convention, is given meaningful effect for individuals wrongfully transferred to the hands of other States;<sup>2</sup>
- The principle that the Convention is interpreted as a living instrument; its interpretation should respond to developments in human rights practice, including the increasingly trans-national nature of human rights violations, involving multiple violations by several States, as epitomised by the practice of ‘extraordinary rendition’; its interpretation should also be informed by developments in international law and practice,<sup>3</sup> among them evolving notions of positive obligations and State responsibility for human rights violations;
- Account must be taken of the nature of the rights at stake: freedom from torture and inhuman and degrading treatment, freedom from arbitrary detention, and the core elements of fair trial rights, are absolute rights, enjoying *jus cogens* status, which are particularly fundamental to the Convention and require particular measures of protection.

### Summary of the Intervention

Part I of this intervention addresses the positive obligations of States, requiring effective measures of prevention, cessation and remedial action in the event of serious violations of human rights. While acknowledging the essentially territorial nature of jurisdiction under the Convention, Part II analyses the limited circumstances in which such positive obligations may arise in respect of individuals not presently within the territory or effective control of the State. These include, firstly, where the State, through its wrongful conduct, facilitates violations by another State, and secondly, where the violations are of such an egregious nature as to amount to serious breaches of *jus cogens* norms. Part III considers why diplomatic representations specifically are among the key measures required of States pursuant to those obligations.

## I. THE NATURE OF POSITIVE OBLIGATIONS

It is an established doctrine of European human rights law that States have a duty to do more than refrain from actively interfering with the rights of individuals: they have a positive obligation to take active steps to safeguard Convention rights, including from the acts of third parties.<sup>4</sup> The doctrine of positive obligations has its roots in Article 1 of the Convention, which requires States to “secure” the Convention rights to all those within its jurisdiction. Positive obligations arise throughout the Convention, and have in particular been identified as aspects of the right to life,<sup>5</sup> freedom from torture

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<sup>1</sup> *Marckx v. Belgium*, Judgment of 13 June 1979, § 31; *Golder v. UK*, Judgment of 21 February 1975; *Hornsby v. Greece*, Judgment of 25 February 1997.

<sup>2</sup> See *infra*, Section I.3.

<sup>3</sup> *Winterwerp v. Netherlands*, Judgment of 24 October 1979.

<sup>4</sup> *Osman v. UK*, Judgment of 28 October 1998; *X and Y v. Netherlands*, Judgment of 26 March 1985.

<sup>5</sup> See, e.g., *Osman v. UK*, cit.

and inhuman and degrading treatment,<sup>6</sup> the right to liberty,<sup>7</sup> elements of the right to fair trial,<sup>8</sup> rights to respect for private and family life,<sup>9</sup> to freedom of expression,<sup>10</sup> association and assembly,<sup>11</sup> and belief.<sup>12</sup>

Positive obligations arise in relation to future, ongoing and past violations of the Convention rights. They include, therefore, preventive obligations, e.g., the duties to put in place a general legal framework to prevent violations<sup>13</sup> and to avert an anticipated violation of Convention rights resulting from the acts of a third party;<sup>14</sup> and obligations to act to end a violation of Convention rights.<sup>15</sup> Positive obligations also include obligations of response to a past or continuing violation of Convention rights, designed to establish accountability, and to provide remedies and truth for the victim or family members.<sup>16</sup> Such obligations require the State to take “reasonable and appropriate measures”<sup>17</sup> capable of securing “practical and effective” protection.<sup>18</sup> While they must not “impose an impossible or disproportionate burden on the authorities”, the authorities have to do “all that could be reasonably expected of them” to prevent violations and end those that are ongoing.<sup>19</sup>

## 1. Positive obligations and the most fundamental Convention rights

Positive duties on the State to protect against and respond to violations of Convention rights are most likely to apply, and where they do apply are heightened, in regard to the most fundamental Convention rights. These include the right to freedom from torture and inhuman or degrading treatment, the absolute and non-derogable nature of which is clearly established both under the Convention and elsewhere in international human rights law,<sup>20</sup> including under customary international law, where it is recognised as a norm of *jus cogens*.<sup>21</sup> The particular importance in a democratic society of the right to liberty and of the core guarantees of fair trial rights, have also been recognised by this Court.<sup>22</sup> There is strong support for the *jus cogens* nature of the prohibition of arbitrary detention.<sup>23</sup> In particular, the Human Rights Committee (HRC) endorsed this position in its *General Comment No. 29*.<sup>24</sup> Particular duties of both prevention and response have been found to apply in cases where Articles 2 and 3 are in issue,<sup>25</sup> and the fundamental importance of the right to liberty has been invoked to imply positive obligations to protect, including measures to protect against and to investigate enforced disappearances.<sup>26</sup> The *jus cogens* nature of certain norms at stake in the present case has important consequences for the positive obligations of States when serious breaches of those norms occur, as discussed in Section II.2 below.

