

REDRESS

Seeking Reparation for Torture Survivors

Parliamentary Assembly of the Council of Europe
Committee on Legal Affairs and Human Rights

Report "The state of human rights in Europe: The need to eradicate impunity"

Submission by the REDRESS Trust

March 2009

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1. REDRESS welcomes the decision of the Committee on Legal Affairs and Human Rights (AS/Jur) to prepare a report on "The state of human rights in Europe: The need to eradicate impunity" and is grateful for the opportunity to submit comments at the occasion of the conference organised by the AS/Jur in co-operation with the German Bundestag's Committee on Human Rights and Humanitarian Aid.
 2. As indicated in the Council of Europe's Resolution 1547 (2007), "[e]ven the most serious human rights violations, such as enforced disappearances, extrajudicial killings, secret detentions, torture and inhuman treatment, still occur in Europe" and "impunity, even for these most serious human rights violations, has not been eradicated in Europe".
 3. REDRESS is an international human rights non-governmental organisation based in the United Kingdom with a mandate to assist torture survivors, to prevent further torture, and to seek justice and other forms of reparation. It has accumulated a wide expertise on the rights of victims of torture to gain both access to the courts and redress for their suffering and has advocated on behalf of victims from different regions throughout the world. REDRESS regularly takes up cases on behalf of individual torture survivors at the national and international level and provides assistance to representatives of torture survivors. It has also intervened before national and international courts and tribunals, including the United Nations Committee against Torture and Human Rights Committee, the European Court of Human Rights, the Inter-American Commission on Human

Rights, the International Criminal Court, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia.

4. These submissions will address impunity in relation to torture and other serious international crimes, in two areas of particular concern to REDRESS:
 - i) Extraterritorial considerations of impunity for the most serious crimes of international concern; and
 - ii) Torture and other serious violations committed in the context of counter-terrorism measures.

A. EXTRATERRITORIAL CONSIDERATIONS OF IMPUNITY FOR THE MOST SERIOUS CRIMES OF INTERNATIONAL CONCERN

I. In Criminal Matters

5. The most serious international crimes - genocide, crimes against humanity, war crimes and torture – often go unpunished because the courts of the territorial state (i.e. where the crimes took place) or the state of active or passive personality (i.e. the state of nationality of the perpetrator or the victim) are unwilling or unable to prosecute those responsible. International or internationalised courts, on the other hand, have restricted mandates which allow them to adjudicate only a small portion of such crimes.
6. The exercise by Council of Europe member states of universal or other forms of extraterritorial jurisdiction for serious international crimes is crucial in order to close this potential ‘impunity gap’ and to uphold Europe’s commitment to accountability for these crimes at the global level. European states must not provide ‘safe havens’ for individuals who are suspected of having committed serious international crimes; and, at the same time they must ensure that the victims of these crimes have access to effective and enforceable remedies in Europe. At the 3rd consultation meeting on the implications for Council of Europe member states on the ratification of the Rome Statute of the International Criminal Court, “participants noted the importance of the development of universal jurisdiction in the fight against impunity for grave crimes of international concern.”¹
7. Furthermore, the obligation to prosecute or extradite persons suspected of having committed serious international crimes results from a number of international treaties to which Council of Europe member states are parties. These include: the Geneva Conventions of 1949, the Convention against Torture of 1984 and the Convention on the Protection of all Persons from Enforced Disappearances of 2006.² It is further widely recognised that international customary law *at least*

¹ CoE, Consult/ICC (2003) Concl., 17/09/03.

² All Council of Europe member states have ratified the Geneva Conventions of 1949 and the Convention against Torture. As to the Convention on the Protection of all Persons from Enforced Disappearances,

- permits the exercise of universal jurisdiction for genocide and crimes against humanity.
8. Although courts in some European countries have prosecuted and convicted individuals of serious international crimes on the basis of universal jurisdiction, serious obstacles remain in Council of Europe member states which hamper the effective exercise of universal jurisdiction. These pertain to both legal and institutional (or procedural) barriers.
 9. At the moment, national legislation in European countries on this matter is not harmonised and often does not reflect countries' obligations under international law, thereby impeding the exercise of universal jurisdiction for serious international crimes.
 10. Serious procedural obstacles, such as the application of state or individual immunities or of statutes of limitation – even for the most serious crimes – continue to hamper the successful exercise of universal jurisdiction in certain European countries. In certain cases national courts have extended the application of immunities to former state officials who, under international law, would not enjoy immunity. The European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes clearly establishes that no statutes of limitation should apply to these crimes.³ Despite the growing recognition that the crime of torture should not be subjected to a statute of limitation,⁴ some European countries, however, provide for statutes of limitation in relation to torture (e.g. France, Germany, Sweden).
 11. Investigations of serious international crimes, particularly in universal jurisdiction proceedings, are complex and pose practical challenges. Investigators and prosecutors working on such cases should have a specialised knowledge of international law and experience in dealing with victims of such serious crimes. An adequate institutional framework is crucial for the successful exercise of universal jurisdiction. It is also fundamental that the different authorities involved in such proceedings have adequate procedures and channels of cooperation. This has already been recognised by the European Union in its Framework Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes.⁵
 12. Many of the practical obstacles faced in the investigation of serious international crimes in universal jurisdiction proceedings are related to the access of evidence

among the Council of Europe member states, only France and Albania have ratified it to this date; the Convention has not yet entered into force.

