Naït-Liman v. Switzerland

Application no. 51357/07

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ) and AMNESTY INTERNATIONAL (AI)

INTERVENER

pursuant to the Deputy Grand Chamber Registrar's notification dated 3 March 2017 that the President of the Grand Chamber had granted permission under Rule 44 § 3 of the Rules of the European Court of Human Rights

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24 March 2017

I. Introduction

The interveners wish to make three submissions relating to the interpretation of the right of access to court under article 6(1) of the European Convention on Human Rights (ECHR), particularly relating to limitations on access to court to claim redress for torture and other cruel, inhuman or degrading treatment committed outside the jurisdiction of the State.

Firstly (in section II), the interveners contend that such limitations fall to be interpreted in light of article 14(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and are therefore, at minimum, subject to very strict requirements of necessity and proportionality. Secondly (in section III), the interveners submit that, where the doctrine of forum of necessity (*forum necessitatis*) applies, any more stringent restrictions on access to court in civil claims for torture and other ill-treatment are particularly difficult to justify. Finally (in section IV), the interveners address the scope of the right to reparation for gross violations of human rights under international law and standards in support of the interveners' contention against undue restrictions to the right of access to court and remedies for crimes under international law committed outside the State's jurisdiction.

II. The international legal framework on civil jurisdiction for violations that occurred abroad and article 6 ECHR

The case law of this Court on article 6 ECHR establishes that any limitation on the right of access to court (i) must not impair the very essence of the right,[1] (ii) must pursue a legitimate aim and (iii) must be proportionate.[2] At the same time, the ECHR "cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken … of 'any relevant rules of international law applicable in the relations between the parties' and in particular the rules concerning the international protection of human rights".[3]

The interveners contend that the requirements of access to court under article 6(1) ECHR should be read in the context of the international law applicable to the obligation of States to provide access to court to claim civil remedies for acts amounting to crimes under international law, such as torture. In particular, article 14 CAT, and its implementation in national jurisdictions, provides detailed explanation of the content of the obligation on States to provide such access.

In interpreting the content of this obligation, it is also significant to note that torture is a crime under international law for which individuals are liable and States may be held responsible under international law. This Court, together with other international bodies and domestic courts, has further recognised that the prohibition of torture has attained the status of a peremptory norm of international law.[4] Indeed, virtually all States, in multiple consensus resolutions of the UN General Assembly, recognise the absolute and peremptory character of the prohibition of torture, as does the

[1] See *Mihailov v. Bulgaria*, ECtHR, Application No. 52367/99, Judgment of 21 July 2005, para 38.
[2] *Ernst and Ors v. Belgium*, ECtHR, Application No. 33400/96, Judgment of 15 July 2003, para 48.
[3] *Golder v. the United Kingdom*, ECtHR, Application No. 4451/70, Judgment of 21 February 1975, para. 29; *Al-Adsani v. the United Kingdom*, ECtHR, Application No. 35763/97, Judgment of 21 November 2001, para. 55; *Neulinger and Shuruk v. Switzerland* [GC], Application No 41615/07, Judgment of 6 July 2010 para. 131; *Nada v. Switzerland* [GC], Application No. 10593/08, Judgment of 12 September 2010, para. 169.
[4] See, *e.g.*, *Demir and Baykara v. Turkey* [GC], ECtHR, Application No. 34503/97, Judgment of 12 November 2008, para. 73. See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ, Judgment of 20 July 2012, para 99.

International Court of Justice[5] and other international judicial authorities.[6] The *jus cogens* character of the prohibition means that norm is intransgressible[7] and supersedes all other international and domestic law that is not of a peremptory character. Furthermore, as stressed by this Court's jurisprudence, the prohibition of torture falls within the scope of the "underlying values" of the ECHR.[8] In a number of cases the Court observed that "Article 3 enshrines one of the most fundamental values of democratic societies".[9]

1. Article 14 of the Convention against Torture

Article 14(1) CAT requires each State party to provide procedures permitting victims to obtain reparation for torture, including when committed outside the State's jurisdiction and regardless of the nationality of the perpetrator or the victim. The Committee against Torture has made clear that this obligation is equally applicable to other cruel, inhuman or degrading treatment.[10] This rule of international law must necessarily infuse a correct interpretation of the right of access to court under article 6(1) ECHR "to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner".[11] Therefore, in order to make an assessment of the scope of the right under article 6(1) ECHR and the proportionality of any limitation thereto, the Court should consider the obligations placed on States by article 14 CAT.

