IN THE EUROPEAN COURT OF HUMAN RIGHTS

AL-SAADOON AND MUFDHI V. THE UNITED KINGDOM

Application no.61498/08

WRITTEN COMMENTS BY

THE BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES, BRITISH IRISH RIGHTS WATCH, THE EUROPEAN HUMAN RIGHTS ADVOCACY CENTRE, HUMAN RIGHTS WATCH, THE INTERNATIONAL COMMISSION OF JURISTS, THE INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, JUSTICE, LIBERTY AND REDRESS

pursuant to Article 36 § 2 of the European Convention on Human Rights and Rule 44 § 2 of the Rules of the European Court of Human Rights

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INTRODUCTION

1. These written comments are respectfully submitted on behalf of the Bar Human Rights Committee of England and Wales, British Irish Rights Watch, the European Human Rights Advocacy Centre, Human Rights Watch, the International Commission of Jurists, the International Federation for Human Rights, JUSTICE, Liberty and REDRESS (hereafter 'the Interveners') pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 of the Rules of Court.[1]

2. Brief details of each of the interveners, their experience and interest in this matter, are set out in the annex to this brief. Together all interveners have extensive experience of working for the effective protection of the right to life around the world. They have contributed to the elaboration of international law and standards relevant to this case, including the status of interim measures, the nature and extent of extra-territorial jurisdiction, and the right to *non-refoulement*, and have intervened in human rights litigation, in national and international fora on these and other related issues. The interveners have provided written comments to this Court in numerous recent cases. All of them have extensive knowledge of the relevant international legal standards and jurisprudence and/or the impact of human rights norms on counter-terrorism measures.

3. This case concerns the transfer, by United Kingdom forces in Iraq, of prisoners held by the United Kingdom in detention facilities in Iraq, to the custody of the Iraqi authorities, contrary to interim measures indicated by this Court. These submissions analyse three of the important issues of principle raised by the case: the nature and extent of extra-territorial jurisdiction under the Convention (Part I of this brief); the rules and principles applicable where obligations under the Convention conflict with other obligations under international law (Part II); and the duty to comply with interim measures indicated by the Court under Rule 39 of the Rules of Court (Part III). The interveners' submissions therefore address questions 1, 2 and 7 of the Questions to the Parties. Our submission considers these issues with reference to principles of international law and jurisprudence of other international and regional tribunals, with a view to providing the Court with an international legal context in which to consider the matters before it.

PART I: JURISDICTION

1. LEGAL STANDARDS RELATING TO EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS LAW

A. General Principles of Interpretation of 'Jurisdiction' Under Article 1 of the Convention

4. Public international law requires that the concept of 'jurisdiction' be interpreted in light of the object and purpose of the particular treaty.[2] In that regard, the Court has reiterated that it must be mindful of **the Convention's special character as a human rights treaty**.[3] The object

[1] Letters dated 24 March 2009 and 25 March 2009 from T.L.Early, Section Registrar, to the International Commission of Jurists on behalf of the Interveners.
[2] Article 31 (1) of the Vienna Convention on the Law of Treaties of 1969.
[3] See e.g. *Loizidou v. Turkey [GC]*, no. 15318/89, 18 Dec.1996, para.43.

and purpose of the Convention as an instrument for human rights protection require that its provisions be interpreted and applied so as to be practical and effective.[4] In addition, any interpretation has to be consistent with the general spirit of the Convention, as an instrument designed to maintain and promote the ideals and values of a democratic society.[5] In its interpretation of the Convention provisions, the Court must also take into account **the relevant rules of international law**, and should so far as possible interpret the Convention in harmony with other rules of international law of which it forms part. [6] When faced with a continuous evolution from its origins in the relevant norms and principles applied in international law, the Court has to search for a **common ground among the international law norms** that reflects the common ground in modern societies.[7]

5. When considering the conduct of States outside their territory, one of the guiding principles under international human rights law, is the **need to avoid unconscionable double standards**. In the words of the UN Human Rights Committee (hereafter the 'HRC') with respect to the applicability of the International Covenant on Civil and Political Rights (hereafter the 'ICCPR', 'it would be unconscionable to permit a state to perpetrate violations on foreign territory which violations it could not perpetrate on its own territory.'[8] The International Court of Justice (hereafter 'ICJ') in affirming the approach of the HRC, observed that

> 'while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the [ICCPR], it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions. …[The *travaux préparatoires* of the ICCPR] show that, in adopting the wording chosen, the drafters of the [ICCPR] did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.'[9]

6. In line with this approach, this Court's established practice emphasises that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another state which it could not perpetrate on its own territory.[10] The Court has applied this principle regardless of whether the impugned act of the State took place within or outside of the regional space of the Council of Europe.[11]

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[4] *Mamtkulov and Askarov v. Turkey [GC]*, nos. 46827/99 and 46951/99, 4 Feb.2005, para. 101.
[5] *Mamtkulov*, op cit, para. 101, *Soering v. the United Kingdom [Plenary]*, no. 14038/88, 7 Jul.1989, para. 87.
[6] *Al-Adsani v. the United Kingdom [GC],* no. 35763/97, 21 Nov.2001, para. 55.
[7] *Demir and Baykara v. Turkey [GC],* no. 34503/97, 12 Nov.2008, para.. 78 and 86.
[8] HRC, *Lopez Burgos v. Uruguay*, Communication No. R 12/52, 6 June 1979, para. 10.3.
[9] See ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 109 (the ICJ cases referred to in the present comments, are available at www.icj-cij.org).
[10] See e.g. *Solomou v. Turkey,* no. 36832/97, 24 Jun. 2008, para. 45; *Issa v. Turkey*, no. 31821/96, 16 Nov.2005, para. 71; *Andreou v. Turkey* (dec.), no. 45653/99, 3 Jun. 2008; *Isaak v. Turkey (*dec.), no. 44587/98, 28 Sept. 2006;.
[11] See *Pad v. Turkey (dec.),* no. 60167/00, 28 Jun.2007, para. 53. For example *Solomou*, *Andreou* and *Isaak,* op cit, concerned activities of Turkey in Cyprus (Member State in the Council of Europe), however *Öcalan v. Turkey* [GC], no. 46221/99, 12 May 2005, *Issa*, and possibly *Pad,* concerned events in countries outside the Council of Europe - respectively, apprehension in Kenya, use of deadly force in Iraq, and in Iran.

B. The Jurisdiction Provisions of Other Human Rights Instruments

7. Article 2 of the ICCPR guarantees protection to all persons "within [the] territory and subject to [the] jurisdiction" of State parties to the Covenant.[12] This formulation has been interpreted by the HRC to mean that State parties are required to respect and ensure the Covenant rights to all persons in their territory and **'anyone within the power or effective control of that State Party even if not situated within the territory of the State Party.'**[13] In addition, HRC has held that:

> "[t]his 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, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation**."**[14]

8. This interpretation of Article 2 of the ICCPR was followed by the ICJ in the case of *Armed Activities on the Territory of the Congo,* and in its *Wall Advisory Opinion.*[15] In its latest Concluding Observations on the UK, the HRC was 'disturbed about the State party's statement that its obligations under the Covenant can only apply to persons who are taken into custody by the armed forces and held in British-run military detention facilities outside the United Kingdom in exceptional circumstances.' The HRC recommended that the UK "should state clearly that the Covenant applies to all individuals who are subject to its jurisdiction or control*."*[16]

9. Within the Inter-American system, there are two separate instruments, the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man. The American Convention on Human Rights contains a provision which is similar to that set out in the European Convention, covering all persons "subject to [the] jurisdiction*"* of the States parties.[17] The jurisprudence of the Inter-American Commission on Human Rights (hereafter the "Inter-American Commission"), like that of the HRC, adopts a broad approach under which a State party to the American Convention "may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state"s own territory."[18] In a line of cases the Inter-American Commission has had regard to relevant European jurisprudence and held that **"jurisdiction [is] a notion linked to authority and effective control, and not merely to territorial boundaries",** and that the focus should be rather on whether the State has "authority and control" over the person.[19] The American Declaration does not contain an

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[12] ICCPR, Article 2.

[13] See HRC, General Comment 31, CCPR/C/21/Rev.1/Add.13, para. 10. See also para. 11 regarding the applicability of ICCPR in time of war.

[14] *Ibid*.

[15] See ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* 19 December 2005, para. 180 and 216; ICJ, *Wall* case, para. 109, op cit.

[16] Human Rights Committee, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, UN Doc. CCPR/C/GBR/CO/6 (30 Jul. 2008) at para.14.

[17] American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, Article 1(1).

[18] Inter-American Commission, *Victor Saldaño v. Argentina*, Report No. 38/99, para. 17.

[19] See e.g. *Saldaño, op cit*, para. 19; *Haitian Centre for Human Rights v. United States of America* (Haitian Interdictions), Case 10.675, Report No. 51/96, 13 March 1997.

explicit jurisdictional provision, however the same principles of control, authority or power have been applied by the Inter-American Commission.[20]

10. The African Charter on Human and Peoples' Rights contains no explicit restriction on territorial applicability, and in its practice the African Commission on Human and Peoples' Rights (hereafter the 'African Commission') has held that, for example, the Charter is applicable in situations of military occupation of foreign territory.[21]

11. Specialised treaties may also have extraterritorial application. For example, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter the "Convention against Torture"), provides that State parties "shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[22] The Committee Against Torture has stated that *"*the concept of "any territory under its jurisdiction," linked as it is with the principle of non-derogability, includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party.*"*[23] The Committee has also addressed specific situations such as military occupation, and peacekeeping operations, and specific instances of control, including detention:

> **[t]he Committee has recognized that "any territory" includes all areas where the State party exercises, directly or indirectly**, **in whole or in part, de jure or de facto effective control, in accordance with international law**. The reference to "any territory" in article 2, like that in articles 5, 11, 12, 13 and 16, refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also **during military occupation or peacekeeping operations** and in such places as embassies, **military bases, detention facilities**, or other areas over which a State exercises factual or effective control. The Committee notes that this interpretation reinforces article 5, paragraph 1 (b), which requires that a State party must take measures to exercise jurisdiction "when the alleged offender is a national of the State." The Committee considers that **the scope of "territory" under article 2 must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention.**[24]

[20] *Coard et al v. United States*, Case 10.951, Report No 109/99, 29 Sept.1999, para. 37.