## 2. The obligation of *non-refoulement*

Amongst the positive obligations with particular relevance to the most fundamental Convention rights is the obligation of *non-refoulement* where there is a risk of torture or inhuman or degrading treatment,

<sup>6</sup> See, e.g., *MC v. Bulgaria*, Judgment of 4 Dec 2003.

<sup>7</sup> *Storck v. Germany*, Judgment of 16 June 2005; *Kurt v. Turkey*, Judgment of 25 May 1998, § 124.

<sup>8</sup> *Airey v. Ireland*, Judgment of 9 October 1979.

<sup>9</sup> *X and Y v. Netherlands*, cit.

<sup>10</sup> *Ozgur Gundem v. Turkey*, Judgment of 11 March 2000.

<sup>11</sup> *Young, James and Webster v. UK*, Judgment of 13 August 1981.

<sup>12</sup> *X v. UK*, Commission admissibility decision of 12 March 1981.

<sup>13</sup> *X and Y v. Netherlands*, cit.; *A v. UK*, Judgment of 23 September 1998.

<sup>14</sup> *Osman v. UK*, cit., § 116; *Kaya v. Turkey*, Judgment of 28 March 2000; *Storck v. Germany*, cit.

<sup>15</sup> *Costello Roberts v. UK*, Judgment of 25 March 1993; *Hatton v. UK [GC]*, Judgment of 8 July 2003; *Keenan v. UK*, Judgment of 3 April 2001.

<sup>16</sup> *Aydin v. Turkey*, Judgment of 25 September 1997; *Keenan v. UK*, cit.; *Kurt v. Turkey*, cit. The duty to investigate is reflected in the Convention Against Torture (CAT), Articles 5, 6, 12 and 13 and in the International Covenant on Civil and Political Rights (ICCPR); see, e.g., HRC, *General Comment No. 31*, CCPR/C/21/Rev.1/Add.13 (2004), §§ 15 and 18.

<sup>17</sup> *Plattform Arzte fur das Leben v. Austria*, Judgment of 21 June 1998, § 34.

<sup>18</sup> *Osman v. UK*, cit., § 116. See also *Aydin v. Turkey*, cit. On “effective” investigation see, e.g., *MC v. Bulgaria*, cit.; *Assenov v. Bulgaria*, Judgment of 28 October 1998.

<sup>19</sup> *Osman v. UK*, cit., §§ 115 and 116.

<sup>20</sup> Art. 4(2), ICCPR; Arts 2(2) and 15, Convention Against Torture (CAT); Art. 27(2), American Convention on Human Rights; Art. 5, Inter-American Convention to Prevent and Punish Torture.

<sup>21</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, ICTY Trial Chamber, Judgment, § 154; *Prosecutor v. Delalic and others*, Case No. IT-96-21-T, ICTY Trial Chamber, § 454; *Prosecutor v. Kunarac*, Case No. IT-96-23-T and IT-96-23/1-T (22 February 2001).

<sup>22</sup> *Engel v. Netherlands*, Judgment of 8 June 1976; *Golder v. UK*, cit.

<sup>23</sup> See, L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Developments, Criteria, Present Status* (Helsinki, 1988), pp. 425 ff., T. Meron, “On a Hierarchy of International Human Rights”, 80 (1986) *AJIL* 1, *Restatement (Third) of the Foreign Relations Law of the United States*, 702.

<sup>24</sup> HRC, *General Comment No. 29*, UN Doc. CCPR/C/21/Rev.1/Add. 11 (2001), § 11.

<sup>25</sup> *Kaya v. Turkey*, cit., § 107; *Aksoy v. Turkey*, Judgment of 26 November 1996; *D v. UK*, Judgment of 21 April 1997.

<sup>26</sup> *Storck v. Germany*, cit., §102; *Orhan v. Turkey*, Judgment of 18 June 2002, § 369.

which has been recognised by this Court<sup>27</sup> as well as by other human rights and international legal treaties and mechanisms<sup>28</sup> and under customary international law.<sup>29</sup> *Soering v. UK* established that Article 3 of the Convention is violated where “substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.”<sup>30</sup> This obligation applies to all forms of transfer from the jurisdiction, including deportation and extradition.<sup>31</sup> The international law obligation of *non-refoulement* applies beyond torture and inhuman and degrading treatment to other serious violations of the most fundamental human rights, including arbitrary detention and flagrant denial of fair trial rights,<sup>32</sup> and case law suggests that it has similar scope under the Convention.<sup>33</sup>

The identification of a duty of *non-refoulement* recognises that the nature, purpose and spirit of the Convention may require in some circumstances that responsibility attach to acts that facilitate human rights violations by other States outside the territorial jurisdiction of the Contracting State.<sup>34</sup> In *Soering v. UK*, it was acknowledged that the UK authorities had no power over the practices of the US authorities; nevertheless, these considerations could not “absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction.”<sup>35</sup>