Article 14(1) of the Convention against Torture states:

> *Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.*

As established by the Vienna Convention on the Law of Treaties (VCLT), which, in this, reflects customary international law,[12] and the jurisprudence of this Court,[13] the first criterion of interpretation of international treaties is the ordinary meaning to be given in good faith to the terms of the treaty in their context and in light of their object and purpose.[14] Article 14 CAT does not, either in its plain meaning or in light of object and purpose, provide for any geographical or other jurisdictional limitation to its

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[5] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal),* Judgment of 20 July 2012, *ICJ Reports* 2012, para. 99.
[6] See, *e.g.*, General Assembly, Resolution, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/RES/68/156 (2013); General Assembly, Resolution, Confidence-building measures in the regional and subregional context, UN Doc. A/RES/67/61(2012); *Judgment of 10 December 1998*, ICTY, Prosecutor v. Anto Furundzia, No. IT-95-17/1T, para. 154.
[7] ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Reports 1996, para 79.
[8] "This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 (art. 3) enshrines one of the fundamental values of the democratic societies making up the Council of Europe", *Soering v. the United Kingdom*, ECtHR, Application No. 14038/88, Judgment of 7 July 1989, para. 88.
[9] *Selmouni v. France* (GC)*,* ECtHR, Application No. 25803/94, Judgment of 28 July 1999, para. 95; *Gafgen v. Germany* (GC)*,* Application No. 22978/05, Judgment of 1 June 2010, para. 87; *Labita v. Italy* [GC]*,* Application No. 26772/95, Judgment of 6 April 2000, para 119.
[10] Committee against Torture, *General Comment No.3, Implementation of article 14 by States parties*, UN Doc. CAT/C/GC/3 (2012), para. 1.
[11] *Šilih v. Slovenia*, ECHR [GC], Application no. 71463/01, 9 April 2009*,* para. 163.
[12] ICJ, *Legality of the Use of Force (Serbia and Montenegro v Belgium),* Preliminary Objections, ICJ Rep 279, para 100; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, para.64.
[13] See, *Golder v. the United Kingdom*, ECtHR, Application No. 4451/70, Judgment of 21 February 1975.
[14] Article 31(1), Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; entry into force: 27 January 1980, in accordance with article 84(1)), 1155 UNTS 331.. Yearbook of the International Law Commission, 1966, vol. II, p.219. In the same sense the International Court of Justice (ICJ) found in the *Territorial Dispute (Libya v Chad)* case that '[I]nterpretation must be based above all upon the text of the treaty', ICJ, *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, para.41) that is to say, to what have been written down by the parties, *i.e.,* the words and phrases used in the treaty, rather than the bargain struck by the parties' (see, O. Dörr and K. Schmalenbach, Vienna Convention on the Law of Treaties, A Commentary, Springer, p.541).

application. The context, object and purpose is expressly identified in the CAT's Preamble, according to which the Convention was drafted "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world."[15]

This approach is affirmed by the authoritative interpretation of the Committee against Torture, according to which

> *"the application of article 14 is 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 commended 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 the rights guaranteed under article 14 in the territory where the violation took place. Indeed, article 14 requires States parties to ensure that all victims of torture and ill-treatment are able to access remedy and obtain redress."*[16]

In a similar sense the Special Rapporteur on Torture of the UN Human Rights Council has noted "[t]hat article 14 is not geographically limited on its face and will apply no matter where the torture takes place."[17]

The literal interpretation of article 14(1) CAT is corroborated by the practice of the States parties in the application of the treaty, a subsidiary means of interpretation, according to the VCLT.[18] Indeed, out of the 160 States parties to the Convention against Torture only one of them, the United States, has made reservation on the geographical scope of Article 14 CAT.[19] This confirms that the provision was intended by the drafters to be applied without geographical or other jurisdictional limitation. In addition, it must be stressed that subsequent United States' practice has made its reservation moot.[20]

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[15] Preamble, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted on 10 December 1984, entered into force 26 June 1987), 1465 UNTS 85 (CAT). See AI Letter to the Chairperson of the UN Committee against Torture, Claudio Grossman: "[t]he Preamble makes clear that the Convention against Torture was designed 'to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world'. Thus, each provision of the Convention must be interpreted in a manner which will make the struggle to end torture and ill-treatment more – not less – effective throughout the world."

