

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Apps. Nos. 10862/09, 45886/07, 32431/0839630/09

B E T W E E N:

MOCANU & ORS

Applicants

-and-

ROMANIA

Respondent

-and-

THE REDRESS TRUST (“REDRESS”)

Intervener

WRITTEN COMMENTS BY REDRESS

Introduction

1. These comments are filed with the permission of the Grand Chamber by its letter of 24 July 2013.
2. As set out in REDRESS' application for leave to intervene dated 19 July 2013, they provide a comparative review of international legal standards and of international and national jurisprudence in relation to:
 - i. the criminalisation of acts that would amount to torture and other internationally prohibited ill-treatment by or with the involvement of state officials as specific offences, and the impact of criminalisation on procedural rules associated with prosecutions;
 - ii. the consideration of psychological forms of harm resulting from ill-treatment by or with the involvement of state officials in a) qualifying the crime; and b) assessing the actions of complainants (e.g., on the reasonableness of any delay in making a complaint); and
 - iii. the operation of prescription periods in relation to acts amounting to torture and other internationally prohibited ill-treatment.

Interpretation of the Convention in light of international law

3. When interpreting the European Convention on Human Rights ("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.¹ These include relevant treaties applicable between the parties (such as the UN Convention against Torture),² and "general principles of law recognized by civilized nations".³
4. This Court has also consistently referred to the need to interpret the Convention in line with its object and purpose as a whole.⁴ The application of Article 3 in this case should be viewed against a background of significant developments during the last decade at the European and international levels which have recognised the importance of combating impunity for torture and cruel, inhuman or degrading treatment or punishment ("other ill-treatment")⁵ and have prioritised the rights of victims to an effective remedy and reparation.⁶ 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.

¹ See ECtHR, *Al-Adsani v United Kingdom* (2001) App. No. 35763/97, ECHR 2001 XI at para. 55, and Art. 31 para. 3 (c) of the Vienna Convention on the Law of Treaties; ECtHR, *Rantsev v Cyprus & Russia* (2010) App. No. 25965/04, Judgment of 7 January 2010, at para. 274.

² See ECtHR, *Rantsev v Cyprus & Russia* (2010) App. No. 25965/04, 7 January 2010, at paras. 277-82 (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).

³ ECtHR, *Golder v United Kingdom* (1975) 21 February 1975, Series A no 18 at para.35.

⁴ As required by Art. 31 of the Vienna Convention on the Law of Treaties.

⁵ Combating impunity is one of the key objectives of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 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 Council of Europe (2011), 'Guidelines of the Committee of Ministers of the Council of Europe on Eradicating Impunity for Serious Human Rights Violations', adopted 30 March 2011; UN Commission on Human Rights (2005), 'Human Rights Resolution 2005/81: Impunity', E/CN.4/RES/2005/81, 21 April 2005; UN Commission on Human Rights (2005), 'Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity', E/CN.4/2005/102/Add.1, 8 February 2005.

⁶ Council of Europe (2011), 'Committee of Ministers Impunity Guidelines', at preamble; HRCtee (2004), 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add. 13, at para. 16; UN General Assembly (2005), '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, adopted by the General Assembly 16 December 2005. See further, *inter alia*, Universal Declaration of Human Rights (Art. 8); the International Covenant on Civil and Political Rights (art.2 (3), art 9(5) and 14(6)); the International Convention on the Elimination of All Forms of Racial Discrimination (art 6); the Convention against Torture (art. 14); the Rome Statute for an International Criminal Court (art. 75); European Convention on Human Rights (art 5(5), 13 and 41); the Inter-American Convention on Human Rights (arts 25, 63(1) and 68); the African Charter on Human and Peoples' Rights (art. 21(2)). See also, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985.

The prohibition of torture and other ill-treatment

5. The international prohibition of torture and other ill-treatment inflicted by state officials, or with their consent or acquiescence, is universally accepted.⁷ There are currently 153 states parties to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the “Convention against Torture”), including all members of the Council of Europe.⁸
6. This Court has consistently maintained that in cases of willful ill-treatment by agents of the state in violation of Article 3, two key obligations arise. First, the State authorities have the procedural obligation to conduct a thorough and effective investigation capable of leading to the identification and punishment of those responsible.⁹ This obligation arises whether or not the victim makes a complaint,¹⁰ and has an absolute character.¹¹ According to the Guidelines on Combating Impunity adopted by the Committee of Ministers in 2011:

Where an arguable claim is made, or the authorities have reasonable grounds to suspect that a serious human rights violation has occurred, the authorities must commence an investigation on their own initiative.

The fact that the victim wishes not to lodge an official complaint, later withdraws such a complaint or decides to discontinue the proceedings does not absolve the authorities from their obligation to carry out an effective investigation, if there are reasons to believe that a serious human rights violation has occurred.¹²

7. Second, the victim must be provided with an effective remedy, including the payment of compensation where appropriate, or at least the possibility of seeking and obtaining compensation for the damage he or she sustained as a result of the ill-treatment.¹³
8. These principles have been endorsed in the “Guidelines of the Committee of Ministers of the Council of Europe on Eradicating Impunity for Serious Human Rights Violations” (“Impunity Guidelines”).¹⁴ This is also consistent with the obligations of states parties under other human rights treaties, including the Convention against Torture, as explained in detail by the Committee against Torture in its General Comments No. 3.¹⁵

Criminalisation, prosecution and punishment of torture and other ill-treatment

9. This Court has held that States have a positive obligation inherent in Article 3 of the Convention to enact criminal law provisions penalising practices that are contrary to Article 3.¹⁶ The Council of Europe’s Committee of Ministers has underscored the importance of this obligation, stressing that “States should take all necessary measures to comply with their obligations under the

⁷ As is the responsibility of States to prevent and respond to such treatment by non-state actors: see ECtHR, *A v United Kingdom* (1998) App. No. 25599/94, Judgment of 23 September 1998, at p. 2699, para. 22; ECtHR [GC], *Z and Ors v United Kingdom* (2001) App. No. 29392/95, ECHR 2001-V; ECtHR, *E and Ors v United Kingdom* (2002) App. No. 33218/96, Judgment of 26 November 2002.