### 3. The right to a remedy

The right to an effective remedy for violations of Convention rights, protected under Article 13 of Convention as well as in procedural aspects of the substantive Convention rights, imposes positive obligations of review and reparation.<sup>36</sup> Article 13 requires remedies that are “effective” in practice as well as in law, and which are not unjustifiably hindered by the acts or omissions of State authorities.<sup>37</sup> The particular importance of the right to a remedy under the Convention in cases of serious violation of the most fundamental rights is reflected in international law. As a matter of customary international law, the legal consequence of the breach of an international obligation is an obligation of cessation of the wrongful act and of reparation.<sup>38</sup> The State should try with all available means to re-establish the situation prior to the breach<sup>39</sup>. The UN Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law,<sup>40</sup> affirm the right to reparations, including restitution, and state in Principle 19 that “restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law ... occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”

The content of the right to a remedy depends on the nature of the substantive right at issue: it carries particular obligations where one of the most fundamental Convention rights is in issue or where

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<sup>27</sup> *Soering v. UK*, Judgment of 7 July 1989; *Chahal v. UK*, Judgment of 25 October 1996.

<sup>28</sup> Art. 19, EU Charter of Fundamental Rights; Art. 22(8), Inter-American Convention of Human Rights; Art. 3(1), Declaration on Territorial Asylum; Art. 8, Declaration on the Protection of All Persons from Enforced Disappearances; Principle 5, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, and Council of Europe Guidelines. See also Art. 16, International Convention for the Protection of All Persons from Enforced Disappearance (not yet in force). A general clause on *non-refoulement* is also contained in Art. 9, International Convention against the Taking of Hostages; Art. 3, European Convention on Extradition; Art. 5, European Convention on the Suppression of Terrorism; Art. 4(5), Inter-American Convention on Extradition. See also Art. 3 of the UN Model Treaty on Extradition. From the UN Treaty Bodies, see HRC, *General Comment No. 20*, UN Doc. UN Doc. A/47/40 (1992), Annex VI, pp. 193–95, § 9, and *General Comment No. 31* (2004), §12. For individual communications, see, e.g., *Chitat Ng v. Canada*, UN Doc. CCPR/C/49/D/469/1991 (1994), § 14.1; *Cox v. Canada*, UN Doc. CCPR/C/52/D/539/1993 (1994); *G.T. v. Australia*, UN Doc. CCPR/C/61/D/706/1996 (1997). See also African Commission on Human and Peoples’ Rights, *Modise v. Botswana* (2000), and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights* (2004).

<sup>29</sup> Lauterpacht & Bethlehem, *The Principle of Non-Refoulement* (2001), §§ 196–216.

<sup>30</sup> *Soering v. UK*, cit., § 91.

<sup>31</sup> *Cruz Varas v. Sweden*, Judgment of 20 March 1991, § 70. The risk may come from state or non-state actors: see, e.g., *HLR v. France*, Judgment of 22 April 1997; *D v. UK*, cit.

<sup>32</sup> HRC, *Kindler v. Canada*, UN Doc. CCPR/C/48/D/470/1991 (1993), § 13.2; HRC, *General Comment No. 31*, cit., § 12.

<sup>33</sup> Article 6: see *Soering v. UK*, cit., § 113, *Drozd and Janousek v. France and Spain*, Judgment of 26 June 1992, § 110; Article 5 and Article 6: *MAR v. UK*, Judgment of 19 September 1997; *Tomic v. UK*, Admissibility decision of 14 October 2003, §3. On the wider application of *non-refoulement*, see *R v. Special Adjudicator, ex parte Ullah*, [2004] UKHL 26, per Lord Bingham, § 21.

<sup>34</sup> *Soering v. UK*, cit., § 88.

<sup>35</sup> *Ibid.*, § 86.

<sup>36</sup> Including Art. 5(4) and (5), Art. 6; Art. 8; Art. 1 of Protocol No. 1: *Iatridis v. Greece*, Judgment of 25 March 1999; *Kudla v. Poland*, Judgment of 26 October 2000.

<sup>37</sup> *Aksoy v. Turkey*, cit., § 95.

<sup>38</sup> See Art. 30, International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001), at 43 (hereinafter “ILC Articles on State Responsibility”).

<sup>39</sup> See ILC Articles on State Responsibility, Art. 35.

<sup>40</sup> Human Rights Res. 2005/33, UN Doc. E/CN.4/RES/2005/35; G.A. Res. 60/147, UN Doc. A/RES/60/147 (2006).

there has been a particularly serious violation of the applicant's Convention rights,<sup>41</sup> including compensation for non-pecuniary damage flowing from the breach<sup>42</sup> and obligations to investigate.<sup>43</sup>

It is established that, in cases of deportation or other removal from the territory where a risk of treatment contrary to Article 3 is alleged, Article 13 requires independent scrutiny of a claim that expulsion would lead to a substantial risk of treatment contrary to Article 3.<sup>44</sup> Following wrongful removal from the territory of a Contracting State to a situation of continuing violation of absolute Convention rights, effective protection of those rights, as well as rights under Article 13, may also require reasonable, appropriate, practical and effective remedial measures, including diplomatic representations to the State in which the individuals are held, as addressed below.