[16] Committee against Torture, *General Comment No.3, op.cit.*, paras. 4(g), 5(f), where the Committee stated that article 14 *requires* States parties to provide a procedure permitting victims and their families to obtain reparation from those responsible for torture regardless where it was committed. The positioned was reiterated in Committee against Torture, *Concluding observations of the Committee against Torture – Canada*, UN Doc. CAT/C/CAN/CO/6 (2012), para.15; and Committee against Torture, *Concluding observations of the Committee against Torture – Chile*, UN Doc. CAT/C/CHL/CO/5 (2009), para.17 d). The CAT recommended the UK to adopt "the Torture (Damages) Bill that would provide universal civil jurisdiction over some civil claims," Committee against Torture, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*, UN Doc. CAT/C/GBR/CO/5 (2013), para.22.

[17] Juan E. Méndez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/70/303 (2015), ("Interim Report 2015"), para. 56.

[18] Article 31.3 of the VCLT.

[19] "That it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party". Bangladesh made upon accession a declaration, which was objected by several other States, whereby "[T]he Government of the People's Republic of Bangladesh will apply article 14 para 1 in consonance with the existing laws and legislation in the country"; New Zealand reserved "[t]he right to award compensation to torture victims referred to in article 14 of the Convention Against Torture only at the discretion of the Attorney-General of New Zealand"; and Fiji upon ratification seems to confirm that "[T]he Government of the Republic of Fiji recognizes the article 14 of the Convention only to the extent that the right to award compensation to victims of an act of torture shall be subject to the determination of a Court of law."

[20] The Torture Victim Protection Act in 1991 provides for universal civil jurisdiction over torture committed abroad, and the Torture Victims Relief Act of 1998 was designed to provide rehabilitation assistance to victims of torture committed abroad living in the USA, as well as those abroad (Pub. L. 105-320, 105th Cong.). Judge J. Breyer stated in his concurring opinion in *Sosa v. Álvarez-Machain* case before the Supreme Court of the United States, "[c]onsensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. That is because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself... Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.", *Sosa v. Álvarez-Machain* (03-339) 542 U.S. 692 (2004) 331 F.3d 604, reversed. The UN Special Rapporteur on Torture also said regarding the USA reservation: "The understanding submitted by the United States that article 14 was limited to territory under a State's jurisdiction is at odds with its legislation (Alien Tort Claims Act) and jurisprudence. It has been rejected by subsequent action, such as the enactment of the Torture Victim Protection Act, and in any event indicates the

Furthermore, the Committee against Torture has declared reservations limiting the application of article 14 CAT are contrary to the Convention's object and purpose "to ensure that **all** victims of torture or ill-treatment have access to redress and remedy."[21]

Finally, supplementary means of interpretation confirm this reading.[22] The *travaux préparatoires* confirm that a proposal by the Netherlands to insert in article 14 CAT the words 'committed in any territory under its jurisdiction' after the word 'torture' was rejected.[23] This confirms that it was the intention of States not to restrict the jurisdictional application of the provision.

The interveners submit that, in light of both the *jus cogens* status of the prohibition of torture and of the content of article 14 CAT, and in order for positive obligations to protect against and remedy torture to be real and effective, access to court and remedies must be provided to the maximum possible extent and any limitation to such access must be interpreted restrictively under article 6 ECHR.

2. State practice

According to the last global Amnesty International survey on States' legislation providing for universal jurisdiction, it appears that not less than 147 out of 193 UN Member States have provided for universal jurisdiction over one or more crimes under international law (genocide, crimes against humanity, war crimes, torture, enforced disappearances and extrajudicial executions).[24] As the European Commission stated before the United States Supreme Court, the universal civil jurisdiction principle "[u]ndisputedly applies to those States, including those within the European Union (EU), that currently permit victims of crime to seek monetary compensation in *actions civiles* within criminal proceedings based on universal jurisdiction."[25] According to the European Commission, such proceedings are available in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Spain and Sweden, and also, outside the EU, Argentina, Bolivia, China, Colombia, Costa Rica, Myanmar, Panama, Senegal and Venezuela, among others.[26]

3. Conclusion

In accordance with this Court's jurisprudence and the Vienna Convention on the Law of Treaties, the ECHR is to be interpreted in light of corresponding bodies of international law binding on the Parties. With regard to cases of allegations of torture or other cruel, inhuman or degrading treatment, CAT provides the universal reference. Any interpretation of the ECHR and of the right of access to court under article 6(1) ECHR, and to an effective remedy under article 13 ECHR read in

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otherwise comprehensive extraterritorial applicability of the article," Juan E. Méndez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Interim report 2015*, para. 56.

