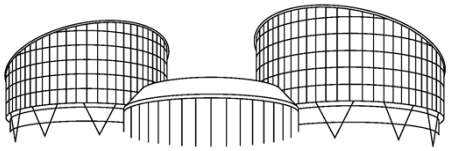

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF NAÏT-LIMAN v. SWITZERLAND

(Application no. 51357/07)

JUDGMENT

STRASBOURG

15 March 2018

This judgment is final but it may be subject to editorial revision.

In the case of Naït-Liman v. Switzerland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President,*
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Ganna Yudkivska,
Helena Jäderblom,
Ledi Bianku,
Kristina Pardalos,
Helen Keller,
André Potocki,
Aleš Pejchal,
Krzysztof Wojtyczek,
Dmitry Dedov,
Yonko Grozev,
Pere Pastor Vilanova,
Pauliine Koskelo,
Georgios A. Serghides,
Tim Eicke, *judges,*

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 14 June 2017 and 7 December 2017,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 51357/07) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Tunisian national who has acquired Swiss nationality, Mr Abdennacer Naït-Liman ("the applicant"), on 20 November 2007.

2. Relying on Article 6 § 1 of the Convention, the applicant alleged that the refusal by the Swiss civil courts to examine his civil claim for compensation in respect of the non-pecuniary damage caused by the alleged acts of torture, inflicted in Tunisia, had infringed his right of access to a court.

3. The application was allocated to the Second Section of the Court, in accordance with Rule 52 § 1 of the Rules of Court ("the Rules").

4. On 30 November 2010 the application was communicated to the Government.

5. The Redress Trust and the World Organisation against Torture ("the OMTC"), the latter being represented by the former, were given leave to intervene in the written procedure, in accordance with Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules.

6. On 21 June 2016 a Chamber of that Section, composed of Işıl Karakaş, President, Nebojša Vučinić, Helen Keller, Paul Lemmens, Egidijus Kūris, Robert Spano and Jon Fridrik Kjølbro, judges, and also of Stanley Naismith, Section Registrar, unanimously declared the application admissible and held, by four votes to three, that there had been no violation of Article 6 of the Convention. The concurring opinion of Judge Lemmens and the joint dissenting opinion of judges Karakaş, Vučinić and Kūris were annexed to the Chamber judgment.

7. On 19 September 2016 the applicant requested that the case be referred to the Grand Chamber under Article 43 of the Convention. On 28 November 2016 a panel of the Grand Chamber accepted the request.

8. The composition of the Grand Chamber was determined in accordance with Article 26 §§ 4 and 5 of the Convention and Rule 24.

9. The applicant and the Government each filed written observations (Rules 59 § 1 and 71 § 1).

10. Observations were also received from the UK Government, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3). In addition, observations were received from the Redress Trust jointly with the OMCT, from Amnesty International jointly with the International Commission of Jurists, and from Citizens' Watch. The parties replied to these observations in the course of their oral submissions at the hearing (Rule 44 § 6).

11. A hearing took place in public in the Human Rights Building, Strasbourg, on 14 June 2017 (Rule 59 § 3).

There appeared before the Court:

(a) *for the* Government

Mr F. SCHÜRMANN, Head of the International Human Rights Protection Unit, Federal Office of Justice, Federal Department of Justice and Police, *Agent*,
Mr N. MEIER, Head of the Private International Law Section, Federal Office of Justice, Federal Department of Justice and Police, *Counsel*
Ms C. EHRICH, lawyer, International Human Rights Protection Unit, Federal Office of Justice, Federal Department of Justice and Police,
Ms A. BEGEMANN, lawyer, Diplomatic and Consular Law Unit, Public International Law Directorate, Federal Department of Foreign Affairs, *Advisers*;

(b) for the applicant
Mr P. GRANT,
Mr F. MEMBREZ, *Counsel*.

The Court heard addresses by Mr Grant, Mr Membrez and Mr Schürmann and replies by Mr Membrez, Mr Grant and Mr Schürmann and Mr Meier to questions put by the judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant was born in 1962 in Jendouba, in the Tunisian Republic ("Tunisia"), and lives in Versoix in the Canton of Geneva.

13. The facts of the case, as submitted by the parties, may be summarised as follows.

A. The background to the present case

14. According to the applicant, on 22 April 1992 he was arrested by the Italian police at his place of residence in Italy and taken to the Tunisian Consulate in Genoa, where he was presented with a bill of indictment stating that he represented a threat to Italian State Security. He alleges that he was then taken to Tunis by Tunisian officials. By his own account, he has never instituted proceedings against the Italian authorities in respect of those events.

15. The applicant further submits that he was arbitrarily detained and tortured in Tunis in the premises of the Ministry of the Interior, from 24 April to 1 June 1992, on the orders of A.K., the then Minister of the Interior. He submits that he was subjected to the so-called "roast chicken" position throughout the entire period of detention and deprived of his basic physiological needs, particularly sleep; he was also beaten on the soles of his feet with a baseball bat and struck all over his body with telephone cords.

16. The applicant submits that he suffers from a series of physical and psychological injuries and disorders.

17. After having been subjected to the alleged torture in Tunisia in 1992, the applicant fled that country in 1993 and took refuge in Switzerland, where he applied for asylum in the same year. The applicant has since been living in the Canton of Geneva.

18. On 8 November 1995 the Swiss authorities granted the applicant asylum.

B. The criminal complaint against the Tunisian Minister of the Interior in office at the time of the alleged facts

19. 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 ("the Principal Public Prosecutor"), for severe bodily injury, illegal confinement, insults, causing danger to health, coercion and abuse of authority. The applicant applied to join these proceedings as a civil party seeking damages.

20. On the same date the Principal Public Prosecutor transmitted to the head of the security police, by internal mail, a request to "attempt to locate and identify the accused individual, who [was] supposedly hospitalised in the Geneva University Hospital, for heart surgery" and "if possible, to arrest him and bring him before an investigating judge". On receipt of this request, the police immediately 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.

21. On 19 February 2001 the Principal Public Prosecutor made an order discontinuing the proceedings on the grounds that A.K. had left Switzerland and that the police had been unable to arrest him. This decision to discontinue the proceedings was not challenged by the applicant.

C. The civil proceedings against the Minister of the Interior in office at the time of the alleged facts

22. By his own account, on 22 July 2003 the applicant asked a Tunisian lawyer to represent him with a view to bringing a civil action for compensation against A.K. and the Tunisian Republic. On 28 July 2003 the lawyer informed the applicant that this type of action had never been successful and advised him not to lodge such a claim. It was allegedly impossible to lodge a civil action of this sort in Tunisia.

23. By a writ dated 8 July 2004, the applicant lodged a claim for damages with the Court of First Instance of the Republic and the Canton of Geneva ("the Court of First Instance") against Tunisia and against A.K. He claimed 200,000 Swiss francs (CHF), with 5% interest from 1 June 1992, as compensation in respect of the non-pecuniary damage arising from the acts of torture to which he had allegedly been subjected. The applicant submitted that the conditions for reparation of non-pecuniary damage provided for by Articles 82 et seq. of the Tunisian Code of Obligations and Contracts, applicable under section 133 (2) of the Federal Law on Private International Law (*Loi fédérale sur le droit international privé*, the LDIP, see paragraph 37 below), had been met.

24. On 9 June 2005 a hearing was held before the Court of First Instance; neither of the defendants was in attendance or represented.

25. By a judgment of 15 September 2005, the Court of First Instance declared the claim inadmissible on the grounds that it lacked territorial jurisdiction. The relevant part of the judgment reads as follows:

> "With regard to an action in tort based on the unlawful acts that were allegedly committed in Tunisia by the defendants, to the claimant's detriment, the Swiss courts do not have territorial jurisdiction under international law to examine the complaint, given that the defendants are not domiciled or habitually resident in Switzerland, and given also that no illegal act or detrimental outcome occurred in Switzerland, pursuant to sections 2 and 129 of the LDIP."

26. Under section 3 of the LDIP (see paragraph 37 below), the Swiss courts also lacked jurisdiction under the forum of necessity, given the lack of a sufficient connection between, on the one hand, the case and the facts, and, on the other, Switzerland. In this connection, the Court of First Instance ruled as follows:

> "All of the acts with regard to whose after-effects the claimant, a Tunisian national, seeks compensation for non-pecuniary damage, were allegedly inflicted on him, as he submits, in Tunisia in 1992, within the premises of the Tunisian Ministry of the Interior, by the Tunisian State and its officials. The mere fact that on account of those acts the claimant applied for and received political asylum in 1995 in Switzerland, where he has since been domiciled, does not, in itself and in the light of current case-law, amount to a sufficient connection enabling a forum of necessity to be established against the defendants in Switzerland and Geneva."

27. By a writ dated 16 November 2005, the applicant appealed against that decision before the Court of Justice of the Republic and the Canton of Geneva ("the Court of Justice"). His appeal was rejected in a judgment of 15 September 2006. After noting that the appellant had shown that he was unable to bring a civil action in Tunisia, the Court of Justice found as follows:

> "As the outcome of the present appeal depends on the immunity from jurisdiction of the respondent parties, the question whether there exists a forum of necessity in the appellant's place of residence can, however, remain undecided."

28. The Court of Justice thus held that the respondents enjoyed immunity from jurisdiction, since the acts of torture had been perpetrated in the exercise of sovereign authority (*iure imperii*) and not under private law (*iure gestionis*). Referring to the judgment delivered by the Court in the case of *Al-Adsani v. the United Kingdom* ([GC], no. 35763/97, ECHR 2001-XI), it further considered that there had been no violation of the applicant's right of access to a court.

29. The applicant lodged an appeal with the Federal Supreme Court, dated 20 October 2006, in which he asked it to rule that the courts of the Republic and the Canton of Geneva had territorial jurisdiction and to find that the defendants did not enjoy immunity from jurisdiction. With regard to

the jurisdiction of the Swiss courts, he argued that the purpose of the introduction of a forum of necessity in section 3 of the LDIP (see paragraph 37 below) had been to avoid denials of justice, especially in cases of political persecution, and that he had provided sufficient evidence that he could not reasonably bring proceedings before a foreign court. As to the immunity from jurisdiction purportedly enjoyed by Tunisia and A.K., the applicant submitted that the exercise of public power did not include an entitlement to commit international crimes such as torture. He specified in this regard that the very definition of torture in Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereafter: "the Convention against Torture"; see paragraphs 45 et seq. below) ruled out any immunity. Lastly, he referred, in very general terms, to Article 16 of the United Nations Convention relating to the Status of Refugees (see paragraph 60 below).

D. The Federal Supreme Court's judgment of 22 May 2007

30. By a judgment of 22 May 2007, the reasoning of which was notified to the applicant on 7 September 2007, the Federal Supreme Court dismissed the appeal. Reiterating the reasoning in the first-instance judgment, the Federal Supreme Court considered that the Swiss courts did not in any event have territorial jurisdiction. The relevant passages of the Federal Supreme Court's judgment read as follows:

> "It must first be considered whether the Swiss courts have jurisdiction to examine the action.
>
> 3.1 As Tunisia is not a party to the Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano Convention, RS 0.275.11), there exists no convention rule between the two States governing the question of forum, which must therefore be examined in the light of the LDIP (sections 1(1)(a) and 1(2) LDIP).
>
> 3.2 In this instance, the jurisdiction of the Swiss authorities cannot be derived from the general rule concerning the international jurisdiction of the State of domicile of the defendant contained in section 2 of the LDIP, since the respondents are not domiciled in Switzerland. The cantonal court was, moreover, right in finding that the criteria, set out in section 129 of the LDIP, for establishing jurisdiction over actions in respect of wrongful acts were not met in so far as the defendants had neither their domicile nor their place of habitual residence or business in Switzerland (section 129(1) LDIP), and neither the wrongful act nor the resultant injury occurred in Switzerland (section 129(2) LDIP).
>
> 3.3 In the absence of an ordinary forum, the problem must be addressed under section 3 of the LDIP, which concerns the forum of necessity ... Under the latter provision, where no forum is provided for in Switzerland by the LDIP and where proceedings in another country prove impossible or one cannot reasonable require that they be brought in that country, the Swiss judicial or administrative authorities of the locality with which the case has a sufficient connection have jurisdiction.

The application of this rule for assigning jurisdiction thus calls for three cumulative conditions to be met: firstly, the Swiss authorities do not have jurisdiction under another provision; secondly, legal proceedings in another country are impossible or cannot reasonably be required; and, thirdly, the case in question has a sufficient connection with Switzerland. In the present case, the first condition is indisputably fulfilled. Fulfilment of the second condition appears more problematic, but in the light of the third condition, which merits more extensive discussion, it is not necessary to elaborate further on this question.

3.4 Section 3 of the LDIP, which must be interpreted restrictively ... represents a safety valve, intended to avoid denials of justice ... in the event of a negative conflict of jurisdiction.

In this connection, the Federal Council, in its authoritative interpretation of this provision, noted that "there are cases that have such a tenuous connection with Switzerland that it is not appropriate to set in motion the entire judicial system in order to resolve them. However, section 3 lays down an exception to this principle. The Swiss authorities must assume jurisdiction even in cases where the connection with our country is very tenuous, where it is impossible to bring proceedings or to lodge an appeal abroad. It is for the claimant or the appellant to demonstrate this impossibility. Where this evidence has been adduced, jurisdiction reverts to the authority of the locality with which the case has a sufficient connection. Where there are several competing fora in Switzerland, it is the first authority before which an action is brought that has jurisdiction. Clearly, the impossibility of bringing and pursuing proceedings abroad can only be examined in the light of the tangible circumstances and of the possible consequences for the individual concerned in the particular case; it will ultimately be for the court to recognise, or not, its jurisdiction" .... .

Although section 3 LDIP may thus seem innately paradoxical in so far as proceedings for which there is no basis for connection with an ordinary forum in Switzerland are, *ipso facto*, lacking in any particular connection with this country, in such a way that determining a "sufficient connection" may prove challenging, and the aim pursued by the law – to prevent a formal denial of justice – difficult to achieve, this legal provision has not in practice been without effect; the cantonal courts in particular have recognised its applicability in the areas of family law, inheritance and proceedings on debt-enforcement and bankruptcy... .

Moreover, legal writers have noted that a subsidiary forum must necessarily be recognised in situations of political persecution... However, neither the case-law nor legal opinion provide much in the way of guidance concerning civil actions for compensation in respect of damage resulting from crimes against humanity, life and physical integrity, committed abroad, by foreign perpetrators.

3.5 That being stated, it is necessary to consider what is meant by "case" ["cause" in the French version] in section 3 LDIP.

It is settled case-law that the law must, in the first instance, be interpreted literally. An interpretation which deviates from the literal meaning of a text expressed in clear terms is allowable only where there are objective reasons for considering that the text fails to convey the true meaning of the provision concerned. Such reasons may derive from the drafting history, from the aim and sense of the provision concerned and from the structure and layout of the law. If the text is not absolutely clear, if it can be interpreted variously, the approach must be to seek out the true import of the provision having regard to all relevant factors, including in particular the drafting history, the intention pursued by the rule, the spirit and values on which it is based or

again its relationship with other legal provisions. The Federal Supreme Court does not favour any one method of interpretation but adopts a pragmatic plurality in its search for the true meaning of the rule; in particular, it takes as a basis a literal understanding of the text only where this offers, with no ambiguity, a solution that is substantively just (ATF 133 III 175 § 3.3.1, V 57 § 6.1; 132 III 226 § 3.3.5 and the judgments cited therein).

In itself, the meaning to be attributed to the term "*cause*" is uncertain in the sense that it does not have a general definition in the laws of civil procedure of the French-speaking cantons (see, however, Bertossa/Gaillard/Guyet/ Schmidt, *Commentaire de la loi de procedure civile genevoise*, vol. I, Geneva 2002, n.10 ad Article 99/LPC/GE, concerning the force of *res judicata*, in which the authors consider that identical claims, in terms of their content, based on the same arguments and the same combination of alleged facts, constitute the objective limit of *res judicata*; that identity is determined by the complete set of legal considerations which formed part of the first application and were adjudicated upon; this was how "cause" was to be understood in former Article 99(2); the alleged facts of the case determine an overall situation ["*Sachverhalt*", "*Prozessstoff*"] which it is for the court to assess) but would appear to equate to "*procédure*" or "*demande en justice*" or in German to "Rechtsstreit", "*Rechtssache*", "*Prozess*", "*Angelegenheit*", "*causa litigandi*" or "*Streitgrund*". At all events, "cause" is not the literal and unambiguous translation of the terms "*Sachverhalt*" or "*fattispecie*" used in the German and Italian versions of section 3 of the LDIP. It should be borne in mind, at this point, that the latter terms are usually translated in French as "*énoncé*" or "*exposé des faits*" or "*état des faits*".

