ALI AARRASS V. BELGIUM: Application Number: 16371/18

Written Comments of REDRESS

24 September 2018

1. These written comments seek to respond to the question as to whether, in a situation where there is a risk of serious injury to physical and moral integrity, a State has a positive obligation to provide consular protection to try and put a stop to the inhuman and degrading treatment being received by one of its nationals in another country.

2. The comments will examine (1) the obligatory nature of international treaty provisions on consular protection, and how these obligations could enable individuals (including dual nationals) to require an individual's state of nationality to take diplomatic protection measures against the state in which the individual is being held, especially where there is (or has been) torture, (2) that consular protection is an important safeguard against torture, (3) that States have considered themselves obliged to consider the use of diplomatic protection to prevent human rights violations, and (4) that international human rights law imposes a positive obligation to act (through use of diplomatic protection measures) to prevent the violation of a *jus cogens* norm such as torture.

Background

3. European Court of Human Rights' caselaw confirms that customary international law and treaty provisions have recognised that the "activities of …diplomatic or consular agents abroad" are legitimate examples of the extra-territorial exercise of jurisdiction by a State.[1] Article 1 of the ECHR does not just enable such extra-territorial jurisdiction, but expects it.[2]

Defining consular protection and diplomatic protection

4. Consular protection has been referred to in several international treaties,[3] most importantly in the 1963 Vienna Convention on Consular Relations (VCCR)[4] which many commentators agree simply codified what already existed under customary international law. The VCCR states that consular functions consist in "protecting in the receiving State the interests of the sending State and of its nationals" and "helping and assisting nationals …of the sending State".[5]

5. Consular protection (sometimes referred to as "consular assistance") means the provision of certain rights of access to, and communication between, detainees and to

[1] *Soering v UK,* Application no. 14038/88, paras. 71 and 73; *Al-Skeini v UK*, Application no. 55721/07, para.134.
[2] If jurisdictional matters were to to be in issue, UNCAT Article 5(1) states: "Each State Party shall take such measures as may be necessary to establish its jurisdiction over the [torture/CIDTP] offences…"
[3] Other treaties containing provisions on consular protection include: *International Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Families*, U.N.T.S., vol. 2220, p .93-127, 18 December 1990 (with 51 States parties to the treaty), Art. 16(7); *International Convention for the Protection of All Persons from Enforced Disappearance*, U.N.T.S., vol. 2716, p. 56-74, 20 December 2006 (with 57 parties to the treaty), Art. 17(2).
[4] U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512, 24 April 1963, available at http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf. There are presently 179 States parties to the VCCR, including Belgium and Morocco.
[5] Article 5(a) and (e).

consular officials (of the detainee's nationality). This is distinct from "diplomatic protection", which is the kind of diplomatic action which involves the invocation of legal responsibility against another state. Whilst consular protection provides the framework to ensure that human rights are respected whilst a person is in custody, diplomatic protection provides the tools to seek to enforce that framework, and to seek redress when, despite the protections in place, mistreatment occurs.[6]

6. Diplomatic protection may be achieved by way of either "diplomatic action" or "international judicial proceedings."[7] The enforcement of VCCR rights invariably involves "diplomatic protection" (usually in the form of international judicial proceedings), since this is the legally recognised State to State process employed by the State of nationality when a national suffers "injury" caused by the "internationally wrongful act" of another State.[8]

1. Consular protection rights

International law and jurisprudence suggests that the receiving state has a positive obligation under the VCCR to facilitate the sending State to exercise the right to consular protection.

7. Both States and individuals are afforded "rights" under the VCCR, Article 36(1)(a)-(c).[9] States have a right to be informed about the arrest, imprisonment or detention of one of their nationals without delay. Furthermore, consular officers of the sending State have the right to visit their national in detention in the receiving State and "to converse and correspond with him and to arrange for his legal representation," subject to the individual's consent. On the other hand, individuals have the right to freedom of communication with consular officers; the right of access to consular officers; the right to have any communication to the relevant consular post forwarded without delay and to be informed about the rights under Article 36(1)(b) without delay.

