**NAIT LIMAN v. SWITZERLAND (Application Number 51357/07)**

**WRITTEN COMMENTS BY**
**REDRESS AND THE WORLD ORGANISATION AGAINST TORTURE**

## INTRODUCTION

1. The Redress Trust ('REDRESS') and the World Organisation Against Torture ('OMCT') (together, 'the Organisations') make these submissions pursuant to leave granted by the President of the Chamber on 12 July 2011 in accordance with Rule 44 § 3 of the Rules of the Court.[1]

2. As is set out in the Court's statement of facts, this case concerns a claim for damages for torture allegedly inflicted on the applicant in Tunisia. In 1995 the applicant was granted refugee status in Switzerland. In 2001 he became aware that the former Tunisian Minister of the Interior, who he alleged was responsible for the torture, was hospitalised in Switzerland. He filed a criminal complaint against the former minister who managed, however, to leave Switzerland before the authorities apprehended him. The applicant later brought a civil claim for damages in Switzerland against both the former minister and the State of Tunisia, however the Swiss Federal Court (on appeal) found, on the basis of its interpretation of the relevant jurisdictional provision, that it did not have jurisdiction to hear the claim.

3. The Organisations intervene in this case in order to address the following legal issues:

(a) the obligation of State parties under Article 6 of the Convention to provide an applicant resident in that State with access to a court concerning allegations of torture committed abroad where there is no other reasonable means of redress; and

(b) whether immunity is applicable to a foreign official in cases of alleged torture (without prejudice to the issue of State immunity).

4. The intervention therefore focuses on the following:

(a) Victims of torture have a right under international law to an effective remedy and to reparation, including access to a court.

(b) Article 6 § 1 should be interpreted in light of international law, including the nature of the violation in question, and the overall object and purpose of the Convention.

(c) A limitation on a resident of a Convention State's right of access to a court in cases alleging torture, where no other means of redress can reasonably be sought, does not pursue a legitimate aim and is disproportionate, taking into account factors including: (i) the special status of the prohibition of torture; (ii) torture victims' right to a remedy and reparation as recognised under the Convention and in international law; (iii) a growing European consensus on similar provisions in other Convention States which recognises their importance and sees the plaintiff's residence as a sufficient connection; (iv) a State's positive obligations to take steps to ensure that rights are practical and effective where the alleged perpetrator was temporarily present in the jurisdiction but fled criminal prosecution; and (v) the lack of alternative means of redress in the foreign State.

(d) There was no effective remedy available for torture in Tunisia against State officials and in particular the present or former Minister of the Interior.

[1] Letters sent by the Section Registrar, Mr Naismith, to REDRESS and OMCT on 12 July 2011. Details of the Organisations are set out in the Annex to these comments.

(e) The only immunity potentially available to a former official is immunity *ratione materiae* (subject-matter immunity) and it does not apply when torture is alleged. As such, its application does not pursue a legitimate aim and is disproportionate.

## A. VICTIMS OF TORTURE HAVE A RIGHT UNDER INTERNATIONAL LAW TO AN EFFECTIVE REMEDY, INCLUDING ACCESS TO A COURT

5. The present case concerns denial of access to justice in a case in which a violation of the absolute prohibition of torture is alleged. As will be indicated in the sections that follow, the underlying nature of the wrong is relevant to an assessment of whether the interference with the right guaranteed by Article 6 § 1 can be justified.

6. The special status of the absolute prohibition of torture is well established in international law, including under the Convention.[2] This Court, together with other international bodies and domestic courts, has recognised that the prohibition against torture has attained the status of a *jus cogens* norm, that is, a peremptory norm of international law.[3] Further the prohibition of torture imposes obligations *erga omnes*, meaning that every State has a legal interest in the performance of such obligations which are owed to the international community as a whole.[4] The *jus cogens* status and the absolute prohibition of torture therefore have important consequences under international law, which provide for the interest and in certain circumstances the obligation of all States to prevent torture and other forms of ill-treatment, to bring it to an end, and not to endorse, adopt or recognise acts that breach the prohibition.[5]

7. At the same time, international law recognises that victims of torture have the right of access to an effective remedy, including access to a court, and full and adequate reparation.[6] The right to an effective remedy is recognised in every major human rights treaty,[7] and in accordance with that right, this Court has emphasised that positive obligations in relation to torture include the duty of the responsible State to provide victims with an effective remedy and appropriate reparation.[8] The central importance of these rights was underlined in 2005, when the UN General Assembly adopted basic principles on the right to a remedy and reparation for gross violations of human rights (hereinafter Basic Principles), including torture. These principles reaffirm that the right of victims to "*equal access to an effective judicial remedy as provided for under international law*"[9] and that redress mechanisms should be fully respected "*irrespective of who may ultimately be the bearer of responsibility for the violation*".[10]

8. The Convention against Torture ("CAT") specifically requires States to provide an effective remedy for the violation of the prohibition against torture.[11] There is growing recognition that all

