



**Joint response by the AIRE Centre, JUSTICE and REDRESS  
to the consultation by the House of Lords European Union Sub-committee E (Law and  
Institutions) on the Proposed Regulation on the Law applicable to non-contractual  
obligations ("Rome" II)**

**The AIRE Centre** is a registered charity that provides advice on individual rights under international human rights law and European Community law. It litigates on behalf of individuals at the ECHR and trains the judiciary and other legal professionals in the UK and Central and Eastern Europe on international human rights law.

**JUSTICE** is an independent all party law reform and human rights organisation which aims to improve British justice through law reform and policy work, publications and training. It is the British section of the International Commission of Jurists.

**REDRESS** is an internationally focussed non-profit human rights organisation based in London. It provides legal advice and assistance to torture survivors for obtaining justice and reparation both through individual casework, law reform and advocacy programmes.

### **Introduction**

1. The proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II") is an important initiative relating to the Community harmonisation of private international law in civil and commercial matters. Whilst the AIRE Centre, JUSTICE and REDRESS recognise the importance of this initiative we wish to take this opportunity of drawing to the attention of the sub-committee our serious concerns in relation to the effect that the proposed regulation will have upon civil actions for reparation brought by victims of violations of human rights, including torture.

### **The Rome II proposals**

2. Article 1 of the proposed Regulation provides that the Regulation shall apply to non-contractual obligations in civil and commercial matters unless the case involves revenue, customs or administrative matters. Article 1(2) excludes certain other matters from the

Regulation, but no violations of human rights other than freedom of expression and information are included in these exceptions. The presumption, therefore, is that the Regulation will *prima facie* apply to these cases. Article 3 provides the general rule that the law applicable shall be the law of the country in which the damage arises or is likely to arise.

3. From the explanatory memorandum to the Rome II proposals it seems that little consideration has been given to the effect of the proposed conflict of law rules upon actions for reparation by victims of violations of human rights including torture. The AIRE Centre, JUSTICE and REDRESS are concerned that if this oversight is not addressed it may cause a significant diminution of the chances of these victims to obtain just reparation by way of civil compensation in the English courts and in the national courts of other Member States.
4. It is significant that, whilst the provisions of Article 6 provide for exceptions to the general rule under Article 3 where an application of the general rule would be contrary to the fundamental principles of the forum as regards freedom of expression and information, no such similar exception has been provided for in the cases where an application of the general rule would be contrary to the fundamental principles of the forum as regards human rights including reparation for torture. The European institutions are obliged to respect *all* the rights set out in the EU Charter of Fundamental Rights, as are member states when implementing EU law. Accordingly, the AIRE Centre, JUSTICE and REDRESS urge that consideration be given to extending the scope of the exception in Article 6 in the following terms:

#### **Proposed addition to Article 6**

“2. The law applicable to a non-contractual obligation arising out of a violation of human rights shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards human rights.”

#### **Example**

- 5) We take as an example the case where a person has suffered torture in a country outside the UK and who wishes to commence civil proceedings in the UK for reparation. Usually a claimant will commence an action for the tort of assault and battery, or possibly the tort of harassment or false imprisonment. Two hurdles have to be surmounted: first the forum must have jurisdiction to hear the case; and, second, the forum must decide which

country's domestic law should be applicable to determine the substantive issues (both as to liability and the amount of damages that might be awarded). The latter hurdle is the conflict of laws question which is the subject of the Rome II proposals.

### **The present position in England and Wales**

- 6) The first hurdle: jurisdiction. Where a victim of torture is suing in tort, she/he must establish either that the claim relates to an act which was committed in England or that damage was suffered in England.<sup>1</sup> Damage can be said to have been suffered in England, even though the physical injuries sustained as a result of the torture were suffered abroad, if the victim suffered serious mental injuries in England as a result of what happened abroad.<sup>2</sup>
  
- 7) The second hurdle: choice of law. Once the English court has determined that it has jurisdiction to hear the dispute it will then go on to apply the choice of law rule. This aspect is the conflict of laws question which forms the subject of the Rome II proposals. The present position is governed by Part III of the Private International Law (Miscellaneous Provisions) Act 1995 ("PIL Act"). Under the provisions of the PIL Act there is a presumption that the applicable law is the law of the country where the significant elements or most of the elements constituting the tort were committed. Where, as in the case of torture, the tort relates to personal injury or death, the applicable law is the law of the country where the victim was when she/he sustained the injuries.<sup>3</sup> The effect of this rule is that where a victim is tortured abroad and the law of that country does not recognise civil liability for torture, an inflexible application of the rule by an English court would mean that the victim's claim would fail. For that reason, there is a statutory exception allowing the English court to apply the law of another country if it appears, in all the circumstances, from a comparison of –
  - (a) the significance of the factors which connect the tort with the country whose law would be applicable under the general rule; and
  - (b) the significance of any factors connecting the tort with another country,

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<sup>1</sup> Schedule 1 of the Civil Procedure Rules 1998 (CPR), preserving Order 11 of the Rules of the Supreme Court (RSC)

<sup>2</sup> *Al-Adsani v. Government of Kuwait* (1996) 107 ILR 536

that it is ***substantially more appropriate for the applicable law for determining the issues in the case, to be the law of the other country.*** If that is the case then the general rule is displaced and the applicable law is the law of the other country. Moreover, the factors that the English court can take into account include, in particular, factors relating to the parties, to any of the events which constitute the tort in question or to any of the circumstances or consequences of those events.<sup>4</sup>

Furthermore, section 14(3) of the PIL Act prohibits the application of the law of another country where that law conflicts with the principles of public policy of the forum (i.e. England). As the United Kingdom is a contracting party both to the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it is highly unlikely that an English court would apply the law of a country that did not recognise civil liability for torture. The practical effect of these present statutory exceptions is that a victim of torture is safeguarded from having his action dismissed where the law of the country in which she/he was tortured did not recognise civil liability for torture.

For the reasons mentioned above, The AIRE Centre, JUSTICE and REDRESS are concerned that the present proposals in Rome II will not provide as much protection to the victims of torture in this regard as do the current provisions of the PIL Act.

Signed by

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<sup>3</sup> s.11(2)(a) PIL Act

<sup>4</sup> s.12 PIL Act