[21] Committee against Torture, *General Comment No.3, op. cit.*, para.43. (emphasis added)

[22] Article 32 VCLT 1969 and Article 32 VCLT 1969 and *Golder v. the United Kingdom*, ECtHR, Application No. 4451/70, Judgment of 21 February 1975.

[23] M. Nowak and E. McArthur, *The United Convention agaisnt Torture*, Oxford University Press, 2008, p.457; J.H. Burgers and H. Danelius, *The United Nations Convention against Torture*, M. Nijhoff, 1988, p.74.

[24] *Universal Jurisdiction : a Preliminary Survey of Legislation around the World – 2012 Update* (IOR 53/019/2012), October 2012. Since then Ecuador has also enacted legislation providing for universal jurisdiction for crimes under international law (Codigo Organico Integral Penal, article 14(2)(e) and (d)).

[25] Supreme Court of the United States, Brief of the European Commission on behalf of the European Union as amicus curiae in support of neither party, *Esther Kiobel, individually and on behalf of her late husband, Dr. Barinem Kiobel, et al., petitioners, v. Royal Dutch Petroleum Co., et al., respondents*, 13 June 2012, pp.18-19.

[26] *Ibid.*

conjunction with article 3 ECHR should reflect and uphold the obligations arising from CAT and, in particular, its article 14(1).

The interveners submit that, based on the ordinary meaning of the wording of article 14(1), the structure of the Convention against Torture, its object and purpose and the *travaux préparatoires*, as well as the authoritative interpretation by the Committee against Torture, it is clear that the obligation to provide redress and remedy contains no geographical or other forms of jurisdictional limitation and applies to torture and other ill-treatment committed outside the State's jurisdiction regardless of the nationality of the perpetrator or the victim. In sum, the interveners consider that article 14(1) CAT *requires* each State party to provide for procedures permitting any victim to obtain reparation for torture committed outside the State's jurisdiction, if the victim cannot otherwise obtain redress.[27]

The interveners therefore consider that, should any restriction to the right to access justice to provide civil remedies for gross human rights violations be applied by State parties to the ECHR, such restrictions must at minimum be assessed on the basis of a **strict** application of the requirement of necessity and proportionality, as further outlined below.

III. Considerations on *forum necessitatis*

The interveners submit that the existence of accessory jurisdictional venues in domestic law for presenting cases of civil liability for gross human rights violations and/or crimes under international law is necessary, separately and in addition to questions of criminal jurisdiction, in order to satisfy the obligations of remedy and reparation for gross violations of human rights. This means that, at minimum, any restrictions on access to court must, in accordance with the principles established in this Court's jurisprudence on article 6 ECHR, be based on a legitimate aim, and be strictly necessary and proportionate to that aim.

The doctrine of forum of necessity (*forum necessitatis*) exists in several countries of the European Union (Austria, Belgium, Estonia, France, Germany, Luxemburg, Netherlands, Poland, Portugal, Romania).[28] Outside the European Union, forum of necessity is recognized at least in Argentina, Canada, Costa Rica, Japan, Mexico, Russia, South Africa, Turkey and Uruguay.[29] In other States, it is admitted via jurisprudential and doctrinal interpretation of jurisdictional rules. In **Belgium, Germany** and **Netherlands** specific legislation allowing for forum of necessity was enacted out of belief that it was necessary in order to give effect to fair trial guarantees under article 6(1) ECHR.[30] In **France** such legislation was dictated by the prohibition of "denial of justice".[31] Most States require the existence of some connection between the plaintiff and the forum State.[32]

As regards Switzerland, article 3 of the 1987 Federal Act on Public International Law (*La loi fédérale sur le droit international privé du 18 décembre 1987*) was intended by

[27] See, Christopher Keith Hall, *The duty of states parties to the Convention against Torture to provide procedures permitting victims to recover reparations for torture committed abroad*, Eur. J. Int'l L., vol. 18, 2007, p. 921.
[28] Arnaud Nuyts, *Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations* (Hereinafter: Study on Residual Jurisdiction), 3 September 2007, Available at: <ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf> (accessed 24 March 2017), p. 66.
[29] Chilenye Nwapi, *A Necessary Look at Necessity Jurisdiction*, 47 University of British Columbia Law Review [2014], pp. 225-226.
[30] Study on Residual Jurisdiction, p. 64; see also Chilenye Nwapi, *A Necessary Look at Necessity Jurisdiction*, 47 University of British Columbia Law Review [2014], pp. 213-214.
[31] *Ibid.*, p. 64.
[32] *Ibid.*, p. 65.