## **II. POSITIVE OBLIGATIONS ARISING EXCEPTIONALLY IN RESPECT OF INDIVIDUALS OUTSIDE THE STATE'S JURISDICTION OR CONTROL**

In general, States' positive obligations arise in respect of risks or violations arising on their territory or under their direct authority or control. However, in certain limited circumstances, positive obligations may also arise in respect of individuals located outside the State's jurisdiction, who are under the authority or control of another State. The first set of circumstances of relevance to this case is where one State has transferred the victim to another, and shares responsibility for the violations by that State, as explained at 4.1 below. The circumstances in which such responsibility arises are set out below in Section II.1(a), and the consequences in terms of the duties of prevention, cessation and remedial action are set out in Section II.1(b). The other set of circumstances where positive obligations may also arise is where treatment of the individual by the third State amounts to a serious breach of an obligation arising under a peremptory norm of general international law, set out in Section II.2 below.

### **1. Obligations arising as a result of the wrongful transfer**

#### **(a) Wrongful nature of the transfer**

In the circumstances of the present case, the State may be responsible for the wrongful act directly through the transfer of an individual in violation of rules on non-refoulement, and/or indirectly through aid and assistance rendered to another State in the commission of an international wrong.

#### *Non-refoulement under international law and/or domestic procedures*

The rendition of an individual in a manner that bypasses all legal process and is inherently arbitrary, and/or where there are substantial grounds for believing that there is a real and personal risk of torture or cruel, inhuman or degrading treatment, arbitrary or indefinite detention or flagrant denial of justice in the receiving State, is unlawful not only under the Convention but under international law more broadly, including under specific conventions and customary law, as set out at Part I above.<sup>45</sup> Accordingly, even where the Convention itself was not applicable at the time of transfer, the rendition of an individual in the above circumstances would be unlawful.

#### *Aid or assistance in the commission of a wrongful act*

In addition to its *non-refoulement* obligations, the responsibility of the rendering State may also be analysed in terms of the 'aid and assistance' provided to the receiving State. As a matter of general international law, as reflected in Article 16 of the Articles on State Responsibility adopted by the International Law Commission (ILC), a State is responsible for providing aid or assistance to another

<sup>41</sup> *Chahal v. UK*, cit., § 150.

<sup>42</sup> *E and Others v. UK*, Judgment of 26 November 2002, § 110; *Keenan v. UK*, cit., § 130.

<sup>43</sup> *Keenan v. UK*, cit., § 132. Art. 13 has been held to imply obligations to investigate in, *inter alia*, cases of violation of the right to life (*Kaya v. Turkey*, cit.), torture and inhuman and degrading treatment (*Aksoy v. Turkey*, cit.), disappearance in breach of Art. 5 (*Orhan v. Turkey*, cit.), and destruction of homes and properties in violation of Art. 8 (*Mentes v. Turkey*, Judgment of 28 November 1997).

<sup>44</sup> *Chahal v. UK*, cit., § 151.

<sup>45</sup> See in particular the instruments and the sources cited *supra*, footnotes 28 and 29.

State in breach of its international obligations if it does so with knowledge of the circumstances of the internationally wrongful act of that State, and if the act would be internationally wrongful if committed by the accessory State.<sup>46</sup> Where individuals are being rendered to torture, inhuman or degrading treatment, arbitrary or indefinite detention and/or flagrant denial of justice, these conditions are clearly met, given the rules of general international law referred to above. The International Court of Justice (ICJ) has recognized the rules concerning aiding and assisting in the commission of a wrongful act, as enshrined in Article 16, as part of customary international law.<sup>47</sup>

### *Continuing wrong*

In the present context a wrongful act may be considered, in line with general international law, to arise at the moment of apprehension and/or transfer and continue for as long as the violation of the rights of the individual by the receiving State persists.<sup>48</sup> While the Court has not addressed this issue directly, this proposition may find some support in the Commission's case-law where expulsion of a person was described as giving rise to "a continuing situation."<sup>49</sup> Moreover, and in any event, the violations at the hand of the detaining State are clearly ongoing. As noted at Part IV below, the State which has wrongfully rendered the individual in question, or has aided and assisted in the ongoing violations, is correspondingly under a continuing duty to take such steps as are available to it to rectify the situation and secure respect for the rights of the individual.

### **(b) Content and scope of post-transfer obligations**

International practice, while still limited, suggests that in circumstances where the State has acted wrongfully and facilitated the violations, certain obligations towards the individual follow, despite his or her being outside the State's direct authority or control. Below are examples of the practice of States that together support the existence of post-transfer obligations to prevent or stop mistreatment or to re-admit the person to the respondent State. This reflects the nature of the duties to prevent or bring about cessation of ongoing wrongs, and to provide reparation or restoration in the event of violations, discussed in Part II.

#### *The duty to take measures of prevention post-transfer*

- The Convention Case-law

The case-law under the Convention lends some support to the proposition that States may in certain circumstances have a positive duty to take reasonable measures to ensure that rights of persons are not violated in other States following transfer.