³ Up to this date, this Convention has been ratified by Belgium, Bosnia and Herzegovina, Netherlands, Romania and Ukraine.

⁴ See, e.g., D. Orentlicher, Report of the independent expert to update the Set of Principles to combat impunity, E/CN.4/2005/102 of 18 February 2005, paras. 47-8.

⁵ Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes.

in the state where the crimes were committed. Agreements on mutual legal assistance are fundamental to combat impunity on a global scale.

The Council of Europe should emphasise the importance of the exercise of universal jurisdiction to ensure accountability for serious international crimes and call upon member states to:

- Fulfil their obligations under international law;
- Ensure that national legislation provides for universal jurisdiction for serious international crimes. The broadest possible definitions of these crimes under customary and conventional international law should be incorporated into domestic law, as should concepts such as command and superior responsibility and joint criminal enterprise;
- Ensure that national legislation excludes the application of immunities to persons who do *not* enjoy immunity under international law as well as the application of state immunity in cases of serious international crimes;
- Exclude statutes of limitation for all serious international crimes.
- Review mutual cooperation agreements with third countries to ensure they permit the effective exercise in Europe of universal jurisdiction for serious international crimes.

The Council of Europe should endorse previous recommendations at the European Union level and call upon its member states to ensure that they create adequate institutions – such as specialised units for the investigation and prosecution of serious international crimes – and to streamline procedures among the different authorities in a way that may enhance the practical effectiveness and increase the number of investigations and prosecutions of serious international crimes.

II. In Civil Matters

13. Immunities – both of foreign states and individual officials – when recognised in relation to serious international crimes provide more often than not *de facto* impunity because of the lack of alternative sources of access to a court. They result in practice – particularly in common law countries – in the denial of the internationally recognised right of victims to an effective remedy and reparation.
14. The Council of Europe’s Secretary General has recognised in his report of 28 February 2006 (SG/Inf (2006) 5) that “international rules on State immunity often prevent States from effectively prosecuting foreign officials who commit crimes on their territory. Immunity must not lead to impunity where serious human rights violations are at stake. Work should start at European and international levels to establish clear human rights exceptions to traditional rules on immunity”.
15. Despite this, lack of clarity persists in national jurisdictions as to the application of immunities in cases involving serious international crimes, particularly in civil

- proceedings. The conflicting views on this issue also became evident in the case of *Al-Adsani v. The United Kingdom* brought before the European Court of Human Rights (“European Court”). In a judgment of 9 to 8, the Court upheld the application of state immunity even against the peremptory character of the norm on the prohibition of torture.
16. Even if there are legitimate concerns related to maintaining good relations between states, the relation between state and foreign officials’ immunity and serious international crimes must be practically addressed within the broader context of the fight against impunity for serious international crimes.
17. The UN Convention on Jurisdictional Immunities of States and Their Property⁶ unfortunately does not provide for a clear exception of the application of immunities to civil proceedings arising from serious international crimes.

The Council of Europe should encourage its member states to develop a coordinated approach so as to acknowledge a clear ‘exception’ to state immunity in cases of serious international crimes.

The Council of Europe should take a leading role in calling for an additional protocol to the UN Convention on Jurisdictional Immunities of States and Their Property where such exception is clearly stated.

III. Abuses Committed by European States in Third Countries

18. European states have increasingly committed troops to operations outside of European territory. The acts committed by European troops abroad, and which may constitute violations of the European Convention on Human Rights (“European Convention”), raise the question of whether and to what extent the European Convention applies extraterritorially.
19. According to Article 1 of the European Convention, the Convention applies to everyone within the jurisdiction of the contracting parties. In its recent jurisprudence, the European Court has found that the European Convention applies to extraterritorial acts when the state exercises “effective control” of the area where the acts occur and when an individual in the territory of another state comes under the “authority and control” of the agents of a state party to the Convention. The responsibility of the state for extraterritorial acts thus depends on the existence of a relationship of control, and its extent will depend on the overall degree of control.⁷
20. However, a certain lack of clarity persists in relation to this question. In *Al-Skeini v. SDD*, for example, the UK House of Lords has recognised the extraterritorial application of the European Convention but only in respect of UK-controlled

⁶ Adopted on 2 December 2004 by the General Assembly of the UN; not yet entered into force.

⁷ See e.g., *Isaak and others v. Turkey*, Appl. No 44587/98; *Issa and others v. Turkey*, Appl. No 31821/96.

places of detention. However, serious violations of fundamental rights recognised by the European Convention (such as torture) may often take place outside of places of detention.