⁸ List of States parties available at: http://treaties.un.org/Pages/ViewDetails.aspx?mtmsg_no=IV-9&chapter=4&lang=en.

⁹ ECtHR [GC], *Gäfgen v Germany* (2010) App. No. 22978/05, Judgment of 1 June 2010, at para. 116.

¹⁰ ECtHR [GC], *Tashin Acar v Turkey* (2004) App. No. 26307/95, Judgment of 8 April 2004, at para. 221. See also CAT (2012), ‘General Comment No. 3: Implementation of Article 14 by States Parties’, CAT/C/GC/3, 13 December at para.27; Council of Europe Commissioner for Human Rights (2009), ‘Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints against the Police’, CommDH(2009)4, 12 March 2009 at para. 7 (“In the event that Article 2 of the ECHR, the right to life, or Article 3, the prohibition of torture, inhuman or degrading treatment or punishment, is engaged, the jurisprudence of the European Court of Human Rights requires that an investigation will be carried out irrespective of whether or not a complaint is made against the police”).

¹¹ Council of Europe (2011), ‘Committee of Ministers Impunity Guidelines’, at Article V (1).

¹² *Ibid.*, at Article V (2)-(3). Article V(1) includes violations of the prohibition of torture and inhuman or degrading treatment or punishment as a “serious human rights violation”, providing that: “States are under a procedural obligation arising under Article 3 of the Convention to carry out an effective investigation into credible claims that a person has been seriously ill-treated, or when the authorities have reasonable grounds to suspect that such treatment has occurred”.

¹³ ECtHR [GC], *Gäfgen v Germany* (2010) App. No. 22978/05, 1 June 2010, at paras. 116 and 18.

¹⁴ Council of Europe (2011), ‘Committee of Ministers Impunity Guidelines’. The Impunity Guidelines highlight 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 [including violations of Article 3 of the Convention] must be held to account for their actions”. See also Council of Europe (2006), ‘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 para. 7.

¹⁵ CAT (2012), ‘General Comment No. 3’, CAT/C/GC/3 at paras. 6, 25.

¹⁶ ECtHR, *Mc v Bulgaria* (2003) App. No. 39272/98, Judgment of 4 December 2003, ECHR 2003-XII at paras. 150, 53 and 66; ECtHR, *Nikolova and Velichkova v Bulgaria* (2007) App. No. 7888/03, Judgment of 20 December 2007, at para. 57; ECtHR, *Çamdereli v Turkey* (2008) App. No. 28433/02, Judgment of 17 July 2008, at para. 38; ECtHR [GC], *Gäfgen v Germany* (2010) App. No. 22978/05, 1 June 2010, at para. 117.

Convention to adopt criminal law provisions to effectively punish serious human rights violations through adequate penalties”.¹⁷

10. This is consistent with the position under the Convention Against Torture, which requires States to make all acts of torture as defined under the Convention, as well as attempts and complicity or participation in torture, “offences under its criminal law”.¹⁸ The Committee has stressed that State parties are also legally obliged to criminalise other cruel, inhuman or degrading treatment or punishment prohibited under article 16 of the Convention against Torture.¹⁹ The requirement to criminalise torture and other ill-treatment is also inherent in the positive obligation of States Parties under human rights treaties to repress and prevent violations.²⁰
11. The criminalisation of torture and other ill-treatment must be backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.²¹ The Court has found violations of Article 3 and Article 13 where prosecutions of alleged perpetrators identified by investigations have not proceeded or have been inadequate.²² In the case of *Gäfgen v Germany*, the Grand Chamber stressed that:

if the authorities could confine their reaction to incidents of wilful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice.²³
12. Again, this is consistent with the Convention Against Torture and other key human rights treaties.²⁴ The UN Human Rights Committee, for example, emphasises that where investigations reveal violations including “torture and other similar ill-treatment” the State must ensure that “those responsible are brought to justice”, and that a failure to do so may result in a separate violation of the Covenant.²⁵ It is also consistent with the views expressed by mechanisms of the Council of Europe. The Committee of Ministers’ Impunity Guidelines stress that, when it comes to serious human rights violations, “States have a duty to prosecute where the outcome of an investigation warrants this” and “when serious human rights violations have been proven, the imposition of a suitable penalty should follow”.²⁶
13. In terms of how such conduct should be criminalised and prosecuted, the Committee against Torture has consistently held that torture as defined in the Convention should be a separate offence “distinct from common assault or other crimes”.²⁷ This obligation continues through to prosecution: the Committee has stressed that “it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present”.²⁸

¹⁷ Council of Europe (2011), 'Committee of Ministers Impunity Guidelines', at para. 1.

¹⁸ Convention Against Torture, Article 4.

¹⁹ See CAT (1997), 'Concluding Observations: Ukraine', UN Doc. CAT/C/SR.287, 1 May 1997 at para. 10; CAT (2008), 'General Comment No. 2: Implementation of Article 2 by States Parties', CAT/C/GC/2, 24 January 2008 at para. 11; CAT (2012), 'General Comment No. 3', CAT/C/GC/3 at para. 19: (“The failure of States parties to enact legislation that clearly incorporates their obligations under the Convention and criminalizes torture and ill-treatment, and the resulting absences of torture and ill-treatment as criminal offences, obstructs the victim’s capacity to access and enjoy his or her rights guaranteed under article 14”).

²⁰ See, eg. HRCtee (1992), 'General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)', Forty-Fourth Session, at para. 13.

²¹ ECtHR, *Mc v Bulgaria* (2003) App. No. 39272/98, 4 December 2003, ECHR 2003-XII at paras. 150, 53 and 66; ECtHR, *Nikolova and Velichkova v Bulgaria* (2007) App. No. 7888/03, 20 December 2007, at para. 57; ECtHR, *Çamdereli v Turkey* (2008) App. No. 28433/02, 17 July 2008, at para. 38; ECtHR [GC], *Gäfgen v Germany* (2010) App. No. 22978/05, 1 June 2010, at para. 117.