Thus, in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, which concerned the forced return of a five-year old to Congo, the Court held that the Belgian authorities' failure to make the necessary arrangements to ensure the applicant's safety upon her return to Kinshasa breached Article 3 of the Convention, since "the Belgian authorities did not seek to ensure that the second applicant would be properly looked after or have regard to the real situation she was likely to encounter on her return to her country of origin".<sup>50</sup> Another case concerned the expulsion to the Congo of a HIV-positive individual who alleged that lack of treatment upon return would violate his Article 3 rights. The application was held manifestly ill-founded, in part because the Swiss authorities had incurred expenses for treatment by the applicant upon his return.<sup>51</sup>

- International Practice

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<sup>46</sup> See Art. 16, ILC Articles on State Responsibility.

<sup>47</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgment of 26 February 2007, § 420.

<sup>48</sup> See, e.g., Art. 14(2), ILC Articles on State Responsibility: "The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation". The breach consisting of composite acts also falls within the category of continuing situation (see *ibid.*, Art. 15).

<sup>49</sup> *X v. Switzerland*, Appl. No. 7601/75, Commission decision of 12 July 1976. On continuing violations in the context of enforced disappearances, see Inter-American Court of Human Rights, *The Serrano Cruz Sisters v. El Salvador*, *Preliminary Objections*, Judgment of 23 November 2004, §§ 100 and 105.

<sup>50</sup> *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Judgment of 12 October 2006, § 69.

<sup>51</sup> *MM v. Switzerland*, Commission admissibility decision of 14 September 1998.

International human rights bodies have also shown themselves willing to consider the conduct of States following transfer of an individual to another State, in assessing compliance with *non-refoulement* obligations. This is exemplified by two cases against Sweden, respectively before the UN Committee against Torture and the Human Rights Committee, concerning transfers to Egypt based on diplomatic assurances that included post-transfer monitoring elements. In *Alzery v. Sweden*, the existence of diplomatic assurances, their content, and implementation of enforcement mechanisms post-transfer, were considered by the HRC and found to be insufficient to ensure compliance with the prohibition of *non-refoulement*.<sup>52</sup> In *Agiza v. Sweden*, the Committee Against Torture likewise assessed the measures the sending State had taken post-transfer.<sup>53</sup> The Committee was willing to address the extent of Sweden's ongoing monitoring of Mr Agiza's condition via monthly visits by the Swedish Ambassador or other officials, and found them insufficient to protect against the manifest risk of ill-treatment in Egypt.<sup>54</sup>

- Domestic Practice

Several other recent developments in domestic practice have addressed the question whether a State has a duty to take diplomatic measures to protect its nationals abroad. Notably, in its recent judgment in the *Hicks* case, the Federal Court of Australia granted leave to Mr Hicks to initiate a case against the government for not deploying all its diplomatic means to bring him back from Guantánamo, on the basis that prolonged deprivation of liberty without charge was in clear breach of fundamental principles of international law.<sup>55</sup> In a US case involving a US national detained in Mexico, the Seventh Circuit Court of Appeals held that the Hostage Act "placed a judicially enforceable duty on the Executive to inquire into the circumstances of an American citizen's extended detention abroad."<sup>56</sup> The Court of Appeals held that such a duty could be judicially enforced and examined whether the measures taken by the Executive branch had met it.<sup>57</sup> The German Constitutional Court in *Hess*<sup>58</sup> recognized the constitutional duty of the State to protect German nationals abroad, and their interests, against foreign States<sup>59</sup> and acknowledged that the government had "already taken major steps to bring about the release of the complainant"<sup>60</sup> and would continue to do so.

The above cases lend support for some limited obligation to take measures, including in some case diplomatic representations, on behalf of nationals. However, unlike the present case they are based on obligations towards nationals, irrespective of whether the State itself was involved in their transfer, or in any wrong-doing. By contrast in situations where the wrongful conduct of the State leads to or assists in the violation, the obligations apply with far greater force. Notably, in *Abbasi v. Secretary of State*, the UK Court of Appeal held that British nationals captured abroad and held in Guantánamo were not owed a duty of diplomatic intervention by the British government *because Britain had no role in their detention*.<sup>61</sup> The court may have reached a different conclusion if the British government had participated in the rendition or the detention.

#### *The duty to remedy/restore in the context of transfer*

International practice also suggests that in certain circumstances States are obliged to engage in action to restore the situation of a wrongfully transferred person. Most often these actions are aimed at securing release from foreign custody and re-admission to the respondent State.

- The Convention Practice

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<sup>52</sup> *Alzery v. Sweden*, UN Doc. CCPR/C/88/D/416/2005 (2006), §§ 11.3–11.5.

<sup>53</sup> *Agiza v. Sweden*, UN Doc. CAT/C/34/D/233/2003 (2005), § 13.4.

<sup>54</sup> *Ibid.*, §§ 4.14–4.20.