As the versions of the law drafted in the three official languages have the same standing, the question arises whether the difference between the French wording and that of the other two versions results from an error in the legislative process, from a difference in meaning which becomes apparent only in the context of specific cases according to a varying understanding of the legal provision in each of the languages, or, lastly, from a linguistic difference attributable either to the non-translatability knowingly taken into account in the drafting or to uncertainty on the part of the legislator as to the meaning to be conveyed (see Schubarth, Die Auslegung mehrsprachiger Gesetzestexte, in *Rapports suisses présentés au XVIIe Congrès international de droit comparé*, Zurich 2006, p. 11 et seq., especially p. 12 s.).

It seems clear that the first of these possibilities can be ruled out. To distinguish between the second and third possibilities the understanding of the term "cause" in legal French terminology must be considered. In this regard, the "cause" of the action is the basis of the claim ["*base de la prétention*"] ('*Streitgrund*" rather than "*Sachverhalt*"), though it should be noted that the legal writers are in some disagreement as to the content and scope of that basis. Some argue that the "cause" must be seen as a legal concept allowing the claim to be defined, while for others the "cause" comes down to a set of facts giving rise to the legal issues in debate or the legal interest invoked (see Vincent/Guinchard, *Procédure civile*, 24th edition, Paris 1996, n. 519 p. 386 et seq., who conclude that the "cause" of the action is constituted by a legally characterised set of facts).

In the case in point, it must be acknowledged that a comparison with the German and Italian versions assists in the interpretation of the French text, supporting the view that the term "*cause*" should be assigned the restricted meaning of "set of facts" or, to take a literal translation of "*Sachverhalt*" and "*fattispeccie*", "*exposé*" or "*état de faits*" and not "*procédure*". In other words, it is the "cause" – which concerns the set of facts and the legal argumentation – rather than the person of the applicant which must have a sufficient connection with Switzerland.

In the present case, however, the claimant complains of acts of torture that were allegedly committed in Tunisia, by Tunisians resident in Tunisia, against a Tunisian residing in Italy. All of the specific features of the case come back to Tunisia, except for the fact of residence in Italy at the relevant time. The facts of the case thus have no connection with Switzerland, so that the question of whether or not the link with this country is sufficient does not arise. In those circumstances, it is not possible to recognise the jurisdiction of the Swiss courts, short of disregarding the clear text of s[ection] 3 of the LDIP [see paragraph 37 below]. The fact that the claimant then chose to come to Switzerland cannot change anything, since it is a fact subsequent to the events of the case and, moreover, does not form part of it.

4. Since the absence of a sufficient connection between the facts of the case and Switzerland suffices to establish the Swiss courts' lack of jurisdiction, the appeal must be dismissed, without it being necessary to examine the issue of immunity from jurisdiction.

..."

E. Subsequent developments

31. The Swiss Government made submissions before the Grand Chamber describing the action taken by the Tunisian Republic after the fall of the regime in January 2011 in order to establish a new democracy and a political system based on respect for human rights and the rule of law. They considered that the possibility of submitting complaints to the newly established courts was the most direct and "natural" means of promoting reconciliation, re-establishing social peace and improving prevention, whilst also respecting the steps taken to repair the harm done to the victims. In this context, the Government referred to Article 148 § 9 of the Tunisian Constitution of 14 January 2014, worded as follows:

"The State commits to implementing the transitional justice system in all areas within the timeline set by the related legislation. In this regard, no claim in respect of the non-retrospective nature of laws, or the existence of a previous amnesty or pardon, or the binding force of double jeopardy, or the statute of limitations or prescription of the crime or punishment, shall be admitted."

32. The Government observed that the constituent elements of transitional justice had already been set out in "Organic Law no. 2013-53 of 24 December 2013, on the introduction of transitional justice and related organisational arrangements", enacted by the Tunisian Parliament on 23 December 2013 and published in the Official Gazette on 31 December 2013. The respondent Government specified that Part III of Title I covered "Accountability and criminal liability", in order to "prevent impunity and ensure that offenders do not escape punishment" (section 6). Section 8 provided for the establishment of specialised divisions in the courts of first instance, composed of judges who would receive special training in transitional justice. They "[would] rule on cases relating to serious violations of human rights", including torture (section 8 (2)(3)),

which – in accordance with section 9 – were not subject to statutory limitation.

33. The Government explained that Part IV of Title I focused more specifically on "Reparation and Rehabilitation" (sections 10 to 13). Pursuant to section 11 § 1:

> "[t]he compensation of victims of violations is a right guaranteed by law and the State shall offer every form of sufficient, effective redress commensurate with the extent of the violations committed and the individual situation of each victim."

34. The Government further added that Title II of the law established a "Truth and Dignity Commission" (TDC), which was an independent body whose members were chosen by the Legislative Assembly from among public officials known for their neutrality, impartiality and competence (sections 16, 19 and 38 of the Organic Law). Under section 17, the TDC's work was to cover the entire period from 1 July 1955 to 31 December 2013, the date of the law's promulgation. The duration of the TDC's work was limited to four years, starting from the date of appointment of its members (section 18).

35. Lastly, the Government informed the Court that, according to information obtained by it from the Swiss Embassy in Tunis, persons who considered themselves victims of the former regime had until 15 June 2016 to apply to the TDC. The Commission was currently dealing with over 60,000 cases. In this capacity, it was holding hearings which, since November 2016, had also been held in public. According to the information received, it was foreseen that selected cases would be transmitted to the courts at a later stage in the investigation process.

36. The applicant has not contested these submissions by the Swiss Government (see paragraphs 31-35 above). He specified at the hearing of 14 June 2017 that he had in fact contacted the TDC and had received a simple acknowledgment of receipt in February 2016, but had had no further communication from the TDC since then.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Relevant domestic law

37. The relevant parts of the Federal Act on Private International Law of 18 December 1987 (LDIP), as in force at the material time, provide:

Section 2 – In general

> "Unless specially provided otherwise in this Act, the Swiss judicial or administrative authorities of the defendant's domicile shall have jurisdiction.

Section 3 – Forum of necessity

Where this Act does not provide for any forum in Switzerland and proceedings abroad prove impossible or it cannot reasonably be required that they be brought, the Swiss judicial or administrative authorities of the locality with which the case has a sufficient connection shall have jurisdiction.

Section 129 – Wrongful act

The Swiss courts of the domicile or, in the absence of domicile, those of the defendant's habitual residence or place of business shall have jurisdiction to examine actions based on a wrongful act.

Where the defendant has neither a domicile nor a place of habitual residence or place of business in Switzerland, the action may be brought before the Swiss court of the place in which the act took place or of its outcome.

Where several defendants can be found in Switzerland and where the claims are essentially based on the same legal and factual grounds, proceedings may be brought against all of them before the same court having jurisdiction; the first court to be seised has exclusive jurisdiction.

Section 133 - Applicable law

Where the perpetrator and the injured party have their habitual residence in the same State, the claims submitted in respect of a wrongful act shall be governed by the law of that State.

Where the perpetrator and the injured party do not have their habitual residence in the same State, those claims shall be governed by the law of the State in which the wrongful act was committed. However, if the result was produced in another State, the law of that State shall be applicable if the perpetrator ought to have foreseen that the result would be produced there.

Notwithstanding the preceding paragraphs, where a wrongful act violates a legal relationship between the perpetrator and the injured party, the claims submitted in respect of that act shall be governed by the law applicable to that legal relationship."

38. Article 41 of the Swiss Code of Obligations provides for liability for a wrongful act:

Article 41 – Conditions for liability

"A person who unlawfully causes damage to another, whether wilfully or through negligence or imprudence, is required to make reparation.

A person who intentionally causes damage to another by acting contrary to moral standards is also required to make reparation."

B. The preparatory work with regard to section 3 of the LDIP

39. The Federal Council's dispatch of 10 November 1982 on section 3 of the LDIP contains the following paragraphs (FF 1983 I 290):

213.3 Forum of necessity

"The draft law seeks to determine, in an exhaustive manner, the Swiss authorities' international jurisdiction. It follows that there is no international jurisdiction in Switzerland if this is not provided for in the draft law. The reasons for this are known. There are cases where the connection with Switzerland is so tenuous as not to justify setting in motion the whole machinery of justice in order to settle them. But section 3 provides for an exception to this principle. The Swiss authorities are bound to declare themselves competent even in cases presenting a highly tenuous connection with our country where it is impossible to bring an action or lodge an appeal abroad. It is for the applicant or the appellant to prove that impossibility. Where such proof has been adduced, jurisdiction lies with the authority at the place with which the facts have a sufficient connection. If there exist several competing fora in Switzerland, jurisdiction lies with the first authority seised.

Clearly, the impossibility of bringing and proceeding with an action abroad can be examined only in the light of the actual circumstances of the case and that of any consequences that may have arisen for the person concerned; ultimately, it will be for the court concerned to decide whether it has jurisdiction."

C. Domestic practice concerning section 3 of the LDIP

40. The general index of the Federal Supreme Court Reports (ATF) contains no case-law concerning section 3 of the LDIP. There is relatively little case-law from the Swiss courts concerning section 3 of the LDIP. Indeed, the present case led the Federal Supreme Court to interpret section 3 of the LDIP in detail for the first time in its judgment of 22 May 2007. The Federal Supreme Court had previously mentioned this provision in a judgment of 5 March 1991 (5C.244/1990, point 5), without however applying it. In an action for release from liability for a debt, the Federal Supreme Court upheld the application of section 3 of the LDIP, which had not been challenged by the defendant, in a judgment of 15 December 2005 (5C.264/2004, point 5), holding that there existed a sufficient connection with the forum of Lugano, where the claimant had its headquarters, taken together with the place in which the proceedings were brought.

41. Without wishing to be exhaustive, the Court also considers it appropriate to take into consideration cantonal practice, to which the parties and the Federal Supreme Court, in its judgment regarding the present case (4C.379/2006, cons. 3.4), also referred. In a judgment of 2 April 1993 (LGVE [*Luzerner Gerichts- und Verwaltungsentscheide*] 1993 I No. 14), the Supreme Court of the Canton of Lucerne confirmed that there was a sufficient connection with the facts of the case in the context of proceedings to vary the terms of a divorce order. In so doing, it specifically noted the Swiss nationality of the parties, the Swiss residence of the claimant at the time that the action was brought, and the fact that the former spouse's divorce had already been pronounced by a Swiss court. The court confirmed that section 3 of the LDIP was to be interpreted restrictively in order to avoid, *inter alia*, forum shopping.

42. In a judgment of 2 March 2005 (AR GVP [*Ausserrhodische Gerichts- und Verwaltungspraxis*] 17/2005 no. 3469), the Cantonal Court of Appenzell Outer Rhodes accepted that the claimant's place of residence met the connection criterion in a case concerning a German national, resident in Switzerland, who had brought an action before the Swiss courts against her husband, a German national resident in Spain, seeking to obtain an advance on legal costs in the context of an application for measures to preserve the marital union.

43. In a judgment of 14 November 2008 (C/5445/2007, point 2), the Canton of Geneva Court of Justice, in additional proceedings to a divorce order involving a Swiss and Spanish national and a French national who were resident in France, and in so far as French law did not recognise the system of offsetting vested benefits in an occupational pension plan, accepted the existence of a forum of necessity in the place of the headquarters of the respondent's insurance institution, namely Geneva.

44. In a judgment of 17 May 2013 (NC130001), the Supreme Court of the Canton of Zurich confirmed the existence of a sufficient link regarding a Swiss national domiciled abroad and requesting registration, in Switzerland, of a change of gender.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The 1984 United Nations Convention against Torture

1. The relevant provisions

45. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter "the Convention against Torture") was ratified by Switzerland on 2 December 1986 and entered into force on 26 June 1987. Article 1 provides:

> "1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity ..."

46. Article 5 of that Convention provides for the States Parties' jurisdiction in criminal matters as follows:

> "1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
>
> (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
>
> (b) When the alleged offender is a national of that State;
>
> (c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law."

47. Articles 6 and 7 of that Convention also relate to the manner in which jurisdiction in criminal matters is exercised:

Article 6

"1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph I of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings."

48. Article 14 of that Convention provides for the right of victims of torture to obtain redress:

"1. 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.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

2. The travaux préparatoires *in respect of Article 14 and the States' declarations at the time of ratification*

49. During the deliberations in 1981 the working group accepted a proposal by the Netherlands to include the words "committed in any territory under its jurisdiction" after the expression "act of torture". When the Convention was adopted, however, this phrase had disappeared, for reasons that are unclear (see Manfred Nowak/Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary*, Oxford University Press 2008, p. 457).

50. When ratifying the Convention against Torture the United States made the following declaration:

"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 the State Party."

51. When submitting the bill for ratification of the Convention against Torture to the Senate, the President of the United States made the following remarks:

"The negotiating history of the Convention indicates that Article 14 requires a State to provide a private right of action for damages only for acts of torture committed in its territory, not for acts of torture occurring abroad. Article 14 was in fact adopted with express reference to '*the victim of an act of torture committed in any territory under its jurisdiction*.' The italicized wording appears to have been deleted by mistake. This interpretation is confirmed by the absence of discussion of the issue, since the creation of a 'universal' right to sue would have been as controversial as was the creation of 'universal jurisdiction', if not more so." ('*Summary and Analysis of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*' in Message from the President of the Unites States transmitting the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 20 May 1998 10th Congress, 2nd Session, reproduced in Nowak/McArthur, op. cit., pp. 460-61).

3. Practice of the United Nations Committee against Torture with regard to Article 14

52. The United Nations Committee against Torture, the entity entrusted with implementing the Convention against Torture, adopted General Comment no. 3 (2012) on the Implementation of Article 14 by States parties (CAT/C.GC/3, 13 December 2012). In it, the Committee asserted that Article 14 does not contain any geographical limitation:

> "22. Under the Convention, States parties are required to prosecute or extradite alleged perpetrators of torture when they are found in any territory under its jurisdiction, and to adopt the necessary legislation to make this possible. The Committee considers that 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."

53. With regard to the practical and legal obstacles inherent in the right to redress for acts of torture, the Committee stated:

> "38. States parties to the Convention have an obligation to ensure that the right to redress is effective. Specific obstacles that impede the enjoyment of the right to redress and prevent effective implementation of article 14 include, but are not limited to: inadequate national legislation, discrimination with regard to accessing complaints and investigation mechanisms and procedures for remedy and redress; inadequate measures for securing the custody of alleged perpetrators, State secrecy laws, evidential burdens and procedural requirements that interfere with the determination of the right to redress; statutes of limitations, amnesties and immunities; the failure to provide sufficient legal aid and protection measures for victims and witnesses; as well as the associated stigma, and the physical, psychological and other related effects of torture and ill-treatment. In addition, the failure of a State party to execute judgements providing reparative measures for a victim of torture, handed down by national, international or regional courts, constitutes a significant impediment to the right to redress. States parties should develop coordinated mechanisms to enable victims to execute judgements across State lines, including recognizing the validity of court orders from other States parties and assisting in locating the assets of perpetrators."

54. However, in several individual communications lodged with the Committee against Torture, the latter has shown a more reserved attitude towards the geographical scope of Article 14. In the case of *Marcos Roitmann Rosenmann v. Spain* (no. 176/2000), the complainant argued that the handling of an extradition request against General Pinochet, then resident in the United Kingdom, was in breach of Article 14 of the Convention against Torture. In a decision of 30 April 2002, the Committee declared this complaint inadmissible for the following reasons:

> "6.6 With respect to (c) [the objection based on the Committee's lack of jurisdiction *ratione personae*], the Committee notes that the complainant's claims with regard to torture committed by Chilean authorities are *ratione personae* justiciable in Chile and in other States in whose territory General Pinochet may be found. However, to the extent that General Pinochet was not in Spain at the time of the submission of the communication, the Committee would consider that articles 13 and 14 of the Convention invoked by the complainant do not apply *ratione personae* to Spain. In particular, his 'right to complain to, and to have his case promptly and impartially examined by, [the] competent authorities', and his claim to compensation would be justiciable vis-à-vis the State responsible for the acts of torture, i.e. Chile, not Spain."

55. In the case of *Z. v. Australia* (no. 511/2012, decision of 26 November 2014), the Committee against Torture examined an individual communication lodged by an Australian citizen of Chinese origin who submitted that she had been tortured by the police during a visit to the People's Republic of China (hereafter "China") in the period 1999-2000. She had attempted, unsuccessfully, to bring a civil action for compensation before the Australian courts against, *inter alia*, the former President of China and a member of that country's communist party. The action had been dismissed by the Australian courts on the grounds that members of the government of a foreign State enjoyed immunity. The Committee, called upon to examine the case, reiterated its approach concerning the geographical application of Article 14 of the Convention against Torture, but dismissed the communication, accepting that the State Party had been unable to establish its jurisdiction for acts of torture committed outside its territory by officials of another State (references omitted):

> "6.3 The Committee notes the State party's argument that the communication is inadmissible *ratione personae* under article 22 of the Convention because the communication requires the Committee to consider whether China itself has violated article 14 by allegedly not providing an effective remedy to the complainant, and China has not made the declaration under article 22 of the Convention. The Committee also notes the complainant's assertion that article 14 applies irrespective of the places of the acts of torture; and that, because the Australian courts have not declined jurisdiction on the ground of *forum non conveniens*, the State party is required to afford an enforceable right to fair and adequate compensation. The Committee recalls its general comment No. 3 (2012) on the implementation of article 14 by States parties, in which it considers that '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' and that 'article 14 requires States parties to ensure that all victims of torture and ill-treatment are able to access remedy and obtain redress'. However, the Committee observes that, in the specific circumstances of this case, the State party is unable to establish jurisdiction over officials of another State for alleged acts committed outside the State party's territory. Accordingly, the Committee considers that, in the case under review, the complainant's claim to redress and compensation is inadmissible."