²² ECtHR, *Abdulsamet Yaman v Turkey* (2004) App. No. 32446/96, Judgment of 2 November 2004, at paras. 55-61; ECtHR, *Mikheyev v Russia* (2006) App. No. 77617/01, Judgment of 26 January 2006, at paras. 141-3; ECtHR, *Nikolova and Velichkova v Bulgaria* (2007) App. No. 7888/03, 20 December 2007, at para. 63; ECtHR, *Ali and Ayse Duran v Turkey* (2008) App. No. 42942, Judgment of 8 April 2008, at paras. 60-73; ECtHR, *Çamdereli v Turkey* (2008) App. No. 28433/02, 17 July 2008, at paras. 38-39; ECtHR [GC], *Gäfgen v Germany* (2010) App. No. 22978/05, 1 June 2010, at paras. 124-30.

²³ ECtHR [GC], *Gäfgen v Germany* (2010) App. No. 22978/05, 1 June 2010, at para. 119. See also ECtHR, *Ali and Ayse Duran v Turkey* (2008) App. No. 42942, 8 April 2008, at para. 61.

²⁴ Convention Against Torture, Articles 5-7. See also IACtHR, "*Street Children*" (*Villagrán-Morales Et Al*) *v Guatemala* (2001) Judgment (Reparations and Costs) of 26 May 2001, Series C, No. 63 at para. 100.

²⁵ HRCtee (2004), 'General Comment No. 31', UN Doc. CCPR/C/21/Rev.1/Add. 13 at para. 18. See also HRCtee (1982), 'General Comment No. 7: Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7)', Sixteenth session, 30 May 1982 at para. 1; HRCtee (1992), 'General Comment No. 20', Forty-Fourth Session at para. 13.

²⁶ Council of Europe (2011), 'Committee of Ministers Impunity Guidelines', at paras. VIII and X. See also Council of Europe Commissioner for Human Rights (2009), 'Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints against the Police', CommDH(2009)4 at para. 18.

²⁷ CAT (2008), 'General Comment No. 2', CAT/C/GC/2 at para. 11.

²⁸ *Ibid.*, at para. 10.

14. The Committee has stressed that, by criminalising and prosecuting torture in this way States “will directly advance the Convention’s overarching aim of preventing torture and ill-treatment” including by “alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture”, emphasising “the need for appropriate punishment that takes into account the gravity of the offence”, enhancing “the ability of responsible officials to track the specific crime of torture” and “enabl[ing] and empower[ing] the public to monitor and, when required, to challenge State action as well as State inaction that violates the Convention”.²⁹
15. Such specific criminalisation also has the practical effect that procedural provisions, including the possibility of special forms of protection for victims and witnesses and statutes of limitations can be tailored to the specific circumstances and particular legal requirements for state-inflicted ill-treatment.

The impact and relevance of psychological harm

16. This Court clearly recognises that Article 3 may be violated by acts that cause either, or both, physical or mental pain and suffering.³⁰ In determining whether an act reaches the threshold for Article 3 the Court will look to both the “physical *and* mental effects” of the treatment.³¹ This is consistent with the Convention against Torture, by which torture is defined to include acts causing “severe pain and suffering, whether physical or mental”,³² and with the understanding of torture and other ill-treatment adopted by other regional and international human rights bodies.³³
17. Regional and international human rights bodies have recognised that physical violence, particularly where it is inflicted by the state, may have particular psychological effects. So, in considering an act of corporal punishment, this Court recognised that:

...it is institutionalised violence that is in the present case violence permitted by law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long lasting physical effects, his punishment whereby he was treated as an object in the power of authorities—constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person’s dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.³⁴

18. Similarly, in *Selmouni v France*, the Grand Chamber found that:

the injuries recorded in the various medical certificates ... and the applicant’s statements regarding the ill-treatment to which he had been subjected while in police custody ... establish the existence of physical and – undoubtedly (notwithstanding the regrettable failure to order a psychological report on Mr Selmouni after the events complained of) – mental pain or suffering.³⁵

19. Similar approaches have been adopted by the African Commission on Human and Peoples’ Rights,³⁶ the Inter-American Court of Human Rights,³⁷ the Committee against Torture,³⁸ and, in the context of arbitrary detention, the International Court of Justice.³⁹

²⁹ *Ibid.*, at para. 11.

³⁰ See, eg. ECtHR [GC], *Gäffen v Germany* (2010) App. No. 22978/05, 1 June 2010, at paras. 89-91. See also ECmHR, *The “Greek Case”* (1969) App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, YB Eur Conv on H R 12 at p. 186 (the prohibition covers “at least such treatment as deliberately causes severe suffering, mental or physical”).

³¹ ECtHR, *Ireland v United Kingdom* (1978) Judgment of 18 January 1978, Series A no. 25 at para. 162; ECtHR, *Selmouni v France* (1998) App. No. 22107/03, Judgment of 14 April 1998, ECHR 1999-V at para. 160 (emphasis added).

³² Convention against Torture, Article 1.

³³ See, eg. AfrComHPR, *Huri-Laws v Nigeria* (2000) Comm. No. 225/98, at para. 41 (agreeing that the assessment of minimum severity is relative and includes consideration of physical or mental effects); IACtHR, *Maritza Urrutia v Guatemala* (2003) Judgment (Merits, Reparations and Costs) of 27 November 2003, Series C, No. 103 at paras. 91-5; CAT, *Besim Osmani v. Serbia* (2009) Comm. No. 261/2005, Views adopted 12 May 2009, UN doc. CAT/C/42/D/261/2005 at para. 10.4 (where the Committee considered the physical and psychological effects of the act in qualifying it under the Convention; HRCtee (1992), ‘General Comment No. 20’, Forty-Fourth Session at para. 5 (“The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim”); UN Special Rapporteur on Torture (2001), ‘Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’, UN Doc. A/56/156, 3 July 2001 at paras. 7-8.

³⁴ ECtHR, *Tyrer v United Kingdom* (1978) App. No. 5856/72, Judgment of 23 April 1978, at para. 33.