<sup>55</sup> See *Hicks v. Ruddock* (2007) FCA 299 (8 March 2007), §§ 49–50, discussing the requisite cooperation and control on behalf of the Australian government in the internment of Hicks by the US.

<sup>56</sup> *Flynn v. Schultz*, 748 F.2d 1186, 1195 (7<sup>th</sup> Cir. 1984), *cert denied*, 474 U.S. 830 (1985).

<sup>57</sup> *Ibid.*, at 1196. See a prior case, *Redpath v. Kissinger*, 415 F. Supp. 566 (W.D. Tex. 1976), also examining the government's actions in respect of another citizen incarcerated abroad. See also *Smith v. Reagan* in the US Court of Appeals regarding the ongoing and substantial efforts of the US government to secure POWs release from Southeast Asia (*Smith v. Reagan*, 844 F.2d 195, 197 (4<sup>th</sup> Cir. 1988)).

<sup>58</sup> BverfGE 55, 349 (1980).

<sup>59</sup> *Ibid.*, at § II(1)(b).

<sup>60</sup> Among other actions, the president sought Hess' release in a letter to the heads of the Allied powers and the Minister for Foreign Affairs wrote a similar letter to his Soviet counterpart, see *ibid.*, at § A III.

<sup>61</sup> *R (on the application of Abbasi & Anor) v. Secretary of State for Foreign and Commonwealth Affairs & Anor* [2002] EWCA Civ. 1598.

The Court has not addressed directly the question of the appropriate remedial action that States should take in the event of unlawful transfer, perhaps as *non-refoulement* cases generally arise prior to – and with a view to avoiding – such transfer. However, several developments in relation to friendly settlements may provide some indication of the remedial action that States – and to a certain extent the court which scrutinises settlements for conformity with human rights – consider appropriate in such cases.

In *Mansi v. Sweden*, a case concerning a claim of *refoulement* contrary to Article 3 of the Convention, the Court accepted a friendly settlement where Sweden agreed, *inter alia*, to readmit the applicant, pay the costs of his return, allow him permanent leave to remain in Sweden, and to use its good offices to encourage the Jordanian authorities to investigate the circumstances of his treatment in Amman.<sup>62</sup> Likewise, in *Sulejmanovic and others v. Italy*, the applicants complained *inter alia* that their deportation from Italy to Bosnia exposed them to a risk of treatment contrary to Article 3.<sup>63</sup> In a friendly settlement, the Italian authorities undertook *inter alia* to cancel the expulsion decisions, allow the applicants and their families to return to Italy, and bear all associated expenses.

- International Practice

International bodies have addressed the obligations of States to take effective measures to provide a remedy and to ‘restore’ the situation of a wrongfully transferred person. The Human Rights Committee in *Jimenez Vaca v. Columbia*, addressing the involuntary exile of the applicant due to threats to his life in Colombia, required the State, as a remedial measure, to allow the applicant to return safely to Columbia.<sup>64</sup> The UN Committee Against Torture recognized in *Dar v. Norway* that, by facilitating the safe return of the applicant and granting him a residence permit, Norway had remedied the breach of Convention Against Torture entailed in its *refoulement* of the applicant contrary to a request for interim measures by the Committee.<sup>65</sup> The African Commission on Human and Peoples’ Rights has recommended that States facilitate the safe return of applicants forced to leave because of violations of their human rights<sup>66</sup> and to ensure the return of persons wrongfully expelled.<sup>67</sup>

- Domestic Practice

With regard to practice before domestic courts, the jurisprudence of the South African Constitutional Court supports the view that there where the State has wrongfully facilitated the transfer, it has a duty to remedy the breach. In *Mohamed & Another v. President & Ors*, where the South African government had worked with US agents to unlawfully render to US custody a Tanzanian national seeking asylum in South Africa, the Court placed a duty on the relevant organs of South Africa “to do whatever may be in their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him”.<sup>68</sup> The principle was confirmed in *Kaunda v. President of the Republic of South Africa*, although in that case no obligation to take measures to protect rights was held to arise as “no wrong has been done to the applicants by the South African government that has to be remedied, nor is there a consequence of unlawful conduct that has to be ameliorated.”<sup>69</sup>

In the Canadian case of *Purdy v. Canada*, the Court of Appeal for British Columbia ordered the Canadian authorities to release information to help defend the applicant, a Canadian citizen, against criminal charges in the United States.<sup>70</sup> It held that as Canadian agents had contributed to his situation by, *inter alia*, tricking the applicant into crossing into the US in order to facilitate his capture by US authorities, the applicant was due disclosure as a remedy for the unlawful action taken against him in Canada.

## 2. Obligations arising for all States from breaches of peremptory norms of international law (*jus cogens*) by another State

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<sup>62</sup> For the terms of the settlement, see *Mansi v. Sweden*, Report of the Commission, adopted on 9 March 1990.

<sup>63</sup> *Sulejmanovic and others v. Italy*, Judgment of 8 November 2002.