the legislator to cover the following situation: "Swiss authorities must declare themselves competent even in cases where ties with [the] country are very small when it is impossible to act or to institute proceedings abroad."[33]

This approach is reflected in the jurisprudence of other national jurisdictions. In *Lamborghini (Canada) Inc. v. Automobile Lamborghini S.P.A*. the Court of Appeal in Quebec considered the requirement of "sufficient connection" met in the situation of a "refugee who cannot sue in the country where he or she was persecuted, or the urgent petition that cannot be heard in time abroad".[34] This understanding was subsequently echoed in *Anvil Mining Ltd. c. Association canadienne contre l'impunité*.[35] Refugees and other persons who successfully sought international protection outside their country of origin are considered by Polish law as potential beneficiaries of forum of necessity doctrine.[36]

It is undisputed that, in States that recognise the doctrine of forum of necessity, habitual residence or domicile of the claimant or the defendant in the country of forum is commonly understood as fulfilling the requirement of "sufficient connection".[37] In *Club Resorts Ltd. v. Van Breda* the Supreme Court of Canada concluded that being domiciled or resident in the jurisdiction is one of "presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute". [38]

The interveners submit that, when the legislation allows jurisdiction for civil liability for acts committed outside the jurisdiction only in cases where the impossibility or impracticality of introducing the complaint in the primary forum of jurisdiction has been demonstrated, this already significantly limits such jurisdiction. The requirement to establish a sufficient connection, like the domicile or residence of the complainant, with the forum State further limits the access to court.

Where domestic legislation imposes such restrictive limits to jurisdiction, the interveners submit that, at a minimum, any further restrictions, including unduly broad interpretations of the sufficient link requirement, and *a fortiori* any blanket exclusion of civil jurisdiction, would be particularly difficult, if not impossible, to justify as strictly necessary and proportionate under article 6 ECHR in cases of remedies for crimes under international law, such as torture.

Limitations on access to court in the interests of the good administration of justice

The Chamber of this Court has identified as a legitimate aim for the restriction of the right of access to court under article 6.1 ECHR "*la bonne administration de la justice*."[39]

In this regard, the interveners submit that the fulfilment of the right of access to court under article 6 ECHR, including when provided under the *forum necessitatis* doctrine,

[33] English translation in Simon Othenin-Girard, *op. cit.*, p. 276. Original in *Message concernant une loi fédérale dur le droit international privé du 10 novembre 1982,* Swiss Federal Council, Doc. No. 82.072, p. 290, para. 213.3.
[34] *Lamborghini (Canada) Inc. v. Automobile Lamborghini S.P.A., [*1997] R.J.Q. 58 (C.A.) at 74 (emphasis added).
[35] *Anvil Mining Ltd. c. Association canadienne contre l'impunité,* [2012] QCCA 117, at 98.
[36] Ustawa Prawo Prywatne Miedzynarodowe, of 4 February 2011, Dz.U. 2011 Nr 80 poz. 432. Article 3 (2) of the Polish Private International Law Act refers to such individuals observing that their "ties with their country of origin have permanently been broken due to the country violating fundamental human rights" which forms basis for them to be able to rely on the doctrine.
[37] Study on Residual Jurisdiction, p. 66.
[38] *Club Resorts Ltd. v. Van Breda*, [2012] SCC 17, at 90.
[39] *Naït-Liman c. Suisse*, ECtHR, Application No. 51357/07, Judgment of 21 June 2016, para. 107.

in regard to civil claims involving violations of human rights that amount to crimes under international law, would certainly not be contrary to the good administration of justice. Indeed, under international law, States are obliged to prosecute or extradite alleged perpetrators of torture or other crimes under international law,[40] even if committed outside the State's jurisdiction. The difficulties for the admission of evidence, as stressed by the Chamber in the present case, would be no less burdensome in a criminal trial, where guilt beyond reasonable doubt must be established, than in a civil one, where the standard of proof is lower and the burden of proof is incumbent on the plaintiff, who does not have in such cases the benefit of the investigative and international cooperation apparatus of a State.