³⁵ ECtHR, *Selmouni v France* (1998) App. No. 22107/03, 14 April 1998, ECHR 1999-V at para. 98. See also ECtHR, *Batu and Others v Turkey* (2004) App. Nos. 33097/96 and 57834/00, Judgment of 3 June 2004, ECHR 2004-IV at paras. 114-15.

³⁶ See, eg. AfrCmHPR, *Curtis Francis Doebbler v Sudan* (2003) Comm. No. 236/2000, at paras. 38-44.

³⁷ See, eg. IACtHR, *Tibi v Ecuador* (2004) Judgment (Preliminary Objections, Merits, Reparations and Costs) of 7 September 2004, Series C No. 114 at para. 148 (“The acts of violence intentionally committed by agents of the State against Daniel Tibi caused him grave physical and mental suffering”).

³⁸ See, eg. CAT, *Besim Osmani v. Serbia* (2009) Comm. No. 261/2005, 12 May 2009, UN doc. CAT/C/42/D/261/2005 at para. 10.4.

³⁹ International Court of Justice, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (2012) Judgment (Compensation) of 19 June 2012, at para. 21.

(i) *Relevance to qualification of the crime*

20. It follows that, where national criminal legislation, or the bodies interpreting it, do not adequately take psychological pain and suffering into account in qualifying a crime, a State will be unlikely to discharge its obligations under the Convention, and other treaties including the Convention against Torture. This is because acts which reach the threshold of torture or other ill-treatment under international law give rise to specific obligations – including the particular, and non-derogable, procedural obligations under the Convention against Torture to investigate, prosecute and provide redress. For this reason, the Committee against Torture has consistently criticised states that criminalise and/or prosecute acts of torture and other ill-treatment without taking into account the cumulative effect of physical and mental pain and suffering.⁴⁰

(ii) *Impact on victims' ability to pursue remedies*

21. The psychological effects of ill-treatment by state actors may also impact on victims' ability to complain about the treatment they have received. The Committee against Torture has recognised that a significant obstacle to redress faced by victims of torture and ill-treatment is the physical, psychological and other related effects of the treatment itself.⁴¹
22. Victims of torture and other ill-treatment by or with the acquiescence of state actors have experienced abuse at the hands of “the larger social and political institutions charged with responsibility for ensuring their safety and well-being”.⁴² It is recognised that this can have particular psychological consequences which may explain a delay in making a complaint, or not making a complaint at all.⁴³
23. There is significant psychological evidence showing that state inflicted violence impacts upon a person's ability to trust others, and particularly state officials,⁴⁴ who victims of state abuse may wish to avoid following the traumatic event.⁴⁵ UNHCR Guidelines recognise that this can have an impact even on disclosures by refugees to state authorities in third countries: “[a] person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority”.⁴⁶
24. Abuse by another human being can shatter a person's basic sense of security, leaving the survivor constantly terrified of being subjected to the same torment again.⁴⁷ Abuses perpetrated by state actors—or those the state cannot or will not check, “may leave victims feeling more vulnerable than acts perpetrated by criminals the state is committed to suppressing because victims have little or no hope that the authorities will investigate them or prevent their repetition”.⁴⁸ Where there are real or perceived failures of the state – for example where it continues to suppress or repress peaceful demonstrations, or shows no sign of pursuing an effective investigation – an individual who has experienced trauma at the hands of state actors may feel that there is effectively no official protection for them.⁴⁹ This can lead to an on-going traumatic stress response resulting in

⁴⁰ See, eg. CAT (2010), 'Concluding Observation: Moldova', CAT/C/MDA/CO/2, 29 March 2010 at para. 19 (“amend the code of criminal procedure to ... clarify that the individual and cumulative physical and mental impact of treatment or punishment should be considered”. See also CAT (2006), 'Concluding Observations: United States of America', CAT/C/USA/CO/2, 25 July 2006 at para. 13; CAT (2007), 'Concluding Observations: Japan', CAT/C/JPN/CO/1, 3 August 2007 at para. 10; CAT (2008), 'Concluding Observations: Estonia', CAT/C/EST/CO/4, 19 February 2008 at para. 8; CAT (2012), 'Concluding Observations: Gabon', CAT/C/GAB/CO/1, 17 January 2013 at para. 7.

⁴¹ CAT (2012), 'General Comment No. 3', CAT/C/GC/3 at para. 38.

⁴² Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?', *Harvard International Law Journal*, 46/2 (2005), 295-345 at p. 303, citing Glenn R. Randall & Ellen L. Lutz, *Serving Survivors of Torture* (1991) at p.4.

⁴³ Linda Piwowarczyk, Alejandro Moreno, and Michael Grodin, 'Health Care of Torture Survivors', *Journal of the American Medical Association*, 284/5 (2000), 539-41; Jose Quiroga and James M. Jaranson, 'Politically-Motivated Torture and Its Survivors: A Desk Study Review of the Literature', *IRCT Torture Journal*, 16/2-3 (2005), 1-111 at p.14.

⁴⁴ Jane Herlihy and Stuart W. Turner, 'The Psychology of Seeking Protection', *International Journal of Refugee Law*, (2009), 171-92 at pp. 174-75, citing Turner, #90. See also Office of the High Commissioner for Human Rights (1999), 'Manual on the Effective Investigation and Documentation of Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment (the "Istanbul Protocol")', UN Doc. HR/P/PT/8/Rev.1, at para. 241.

⁴⁵ Piwowarczyk, Moreno, and Grodin, 'Health Care of Torture Survivors', (2000) at pp. 539-41. See also Office of the High Commissioner for Human Rights (1999), 'Istanbul Protocol', UN Doc. HR/P/PT/8/Rev.1 at paras. 142, 241, 53.

⁴⁶ United Nations High Commissioner for Refugees (1992), 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Eng/REV.1 Reedited January 1992 at para. 198.

⁴⁷ O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?', (2005) at p. 310.

⁴⁸ *Ibid.*, at p. 303.