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[2] See, eg, *Shamayev and Ors v Georgia and Russia,* no. 36378/02, §335, ECHR 2005-III.
[3] See *Demir and Baykara v Turkey* [GC], no. 34503/97, §73, 134512 November 2008; *Ely Ould Dah v France*, no. 13113/03, 53217 March 2009.
[4] See ICJ Reports: *Barcelona Traction, Light and Power Company, Limited, Second Phase* (1970, § 33); *Case Concerning East Timor* (1995, § 29); *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (preliminary objections) (1996, §31).
[5] See e.g. ICTY judgments: *Prosecutor v Delalic and Others* (Judgment of the Trial Court), IT-96-21-T (1998), § 454, *Prosecutor v Kunarac* (Judgment of the Trial Court), IT-96-23-T & IT-96-23/1 (2001), § 466, and *Prosecutor v Furundzija*, (Judgment of the Trial Court) IT-95-17/1-T (1998), 121 ILR 213, §147; and comments of this Court in *Al-Adsani v United Kingdom* [GC], no. 35763/97, §60-65, ECHR 2001 XI.
[6] The *ubi ius ibi remedium* principle of international law comes from the Permanent Court of International Justice in the Chorzów Factory case: "[I]*t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation*." *Chorzów Factory* (Ger. v. Pol.), 1928 P.C.I.J (ser. A) No. 17, at 29 (Sept.12).
[7] See for example, the Universal Declaration of Human Rights (Art. 8), the International Covenant on Civil and Political Rights (Art. 2), the International Convention on the Elimination of All Forms of Racial Discrimination (Art. 6), the Convention of the Rights of the Child (Art. 39), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 14), the Convention for the Protection of All Persons from Enforced Disappearance (Arts. 17 and 24), the African Charter on Human and Peoples' Rights (Art. 7), the American Convention on Human Rights (Art. 25) and the Convention (Art. 13).
[8] *Ilhan v Turkey,* no. 22277/93, §97, ECHR 682000-VII. The Inter-American Court of Human Rights has, too, emphasised that every violation of an international obligation which results in harm creates a duty to make adequate reparations and that the right to a remedy must be effective: *Durand and Ugarte v Peru*, Reparations, IACtHR (ser. C) No. 89, 3 December 2001, § 24; *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am.Ct.H.R. (ser. C) No. 4, 29 July 1988, §§ 80 and 178.
[9] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN G.A. Res 60/147 (2005), para. 12.
[10] *Ibid.* para. (3)(c).
[11] Art. 14.

States – not just the State in whose jurisdiction the torture took place – have duties to assist victims to secure that right. The Committee Against Torture, the body established under the CAT to provide authoritative interpretations regarding its scope and application,[12] has in recent years made it clear in its jurisprudence that the obligations to provide redress are not limited to the State in whose jurisdiction the torture in question was carried out, and has criticised States that fail to provide or restrict civil remedies for torture committed abroad.[13] It has reaffirmed that this is the correct interpretation of Article 14 in a recently-issued draft General Comment on the article, which states:

> *The Committee considers that obligations of States parties under article 14 are not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party. The Committee has praised the efforts of States parties for providing civil remedies for victims who were subjected to torture or ill-treatment outside their territory. This is particularly important when a victim is unable to exercise his or her rights guaranteed under article 14 in the territory where the violation took place. Indeed, article 14 requires States to ensure that all victims of torture are able to access remedy and obtain redress.*[14]

9. These developments are indicative of the international recognition of the link between the lack of accountability for torture and its continuing occurrence.[15] The "*importance of the right to an effective remedy for victims of human rights violations*" and the fact that "*those responsible for acts amounting to serious human rights violations must be held to account for their actions*" have also recently been reaffirmed by the Committee of Ministers of the Council of Europe.[16]

## B. ARTICLE 6 § 1 MUST BE INTERPRETED IN LINE WITH INTERNATIONAL LAW AND IN LIGHT OF THE OBJECT AND PURPOSE OF THE CONVENTION

10. The existence and importance of the general right of victims of torture under international law to an effective remedy and reparation is relevant to the Court's interpretation of Article 6 § 1 of the Convention. This Court has consistently emphasised the 'living' nature of the Convention, which must be interpreted in the light of present-day conditions. In so doing, it has taken account of evolving norms of national and international law in its interpretation of the Convention.[17]

11. When interpreting the Convention, this Court has stressed that account must be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties and that the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part.[18] These include relevant treaties applicable between the parties (such as the CAT),[19] and "*general principles of law recognized by civilized nations*".[20] In

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[12] See *Furundzjia*, above n. 5, §152.

[13] See, eg, Concluding Observations on Japan, CAT/C/JPN/CO/1 (2007), §23 and Nicaragua CAT/C/NIC/CO/1 (2009), §25. The Committee also recommended that Canada review its position under Art. 14 to ensure the provision of compensation through its civil jurisdiction to all victim of torture: Concluding Observations on Canada, CAT/C/CR/34/CAN (2005), §5(f).

[14] Committee against Torture, 'Working Document on Article 14 for Comments', Forty-sixth session, 9 May-3 June 2011, §20. The position taken by the Committee Against Torture on access to a remedy for torture committed outside of the forum jurisdiction under the CAT can be distinguished from the position taken by the Grand Chamber in 2001 in *Al-Adsani v United Kingdom* , above n.5, §40, on the positive obligations imposed by Art. 3 of the Convention. In that case the Grand Chamber held that the positive obligation to provide a remedy arising under Art. 3 applied only to torture committed within the jurisdiction, as that was the primary scope of the Article's application (although it should be noted that in that case the Court was open to the possibility of evolution in international law in relation to torture: see §61). It is submitted that the current position under the CAT is, however, relevant to this Court's consideration of the application of Art. 6 § 1 to those within the forum State's territorial jurisdiction.

[15] As the UN Special Rapporteur on Torture has noted "*the single most important factor in the proliferation and continuation of torture is the persistence of impunity*": UN General Assembly, A/56/156 (2001), at para. 26. The Inter-American Court of Human Rights has also noted that laws that lead to impunity, including by denying access to court, violate rights including Art. 8 of the American Convention (comparable to Art. 6) as they "*lead to the defenselessness of victims and perpetuate impunity*" and "*prevent victims and their next of kin from knowing the truth and receiving the corresponding reparation*": *Barrios Altos* case (*Chumbipuma Aguirre et al*. v *Peru*), Merits (2001) IACtHR, *Series C*, No. 75, §43.

[16] Preamble to the *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies. See *also Recommendation Rec(2006)8 of the Committee of Ministers to Member States on assistance to crime victims*, adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers' Deputies, §7.