8. The VCCR is not expressed in terms which can easily be interpreted as giving a detained person rights against their State of nationality. Nonetheless, many European States have created rights to consular protection (which would be enforceable against them by their own nationals). For example, the right to consular protection is effectively enshrined in Article 14 of the Portuguese Constitution, Article XXVII of the Hungarian Constitution, Article 13 of the Estonian Constitution, and Article 17 of the Romanian Constitution. Additionally, other States (such as Bulgaria[10]) have no specific law on consular protection, but such a right can be established through legal interpretation. Other countries

[6] See, for example, the *Report of UN Working Group on Arbitrary Detention* (UNWGAD Report), A/HRC/39/45, 2 July 2018, paras. 51-52.

[7] International Law Commission (ILC), *Draft Articles on Diplomatic Protection* (ADP)(2006), text submitted to the UN General Assembly (A/61/10), version with commentaries available at http://www.refworld.org/pdfid/525e7929d.pdf, Commentary to Article 1, para. 8.

[8] This is reinforced by the International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, annexed to UN Doc. A/RES/56/83 of 12 December 2001, available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf. See, Chapter I, General Principles, Article 1.

[9] Other relevant VCCR provisions include representing or arranging for legal representation in hearings in order to preserve the rights and interests of an individual (Article 5(i)).

[10] Articles 25(5) and 26(1) of the Bulgarian Constitution can be interpreted to impose state obligations for the protection of citizens abroad.

upholding a partial but still significant guarantee of consular protection include Germany,[11] Lithuania,[12] Ireland[13] and Malta.[14]

Enforcing consular protection rights

9. International jurisprudence on the VCCR has focused on the enforceability of the VCCR consular access provisions, by way of legal action brought by the sending State (on behalf of the affected individual) against the receiving State at the International Court of Justice (ICJ). Importantly, the cases confirm that the ICJ has repeatedly recognised that the VCCR consular access provisions create individual "rights", and State "rights", both legally enforceable by the State on behalf of the individual whose rights have been violated.[15]

10. It is worth emphasizing that several of these cases have been decided in the context of an attempt to prevent the commission or continuance of severe human rights violations, most commonly in the context of efforts to prevent the carrying out of the death penalty. The cases effectively conclude that the receiving state has a positive obligation under the VCCR to facilitate the sending State to exercise the right to consular protection.

Consular protection as a human right

11. The Inter-American Court of Human Rights (IACtHR) issued an Advisory Opinion in 1999, requested by Mexico, arising from Mexico's concern that various of its nationals on death row in the US had not been informed by the US authorities of their rights to consular protection.[16] The IACtHR held that the VCCR rights to consular notification and to consular access are fundamental human rights essential to the protection of due process, and their denial renders any subsequent execution arbitrary and illegal under international law.[17] The IACtHR specifically concluded that the right to consular information under Article 36(1)(b):

> …becomes all the more imperative here, given the exceptionally grave and irreparable nature of the penalty that one sentenced to death could receive. If the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life. (at para. 135)
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> …the Court concludes that nonobservance of a detained foreign national's right to information, recognized in Article 36(1)(b) of the [VCCR] is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death

[11] CARE Project, *Consular and Diplomatic Protection Legal framework in the EU Member States*, December 2010, available at: http://www.ittig.cnr.it/Ricerca/ConsularAndDiplomaticProtection.pdf., pp. 193, 197-198.
[12] Ibid, pp. 301-304.
[13] Ibid, pp. 240-244.
[14] Ibid, pp. 333-339.
[15] The cases have largely been brought under an Optional Protocol to the VCCR, concerning the "Compulsory Settlement of Disputes", U.N.T.S., vol. 596, p. 487, 24 April 1963. There are 51 parties to the Optional Protocol. Belgium is a party to the Optional Protocol but Morocco is not. However, even those States not party to the Optional Protocol could have a dispute adjudicated by the ICJ if they consent to the ICJ's jurisdiction in a particular case (see ICJ Statute, Article 36). Cases at the ICJ in this regard include: *Germany v US (LaGrand)*, 27 June 2001; *Mexico v US (Avena),* 31 March 2004; *Republic of Guinea v Democratic Republic of the Congo (Diallo),* 30 November 2010; *Jadhay Case (India v Pakistan)*, case ongoing.
[16] *The right to information on consular assistance in the framework of the guarantees of the due process of law*, (Advisory Opinion OC – 16/99), available at http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf.
[17] Ibid., para. 137.