⁴⁹ Angela Burnett and Michael Peel, 'The Health of Survivors of Torture and Organised Violence', *British Medical Journal*, 322/7286 (2001), 606-09.

decreased reliance on official institutions and an increased reliance on oneself to deal with problems arising from trauma.⁵⁰

25. Survivors of torture and other ill-treatment also commonly adopt protective coping mechanisms, such as denial and avoidance, which may lead to further difficulty in disclosing their experience of trauma.⁵¹ According to Herlihy and Turner:

Due to being subjected to ... sudden, unbidden and painful memories, many individuals develop strategies for avoiding any triggers, or situations which will cause the memories to recur. For example, many refugees in a clinical setting report ... avoiding walking past a police station.... Despite a claimant being perfectly well aware that they must fully disclose and explain their experiences in order to have the best chance of being recognized as a refugee, the need to avoid the ‘reliving’ of past experiences is also very compelling. Such avoidance can become a way of life, and indeed some of the strategies may not be conscious.⁵²

26. Such considerations apply equally to victims of torture and other ill-treatment who remain in the country in which the violations took place.

27. The psychological impact of ill-treatment may differ depending on who is subjected to it. For example, an individual who does not identify as a protestor or activist, and who is subject to state-inflicted violence may be disproportionately impacted by that violence. A study with political activists concluded that pre-trauma doubts concerning a benevolent and shielding state may have protected victims, to some extent, from the most significant traumatic effects of abuse suffered at the hands of state authorities.⁵³ The opposite has been shown for those who did not identify as political activists or who did not have negative pre-existing connotations of the roles and behaviour of state actors. The results of one study which compared torture survivors who had no history of political activity with torture survivors who were committed political activists showed that:

Less psychological preparedness for trauma was by far the strongest predictor of greater perceived distress during torture and more severe psychological problems afterwards. These findings supported both the role of prior immunization in reducing the effects of traumatic stress and the role of unpredictability and uncontrollability of stressors in exacerbating the effect.⁵⁴

28. It is notable that a range of opinion, including rulings of this Court and national courts, now recognises the significant and enduring effects of childhood abuse, sexual and non-sexual, and their impact on the ability of survivors to initiate legal proceedings.⁵⁵ Victims of abuse may consciously or unconsciously repress or partly suppress their memory of the experience, or develop depression or Post Traumatic Stress Disorder (PTSD).⁵⁶ Courts have recognized that, as such ill-treatment is often committed by persons in authority to the victim, the victims feel “powerless to do anything about it”,⁵⁷ and this may be “compounded by tactics employed by the abuser which are calculated to impose helplessness, fear, secrecy and guilt” upon the victim.⁵⁸ All

⁵⁰ Craig Higson-Smith, 'Counseling Torture Survivors in Contexts of Ongoing Threat: Narratives from Sub-Saharan Africa', *Peace and Conflict: Journal of Peace Psychology*, 19/2 (2013), 164-79 at p. 172.

⁵¹ Office of the High Commissioner for Human Rights (1999), 'Istanbul Protocol', UN Doc. HR/P/PT/8/Rev.1 at para 142.

⁵² Herlihy and Turner, 'The Psychology of Seeking Protection', (2009) at p. 177.

⁵³ Quiroga and Jaranson, 'Politically-Motivated Torture and Its Survivors: A Desk Study Review of the Literature', (2005) at p.27.

⁵⁴ *Ibid.*, at p. 27, citing Basoglu et al. 'Appraisal of self, social environment, and state authority as a possible mediator of post-traumatic stress disorder in tortured political activists', *Journal of Abnormal Psychology* 105 (1996), 232-6.

⁵⁵ See for example ECtHR, *Stubbings and Ors v United Kingdom* (1996) Apps. No. 36-37/1995, 542-543/1995 and 628-629/1995, Judgment of 22 October 1996, at para. 56 (“There has been a developing awareness in recent years of the range of problems caused by child abuse and its psychological effects on victims, and it is possible that the rules on limitation of actions applying in member States of the Council of Europe may have to be amended to make special provision for this group of claimants in the near future”). Note that in 2008 the House of Lords overruled its own decision which had been at issue in *Stubbings*, finding that claims for historic sexual abuse could be brought after the usual limitation period had expired: UK House of Lords, *A v Hoare* (2008) Judgment of 30 January 2008, [2008] UKHL 6. See also Committee on the Rights of the Child (2006), 'Concluding Observations: Iceland', CRC/C/OPSC/ISL/CO/1, 21 June 2006 at para. 14(c). On the issue of the psychological impact of the sexual abuse itself and the delay in making a complaint see in particular paras. 44-49 (Lord Hoffman), and paras. 54, 57, 60 (Baroness Hale). See also Elizabeth Adjin-Tettey and Freya Kodar, 'Improving the Potential of Tort Law for Redressing Historical Abuse Claims: The Need for a Contextualized Approach to the Limitation Defence', *Ottawa Law Review*, 42/1 (2010), 95-122; Carol Brennan, 'An Instrument of Injustice? Child Abuse and the Reform of Limitation Law', *Child and Family Law Quarterly*, 18/1 (2006), 67-92; Ben Mathews, 'Limitation Periods and Child Sexual Abuse Cases: Law Psychology, Time and Justice', *Torts Law Journal*, 11 (2003), 218-43.

⁵⁶ Brennan, 'An Instrument of Injustice? Child Abuse and the Reform of Limitation Law', (2006) at p. 72; Mathews, 'Limitation Periods and Child Sexual Abuse Cases: Law Psychology, Time and Justice', (2003) at 1.1-1.2.

⁵⁷ Court of Appeal (England and Wales), *Kr & Ors v Bryn Alyn Community (Holdings) Ltd & Anor* (2003) [2003] EWCA Civ 85 at para. 41. See also UK House of Lords, *A v Hoare* (2008) 30 January 2008, [2008] UKHL 6 at para. 54 (per Baroness Hale).

⁵⁸ Brennan, 'An Instrument of Injustice? Child Abuse and the Reform of Limitation Law', (2006) at p. 72; Mathews, 'Limitation Periods and Child Sexual Abuse Cases: Law Psychology, Time and Justice', (2003) at 1.1-1.2.

of these conditions may have the effect of making the sufferer unable to take the steps necessary to pursue a remedy against the perpetrator.