[21] See African Commission, *DRC v. Burundi, Rwanda, Uganda,* Communication 227/1999, reported in 20th Activity Report of the African Commission on Human and Peoples' Rights Annex IV, examined also below in section IV.

[22] Convention Against Torture, Art. 2(1).

[23] Committee against Torture, *General Comment No. 2: Implementation of article 2 by States parties*, UN Doc. CAT/C/GC/2 (24 Jan. 2008) at para. 7.

[24] UN Committee Against Torture, General Comment no. 2, *Implementation of Article 2 by States Parties*, CAT/C/GC/2, 24 January 2008, para. 16 (emphasis added). See also *Committee Against Torture,* Conclusions and Recommendations: USA, *UN doc.CAT/C/USA/CO/2, of 18 May 2006, para. 15:* 'the provisions of the Convention expressed as applicable to 'the territory under the State party's jurisdiction' apply to, and are fully enjoyed by, all persons under the effective control of its authorities, of whichever type, wherever located in the world.' See ffurther, in respect of the Convention on the Prevention and Punishment of the Crime of Genocide, the ICJ which has held that it applies 'wherever [a State] may be acting or may be able to act in ways appropriate to meeting [its] obligations.' (ICJ, Case *Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia Montenegro*), No. 91 [2007] ICJ 1, 26 February 2007). With regards to the applicability of the Convention for Elimination of All Forms of Racial Discrimination, the ICJ has noted that *"*there is no restriction of a general nature in CERD relating to its territorial application […].The Court consequently finds that these provisions of CERD generally appear to

12. The Committee against Torture, in its most recent Conclusions and Recommendations in relation to the UK expressed concern at,

> the State party's limited acceptance of the applicability of the Convention to the actions of its forces abroad, in particular its explanation that "those parts of the Convention which are applicable only in respect of territory under the jurisdiction of a State party cannot be applicable in relation to actions of the United Kingdom in Afghanistan and Iraq"; the Committee observes that **the Convention protections extend to all territories under the jurisdiction of a State party and considers that this principle includes all areas under the de facto effective control of the State party's authorities.** [emphasis added].[25]

13. Similarly, the UK Parliament's Joint Committee on Human Rights has stated,

> Whilst the application of the Criminal Justice Act 1988 to UK forces in Iraq (subject to the defences available under the Act, which have been considered above) is likely to satisfy the requirement of the Convention for the criminalisation of acts of torture, the Government has not expressly accepted the application of other rights and duties under UNCAT to territory controlled by UK forces abroad, in particular the duty to prevent torture, the duty not to return detainees to face torture, and the duty to investigate allegations of torture. **We recommend that the Government should expressly accept the application of all of the rights and duties in the Convention Against Torture to territory under the control of UK troops abroad.** [emphasis as in original][26]

14. The above-mentioned bodies, including this Court, in practice frequently imply the extraterritorial applicability of human rights obligations, albeit without expressly addressing the question of jurisdiction.[27] Indeed, the jurisprudence of other international human rights bodies does not suggest that applicability of human rights obligations outside the State's territory is in some way exceptional or extraordinary. To the contrary, it has been suggested that where the State exercises its powers abroad, **there should be a presumption of extraterritorial reach of human rights obligations**.[28]

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apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.*" (*ICJ, *Provisional Measures in the case of Georgia v. Russia*, no. 35/2008, order of 15 Oct.2008.)

[25] Committee against Torture, *Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland*, UN Doc. CAT/C/CR/33/3 (10 Dec. 2004) at para. 4(b).

[26] Joint Committee on Human Rights, *The UN Convention against Torture (UNCAT)*, Nineteenth Report of 2005-06 Session Volume 1 (18 May 2006) at para. 73.

[27] See e.g., ICJ, *DRC v. Uganda*, *op cit,* para. 178 – 180; African Commission, *DRC v. Burundi, Rwanda, Uganda*, op cit, para. 216. For examples within the Convention system, see *Xhavara and Others v. Italy and Albania* (dec.), no. 39473/98, 11 Jan.2001, concerning the sinking in international waters of a ship carrying irregular Albanian immigrants by an Italian naval ship. See also *Women on Waves and Others v. Portugal,* no. 31276/05, 3 Feb.2009, concerning the ban on a ship chartered by the Women on Waves Foundation from approaching Portuguese territorial waters and entering Portugal.

[28] Judge Theodor Meron, former President of the ICTY: 'In view of the purposes and objects of human rights treaties, there is no *a priori* reason to limit a state's obligation to respect human rights to its national territory. Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction, or de facto jurisdiction) over persons outside national territory, the presumption should be that the state's obligation to respect the pertinent human rights continues. That presumption could be rebutted only when the nature and the content of a particular right or treaty language suggest otherwise;' and 'Fundamental principles as the prohibition

15. In addition, public international law principles provide guidance on this matter.[29] The International Law Commission (ILC) observed that "[i]nternational life provides abundant examples of activities carried out on the territory of a State by agents of another State acting on the latter's behalf", and that "[t]here is nothing abnormal in this." While discussing the ILC's Articles on State Responsibility, it expressly noted that "draft articles 5 et seq.[which provide rules on attribution of conduct to a state] set no territorial limitation on the attribution to the State of the acts of its organs."[30] Therefore, under public international law the State is responsible for the conduct of its organs, which constitutes breach of an international obligation of that State,[31] regardless whether this conduct was performed on or outside the territory of that State.

C. The Relevant Test in International Human Rights Law

16. In the Court's jurisprudence, the focus of the analysis of extraterritorial applicability of the Convention has been on whether the impugned State's actions involve "authority and/or effective control" **over persons** outside its territory, or "effective control" **over foreign territory**.[32] Outside the Convention system, there is no apparent distinction between **territorial** control and **personal** control. Rather, the extraterritorial jurisdictional test of other international human rights bodies has focused on whether the State has "authority and control"[33] or "power or effective control"[34] over a person, who is located outside its borders. It is clear from the jurisprudence of other international bodies that this test is intended to cover a variety of extraterritorial activities of States, and in practice has been applied so as to bring within the scope of the relevant regional and international instruments a range of situations similar to those covered under the Convention tests.[35]

17. In accordance with the practice of the Court,[36] other international bodies consider that the question of whether the State exercises control, authority, or power, is in all cases one of fact, to be assessed on a **case-by-case basis depending on the circumstances of the particular**

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of the arbitrary taking of life, the duty of humane treatment of persons in detention, the prohibition of inhuman or degrading treatment or punishment, and essential due process must always be respected.' In 'Agora: The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties,' 89 American Journal of International Law, vol.89 (1995), p.78, at pp.80– 81(fns omitted).

[29] For the Court's reference to the work of the International Law Commission, see e.g. *Ilaşcu and Others v. Moldova and Russia, no. 48787/99,* 8 Jul. 2004, para. 320.

[30] In the Report of the Committee on Legal Affairs and Human Rights of PACE, 'Areas Where the European Convention on Human Rights Cannot Be Implemented', Doc.9730, 11 March 2003, para. 15. The Legal Affairs Committee of PACE noted in the same report that the ILC devoted a special provision, Article 12, to this issue; however, it was later decided to delete it, as it was considered unnecessary to devote a separate provision to such an obvious principle. Ibid., footnote 11, referring to UN doc.A/53/10, Report of the ILC on the Work of its fiftieth Session (1998), para. 426.

[31] See ILC, Articles on State Responsibility, Article 2.

[32] There is also an additional test which focuses on whether the acts of private individuals abroad which breach the Convention have been committed with the acquiescence or connivance of authorities of the State. See *Solomou*, op cit, para. 44-46, and *Isaak* (dec.), op cit.

[33] See Inter-American Commission, *Coard et al v. United States*, op cit, para. 37.

[34] HRC, General Comment 31, para. 10.

[35] E.g. abductions, arrest, detentions, killings, and other acts or omissions of State agents abroad.

[36] See*, Issa,, op cit, para.*55 – 'the issue [of jurisdiction] is inextricably linked to the facts underlying the allegations.'

case.[37] In addition, either **temporary**,[38] **or prolonged**[39], control, authority or power may give rise to a finding of "jurisdiction" for the purposes of the Convention.

18. Also in similarity with the approach of the Court,[40] the international bodies referred to herein have held that the lawfulness under domestic or international law of the action by which any of the forms of control, authority, or power, were obtained, is not relevant for the purposes of determining whether the State in fact exercises control, authority or power over the individual and, therefore, whether that individual is in fact subject to that State's jurisdiction.[41] Therefore, **either *legal* or *factual*** control, authority or power, may give rise to "jurisdiction" for the purposes of the Convention.

19. In accordance with international practice, **the Court's jurisprudence clearly distinguishes between "jurisdiction"**, which is a prerequisite for triggering the Convention obligations,[42] and **responsibility for violation** of those obligations. Although both are questions involving assessment of facts, they require different analysis, and there may be instances where the Convention is applicable extraterritorially, without there being a breach of its provisions.

D. The *"Espace Juridique"* Concept Does Not Restrict the Application of the Convention to the Regional Space of the Contracting Parties

20. The Court has established the principle that in certain circumstances, **the scope of the Convention may extend beyond the regional space of the contracting parties.**[43] In this respect, the jurisprudence of the Court is in step with the practice of other regional and international bodies, [44] none of which appear to refer to a "legal space" or "*espace juridique"* limitation of the kind referred to *obiter dicta* by the Court in *Banković*. [45] For example, the *Lopez Burgos* case before the HRC concerned an applicant who was abducted and detained by Uruguayan agents in

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[37] See HRC, *Lopez Burgos, op cit*; *Lilian Celiberti de Casariego v. Uruguay,* Communication No. 56/1979, 29 July 1981; *Coard et al v. United States*, op cit. For example, in *Coard* the Inter-American Commission discusses existence of control "*under given circumstances*", and "*usually* through the acts of state's agents abroad."