4. Academic opinion on Article 14

56. Academic opinion is divided on the question whether Article 14 of the Convention against Torture has extra-territorial jurisdiction. In the opinion of certain commentators, this provision does not lay down an obligation to exercise universal jurisdiction, but equally it does not prohibit States, in the light of paragraph 2 and of the object and purpose of the Convention, from providing for such a possibility (see Nowak/McArthur, *op.cit*., p. 494 et seq., and Kate Parlett, Universal Civil Jurisdiction for Torture, *European Human Rights Law Review*, Issue 4 (2007), pp. 385-403, 398).

57. Other authors argue that Article 14 does apply to acts of torture committed abroad, given that it provides for no geographical limitation (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, *European Journal of International Law*, vol. 18 no. 5 (Nov. 2007), pp. 921-37, 926, and Alexander Orakhelashvili, State Immunity and Hierarchy of Norm: Why the House of Lords Got It Wrong, *European Journal of International Law*, vol. 18 no. 5 (Nov. 2007), pp. 955-70, 961).

58. Still other commentators consider that no inference can be drawn from Article 14 as to whether a State Party is obliged to make available to victims of torture remedies in respect of acts which were perpetrated outside its jurisdiction (see, for example, Paul David Mora, The Legality of Civil Jurisdiction over Torture under the Universal Principle, *German Yearbook of International Law*, Vol. 52, 2009, pp. 367-403, 373).

B. The 1951 United Nations Convention relating to the Status of Refugees

59. The United Nations Convention relating to the Status of Refugees of 28 July 1951 entered into force on 22 April 1954. It was ratified by Switzerland on 21 January 1955 and entered into force in respect of Switzerland on 21 April 1955.

60. The relevant provision for the present case reads as follows:

Article 16 – Access to courts

"1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi.*

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence."

C. Resolution 60/147 of the General Assembly of the United Nations of 16 December 2005

61. On 16 December 2005 the General Assembly of the United Nations adopted Resolution 60/147, containing, in the annex, the "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". The relevant paragraphs are worded as follows:

Preamble

"The General Assembly,

...

Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law,

Convinced that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines,

Adopts the following Basic Principles and Guidelines:

...

II. Scope of the obligation [to respect, ensure respect for and implement international human rights law and international humanitarian law]

The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

...

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

(d) Provide effective remedies to victims, including reparation, as described below.

...

VII. Victims' right to remedies

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

(a) Equal and effective access to justice;

(b) Adequate, effective and prompt reparation for harm suffered;

(c) Access to relevant information concerning violations and reparation mechanisms.

VIII. Access to justice

A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws...

IX. Reparation for harm suffered

Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

..."

D. The work of the Institute of International Law on universal civil jurisdiction with regard to reparation for international crimes

62. On 30 August 2015 the Institute of International Law (hereafter "the IIL") adopted at its Tallinn Session a Resolution entitled "Universal Civil Jurisdiction with regard to Reparation for International Crimes". It is worded as follows:

Resolution

"The *Institute of International Law*,

Conscious that appropriate and effective reparation has to be provided for the harm suffered by the victims of international crimes;

Considering that "international crimes" means serious crimes under international law such as genocide, torture and other crimes against humanity, and war crimes;

Recalling that universal criminal jurisdiction is a means of preventing the commission of such crimes and to avoid their impunity, as affirmed in the 2005 Krakow Resolution on "universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes";

Noting that the prosecution of the authors of international crimes and their punishment provides only a partial satisfaction to the victims;

Considering that universal civil jurisdiction is a means of avoiding the deprivation of the victims of international crimes to obtain reparation of the harm suffered, in particular because the courts ordinarily having jurisdiction do not provide for an appropriate remedy;

Adopts the following Resolution:

Article 1

1. Victims of international crimes have a right to appropriate and effective reparation from persons liable for the injury.

2. They have a right to an effective access to justice to claim reparation.

3. These rights do not depend on any criminal conviction of the author of the crime.

Article 2

1. A court should exercise jurisdiction over claims for reparation by victims provided that:

(a) no other State has stronger connections with the claim, taking into account the connection with the victims and the defendants and the relevant facts and circumstances; or

(b) even though one or more other States have such stronger connections, such victims do not have available remedies in the courts of any such other State.

2. For the purposes of paragraph 1(b), courts shall be considered to provide an available remedy if they have jurisdiction and if they are capable of dealing with the claim in compliance with the requirements of due process and of providing remedies that afford appropriate and effective redress.

3. The court where claims for relief by victims have been brought should decline to entertain the claims or suspend the proceedings, in view of the circumstances, when the victims' claims have also been brought before:

(a) an international jurisdiction, such as the International Criminal Court;

(b) an authority for conciliation or indemnification established under international law; or

(c) the court of another State having stronger connections and available remedies within the meaning of the foregoing paragraphs.

Article 3

States should see that the legal and financial obstacles facing victims and their representatives are kept to a minimum in the course of procedures relating to claims for reparation.

Article 4

States should endeavour to develop procedures to allow groups of victims to present claims for reparation.

Article 5

The immunity of States should not deprive victims of their right to reparation.

Article 6

It is recommended that in the course of the preparation of an instrument on jurisdiction and enforcement of judgments in civil and commercial matters, in particular by the Hague Conference on Private International Law, the rights of victims as set out in these Articles be taken into account."

63. In his background report to this Resolution (*Yearbook of the Institute of International Law*, Tallinn Session, *Justitia et Pace*, 2015 vol. 76, pp. 1-266), the rapporteur Andreas Bucher argues that Article 14 of the Convention against Torture does not impose universal civil jurisdiction in the area of international crimes, in the following terms:

"65. ....the cited provisions do not define the connection that a victim must have with a State in order to be able to benefit from its system for reparation; equally, they do not indicate that even victims who have no connection with the territory of a State may apply in it for compensation in respect of acts of torture sustained elsewhere. Admittedly, it is evident that the obligation to put in place a compensation system lies on the State responsible for acts of torture, and on the State in which such acts were prepared or on the territory of which the torturers have attempted to obtain refuge. However, the system recommended by the Convention against Torture does not impose on a State an obligation to provide reparation in respect of acts having no connection with that State or for victims whose protection does not fall within its sphere of interest, whether that is expressed in terms of jurisdictional criteria, political stakes, or in any other manner. In other words, the Convention does not require that a State endow its courts with universal civil jurisdiction.

66. Moreover, we note that in Articles 5 to 8, the Convention against Torture defines its criminal scope in detail. This international criminal jurisdiction is not universal, although it might be thought that its effects appear to be so. However, even if this were correct, one cannot assign a similar scope to Article 14 on the obligation to provide redress, which is worded in terms that are significantly more general and thus less binding on the States Parties. Nor does this difference in the texts allow for the conclusion that the system for civil jurisdiction ought to be defined in parallel with the grounds for criminal jurisdiction; a mere affirmation that these two systems for redress would be complementary is insufficient to overcome the difference between them as that was intended by the authors of the Convention."

E. The relevant work of the Institute of International Law and the International Law Association on the forum of necessity

64. The background report to the Resolution adopted by the IIL in 2015, mentioned above (see paragraph 63), also refers to the concept of the forum of necessity. It argues that this concept is not generally accepted by the States, as follows:

"188. The idea of accepting a forum of necessity with so many clarifications would require implementation at the level of private international law, whether national or international in source. As matters currently stand, it is not possible to derive such a

solution from general international law. In particular, its adoption conflicts with the fact that the concept of a forum of necessity, like that of a denial of justice, is not generally accepted in the various legal systems...”

65. In addition, referring to the present case as judged before the Swiss courts, the rapporteur notes the lack of precision in the criteria used by the domestic legal orders, such as “sufficient connection” or “connection with the dispute”:

“189. Indeed, attention should be drawn to the lack of clarity surrounding use of the criterion of a ‘sufficient connection’ with the forum State or a “connection with the dispute’, especially with regard to a provision as it exists in Switzerland and Quebec. Its indeterminacy creates a risk that it will be misunderstood and interpreted to the detriment of victims’ legitimate interests. This has been confirmed by a judgment of the Swiss Federal Court, refusing to accept a forum of necessity in the case of a Tunisian national, resident with his family for ten years in Switzerland, where he had obtained political asylum, and who was claiming reparation for non-pecuniary damage from the Republic of Tunisia on account of torture experienced in the premises of the Ministry of the Interior in Tunisia in 1992; at the end of a purely literal interpretation, it was concluded that the forum of necessity could not be recognised, since it required a sufficient connection with the “facts of the case”, while the connection with the claimant’s person was not decisive.”

66. At its Sofia Session in 2012, the “Committee on International Civil Litigation and the Interests of the Public” of the International Law Association (hereafter, “the ILA”) adopted Resolution no. 2/2012. This Resolution addresses problems of coordination between different jurisdictions and is limited to claims against individuals, corporations and other non-State actors (see paragraph 1.1 below). Among the elements which could serve as grounds for State jurisdiction, the Resolution proposes, *inter alia*, the forum of necessity. The relevant paragraphs are worded as follows:

(1) Scope

“1.1 These Guidelines apply to civil claims against corporations, individuals and other non-State actors arising out of or brought to redress conduct constituting a human rights violation, in view of the nature of the norm allegedly violated or the gross or systematic nature of the breach alleged.”

2.3. Forum of necessity

“2.3(1) The courts of any State with a sufficient connection to the dispute shall have jurisdiction in order to avert a denial of justice.

2.3(2) A denial of justice in the sense of paragraph 2.3(1) occurs if the court concludes upon hearing all interested parties, and after taking account of reliable public sources of information, that:

(a) no other court is available; or

(b) the claimant cannot reasonably be expected to seize another court.

2.3(3) A sufficient connection in the sense of paragraph 2.3(1) consists in particular in:

(a) the presence of the claimant;

(b) the nationality of the claimant or the defendant;

(c) the presence of assets of the defendant;

(d) some activity of the defendant; or

(e) a civil claim based on an act giving rise to criminal proceedings in the court seized of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings."

IV. COMPARATIVE-LAW MATERIAL

67. The Court has updated the comparative-law analysis that was prepared for the Chamber (see paragraphs 48-76 of the Chamber judgment). The updated version takes into account 39 member States of the Council of Europe (Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Turkey, Ukraine and the United Kingdom), and also certain States which are not members of the Council of Europe.

A. Universal jurisdiction for civil actions to obtain compensation for damage sustained as a result of torture

68. In the context of the comparative-law research, the Court analysed the situation in the various States with regard to universal jurisdiction for civil actions to obtain compensation for damage sustained as a result of acts of torture.

1. Council of Europe member States

69. It follows from the above-mentioned study that, of the 39 European States included in the analysis, only the Netherlands recognise universal civil jurisdiction in respect of acts of torture. In the *Akpan* case (judgment of 30 January 2013, case no. C/09/337050/HA), the District Court of The Hague found against a subsidiary of the Dutch company Shell, holding that it had breached its responsibility to protect the Ogoni people in Nigeria in the course of its petroleum-extraction activities. The parent company was also subject to an obligation to provide protection under Nigerian law, but it was found that, in this particular case, the conditions for applying that obligation were not met. Previously, in the *El-Hojouj v. Amer Derbas and*

Others case (judgment of 21 March 2012, case no. 400882/HA), the same court had awarded damages to a Palestinian doctor who had been tortured by Libyan officials.

70. The other Contracting States studied do not recognise universal international jurisdiction before the civil courts, whether for acts of torture or for other criminal acts or offences.

71. In Italy, for example, there is neither a provision of positive law nor clear case-law conferring on the civil courts universal jurisdiction for compensation claims in cases of torture and crimes against humanity. However, part of Italian academic opinion considers that certain decisions by the Italian courts may be moving in the direction of recognising such jurisdiction. These include the Court of Cassation's judgment in the *Ferrini* case (6 November 2003, 11 March 2004), concerning Germany's liability for the claimant's arrest in Italy and his deportation to Germany during the Second World War. In the context of those proceedings, the Court of Cassation placed particular emphasis in its reasoning on the need to ensure respect for *jus cogens* as a fundamental value of the international community. Reference should also be made to a series of subsequent judgments delivered by the Italian courts against Germany in the period 2004-2008. One of those judgments declared enforceable in Italy a judgment by a Greek court which ordered Germany to compensate the victims of the Distomo (Greece) massacre of 10 June 1944. These Italian judgments were the subject of the judgment by the International Court of Justice (hereafter, "the ICJ") of 3 February 2012, in the case on *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, judgment, *ICJ Reports* 2012, p. 99), which found that Italy had breached customary international law guaranteeing States jurisdictional immunity.

72. In the United Kingdom, in the case of *Jones v. Saudi Arabia* ([2006] UKHL 26), the House of Lords held that Article 14 of the Convention against Torture did not provide for universal civil jurisdiction, and that there was no evidence that States had recognised an international-law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law. Equally, there was no consensus of judicial and learned opinion that they should. The House of Lords distinguished the *Jones* case from another case previously examined by it, namely *Pinochet (no. 3)* [*ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147], concerning the former Chilean dictator, on the grounds, specifically, that the Pinochet case concerned criminal proceedings which fell squarely within the universal jurisdiction mandated by the Convention against Torture (see §§ 25-32 of the judgment). The House of Lords thus found no reason to set aside the applicability of the rule laying down absolute State immunity for acts committed by their representatives acting in their official capacity. That case subsequently came before this Court, which held that

there had been no violation of Article 6 § 1 of the Convention (see *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40525/06, ECHR 2014). In a recent judgment in the case of *Belhaj and another v. Straw and others* ([2017] UKSC 3), Lord Mance and Lord Sumption reiterated the findings of the House of Lords with regard to the non-existence of universal civil jurisdiction for acts of torture.

2. Non-member States of the Council of Europe

73. Turning to non-member States of the Council of Europe, the Court notes that the Canadian courts enjoy universal jurisdiction in examining civil claims – but solely in cases concerning terrorism, under the 2012 Justice for Victims of Terrorism Act. However, this jurisdiction is subject to the condition that the victim is a Canadian citizen or is a permanent resident of Canada, or that the civil action has a "real and substantial connection to Canada". In contrast, universal jurisdiction does not apply to actions in respect of damage sustained as a result of other violations of international law, including torture, except where it is shown that it took place in the context of acts of terrorism. In the case of *Bouzari v. Islamic Republic of Iran* ([2004] 243 DLR (4th) 406), the Ontario Court of Appeal held that Article 14 of the UN Convention against Torture did not impose an obligation on Canada to ensure civil-law remedies for acts of torture committed outside its territory. In the case of *Kazemi (Succession) v. the Islamic Republic of Iran* (2014 SCC 62, [2014] 3 S.C.R 176), the Supreme Court of Canada, noting the absence of State practice and of *opinio juris*, held that Canada was not obliged to open its courts so that its citizens could seek civil redress for acts of torture committed abroad.

74. Of all the States included in the present survey, only the United States provides, at federal level, for universal jurisdiction in respect of civil claims for compensation with regard to damage sustained as a result of torture, on the basis of two federal laws: the 1789 Alien Tort Statute and the 1991 Torture Victim Protection Act.

75. The first ascribes jurisdiction to the federal courts for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". In other words, it is not necessary that the impugned act was committed in the territory of the United States or by a national of that State. The first significant application of the Alien Tort Statute was in the landmark case of *Filártiga v. Peña-Irala*, examined before the Second Circuit Court of Appeals in 1980 [630 F.2d 876 (2d Cir. 1980)]. In that case, the court accepted the complaint by the parents of a victim who had been tortured to death in Paraguay; the complaint was brought against the perpetrator of the impugned acts, who was then resident in the United States. The court found that federal jurisdiction could be exercised whenever an alleged torturer was found and served with process by an alien within the borders of the United States (ibid., at p. 878).

76. The Torture Victim Protection Act provides as follows:

> "An individual who, under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture shall, in a civil action, be liable for damages to that individual..." (section 2 (a) § 1).

77. It is clear from these two laws that cases can, *a priori*, be submitted to the courts of the United States without there being a jurisdictional link with that country. For a court to be entitled to take action on a case, the person against whom the claim is brought must nonetheless fall within the jurisdiction of the United States at the time that the action is lodged. Furthermore, even where the court's jurisdiction is accepted, there exist other legal obstacles. In reality, it seems that about 80% of the cases brought under those two Acts have been dismissed on various grounds, such as the "act of State" doctrine, sovereign immunity or the *forum non conveniens* doctrine (see Nowak/McArthur, *op.cit*., p. 494).