The Council of Europe should recognise the importance of asserting the extraterritorial application of the European Convention in cases where the troops of its member states exercise control over an area or of individuals of another state. It is important for it to reaffirm the principle that member states cannot perpetrate violations of the Convention in other states which they could not perpetrate in their own territory.

B. TORTURE AND OTHER SERIOUS VIOLATIONS COMMITTED IN THE CONTEXT OF COUNTER-TERRORISM MEASURES

I. Investigations and Effective Remedies

21. The Council of Europe has repeatedly affirmed the need of its member states to ensure respect for fundamental human rights while countering terrorism.

However, as documented by the inquiries of the Parliamentary Assembly and the Secretary General of the Council of Europe, and the investigation conducted by the Temporary Committee of the European Parliament, member states of the Council of Europe have participated or colluded in counter-terrorism practices which are recognised to violate fundamental human rights, such as the right to be free from torture, cruel, inhuman or degrading treatment, the right to liberty and security, the right to be free from enforced disappearance, and the right to a remedy. These practices include ‘extraordinary renditions’, unlawful detention and interrogation techniques which are tantamount to torture and other ill-treatment.

22. Despite these painstaking investigations, there has been insufficient and unsatisfactory follow-up action taken by each member state to address the issues raised by the Council of Europe investigations. Only very few states have initiated detailed investigations into the responsibilities of their own officials. So far, victims of such violations have received neither an official acknowledgement nor reparation for what has happened to them. States must still take action to ensure accountability of those responsible for these violations, and to provide effective remedies and reparations to the victims.

The Council of Europe should continue to vigorously call upon its member states to follow up on its Resolutions 1507 and 1562.

It should reiterate its call to states to conduct thorough investigations and provide effective reparation to victims.

The Committee on Legal Affairs and Human Rights should seek a mandate to prepare a report which takes stock of the investigations that have been undertaken in Council of Europe member states.

II. State Secrets and National Security Concerns

23. The few investigations initiated in Council of Europe member states have met with obstacles, such as the assertion by governments of state secrecy and national security concerns that aim to prevent key information from being disclosed and analysed in judicial proceedings. Such assertions will result in *de facto* impunity when they bar investigations and prosecutions from going forward. In its Resolution 1562 the Parliamentary Assembly has already affirmed that “[i]nformation as well as evidence concerning the civil, criminal or political liability of the state’s representatives for serious violations of human rights must not be considered as worthy of protection as state secrets”.

The Council of Europe should continue to voice its concern over the use of state secrets and national security concerns to bar criminal and other investigations.

III. Intelligence Agencies

24. Intelligence agencies have increasingly performed activities under powers which traditionally belong to law enforcement agencies. Also, they lack oversight over their activities. These concerns have been recently voiced by the International Commission of Jurists’ Eminent Jurist Panel on Terrorism, Counter-terrorism and Human Rights in their report of 16 February 2009 and by Martin Scheinin, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, in his report of 4 February 2009.

The Council of Europe should consider initiating a process at the European level with a view to developing a common approach to an adequate regulation of the activities of intelligence agencies in the context of counter-terrorism, in a way that increases their accountability.

III. Deportations

25. The European Court has reaffirmed in its recent jurisprudence the absolute nature of the prohibition of torture and of the principle of *non-refoulement* even in cases where states invoke reasons of national security to deport ‘terror suspects’. In *Saadi v. Italy* the court stated that “the prospect that he [the applicant] may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return”.

26. The Court has also indicated that diplomatic assurances cannot be taken automatically as sufficient guarantees that the individual does not face a real risk of torture.
27. The court has adopted an extremely cautious posture regarding diplomatic assurances, which suggests that these are far from the ideal ways in which to guarantee the respect for Article 3 of the European Convention, and indeed will typically result in violations of Article 3. This position is in line with various calls against the reliance on diplomatic assurances. As stated by the Council of Europe's Commissioner for Human rights in 2006, diplomatic assurances "are not credible and [have] also turned out to be ineffective in well-documented cases."
28. Nonetheless, European states continue to rely on diplomatic assurances to take decisions to deport individuals who they consider to be 'terror suspects' to countries which have a pattern of practising torture.
29. When states have deported an individual to a country where he faced a real risk of torture, thus violating the principle of *non-refoulement*, they are under the obligation to afford victims with effective and adequate remedies. When such violations are established by UN treaty bodies (e.g. the UN Human Rights Committee), states must honour their commitments as regards the promotion and protection of human rights and provide for the full and prompt implementation of such decisions.

The Council of Europe should recognise the ongoing practice of relying on diplomatic assurances when deporting individuals to states known to have a pattern of practising torture as a matter of grave concern, and should call upon its members states to abandon this practice because of the inherent risk it entails of violating the fundamental and non-derogable principle of *non-refoulement*.

The Council of Europe should call upon its member states to meet their obligations under international law to provide victims of unlawful deportation with an effective and adequate remedy. It should recall that member states must honour their international commitments and fully implement the views of UN treaty bodies.