<sup>64</sup> UN Doc. CCPR/C/74/D/859/1999 (2002).

<sup>65</sup> UN Doc. CAT/C/38/D/249/2004 (2007).

<sup>66</sup> *Ouko v. Kenya*, Comm. No. 232/99 (2000)

<sup>67</sup> *Malawi African Association and Others v. Mauritania*, African Commission on Human and Peoples’ Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000)

<sup>68</sup> CCT 17/01 (2001), quotation from § 72.

<sup>69</sup> CCT 23/04 (2004), quotation from § 53.

<sup>70</sup> *Purdy v. A.G. (Canada)*, 2003 BCCA 447



A further situation in which obligations may arise for a State in relation to treatment of individuals outside its jurisdiction, irrespective of wrongdoing on its part, is where that treatment constitutes a serious breach of an obligation arising under a peremptory norm of international law. The ILC has recognized that when a serious breach of a peremptory norm of international law occurs,<sup>71</sup> all States “shall cooperate to bring to an end through lawful means” any such breach, and shall not “recognise as lawful a situation created by a serious breach” nor “render aid or assistance in maintaining that situation.”<sup>72</sup>

The fact that such legal obligations may arise as a consequence of the breach of certain fundamental norms of international law by other States has been recognized by the ICJ in its Advisory Opinion on the *Legality of the Construction of a Wall in the Occupied Palestinian Territories*.<sup>73</sup>

### **III. THE DUTY TO MAKE DIPLOMATIC REPRESENTATIONS IN THE CONTEXT OF POSITIVE OBLIGATIONS OF STATES TO PREVENT VIOLATIONS AND RESTORE THE PRIOR SITUATION**

As demonstrated in preceding sections, States have positive obligations both to prevent or stop serious violations of human rights, and to make reparation.<sup>74</sup> It is submitted that in circumstances such as those in which the applicants find themselves, where the State has contributed to a wrong for which other means of reparation are not available, the positive obligation to take reasonable, appropriate, practical and effective measures requires the State to make diplomatic representations to the State in which the individuals are held. This is supported by the following considerations.

#### **1. Diplomatic representations are the measures most readily available to the State in circumstances where the individual is within the control of another State**

In general, States have at their disposal an array of measures with a view to meeting their positive obligations towards persons within their jurisdiction or control. However, in circumstances where individuals are detained by other States which are alleged to be violating their fundamental human rights, and where the State in question does not control the individual or that State, the range of measures available to the State is diminished. Diplomatic representations are one of the few measures realistically available. They are, moreover, the least intrusive of the measures potentially available, which include the taking of measures of retorsion, i.e. “unfriendly” conduct which is not inconsistent with any international obligation of the State engaging in it,<sup>75</sup> the adoption of countermeasures in order to induce the third State to comply with his obligations<sup>76</sup> and the commencement of judicial proceedings where jurisdiction exists. It is submitted that they readily fall within the category of reasonable and appropriate measures available to the State.

#### **2. Diplomatic representations are not only legitimate, but increasingly accepted and expected as an appropriate means to secure compliance with human rights obligations.**

The making of diplomatic representations in relation to violations of fundamental human rights is not only a permitted tool of foreign policy but is recognized by the UN Human Rights Committee, among others, as a “reflection of legitimate community interest”.<sup>77</sup> For example, recent practice in relation to the situation in Guantánamo Bay specifically has shown that not only is the making of diplomatic representations permitted, but that there is an expectation that States will make such representations if

<sup>71</sup> ILC Articles on State Responsibility, Art. 40.

<sup>72</sup> ILC Articles on State Responsibility, Art. 41.

<sup>73</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p. 136, at p. 200, § 159.

<sup>74</sup> See *supra*, Section I.3.

<sup>75</sup> See ILC, Commentaries on the Articles on Responsibility of States for Internationally Wrongful Acts, Introductory Commentary to Part Three, Chapter II, § (3).

<sup>76</sup> See ILC Articles on State Responsibility, Arts 49–54.

<sup>77</sup> HRC, *General Comment No. 31*, cit., § 2: “To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.” See also Institut de droit international, “The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States”, 63 *Annuaire de l’Institut de droit international* 338 (1989), Art. 3: “Diplomatic representations as well as purely verbal expressions of concern or disapproval regarding any violations of human rights are lawful in all circumstances.”

there is credible evidence of violation of fundamental human rights. In this regard, the Parliamentary Assembly of the Council of Europe has called on the Member States of the Council of Europe “[...] to enhance their diplomatic and consular efforts to protect the rights and ensure the release of any of their citizens, nationals or former residents currently detained at Guantánamo Bay, whether legally obliged to do so or not”, and “[...] to respect the erga omnes nature of human rights by taking all possible measures to persuade the United States authorities to respect fully the rights under international law of all Guantánamo Bay detainees.”<sup>78</sup>

### 3. Consistent with obligations in the face of serious breaches of *jus cogens* norms

As discussed above (see Section II.2), in relation to serious breaches of *jus cogens* norms, States may be under a duty to take measures in cooperation with other States in order to bring the breach to an end, as well as to refuse to recognise the legality of the situation and refrain from providing aid and assistance to the responsible State in maintaining the illegal situation. Such measures may conceivably include the making of diplomatic representations.<sup>79</sup> Particularly where the State has, through its wrongful acts,<sup>80</sup> facilitated serious human rights violations that are ongoing, it is required – in the absence of other available means – to make reasonable diplomatic representations to bring such violations to an end.