[17] See, eg, *Soering v United Kingdom*, 7 July 1989, §102, Series A no. 161; *Rantsev v Cyprus & Russia,* no. 25965/04, §§277-282, 7 January 2010.

[18] See *Rantsev v Cyprus & Russia*, *ibid.*, §274; *Al-Adsani v United Kingdom*, above n. 5, §55, and Art. 31 para. 3 (c) of the Vienna Convention on the Law of Treaties.

[19] See *Rantsev v Cyprus & Russia*, *ibid.*,§277-282 (by which it took account of the 2005 Anti-Trafficking Convention in a case concerning trafficking, which is not specifically referred to in the Convention).

[20] *Golder v United Kingdom*, 21 February 1975, §35, Series A no 18.

particular, this Court has identified two "*universally 'recognised' fundamental principles of law*" central to the understanding of Article 6 § 1: that a civil claim must be capable of being submitted to a judge; and the principle of international law which forbids the denial of justice. [21]

12. This Court has also consistently referred to the need to interpret the Convention in line with its object and purpose as a whole.[22] On that basis, the Court has held that Article 6 § 1 must be interpreted in light of the fact that the Convention arose because the Governments concerned were (as expressed in the preamble):

> *resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration*.[23]

The Court has stressed, furthermore, the importance of the signatory parties' commitment to the rule of law to understanding Article 6 § 1. According to the Court, "*in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts*".[24]

13. The application of Article 6 § 1 in this case should be viewed against a background of significant developments during the last decade which have sought to combat impunity for torture[25] and prioritise the rights of victims to an effective remedy and reparation.[26] Interpretation of the Convention in accordance with these developments is fully aligned with the object and purpose of the treaty, that is the collective enforcement of certain rights stated in the Universal Declaration on Human Rights (including the fundamental prohibition of torture, as replicated in Article 3 of the Convention), and the State parties' commitment to the rule of law.

## C. THE ISSUE OF JURISDICTION

**A limitation on a resident of a Convention State's right of access to a court in cases alleging torture, where no other means of redress can reasonably be sought, does not pursue a legitimate aim and is disproportionate**

### *The applicability of Article 6 § 1*

14. This Court has taken as the starting point when assessing whether there is a civil "right" and in determining the substantive or procedural characterisation to be given to the impugned restriction, the provisions of the relevant domestic law and their interpretation by the domestic courts.[27] The Court has stated, however, that where there are strong reasons to substitute its own views for those of the national courts on a question of interpretation of domestic law, by finding that there was arguably a right recognised by domestic law, it may do so.[28]

15. In considering the domestic court's interpretation, the Court will take into account whether that court analysed "*in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom*".[29] In carrying out its assessment, it is necessary to look beyond the appearances and the language used and to concentrate on the realities of the situation.[30] This Court has emphasised that the result of its

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[21] *Ibid*.
[22] As required by Art. 31 of the Vienna Convention on the Law of Treaties.
[23] *Golder v United Kingdom*, above n.20, §34.
[24] *Ibid*.
[25] Combating impunity is one of the key objectives of the CAT, eg Arts. 4-9 concern universal jurisdiction over torture and Arts. 13 and 14 guarantee the right to complain and to a remedy. See also UN Commission on Human Rights (2005), *Human Rights Resolution 2005/81: Impunity*, 21 April 2005, E/CN.4/RES/2005/81; UN Commission on Human Rights (2005) 'Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher', UN doc. E/CN.4/2005/102 and Add.1.
[26] Including the Committee's jurisprudence on the obligation on all States to provide victims of torture with access to a civil remedy, particularly where the victim is unable to access that right in the territory where the violation took place (see above, para.8; and the Basic Principles.
[27] *Markovic and Ors v Italy* [GC], 1398/03, §95, 2006-XIV.
[28] *Ibid*.
[29] *Ibid*.
[30] *Ibid*, citing *Van Droogenbroeck v Belgium*, 24 June 1982, §38, Series A no. 50.

determination should be consistent with the rule of law and the basic principles underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication and the international law principle that prohibits denials of justice.[31] In making its determination the Court will be guided by the fact that Article 6 § 1 requires State parties to ensure access to a court for those *within its jurisdiction*.[32]

16. Under Swiss law, there is a well known substantive right to pursue an action for moral damages arising from personal injury.[33]

17. In determining issues such as whether it was permissible for the Federal Court to interpret Article 3 of the Code of Private International Law (hereinafter CPIL) as imposing a restriction on that right in cases such as the present, this Court will generally consider whether the result of that interpretation is consistent with Article 6 § 1.[34] It is submitted that in the case of a person who has no other access to a court in relation to torture, the only interpretation that is consistent with the basic principles underlying Article 6 § 1 is that residence or refugee status in Switzerland is a sufficient link to exercise jurisdiction. Further, an interpretation to the contrary is not in line with the purpose of Article 3 CPIL, which is to avoid a denial of justice,[35] nor with the legislature's intention that Swiss authorities will declare themselves competent even in cases where the connection with the country is very small.[36] A restrictive interpretation is contrary to its purpose and therefore the general procedural condition of having an interest in the action is arguably sufficient.[37]

18. In any event, the Organisations submit that Swiss law provides another basis for a civil right because it directly incorporates international law,[38] which recognises the right of a victim of torture to an effective remedy and to reparation from the individual and State responsible, without explicit territorial limitations (as outlined above at Section A). International treaties to which Switzerland is a party are directly incorporated into Swiss law, and pursuant to Article 1(2) of the CPIL override its general rules.[39]

***Legitimate aim and proportionality***

19. In determining whether the limitation pursued a legitimate aim and was proportionate, this Court will take a range of factors into account, including the seriousness of the violations seeking to be addressed by the victims[40] and whether alternative means of redress are available.[41]