78. Moreover, limitations have been placed on the scope of the Alien Tort Statute in recent years. In the case of *Kiobel v. Royal Dutch Petroleum Co*., Nigerian nationals who had obtained refugee status in the United States applied to the American courts under the Alien Tort Statute, alleging that Dutch, British and Nigerian companies had aided and abetted violations of international law committed by the Nigerian Government [*Kiobel v. Royal Dutch Petroleum Co*., 133 S. Ct. 1659 (2013)]. On 17 April 2013 the US Supreme Court ruled as follows:

> "We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. '[T]here is no clear indication of extraterritoriality here,' *Morrison*, 561 U. S., at ___ (slip op., at 16), and petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred.
>
> **IV**
>
> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. See *Morrison*, 561 U. S. ___ (slip op. at 17–24). Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required."

3. Possibility of joining criminal proceedings as a civil party

79. The question of the civil courts' universal jurisdiction must be distinguished from the possibility of applying to join the proceedings as a civil party in criminal proceedings brought before the criminal courts on the basis of the principle of universal jurisdiction in criminal matters. Several States provide for this possibility (including Belgium, Spain, France, Ireland, Norway, the Czech Republic and Slovenia).

80. Thus, in Belgium the universal jurisdiction of the national criminal courts is governed by Article 12*bis* of the preliminary part of the Code of Criminal Procedure, introduced by the Law of 5 August 2003. This article enables the Belgian criminal courts to extend their jurisdiction to include offences that do not have a connection with the national territory, either in application of a rule of international law (as provided for by the Convention against Torture), or in application of a rule of customary international law (as regards the crime of genocide and crimes against humanity).

81. Equally, the Judicature Act in Spain provides for the universal criminal jurisdiction of the Spanish courts for certain crimes, including crimes against humanity and acts of torture, committed in other States by Spanish citizens or by non-nationals, subject to certain conditions. In the context of criminal proceedings, the victims of crimes may join the proceedings as a civil party and claim redress in respect of the damage sustained (Article 112 of the Code of Criminal Procedure).

82. In France, the Code of Criminal Procedure allows criminal charges to be brought against persons responsible for acts of torture and other cruel, inhuman or degrading treatment or punishment, even when committed outside French territory, and to try them before French courts if those persons are present in France. In such cases, the civil-party proceedings can be joined to the public prosecution.

83. In Ireland the legislation also recognises universal criminal jurisdiction in respect of torture and crimes against humanity, and the general national scheme of compensation for victims of crime applies in principle to cases examined by the Irish courts on that basis; however, there is no practical example to date of such compensation being awarded by the Criminal Injuries Compensation Tribunal.

B. The forum of necessity

1. Geographical scope

84. The Court's comparative-law analysis has shown that the rules governing universal civil jurisdiction in eleven of the European States considered (Austria, Belgium, Estonia, France, Germany, Luxembourg, the Netherlands, Norway, Poland, Portugal and Romania) explicitly recognise either the forum of necessity or a principle bearing another name but entailing very similar if not identical consequences (as in the case of France). Including Switzerland, there are therefore twelve States in this category. Among the non-member States of the Council of Europe, the forum of necessity is recognised by the Civil Code of Quebec (in Canada), but the domestic case-law has recently introduced it into the domestic law of some other Canadian provinces.

85. In eight of these States, the forum of necessity is provided for by law (Austria, Belgium, Estonia, the Netherlands, Poland, Portugal, Romania and Switzerland), even if it was in some instances initially defined by the case-law and subsequently enacted in law by the legislature. Quebec also comes within this category. In the four other States (France, Germany, Luxembourg and Norway), the forum of necessity is a creation of case-law, and has not been enacted into law by the legislature. The same is true in respect of Canada (except for Quebec).

86. In France, private international law does not include the jurisdictional principle of a "forum of necessity" as such. In some rare cases, however, the national courts have held, on the basis of international public policy and in order to avoid a denial of justice, that they have jurisdiction.

2. Applicability ratione materiae

87. As to the types of dispute to which the principle of the forum of necessity applies, the Court notes that in all of the States studied which recognise this concept, the forum of necessity is applied, barring the occasional exception, without distinction being made on the basis of the nature of the dispute. It seems, however, that this forum is primarily applied in the areas of family law or contract law. It does not appear that the courts in these member States have been required to rule on a case similar to the present one, that is, concerning a civil action to obtain compensation for damage sustained as a result of torture.

3. Conditions of application

88. As to the conditions of application of the forum of necessity, the Court observes that in all the States which recognise this principle – whether it has been established by case-law or codified by the legislature – its application is always subject to two cumulative conditions, namely, the *de facto* or *de jure* impossibility of bringing the dispute before the courts of another State, and the existence of at least a certain proximity (or at least a certain connection) between the dispute and the State of the forum applied to.

89. With regard to the first condition, the Court observes that the forum of necessity is by nature subsidiary, and that it enters into play where examination of the case by the courts of another State is (*de jure* or *de facto*) impossible, or is unreasonably difficult. With regard to the second condition, namely the existence of a certain connection between the dispute and the forum State in question, the Court notes that the relevant legislative provisions require either "close ties" (as in Belgium and Estonia), or "sufficient" (Poland, Romania) or "sufficiently strong" ties (Portugal), without further precision. Identification of the relevant connection and of its

effective existence is carried out in the specific circumstances of the case by the domestic court before which it is brought. The factors which indicate a connection accepted by the courts may vary depending on the nature of the dispute or the identity of the parties (legal entities, natural persons).

4. Distinction between forum of necessity and forum non conveniens

90. The Court further notes that in those States and territories with a legal system based on the Anglo-American tradition, the question of a forum of necessity is not posed in the same terms. The broad scope of judicial power leads the courts to set limits on it. These limits are the equivalent of the grounds of jurisdiction in the civil-law tradition, in that they determine the cases that may be heard and determined by the courts. In the majority of cases, therefore, the aim is not to resolve a conflict as to proper jurisdiction by allowing for an additional or exceptional forum, but, conversely, to prevent too broad an exercise of judicial power at international level. To this end, an exception known as the *forum non conveniens* has been developed. Under this exception "a national court can decline jurisdiction on the grounds that a court with equal jurisdiction, situated in another State, would, objectively speaking, be a more appropriate forum for examining a dispute, that is, before which the dispute could be suitably settled, for the interests of all parties and for the ends of justice" (see House of Lords judgment in *Spiliada Maritime Corporation/Cansulex Ltd*, [1987] AC 460, esp. p. 476). The concept of denial of justice is relevant only for ensuring that the court before which a *forum non conveniens* claim is brought does not relinquish jurisdiction without verifying that an alternative forum exists.

V. EUROPEAN UNION LAW

91. The Court also considers it appropriate to refer to certain relevant elements of European Union law. The recast version of the Brussels I Regulation (known as "Brussels I-*bis*", introduced by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), in force since 10 January 2015) does not provide for a forum of necessity. However, the forum of necessity is explicitly recognised in three special regulations covering certain fields which are excluded from the scope of the Brussels I-b*is* Regulation pursuant to Article 1 § 2.

92. Thus, Article 11 of Regulation (EU) no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a

European Certificate of Succession explicitly provides for a forum of necessity in the following terms:

Article 11 – Forum necessitatis

"Where no court of a Member State has jurisdiction pursuant to other provisions of this Regulation, the courts of a Member State may, on an exceptional basis, rule on the succession if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected.

The case must have a sufficient connection with the Member State of the court seised."

93. Furthermore, a similar provision is contained in Article 7 of Council Regulation (EC) no. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. This is also the case with regard to Article 11 of Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial regimes. However, it should be noted that none of these texts provides more specific information on the nature of this connection. Identification of the relevant connection and the effective existence of a sufficient connection are left in each case to the assessment of the domestic court.

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

94. 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. He alleged a violation of his right of access to a court within the meaning of Article 6 § 1 of the Convention, the relevant part of which reads as follows:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

95. The Government contested that argument.

A. The nature and scope of the dispute

96. The Court considers it appropriate to clarify at the outset the nature of the present dispute and what exactly is at stake. In this connection, it

reiterates that the applicant claims to have been subjected to acts of torture and that the Swiss authorities granted him asylum on account of persecution suffered in his country of origin. If proved true, the facts at the origin of the application are therefore particularly serious.

97. In this context, the Court would emphasise, first and foremost, the broad international consensus recognising the existence of a right for victims of acts of torture to obtain appropriate and effective compensation (see paragraphs 61 and 62 above). While there is little doubt as to the binding effect of this right on the States with regard to acts of torture perpetrated on the territory of the forum State or by persons within its jurisdiction, the same does not apply to acts committed by third States or persons under their jurisdiction (see paragraphs 182-202 below). However, it is precisely this latter category of acts which is in issue in the present case. The Court would therefore specify that, whatever the consequences that fall to be drawn with regard to this circumstance under the Convention, they do not call into question, as to its principle, the right of victims of acts of torture to obtain appropriate and effective compensation.

98. The Court also considers it useful to clarify four aspects regarding the scope of the dispute. Firstly, it reiterates that the Chamber left open the question of whether the respondents enjoyed immunity from jurisdiction in the proceedings in issue in the present case, given that the Federal Supreme Court declined at the outset its jurisdiction *ratione loci* to examine the applicant's appeal, and accordingly concluded that it was not necessary to consider the question of immunity from jurisdiction (see Chamber judgment, § 106).

99. The Court notes that this approach corresponds to the international practice in this area. Indeed, the ICJ, in the case concerning the *Arrest Warrant of 11 April 2000 ((Democratic Republic of the Congo v. Belgium),* judgment, *ICJ Reports* 2002, § 46), held:

> "As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction."

The ICJ had a subsequent opportunity to confirm this principle (*Jurisdictional Immunities of the State (Germany v. Italy; Greece [intervening]*), *ICJ Reports* 2012, § 82). Accordingly, bearing in mind its conclusion as to the jurisdiction of the Swiss courts, the Court does not consider it necessary to examine the question of possible immunities from jurisdiction.

100. Secondly, as regards the applicant's criticism of the prosecuting authorities, accusing them of a lack of diligence in respect of A.K., – a criticism shared by the authors of the dissenting opinion annexed to the Chamber judgment –, the Court observes that the applicant lodged his criminal complaint on 14 February 2001 and that, on the same date, the

Principal Public Prosecutor transmitted to the head of the security police, by internal mail, a request to "attempt to locate and identify the accused, who [was] supposedly hospitalised in the Geneva University Hospital, for heart surgery" and "if possible, [to] arrest him and bring him before an investigating judge" (see paragraph 20 above). On receipt of this request, the police immediately contacted the hospital, which informed them that A.K. had indeed been a patient there, but that he had left the hospital on 11 February 2001 and had subsequently left Switzerland. The decision to discontinue the proceedings was not challenged by the applicant. The Court concludes that the Swiss prosecuting authorities cannot be accused of negligence in dealing with the applicant's criminal complaint. It follows that this aspect will not be taken into consideration by the Grand Chamber in assessing compliance with Article 6 of the Convention.

101. Thirdly, the Court reiterates that, at the hearing of 14 June 2017, the applicant confirmed that he had sent an application to the TDC (see paragraph 36 above) and in February 2016 had received a simple acknowledgment of receipt, but had had no further news from the TDC since then. In so far as this entity was set up after the relevant Federal Supreme Court judgment in this case, the Court considers that the possibility of submitting a complaint to it, possibly followed by judicial proceedings, as explained by the Government (see paragraphs 31-35 above), is not relevant for the examination of the present case.

102. Fourthly, with regard to the fact that the applicant would appear never to have brought proceedings in Italy, whether against the Tunisian authorities, in respect of the torture sustained, or against the Italian authorities, in respect of his arrest and surrender to the Tunisian authorities on 22 April 1992 (see paragraph 14 above), the Court points out that it put a specific question to the parties on this matter ahead of the hearing on 14 June 2017, without however obtaining any definite information in response. It further reiterates that the Federal Supreme Court left open the question whether the second condition for the application of section 3 of the LDIP – that legal proceedings in another country were impossible or could not reasonably be required – had been met (point 3.3 of the judgment, see paragraph 30 above). Accordingly, and in the absence of more ample information on this subject, the outcome of such proceedings, including the question of the jurisdiction of the Italian courts, remains speculative. In those circumstances, the Court cannot rule on this question.

B. Applicability of Article 6 of the Convention

103. In their submissions before the Chamber, the Government, referring primarily to the *Al-Adsani* judgment (cited above, § 47), maintained, in essence, that Article 6 § 1 of the Convention could not create, by way of interpretation, a substantive civil right which had no legal basis in the State

concerned. In their view, Swiss law did not recognise a right to bring an action for compensation in respect of acts of torture that had no connection with Swiss jurisdiction. Accordingly, Article 6 § 1 of the Convention was not applicable to this case.

104. The Chamber rejected this argument as follows (Chamber judgment, § 85):

> "In the present case, the applicant had based his claim on Article 82 et seq. of the Tunisian Code of Obligations and Contracts, which he considered applicable under section 133 al. 2 of the LDIP. The Court further observes that similar provisions providing for civil liability in respect of an unlawful act, applicable, *inter alia*, to acts adversely affecting a person's physical or moral integrity, exist in Swiss law, particularly in Articles 41 et seq. of the Code of Obligations ... The restricted interpretation given by the Federal Court to the concept of the forum of necessity does not represent an obstacle to the application of Article 6 § 1 to the present case (see, *mutatis mutandis, Al-Adsani*, cited above, §§ 46-49, and *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40525/06, 14 January 2014, § 164). As this provision is therefore applicable in the present case, the objection that the application is incompatible with the provisions of the Convention must be rejected."

105. The Grand Chamber notes that the Government did not repeat this argument in the proceedings before it, or contest the Chamber's opinion on this point. Nonetheless, it considers it useful to add the following observations.

106. The applicability of Article 6 § 1 in civil matters firstly depends on the existence of a dispute ("*contestation*" in French). Further, the dispute must relate to "rights and obligations" which, arguably at least, can be said to be recognised under domestic law. Lastly, these "rights and obligations" must be "civil" ones within the meaning of the Convention, although Article 6 does not itself guarantee any particular content for them in the substantive law of the Contracting States (see, for example, *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 88, ECHR 2016 (extracts); *Boulois v. Luxembourg* [GC], no. 37575/04, § 91, ECHR 2012; and *James and Others v. the United Kingdom*, 21 February 1986, § 81, Series A no. 98). This concept cannot be interpreted solely by reference to the respondent State's domestic law; it is an "autonomous" concept deriving from the Convention. Article 6 § 1 of the Convention applies irrespective of the parties' status, the character of the legislation which governs how the "dispute" is to be determined, and the character of the authority which has jurisdiction in the matter (see, for example, *Georgiadis v. Greece*, 29 May 1997, § 34, *Reports of Judgments and Decisions* 1997-III). Whether or not a right is to be regarded as civil within the meaning of that term in the Convention must be determined by reference not only to its legal classification but also to its substantive content and effects under the domestic law of the State concerned (see *Perez v. France* [GC], no. 47287/99, § 57, ECHR 2004-I).

107. In the present case, the Court has no doubt that there exists a "genuine and serious" dispute, as required by the Court's case-law (see, for example, *Lupeni Greek Catholic Parish and Others,* cited above, § 71, and *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 81, Series A no. 52). The fact that the respondent State does not actually contest the existence of a right of victims of torture to obtain compensation, but rather its extra-territorial application, is immaterial, given that the dispute may relate not only to the actual existence of a right but also to its scope and the manner of its exercise (see *Benthem v. the Netherlands*, 23 October 1985, § 32, Series A no. 97).

108. The Court also considers that the applicant can lay claim to a right which is, at least on arguable grounds, recognised under Swiss law. In addition to Article 41 of the Swiss Code of Obligations, mentioned by the Chamber (see paragraph 38 above), which recognises the general principle of civil liability for unlawful acts, the Court refers to the elements of international law cited above (see paragraphs 61-63 above) and especially to Article 14 of the Convention against Torture (see paragraphs 45 et seq. above). This guarantees a right that is firmly embedded, as such, in general international law, namely the right of victims of acts of torture to obtain redress and to fair and adequate compensation. With the ratification of this instrument by Switzerland on 2 December 1986, its provisions became an integral part of Switzerland's legal system, obliging the national authorities to comply with them.

109. As to whether the States Parties to that instrument are obliged to guarantee this right even for acts of torture that were inflicted outside their territories by foreign officials, as the applicant submits, the Court considers that this question goes to the substance of the present case, which will be examined below (see paragraphs 112 et seq.). Nevertheless, it is not decisive for the applicability of Article 6.

110. The Court concludes from this that the right of victims of acts of torture to obtain compensation is today recognised in Swiss law. Moreover, it is not in dispute between the parties that this right is a civil one.