penalty is a violation of the right not to be "arbitrarily" deprived of one's life… (at para.137)

12. To the best of our knowledge, the IACtHR has never been asked to consider whether this finding might be replicated in a case where a State's national was seeking the enforcement of their "human rights" against that same State. However, if the IACtHR is able to conclude that rights to consular protection are "human rights" enforceable against a receiving State, it is hard to see why the rights would not also be enforceable against a sending State. Indeed, if consular protection rights are considered to be "human rights", it would imply an applicability to both sending and receiving States.

13. Given that the ICJ is designed to settle disputes between States, and is not itself a court set up to adjudicate on an individual's human rights, it is perhaps not surprising that it has to date not felt it necessary to define VCCR in terms of "human rights", enforceable by an individual against that person's own State of nationality. However, the ICJ has recognised the importance of diplomatic protection as a means of protecting human rights.[18]

2. Consular protection as a safeguard against torture

Consular protection rights are an important safeguard to prevent torture.

14. Experts (including the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment in a 2018 report) are agreed that procedural safeguards against torture are a key tool in the prevention of torture, especially where those safeguards are institutionalised:[19]

> The risk of torture and ill-treatment is greatest in the first hours of custody and during incommunicado detention. Therefore, preventive safeguards must be implemented immediately after arrest, including the notification of a third party, access to a lawyer and a physician and the furnishing of the detainee with information on their rights, available remedies and the reasons for arrest.[20]

15. The Special Rapporteur has also recommended a range of measures directed at making those in detention more accessible and visible to their families and lawyers, and has recognised the importance of consular protection as a further such safeguard for detainees:

> The right of foreign nationals to have their consular or other diplomatic representatives notified must be respected.[21]

16. The European Court of Human Rights has previously endorsed the recommendations made by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) concerning the safeguards to be put in place in cases of (for example) incommunicado detention in police custody.[22] Whilst UNCAT

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[18] See discussion of *Diallo* case below.

[19] *Report of the Special Rapporteur on the question of torture,* E/CN.4/2003/68, 17 December 2002, para. 26, available from https://www.ohchr.org/Documents/Issues/SRTorture/recommendations.pdf.

[20] *Interim report of the Special Rapporteur, Nils Melzer,* A/73/207, 20 July 2018, para. 26, available from http://www.undocs.org/a/73/207

[21] *Report of the Special Rapporteur on the question of torture,* ibid., para. 26(g).

[22] *Etxebarria Caballero v Spain* (application no. 74016/12) and *Ataun Rojo v Spain* (application no. 3344/13). The CPT's recommendations are reproduced by the Council of Europe Commissioner for Human Rights in his *Report… Following his visit to Spain from 3 to 7 June 2013,* dated 9 October 2013, available here: https://rm.coe.int/16806db80a.

does not itself spell out exactly what a State must do to put in place the "effective legislative, administrative, judicial or other measures to prevent acts of torture" (Article 2(1)), save that they must be "effective", the UN Committee against Torture has specifically recognised the importance of such safeguards in preventing torture.[23]

17. According to a recent report from the UN Working Group on Arbitrary Detention, the VCCR consular protection rights referred to above are "an important safeguard for individuals who are arrested and detained in a foreign State to ensure that international standards are being complied with",[24] and are exactly the kind of safeguards which would reduce the risk of torture.