20. Limitations on access to a court in cases with extraterritorial elements may pursue legitimate aims in normal circumstances to regulate jurisdiction between States. However, in cases where no reasonable alternative forum exists, such considerations bear much less weight. In the context of (i) a claim for damages for torture – recognised as a crime in which all States have an interest in preventing and punishing; (ii) brought by a resident of the State, therefore having an even stronger link to the State; and (iii) where denial of justice would otherwise result, a limitation cannot be seen to pursue a legitimate aim. Rather, the limitation undermines the principles on which Article 6 § 1 is based.[42]

21. Factors the Court may consider in the analysis of whether a restriction is proportionate include the nature of the prohibition of torture as a crime against all humankind and the importance

[31] See *Golder v United Kingdom*, above n.20, §34; *Fayed v United Kingdom*, 21 September 1994, §65, Series A no. 294B.
[32] Art. 1, with Art. 6 § 1 of the Convention.
[33] Similar to the way the civil right in question was characterised in *Al-Adsani v United Kingdom*, above n.5, §48.
[34] This Court has confirmed that, although the domestic courts have the primary role of interpreting and *applying* domestic law, the Court is competent to ascertain whether the effects such an interpretation are compatible with the Convention: *Waite and Kennedy v Germany* [GC], no.26083/99, §54, ECHR 1999-I.
[35] B. Dutoit, *Droit international privé suisse, Commentaire de la loi fédérale du 18 décembre 1987*, Ed. 4 suppl., 2011, on Article 3, §3, p. 8.
[36] *Ibid.*
[37] S. Othenin-Girard, 'Quelques observations sur le for de nécessité en droit international privé suisse (art. 3 LDIP)', in Revue suisse de droit international et de droit européen (1999), p. 276 ("*la condition procédurale de l`intérêt à l`action, tout générale, suffit*").
[38] See Swiss Federal Department of Foreign Affairs website, 'The relationship between national and international law'(2011).
[39] Code of Private International Law, Article 1(2).
[40] See *Osman v United Kingdom,* no.23452/94, §l150-152, ECHR 1998-VIII.
[41] *Waite and Kennedy v Germany*, above n.31, §68-74; *De Jorio v Italy*, no. 73936/01, §45 and 56, 3 June 2004; *Ielo v Italy*, no. 23053/02, §44 and 53, 6 December 2005.
[42] As to which, see Section B above.

of the victims' right to a remedy and reparation under international law (see both points outlined at Section A), the growing European consensus on the importance of forum of necessity provisions, the defendant`s temporary presence in the jurisdiction and the lack of alternative means of redress.

### *(i) There is a growing European consensus on the importance of forum of necessity provisions, and residence of the plaintiff as a sufficient connecting factor*

22. A factor which this Court has considered relevant to the proportionality analysis in relation to a limitation on the right guaranteed under Article 6 § 1 is whether the limitation is consistent with and reflects generally recognised rules within signatory States, the Council of Europe and Members of the European Union.[43]

23. There is a growing European consensus on the importance of providing "emergency" jurisdiction to plaintiffs (where the ordinary jurisdictional connecting factors are not present but no other forum is available) to ensure the plaintiff's right of access to a Court under Article 6. A number of other Convention States, including **Austria, Belgium, Estonia, the Netherlands, Poland** and **Portugal** have forum of necessity provisions similar to that in Switzerland,[44] some which were enacted specifically to ensure the plaintiff's right of access to court under Article 6 of the Convention.[45] In other Convention States, including **Finland, France, Germany, Luxembourg, Romania, Russia**, **Spain, Sweden and Turkey** similar rules on jurisdiction to avoid a denial of justice have been developed by the courts.[46] The consensus in practice in these Convention States recognises the residence of the plaintiff in the forum State as a sufficient connection for the exercise of this jurisdiction.[47] A 2007 study of jurisdiction rules in EU Member States conducted for the European Commission noted that where such rules exist "*there is a general consensus that the required connection exists at least when the plaintiff is domiciled or habitually resident in the forum State, or even when he is a citizen of that State*".[48]

24. Recognising the growing consensus on emergency jurisdiction, the European Commission has recently proposed the introduction of a *forum necessitatis* provision for all EU Member States in its proposed amendments to the Brussels I Regulation on Jurisdiction and the Recognition and Enforcement of Judgments.[49] This includes a provision by which the courts of a Member State will

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[43] *A v United Kingdom,* no. 35373/97, §83, ECHR 2002-X.

[44] In 2007, a study on residual jurisdiction in EU Member States was conducted for the European Commission by Professor Arnaud Nuyts. References to the legislative provisions and caselaw cited in the following footnotes can be found (unless otherwise indicated) in the relevant country reports for each country (hereinafter referred to as EU Country Study for 'x'), which can all be found here: http://ec.europa.eu/civiljustice/publications/publications_en.htm, at Section 16 ('Forum *necessitatis*'). See also, generally, European Commission, 'Data Collection and Impact Analysis – Certain Aspects of a Possible Revision of Council Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('Brussels I'), (December 2010), Appendix D, for a survey of the rules in each EU member state. See Austria: *Matscher in Fasching* 2 I §28 JN Rz 69; Belgium: Code of Private International Law, Art. 11; Estonia: Code of Civil Procedure, s 72; the Netherlands: Code of Civil Procedure, Art. 9; Poland: Code of Civil Procedure, Art. 1099-1 (which is referred to but was enacted after the publication of the Country Report, although this is not reflected in the 2010 report); Portugal: Code of Civil Procedure, Art. 65(1)(d).

[45] See, for example, in the case of the introduction of the equivalent Belgian legislation, *Rapport fait au nom de la Commission de la justice du Sénat*, Documents parlementaires, Sénat, 2003-2004, n° 3-27/7, p. 31. See also in relation to the Netherlands, EU Country Study on the Netherlands, p. 23 ("*The Dutch lawmakers said that principle in article 6 of the ECHR, which grants everyone the right to access to a court, was the basis for article 9(b) and (c)*"). This is also the basis for the rule developed by the courts in France and Spain: see Nuyts, *Study on Residual Jurisdiction: General Report,* 3 September 2007, p. 22.