111. In view of the foregoing, Article 6 § 1 of the Convention is applicable in the present case.

C. Merits

1. The principles governing the right of access to a court

112. The Court reiterates that the right of access to a court – that is, the right to institute proceedings before the courts in civil matters – constitutes an element which is inherent in the right set out in Article 6 § 1 of the Convention, which lays down the guarantees applicable as regards both the organisation and composition of the court, and the conduct of the

proceedings. All of those elements make up the right to a fair trial secured by Article 6 § 1 (see *Baka v. Hungary* [GC], no. 20261/12, § 120, ECHR 2016, and *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18).

113. The right to a fair hearing, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights (see, among other authorities, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 126, ECHR 2016; *Eşim v. Turkey*, no. 59601/09, § 18, 17 September 2013; and *Běleš and Others v. the Czech Republic*, no. 47273/99, § 49, ECHR 2002-IX). Everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, Article 6 § 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, is one particular aspect (see, *inter alia*, *Howald Moor and Others v. Switzerland*, nos. 52067/10 and 41072/11, § 70, 11 March 2014, and *Golder,* cited above, § 36).

114. However, the right of access to a court is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (see *Baka*, cited above, § 120; *Al-Dulimi and Montana Management Inc.*, cited above, § 129; *Yabansu and Others v. Turkey*, no. 43903/09, § 58, 12 November 2013; and *Howald Moor and Others*, cited above, § 71). That being stated, those limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired (see *Baka*, cited above, § 120; *Al-Dulimi and Montana Management Inc.*, cited above, § 129; *Stanev v. Bulgaria* [GC], no. 36760/06, § 230, ECHR 2012; and *Howald Moor and Others*, cited above, § 71).

115. In addition, such limitations will not be compatible with Article 6 § 1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Baka*, cited above, § 120; *Al-Dulimi and Montana Management Inc.*, cited above, § 129; *Stubbings and Others v. the United Kingdom*, 22 October 1996, § 50, *Reports* 1996-IV; *Stagno v. Belgium*, no. 1062/07, § 25, 7 July 2009; and *Howald Moor and Others*, cited above, § 71).

116. Lastly, the Court reiterates the fundamental principle according to which it is for the national authorities, notably the courts, to interpret and apply domestic law (see, among many other authorities, *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176‑A; *Kopp v. Switzerland*, 25 March 1998, § 59, *Reports* 1998‑II; and *Nusret Kaya and Others v. Turkey*, nos. 43750/06, 43752/06, 32054/08, 37753/08 and 60915/08,

§ 38, ECHR 2014 (extracts)). It follows that the Court cannot call into question the findings of the domestic authorities on alleged errors of domestic law unless they are arbitrary or manifestly unreasonable (see, to this effect, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, §§ 85-86, ECHR 2007‑I).

2. Application of these principles in the present case

117. It is clear that the applicant's right of access to a court was restricted in that the Swiss courts held that they did not have jurisdiction to entertain his claim for compensation. The Court must therefore examine whether that restriction pursued a legitimate aim and, if so, whether it was reasonably proportionate to the aim pursued.

a. Did the restriction on the applicant's right of access to a court pursue a legitimate aim?

i. The Chamber judgment

118. With regard to the aim pursued by the restriction on the right of access to a court, the Chamber considered that the refusal to entertain the applicant's civil action was aimed at ensuring the proper administration of justice and the effectiveness of domestic judicial decisions. It also shared the Government's view that universal jurisdiction, in a civil context, would risk creating considerable practical difficulties for the courts, particularly regarding the administration of evidence and the enforcement of judicial decisions (see Chamber judgment, § 107).

ii. The parties' submissions to the Grand Chamber

(α) The applicant

119. With regard to the legitimate aims based on the proper administration of justice and the effectiveness of domestic judicial decisions, the applicant submitted that the Chamber had not really explained what was to be understood by those concepts. He considered that the Court's case-law had, over decades, expanded litigants' access to the courts very extensively, without the Court ever accepting the argument that this could result in an additional burden on the courts.

120. With regard to the difficulties arising from the administration of evidence, the applicant submitted that the judgment had provided no explanation of, or justification for, this assertion. As to the difficulties in the enforcement of judicial decisions, he submitted that the feasibility of enforcing in another country a judgment delivered in Switzerland could not be a precondition for recognising the jurisdiction of the Swiss courts, adding that the Federal Supreme Court's judgment made no reference to this argument in its reasoning.

(β) The Government

121. With regard to the aims pursed by the restriction on the applicant's access to a court, the Government referred to the Chamber's reasoning (see paragraph 118 above).

iii. The Court's assessment

122. With regard to the legitimate aims of the impugned restriction, the Grand Chamber discerns several, which are all related to the principles of the proper administration of justice and maintaining the effectiveness of domestic judicial decisions.

123. Firstly, there can be little doubt that an action such as the applicant's, alleging that he had been tortured in Tunisia in 1992, would pose considerable problems for the Swiss courts in terms of gathering and assessing the evidence.

124. In addition, the enforcement of a judgment giving effect to such an action would entail practical difficulties (see Chamber judgment, § 107). In this connection, one might wonder, from the perspective of the effective right of access to a court, whether a judgment delivered in such circumstances could effectively be enforced (see, *mutatis mutandis, Hornsby v. Greece*, 19 March 1997, §§ 40-45, *Reports* 1997-II).

125. Further, it seems legitimate for a State to wish to discourage forum shopping, in particular in a context in which the resources allocated to domestic courts are being restricted.

126. Moreover, the Court considers justified the fear expressed by the Government to the effect that accepting an action such as the applicant's, where the connection with Switzerland at the relevant time was relatively tenuous, would be likely to attract similar complaints from other victims in the same situation with regard to Switzerland, and thus to result in an excessive workload for the domestic courts. It follows that a reasonable restriction on admissible complaints is likely to ensure the effectiveness of the justice system.

127. Lastly, and as a subsidiary consideration, the Grand Chamber accepts that a State cannot ignore the potential diplomatic difficulties entailed by recognition of civil jurisdiction in the conditions proposed by the applicant.

128. In view of the foregoing considerations, the Court concludes that the restriction on the applicant's right of access to a court can be regarded as pursuing the legitimate aims referred to above. It must now determine whether it was proportionate to those aims.

b. Was the restriction proportionate?

i. The Chamber judgment

129. With regard to the proportionality of the restriction in question, the Chamber held that it had not infringed the very essence of the applicant's right of access to a court (see Chamber judgment, § 108). In particular, it considered that the respondent State was not bound to accept universal civil jurisdiction under other norms of international law, despite the undisputed *jus cogens* nature of the prohibition on torture in international law (see Chamber judgment, § 116).

130. The Chamber further noted that the very wording of Article 14 of the Convention against Torture, ratified by Switzerland, was not unequivocal as to its extra-territorial application, and that no concrete indications could be derived from the preparatory works to that provision (see Chamber judgment, § 117). The Chamber also pointed out that none of the 26 European States analysed in its survey recognised universal civil jurisdiction in respect of acts of torture (see Chamber judgment, § 118). It concluded that Switzerland was not bound by any convention obligation to accept the applicant's civil action on that basis (see Chamber judgment, § 120).

131. The Chamber also considered that the Federal Supreme Court's interpretation of section 3 of the LDIP in the present case, while restrictive, had not been arbitrary (see Chamber judgment, § 112). It pointed out that the applicant had obtained Swiss nationality in the intervening period, but observed that the Town of Versoix's confirmation of the applicant's acquisition of nationality had been issued after the adoption of the Federal Supreme Court's judgment of 22 May 2007 and could not therefore be taken into account by that court (see Chamber judgment, § 113). Furthermore, the Chamber noted that only nine of the 26 Contracting States studied in its comparative-law analysis recognised the concept of a forum of necessity and that, in those States which did apply it, it was, as in Switzerland, subject to strict conditions which had to be met cumulatively. The Chamber concluded that the interpretation given to section 3 of the LDIP in the present case was in no way exceptional and reflected the solution adopted in the member States of the Council of Europe which had introduced such a forum of necessity into their own legal systems (see Chamber judgment, § 114).

ii The parties' submissions to the Grand Chamber

(α) The applicant

132. The applicant submitted that the restriction on the right of access to an appropriate forum, Switzerland in his case, had been manifestly unreasonable and had in the present case impaired the very essence of that

right. With regard to the drafting history of section 3 of the LDIP, he pointed out that the Federal Council had noted that "[t]he Swiss authorities must declare themselves competent, even in cases in which the connection with our country [was] tenuous, where it [was] impossible to bring an action or lodge an appeal abroad" (point 3.4 of the Federal Supreme Court's judgment, referring to Federal Gazette 1983 I 290). Yet, according to the applicant, the Federal Supreme Court had nevertheless departed from this approach by indicating that section 3 of the LDIP was to be interpreted restrictively and denying the existence of sufficient ties between himself and Switzerland.

133. As to the impairment of the very essence of the right of access to court within the meaning of Article 6, the applicant argued that it was established that he could not bring his case before the ordinary forum in Tunisia. He alleged that, by interpreting the concept of "the case" as being restricted to the facts at the origin of the legal action, namely to the torture, the Federal Supreme Court had closed the door to any possibility for the applicant to obtain the reparation to which he laid claim. In so doing, that court had refused the possibility of conducting a genuine balancing exercise of all the interests at stake, between the possible legitimate aims justifying a restriction on the one hand and the fact that the case concerned reparation for an international crime and his connections with Switzerland on the other.

134. According to the applicant, the present case did not necessarily require the Court to rule on the refusal or acceptance of universal civil jurisdiction. Instead, it concerned the question whether a State which had legislated for a right of access to its courts by introducing a forum of necessity could interpret that forum in a manner which disregarded the ties that one of the parties to the dispute had with that State.

135. In any event, the applicant considered that the approach taken by the Federal Supreme Court had been incompatible with international law. He submitted that Article 14 of the Convention against Torture imposed an obligation on the States Parties not to interpret their domestic legal provisions in such a way as to negate the right of the victims of torture to obtain reparation. He referred to General Comment no. 3 (2012) of the United Nations Committee against Torture (§§ 52-53 above), which stated that "[t]he Committee consider[ed] that the application of article 14 [was] not limited to victims who [had been] harmed in the territory of the State party or by or against nationals of the State party ... This [was] particularly important when a victim [was] unable to exercise the rights guaranteed under article 14 in the territory where the violation took place" (General comment no. 3 (2012), § 22). Thus, the applicant submitted that Article 14 of the Convention against Torture enshrined an obligation on all the States Parties to the Convention against Torture. He added that the ICJ had specified, with regard to obligations *erga omnes partes*, that "each State party ha[d] an interest in compliance with them in any given case"

(*Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), judgment, *ICJ Reports* 2012, § 68). With regard to torture, he also pointed out that the ICJ had held that by establishing the jurisdiction of their courts to prosecute crimes of torture, "the States parties ensure[d] that their legal systems [would] operate to that effect and commit themselves to coordinating their efforts to eliminate any risk of impunity" (ibid., § 75).

136. The applicant further noted that at its Tallinn Session in 2015, the IIL had adopted a resolution entitled "Universal Civil Jurisdiction with regard to Reparation for International Crimes" (see paragraph 62 above). He pointed out that Article 2 of this Resolution set out the right to enjoy effective access to justice in order to be able genuinely to seek and obtain this reparation. The same Article set out in detail the conditions which must guide the Swiss courts in establishing their jurisdiction over claims for reparation in respect of international crimes. The applicant concluded that recourse to Article 2 of the IIL Resolution would have made it possible to interpret section 3 of the LDIP in such a way as to fully safeguard his right to an appropriate forum. Furthermore, as a recognised refugee in Switzerland, he also relied on Article 16 of the United Nations Convention relating to the Status of Refugees (see paragraph 60 above) in support of his case.

137. The applicant then pointed out that the requirement of a forum of necessity had been laid down in 2012 by the ILA in its Sofia Guidelines on Best practices for international civil litigation for human rights violations (see paragraph 66 above). This proposal had been intended to encourage the adoption of rules of private international law to ensure the fair and effective resolution of questions arising in civil litigation in respect of human-rights violations. The applicant added that, even if this proposal [had] not (yet) entered into positive law, it was nevertheless an element to be taken into account in developing an *opinio juris* that would guarantee, in the most appropriate way, protection against denials of justice.

138. The applicant also pointed out that the main question before the Federal Supreme Court had been the meaning to be assigned to "the locality with which the case ha[d] a sufficient connection", in determining the existence of a forum in Switzerland. He added that, on this point, the Federal Supreme Court had assigned the concept of "case" solely to the factual situation underlying the claim, namely the criminal act (torture), while refusing the idea that facts concerning the claimant's person could constitute admissible elements in interpreting the concept of sufficient connection with Switzerland (he referred to point 3.5, § 6 of the Federal Supreme Court's judgment; see paragraph 30 above). According to the applicant, however, the place of residence of one of the parties (the victim) could not be left out of the constituent elements of the "facts of the case". Regarding, more specifically, civil liability, as in the present case, he submitted that if the facts occurred abroad it would never be possible to

provide an ordinary forum under section 3 of the LDIP and, in consequence, the Federal Supreme Court's interpretation ruled out all possibility of providing a forum of necessity. In other words, the Federal Supreme Court's restrictive interpretation of the concept of "the case" had negated the very purpose of that provision, which was to prevent denials of justice.

139. The applicant further observed that recognition of a forum in Switzerland was currently subject to conditions that were stricter in a case of torture than those existing in other areas of law; this was completely incompatible with the purpose of section 3 of the LDIP, which was to reserve a forum of last resort for exceptional cases, such as for crimes of international law. In this regard, he specified that Swiss practice contained numerous legal or case-law examples substantiating the notion that the "case" ["*cause*"] could not be confined solely to the set of facts which gave rise to the legal question to be determined. In respect of those situations, the legislature or the courts had taken the view that if the action could not be brought in the forum to which it would ordinarily have been assigned, or if it could not reasonably be required that it be brought there, an alternative forum had to be provided in Switzerland where there existed a further connection, which might range from the nationality of one of the parties to the mere fact of property having been attached by the courts. In none of these situations was the fact that the legal basis for the action was to be found in another country regarded as inconsistent with recognition of an appropriate forum in Switzerland.

140. In other words, the interpretation provided by the Federal Supreme Court, in a case in which the action concerned reparation following acts of torture, was in direct conflict with the thrust of the legislation and case-law developments in cases concerning, *inter alia*, termination of proceedings, confirmation of attachment of property, divorce, the general effects of marriage, and parent-child relationships established by birth or adoption.

141. The applicant also alleged that the Chamber had correctly considered, with regard to the approaches adopted in other States, that "the sufficient connection [was] normally based on nationality, domicile or habitual residence". He added that "[i]t follow[ed] that section 3 of the LDIP [was] in no way exceptional and [fell] within a very broad consensus among the member States of the Council of Europe which ha[d] introduced this form of jurisdiction into their own legal systems" (see Chamber judgment, § 114). According to the applicant, it was thus incomprehensible that the Chamber had not concluded that the Federal Supreme Court's judgment was diametrically opposed to its own conclusion, given that it failed to take any account of such connections with Switzerland and focused only on the fact that the elements relating to the legal basis of the dispute were located abroad.

142. Lastly, the applicant argued that in the case of *Arlewin v. Sweden* (no. 22302/10, 1 March 2016), the Court had recently found a violation of the right of access to a court in a situation in which the domestic courts had denied the existence of a Swedish forum in a case concerning a television programme, the content and aim of which were exclusively directed at Sweden and adversely affected the reputation of Swedish nationals living in Sweden. He added that the situation had been such that the refusal by the Swedish court to accept jurisdiction had left the applicant with little choice but to apply to a foreign court, whose jurisdiction was not in dispute but which was manifestly inappropriate. The mere fact that the programme was broadcast by a British company operating on the territory of the United Kingdom did not in itself constitute a legitimate reason for maintaining that the appropriate forum was in the United Kingdom. The applicant submitted that the *Arlewin* judgment was important for the present case in so far as it had upheld the right of access to a (Swedish) court when it would also have been possible to bring the case before a court in the United Kingdom. He considered that the right to a fair trial had clearly tipped the balance in favour of Swedish jurisdiction.

(β) The Government

143. With regard to the proportionality of the restriction on the right of access to a court, the Government also invited the Grand Chamber to follow the Chamber's reasoning. As to the dissenting opinion, the Government accepted that in the fight against torture States had a responsibility, up to a point, to act as universal guardians of justice; however, they were convinced that the idea of assuming universal civil jurisdiction for acts of torture went beyond the limits of what a State governed by the rule of law could do, for the reasons set out below.

144. Providing for virtually unlimited civil jurisdiction on the part of a national judicial system would overburden the judicial authorities of any nation. It was therefore unsurprising that no European State appeared to have enacted a law providing for civil jurisdiction in situations similar to that of the applicant, or to have interpreted the forum of necessity rule, where applicable, in that manner.

