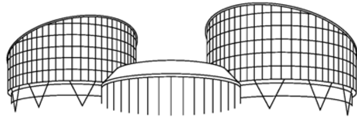

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Refusal by the Swiss courts to examine a compensation claim relating to alleged acts of torture in Tunisia: no violation

In today's **Grand Chamber** judgment[1] in the case of Nait-Liman v. Switzerland (application no. 51357/07) the European Court of Human Rights held, by a majority (fifteen votes to two), that there had been:

no violation of Article 6 § 1 (right of access to a court) of the European Convention on Human Rights.

The case concerned the refusal by the Swiss courts to examine Mr Naït-Liman's civil claim for compensation for the non-pecuniary damage arising from acts of torture allegedly inflicted on him in Tunisia.

The Court considered, on the basis of a comparative legal study, that international law had not imposed an obligation on the Swiss authorities to open their courts with a view to ruling on the merits of Mr Naït-Liman's compensation claim, on the basis of either universal civil jurisdiction in respect of acts of torture or a forum of necessity. It followed that the Swiss authorities had enjoyed a wide margin of appreciation in this area.

With regard to the criteria laid down by the legislature, the Court concluded that by introducing a forum of necessity with the criteria laid down in section 3 of the Federal Law on Private International Law, the Swiss legislature had not exceeded its margin of appreciation. As to the margin of appreciation of the domestic courts, the Court could perceive no arbitrary or manifestly unreasonable elements in the Federal Supreme Court's interpretation in its judgment of 22 May 2007, by which the Federal Supreme Court dismissed Mr Naït-Liman's appeal, holding that the Swiss courts did not have territorial jurisdiction.

The Court reiterated, however, that this conclusion did not call into question the broad consensus within the international community on the existence of a right for victims of acts of torture to obtain appropriate and effective redress, nor the fact that the States were encouraged to give effect to this right.

Principal facts

The applicant, Abdennacer Naït-Liman, is a Tunisian national who has acquired Swiss nationality. He was born in 1962 and lives in Versoix in the Canton of Geneva.

According to the applicant, he was arrested in April 1992 by the police in Italy and taken to the Tunisian consulate in Genoa, where he was presented with a bill of indictment according to which he represented a threat to Italian State security. He was then taken to Tunis by Tunisian agents. Mr Naït-Liman alleges that, from 24 April to 1 June 1992, he was detained and tortured in Tunis in the premises of the Ministry of the Interior on the orders of A.K., the then Minister of the Interior. Following the alleged torture, Mr Naït-Liman fled Tunisia in 1993 for Switzerland, where he applied for political asylum; this was granted in 1995.

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

On 14 February 2001, having learnt that A.K. was being treated in a Swiss hospital, the applicant lodged a criminal complaint against him with the Principal Public Prosecutor for the Republic and the Canton of Geneva. He applied to join these proceedings as a civil party. On the same date the principal public prosecutor transmitted to the head of the security police a request to attempt to locate the accused individual and, if possible, to arrest him and bring him before an investigating judge. The police contacted the hospital, which informed them that A.K. had indeed been a patient there, but that he had already left the hospital on 11 February 2001. On 19 February 2001 the principal public prosecutor discontinued the proceedings on the grounds that A.K. had left Switzerland and that the police had been unable to arrest him.

On 8 July 2004 the applicant lodged a claim for damages with the Court of First Instance of the Republic and the Canton of Geneva against Tunisia and against A.K. On 15 September 2005 the Court of First Instance declared the claim inadmissible on the ground that it lacked territorial jurisdiction and that the Swiss courts did not have jurisdiction under the forum of necessity in the case at hand, owing to the lack of a sufficient link between, on the one hand, the case and the facts, and, on the other, Switzerland.