[46] Finland: see the EU Country Study on Finland, p. 8; France: see the EU Country Study on France, p. 20; Germany: see the EU Country Study on Germany, p. 15, (a denial of justice cannot be allowed, but there must be a sufficient connection to Germany); Luxembourg: Tribunal d'arrondissement de Luxembourg, June 30, 1961, Pasicrisie 18, p. 372 (where the court recognized also that it can hear a matter when the plaintiff has no other means to preserve his/her rights); Romania: see the EU Country Study on Romania, p. 12; Spain: see the EU Country Study on Spain, p. 13; Sweden: see the EU Country Study on Sweden, p. 9, referring to NJA 1971 p. 417, 1980 p .188, 1985 p. 832, 1989 p. 143 and Bogdan, Michael, *Svensk internationell privat- och processrätt*, 5:th ed. pp.109-110 with further references. For Russia and Turkey see B. Ubertazzi (2011) 'Intellectual Property Rights and Exclusive (Subject Matter) Jurisdiction: Between Private and Public International Law', 15(2) *Marquette Intellectual Property Law Review* 357-448 at 388.

[47] See, eg. Austria: *Matscher in Fasching* 2 I §28(1)(2) JN Rz 69 (plaintiff's domestic domicile or usual residence); Estonia: Code of Civil Procedure, s 72(2) (petitioner is a resident); France: Paris *Tribunal de grande instance*, 1 October 1976, *JDI* 1976, p. 879 (plaintiff's stable residence is a sufficient link); Luxembourg (where it appears no specific link is required if a denial of justice will otherwise result: see the EU Country Study on Luxembourg, p. 11); The Netherlands, case of *Rb. Rotterdam*, 4 June 2003, S&S 2005, 30 (upheld on appeal in 2010, Court of Appeal of the Hague, case no. 200.017.633/01, Judgment of the Third Civil Chamber of 30 November 2010, where it was held that the fact that the plaintiff was based in the Netherlands was a sufficient connection in relation to a very similar provision (Art. 9(c) of the Code of Civil Procedure) (see para. 4.7 of the appeal judgment); Spain: see EU Country Study on Spain, p. 13 (plaintiff's domicile or habitual residence in Spain is a sufficient link); Portugal: see EU Country Study on Portugal, p. 14 (connection to plaintiff's person is sufficient).

[48] Nuyts, *Study on Residual Jurisdiction: General Report,* above n.45, p. 66.

[49] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

be able to exercise jurisdiction if no other forum guaranteeing the right to a fair trial is available and the dispute has a sufficient connection with the Member State concerned. It has specifically based the inclusion of this provision on guaranteeing the right to fair trial of European Union claimants.[50]

25. Furthermore, linking factors which were present in this case were in any event the type of factors that are recognised to provide a sufficient jurisdictional connection in other Convention States, even without forum of necessity jurisdiction: for example, the temporary presence of the defendant in the jurisdiction (**Cyprus, England, Finland, Ireland, Poland, Scotland, and Slovenia**);[51] a claim in tort for damage resulting in the territory of the forum State, construed in such a way as it would include ongoing medical and psychological problems arising from the torture (eg. in **England**);[52] a claim for personal injury by a resident of the country (**Latvia** and **Russia**);[53] or simply the place of the plaintiff's domicile (**Romania**).[54] Some of these grounds cannot be applied in matters where the defendant is domiciled in a Brussels Regulation State, on the basis of the high degree of trust which the Member States accord to one another's legal systems and judicial institutions (meaning that it will always be reasonable to seek a remedy in the State specified by the Convention rules).[55] However, these connecting factors *are* used for defendants based in non-Regulation States.

***(ii) The defendant's presence in the jurisdiction, even if only temporary, gave rise to positive obligations to ensure practical and effective access to a court***

26. Another relevant factor to take into account in the proportionality analysis is the fact that in this case the official accused of torture was previously present in the jurisdiction – giving rise to a basis for a remedy for the applicant through both criminal and civil proceedings – and the Respondent State was alerted to this fact, but failed to apprehend the official. This set of circumstances engaged positive obligations on the part of the State authorities to take swift and diligent action to facilitate the effective use by a claimant of his or her right to a court under Article 6 § 1 of the Convention.[56] In cases where it is judged that the State has failed in its positive obligations under Article 6 § 1 towards the applicant in relation to the same matter, this should be a factor weighing against the proportionality of any later limitation.

27. The Court has stressed that Article 6 § 1:

> "*garantit aux plaideurs un droit effectif d'accès aux tribunaux pour de telles contestations* [contestations qui avaient des implications directes sur ses droits et obligations de caractère civil]. *Elle a déclaré par ailleurs qu'un obstacle de fait peut enfreindre la Convention à l'egal d'un obstacle juridique*".[57]

28. It follows that in cases where an undoubted basis for criminal (and associated civil) jurisdiction over an alleged perpetrator of torture exists under domestic law (and in particular an obligation to exercise it under international law[58]) the authorities must do all they can to guarantee practical and effective access to the court. Where the alleged perpetrator is not stopped from leaving the jurisdiction, the right of the torture survivor to access to a court is effectively negated,