### 4. The Court has previously found diplomatic measures to constitute “reasonable measures”

Finally, it is noted that the Court has previously identified positive obligations to make diplomatic representations, albeit in relation to a different situation. In *Ila\_cu and others v. Moldova and Russia*, Moldova did not exercise control over the entirety of its territory due to the existence of the separatist Transdniestrian Republic; however it was nevertheless held to be under a positive obligation to take reasonable measures available to it, including diplomatic efforts and appropriate *démarches* and representations, to attempt to secure respect for the fundamental rights of the applicants. It may be noted that this was so despite the fact that the separatist movement was not bound by the Convention. The Court observed that “[...] even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.”<sup>81</sup> Diplomatic representations are therefore clearly among the measures that the Court feels able to require of States in appropriate circumstances.

### 5. The scope and content of the obligation to make diplomatic representations

Given that the control and treatment of the applicants in this case currently falls within the power of another State, it is noted that the obligation to make diplomatic representations can only be one of means, rather than of result; in other words, the obligation is to take those reasonable avenues which are available to the State to attempt to obtain release and return of the individuals.

An instructive analogy may be drawn in this regard with the case-law of the Court in relation to the positive obligation to investigate under Articles 2 and 3 of the Convention, discussed above. In the context of Article 2, the Court has stated repeatedly that this positive obligation is “*not an obligation of result, but of means*.”<sup>82</sup> According to the Court, this character of the obligation implies that “[t]he authorities must have taken the reasonable steps available to them...”,<sup>83</sup> and further, that “[a] requirement of promptness and reasonable expedition is implicit”.<sup>84</sup> While States undoubtedly enjoy a large margin of discretion in determining the precise nature and form of the diplomatic representations, they should nevertheless act promptly in making diplomatic representations as soon as they are aware of any violation of the rights of an individual transferred by them.

<sup>78</sup> Parliamentary Assembly of the Council of Europe, Resolution 1433 (2005) “Lawfulness of detentions by the United States in Guantánamo Bay”, 26 April 2005, § 10 (i) and (viii), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1433.htm>; see also Recommendation 1699 (2005), <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/EREC1699.htm>.

<sup>79</sup> See the previous footnote and accompanying text. See also ILC, *Seventh Report on Diplomatic Protection* by John Dugard, Special Rapporteur, UN Doc. A/CN.4/567 (2006), § 84: “Moreover, new developments in international law allow a State to protect – by protest, negotiation, arbitration and judicial proceeding – both nationals and non-nationals subjected to the violation of human rights norms (with the status of *jus cogens* or which qualify as obligations *erga omnes*) in foreign countries.”

<sup>80</sup> See discussion *supra* Section II.1.

<sup>81</sup> *Ila\_cu and Others v. Moldova and Russia* [GC], Judgment of 8 July 2004, § 331.

<sup>82</sup> *McKerr v. United Kingdom*, Judgment of 4 May 2001, § 113; *Adali v. Turkey*, Judgment of 31 March 2005, § 223.

<sup>83</sup> *McKerr*, cit., § 113; *Adali*, cit., § 223.

<sup>84</sup> *McKerr*, cit., § 114; *Adali*, cit., § 223.

If diplomatic representations were not to be considered among the arsenal of obligatory positive measures applicable in circumstances where the State is responsible for – or aids and assists in – the violation by other States, individuals would in effect be left without protection. In circumstances such as arise in this case, positive obligations under the Convention, read in light of international and comparative standards as set down in this brief, require that States should take timely and effective diplomatic measures. States’ obligations to do so are essential if the Convention is to fulfill its protective and remedial function.<sup>85</sup>

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<sup>85</sup> Examples of State practice regarding post-transfer measures include: inquiry regarding circumstances of detention (see, e.g., *Khadr v. Canada* [2004] F.C. 1145, at §§ 22–25; *Kaunda*, cit., at § 144); monitoring through diplomatic visits to the prisoner (see, e.g., *Agiza*, cit., § 4.14 and *Alzery*, cit.); visits by members of government (see, e.g., *Smith v. Reagan*, cit., at 197); facilitation of legal representation (see, e.g., *Agiza*, cit., at § 4.19; *Khadr*, cit., at § 21, *Kaunda*, cit., at § 144); medical examination and care (*Khadr*, cit., § 21; *Agiza*, cit., § 4); representations seeking release (see, e.g., *Hess*, cit., at § A III, *Smith v. Reagan*, cit., at 197), and various others depending on the specific circumstances of each case (see also *supra* Section II.1(b)).