Mr Naït-Liman lodged an appeal with the Court of Justice of the Republic and the Canton of Geneva. His appeal was rejected in a judgment of 15 September 2006. The Court of Justice held that the respondents enjoyed immunity from jurisdiction, and considered that there had been no violation of Mr Naït-Liman's right of access to a court. Mr Naït-Liman lodged an appeal with the Federal Supreme Court, which dismissed it in a judgment of 22 May 2007, considering that the Swiss courts in any event lacked territorial jurisdiction.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right of access to a court), the applicant complained that the Swiss courts had declined jurisdiction to examine the merits of his action for damages, lodged against Tunisia and against A.K., who were, he alleged, responsible for the acts of torture that had been inflicted on him on the territory of Tunisia.

The application was lodged with the European Court of Human Rights on 20 November 2007.

The Redress Trust and the World Organisation against Torture (OMCT) were given leave to intervene in the written procedure.

The Court delivered a Chamber judgment on 21 June 2016, holding, by four votes to three, that there had been no violation of Article 6 § 1 of the Convention.

On 19 September 2016 the applicant requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 28 November 2016 the panel of the Grand Chamber accepted that request.

The Government of the United Kingdom, which had been granted leave to intervene in the written procedure, submitted observations. The Redress Trust jointly with the OMCT, Amnesty International jointly with the International Commission of Jurists, and Citizen's Watch also submitted observations.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Guido **Raimondi** (Italy), *President*,
Angelika **Nußberger** (Germany),
Linos-Alexandre **Sicilianos** (Greece),
Ganna **Yudkivska** (Ukraine),
Helena **Jäderblom** (Sweden),
Ledi **Bianku** (Albania),

Kristina **Pardalos** (San Marino),
Helen **Keller** (Switzerland),
André **Potocki** (France),
Aleš **Pejchal** (the Czech Republic),
Krzysztof **Wojtyczek** (Poland),
Dmitry **Dedov** (Russia),
Yonko **Grozev** (Bulgaria),
Pere **Pastor Vilanova** (Andorra),
Pauliine **Koskelo** (Finland),
Georgios A. **Serghides** (Cyprus),
Tim **Eicke** (the United Kingdom),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar.*

Decision of the Court

Article 6 § 1 (right of access to a court)

1. Applicability of Article 6 of the Convention

The Court held (by sixteen votes to one) that Article 6 of the Convention was applicable in this case since, on the one hand, it concerned a “genuine and serious” dispute, and, on the other, the applicant could lay claim to a right which was, at least on arguable grounds, recognised under Swiss law: the right of victims of acts of torture to obtain redress was recognised under Swiss law, in particular by Article 41 of the Swiss Code of Obligations, and by various elements of international law, especially Article 14 of the 1984 United Nations Convention against Torture[2] (in force in Switzerland since 26 June 1987).

2. Merits

The Court identified several legitimate aims pursued by the restriction on the right of access to a court, which were all related to the proper administration of justice, particularly in terms of the problems in gathering and assessing the evidence, the difficulties linked to execution of a judgment, the State’s wish to discourage forum-shopping, and the risk of attracting similar complaints, which could create an excessive workload for the domestic courts.

With regard to the proportionality of the restriction on the applicant’s right of access to a court, the Court reiterated that the State enjoyed a certain margin of appreciation in regulating this right; the scope of this margin depended, *inter alia*, on the relevant international law in this area.

The Court identified two concepts of international law that were relevant for the present case: universal jurisdiction and the forum of necessity[3]. The Court had first to examine whether Switzerland was bound to recognise universal civil jurisdiction for acts of torture by virtue of an international custom, or of treaty law.

With regard to a possible international custom, it transpired from the comparative legal study conducted by the Court that, of the 39 European States examined, only the Netherlands recognised universal civil jurisdiction in respect of acts of torture. Outside Europe, universal civil jurisdiction was

2. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
3. The “forum of necessity” refers to the exceptional jurisdiction assumed by a State’s civil courts which would not normally have jurisdiction to examine a dispute under the general or special rules on jurisdiction laid down by that State’s law, where proceedings abroad prove impossible or excessively and unreasonably difficult, in law or in practice (see § 180 of the judgment).

recognised only in the United States and Canada, provided in the latter case that the claimant could demonstrate that the torture had taken place in the context of a terrorist act. Moreover, several member States of the Council of Europe provided for the universal jurisdiction of their courts in criminal matters, and allowed a claimant in such cases to apply, as a civil party, to join the proceedings brought before a criminal court.