[38] See *Issa, op cit*, para. 74-76.

[39] See e.g. *Loizidou v. Turkey*, *op cit.*

[40] Eg. *Loizidou*, op cit, para. 52;

[41] See HRC, General Comment 31, para. 10; see also ICJ, *Wall* Advisory Opinion.

[42] See *Issa, op cit*, para. 66.

[43] *Pad v. Turkey (*dec.), op cit, para 53*: "*A State may be held accountable for violations of the right to life of persons who are in the territory of another State which does not necessarily fall within the legal space of the Contracting States;" For recent case law see footnote reference above to the *Öcalan,* and *Issa* cases. For older case-law under the Convention, see the European Commission, *Illich Sanchez Ramirez v. France (dec.)*, no. 28789/95, 24 Jun.1996, concerning apprehension of the applicant by French authorities outside the Council of Europe (in Sudan).

[44] See eg. HRC, *Lopez Burgos,* op cit, where the applicant was abducted and detained by Uruguayan agents in Argentina, which had not ratified the ICCPR at the time; however, on the facts of the case the HRC found that ICCPR applied. The HRC reached the same conclusion in *Lilian Celiberti de Casariego,* op cit, concerning an applicant who was abducted by Uruguayan agents in Brazil, which was not a party to the ICCPR then. The case *Armando Alejandre Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Republica de Cuba*, Case 11.589, Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 586 (1999), known as the *Brothers to the Rescue* case, and the *Haitian Interdiction* case before the Inter-American Commission both concerned action in *international* (air and water) space; on the facts of the cases, the Commission found that the respondent States have exercised jurisdiction for the purposes of applicability of their human rights obligations (see below in section IV).

[45] *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, 12 Dec. 2001.

Argentina, which had not ratified the ICCPR at the time; however, on the facts of the case the HRC found that ICCPR applied. The HRC reached the same conclusion in *Lilian Celiberti de Casariego,* concerning an applicant who was abducted by Uruguayan agents in Brazil, which was not a party to the ICCPR then. The *Brothers to the Rescue* case, and the *Haitian Interdiction* case before the Inter-American Commission both concerned action in **international** (air and water) space; on the facts of these cases, the Commission found that the respondent States had exercised jurisdiction for the purposes of applicability of their human rights obligations.

21. Therefore, the Convention case law has consistently developed the principles with regard to the interpretation of "jurisprudence" in light of the purpose and object of the Convention to protect human rights, and in light of developments in other international law. The Convention has been considered applicable in territories outside the European "legal space" - for example in northern Iraq,[46] Kenya,[47] Sudan,[48] Iran,[49] in a UN neutral buffer zone,[50] and in international waters.[51] The interpretation in *Banković* of "*espace juridique*" as a limitation to the jurisdiction for the purpose of Article 1 of the Convention has been a single exception, which is not binding and indeed has not been followed in more recent cases such as *Issa, Ocalan*, *Isaak,* and *Pad*.[52] Applying such an unjustifiably rigid limitation would conflict with the **universality of human rights** emphasised in the Preamble of the Convention, which refers to the Universal Declaration of Human Rights.[53] Accordingly, the existence of "jurisdiction" for the purposes of Article 1 must be determined with regard to the existence of control, authority, or power of the State over an individual regardless of whether this individual is located within or outside the European regional space.

2. INSTANCES OF EXTRATERRITORIAL DEPRIVATION OF LIBERTY IN THE JURISPRUDENCE OF REGIONAL AND INTERNATIONAL BODIES

22. The international bodies referred to herein have considered **deprivation of liberty to be a form of direct exercise of State power over the individual**. For example, an Inter-American case, *Coard and Others v. United States*, was brought under the American Declaration by citizens of Grenada who were detained by US soldiers in Grenada during the 1983 US military intervention there. The detainees were turned over by the US to post-intervention Grenadian authorities, tried and convicted, with the majority being sentenced to death. In finding that the Declaration rights were applicable to US military activity in Grenada and that there had been violations of those rights, the Commission focused on the question of whether the individual was in some way subject to the "control" of the State.[54] The Commission stated:

> 37. While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it

[46] *Iss, op cit.*
[47] *Ocalan, op cit.*
[48] the European Commission case, *Sanchez Ramirez, op cit.*
[49] *Pad, op cit.*
[50] *Isaak, op cit.*
[51] *Xhavara* and *Women on Waves* cases, *op cit*.
[52] All *op cit*.
[53] See eg. Philip Leach, 'The British Military in Iraq – the Applicability of the *Espace Juridique* Doctrine under the European Convention on Human Rights', Public Law 2005 AUT, 448-458. For a critique of the *espace juridique* limitation see also Ralph Wilde, 'The "Legal Space" or *"Espace Juridique"* of the European Convention on Human Rights: Is it Relevant to Extraterritorial State Action?', EHRLR 2(2005), 115-124.
[54] *Coard*, op cit.

> pertinent to note that, under certain circumstances, **the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by** the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination -- "without distinction as to race, nationality, creed or sex." **Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.** [emphasis added]

23. The *Detainees in Guantanamo Bay, Cuba*, case was brought under the American Declaration on behalf of individuals initially detained by US authorities in various locations all over the world and who were subsequently brought to and detained on Cuban territory within the US-controlled naval base at Guantánamo Bay. The Inter-American Commission was principally concerned with arguments relating to the interaction of human rights law and international humanitarian law. The Commission concluded that while the rights of the individuals detained during an armed conflict would be determined in part by reference to international humanitarian law, those detainees who were subject to the "authority and control" of a state also **remain protected at the very least by non-derogable protections of human rights laws**.[55]

24. The *Haitian Interdictions* case concerned action by US military vessels in international waters designed to prevent Haitian refugees from sailing to the US or other countries. The Inter-American Commission considered the US extraterritorial action sufficient to render the human rights obligations of the American Declaration applicable. There was no discussion of the degree of US control of the international waters where the interdiction actions were taking place or of the leased Cuban territory, where some Haitians were detained prior to repatriation to Haiti, as a necessary prerequisite to the triggering of the obligations of the Declaration. The Commission found a violation of the right to life pursuant to Article I of the American Declaration on the basis that the US exposed the refugees to the risk of death on return to Haiti.[56]

25. The HRC has examined two cases, which have previously been referred to by the Court[57] on the issue of jurisdiction. In *Sergio Euben Lopez Burgos v. Uruguay,*[58] and in *Lilian Celiberti de Casariego v. Uruguay*[59] the victims, who were Uruguayan nationals, were abducted and detained in, respectively, Argentina and in Brazil, by Uruguayan agents. They were

[55] *Detainees in Guantanamo Bay, Cuba, Request for Precautionary Measures* para.532, op cit.
[56] *Haitian Interdiction,* para. 550, op cit.
[57] Eg. in *Issa*, op cit, para. 71.
[58] Communication No. R.12/52 (6 June 1979), UN Doc. Supp. No. 40 (A/36/40) at 176 (1981)
[59] Communication No. 56/1979 (29 July 1981), UN Doc. CCPR/C/OP/1 at 92 (1984).

subsequently taken to Uruguay where they were subjected to ill-treatment. In both cases, the HRC took the same approach to the extraterritorial applicability of the ICCPR. It established the requirement of "authority and control" of the State over the person for the purposes of applicability of the ICCPR, and in interpreting this requirement it put emphasis on the nexus between the individual and the State which affects the individual's rights. In *Burgos*, the HRC found:

> 12.1 The Human Rights Committee further observes that although the arrest and initial detention and mistreatment of Lopez Burgos allegedly took place on foreign territory, the Committee is not barred either by virtue of article 1 of the Optional Protocol ("... individuals subject to its jurisdiction ...") or by virtue of article 2 (1) of the Covenant ("... individual within its territory and subject to its jurisdiction ...") from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil.
>
> 12.2 The reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" does not affect the above conclusion because **the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.**
>
> 12.3 **Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but does not imply that the State party concerned cannot 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.** According to article 5 (1) of the Covenant:
>
> > "1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized heroin or at their limitation to a greater extent than is provided for in the present Covenant."
>
> In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory. (emphasis added)[60]

[60] Article 5(1) of the ICCPR is in similar terms to Article 17 of the European Convention.

SECTION II: CONFLICTING INTERNATIONAL LAW OBLIGATIONS

1. INTERPRETATION OF THE CONVENTION

A. The Convention falls to be interpreted in accordance with international law, but with due regard to its special character

26. Interpretation of the Convention is guided primarily by the ordinary meaning of the Convention's terms, seen in their context, by the object and purpose of the Convention, and by the need to ensure that Convention rights are practical and effective, rather than theoretical and illusory.[61] In addition, the Court has acknowledged the need, in interpreting the Convention, to take account of relevant rules and principles of international law applicable in relations between the Contracting Parties, in accordance with Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969 (hereinafter "the Vienna Convention").[62] In such cases, however, the Court has stressed that in interpreting the Convention in accordance with other international obligations, it "must be **mindful of the Convention's special character as a human rights treaty**".[63] (emphasis added)

2. CONSEQUENCES OF CONFLICTING INTERNATIONAL OBLIGATIONS

A. The Convention is not generally displaced by other international legal obligations, including bilateral treaties

27. International instruments that create binding obligations on states may take a number of forms. Treaty obligations will arise where international agreements contain provisions which demonstrate the parties' intention to be bound by the commitments set out therein.[64] For example, although an exchange of letters or a memorandum of understanding will not in every case constitute a treaty, treaty obligations will arise where such instruments contain commitments by which it is demonstrated the parties intended to be bound.[65] Where however an agreement creating a binding international obligation is established to exist, and where it apparently conflicts with obligations under the Convention, then both the Convention principles and jurisprudence, and general principles of customary international law, as declared in the Vienna Convention, regulate such conflict.