3. Discretionary or obligatory protection

International human rights law should recognise an obligation to exercise diplomatic protection, if the protection is sought in order to prevent torture.

18. The traditional approach of international law was that a State had the *right* to exercise diplomatic protection on behalf of a national, though not the *obligation* to do so.[25] However, this was based on two principles, which, whilst central to international law, were developed before the ascendency of the international human rights order: firstly, the assumption that the state was paramount, and secondly, that the individual was insignificant and had no rights under international law. Yet the modern international legal framework now recognizes the individual, if not as a "subject" of international law, then certainly as a "participant" in the international legal order, with standing to enforce their human rights at the international level before international tribunals through international or regional human rights conventions.[26] At the same time, whilst the human rights themselves have developed, mechanisms to achieve remedies remain more limited, and diplomatic protection therefore retains an important role.[27]

19. Whilst the ILC's proposed *Draft Articles on Diplomatic Protection* did not include an obligation to guarantee an individual right to diplomatic protection, the Special Rapporteur of the ILC has argued that "the right of a state to protect a national when it pleases and whether it pleases has no place in contemporary international law".[28] Indeed, several States have enacted obligations to consider requests for diplomatic protection as a matter of their citizens' constitutional rights,[29] and in 2000, in his First Report on Diplomatic Protection,[30] the Special Rapporteur of the ILC was able to point out that a number of States had by that time recognised the individual's right to receive diplomatic protection for injuries suffered abroad.[31]

20. An obligation to exercise diplomatic protection would be an important step in strengthening human rights protection for a State's nationals. The ILC for instance

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[23] See for example: *Gerasimov v Kazakhstan*, Communication No. 433/2010, CAT/C/48/D/433/2010, 10 July 2012.
[24] UNWGAD Report, para. 51; see also para. 56.
[25] *Barcelona Traction Light and Power Company Limited (Belgium v Spain)*, ICJ Reports 1970, 4 at 44.
[26] Dugard, J, *Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission*, (2005) 24 Australian Year Book of International Law 75. Profesor Dugard served as the Special Rapporteur to the ILC on the subject of diplomatic protection.
[27] Ibid.
[28] Ibid.
[29] See examples above.
[30] *First Report on Diplomatic Protection, by Mr. John E. Dugard, Special Rapporteur, ILC, 52nd session*, 7 March 2000, A/CN.4/506, available at http://legal.un.org/ilc/documentation/english/a_cn4_506.pdf (Special Rapporteur's Report).
[31] Ibid, para. 80.

observed that "diplomatic protection… remains an important remedy for the protection of persons whose *human rights* have been violated abroad" [our emphasis].[32] This recognises that it is in the area of human rights that diplomatic protection is increasingly being relied upon, and is consistent with the view of the ICJ which explained the issue in the *Diallo* case as follows:

> Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, […] diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights.[33]

21. Courts in various jurisdictions have grappled with the extent to which diplomatic protection can be enforced by a State's nationals to take action to redress past harm or protect them from possible future harm. In the UK, the Court of Appeal concluded in 2002, in the case of *Abbasi*,[34] that neither the ECHR nor the Human Rights Act imposed on the UK an obligation to exercise diplomatic protection.[35] However, the Court of Appeal recognised that it is vital that the UK Government examines the nature and extent of the injustice claimed[36] so that a balance can be struck between the interests of the individual and foreign policy considerations:

> Even where there has been a gross miscarriage of justice, there may perhaps be overriding reasons of foreign policy which may lead the Secretary of State to decline to intervene. However, unless and until he has formed some judgment as to the gravity of the miscarriage, it is impossible for that balance to be properly conducted. (at para. 100)

22. In in the 2004 case of *Kaunda*, the South African Constitutional Court accepted that if there was a "material infringement of a human right that forms part of customary international law", the South African constitution did contemplate that government "will act positively to protect its citizens against human rights abuses:"[37]

> There may thus be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable, and a court could order the government to take appropriate action. There may even be a duty on government in extreme cases to provide assistance to its nationals against egregious

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[32] ILC, *Draft Articles on Diplomatic Protection*, Commentary to Art. 1, para. 4

[33] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment of 24 May 2007, para. 39.