Furthermore, there are situations where the possibility exists for criminal investigations and prosecutions for crimes under international law committed outside the State's jurisdiction, irrespective of the nationality of the victim or suspected perpetrator. The interveners submit that, especially when civil remedies can be claimed in such proceedings, it is manifest that any more stringent restrictions to access such remedies outside of criminal proceedings could not be justifiable as necessary and proportionate. Such restrictions would necessarily run counter to the need to ensure proper implementation of the States' obligations under article 6 ECHR, and fail the test of strict necessity and proportionality in the pursuit of the good administration of justice.

IV. The scope of the right to reparation for gross violations of human rights

One of the legitimate aims identified by the Chamber to restrict the right of access to court was incapacity to execute the domestic decision.[41] The interveners contend that the extent of the difficulties in executing such decisions must be assessed in light of the full extent of the scope of the obligation of reparation for gross human rights violations.

Recognized under customary international law,[42] the right to reparation covers different forms of redress, which are usually cumulative. The *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*, which were adopted by a consensus of all States in the UN General Assembly, affirm that States must "provide redress for victims of torture or other cruel, inhuman or degrading treatment or punishment, encompassing effective remedy and adequate, effective and prompt reparation, which should include restitution, fair and adequate compensation, rehabilitation, satisfaction and guarantees of non-repetition, taking into full account the specific needs of the victim."[43]

The Council of Europe Committee of Ministers' *Guidelines on eradicating impunity for serious human rights violations* provide that "*States should take all appropriate measures to establish accessible and effective mechanisms which ensure that victims of serious human rights violations receive prompt and adequate reparation for the*

[40] See, articles 5 and 7 CAT, and *International Convention for the Protection of All Persons from Enforced Disappearance*.
[41] *Naït-Liman c. Suisse*, *op. cit.*, para. 107.
[42] PCIJ, *Case Concerning the Factory at Chorzów (Jurisdict ion)*, P.C.I.J. Serie s A, No 9 [8 i.e.], 26 July 1927, p 21.
[43] General Assembly, Resolution, *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 Doc. 60/147 (2005), (UN Basic Principles on Remedy and Reparation), Principle II(3)(c).

harm suffered. This may include measures of rehabilitation, compensation, satisfaction, restitution and guarantees of non-repetition."[44]

It is important to note that according to the UN Updated Set of Principles on Impunity, "[i]mpunity arises from a failure by States to meet their obligations … to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations."[45] Furthermore, "[t]he right to reparation shall cover all injuries suffered by victims; it shall include measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law."[46]

In interpreting States' obligations under article 2.3 of the International Covenant on Civil and Political Rights, to which all ECHR Contracting Parties are parties, the UN Human Rights Committee has said:

> *[It] requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy … is not discharged…. the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."*[47]

While restitution,[48] compensation[49] and non-repetition are essential components of the right to reparation for gross human rights violations, they are by no means the only ones. The obligations to provide rehabilitation and satisfaction are also crucial to the realisation of this right.

Rehabilitation measures are required under several universal treaties and declarations, including under the Convention against Torture.[50] They are often recommended or ordered in addition to compensation, in particular for victims of