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[61] *Demir and Baykara v. Turkey*, Application no. 34503/97, [GC] paras. 65-68; *Golder v. the United Kingdom*, 21 February 1975, para. 29, Series A no. 18; *Johnston and Others v. Ireland*, 18 December 1986, para. 51 et seq., Series A no. 112; and *Witold Litwa v. Poland*, no. 26629/95, para. 57-59, ECHR 2000-III.

[62] *Case of Demir and Baykara v. Turkey*, op cit, para.67; *Lithgow and Others v. the United Kingdom*, 8 July 1986, para. 114 and 117, Series A no. 102.

[63] *Al-Adsani v. United Kingdom*, Application no. 35763/97, paragraph 55. see, *mutatis mutandis*, *Loizidou v. Turkey* (merits), judgment of 18 December 1996, *Reports* 1996-VI, p. 2231, para. 43' *Behrami v. France, op cit, Germany and Norway*, Application no. 78166/01, para.122; *Bankovich and Others v. Belgium,* Application no. 52207/99, para.57.

[64] Article 2(1)(a), VCLT defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

[65] See Commentary to VCLT, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 188; *Case concerning maritime delimitation and territorial questions between Qatar and Bahrein (Qatar v. Bahrein)*, ICJ, Admissibility Decision, 1 July 1994, ICJ Reports 1994, p. 120, paragraph 23.

28. It is submitted that, in accordance with these principles, the primary factors to be taken into account in resolving the question of apparent conflict between obligations under the Convention and other legal obligations: 1) the **form of the legal instruments concerned**; 2) the **degree of compatibility the putatively conflicting obligation maintains** with the Convention, e.g. whether a treaty that provides for the transfer of competencies of the Contracting State provides for **equivalent protection in relation to Convention rights**; and 3) the **nature of the Convention rights affected**. These are considered in turn below.

1) The form of the conflicting legal instruments.

29. As a general rule, where a State enters into a treaty that conflicts with the obligations arising from a previous treaty with a different state or states, both treaties are in force, and the state that is party to both must therefore respect obligations arising from both treaties (assuming the obligations are otherwise lawful, e.g. do not contravene a peremptory norm of international law).[66] However, when the treaties do conflict, the State must either find an interpretation that allows the implementation of their obligation in conformity with both treaties, or otherwise, incur international responsibility for breach of one of the international obligations.[67]

30. The Convention is a multilateral treaty containing human rights obligations that are *erga omnes partes*,[68] which necessarily run not simply between states in their bilateral relations, but to all parties to the treaty concerned. Therefore, the State entering into a conflicting agreement with a non-Convention State necessarily affects the interests of all parties to the Convention. Article 30.4(b) of the Vienna Convention states that where States Parties to a later treaty do not include all States Parties to the earlier one, then "as between a State Party to both treaties and a State Party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations". Therefore, between all parties to the Convention, to which obligations are owed *erga omnes partes,* the Convention remains operative. The State Party continues to owe legal obligations to all State Parties to the Convention, and their corresponding legal interests are not affected by the agreement. In this situation, the Convention rights can be limited only to the extent provided for in the Convention itself.

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[66] Article 30 ILC Articles, see *infra*. See *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission Finalised by Martti Koskenniemi,* at para.320: "it is now well settled that in cases of conflict, the issue is not with invalidity but relative priority between treaties …"

[67] See, Article 2, ILC's Articles on State Responsibility.

[68] International Court of Justice, Decision of 5 February 1970, Case concerning Barcelona Traction Light and Power Company, para. 34, in *Recueil des Arrêts de la Cour Internationale de Justice* – 1970, para. 33; General Comment 31, UN Human Rights Committee, UN document CCPR/C/21/Rev.1/Add.13, para. 2; Article 48 ILC's Articles on State Responsibility and commentary to Article 48: "obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations have sometimes been referred to as obligations *erga omnes partes*… [which] have to be collective obligations i.e. they must apply between a group of States and have been established in some collective interest. They might concern, for example, the environment or security of a region (e.g. a regional nuclear free zone treaty or a regional system for the protection of human rights)."

31. The Convention jurisprudence also affirms that other treaties do not displace the Convention obligations of States.[69] This principle is particularly evident in cases concerning extradition treaties that may conflict with the principle of *non-refoulement*. Notably, in *Soering v. UK*, the existence of an obligation to transfer the applicant under an extradition treaty with the United States could not absolve the United Kingdom from performance of its obligations to comply with interim measures of the Court, which prevented his transfer.[70] As the Grand Chamber noted in *Mamatkulov and Askarov v. Turkey*, this case "resolved the conflict ... between a State Party's Convention obligations and its obligations under an extradition treaty with a third-party State by giving precedence to the former."[71]

32. This principle is also clear from the case law relating to subsequent treaties or other international obligations that transfer competence in certain areas to other international or regional organisations. In *Prince Hans-Adam II of Liechtenstein v. Germany*, the Grand Chamber emphasised that "the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States"[72] and that "[i]t would be incompatible with the object and purpose of the Convention … if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution" of competences.[73] In *Matthews v. UK* the Court held that the UK could not evade responsibility under the Convention by reliance on its transfer of powers to the EU, by a treaty subsequent to the Convention: "In particular, the suggestion that the United Kingdom may not have effective control over the state of affairs complained of cannot affect the position, as the United Kingdom's responsibility derives from its having entered into treaty commitments subsequent to the applicability of Article 3 of Protocol No. 1 to Gibraltar, namely the Maastricht Treaty taken together with its obligations under the Council Decision and the 1976 Act."[74]

2) Consistency of Protection: Equivalence to Convention protection

33. In a line of cases, the Court has considered treaties providing for the transfer of competencies to international organisations to be generally permissible, but only provided that Convention rights continue to be secured by the relevant organisation in a manner which affords protection at least equivalent to that provided under the Convention.[75] Where such

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[69] *X v. Federal Republic of Germany*, App 235/56 (1958-9) 2 Yearbook 256, at 300: "if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the treaty". Regarding a conflicting treaty obligation arising prior to a State becoming party to the ECHR, see *Slivenko v. Latvia* (Grand Chamber) Application no. 48321/99, Admissibility decision of 21 March 2002, para 62, and merits, 9 October 2003, para.120, where it was held that an earlier bilateral treaty could not deprive the Court of its power to review whether there was an interference with ECHR rights, and whether such interference was justified.

[70] *Soering v. UK*, App. No.14038/88, Judgment of 7 July 1989, para31, para.111.

[71] *Mamatkulov and Askarov v. Turkey*, *op cit*, para107

[72] [GC], no. 24833/94, paras. 29, 32-34, ECHR 1999-I*; Case of Prince Hans-Adam II of Liechtenstein v. Germany*, Application no. 42527/98, paragraph 47.

[73] *Case of Prince Hans-Adam II of Liechtenstein v. Germany*, op cit, para. 48. See also, in the same terms, *Waite and Kennedy v. Germany*, Application no. 26083/94, Judgment of 18 February 1999, para.67, where the Court also linked this rule and the principle that Convention rights should be interpreted so as to be practical and effective.

[74] para.34

[75] *Matthews v. United Kingdom*, Application no. 24833/94, para. 32. *Bosphorus v. Ireland* op cit, para.155.

equivalent protection is guaranteed in the organisation, the presumption will arise that the State complies with the Convention in implementing legal obligations flowing from membership of that organisation.[76] However, any such presumption can be rebutted if, in the circumstances of a particular case, the protection of Convention rights is considered to have been manifestly deficient. In such cases, the Court has held that "the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights." [77]

34. It is submitted that such considerations equally apply where a subsequent international obligation of a Convention Contracting State, by treaty or otherwise, provides for joint or co-operative activity with another State, that impacts on the protection of the Convention rights within the jurisdiction of the first State. Where the human rights protection available as a result of the conduct of the second state is manifestly deficient in the circumstances of a particular case, the presumption of Convention compliance is rebutted.

35. Furthermore, the Convention jurisprudence noted above suggests that when assuming a treaty or other international law obligation that will allow for the transfer of detainees, the transferring Convention Contracting State must establish the equivalency of the human rights protection system of the receiving State to that provided under the Convention, or otherwise allow for exceptions to the obligation of transfer in accordance with the principle of *non-refoulement*.

36. This obligation continues to apply where a Convention Contracting State exercises jurisdiction extra-territorially. In such cases, there is an obligation to negotiate with the territorial state to condition its exercise of its ordinary sovereign activity in a manner that does not impede the Convention Contracting State in the discharge of its Convention obligations. Such obligations cannot, in view of the object and purpose of the Convention, be nullified by treaties or other international law obligations owed to the territorial state. Competing international law obligations of the Convention Contracting State, stemming from the sovereignty of the territorial state, do not permit the Contracting State to violate at will its Convention obligations while exercising jurisdiction extra-territorially: were they to do so, this would undermine the object and purpose of the Convention, and would amount to an interpretation of the Convention contrary to its character as a treaty protecting human rights.

3) *The nature of the rights in issue: absolute and non-derogable rights and norms of jus cogens.*

37. Where a Convention right permits certain limitations or qualifications, a conflicting international obligation, as with a rule of national law, may allow for such limitations or qualifications, within the general constraints defined by the Convention and the Court's jurisprudence.[78] However, where a conflicting international law obligation imposes limitations on absolute rights (such as the right to *non-refoulement*), including peremptory norms of international law (*jus cogens*) or limitations to qualified rights which go beyond those permitted by the Convention, the State's Convention obligations will be violated.

[76] *Bosphorous*, op cit, para.156.
[77] *ibid*
[78] *Prince Hans-Adam II of Lichtenstein v. Germany*, *op cit*; *Waite and Kennedy v. Germany*, op cit, para.67.