[34] *Abbasi and Another v Secretary of State for Foreign Affairs and Another* [2002] EWCA Civ.1598, available at http://www.bailii.org/ew/cases/EWCA/Civ/2002/1598.html.

[35] Ibid., paras 41-79. European Court of Human Rights cases examined included *Al Adsani v UK* (2002) 34 EHRR 11 (Application no. 35763/97), *Soering* [1989] 11 EHRR 439 (Application no.14308/88), *Bankovic v Belgium* 11 BHRC 435 (App. No. 52207/99) and *Bertrand Russell Peace Foundation v United Kingdom* (Commission decision 2 May 1978.)

[36] In *Abbasi* the "injustice" did not explicitly include torture, which would have been subject to the absolute prohibition discussed below.

[37] *Kaunda and Others v President of the Republic of South Africa and Others* [2004] ZACC 5, available at http://www.saflii.org/za/cases/ZACC/2004/5.html, paras. 64-66.

> breaches of international human rights which come to its knowledge. The victims of such breaches may not be in a position to ask for assistance, and in such circumstances, on becoming aware of the breaches, the government may well be obliged to take an initiative itself.[38]

23. Whilst in 2000 the Special Rapporteur of the ILC noted the dismissal of several earlier claims brought by individuals against their governments for diplomatic protection,[39] this more recent jurisprudence from the UK and South Africa suggests that, the more egregious the mistreatment or injustice alleged on the part of the affected individual, the more the balance will be tipped in favour of the recognition of an obligatory element in the protection offered. As we will see below, the obligatory element will be further strengthened if the violation is of a *jus cogens* norm, such as torture.

Dual nationals

24. The VCCR is silent on the issue of dual nationality, which is a particular issue in certain jurisdictions, complicating or preventing provision of and/or access to consular protection. Where a person with dual nationality is detained in a third country, the situation is relatively straightforward, and local authorities in that State are required to comply with all aspects of VCCR Article 36, including promptly contacting the consulate(s) at the detainee's request. However, dual (or plural) nationalities tend to be a particular problem when individuals are detained in a country of which they are also a national.

25. In the *Avena* case, in which some of the Mexican nationals bringing the case were dual Mexican – US nationals, the ICJ decided that it did not have to determine definitively the issue of whether Article 36 of the VCCR applied to a person arrested or detained in the US (the receiving state), where that person was also a US national. However, it appears to have agreed that, if the Mexican nationals were also nationals of the US, there would be no breach of treaty obligations in such circumstances.[40]

26. Article 7 of the ILC Draft Articles on Diplomatic Protection uses the concept of "predominant nationality" regarding claims against a State of nationality where a person with multiple nationality is concerned. It provides that:

> [A] State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.[41]

27. Indicators to suggest that a nationality is predominant include habitual residence of the individual; the amount of time spent in each country of nationality; date of naturalisation; place, curricula and language of education; employment and financial interests; place of family life; family ties in each country; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other state of nationality; possession and use of passport of the other State; and military

[38] Ibid., paras. 69-70. An egregious or gross breach of human rights would generally be thought to include torture: see, for example, *Abbasi*, ibid., paras 42-43.

[39] Cases in the UK, Netherlands, Spain, Austria, Belgium and France: see *First Report on Diplomatic Protection, by Mr. John E. Dugard, Special Rapporteur*, ibid., para. 86.

[40] *Mexico v US (Avena),* 31 March 2004, paras. 41-42 and 53-57.