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[44] Council of Europe (CM), *Guidelines on eradicating impunity for serious human rights violations,* 2011, XVI (Reparation).
[45] Economic and Social Council, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UN Doc. E/CN.4/2005/102/Add.1 (2005) (UN Impunity Principles), article 1.
[46] *Ibid.*, Principle 34.
[47] Human Rights Committee, *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 (2004), para. 16.
[48] *Papamichalopoulos and Others v. Greece (Article 50)*, ECtHR, Application No. 14556/89, Judgment of 31 October 1995, para. 34; *Case Concerning the Factory At Chorzów (Cl aim for Indemnity) (The Merits)*, P.C.I.J., Series A No 17, 13 September 1928, p 47. For more details about these measures, *see*: ICJ, The right to a remedy and to reparation for gross human rights violations – A practitioners' guide, 2006, pp. 115-118, available at : https://www.icj.org/the-right-to-a-remedy-and-to-reparation-for-gross-human-rights-violations/ (accessed 15 March 2017) (hereafter: ICJ practitioners' guide no.2). UN Basic Principles on Remedy and Reparation, Principle 19.
[49] Article 14 CAT, Articles 16(4) and (5) of the *Indigenous and Tribal Peoples Convention 1989 (No. 169)*, Article 75(1) of the *Rome Statute of the International Criminal Court*, Article 19 of *Declaration on the Protection of all Persons from Enforced Disappearance*, Principle 12 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Article 9(2) of the *Declaration on Human Rights Defenders*. In the regional instruments, Article 63 (1) ACHR, Article 9 *Inter-American Convention to Prevent and Punish Torture*, Articles 288 (2) *Treaty of the European Community*, Article 41(3)of the *Charter of Fundamental Rights of the European Union*, Article 21(2)AfrCHPR, Article 27 (1) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Enshrined in many human rights treaties, the right to compensation is recognized by the UN treaty bodies even if the particular treaty does not explicitly mention it (Human Rights Committee, Concluding Observations on the Libyan Arab Jamahiriya, UN Doc. CCPR/C/79/Add.101(1998), para 7; Human Rights Committee, Concluding Observations on Guatemala, UN Doc. CCPR/CO/72/GTM (2001), para 12; *Almeida de Quinteros et al v Uruguay*, Human Rights Committee Communication No. 107/1981, Views of 21 July 1983, UN Doc. CCPR/C/19/D/107/1981 (1990), para 138; *Sarma v Sri Lanka*, Human Rights Committee Communication No. 250/2000, Views of 31 July 2003, UN Doc. CCPR/C/78/D/950/2000 (2003), para 11.
[50] See, CAT, article 14 (1); CRC, article 39.

torture.[51] Victims are entitled to rehabilitation of their dignity, their social situation and their legal situation.[52]

Non-financial reparations for moral damage or damage to the dignity or reputation, can also take the form of **satisfaction**. Measures of satisfaction can include apology, public acknowledgement and acceptance of responsibility, along with public commemoration.[53] According to the Court and other international tribunals, a condemnatory judgment may in itself constitute satisfaction.[54]

The importance of the establishment of a truthful record of fact is a central element of satisfaction. The *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* list among the relevant measures:

> *(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; …*
> *(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; …*
> *(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.*[55]

It follows from these principles that one of the most important forms of reparations is the acknowledgment of the truth, responsibility and fault.[56] The right to truth has been recognized in international law both for the victims of human rights violations and, in case of gross violations of human rights and serious violations of international humanitarian law, for the general public.[57] It embodies the right of the victim and his or her family members to know the truth about the victim's fate and whereabouts and

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[51] Theo Van Boven, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38, UN Doc. E/CN.4/2003/68 (2002), para 26(l); Nigel Rodley, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/54/426 (1999), para. 50; Committee against Torture, Conclusions and Recommendations on Brazil, UN Doc. A/56/44 (2001), para.120(f);; Committee against Torture, Conclusions and recommendations on Zambia, UN Doc. CAT/C/XXVII/Concl.4 (2001), para 8g); Committee against Torture, Conclusions and recommendations on Indonesia, UN Doc. CAT/C/XX VII/Concl.3 (2001), para 10 n); Committee against Torture, Conclusions and recommendations on Turkey, UN Doc. CAT/C/CR/30/5 (2003), para 7 (h); Committee against Torture, Conclusions and recommendations on Cambodia, UN Doc. CAT/C/CR/30/2 (2003), para 7 (k). ICJ, practitioners' guide no.2, p. 144.

[52] See Economic and Social Council, General Comment No. 19 of the Declaration on the Protection of All Persons from Enforced Disappearance (1998), UN Doc. E/CN.4/1998/43, para. 75. See, ICJ, practitioners' guide no.2, p. 145.

[53] ICJ, practitioners' guide no.2, pp. 146-149.

[54] See ECtHR jurisprudence: *Golder v. the United Kingdom*, ECtHR, Application No. 4451/70, Judgment of 21 February 1975, para 46; *Oçalan v. Turkey*, Application No. 46221/99, Judgment of 12 March 2003, para. 250; I/ACtHR: *Cesti Hurtado Case (Reparations),* Judgment of 31 May 2001, Series C No78, para 59.

[55] UN Basic Principles on Remedy and Reparation, Principle 22.

[56] ICJ, practitioners' guide no.2, p.146.