29. It is increasingly accepted by national courts and legislatures that these factors should be taken into account when considering the application of limitation periods in claims for personal injury.⁵⁹ It is also reflected, in relation to prosecutions, in the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and European Union Directive 2011/92/EU on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography. Each of these mandates that prosecutions for sexual offences against children should be allowed to proceed for a sufficient period of time after the victim has reached the age of majority, commensurate with the gravity of the offence.⁶⁰ On the basis of the above, clear analogies may be drawn with claims of the infliction of harm by state actors amounting to torture or other ill-treatment. The impact of the treatment inflicted should be taken into account in considering the later actions of the victim and the potential application of limitation periods.

Limitation periods in relation to torture and other ill-treatment

(i) Torture and other ill-treatment and statutory limitation periods

30. It is well recognised that there are certain crimes for which statutes of limitation cannot apply, including war crimes and crimes against humanity.⁶¹ However, this principle is not limited to war crimes and crimes against humanity. At the International Tribunal for the Former Yugoslavia it was recognized that torture falls within the international crimes recognised as violations of *jus cogens* norms and to which no statute of limitation should apply.⁶² States have an obligation to ensure that those who violate such norms do not do so with impunity and are brought to justice, either by prosecution within the State or extradition for prosecution in another State.
31. The UN Independent Expert to Update the Set of principles for the protection and promotion of human rights through action to combat impunity, Diane Orentlicher, noted in 2005 that “the general trend in international jurisprudence has been towards increasing recognition of the relevance of [the doctrine of imprescriptibility] not only for such international crimes as crimes against humanity and war crimes, but also for gross violations of human rights such as torture”.⁶³ The updated set of principles she prepared, finalised in February 2005, provided that “[p]rescription shall not apply to crimes under international law that are by their nature imprescriptible”.⁶⁴
32. In 2006 the United Nations General Assembly endorsed the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, recognising that “[w]here so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitation shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law”.⁶⁵ The Basic Principles go on to state that

⁵⁹ In relation to England and Wales see, eg. UK House of Lords, *A v Hoare* (2008) 30 January 2008, [2008] UKHL 6 at paras. 44-49. In relation to Canada see Adjin-Tettey and Kodar, 'Improving the Potential of Tort Law for Redressing Historical Abuse Claims: The Need for a Contextualized Approach to the Limitation Defence', (2010). Concerning Ireland see Statute of Limitations (Amendment) Act 2000, which retrospectively extended the period within which a person may bring a civil claim arising out of child sexual abuse in circumstances where the person bringing the claim is deemed to be “under a disability”. For European states more generally see Parliamentary Assembly of the Council of Europe (2010), 'Child Abuse in Institutions: Ensuring Full Protection of the Victims', Doc 12358, 20 September 2010 at para. 47.

⁶⁰ See Council Of Europe (2007), 'Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse', adopted 25 October 2007, entered into force 1 July 2010 at Article 33; European Parliament and Council of the European Union (2011), 'Directive 2011/92/EU on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA', Official Journal of the European Union, L335/1, 17 December 2011 (enters into force 18 December 2013) at Article 15: “States shall take the necessary measures to enable the prosecution of [specified offences relating to child sexual abuse] for a sufficient period of time after the victim has reached the age of majority and which is commensurate with the gravity of the offence concerned”).

⁶¹ This is reaffirmed in international treaties prohibiting the application of statutory limitations to certain war crimes and crimes against humanity, such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) and the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (1974).

⁶² See ICTY, *Prosecutor v Furundžija* (1998) Case No. IT-95-17/1-T, Trial Chamber judgment of 16 November 1998, at paras. 155, 57 (“torture may not be covered by a statute of limitations”).

⁶³ UN Commission on Human Rights (2005), 'Report of the Independent Expert to Update the Set of Principles to Combat Impunity', E/CN.4/2005/102, 18 February 2005 at para. 47. See also UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (1997), 'Final Report of the Special Rapporteur of the Sub-Commission on Impunity of Perpetrators of Violations of Civil and Political Rights, Mr Louis Joinet', UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997 at para. 31: (“[p]rescription is without effect in the case of serious crimes under international law ... [and] it cannot run in respect of any violation while no effective remedy is available”).

⁶⁴ UN Commission on Human Rights (2005), 'Draft Updated Impunity Principles', E/CN.4/2005/102/Add.1 at Principle 23.

⁶⁵ UN General Assembly (2005), 'Basic Principles on Remedy and Reparation', UN G.A. Res 60/147 at Article 6.

“[d]omestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive”.⁶⁶

33. This general position in international law has been reflected in the jurisprudence of UN treaty bodies. The UN Committee against Torture has consistently made it clear that under the Convention against Torture, the crime of torture should not be subject to any limitation period,⁶⁷ and has clarified that the same applies to other forms of ill-treatment.⁶⁸ In the context of a state party review it has expressed concern that “the statute of limitations for acts amounting to torture and ill-treatment may prevent investigation, prosecution and punishment of these grave crimes”.⁶⁹ In that review it recommended that the State Party:

review its rules and provisions on the statute of limitations and bring them fully in line with its obligations under the Convention, so that acts amounting to torture and ill-treatment ... can be investigated, prosecuted and punished without time limitations.⁷⁰

34. Similarly, the Inter-American Court of Human Rights has held that:

... provisions on prescription ... are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary executions, and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.⁷¹

35. This has also been the approach of the UN Special Rapporteur on Torture⁷² and the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.⁷³ The application of statutes of limitation to “physical and psychological torture” and “cruel, degrading, humiliating or inhuman treatment” is also specifically prohibited under Article 8(2) of the Arab Charter.⁷⁴

36. The UN Human Rights Committee has made it clear that, in relation to extrajudicial executions, the prohibition of torture “and other similar ill-treatment”, and enforced disappearances, “...impediments to the establishment of legal responsibility should also be removed”, including “unreasonably short periods of statutory limitation *in cases where such limitations are applicable*”.⁷⁵ In 2008 the Committee held, in the context of state party reporting, that a “statute of limitations on offences involving serious human rights violations should be abolished”.⁷⁶ In 2000, it had included the following recommendation in its concluding observations on Argentina: “Gross violations of civil and political rights during military rule should be prosecutable for as long as

⁶⁶ Ibid., at Article 7.