[41] Such a position is also reflected in for example the case of *Carnevaro (Italy v Peru)* (1912), Permanent Court of Arbitration, 11 RIAA 397; *Esphahanian v Bank Tejarat* (1983) 2 Iran-US CTR 157 (in the Iran-US Claims Tribunal); the United Nations Compensation Commission established to provide for damages caused by the Iraqi invasion and occupation of Kuwait – see United Nations document S/AC.26/19991/Rev.1, para.11.

service.[42] The concept of predominant nationality reflects more progressive practice regarding stateless persons and refugees, which indicates that the appropriate State to protect such persons is the State of "lawful and habitual residence."[43]

28. The Report of the UN Working Group on Arbitrary Detention has recently concluded:

> Where dual nationals are detained by one State of nationality, it has been the general practice that one State of nationality only insists on consular assistance being provided to the dual national detained by the other State of nationality with the consent of the latter. However, nothing prohibits a State of nationality from exercising consular assistance. Similarly, the jurisprudence of international tribunals suggests that a State is not prohibited from exercising diplomatic protection in instances where dual nationals are subjected to injury by the other State of nationality. In such cases, consent from the other State of nationality is not required.[44]

4. The prohibition on torture

A State has a positive obligation to use all available mechanisms to prevent torture.

29. As we have already seen, international law may oblige states to exercise diplomatic protection, at least in cases of egregious violations of human rights. This is consistent with international human rights law which obviously provides obligations for states, including in relation to human rights such as the right to freedom from torture and CIDTP. If the State does retain any discretion whether or not to exercise diplomatic protection, such discretion is not unfettered, and must be exercised in such a way as to recognize the positive obligation to prevent torture.

30. Articles 2 and 16 of the UNCAT, Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 5 of the Universal Declaration of Human Rights (UDHR) and Article 3 of the ECHR set out the right to freedom from torture under any circumstance. Since UNCAT's entry into force, the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment (CIDTP) has become accepted as a *jus cogens* norm.[45]

31. UNCAT provides in Article 2(1) that:

> Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

32. In some situations, it may be that the only way in which a State can implement its human rights obligations under UNCAT is if it exercises diplomatic protection by taking up the case, or 'espousing' it, against the State which has been responsible for the torture or other ill-treatment. The UN Committee Against Torture in its General Comment 3 states that the redress requirements (under UNCAT Article 14) include "satisfaction", which in

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[42] Dugard SC, J, Eatwell, T, MacDonald QC, A, *Legal Opinion Re. Nazanin Zaghari - Ratcliffe – Availability of Diplomatic Protection*, 16 October 2017, available at https://redress.org/wp-content/uploads/2017/11/16.10.17-Zaghari-Ratcliffe-Opinion-Diplomatic-Protection_for-web.pdf

[43] ILC, *Draft Articles on Diplomatic Protection*, Article 8 (1).

[44] UNWGAD Report, para. 53.

[45] See, for example, *Al-Adsani v UK*, Application, judgment of 21 November 2001, paras. 30, 60, 61, quoting International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Furundzija* (10 December 1998, case no. IT-95-17/I-T) at paras. 147, 153-154.

turn should include "effective measures aimed at the cessation of continuing violations", without which a State may be in breach of its obligations under Article 14.[46]

33. The European Court of Human Rights has established in its case law that Article 3 requires not just the enactment of legislation criminalising ill-treatment, but also the positive obligation to enforce their own legislation in a way which provides real and effective protection for individuals within their jurisdiction.[47] For example, in *Z v UK* the Court concluded that:

> These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge…[48]

Obligation to prevent ongoing torture

34. It is generally accepted that an international wrongful act of a State entails responsibility, and that an international wrongful act will have occurred if there is an action or omission attributable to that state under international law which constitutes a breach of one that State's international obligations.[49] *Jus cogens* norms, such as those already discussed covering torture and CIDTP, would be classed as international obligations, whether or not a State had become a State party to a relevant human rights instrument (for example, UNCAT). The state responsible for the internationally wrongful act is under a duty to cease that act, or to guarantee that it will not be repeated.[50]