145. The Government also pointed out that, while there were admittedly few cases in the Federal Supreme Court's case-law concerning the application of section 3 of the LDIP, this provision had nonetheless not remained a dead letter. In particular, the cantonal courts had accepted its application in cases involving family law, successions and debt recovery and bankruptcy proceedings. It was thus established that the courts had applied the forum of necessity in very varied circumstances.

146. According to the Government, it followed from this case-law that the factors constituting a "sufficient connection" capable of establishing the jurisdiction of the Swiss authorities under section 3 of the LDIP were the

Swiss nationality of the claimant in matters of family law or cases concerning a person's status; the fact that the claimant or another party with a direct interest in the matter was resident in Switzerland, provided that the case came within the scope of family law; the location of property in Switzerland in cases concerning inheritance law; and, subject to certain conditions, the existence of a place of enforcement in Switzerland.

147. The case currently before the Grand Chamber was, however, very unusual, and the only one of its kind which had had to be decided by the Swiss courts. In the light of the latter's practice, the Government concluded that the Federal Supreme Court's application of it in the present case had been by no means exceptional and was in line with previous practice. It followed that the refusal to accept the forum of necessity envisaged in section 3 of the LDIP was far from being arbitrary or manifestly unreasonable.

148. With regard to the question of whether there existed a possible obligation to accept universal civil jurisdiction, the Government argued that international law and State practice seemed even less developed with regard to such an obligation. They emphasised that no European State had accepted such jurisdiction. The Government also submitted that none of the international instruments invoked by the applicant recognised this jurisdiction, particularly Article 16 of the Geneva Convention of 28 July 1951 relating to the Status of Refugees, and that no rule of customary international law provided for it. They added that the text of Article 14 of the Convention against Torture contained no indication of any extraterritorial application of this rule, and that several judgments delivered by the domestic courts confirmed that Article 14 of the Convention against Torture contained no obligation to introduce universal civil jurisdiction for victims of torture (they referred, in particular, to UK House of Lords, *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya as Saudiya and others* [2006] UKHL 26, and Court of Appeal for Ontario, *Bouzari v. Iran,* cited above (see paragraph 73). In consequence, the Government submitted that at the present time there was no apparent move in international law towards broadening the principle of universal jurisdiction to include civil proceedings. Lastly, they argued that the Committee against Torture's practice could not serve as a solid basis from which to derive an obligation on the States to accept universal civil jurisdiction irrespective of any connection between a given case and these States, although the Committee's General Comment no. 3 (2012) did seem to recommend such an interpretation.

149. With regard to the texts issued by the ILA and the IIL, the Government noted that these were the product of exclusively academic associations, and had no official weight. The Government further observed that these documents had been published in August 2012 (ILA) and on 30 August 2015 (IIL), that is, long after the Federal Supreme Court had

delivered its judgment of 22 May 2007. As to the substance, the Government considered that the ILA Sofia Guidelines did not apply to the circumstances such as those in the present case, in so far as Article 1.1 limited the scope of application to civil claims against non-State actors. With regard to the IIL's Tallinn Resolution, the Government stressed that Article 2.1 used the conditional tense ("A court *should* exercise...") , which implied that the Resolution belonged to the domain of *lex ferenda*, rather than that of *lex lata*.

150. In the light of these considerations, the Government concluded that international law did not oblige Switzerland to deal with the applicant's claim and that, accordingly, the Swiss courts' decisions had been in accordance with Article 6 § 1.

151. With regard to section 3 of the LDIP, the Government submitted that the Federal Supreme Court, in interpreting the three conditions for accepting a forum of necessity, had begun by noting the inexistence of an ordinary forum (first condition). It had left open the question of whether proceedings abroad had proved impossible (second condition), instead examining in greater depth the third condition, namely that of a "sufficient connection" between the applicant's case and Switzerland.

152. Like the Federal Supreme Court, the Government noted that section 3 had to be interpreted restrictively, and stated that it represented a safety valve designed to prevent denials of justice in the event of a negative conflict of jurisdiction (Federal Supreme Court judgment, point 3.4; see paragraph 30 above). However, they added that the drafting history showed that the hypothetical situation of a foreign national whose case had no connection with Switzerland had indeed been envisaged in the parliamentary debates, but the idea of opening up the Swiss courts to such cases had been explicitly rejected, at the cost of being unable to avoid all denials of justice.

153. As to the question of what factors were capable of constituting a "sufficient connection", the Government noted that the criterion of nationality had not been retained as one of those generally accepted as giving access to a forum of necessity. Although nationality could be a decisive criterion on which to base jurisdiction in Switzerland with regard to the law of persons and in certain areas of family law (and, to a lesser extent, the law of obligations), it did not constitute, in itself and in every case, a "sufficient connection" required by law.

154. In addition, the Government submitted that the question of which elements formed the constituent parts of a "case" also had a temporal dimension. In many cases the aim of legal action was to influence an existing factual situation and the question of which elements constituted the case related to the situation as it stood when the action was initiated. However, where an action concerned a set of circumstances which had ended before that action was initiated, the elements of the case had to be

examined as they had stood at the material time, prior to the proceedings. When an element of the case was altered after the decisive set of circumstances had ceased to exist, that change was not part of the "case" and could thus no longer create a sufficient connection to warrant a forum of necessity.

155. With regard to the naturalisation procedure, the Government noted that this procedure could not influence the outcome of the case, because it too had occurred "subsequent to the cause of action" (the Federal Supreme Court's judgment, point 3.5). Based on the approach adopted by the Federal Supreme Court, his naturalisation could not be treated differently from the other factors relied upon by the applicant, namely his residence in Switzerland, his refugee status and the fact that he was receiving welfare benefits. The Government further submitted that it was not to be assumed that the Federal Supreme Court had been aware that the naturalisation procedure was under way. In any event, no mention was made of that procedure in the appeal documents, which indicated, in the Government's view, that the applicant himself had not considered this detail as an argument for applying the forum of necessity.

156. In the light of the foregoing, the Government concluded that while the courts had admittedly applied the forum of necessity in very varied circumstances, none of them seemed comparable with the instant case. All of the acts with regard to whose after-effects the applicant, a Tunisian national at the material time, was seeking compensation for non-pecuniary damage, had allegedly been inflicted on him in Tunisia, by the Tunisian State and its officials, and were totally unconnected with Switzerland. In those circumstances, the Government considered that the refusal to accept the forum of necessity provided for in section 3 of the LDIP had been by no means arbitrary or manifestly unreasonable.

iii Third-party observations

(α) The United Kingdom

157. The United Kingdom considered that the Chamber had carried out a careful analysis of the international and comparative law with regard to international jurisdiction, and they were in full agreement with its conclusions. They endorsed the Chamber's opinion that none of the 26 States Parties studied in the course of the Court's survey provided for universal civil jurisdiction in respect of acts of torture (see Chamber judgment, § 49).

158. They also submitted that Article 14 of the Convention against Torture did not oblige the States Parties to establish universal jurisdiction. They shared the Chamber's view that the text of that provision was not clear on this point, and that the *travaux préparatoires* also failed to shed light on this question (see Chamber judgment, § 117).

159. The United Kingdom also considered that the Chamber judgment had correctly reflected the conclusions reached in the *Jones v. Saudi Arabia* case ([2006] UKHL 26), in which the House of Lords had held that Article 14 of the Convention against Torture did not provide for universal civil jurisdiction, which would operate as an exception to State immunities (see Chamber judgment, § 51).

160. Lastly, the third-party intervener considered that the proper administration of justice and the effectiveness of judicial decisions were legitimate aims that could guide the States in deciding whether to exercise universal civil jurisdiction. They further added that the applicant's argument concerning the rarity of cases of this nature in the national courts did nothing to diminish the practical difficulties caused by cases such as that of the applicant.

(β) Amnesty International and the International Commission of Jurists

161. Amnesty International and the International Commission of Jurists submitted that Article 14 of the Convention against Torture, interpreted first of all in the light of its plain meaning, did not provide for any geographical limitation to its application. Such an approach had moreover been confirmed by the Committee against Torture in its General Comment no. 3, referred to above, and by Juan E. Méndez, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, according to whom "[a]rticle 14 [was] not geographically limited on its face and [would] apply no matter where the torture [took] place" (Interim Report, 7 August 2015, UN Doc. A/70/303, § 56).

162. The third-party interveners considered that such an approach was corroborated by the States' practice. They noted that, of the 160 States Parties to the Convention against Torture, only the United States had placed a reservation on the geographical scope of Article 14.

163. The third-party interveners also submitted that the *travaux préparatoires* for Article 14 of the Convention against Torture argued in favour of universal jurisdiction. They indicated that a proposal by the Netherlands to insert the words "committed in any territory under its jurisdiction" after the word "torture" had been rejected. They concluded that the intention of the States which had negotiated the Convention had been not to limit the geographical scope of Article 14.

164. The third-party interveners further submitted that, according to a preliminary survey by Amnesty International on universal jurisdiction in 2012, no less than 147 out of the 193 member States of the United Nations had provided for universal jurisdiction over one or more international crimes (genocide, crimes against humanity, war crimes, torture, enforced disappearances and extrajudicial executions) (Universal Jurisdiction: a Preliminary Survey of Legislation around the World – 2012 Update (IOR 53/019/2012)).

165. Lastly, the third-party interveners referred to the European Commission's *amicus curiae* brief, submitted to the Supreme Court of the United States in the case of *Kiobel v. Royal Dutch Petroleum Co*., dated 13 June 2012. In it, the Commission held as follows (references omitted):

> "This application of the ATS [Alien Tort Statute] is consistent with the growing recognition in the international community that an effective remedy for repugnant crimes in violation of fundamental human rights includes, as an essential component, civil reparations to the victims ... This principle undisputedly applies to those States, including those within the European Union, that currently permit victims of crime to seek monetary compensation in *actions civiles* within criminal proceedings based on universal jurisdiction. Similarly, outside the European Union, numerous States around the world permit civil claims to be brought within criminal proceedings based on torts committed abroad."

(γ) Redress Trust and the OMCT

166. The Redress Trust and the OMCT noted that certain States Parties to the Convention recognised the forum of necessity. They stressed that this growing recognition was also reflected in the Guidelines on best practice for international civil litigation for human rights violations, adopted by the ILA in August 2012 and referred to above (see paragraph 66).

167. The third-party interveners argued that universal jurisdiction was a principle enshrined in international law, based on an international consensus that certain crimes, including torture, constituted crimes under international law and that the perpetrators of those crimes had to be held accountable, irrespective of where the crime had been committed and of the nationality of the perpetrator. They added that international law also recognised that victims of serious human rights violations had a right to an effective remedy and to reparation.

168. The third-party interveners noted that many States Parties to the Convention permitted victims of serious international crimes to seek monetary compensation by way of civil-party actions within criminal proceedings based on universal jurisdiction, and that at least ten of those States had initiated criminal proceedings on such a basis.

169. The third-party interveners concluded that the cases in which States Parties to the Convention had awarded compensation to victims of torture and of other serious human-rights violations on the basis of universal jurisdiction not only illustrated a trend towards recognising victims' rights on the basis of universal jurisdiction, but also showed that notwithstanding the practical difficulties, such proceedings were feasible and were often the sole method available for victims to access justice.

(δ) Citizens' Watch

170. Citizens' Watch reiterated that the Convention had to be read as a whole. In consequence, the third-party intervener considered that the

complaint lodged by the applicant, namely the right of effective access to a court, was intrinsically linked with the prohibition of torture enshrined in Article 3 of the Convention. In other words, the prohibition of torture, which was "part of the very essence of the Convention" (citing *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 158, ECHR 2016), should inform the Court's interpretation of Article 6 § 1 of the Convention in the present case.

171. Citizens' Watch also reiterated that Article 3 established a procedural obligation on States Parties to the Convention to carry out an effective investigation into credible allegations of ill-treatment within the meaning of that provision. Although Article 3 was generally understood as requiring criminal investigations, nothing precluded other types of judicial proceedings – including, for example, civil or disciplinary proceedings against those individuals who were allegedly implicated in torture – from being taken into account.

172. As to other sources of international law, Citizens' Watch did not consider that Article 14 of the Convention against Torture required States Parties to establish universal civil jurisdiction. However, it considered that victims of torture should be provided with access to court where there existed a tangible link with the forum State, such as residence or the presence of the party to the prospective proceedings, or the presence of the potential defendant's assets.

iv The Court's assessment

173. With regard to the proportionality of the restriction on the right of access to a court, the Court reiterates that the State enjoys a certain margin of appreciation in regulating this right (see paragraph 114 above). In cases such as the present one, the scope of this margin depends, *inter alia*, on the relevant international law in this area. It is therefore necessary to examine this point before considering the application of section 3 of the LDIP in the present case.

174. In this connection, the Court reiterates that the provisions of the Convention cannot be interpreted and applied in a vacuum. Despite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties of 23 May 1969 ("the Vienna Convention"). Thus the Court has never considered the provisions of the Convention to be the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, account should be taken, as indicated in Article 31 § 3 (c) of the Vienna Convention, 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 (see, for example, *Golder,* cited above, § 29; *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 131,

ECHR 2010; *Nada v. Switzerland* [GC], no. 10593/08, § 169, ECHR 2012; and *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 138, ECHR 2016).

175. Moreover, in cases involving issues that are subject to constant developments in the Council of Europe member States, the Court may examine the situation in other member States in respect of the issues at stake in a given case in order to assess whether there exists a "European consensus" or at least a certain trend among the member States (see, *mutatis mutandis*, *Bayatyan v. Armenia* [GC], no. 23459/03, § 122, ECHR 2011; *Hämäläinen v. Finland* [GC], no. 37359/09, §§ 72-75, ECHR 2014; and *Magyar Helsinki Bizottság,* cited above, § 138).

(α) Relevant international law and the resulting margin of appreciation in the present case

176. Like the Chamber, the Court discerns two concepts of international law that are relevant for the present case: the forum of necessity and universal jurisdiction. Although the applicant submitted before the Grand Chamber that he was not relying on universal jurisdiction, the Grand Chamber considers that, in substance, his arguments come very close to such an approach. However, before assessing the impact of these two concepts in the present case, it is appropriate to differentiate between them.

177. "Jurisdiction" is the power of an entity or an institution to rule on a question of law arising in a particular case in the form of a disagreement or a dispute. In private international law, the universal nature of jurisdiction refers to an absence of the required connection between the jurisdiction applied to and the "case" or impugned situation.

178. The Court considers that, unlike in civil matters, universal jurisdiction is relatively widely accepted by the States with regard to criminal matters, a situation which is reflected in the fact that Article 5 § 2 of the Convention against Torture clearly provides for universal jurisdiction in criminal matters, in contrast to Article 14, which is more ambiguous with regard to its geographical scope (see paragraphs 45 et seq. above).

179. In the concept's absolute form, universal jurisdiction does not depend on any connecting factor *ratione personae* determining the persons subject to the court exercising such jurisdiction (Report by Andreas Bucher, cited above, § 181). Nor does it depend on a connecting factor *ratione loci*, requiring that this jurisdiction be exercised only in the presence of certain ties – geographical or otherwise related to place – with the jurisdiction applied to in a specific case (ibid.).

180. In relation specifically to this last element, namely the lack of a tie with the jurisdiction in question, universal jurisdiction, in its absolute form, differs from the concept of the forum of necessity. "Forum of necessity" refers to the exceptional (or residual) 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.

181. In view of these considerations, the Court will now examine whether the Swiss authorities were legally bound to open their courts to the applicant, by virtue either of universal civil jurisdiction for torture, or of the forum of necessity. The conclusions drawn from that assessment will serve to determine the scope of the margin of appreciation enjoyed by those authorities in this case.

- Whether the Swiss authorities were obliged to open their courts to the applicant by virtue of universal civil jurisdiction for acts of torture

182. The Court reiterates that Article 38 of the Statute of the International Court of Justice sets out the formal sources of international law. With regard to the present case, it considers it appropriate 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. It is necessary to examine these two possibilities successively.

183. With regard to a possible international custom, it transpires from the comparative legal study conducted by the Court that, of the 39 European States examined, only the Netherlands recognise universal civil jurisdiction in respect of acts of torture; however, this was not enshrined in the case-law until after the Federal Supreme Court's judgment in the present case, delivered on 22 May 2007 (see the cases of *El-Hojouj v. Amer Derbas and Others* and *Akpan*, of 2012 and 2013 respectively (paragraph 69 above)). Furthermore, at least in the *Akpan* case, there existed a solid connecting link with the Netherlands, in that the entity against which proceedings were brought before the Netherlands courts was a subsidiary of a company established under the authority of that State. It is not therefore possible to speak of universal jurisdiction in an absolute sense in respect of that case.

184. Outside Europe, universal civil jurisdiction is recognised only in the United States, under two federal laws, and also in Canada, provided in the latter case that the claimant can demonstrate that the torture took place in the context of a terrorist act (see paragraph 73 above).