38. Of relevance is a line of Convention caselaw concerning interferences with qualified Convention rights flowing from international treaty obligations.[79] In these cases, the Court has considered whether the measure alleged to be interfering with Convention rights could be justified as a permissible qualification to those rights. In those cases where the Court has considered the right of access to a court, a qualified right under Article 6 ECHR, the fact that the interference stemmed from a competing international law obligation did not alter the Court's analysis of whether the interference with this right could be justified as necessary and proportionate, in light of the legitimate aims pursued.[80]

39. Convention rights that are absolute (including Article 3[81]) or subject to only very narrow and specific limitations (Article 2),[82] and the fundamental nature of which has been particularly stressed in the jurisprudence of the Court,[83] may not be restricted or qualified for the purpose of fulfilling a competing international obligation. In addition, rights which are non-derogable under the Convention (including Articles 2, 3 and 6)[84] may not, even in a situation of emergency threatening the life of the nation, be interfered with as a consequence of such a competing obligation beyond what is permitted by the terms of the Convention and the Court's jurisprudence.

40. The obligation of *non-refoulement* to face a real risk of torture or inhuman or degrading treatment, or other serious violation of human rights is absolute.[85] Therefore, unlike qualified Convention rights it cannot be modified by subsequent international law

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[79] *Waite and Kennedy v. Germany, o p cit, Al-Adsani, Beer and Regan v. Germany* Application no. 28934/95*, Fogarty v. UK*, Application no. 37112/97, *Prince Hans Adam II of Liechtenstein v. Germany, op cit.*

[80] *Waite and Kennedy v. Germany, o p cit, Al-Adsani, Beer and Regan v. Germany* op cit*, Fogarty v. UK*, op cit.

[81] *Al-Adsani v. United Kingdom*, Application no. 35763/97, paragraph 56; *Saadi v. Italy*, Application no.37201/06, para.138-140

[82] *McCann v. UK, op cit.*

[83] Regarding Article 2: *McCann v. UK*, para.147 "Article 2 ranks as one of the most fundamental provisions in the Convention …As such, its provisions must be strictly construed." See further *Streletz v. Germany* identifying the right to life as protected by Article 2 as "the supreme value in the hierarchy of human rights" paras.92-94. Application nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001. Regarding Article 3: *Soering v. UK*, *op cit*, para.88: "This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe." Regarding Article 6, see *Salabiaku v. France* para. 28 Application no. 10519/83; *Delcourt v. Belgium* para.25, noting that a restrictive interpretation of Article 6 would be contrary to the object and purpose of the Convention.

[84] Including Articles 2, 3 and 6 ECHR

[85] In relation to *non-refoulement* to face a real risk of treatment contrary to Article 3: *Saadi v. Italy*, Grand Chamber, para.138. "Accordingly, the Court cannot accept the argument of the United Kingdom Government, supported by the respondent Government, that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole (see paragraphs 120 and 122 above). Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule." In relation to *refoulement* regarding Article 2 see *Bader and Kanbor v. Sweden* App no.13284/04; and flagrant denial of fair trial contrary to article 6 see *Al-Moayad v. Germany* app no.35865/03.

obligations. The obligation of *non-refoulement* applies in unmodified form to a state exercising extra-territorial jurisdiction, as has been authoritatively affirmed regarding comparable obligations under the Convention Against Torture, the International Covenant on Civil and Political Rights, and the Refugee Convention.[86] As a consequence, subsequent treaties overruling the absolute obligation of States Parties not to *refoule* an individual under their control to a State that does not afford equal protection for such rights cannot absolve the State Party of responsibility for discharging its obligations and for any resulting violations of the Convention.

41. In cases of *refoulement* to face treatment in violation of a norm of *jus cogens*, additional considerations apply. It is widely accepted that neither treaty provisions nor customary international law rules can override rules of *jus cogens*. When they do, Article 53 of the Vienna Convention provides that they are null and void.[87] Article 53 states that "a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[88] Article 71 of the Vienna Convention provides for the consequences for the validity of a treaty in case of breach of a peremptory norm of international law:

> "1. In the case of a treaty which is void under article 53 the parties shall:
> (*a*) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and
> (*b*) bring their mutual relations into conformity with the peremptory norm of general international law."[89]

42. The *Articles on States Responsibility* adopted by the International Law Commission provide that, in the case of a breach in respect of an obligation arising out of a *jus cogens* norm, all other States have an obligation to cooperate to bring an end to the breach through lawful means and not to recognise as lawful a situation created by such a breach, or to render

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[86] Conclusions and Recommendations of the Committee Against Torture, United States of America, op cit para.20; Conclusions and Recommendations of the Human Rights Committee, United States of America, CCPR/C/USA/CO/3 (2006); United Nations High Commissioner for Refugees, *The Scope and Content of the Principle of Non-Refoulement,* Opinion, Sir Elihu Lauterpacht CBE QC, Daniel Bethlehem, Barrister, paras.62-67, concludes that: "the principle of *non-refoulement* will apply to the conduct of State officials or those acting on behalf of the State *wherever this occurs*, whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc." See also ibid, para.242. See further, UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007. Consider also CAT General Comment 2, op cit, paras 7, 16 and 19; Nowak & McArthur, p.129, para.4; p.147, para.72 and p.199, para. 180-1; and the approach adopted by the HRC in its General Comment 31, para. 10-11); CAT, Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland: UN doc. CAT/C/CR/33/3, 10 December 2004, para.4(b) and para.5(e).

[87] Article 53 VCLT "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law…"

[88] Article 53 VCLT

[89] Article 71(1)(a), VCLT.

aid or assistance in maintaining that situation.[90] These obligations have also been recognised by the International Court of Justice.[91]

43. There is no doubt as to the *jus cogens* nature of the prohibition of torture, including its corollary principle of *non-refoulement* to face a risk of torture.[92] As a consequence, no State can conclude or act in furtherance of an international agreement which may risk breaching the principle of *non-refoulement* when there is a serious risk that the person transferred will be subjected to conduct prohibited under Article 3 of the Convention. Where possible, the treaty must be interpreted and applied so as to avoid such risk. Where it cannot be so applied, the treaty is automatically null and void, and the State is under the obligation not to apply the treaty and to "eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law".[93] In the event of a treaty in breach of the principle of *non-refoulement* to torture or inhuman or degrading treatment or punishment, the State must not transfer the persons concerned, or, if it has already transferred them, in breach of a norm of *jus cogens*, it must make all possible efforts to regain control of them, or to ensure they are not subject to such treatment.

SECTION III: INTERIM MEASURES

1. INTRODUCTION

44. Interim measures are an essential element of procedure before international tribunals, with particular significance for tribunals that adjudicate on human rights, and are widely recognised as having binding legal effect. As regards interim measures under Rule 39 of the Rules of Court of the European Court of Human Rights, the Court and its Grand Chamber have repeatedly affirmed their binding nature, under Article 34 of the Convention, read in light of Articles 1, 13 and 46. In the European human rights system, as before other international tribunals, the binding nature of interim measures derives from their essential

[90] International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, Introductory Commentary to Part II, Chapter 3, paragraph (7) (2001), Articles 40-41.

[91] International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Reports 2004, 136 at 200 (para. 159), requiring States not to recognize nor to render aid or assistance to the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory in violation of the right of the Palestinian people to self-determination.

[92] International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecutor vs. Anto Furundzija*, Judgment No. IT-95-17/1-T, para. 154; *The Prosecutor vs. Delalic and others*, ICTY Trial Chamber, IT-96-21-T, para.454; *The Prosecutor vs. Kunarac*, It-96-23-T and IT-96-23/1-T (22 February 2001). *Al-Adsani v. UK*, op cit para.60. See also Inter-American Court of Human Rights (Judgment of 7 September 2004, *Tibi c. Ecuador*, para 143; . Judgment of 8 July 2004, *Hermanos Gómez Paquiyauri c. Perú*, para. 112; Judgment of 27 November 2003*, Maritza Urrutia c Guatemala*, para. 92; and Judgment of 18 August 2000, *Cantoral Benavides c. Perú,* paras. 102 & 103), UN Special Rapporteur on Torture (UN Doc. E/CN.4/2006/6, para. 17) and IACHR (*Report on Terrorism and Human Rights,* OAS Doc. OEA/Ser.L/V/ll.116, Doc. 5 rev. 1 corr., para. 155). UN General Assembly , Resolution 59/188, *Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,* 8 March 2005. On non-refoulement to torture, see Lauterpacht and Bethlehem (2001, para.195) ; Bruin and Wouters (2003, para.4.6) ., Allain (2002); Report of th Sepecial Rapporteur on Torture to the GA (2004); IACHR Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System (2000), para.154).

[93] Article 71(1)(a), VCLT 1969.

role in preventing irreparable harm to the rights of the parties to a case pending its full consideration, and thereby preserving the capacity of the Court to adjudicate on the case, in a way that effectively protects the Convention rights; the duty to comply with orders for interim measures therefore reflects the obligation to comply with the Convention in good faith.

45. If interim measures, recognised as having binding legal effect, are to fulfil their functions, then the obligation to comply with them must be strictly and consistently applied, irrespective of national law, and must not be undermined by competing international law obligations. To discharge the obligation to comply with interim measures, a State must demonstrate that it has taken all available measures to comply with the measure. No action may be taken in contradiction of an interim measure until the Court itself has determined that all reasonable and available steps have been taken to comply with it, or that for other reasons the measure is no longer necessary or appropriate.

46. Fundamentally, interim measures are the ultimate enforcement mechanism of the ECHR, in that they prevent putative breaches before it has been possible to adjudicate on actual violations.