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[50] European Commission, COM(2010) 748, *Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, 2010/0383 (COD), 14 December 2010, p. 8.
[51] If the defendant was served with proceedings while in the jurisdiction: see EU Country Reports for the relevant countries.
[52] *Al-Adsani v Kuwait*, [1994] PIQR 236 at 239.
[53] Latvia: Civil Procedure Law, Art. 28(3); Russia: Civil Procedure Code, Section 29(5).
[54] Bulgaria: Civil Procedure Code, Art. 5.
[55] On which the Brussels Convention regime is based: see European Court of Justice [GC], Case C-185/07, *Allianz SpA & Anor v West Tankers Inc* (2009), §30.
[56] In relation to positive obligations on States under Art. 6§ (1) to ensure practical and effective access to a court see also *Ganci v Italy*, no. 41576/98, §§29-31, ECHR 2003-XI (the Court found a violation of Art. 6 of the Convention in a case where a prisoner's complaint against being transferred to a cell with harsher security regime was not adjudicated until after the regime had ceased to apply to him); and *Dubinskaya v Russia*, no. 4856/03, §41, 13 July 2006 (where the Court ruled that "[a] *litigant's right of access to a court would be illusory if he or she were to be kept in the dark about the developments in the proceedings…especially where such decisions are of the nature to bar further examination*").
[57] *Farcas v Romania*, no. 32596/04, §48, 14 September 2010 (emphasis in the original).
[58] CAT, Arts. 5-7.

unless the courts are allowed to proceed with the examination of the case in some way notwithstanding the respondent's absence.[59]

### *(iii) The lack of alternative means of redress in the foreign State meant that the restriction resulted in a denial of justice*

29. In assessing proportionality under Article 6 § 1, an important factor to be taken into account is whether reasonable alternative means to effectively protect the applicants' rights under the Convention existed.[60] The result of the Federal Court's restrictive interpretation was that the applicant, who had come to Switzerland many years previously seeking asylum *as a result of the torture*, was denied access to justice.

30. Ample authoritative reports have documented that acts of torture and other forms of prohibited ill-treatment in Tunisia were of a systematic and widespread nature affecting both ordinary criminal suspects as well as political or religious prisoners.[61] This applied even more so for those detained by the Ministry of Interior, including in unacknowledged and/or secret detention in the basement of the Ministry of Interior itself in Tunis.[62]

31. The intervening organisations, notably the OMCT, has for many years documented torture-related cases in Tunisia in partnership with local organisations and has submitted individual complaints to the UN Committee Against Torture.[63] A series of individual decisions of the UN Committee Against Torture, which the Tunisian authorities consistently refused to implement, illustrate the lack of independent and effective remedies and the total absence of reparations for victims of torture.[64] This has also been recognised by the UN Human Rights Committee in its consideration of the State report of Tunisia in 2009.[65]

32. In these circumstances, there was no available remedy for a victim of torture who received refugee status in Switzerland. This resulted in a particularly flagrant breach in Tunisia of the applicant's right as recognised under Article 3 of the Convention, and as provided for in Article 14 of the CAT, to an effective remedy and reparation for torture.

33. Barring a victim's access to a remedy for torture and allowing impunity of the perpetrator are contrary to the object and purpose of the Convention to take steps to collectively enforce certain rights recognised in the Universal Declaration of Human Rights, corrosive to the rule of law, and offend the general principle underlying Article 6 § 1 forbidding a denial of justice.

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[59] The fact that States can still take positive steps if the accused leaves the jurisdiction is supported by some State practice which has been upheld by this Court. In France, a criminal complaint was brought by two political refugees against an intelligence officer accused of torture in Mauritania while he was in the jurisdiction. The official, Ely Ould Dah, was arrested, but while on bail escaped the jurisdiction. Nevertheless, the French courts held that he should be tried *in absentia*; he was convicted and sentenced to ten years imprisonment and reparation was provided to the victims (see *Arrêt sur l'action civile de la Cour d'assises du Gard, 1 juillet 2005, 3*, reprinted in *Groupe d'action judiciaire de la FIDH, Mauritanie: Affaire Ely Ould Dah, Annex 4, novembre 2005*). The case was challenged before this Court as a violation under Art. 7, but the Court held that the conviction was not incompatible with the Convention: *Ely Ould Dah v France*, above n.3.

[60] *Ernst and Ors v Belgium*, no. 33400/96, §53-57, 15 July 2003; *Cordova v Italy (No. 1)*, no. 40877/98, §65-66, ECHR 2003-I; *Cordova v Italy (No. 2)*, no. 45649/99, §66-67, ECHR 2003-I.

[61] HRCtee, Report of the Special Rapporteur for follow-up on concluding observations, CCPR/C/101/2, 2 May 2011, p. 17; UN Special Rapporteur on torture and other forms of cruel, inhuman, degrading treatment or punishment ("UN Special Rapporteur on Torture"), Press Statement, Tunis 21 May 2011; UN Special Rapporteur on human rights and counter-terrorism ("UN Special Rapporteur on Terrorism"), Press Statement, Tunis/Geneva 26 May 2011; Human Rights Council, Report of the UN Special Rapporteur on Terrorism, A/HRC/16/51/Add.2, 28 December 2010; ICJ, 'Assessing Damage, Urging Action', (2009), p.147.

[62] Human Rights Council, Report of the UN Special Rapporteur on Terrorism, A/HRC/16/51/Add.2 (2010) and press release following his visit in May 2011, Tunis/Geneva, 26 May 2011; press statement of UN Special Rapporteur on Torture 21 May 2011, *ibid.*; OMCT, 'OMCT High Level Mission to Tunisia: Eradicating torture is a benchmark for the success of the transition', Press Statement, Tunis, 23 May 2011.

[63] *Ben Salem v Tunisia*, Communication No. 269/2005, CAT/C/39/D/269/2005, 22 November 2007; *Saadia Ali v Tunisia*, Communication No. 291/2006, CAT/C/41/D/291/2006, 21 November 2008; *M`Barek v Tunisia*, Communication No. 60/1996, CAT/C/23/d/60/1996, 10 November 1994; OMCT, 'La situation des droits de l`Homme en Tunisie' pp. 14-15; OMCT, 'Note sur le suivi de la mise en oeuvre des recommandations du comité des droits de l`homme par la Tunisie', (2009).