35. For example, the 1980 ICJ case of *US v Iran* arose out of the seizure and detention of US Embassy staff in Tehran. Aside from the obvious breach of diplomatic and consular rules in general, the court effectively identified an international wrongful act in that case as being the violation of the freedom and and personal integrity of the individuals, and ordered Iran immediately to terminate the unlawful detention:

> Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.[51]

36. Therefore, in the case of ongoing risks of torture and CIDTP, a State could use mechanisms available either at the ICJ, or under the ECHR (Article 33), or in other tribunals (such as the inter-state proceedings provided for under either the ICCPR or UNCAT) to seek to prevent ongoing violations.[52] The recent international jurisprudence considered in section 3 above suggests that the *jus cogens* nature of the prohibition on

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[46] Committee against Torture, General Comment 3: *Implementation of article 14 by States parties*, UN Doc. CAT/C/GC/3, 13 December 2013, paras. 16-17.
[47] *A. v UK*, Judgment of 23 September 1998, para. 22.
[48] *Z. v UK*, Judgment of 10 May 2001, paras. 73-74. There is considerable evidence to show that individuals who have experienced torture or CIDTP should be considered to be "vulnerable": see for example, the *UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol)*, 9 August 1999, available at: http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf, Chapter VI(A).
[49] ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts,* ibid., Articles 1 and 2.
[50] Ibid., Article 30. UNCAT Article 14 requires the "cessation of continuing violations": see Committee against Torture, General Comment 3, ibid..
[51] *Case Concerning U.S. Diplomatic and Consular Staff in Tehran (U.S. v Iran)*, 1980, para. 91.
[52] In the *LaGrand* case (see note 15), Germany sought and obtained non-repetition measures from the ICJ.

torture would provide strong grounds to argue that a State would be obliged to exercise diplomatic protection in order to prevent any such ongoing violations.

37. As the Special Rapporteur to the ILC concluded almost 20 years ago:

> Today there is general agreement that norms of *jus cogens* reflect the most fundamental values of the international community and are therefore most deserving of international protection. It is not unreasonable therefore to require a State to react by way of diplomatic protection to measures taken by a State against its nationals which constitute the grave breach of a norm of *jus cogens*. If a State party to a human rights convention is required to ensure to everyone within its jurisdiction effective protection against violation of the rights contained in the convention and to provide adequate means of redress, there is no reason why a State of nationality should not be obliged to protect its own national when his or her most basic human rights are seriously violated abroad.[53]

38. The ECHR is a living instrument, and "must be interpreted in the light of present-day conditions".[54] Consular functions are increasingly seen as a necessary safeguard against torture, and this should be reflected in the international legal framework.[55] Indeed:

> There is now a compelling argument for the proposition that states have, not only a right but, a legal obligation to protect their nationals abroad against an egregious violation of their human rights. Those states that have ratified international human rights instruments and are committed to the promotion and protection of international human rights have a special duty in this regard... Diplomatic protection provides the state with a tool to protect the fundamental human rights that we have committed ourselves to promoting and protecting.[56]

Conclusion

39. International treaty provisions on consular protection are obligatory and act as an important safeguard against torture. Whilst many states consider themselves obliged to *consider* the use of diplomatic protection to prevent human rights violations, the discretion which states have as to whether or not to exercise such diplomatic protection is not unfettered. When violations are of *jus cogens* norms such as the prohibition on torture, a state's failure to exercise diplomatic protection to bring torture to an end should be placed under particularly close scrutiny, and a refusal to act may be impossible to reconcile with its obligations under the European Convention.

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[53] Special Rapporteur's Report, para. 89.
[54] *Tyrer v. United Kingdom*, (Appl No. 5856/72) Judgment of 25 April 1978, Series A no. 26, para. 31.
[55] For example, the UN Working Group on Arbitrary Detention has recently confirmed its intention "to continue to raise and integrate issues relating to consular assistance and diplomatic protection in the context of its opinions and recommendations, its country visits and its follow-up procedure": see UNWGAD Report, para. 58.
[56] *Kaunda* judgment, separate opinion of Ngcobo J, at paras. 169-170.