2. THE BINDING NATURE OF INTERIM MEASURES

A. Interim measures before the European Court of Human Rights

47. The binding nature of interim measures indicated under Rule 39 of the Rules of Court has been repeatedly affirmed, including by the Grand Chamber, as a necessary consequence of the obligations of States under Article 34 of the Convention, not to hinder the exercise of the right of individual petition, and under Article 1 of the Convention, to protect the Convention rights.[94] In the leading case of *Mamatkulov and Askarov v. Turkey*,[95] the Grand Chamber's finding that interim measures were binding, was based on the necessity of such measures to prevent irreparable damage to the rights of the parties to a case, pending the decision of the Court, and to ensure effective operation of the individual petition system, and to the Court's role in securing the Convention rights.[96]

48. The binding nature of interim measures therefore has its roots in both procedure and substance: it is necessary, first, to preserve the rights of the parties from irreparable harm, protecting against any act or omission that would destroy or remove the subject matter of an application, would render it pointless, or would otherwise prevent the Court from considering it under its normal procedure[97]; and second, to permit the Court to give practical and effective protection to the Convention rights by which the Member States have undertaken to abide. [98]

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[94] *Mamatkulov and Askarov v. Turkey*, Application Nos. 46827/99 and 46951/99, Grand Chamber, 4 February 2005; *Shamayev and Others v. Georgia and Russia* Application no.36378/02*; Aloumi v. France,* App no. 50278/99; *Paladi v. Moldova* Application No 39806/05; *Aleksanyan v. Russia*, Application No.46468/06; *Shtukaturov v. Russia*, Application No.44009/06; *Ben Khemais v. Italy* Application no.246/07, Judgment of 24 February 2009.

[95] *op cit*

[96] *Mamatkulov and Askarov v. Turkey*, op cit, paras.123-125.

[97] *ibid* paras.101- 108, *Paladi v. Moldova* para.87 *Ben Khemais v. Italy* Application no.246/07, 24 February 2009, para.81

[98] *Mamatkulov, op cit*, Para.125; See also *Aloumi v. France* Application no. 50278/99 Para.103

49. Furthermore, as the Court has recognised, interim measures ultimately protect the capacity of the individual petitions system to provide victims of human rights violations with an effective remedy. This reflects the substantive right to a remedy under Article 13 of the Convention, which functions as an inherent requirement in proceedings before the Court. [99] Interim measures may also ultimately serve to allow enforcement of obligations under Article 46 of the Convention, since they may be required for the State to discharge its obligation to comply with the final judgment of the Court.[100] These functions of interim measures, which are also common to other systems, and the importance of interim measures to the integrity of the Convention system, necessitate that they be binding, and further require that the obligation to comply with such measures be rigorously and consistently applied and enforced.

50. The binding quality of interim measures in the European Convention system is supported by the general principles of international law and the law of treaties. [101] Article 31(1) of the Vienna Convention on the Law of Treaties requires that treaties must be interpreted in good faith and in light of their object and purpose. These principles are also the basis of the obligation to comply with interim measures in the jurisprudence of other international tribunals, considered below.

B. Interim measures in other international tribunals

51. Interim or provisional measures are an established mechanism in the procedures of other international tribunals, in particular the International Court of Justice, the UN Human Rights Committee, the UN Committee against Torture, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Human and People's Rights. As the Grand Chamber recognised in *Mamatkulov*,[102] although the legal basis and regulation of interim measures varies as between these mechanisms, in all of them, interim measures have been found to be legally binding on the parties. That the binding effect of such measures has been affirmed irrespective of whether provision for interim measures is made in the relevant treaty, or in the rules of Court, and even before tribunals the final decisions of which are not in themselves legally binding on States Parties,[103] demonstrates the significance attached to interim measures as a procedural mechanism to ensure the effectiveness of international law.

52. Consistently in the jurisprudence of these various tribunals, the binding nature of interim measures is based on the necessity to preserve the facts of the situation pending adjudication of the case, and to prevent irreparable damage to the interests of one of the parties.[104] Interim measures are exceptional and are indicated, to either party to a case, only

[99] *Mamatkulov, op cit,* para.124
[100] *ibid*
[101] *ibid*, para.109, para.123
[102] *Op cit*, para.124
[103] Including the United Nations Human Rights Committee and the United Nations Committee Against Torture.
[104] Committee Against Torture, Rules of Procedure Rule 108, provides for "such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations." Human Rights Committee Rules of Procedure Rule 86: interim measures may be indicated "to avoid irreparable damage to the victim of the alleged violation."

in situations of urgency and where there is a risk of action being taken by one party which would result in irreparable damage to the interests of the other.[105] Before human rights tribunals, interim measures have the additional function of preserving, pending full consideration of the case, the capacity of the tribunal to provide real and effective protection of the human rights guaranteed by its governing treaty, and to provide an effective remedy for breach of those rights. Interim measures are thus closely linked with the substance of the rights protected by the governing treaty and with the Contracting Parties' undertaking in good faith to abide by those rights, as well as by the adjudicatory process that ensures their protection. [106] The law and practice regarding interim measures in relevant international tribunals is considered briefly below.

C. International Court of Justice

53. Provisional measures, provided for under Article 41 of the Statute of the ICJ, are intended to preserve the respective rights of the parties pending the decision of the Court, and to ensure that irreparable prejudice is not caused to rights that are the subject of dispute before it.[107] They will be ordered only where there is urgency "in the sense that action prejudicial to the rights of either party is likely to be taken before the Court has given its final decision".[108]

54. In its decision in the *LaGrand case* (*US v. Germany*), [109] despite the ambiguous language of Article 41 of the Statute of the Court, in particular the references to the "power to indicate" provisional measures, and to "suggested" measures, the ICJ affirmed the binding nature of provisional measures.[110] The Court relied on the object and purpose of the Statute: to enable the Court to fulfil the basic function of judicial settlement of international disputes by binding legal decisions.[111] From this, as well as the terms of Article 41 read in context, it followed that the purpose of Article 41 was to safeguard the rights of the parties pending settlement of the dispute. For such measures not to have binding effect would be contrary to the object and purpose of the Article.

D. Inter-American Court and Commission

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[105] See *infra* in relation to the ICJ and the Inter-American Court.
[106] See in particular jurisprudence of the Inter-American court and HRC, considered *infra*.
[107] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*) Order of 13 September 1993, para.35. *Nuclear Tests (Australia v. France)* Interim Protection Order of 22 June 1973, ICJ Reports 1973 p.103; United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, ICJ Reports 1979 p.19, para.36; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Order 16/07/2008 – Request for Interpretation of the Judgment of 31 March 2004 para.65
[108] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* Provisional Measures, Order of 23 January 2007, ICJ Reports 2007, p.11 para.32; *Avena and other Mexican Nationals v. United States of America*, Request for Interpretation of the Judgment of 31 March 2004, op cit, para.66.
[109] International Court of Justice, *LaGrand case (Germany v. USA*), Judgment of 27 June 2001.
[110] See, for example, N. Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, L.G.D.J. 7th edition, Paris 2002, pp.904-905; and J Sztucki, *Interim Measures in the Hague Court, An Attempt at a Scrutiny*, Devener-Kluwer, pp.35-60 and 270-280.
[111] *LaGrand, op cit,* Para.102

55. Provisional measures of the Inter-American Court are provided for under Article 63.2 of the American Convention, in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons. [112] The binding nature of these measures is undisputed and has been repeatedly affirmed in orders of the Inter-American Court.[113]

56. In addition to the preservation of the rights of the parties to a dispute pending settlement, the Inter-American Court has emphasised that provisional measures represent a means to protect substantive human rights. Thus it has stated that: "under International Human Rights Law provisional measures are not only precautionary, in the sense that they preserve a legal status, but essentially protective since they protect human rights, as they seek to prevent irreparable damage to persons. These measures are applied as long as the prerequisites of extreme gravity and urgency and prevention of irreparable damage to persons are met. Thus, provisional measures become a true preventive jurisdictional guarantee".[114]

57. In serious and urgent cases, the Inter-American Commission may also issue precautionary measures when necessary in order to prevent irreparable harm to persons.[115] In a recent case, for example, it issued precautionary measures to protect Djamel Ameziane, an Algerian citizen who has been held at Guantánamo Bay for more than six years. It requested the US to:

> "4. Take all measures necessary to ensure that Mr. Djamel Ameziane is not transferred or removed to a country where there are substantial grounds for believing that he would be in danger of being subjected to torture or other mistreatment, and that diplomatic assurances are not used to circumvent the United States' *non-refoulement* obligations".[116]

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[112] See also, Article 26 of the Rules of Procedure of the Inter-American Court of Human Rights.

[113] *Chunimá v. Peru* Order of the Court of 15 July 1991, Inter-Am Ct. HR (ser.E) (1991), *James v. Trinidad and Tobago,* Order of the Court of 4 November 2000, Inter-Am. Ct. HR (ser.E) (2000) *Loayza Tamayo v. Peru,* Order of the Court of 13 December 2000, Inter-Am Ct. HR (Ser.E) (2000); *Haitians and Dominican nationals of Haitian origin in the Dominican Republic v. the Dominican Republic,* Order of the Court of September 4, 2000, Inter-Am. Ct. HR (Ser.E) (2000). See further the extrajudicial comments of Asdrúbal Aguiar, former judge of the Inter-American Court of Human Rights, in *Apuntes sobre las medidas cautelares en la Convención Americana sobre Derechos Humanos*, in *La Corte y el sistema Interamericano de Derechos Humanos*, Rafael Nieto Navia, Editor, 1994, p.19.

[114] Order of the Inter-American Court of Human Rights of November 29, 2006, Provisional Measures Regarding the Republic of Colombia, *Matter of Giraldo-Cardona*, para.5. See also, Order of the Inter-American Court of Human Rights of February 6, 2008 Provisional Measures with regard to Columbia, *Matter of the peace Community of San José de Apartadó*: para.16; Order of the Inter-American Court of Human Rights of February 2, 2007, Request for Provisional Measures filed by the Inter-American Commission on Human Rights regarding the Bolivarian Republic of Venezuela, *Matter of the Penitentiary Centre of the Central Occidental Region (Urbiana Prison)*, para.4. *Loayza Tamayo Case*, Order of the Court of December 13, 2000, Inter-Am Ct HR (Ser.E) (2000): paras 10-11;*James et al ; In the Matter of Trinidad and Tobago,* Order of the Inter-American Court of Human Rights of December 2, 2003, paras.9 and 10.