[64] See the three CAT cases referred to, *ibid*.

[65] HRCtee, Concluding Observations on State Party Report of Tunisia, CCPR/C/TUN/CO/5, 23 April 2008, para. 11.

## D. THE ISSUE OF IMMUNITY

### 1. The only immunity potentially available to a former official is immunity *ratione materiae* (subject-matter immunity) and it does not apply when torture is alleged

34. REDRESS has, with other organisations, submitted a full amicus brief on these issues in the case of *Jones v United Kingdom*,[66] currently before the Court, and annexes it to this submission in the event that the Court wishes to take notice of it.

35. The essence of the Organisations' submission on this point is that there is no rule of international law requiring that a former State official is shielded from jurisdiction for alleged acts of torture by any State or official immunity. The only immunity that the Court could consider in relation to former officials in such cases is immunity *ratione materiae* (subject-matter immunity), which is purely functional.[67] It is justified in situations in which responsibility for the commission of official acts is solely attributable to the State and not to the official personally,[68] who acts as the 'mere instrument' or mouthpiece of the State. However, such immunity is not applicable to officials alleged to have carried out torture, because torture gives rise to both individual and State responsibility under international law; not just State responsibility.[69]

36. This is supported by significant State practice. Subject-matter immunity has not presented a barrier to proceedings in the significant number of national prosecutions in Member States of current and former foreign State officials for crimes under international law committed since the Second World War.[70] In *Pinochet,* where Spain, Switzerland, France and Belgium sought the extradition of the former Head of State of Chile, the House of Lords expressly determined that he could not assert subject-matter immunity with respect to torture (he could not claim personal immunity since he was out of office).[71] Courts in France, Italy, the Netherlands and Spain have convicted current and former foreign officials of crimes under international law.[72] Other courts in States such as France, Italy, Spain and Sweden have issued arrest warrants for current and former officials for such crimes without immunity presenting an obstacle to their issuance.[73]

37. The rationale that underpins the denial of subject-matter immunity in the criminal sphere - namely that subject-matter immunity only covers acts which are solely attributable to the State, which torture is not - applies with equal force to civil suits against officials. This is particularly so in the majority of Member States in which it is possible to bring a claim for damages within criminal proceedings demonstrating a lack of a clear dividing line between criminal and civil

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[66] Applications nos. 34356/06 and 40528/06.

[67] As opposed to personal immunities which may be enjoyed by some serving very high-ranking government officials such as Heads of State, Heads of Government, Foreign Ministers and diplomats: see *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v. Belgium*) [2002] ICJ Rep 3 at pp. 20-21.

[68] *Prosecutor v Blaškić* (Objection to the Issue of *Subpoena duces Tecume*) IT-95-14-AR108 (1997), 110 ILR 607, 707, §38 (finding that "*officials cannot suffer the consequences of wrongful acts which are not attributable to them personally*").

[69] See developments since Art. 7 of the Charter of the International Military Tribunal at Nuremberg (1945) 82 UNTS 279, eg Arts. 27(1) of the Rome Statute and Arts. 4(1), 5 and 7 of the CAT firmly establishing individual responsibility for crimes under international law. See also the Articles on Responsibility of States for Internationally Wrongful Acts (2001) (noting that the articles are "*without prejudice to the individual responsibility under international law of anyone acting on behalf of a State*"). See also Institut de droit international, "Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of international crimes" (2009), Art. 3(1).

[70] For the thousands of former Axis officials prosecuted for crimes during the Second World War. See, Cryer et al., *An Introduction to Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007) Chapter 4.

[71] *R v Bow Street Stipendiary Magistrate and ors ex p Pinochet Urarte* (No 3) [1999] 2 WLR 827.

[72] ***France:*** See n.59; ***Italy:*** See, Amnesty International, Report 2001, AI Index: POL 10/001/2001 at 139 (conviction by Rome Court of Assizes of seven former Argentine officials for murder and abduction of seven Italian citizens); ***Netherlands:*** Case BG1476, 07/10063, Supreme Court (2008) (upholding conviction of former senior intelligence official for torture); ***Spain:*** Conviction of former Argentine naval officer, Adolfo Scilingo, for kidnapping and murder, *Tribunal Supremo, Sala de lo Penal, Sentencia Nº:798/2007*, (2007); ***Sweden***: see n.74.

[73] ***Italy:*** Van Auken, 'Italian judge seeks trial of 140 over Operation Condor repression' *Global Research* (2008) (arrest warrants issued for current and former officials in Argentina, Bolivia, Brazil, Chile, Peru and Uruguay suspected of committing torture and enforced disappearances); ***Spain:*** Spanish courts have issued arrest warrants for current and former officials from Argentina, Chile, Guatemala, *Audiencia Nacional, Juzgado Central de Instruccion Uno, D. Previas 331/1999* (2008); Israel and Rwanda, *Audiencia Nacional, Juzgado Central de Instruccion No. 4, Sumario 3/2.008 – D. Auto* (2008) (arrest warrants against 40 Rwandese citizens, some of them current or former officials, for crimes against humanity, exempting President based on personal immunity); ***Sweden:*** International arrest warrant and extradition request issued in November 2001 for an Argentine naval officer for the enforced disappearance of a Swedish citizen, Decision by Chief Prosecutor, Tomas Lindstrand, (2001), C9-1-405-01.

proceedings. This is also supported by State practice by which civil damages have been awarded in conjunction with criminal convictions of State officials for torture.[74]

### 2. The application of subject-matter immunity to cases involving allegations of torture does not pursue a legitimate aim and is disproportionate

38. Given that there is no rule of international law requiring the application of State immunity to a former official in relation to alleged torture, its application to restrict the right of access to a court does not pursue a legitimate aim.[75] The only role subject-matter immunity plays is to prevent the official being held to account, which cannot be considered a legitimate aim under Article 6 § 1.