[57] Human Rights Council, Resolution, Right to the truth, UN Doc. 9/11 (2008), Article 1; Human Rights Committee, Resolution, Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, UN Doc. 12/12 (2009), Article 1. See also UN Impunity Principles, Principle 2; UN Basic Principles on Remedy and Reparation, Principle 4; Juan E. Méndez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/19/61 (2012), para. 48. In 2011, the UN Human Rights Council established a special procedure on the promotion of truth, justice, reparations and guarantees of non-recurrence: Resolution 18/7 of 29 September 2011. Inter-American Court of Human Rights: *Contreras et al. v. El Salvador*, 31 August 2011 (Merits, Reparations and Costs), C No. 232, paras. 173 and 26; *Familia Barrios v. Venezuela*, 24 November 2011 (Merits, Reparations and Costs), C No. 237, in Spanish, para. 291; *Gelman v. Uruguay*, 24 February 2011 (Merits and Reparations), C No. 221, § 243. *Radilla-Pacheco v Mexico*, C No. 209, 23 November 2009, paras. 180, 212, 313 and 334; *Fleury y otros v. Haiti*, 23 November 2011 (Merits and Reparations), C No. 236, in Spanish; *Gelman v. Uruguay*, op cit, para. 256; *Gomes Lund y otros (Guerrilha do Araguaia) v. Brasil*, 24 November 2010, C No. 219, para. 257; *Caracazo v. Venezuela*, 29 August 2002, C No. 95, paras. 117, 118.

the nature and circumstances of the human rights violations that have taken place. More broadly, it requires public acknowledgement of the violations and public disclosure of the results of the investigation. It is also necessary for public trust in State institutions and for public confidence that action will be taken to prevent impunity.[58] In *El-Masri* the Grand Chamber recognised "the right to the truth regarding the relevant circumstances" of such cases, and that the "right to know what had happened" can extend not only to an applicant and his or her family, "but also for other victims of similar crimes and the general public".[59]

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 article 8 of the American Convention on Human Rights (comparable to article 6 ECHR) as they "lead to the defencelessness of victims and perpetuate impunity [and] prevent victims and their next of kin from knowing the truth and receiving the corresponding reparation".[60]

Conclusions

The interveners submit that execution of a judgment in a case where the facts occurred outside of the State's jurisdiction and the perpetrator is not present in the forum State nor possesses property there, can fulfil certain important aspects of the right to reparations, and thereby provide a certain measure of justice.

The interveners recall that, even where the possibility of enforcing of awards of compensation or restitution is limited within the forum jurisdiction, the national courts are nevertheless capable of delivering enforceable decisions that can restore the dignity of the victims and provide an accurate accounts of the facts. While these acts would constitute partial and insufficient means of reparation, they will help implement the right to the truth – both in its individual and collective dimension – and the victims' right to satisfaction and rehabilitation, aspects of their right to reparations.

[58] *Isayev and Others v. Russia*, ECtHR, Application No. 43368/04, Judgment of 21 June 2011, para. 140; *Al-Skeini and Others v. the United Kingdom* [GC], ECtHR, Application No. 55721/07, Judgment of 7 July 2011; *McKerr v. the United Kingdom*, Application No. 28883/95, Judgment of 4 May 2001, para. 115; *Khamzayev and Others v. Russia*, ECtHR, Application No. 1503/02, Judgment of 3 May 2011, para. 196. Council of Europe Committee of Ministers, Guidelines on *Eradicating impunity for serious human rights violations*, approved on 30 March 2011, Article VI. The Guidelines stress that "States are to combat impunity as a matter of justice for the victims, as a deterrent with respect to future human rights violations and in order to uphold the rule of law and public trust in the justice system", Article I.3. Also, "impunity for those responsible for acts amounting to serious human rights violations inflicts additional suffering on victims" (*ibid*, Preamble). See also, Articles III.2, III.3, XVI.

[59] *El-Masri v. The former Yugoslav Republic of Macedonia*, ECtHR, Application No. 39630/09, Judgment of 13 December 2012, para. 191; Abu Zubaydah, para. 489. See also for all the rest of the section, for the same citation the verbatim text in Al Nashiri 488-499. See, *Anguelova v. Bulgaria*, ECtHR, Application No. 38361/97, Judgment of 16 June 2002, para. 140; *Al-Skeini and Others v. the United Kingdom* [GC], ECtHR, Application No. 55721/07, Judgment of 7 July 2011, para. 167.

[60] *Barrios Altos* case (*Chumbipuma Aguirre et al*. v. *Peru*), Merits (2001) IACtHR, *Series C*, No. 75, para 43.