⁶⁷ See, eg. CAT (2007), 'Concluding Observations: Denmark', CAT/C/DNK/CO/5, 16 July 2007 at para. 11; CAT (2010), 'Concluding Observations: Jordan', CAT/C/JOR/CO/2, 25 May 2010 at para. 9; CAT (2011), 'Concluding Observations: Bulgaria', CAT/C/BGR/CO/4-5, 14 December 2011 at para. 8; CAT (2012), 'Concluding Observations: Armenia', CAT/C/ARM/CO/3, 6 July 2012 at para. 10.

⁶⁸ CAT (2012), 'General Comment No. 3', CAT/C/GC/3 at para. 40.

⁶⁹ CAT (2007), 'Concluding Observations: Japan', CAT/C/JPN/CO/1 at Section C.

⁷⁰ Ibid.

⁷¹ IACtHR, *Barrios Altos v Peru* (2001) Judgment of 14 March 2001, Series C, No. 75 at para. 41. See also IACtHR, *Rochela Massacre v Colombia* (2007) Judgment of 11 May 2007, Series C, No. 163 at para. 294; IACtHR, *Las Dos Erres' Massacre v Guatemala* (2009) Judgment (Preliminary Objection, Merits, Reparation and Costs) of 24 November 2009, at para. 233 (“the State may not apply amnesty laws nor argue prescription, non-retroactivity of the criminal law, former adjudication, the non bis in idem principle...or any other similar means of discharging from liability, to excuse itself from this obligation [to identify, prosecute and punish those responsible for serious crimes]”). See also ECOWAS Community Court of Justice, *Hadijatou Mani Koraou v the Republic of Niger* (2008) Judgment No. ECW/CCJ/JUD/06/08, 27 October 2008, at para. 56 (“It should be underlined that since human rights are inherent to the human being, they are “inalienable, imprescriptible and sacred” and do not suffer any limitation”).

⁷² Human Rights Council (2009), 'Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Mission to the Republic of Moldova', A/HRC/10/44/ADD.3, 12 February 2009 at para. 81 (“...However, some gaps remain, such as the statute of limitations that applies to the crime of torture”).

⁷³ Human Rights Council (2010), 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin : Mission to Peru', A/HRC/16/51/Add.3, 15 December 2010 at para. 43(c) (“Ensure that obstacles for prosecution and conviction for grave human rights violations in the course of counter-terrorism operations, such as those based on a statute of limitations in domestic law, are overcome in accordance with the jurisprudence of the Inter-American Court of Human Rights and applicable international human rights law”).

⁷⁴ League of Arab States, Arab Charter on Human Rights, 22 May 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005), *entered into force* 15 March 2008.

⁷⁵ HRCtee (2004), 'General Comment No. 31', UN Doc. CCPR/C/21/Rev.1/Add. 13 at para. 18 (emphasis added). See also concluding observations on Ecuador (1998), A/53/40, para. 280 (“The Committee welcomes the information that ... torture, enforced disappearances and extrajudicial executions have no statute of limitation...”).

⁷⁶ See, eg., HRCtee (2008), 'Concluding Observations: Panama', CCPR/C/PAN/CO/3 17 April 2008. See also HRCtee (2010), 'Concluding Observations: El Salvador', CCPR/C/SLV/CO/6, 18 November 2010 at para. 6.

necessary, with applicability as far back in time as necessary to bring their perpetrators to justice”.⁷⁷

37. Finally, the UN Committee against Torture has stressed that limitation periods are contrary to Article 14 of the Convention against Torture. Under that provision, States have an independent obligation to ensure that victims of torture and other ill-treatment obtain redress.⁷⁸ Effective investigations and access to justice require the removal of obstacles that impede enjoyment of the procedural aspect of the right to a remedy, including statutes of limitation that operate in practice to bar complaints.⁷⁹

38. In the Committee’s General Comment No 3, it stated:

On account of the continuous nature of the effects of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them. For many victims, passage of time does not attenuate the harm and in some cases the harm may increase as a result of post-traumatic stress that requires medical, psychological and social support, which is often inaccessible to those who have not received redress. States parties shall ensure that all victims of torture or ill-treatment, regardless of when the violation occurred or whether it was carried out by or with the acquiescence of a former regime, are able to access their rights to remedy and to obtain redress.⁸⁰

(ii) The compatibility of limitation periods with the Convention

39. This Court holds Article 3 to be among “the most fundamental provisions” of the Convention,⁸¹ and has held that the operation of a limitation period to bar the prosecution of a state official charged with acts violating Article 3 cannot be justified. The Court has repeatedly held that:

where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an “effective remedy” that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.⁸²

40. Even when it comes to proceedings concerning rights which may be subject to legitimate restrictions,⁸³ the Court has stressed that – when considering statutes of limitation – it “needs to ascertain in a given case is whether the nature of the time-limit in question and/or the manner in which it is applied is compatible with the Convention”.⁸⁴ In those cases the Court has, on several occasions “found that it has difficulties in accepting inflexible limitation periods which do not provide any exceptions to the application of that period”.⁸⁵

41. In such a case the existence of a limitation period must be carefully justified. A crucial factor relevant in the determination of whether a restriction is allowed under the Convention is the nature of the right engaged. The Court has continually stressed that the Convention is intended to guarantee rights that are not merely theoretical or illusory but rather rights that are practical and effective.⁸⁶ Existing judicial and other remedies must be effective and equally accessible in practice not only in law.⁸⁷ As the UN Human Rights Committee and UN Committee against Torture have stressed, this requires that they “should be appropriately adapted so as to take account of the special vulnerability of certain categories of person”.⁸⁸

⁷⁷ HRCtee (2000), ‘Concluding Observations: Argentina’, CCPR/CO/70/ARG, 15 November 2000.

⁷⁸ CAT (2012), ‘General Comment No. 3’, CAT/C/GC/3 at para. 27.

⁷⁹ *Ibid.*, at para. 40.