39. Even if the Court was to find that the application of immunity pursued a legitimate aim, the means employed to achieve the aim – the application of a blanket immunity to all acts carried out by an official, even those amounting to crimes under international law – is a disproportionate interference with the right under Article 6 § 1. This is for many of the same reasons as outlined above in relation to the Federal Court's interpretation of its own jurisdiction, including the nature of the wrong at issue, the victim's right to a remedy under international law, and the fact that no alternate means of redress existed.

## CONCLUSION

40. In summary, victims of torture have a fundamental right to a remedy and reparation from those responsible recognised in international law and by this Court. Where a survivor of torture committed in a third State (i) is resident in a Convention State, (ii) has a right to claim damages in relation to that torture, and (iii) cannot reasonably be expected to bring a claim in another jurisdiction, a restriction limiting access to a court to circumstances where the facts of the torture itself had a connection to the forum State does not pursue a legitimate aim and is disproportionate. Similarly, international law does not require subject-matter immunity to be granted to a foreign official in cases of torture, and its application therefore does not pursue a legitimate aim, nor is it proportionate. The interests at stake are of fundamental importance. Blocking such a plaintiff's access to the court leads to impunity for the perpetrator of torture and a complete denial of justice to the victim. This is incompatible with the principles underlying Article 6 and the Convention as a whole.

**REDRESS** **OMCT**

Sarah Fulton Carla Ferstman Gerald Staberock

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[74] For example, on March 16, 1990, a **French** court convicted and sentenced a serving Argentine naval officer *in absentia* to life imprisonment for torture and enforced disappearance, and also awarded the *parties civiles* damages (REDRESS, *Universal Jurisdiction in Europe* (30 June 1999) at p. 26); in March 1999, a French court sentenced six Libyan officials *in absentia* to life imprisonment for the bombing of a French plane, and awarded the *parties civiles* up to FRF 200,000 (Cour d'assises de Paris, 31 mars 1999, (2001) Gazette du Palais, 16 juin 2001 no 167, p 37; for the specification that the defendants were Libyan officials: see *Procés du DC 10 – arrêt du renvoi du 12 juin 1998*); See also the case of Ely Ould Dah, referred to above at n.59; in 1998, the **Spanish** courts issued an order freezing the assets of Augusto Pinochet, who was accused of torture and other crimes, to satisfy his potential civil liability for those crimes. In 2005, the investigating judge quantified this potential civil liability at 1,445,530,116 euros (copies of the relevant court documents and translations are provided on the website of the Chilean "El Clarin" newspaper: see the Indictment dated 10 December 1998, issuing a provisional declaration of civil liability and confirming a previous freezing order to secure it, at http://www.elclarin.cl/fpa/pdf/p_101298.pdf, pp 279-280, English translation available at http://www.elclarin.cl/fpa/pdf/p_101298_en.pdf, p 368; see the ruling of Investigating Court No. 5 Madrid of 25 February 2005 (Preliminary Investigation Abbreviated Proceeding 40/2005c) at http://www.elclarin.cl/fpa/pdf/p_250205.pdf, p 8, English translation available at http://www.elclarin.cl/fpa/pdf/p_250205_en.pdf, p 5); on April 8, 2011 a **Swedish** court sentenced a former prison guard to five years imprisonment for aggravated crimes against international law for a Croatian militia, and ordered him to pay compensation totalling 1.5 million kronor ($240,656) (see the newsletter of the Association of Defence Counsel of the ICTY, Issue 11, 19 April 2011 at 8: available at: http://issuu.com/adcicty/docs/adc-icty_newsletter_issue_11).

[75] And should be contrasted to the application of immunity to a State itself, such as that examined in *Al-Adsani v United Kingdom,* above, n.5.

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**ANNEX TO WRITTEN COMMENTS BY REDRESS AND OMCT**

## DETAILS OF INTERVENERS

### REDRESS

The Redress Trust ('REDRESS') is an international human rights non-governmental organisation based in London with a mandate to assist torture survivors to prevent their further torture and to seek justice and other forms of reparation. It has accumulated a wide expertise on the rights of victims of torture to gain both access to the courts and redress for their suffering and has advocated on behalf of victims from all regions of the world. Over the past 18 years, REDRESS has regularly taken up cases on behalf of individual torture survivors at the national and international level and provides assistance to representatives of torture survivors. REDRESS has extensive experience in interventions before national and international courts and tribunals, including the United Nations' Committee against Torture and Human Rights Committee, the European Court of Human Rights, the Inter-American Commission of Human Rights, the International Criminal Court, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.

### OMCT

Created in 1986, the World Organisation Against Torture (OMCT) is today the main coalition of international non-governmental organisations (NGO) fighting against torture, summary executions, enforced disappearances and all other cruel, inhuman or degrading treatment. With 297 affiliated organisations in its SOS-Torture Network and many tens of thousands correspondents in every country, OMCT is the most important network of non-governmental organisations working for the protection and the promotion of human rights in the world.

Based in Geneva, OMCT's International Secretariat provides personalised medical, legal and/or social assistance to hundreds of torture victims and ensures the daily dissemination of urgent appeals across the world, in order to protect individuals and to fight against impunity. Specific programmes allow it to provide support to specific categories of vulnerable people, such as women, children and human rights defenders. In the framework of its activities, OMCT also submits individual communications and alternative reports to the special mechanisms of the United Nations, and actively collaborates in the development of international norms for the protection of human rights.

OMCT enjoys a consultative status with the following institutions: ECOSOC (United Nations), the International Labour Organization, the African Commission on Human and Peoples' Rights, the Organisation Internationale de la Francophonie, and the Council of Europe.

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**ANNEX TO WRITTEN COMMENTS BY REDRESS AND OMCT**

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