The Court concluded that those States which recognised universal civil jurisdiction – operating autonomously in respect of acts of torture – were currently the exception. Although the States' practice was evolving, the prevalence of universal civil jurisdiction was not yet sufficient to indicate the emergence, far less the consolidation, of an international custom which would have obliged the Swiss courts to find that they had jurisdiction to examine Mr Naït-Liman's action. As it currently stood, international treaty law also failed to recognise universal civil jurisdiction for acts of torture, obliging the States to make available civil remedies in respect of acts of torture perpetrated outside the State territory by the officials of a foreign State.

The Court concluded that international law had not obliged the Swiss authorities to open their courts to Mr Naït-Liman on the basis of universal civil jurisdiction for acts of torture.

The Court had then to determine whether international law had imposed an obligation on the Swiss authorities to make a forum of necessity available to Mr Naït-Liman so that the compensation claim in respect of the alleged damage sustained as a result of human-rights violations could be examined.

Firstly, it transpired from the study conducted by the Grand Chamber that, of the 40 States examined, 28 European States did not recognise the forum of necessity. As the forum of necessity was not generally accepted by the States, it could not be concluded that there existed an international custom rule enshrining the concept of forum of necessity. The Court further noted that there was also no international treaty obligation on the States to provide for a forum of necessity.

It had therefore to be concluded that international law had not imposed an obligation on the Swiss authorities to open their courts with a view to ruling on the merits of Mr Naït-Liman's compensation claim, on the basis of either universal civil jurisdiction in respect of acts of torture or a forum of necessity. It followed that the Swiss authorities had enjoyed a wide margin of appreciation in this area.

In order to determine whether the Swiss authorities had exceeded their margin of appreciation in the present case, the Court was required to examine, in turn, section 3 of the Federal Law on Private International Law and the decisions issued by the Swiss courts.

With regard to the criteria laid down by the Swiss legislature for the implementation of section 3 of the Federal Law on Private International Law, the comparative law study carried out by the Court indicated that in all the States which did recognise the forum of necessity, it was applied only exceptionally and subject to two cumulative conditions, namely the absence of another forum with jurisdiction, and the existence of a sufficient connection between the case and the State which assumed jurisdiction. The Court concluded that by introducing a forum of necessity with the criteria laid down in section 3 of the Federal Law on Private International Law, the Swiss legislature had not exceeded its margin of appreciation.

With regard to the margin of appreciation of the domestic courts, the Court reiterated that in those States which recognised the forum of necessity, the courts enjoyed considerable discretion in defining the connecting links and applying them on a case-by-case basis. In the present case, the Court perceived no arbitrary or manifestly unreasonable elements in the Federal Supreme Court's interpretation of section 3 of the Federal Law on Private International Law in its judgment of 22 May 2007. Moreover, it discerned no elements indicating that the Federal Supreme Court had exceeded its margin of appreciation in another manner.

In conclusion, the Court considered that the Swiss courts' refusal to accept jurisdiction to examine Mr Naït-Liman's action seeking redress for the acts of torture to which he was allegedly subjected had pursued legitimate aims and had not been disproportionate to them. It followed that there had been no violation of the right of access to a court within the meaning of Article 6 of the Convention. Nonetheless, the Court reiterated that this conclusion did not call into question the broad consensus within the international community on the existence of a right for victims of acts of torture to obtain appropriate and effective redress, nor the fact that the States were encouraged to give effect to this right. However, it did not seem unreasonable for a State which established a forum of necessity to make its exercise conditional on the existence of certain connecting factors with that State, to be determined by it in compliance with international law. Given the dynamic nature of this area, the Court did not rule out the possibility of developments in the future.

The Court invited the States Parties to the Convention to take account in their legal orders of any developments facilitating effective implementation of the right to compensation for acts of torture.

Separate opinions

Judge Wojtyczek expressed a partly dissenting opinion. Judge Dedov and Judge Serghides each expressed a dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.