185. Moreover, according to the information available to the Court, several member States of the Council of Europe provide for the universal jurisdiction of their courts in criminal matters, and allow a claimant in such cases to apply, as a civil party, to join the proceedings brought before a criminal court (see paragraphs 79-83 above). The Court notes that the possibility of joining a compensation claim to ongoing criminal proceedings presents fewer practical difficulties, given that such a claim can rely on the advantages inherent in the criminal proceedings, such as the institution and pursuit of the proceedings, of its own motion, by the competent prosecuting authority, or the centralised establishment and assessment of the facts and

evidence as part of the investigation carried out by that authority. It is therefore natural and legitimate for the States to accept more easily such a procedure, namely joining the proceedings as a civil party, without however recognising universal jurisdiction in the context of autonomous civil proceedings. In any event, the Court points out that in the present case the applicant lodged a criminal complaint in 2001 and applied to join the proceedings as a civil party, but that the complaint was discontinued on the ground that A.K., the presumed perpetrator of the acts of torture, had left Swiss territory.

186. The Court further observes that the States referred to in the European Commission's *amicus curiae* brief in the above-cited *Kiobel* case (see paragraph 165 above), referred to by Amnesty International and the International Commission of Jurists, accept universal jurisdiction provided that the civil-party actions are brought within criminal proceedings. In the present case, however, the applicant lodged his civil action for damages in 2004, separately from any criminal proceedings. Moreover, Amnesty International's preliminary survey on universal jurisdiction worldwide, published in 2012, concerns primarily universal jurisdiction in the criminal sense of the term, and not in the civil sense, which is the only one in issue in the present case (see paragraph 164 above).

187. In the light of these considerations, it has to be concluded that those States which recognise universal civil jurisdiction – operating autonomously in respect of acts of torture – are currently the exception. Although the States' practice is evolving, the prevalence of universal civil jurisdiction is 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 the applicant's action.

188. The Court considers that, as it currently stands, international treaty law also fails to recognise universal civil jurisdiction for acts of torture, obliging the States to make available, where no other connection with the forum is present, civil remedies in respect of acts of torture perpetrated outside the State territory by the officials of a foreign State.

189. Admittedly, the Committee against Torture has advocated, especially in General Comment no. 3 (2012), an extensive interpretation of Article 14 of the Convention against Torture, which provides that each State Party must ensure in its legal system that the victim of an act of torture is entitled to obtain redress and to enjoy an enforceable right to fair and adequate compensation (see paragraphs 52-53 above). It has encouraged the States to offer such a remedy also in situations in which the act of torture was perpetrated outside the State's territory, including, it seems, by officials of a foreign State (ibid.).

190. The Court notes, however, that the Committee against Torture seems more reserved on this question in its examination of individual communications (see, in particular, the relevant cases referred to in

paragraphs 54-55 above). In any event, so far as the Court is aware, the Committee has never found a violation of the Convention against Torture by a State Party on the ground that it failed to recognise universal civil jurisdiction in its domestic legal order. In any case, the applicant does not allege this.

191. As to the other arguments advanced by Amnesty International and the International Commission of Jurists on the basis of Article 14 of the Convention against Torture (see paragraphs 161-64 above), these are not accepted by the Court, for the following reasons. With regard firstly to the text of this provision, it must be observed that Article 14, which enshrines in a general manner the right of victims of torture to obtain redress, is silent on how this right is to be implemented effectively and on the geographical scope of the States Parties' obligations to that end. It cannot therefore be claimed that the text of Article 14 amounts, in itself, to an argument in favour of universal civil jurisdiction. Indeed, this was already the Chamber's view (see Chamber judgment, § 117).

192. With regard to the *travaux préparatoires*, the Court notes firstly that, in accordance with Article 32 of the Vienna Convention, these are only a "supplementary means" of interpretation of treaties. It is thus necessary to take them into account on a subsidiary basis and with a certain restraint when interpreting the terms of a treaty (see, to similar effect, the prudence expressed by the ICJ in the *Case of Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility* (judgment, *ICJ Reports* 1995, § 41).[1] The Court further points out that the Chamber concluded that no concrete element could be derived from the *travaux préparatoires* for the Convention against Torture with regard to the geographical scope of Article 14 (see Chamber judgment, § 117). Having studied the matter itself, the Grand Chamber shares this opinion. Admittedly, the proposal by the Netherlands to include the words "committed in any territory under its jurisdiction" had disappeared when the Convention was adopted. However, the reasons for this omission remain unknown (see Manfred Nowak/Elizabeth McArthur, *op.cit*., paragraph 49 above). In those circumstances, it is difficult to attach decisive importance to it. It cannot therefore be concluded from the *travaux préparatoires* that the authors of the Convention against Torture intended to accept universal jurisdiction in the framework of Article 14.

[1] The ICJ held, in particular, that the travaux préparatoires of the Doha Minutes were "to be used with caution in the present case, on account of their fragmentary nature" and that they appeared "in the absence of any document relating the progress of the negotiations … to be confined to two draft texts submitted by Saudi Arabia and Oman successively and the amendments made to the latter" (§ 41); see also the ICJ's position in the Case *concerning the Legality of the Use of Force (Serbia and Montenegro v. Belgium*), preliminary objections, judgment, *ICJ Reports* 2004, particularly § 113, in which the ICJ notes the "somewhat cursory" and therefore "less illuminating" nature of the *travaux préparatoires* with regard to Article 35 of its own Statute.

193. In this context, Amnesty International and the International Commission of Jurists have also argued that the absence of reservations to Article 14, with the exception of one reservation by the United States, is an indication of the States Parties' acceptance of universal civil jurisdiction. The Court does not share this view either. It cannot be ruled out that, faced with a text which makes no mention of this scenario and with *travaux préparatoires* which are almost silent on the subject, the States simply did not envisage the possibility of universal jurisdiction and, accordingly, did not feel obliged to enter reservations to Article 14 in order to exclude such jurisdiction from its scope.

194. Admittedly, certain non-legally binding documents have recently been adopted, recommending that the States guarantee effective access to justice for victims of torture. According to these documents, if the State in which an act of torture has taken place does not provide redress to the victim, the courts of third States are encouraged to find that they have jurisdiction in order to prevent a denial of justice, for example by accepting universal jurisdiction.

195. These texts include, in particular, the Resolution adopted by the IIL in Tallinn on 30 August 2015 (see paragraph 62 above). The Court notes, however, that, although the "right to appropriate and effective reparation" for victims of international crimes and their "right to an effective access to justice to claim reparation" are firmly asserted in Article 1 §§ 1 and 2 of the Resolution, its wording is more hesitant on the question of whether there exists a general obligation on States' courts to exercise their jurisdiction to examine victims' reparation claims in cases where no other State has stronger connections with the dispute. Indeed, the use of the conditional tense in Article 2 § 1 seems to suggest that this is a matter of *lex ferenda* rather than of positive law.

196. In addition, in his report in support of the Resolution, the IIL's rapporteur expressed the view that Article 14 of the Convention against Torture does not impose universal civil jurisdiction in the area of international crimes (see §§ 65 and 66 of the report, quoted in paragraph 63 above). Equally, academic opinion does not appear to be unanimous on whether Article 14 of the Convention against Torture must have extra-territorial applicability, even where the act of torture was perpetrated by officials of a foreign State (see paragraphs 56-58 above).

197. Lastly, in so far as the applicant, as a recognised refugee in Switzerland, relies on Article 16 of the United Nations Convention relating to the Status of Refugees (see paragraph 60 above), the Court notes that before the Federal Supreme Court he simply referred, in very general terms, to this provision, without explaining for what reason and in what respect it could have been relevant to the complaint forming the subject of the present application. The Court observes, however, that the text of Article 16 refers in general terms to the right of refugees to have access to a court, but does

not guarantee as such the right to bring proceedings against a foreign State or one of its officials for acts of torture committed abroad. In consequence, even supposing that the applicant had duly raised this complaint before the domestic courts, he cannot extract an additional argument from it in support of his application.

198. In view of the above, the Court concludes that international law did not oblige the Swiss authorities to open their courts to the applicant pursuant to universal civil jurisdiction for acts of torture.

- Whether the Swiss authorities were obliged to open their courts to the applicant by virtue of the forum of necessity

199. The Court observes that, before both the Chamber and the Grand Chamber, the applicant has essentially based his complaint on the forum of necessity within the meaning of section 3 of the LDIP and criticises the allegedly overly restrictive manner in which the Federal Supreme Court interpreted that provision in the judgment forming the subject of the present application. At this stage, the Court must therefore determine whether international law imposed an obligation on the Swiss authorities to make a forum of necessity available to the applicant so that the compensation claim in respect of the alleged damage sustained as a result of human-rights violations could be examined. It will consider, in succession, comparative law, with a view to discerning the possible existence of an international custom, then international treaty law.

200. Firstly, it transpires from the study conducted by the Grand Chamber that, of the 40 States examined, including Switzerland, 28 European States do not recognise the forum of necessity. It exists in only 12 of the States studied, including Switzerland (see paragraph 84 above). In addition, it has only recently been recognised and is subject to strict conditions in Canada. In contrast, the countries with an Anglo-American tradition do not recognise the concept. On the contrary, they apply the principle of *forum non conveniens*, which enables a court to refuse to examine a case if a court of another State has a more appropriate connection (see paragraph 90 above).

201. In view of the above considerations and the fact that the concept of a forum of necessity is not generally accepted by the States, it cannot be concluded that there exists an international custom rule enshrining the concept of forum of necessity.

202. The Court further notes that there is also no international treaty obligation obliging the States to provide for a forum of necessity.

- The scope of the margin of appreciation in the present case

203. In the light of the foregoing considerations, the Court concludes that international law did not impose an obligation on the Swiss authorities to open their courts with a view to ruling on the merits of the applicant's

compensation claim, on the basis of either universal civil jurisdiction in respect of acts of torture, or forum of necessity. It follows that the Swiss authorities enjoyed a wide margin of appreciation in this area.

204. It must therefore be ascertained at this stage whether that margin of appreciation was overstepped in the present case.

(β) Whether the Swiss authorities exceeded their margin of appreciation in the present case

205. In order to determine whether the Swiss authorities exceeded their margin of appreciation in the present case, the Court must examine, in turn, section 3 of the LDIP and the relevant decisions of the Swiss courts, particularly the Federal Supreme Court's judgment of 22 May 2007.

206. With regard to section 3 of the LDIP, the Court notes at the outset that the mere fact of introducing a forum of necessity, designed as it is to widen the jurisdiction of the national courts rather than reduce it, clearly cannot constitute overstepping by the legislature of its margin of appreciation.

207. As to the criteria laid down by the Swiss legislature for the implementation of section 3 of the LDIP in a given case, the comparative-law study referred to above indicates that in all the States which do recognise the forum of necessity, it is 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 assumes jurisdiction (see paragraphs 88-89 above). The same two conditions are also found in the European Union law referred to above (see paragraphs 91-93). With regard to the connecting link, the Court observes that the relevant texts do not lay down the criteria to be used, leaving this task to the domestic courts. In this respect, therefore, section 3 of the LDIP corresponds fully to the notions prevailing in this area.

208. The Court concludes that by introducing a forum of necessity with the criteria laid down in section 3 of the LDIP, the Swiss legislature did not exceed its margin of appreciation.

209. Turning now to the margin of appreciation of the domestic courts, the Court reiterates that in those States which recognise the forum of necessity, the courts enjoy considerable discretion in defining the connecting links and applying them on a case-by-case basis. In so doing the domestic courts most frequently take account of the nature of the dispute or the identity of the parties (see paragraph 89 above). It is on the basis of these elements that the Court will examine whether the Federal Supreme Court exceeded its margin of appreciation in the present case when interpreting section 3 of the LDIP.

210. In this connection, it should be reiterated at the outset that it is in the first place for the national authorities, and notably the courts, to interpret and apply domestic law (see paragraph 116 above).

211. The applicant criticises, first and foremost, the fact that the Federal Supreme Court considered that it had to have regard to matters as they stood at the material time, namely in 1992, in assessing whether it had jurisdiction. He considers that the Federal Supreme Court was wrong in failing to take account of the ties subsequently formed by him with Switzerland.

212. On this point, the Court notes that, according to the Federal Supreme Court, the term "case" (French "*cause*") must be understood in the restricted sense of "set of facts". In other words, it is the alleged facts – and not the person of the claimant which must have a sufficient connection with Switzerland (see the judgment of 22 May 2007, point 3.5, paragraph 30 above). With regard to the case and the application of section 3 of the LDIP, the Government also argued that the appropriateness of creating a general forum of necessity, accessible also to foreigners who had no connection with Switzerland, had been discussed when drafting this section, but it had been decided not to pursue that option.

213. According to the Government, the question of which elements form the constituent parts of a "case" also had a temporal dimension (see paragraph 154 above). Where an action concerned a set of circumstances which had ended before that action was initiated, the elements of the case must be examined as they stood at the material time, before the proceedings had begun. In consequence, when an element of the case was altered after the decisive set of circumstances ceased to exist, that change was not part of the "case" and could thus no longer create a sufficient connection to warrant a forum of necessity.

214. Having regard to the wide margin of appreciation granted to the national courts in this area and in the light of the relevant practice of the Swiss courts as described above (see paragraphs 40-44), the Court perceives no arbitrary or manifestly unreasonable elements in the Federal Supreme Court's interpretation of section 3 of the LDIP in the present case. Although certain court rulings seem to indicate that the decisive date for application of section 3 of the LDIP is the point at which the action was lodged, these do not, in the Court's view, enable any decisive conclusions to be drawn. The domestic case-law on this question is relatively limited and concerns very diverse cases, including continuing situations that cannot be compared with the applicant's case.

215. Lastly, in so far as the applicant relies on the judgment in *Arlewin v. Sweden* (cited above) in support of his argument that the refusal to examine his action was disproportionate (see paragraph 142 above), the Court considers that there were several clear and strong connecting links between the claim brought by the applicant in the *Arlewin* case and Sweden.

It concerned defamation proceedings brought in respect of a television programme, the content of which focused exclusively on Sweden and which adversely affected the reputation of Swedish nationals who were resident in Sweden. The question of a possible forum of necessity did not therefore arise. Accordingly, the Court considers that the applicant, whose action for damages involved no connection with Switzerland at the time of the relevant events, cannot usefully rely on that case.

216. In the light of the above considerations, the Court perceives no arbitrary or manifestly unreasonable elements (see paragraph 116 above) in the Federal Supreme Court's interpretation of section 3 of the LDIP. Moreover, it discerns no elements indicating that the Federal Supreme Court exceeded its margin of appreciation in another manner. Accordingly, the restrictions on the applicant's right of access to a court were not disproportionate to the legitimate aims pursued.

(γ) General conclusion

217. Having regard to the foregoing, the Court considers that the Swiss courts' refusal, in application of section 3 of the LDIP, to accept jurisdiction to examine the applicant's action seeking redress for the acts of torture to which he was allegedly subjected pursued legitimate aims and was not disproportionate to them. Accordingly, there has been no violation of the right of access to a court within the meaning of Article 6 of the Convention.

218. That being so, it should be reiterated that this conclusion does 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 are encouraged to give effect to this right by endowing their courts with jurisdiction to examine such claims for compensation, including where they are based on facts which occurred outside their geographical frontiers. In this respect, the efforts by States to make access to a court as effective as possible for those seeking compensation for acts of torture are commendable.

219. However, it does not seem unreasonable for a State which establishes 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 and without exceeding the margin of appreciation afforded to the State under the Convention.

220. Nonetheless, given the dynamic nature of this area, the Court does not rule out the possibility of developments in the future. Accordingly, and although it concludes that there has been no violation of Article 6 § 1 in the present case, the Court invites 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, while assessing carefully any claim of this nature so as to identify, where

appropriate, the elements which would oblige their courts to assume jurisdiction to examine it.

FOR THESE REASONS, THE COURT

1. *Holds*, by sixteen votes to one, that Article 6 § 1 is applicable in the present case;

2. *Holds*, by fifteen votes to two, that there has been no violation of Article 6 § 1 of the Convention.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 March 2018.

Johan Callewaert	Guido Raimondi
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Judge Wojtyczek;
(b) dissenting opinion of Judge Dedov;
(c) dissenting opinion of Judge Serghides.

G.R.
J.C.

PARTLY DISSENTING OPINION OF JUDGE WOJTYCZEK

(Translation)

1. With all due respect to my colleagues, I do not share their view that the present application is admissible. In my opinion, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms is inapplicable to the present case, since the dispute brought before the Swiss courts falls outside the scope of the Swiss Confederation's jurisdiction. I consider that the approach adopted by the majority is methodologically erroneous.