[115] See Article 25 of the Rules of Procedure of the Inter-American Commission on Human Rights.

[116] Letter to Center for Constitutional Rights and Centro por la Justicia y el Derecho Internacional (CEJIL) from the Inter-American Commission on Human Rights, *Ref: Djamel Ameziane, Precautionary Measures No. 211-08, United States* (20 Aug. 2008) available at: http://ccrjustice.org/files/2008-08-20%20IACHR%20Initial%20Response.pdf. The Commission also requested the US to: "1. Immediately take all measures necessary to ensure that Mr. Djamel Ameziane is not subjected to cruel, inhuman or degrading treatment or torture during the course of interrogations or at any other time, including but not

E. United Nations Human Rights Committee

58. The individual complaints procedure under the Optional Protocol to the ICCPR does not itself provide for interim measures, but Rule 92 HRC Rules of Procedure allows the Committee to "inform [the] State of its Views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation."

59. Despite this absence of an express treaty basis, the Human Rights Committee has consistently held that interim measures have binding effect, since the obligation to comply with interim measures is implied in the obligations under the Optional Protocol to co-operate with the Committee and the petitions procedure in good faith, and to allow the Committee to consider the merits of the case and forward its views to the parties.[117] In *Piandiong v. the Philippines,*[118] the Committee considered that a State Party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration of communications by the Committee, or to render examination by the Committee moot and "the expression of its views nugatory and futile".[119] The Committee further considered that disregard of such measures, especially by irreversible measures such as execution or deportation, undermined the substance of the Covenant rights.[120]

F. United Nations Committee against Torture

60. Interim measures, provided for under rule 108 of the Committee against Torture's Rules of Procedure, are "requested" rather than imposed by the Committee. Nevertheless, the Committee, in a series of cases where the authors of communications have been transferred from the territory despite requests under Rule 108, has stated unequivocally that it considers its requests for interim measures to be binding on States that have accepted the right of individual petition under Article 22 of the Convention Against Torture (CAT).[121] Adopting a purposive interpretation of Article 22, the Committee has pointed to States' undertaking in good faith, in accepting Article 22, to co-operate with the Committee in its consideration of

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limited to all corporal punishment and punishment that may be prejudicial to Mr. Ameziane's physical or mental health; 2. Immediately take all measures necessary to ensure that Mr. Djamel Ameziane receives prompt and effective medical attention for physical and psychological ailments and that such medical attention is not made contingent upon any condition; 3. Take all measures necessary to ensure that, prior to any potential transfer or release, Mr. Djamel Ameziane is provided an adequate, individualized examination of his circumstances through a fair and transparent process before a competent, independent and impartial decision maker".

[117] *Piandiong v. the Philippines*, Comm No 869/1999, CCPR/C/70/D/869/1999, para.5.1. *Validzhon Khalilov v. Tajikistan* Comm No 973/2001, CCPR/C/83/D/973/2001 para.4.1; *Mansaraj and others v. Sierra Leone* Comm No. 841/98, CCPR/C/77/D/1086/2002, para.5.1; *Glen Ashby v. Trinidad and Tobago*, Com No 580/1994, CCPR/C/74/D/580/1994, para.4.11.

[118] *Piandiong v. the Philippines*, *op cit*.

[119] *ibid*, para.5.2

[120] *ibid*, para.5.3 These points were reiterated by the Committee in *Validzhon Khalilov v. Tajikistan op cit*, para.4.1- 4.2. *Mansaraj and others v. Sierra Leone op cit*, para.5.1-5.2; and *Sholam Weiss v. Austria* Comm No. 1086/2002, CCPR/C/77/D/1086/2002, 3 April 2003

[121] *Brada v. France*, Comm No 195/2002; *Pelit v. Azerbaijan*, Com No 281/2005, CAT/C/38/D/281/2005; *Dar v. Norway* Comm No.249/2004, CAT/C/38/D/249/2004. See also *Rosana Nuñez Chipana v. Venezuela*, Comm. No.110/1998, CAT/C/21/D/110/1998, para.8; *TPS v. Canada*, Comm. No.999/1997, CAT/C/24/D/99/1997, para.15.6.

individual communications. It has also emphasised that, without respect for interim measures, the individual communications procedure becomes, in many cases, futile. The Committee has found that compliance with a request for interim measures is essential to protect against irreparable harm to the individual, pending the decision of the Committee, and to ensure that any eventual finding by the Committee is not "nullified" or rendered purely academic because of action taken whilst the process is ongoing.[122]

61. Furthermore, the Committee found in *Agiza v. Sweden* that:

> "13.9 The Committee observes, moreover, that by making the declaration under article 22 of the Convention, the State party undertook to confer upon persons within its jurisdiction the right to invoke the complaints jurisdiction of the Committee. That jurisdiction included the power to indicate interim measures, if necessary, to stay the removal and preserve the subject matter of the case pending final decision. **In order for this exercise of the right of complaint to be meaningful rather than illusory, however, an individual must have a reasonable period of time before execution of a final decision to consider whether, and if so to in fact, seize the Committee under its article 22 jurisdiction.**[123] [emphasis added]

G. African Commission on Human and People's Rights

61. Interim measures are provided for in Rule 111 of the Rules of Procedure of the African Commission on Human and People's Rights (ACHPR). The ACHPR has found, in the *Saro-Wiwa case*, that these rules are binding, and that disregard of them violates Article 1 of the African Charter on Human and People's Rights.[124] Finding a violation of the Charter in that case, as a result of failure to comply with its interim measures, the ACHPR noted:

> Rule 111 of the Commission's Rules of Procedure (revised) aims at preventing irreparable damage being caused to a complainant before the Commission. Execution in the face of the invocation of Rule 111 defeats the purpose of this important rule.[125]

2. THE NATURE OF THE OBLIGATION TO COMPLY WITH INTERIM MEASURES

62. Given the purposes and significance of interim measures in protecting the Convention rights, the obligation under Article 34 of the Convention to abide by these measures should be strictly and consistently applied, and requires both that the State should refrain from action in violation of the interim measure, and that it should take all steps available to it to comply

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[122] *TPS v. Canada op cit*, para.15.6; *Cecilia Rosana Nunez Chipana v. Venezuela*, *op cit,* para.8. *Brada v. France*, *op cit,* para.13.4. The Committee expressed itself in similar terms in *Pelit v. Azerbaijan* Com No 281/2005, CAT/C/38/D/281/2005 para.10.1 and in *Dar v. Norway* Comm No.249/2004 para.16.3.

[123] Committee against Torture, *Agiza v. Sweden*, Comm. No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (20 May 2005) at para. 13.9.

[124] ACHPR, 137/94, 139/94, 154/96 and 161/97 International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation/Nigeria

[125] para.114

with the order. A State Party cannot substitute its own judgment for that of the Court, in deciding whether or to what extent to comply with interim measures. As the Grand Chamber has recently held in *Paladi v. Moldova*:

> "it is clear from the purpose of this rule, which is to ensure the effectiveness of the right of individual petition … that the intentions or reasons underlying the acts or omissions in question are of little relevance when assessing whether Article 34 of the Convention was complied with …. What matters is whether the situation created as a result of the authorities' act or omission conforms to Article 34."[126]

63. In particular, it is submitted that the duty to comply with interim measures has the following aspects.

A. A competing international obligation does not permit disregard of interim measures.

64. Where a competing international law obligation exists, this does not in itself override the obligation to comply with interim measures. In *Soering v. UK*, the existence of an obligation to transfer the applicant, under an extradition treaty with the US, did not absolve the UK from its obligations to comply with interim measures of the Court, which prevented his transfer.[127] As the Grand Chamber noted in *Mamatkulov and Askarov v. Turkey*, this case "resolved the conflict ... between a State Party's Convention obligations and its obligations under an extradition treaty with a third-party State by giving precedence to the former."[128]

65. Similarly, the HRC, in *Weiss v. Austria*[129], did not accept the arguments of the defendant State that interim measures could not override contrary obligations of international law, in this case an obligation under an extradition treaty with the United States.[130] Despite those competing obligations, the Committee found that non-observance of interim measures requesting a stay of the extradition, violated the ICCPR.[131]

66. These decisions reflect the general principle of European Convention jurisprudence that States' Article 1 responsibilities to protect the Convention rights are not nullified by conflicting treaty obligations.[132] As discussed in Part II above, where a Convention right permits certain limitations or qualifications, another treaty, as with a rule of national law, may allow for such limitations or qualifications, within the general constraints defined by the Convention and the Court's jurisprudence.[133] However, where a subsequent treaty imposes limitations on absolute rights (such as the right to *non-refoulement*) or limitations to qualified rights which go beyond those permitted by the Convention, the State's Convention obligations will be violated. Where a State has entered into a treaty obligation flowing from membership of an international organisation which affords equivalent protection for human

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[126] *Paladi v. Moldova*, *op cit*, para.87.
[127] *Soering v. UK*, App. No.14038/88, Judgment of 7 July 1989, para31, para.111.
[128] *Mamatkulov and Askarov v. Turkey*, *op cit*, para107
[129] *op cit*.
[130] ibid, paras.5.2-5.3.
[131] ibid, paras.7.1-7.2.
[132] *Prince Hans-Adam II of Lichtenstein v. Germany*, Judgment of 12 July 2001, paras.46-48; *Matthews v. UK,* (Grand Chamber) Application No. 24833/94, paras.30-34. See supra , Part II of this brief.
[133] *Prince Hans-Adam II of Lichtenstein v. Germany*, *op cit*; *Waite and Kennedy v. Germany*, Application no. 26083/94, Judgment of 18 February 1999, para.67.

rights, there is a rebuttable presumption of Convention compliance.[134] However it is submitted that, even in such situations, the obligation to comply with an interim measure would apply, as necessary to preserve the object and purpose of the Convention, given the need to prevent irreparable damage pending consideration of the merits by the Court, including in relation to the question of equivalent protection.