⁸⁰ *Ibid.*

⁸¹ ECtHR [GC], *Z and Ors v United Kingdom* (2001) App. No. 29392/95, ECHR 2001-V at para 110; *ibid.*, at para 109.

⁸² See, eg. ECtHR, *Abdulsamet Yaman v Turkey* (2004) App. No. 32446/96, 2 November 2004, at para. 55; ECtHR, *Yeter v Turkey* (2009) App. No. 33750/03, Judgment of 13 January 2009, at para. 70; ECtHR, *İzci v Turkey* (2013) App. No. 42606/05, Judgment of 23 July 2013, at para. 73.

⁸³ Including Article 6 (right of access to a court) and Article 8 (right to private life): see, eg. ECtHR, *Stubbings and Ors v United Kingdom* (1996) Apps. No. 36-37/1995, 542-543/1995 and 628-629/1995, 22 October 1996; ECtHR, *Roman v Finland* (2013) App. No. 13072/05, Judgment of 29 January 2013.

⁸⁴ ECtHR, *Roman v Finland* (2013) App. No. 13072/05, 29 January 2013, at para 50.

⁸⁵ *Ibid.*, at para 57.

⁸⁶ ECtHR, *Aksoy v Turkey* (1996) App. No. 21987/93, Judgment of 18 December 1996, ECHR 1996-VI, no. 26 at para. 95; HRCtee, *Deon Mctaggart v Jamaica* (1998) Comm. No. 749/1997, Views adopted 3 June 1998, UN Doc. CCPR/C/62/D/749/1997 at paras. 10-11; ECtHR, *Cordova v Italy (No. 1)* (2003) App. No. 40877/98, Judgment of 30 January 2003, at para. 58. See also Judicial Guarantees in States of Emergency, Inter-Am. Ct. H.R., (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987). at para. 24.

⁸⁷ See ECtHR, *Ilhan v Turkey* (2000) App. No. 22277/93, Judgment of 26 June 2000, ECHR 2000-VII; ECtHR, *E and Ors v United Kingdom* (2002) App. No. 33218/96, 26 November 2002.

⁸⁸ HRCtee (2004), ‘General Comment No. 31’, UN Doc. CCPR/C/21/Rev.1/Add. 13 at para. 15. See also CAT (2012), ‘General Comment No. 3’, CAT/C/GC/3 at para. 38.

42. These principles have been reflected in recent decisions of national courts concerning the potential application of statutes of limitation to civil claims concerning serious human rights violations, including torture and other ill-treatment. In 2011, the District Court of The Hague found that no statute of limitation should apply to claims for compensation brought by wives of men extrajudicially killed in Indonesia by Dutch soldiers in 1947, and a man shot and injured in the same incident, even though the claim had not been brought until 2008. The Court ruled that given the gravity of the facts, the State's knowledge of these facts and its passive attitude over a period of sixty years, the invocation of the statute of limitations was unacceptable in view of the criteria of reasonableness and fairness.⁸⁹
43. In 2012, the High Court of England and Wales held that claims for damages for personal injury brought by individuals who had allegedly been tortured while held in detention in Kenya during the 1950s by agents of the British colonial government should not be subject to the usual limitation period.⁹⁰ Importantly, the Court took into account evidence of the psychologically debilitating effects of torture and ill-treatment committed in detention, and their impact on the claimants' ability to speak out openly about the abuse,⁹¹ as well as the seriousness of the allegations,⁹² in coming to this conclusion.
44. Given the gravity of torture and other ill-treatment, and the imperative to combat impunity for it, any legitimate aim alleged to be pursued by such a limitation period can be pursued by less drastic means, including the application of the appropriate standard of proof, and rules guiding prosecutors as to the sufficiency of evidence and the requirement of public interest in pursuing prosecutions.⁹³

Conclusion

45. The Committee of Ministers has confirmed that:

States should support, by all possible means, the investigation of serious human rights violations and the prosecution of alleged perpetrators. Legitimate restrictions and limitations on investigations and prosecutions should be restricted to the minimum necessary to achieve their aim.⁹⁴

The Committee of Ministers has also recognised that “impunity for those responsible for acts amounting to serious human rights violations inflicts additional suffering on victims”.⁹⁵

46. Victims of torture and other ill-treatment by or with the consent or acquiescence of state officials often face particular difficulties reporting the crime to the authorities, arising both from particular psychological issues resulting from the trauma inflicted, from incentives for state inaction on the complaint, and from legitimate concerns about security. These difficulties are compounded in situations of massive violations of human rights. For the reasons outlined above limitation periods should not block the investigation and prosecution of state officials for acts which violate the non-derogable prohibition of torture and other ill-treatment.

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⁸⁹ District Court of the Hague, *Wisah Binti Silan and Ors v Netherlands* (2011) 354119 / HA ZA 09-4171, Judgment of 14 September 2011, at paras. 4.15-4.18.

⁹⁰ High Court (England and Wales), *Mutua and Ors v Foreign and Commonwealth Office* (2012) Judgment of 5 October 2012, [2012] EWHC 2678 (QB).

⁹¹ *Ibid.*, at para. 35.

⁹² *Ibid.*, at para. 15.

⁹³ See, eg. the provisions in English law referred to in ECtHR, *Stubbings and Ors v United Kingdom* (1996) Apps. No. 36-37/1995, 542-543/1995 and 628-629/1995, 22 October 1996, at para. 39. As to such a balancing in favour of allowing a civil claim to proceed see the judgment of the UK House of Lords, *A v Hoare* (2008) 30 January 2008, [2008] UKHL 6; District Court of the Hague, *Wisah Binti Silan and Ors v Netherlands* (2011) 354119 / HA ZA 09-4171, 14 September 2011, at para. 4.16.

⁹⁴ Council of Europe (2011), 'Committee of Ministers Impunity Guidelines', at para. XIV. “*Serious human rights violations*” are defined as “*those acts in respect of which states have an obligation under the Convention, and in the light of the Court’s case law, to enact criminal law provisions*”, and include obligations arising in the context of the prohibition of torture and inhuman or degrading treatment or punishment (para. II (3)).

⁹⁵ *Ibid.*, Preamble.