B. The obligation to comply with interim measures arises irrespective of national law.

67. Just as national law cannot be invoked to justify a violation of the Convention,[135] it is clear that deficiencies in national law or practice cannot justify non-compliance with interim measures.

68. In *Shtukaturov v. Russia*,[136] the Court, finding a violation of Article 34 in the failure to comply with interim measures "[took] note that the Russian legal system may have lacked a legal mechanism for implementing interim measures under Rule 39. However, it does not absolve the defendant State from its obligations under Article 34 of the Convention." Similarly, the Human Rights Committee has held that the absence of direct applicability of the ICCPR by national courts could not be invoked to evade the obligation to observe interim measures. In *Roberts v. Barbados* it held that, although the ICCPR was not part of the domestic law of Barbados:

> "the State Party has nevertheless accepted the legal obligation to make the provisions of the Covenant effective. To this extent, it is an obligation for the State party to adopt appropriate measures to give legal effect to the views of the Committee as to the interpretation and application of the Covenant in particular cases arising under the Optional Protocol. This includes the Committee's views under rule 86 of the rules of procedure on the desirability of interim measures of protection, to avoid irreparable damage to the victim of the alleged violation."[137]

C. The State is required to take all available reasonable measures to comply with interim measures.

69. The essential nature of interim measures in protecting the individual petitions process and the capacity of the Court to protect the Convention rights, requires not only that states should always refrain from actions contrary to interim measures, but also that, where necessary to preserve the status quo, they should actively take all reasonable and available steps, including legislative, judicial, diplomatic and operational, to ensure compliance with the measure indicated by the Court. All institutions of the State are bound by an order for interim measures, and must take such measures as are at their disposal to ensure compliance with the interim measures.[138] Institutions of the State may be expected to expedite their

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[134] *Bosphorus Hava v. Ireland*, Application No. 45036/98, Judgment of 30 June 2005, paras.154-156.
[135] *United Communist Party of Turkey v. Turkey, Application no.*133/1996/752/951, Grand Chamber, 30 January1998, para.30.
[136] Application no.44009/06, Judgment of 27 March 2008: para.148
[137] Comm No 498.92, CCPR/C/51/D/489/1992, 19 July 1994, para.5.3. See also, Human Rights Committee, *Weiss v. Austria*, UN Doc.CCPR/C/77/D/1086/2002 (2002)
[138] *Shtukaturov v. Russia*, Application no.44009/06, Judgment of 27 March 2008, pra.144 "for the Court, it makes no difference whether it was the State as a whole or any of its bodies which refused to implement an interim measure". In that case the Court found a violation of Article 34, following a failure by the Russian courts to implement an interim measure. The responsibility of all institutions of the State reflects the

normal procedures to react speedily, in recognition of the urgent nature of orders for interim measures. In *Paladi v. Moldova*, the Grand Chamber found a violation of Article 34 due to a three-day delay in implementing interim measures, despite the contention of the Government that the delay had been due to circumstances beyond the Government's control.[139] The Court found that, for example, the relevant court reacted slowly and did not call an urgent hearing, as it could have done to adequately facilitate compliance with interim measures.[140]

70. In the *La Grand case,* it was significant to the ICJ's finding of a violation of Article 41 of the Statute that, first, the US authorities had limited themselves to the transmission of the order for provisional measures to the State Governor concerned, without any comment, or any request for a stay of execution; that the Governor had not granted a stay of execution, though this would have been open to him; and second, that the US Supreme Court had failed to grant a preliminary stay of execution, a measure that would have been open to it to take. The Court noted that "the various competent United States authorities failed to take all the steps they could have taken to give effect to the Court's Order."[141] Despite the short time available to the authorities to act,[142] the steps taken did not discharge the obligation to comply with the order preliminary measures of the Court.[143]

71. It is notable that the Inter-American Court and Commission regularly require States to take a range of positive operational measures in implementation of its provisional measures, including measures to protect the lives of those under threat from private parties, or to prevent violence or ill-treatment in prisons.[144] These measures stem from the principle

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general principles of State Responsibility: Article 4 ILC's Articles on State Responsibility, as well as general principles of ECHR jurisdiction: *United Communist Party of Turkey and Others v. Turkey*, Application No. 133/1996/752/951 Judgment of 30 January 1998, paras.29-31.

[139] para.82

[140] para.101. See also *Shamayev and Others v. Georgia and Russia*, *op cit.*

[141] *La Grand case, op it, para.114-115. Judgment of 27 June 2001*

[142] ibid, para.111-112.

[143] Ibid, para.115.

[144] Order of the Inter-American Court of Human Rights of November 29, 2006, Provisional Measures Regarding the Republic of Columbia, Matter of Giraldo-Cardona, paras.4-8; Giraldo Cardona Case, Order of the President of the Inter-American Court of Human Rights of October 28, 1996, Provisional Measures Requested by the Inter-American Commission on Human Rights in the Matter of Columbia, para.6; Order of the Inter-American Court of Human Rights of February 2, 2007 Request for Provisional Measures filed by the Inter-American Commission on Human Rights regarding the Bolivarian Republic Venezuela, Matter of the Penitentiary Center of the Central Occidental Region (Uribana Prison), paras.4-12. *Francisco Pastor Chaviano Gonzalez v. Cuba*, Precautionary measures Nº 19-07, Int-Am. Comm. H.R. (28 Feb. 2007) (precautionary measures granted to guarantee life and physical integrity and to instruct competent authorities to evaluation health conditions and to provide adequate medical treatment in detention centre in which petitioner had a serious illness); *Felix Andres Mendoza Monterroso and Family v. Guatemala*, Int-Am. Comm. H.R. (23 Mar. 2007) (precautionary measures granted to guarantee life and physical integrity and to report on actions taken to investigate judicially the facts that gave rise to the precautionary measures which were torture, threats, kidnapping and death threats to family members because of the complaints lodged); *Trade Unionists at the Empresa Portuaria Quetzal v. Guatemala*, Int-Am. Comm. H.R. (31 Aug. 2007) (precautionary measures to guarantee life and physical integrity; and to report on actions take to investigate judicially the facts that gave rise to the precautionary measures - granted after petitioners subject to intimidation and threats and secretary general of trade union killed and witness to the killing also murdered). (See Annual Report of the Int.Am. Comm. H.R. 2007, OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (29 Dec. 2007)).

that, in international human rights law, provisional measures are not only precautionary, but have a role in protecting human rights. [145]

72. Furthermore, it is submitted that, in light of the significance attached to interim measures in the jurisprudence of the Court, the burden lies with the State to establish that all reasonable steps have been taken by all its institutions to ensure compliance with the interim measure.

D. The obligation to comply with interim measures is not dependant on the merits of the case.

73. Given that interim measures are intended to preserve the status quo pending consideration of the case, orders for interim measures imply no decision on the merits of the case, [146] including on the question of jurisdiction.[147] The obligation to comply with such measures applies irrespective of the merits of the case, and of whether the non-compliance would cause or has caused irreparable harm or violation of Convention rights: in *Paladi v. Moldova* it was held that "the fact that the damage which an interim measure was designed to prevent subsequently turns out not to have occurred despite a State's failure to act in full compliance with the interim measure is equally irrelevant for the assessment of whether this State has fulfilled its obligations under Article 34".[148]

74. *A fortiori*, the State Party's belief as to the merits of the case (including on issues of jurisdiction) is irrelevant to the obligation to comply with interim measures. A State Party cannot substitute its own judgment for that of the Court, in deciding whether to comply with interim measures, or to what extent or within what time limits they should be complied with.[149] Therefore if a party considers the interim measures to be unworkable or incorrect, it must apply to the Court for their revision or removal, it cannot unilaterally decide to substitute its views for that of the Court: *"*It is for the Court to verify compliance with the interim measure, while a State which considers that it is in possession of materials capable of convincing the Court to annul the interim measure should inform the Court accordingly."[150]

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[145] Order of the Inter-American Court of Human Rights of November 29, 2006, Provisional Measures Regarding the Republic of Columbia, Matter of Giraldo-Cardona, paras.4-8;

[146] *Ilaechea Cahuas v. Spain* App no.24668/03, para.81. See also Rules of Procedure of the Committee Against Torture, Rule 108, para.2 *;* Rules of Procedure of the Human Rights Committee, Rule 92.

[147] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*) Order of 13 September 1993, para.24: "on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicants appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established." *In Detainees in Guantanamo Bay, Cuba Request for Precautionary Measures*, Inter-Am. Comm..H.R. (13 Mar. 2002). the Inter-American Commission held that, "[i]n light of the foregoing considerations, and without prejudging the possible application of international humanitarian law to the detainees at Guantanamo Bay, the Commission considers that precautionary measures are both appropriate and necessary in the present circumstances, in order to ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess, which may in no case fall below the minimum standards of non-derogable rights." [emphasis added]

[148] para.89

[149] *Paladi v. Moldova, op cit* para.90

[150] *Paladi v. Moldova, op cit*. See further *Olaechea Cahuas v. Spain*, op cit, para.81

3. CONCLUSIONS

75. Throughout the jurisprudence of the Court, and that of other international tribunals, it is made clear that binding interim measures are a vital mechanism indicted in urgent cases where there is an immediate risk of irreparable harm. The necessity of compliance with interim measures of human rights tribunals also follows from the nature of the rights which such measures commonly protect: where they are indicated to prevent irreparable harm to absolute and non-derogable Convention rights, including the right to freedom from torture and inhuman or degrading treatment or punishment, the right to life, or the right to fair trial, there is a particular imperative to uphold them. The obligation to comply with the Convention in good faith and in light of its object and purpose requires that such obligations be strictly and consistently adhered to, in all cases, and with all efforts of all institutions of the State, irrespective of the State Party's view of the merits of the case, including on issues of jurisdiction. Exceptions to or qualifications of this rule would undermine the capacity of the Court to provide real and effective protection of the Convention rights.