2. In order to ascertain whether Article 6 is applicable in the present case, it is first necessary to explore the question of the State's international jurisdiction. Without entering into the applicable international law in detail, it is enough to point out very briefly that a State may exercise its public authority within its own jurisdiction, delimited by international law. Legal scholarship explains:

> "Inside its territory, the State conducts itself normally as a sovereign power and the entirety of its jurisdiction is traditionally designated by the expression 'territorial sovereignty' or 'principal territorial jurisdiction'.
>
> Outside its territory, the jurisdiction accorded to a State by international law is based on various titles." (P. Dailler, M. Forteau, A. Pellet, *Droit international public*, Paris, LGDJ, 2009, p. 513)

States may rule on cases that are extra-territorial in nature, *inter alia* on the basis of personal jurisdiction or universal jurisdiction. In general, States have jurisdiction to decide on certain subject-matters or rule in certain cases if there exists a connection between those areas or cases and the State in question, and if that connection is recognised as relevant under the rules of international law. Legal scholarship summarises this question as follows:

> "... a principle of substantial and genuine connection between the subject-matter of jurisdiction, and the territorial base and reasonable interests of the jurisdiction sought to be exercised, should be observed." (I. Brownlie, Principles of Public International Law, Oxford, Oxford University Press, 2008, p. 299)

The question of whether and under what circumstances States may exercise their authority beyond those jurisdictional titles that are clearly recognised under international law is a matter of dispute in legal scholarship. Certain commentators emphasise the freedom enjoyed by States, while others underline the limitations on their jurisdiction. According to C. Ryngaert:

> "The State with the strongest nexus to a situation is entitled to exercise jurisdiction, yet if it fails to adequately do so another State with a weaker nexus (and in the case of violations of *jus cogens* without a nexus) may step up, provided that its exercise of jurisdiction serves the global interest." (*Jurisdiction in International Law,* Oxford, Oxford University Press, 2015, p. 231)

According to P. Dailler, M. Forteau and A. Pellet:

> "the State does not enjoy a freedom of unlimited international action and can act only under a title of jurisdiction defined by public international law" (op. cit., p. 562).

Moreover, legal scholarship has noted the evolution of rules of international law delimiting States' jurisdiction (see, in particular, A. Mills, Rethinking Jurisdiction in International Law, *British Yearbook of International Law*, vol. 84 (2014), no. 1, pp. 187-239). However, even supposing that international law permitted States to exercise their public authority extra-territorially where this is not explicitly prohibited by a rule of international law, one cannot equate the scope of the Convention with the sphere of action delimited by the principle that everything that is not explicitly prohibited is permitted (a principle that is itself not uncontroversial – see, for example, R. Kolb, "La règle résiduelle de liberté en droit international public ("Tout ce qui n'est pas interdit est permis"): aspects theoretical", *Revue belge de droit international*, vol. 34 (2001), no. 1, pp. 100-127).

I would note in passing that the majority sets out the following definition in paragraph 177 of the present judgment:

> "'Jurisdiction' is the power of an entity or an institution to rule on a question of law arising in a particular case in the form of a disagreement or a dispute."

This definition departs from linguistic practice. It limits jurisdiction to those questions of law which arise in disputes, leaving outside its scope the establishment of the facts and the authority to rule on cases that do not have the nature of a dispute.

3. The Convention defines its scope in Article 1. This provision reads:

> Obligation to respect human rights
>
> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

The scope of the Convention is defined here by the terms "*juridiction*" in the French version and "jurisdiction" in the English. The starting point for establishing this scope is the concept of jurisdiction in international law (see, for example, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 312, ECHR 2004-VII). In principle, the Convention applies within the area of jurisdiction of each High Contracting Party, defined in accordance with the applicable rules of international law. However the scope of the Convention is not always identical to the area of jurisdiction of the States Parties, jurisdiction in the sense of what is "legally possible". On the one hand, if a State cannot effectively exercise full territorial jurisdiction over part of its territory, the Convention applies only to the extent that the State can effectively exercise its jurisdiction (see *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310; *Cyprus v. Turkey* [GC], no. 25781/94, §§ 76-80, ECHR 2001-IV; and *Ilaşcu*, cited

above, § 312). On the other hand, if a State exercises its authority beyond its international area of jurisdiction, the actions undertaken fall within the scope of the Convention and must comply with the rights guaranteed by that treaty (compare with *Ilaşcu*, cited above, § 314, and *Öcalan v. Turkey* [GC], no. 46221/99, § 91, ECHR 2005-IV). Furthermore, the States have jurisdiction to determine whether or not the Convention applies to the territories for whose international relations they are responsible. Specific issues arise in the event of a transfer of competences to international organisations (see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI).

Generally speaking, the phrase "everyone within their jurisdiction" indicates any person who is under a State's public authority. Jurisdiction within the meaning of Article 1 corresponds to the sphere in which the State effectively exercises its authority (even without a title in international law) or, at the least, can exercise its authority effectively on the basis of a title that is clearly recognised under international law. While the State is bound to exercise its jurisdiction in such a way as to render effective the rights guaranteed by the Convention, the latter document does not oblige a State to exercise its authority beyond the titles that are clearly recognised under international law, even if such an action does not infringe a rule of international law. In contrast, if a State decides to take action or rule on cases beyond these jurisdictional titles, it engages its responsibility for any violation of the rights secured by the Convention.

4. In order to establish whether a case falls within the scope of the Convention as defined by Article 1, it is necessary, firstly, to ascertain whether the State has jurisdiction to rule on that case under those rules of international law which determine the scope of its jurisdiction.

In this context, it should be noted that one and the same person may fall within the jurisdiction of a State in respect of certain matters, and fall within the jurisdiction of other States in respect of other matters. In these circumstances, the expression "to everyone within their jurisdiction" does not extend to all of a person's affairs, but only to those of that person's affairs which fall within the State Party's effective jurisdiction or public authority. In other words, the High Contracting Parties must secure the rights and freedoms under Section 1 of this Convention "to everyone within their jurisdiction for those matters falling within their jurisdiction".

5. In the present case, the majority seeks to ascertain "whether the Swiss authorities were legally bound to open their courts to the applicant, by virtue either of universal civil jurisdiction for torture, or of the forum of necessity" (see paragraph 181). I consider this approach to be mistaken from a methodological perspective.

Firstly, it should be noted that the forum of necessity is not a jurisdictional title under international law, but a tool used in private international law to enable a State to rule on cases that are beyond its

international jurisdiction if they fall, *de facto* or *de jure*, outside the jurisdiction of other States. It is considered as a practical tool which makes it possible to safeguard private interests in the event of "negative conflicts of jurisdiction" between States. In principle, it operates outside the scope of the Convention.

Secondly, the question of whether the Swiss authorities were legally bound to open their courts to the applicant by virtue of universal civil jurisdiction for torture is based on a misunderstanding and should be refined. Two issues should be distinguished here: the question is whether international law recognises universal jurisdiction in respect of cases concerning compensation for acts of torture and, if so, whether the use of this jurisdiction is optional (discretionary) or compulsory under the applicable rules of international law. A situation may be imagined in which general international law accepts optional universal jurisdiction but where the Convention itself makes the use of this jurisdiction compulsory.

The majority finds as follows (in paragraph 198):

> "In view of the above, the Court concludes that international law did not oblige the Swiss authorities to open their courts to the applicant pursuant to universal civil jurisdiction for acts of torture."

This conclusion is fully justified, but it requires further explanation. It immediately raises the following question: if international law did not oblige the Swiss authorities to open their courts to the applicant pursuant to universal civil jurisdiction for acts of torture, does the Convention not oblige those authorities to open their courts to the applicant pursuant to universal civil jurisdiction for acts of torture?

In my opinion, the arguments put forward in the reasoning of the present judgment justify the conclusion that, as international law currently stands, it is not established that universal jurisdiction extends to civil disputes in respect of compensation for acts of torture outside the context of criminal proceedings. International law does not recognise universal jurisdiction with sufficient clarity for it to serve as a title for ruling in such situations.

It should be added here that there are important differences between universal criminal jurisdiction and universal civil jurisdiction. The exercise of universal jurisdiction in criminal matters is essentially justified by the presence of the accused person in the territory of a third State. That State can thus effectively prosecute the individual in question and, where appropriate, enforce the sentence imposed. A State is not obliged to prosecute persons suspected of acts of torture committed outside its territory where no other link exists between the State and those acts if those persons are not present within its territory. It is the suspected person's physical presence which in practice defines and limits the use of universal jurisdiction in criminal matters. The use of universal civil jurisdiction is, in principle, triggered by the claimant. The question of universal civil jurisdiction arises if the respondent is not resident in the territory of the

State in which the action is brought. In such a situation, in the absence of assets that can be seized for the purpose of enforcement in the territory of the State concerned, the civil action may result in failure to recover the sums claimed. The recognition of universal civil jurisdiction would enable the claimant to choose the forum State freely.

The dispute in question in the present case falls within Tunisia's territorial jurisdiction. At the same time, it does not fall within any jurisdictional title of the respondent State that is recognised under international law, and remains outside that State's area of jurisdiction. In consequence, it does not fall within the jurisdiction of the Swiss Confederation within the meaning of Article 1 of the Convention. As such, Article 6 is not applicable in the present case.

6. It should be noted here that the present case concerns reparation for torture. According to the Court's case-law, the prohibition of torture has achieved the status of a peremptory norm in international law (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 61, ECHR 2001-XI). Certain commentators emphasise the need to implement the *jus cogens* rules of international law in order to justify the exercise of public authority with regard to those cases which have no connection with the State in question and, in particular, no link to the State's jurisdiction with regard to civil damages (see, for example, C. Ryngaert, *op. cit.*). There is no doubt that the need to implement the *jus cogens* rules of international law is a very strong argument *de lege ferenda* for recognising universal civil jurisdiction with regard to the violation of such rules. However, so long as this jurisdiction has not been recognised with sufficient clarity, *de lege lata* the *jus congens* nature of a norm is not in itself a basis for exercising public authority extra-territorially, even for the purposes of its implementation.

7. The majority expresses the following view:

> "108. The Court also considers that the applicant can lay claim to a right which is, at least on arguable grounds, recognised under Swiss law ...
>
> 109. As to whether the States Parties to that instrument are obliged to guarantee this right even for acts of torture that were inflicted outside their territories by foreign officials, as the applicant submits, the Court considers that this question goes to the substance of the present case, which will be examined below (see paragraphs 112 et seq.). Nevertheless, it is not decisive for the applicability of Article 6.
>
> 110. The Court concludes from this that the right of victims of acts of torture to obtain compensation is today recognised in Swiss law. Moreover, it is not in dispute between the parties that this right is a civil one.
>
> 111. In view of the foregoing, Article 6 § 1 of the Convention is applicable in the present case."

In order to establish the existence of a right, it is necessary to identify not only its content, but also the right-holder and the right-obligors. Swiss law recognises the right of victims of acts of torture committed by Swiss officials to obtain compensation from the Swiss authorities or officials. The

holders of this right are the *victims of acts of torture committed by the Swiss officials* and as such they come within the jurisdiction of the Swiss Confederation. The right-obligors are the bodies of the Swiss Confederation and the agents of that State. The content of the right concerns the acts of torture committed *by Swiss officials*.

It has not been established that Swiss law recognises *the right of victims of acts of torture committed by foreign officials to obtain compensation* as a right which exists in the Swiss legal order. This second right has different right-holders, namely *the victims of acts of torture committed by the officials of another State*, that is, by persons who come under the jurisdiction of another State. It has a different content, since it concerns acts of torture committed by foreign officials. The national authorities' role would consist not in providing redress for the prejudice, but in ruling on the obligation on the foreign authorities or officials to provide redress for the prejudice and, where appropriate, to enforce any judgment handed down.

The majority (in paragraph 107) expresses the following opinion:

> "The fact that the respondent State does not actually contest the existence of a right of victims of torture to obtain compensation, but rather its extra-territorial application, is immaterial, given that the dispute may relate not only to the actual existence of a right but also to its scope and the manner of its exercise (see *Benthem v. the Netherlands*, 23 October 1985, § 32, Series A no. 97)."

This approach is based on confusion between two elements which must be distinguished: the main dispute and the subsidiary dispute. The main dispute concerns compensation for acts of torture committed in the Tunisian Republic by officials of that State. The applicant's claim is based on Tunisian civil law and was brought against Tunisia and a national of that country. This case does not have sufficient strong ties to Switzerland and does not fall within any of the jurisdictional titles that are recognised under international law.

The second or subsidiary dispute concerns the Swiss courts' jurisdiction to examine the main dispute. This dispute falls within Switzerland's jurisdiction and is fully governed by Swiss law. On this point, the applicant had full access to the Swiss courts and obtained a judicial decision on the merits of this second dispute.

The majority states that Article 6 is "applicable to the facts of the case". But to what facts do they refer? Those of the first dispute or of the second dispute as identified above? Article 6 is not applicable to the first dispute. It is applicable to the second, but access to a court which would deliberate on the merits was fully upheld. In consequence, the part of the application concerning this second dispute is manifestly ill-founded.

To find that Article 6 is applicable indicates that a dispute falls within the respondent State's area of judicial jurisdiction. If Article 6 is applicable, the State must justify restrictions imposed on the rights protected by this provision. To find that Article 6 is applicable without establishing valid

jurisdictional titles and without identifying specific criteria for defining this provision's scope amounts in practice to extending this article's sphere of applicability to any dispute which concerns a right that is similar to the right recognised by the Convention but which is asserted in respect of another State, on each occasion that a party wishes to bring that dispute before the courts of a State Party.

8. In paragraphs 112 to 116, the Court sets out a number of principles governing the right of access to a court. The majority states, *inter alia*:

> "114. However, the right of access to a court is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, which enjoys a certain margin of appreciation in this regard ... . That being stated, those limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired...
>
> 115. In addition, such limitations will not be compatible with Article 6 § 1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved ..."

This statement of the applicable principles commits the Court. It must verify whether or not the principles described have been complied with in the circumstances of the case. The following section, which begins in paragraph 117, is entitled "Application of these principles in the present case". However, the principles identified are applied selectively. Compliance with certain of the principles is not examined. In particular, the majority fails to assess whether or not the restrictions imposed impair the very essence of the right to a court. This principle is set out solemnly, but does not seem to be taken very seriously.

The concept of the substance of a fundamental right comes from German law and is the subject of conflicting legal theory. In particular, legal scholarship discusses whether this concept ought to be attached to an individual legal position or to the objective guarantee of a legal institution and whether it should be understood as absolute or relative guarantee (see, for example, A. Leisner-Egensperger, *Wesensgehaltgarantie* in *Handbuch der Grundrechte in Deutschland und Europa*, Band III *Grundrechte in Deutschland. Allgemeine Lehren II*, D. Merten, H.-J. Papier (dir.), Heidelberg, C.F. Muller, 2009). It should be noted that the wording used by the majority, taken in its literal sense, is categorical. In the absence of other indications in the reasoning of the judgment, it suggests *prima facie* that it concerns the individual legal position of each right-holder and that it establishes an insuperable threshold, or the minimum that it is essential to guarantee to each individual. It might be thought that if the majority had chosen a different meaning it would have used a different expression or at least explained the meaning of the wording used.

In those circumstances, the judgment may appear to be based on a contradiction. On the one hand, the majority declares Article 6 applicable to

the facts of the case, which means that the respondent State cannot restrict the applicant's access to a court to such an extent that the very essence of the right is impaired. At the same time, Swiss law completely denied the applicant access [to the courts] with regard to his compensation claim. This denial goes to the very essence of the applicant's individual legal position with regard to access to a court. If one declares that Article 6 is applicable, it must be concluded that the imposed limitations restricted a person's access in such a manner that it impaired the very essence of his subjective right to a court, considered as a subjective and individual guarantee. The imposed limitation did not concern the substance of the right of access to a court, if this substance is understood as the minimal institutional guarantee of general access to the courts in a State's legal system or as a guarantee that is subjective but highly circumscribed. In any event, the requirement to comply with the concept of the substance of a right, formulated without further explanation and without being effectively applied, gives no clear indication to the High Contracting Parties as to the content of their obligations and does not promote legal certainty.

9. In my opinion, the majority has established a scope of application for Article 6 of the Convention which exceeds the scope of the Convention as defined in Article 1. Such an approach may give rise to practical problems both in relations between the States Parties and in relations with third countries.

DISSENTING OPINION OF JUDGE DEDOV

Some preliminary general remarks

To my regret, I cannot join the majority in finding that there has been no violation of Article 6 § 1, because the problem of individual access to a court within public international law remains open. This issue concerns the future of international relations, which is a form of political ideal, although its resolution can be found only on the basis of the values of a civilised society.

The present case is an extremely difficult one in which to reach a judicial decision. The majority preferred to maintain the current state of regulation and practice in this sphere, without evaluating its limitations and disadvantages. This applicant's situation does not correspond to a pressing social need, and thus calls for an adequate reaction from a reputable international institution such as the European Court of Human Rights, in order to promote social progress. The positivist approach does not therefore help in the present case. The Court preferred to conclude that neither universal jurisdiction nor the forum of necessity can be applicable, while a more relevant approach, in my view, would be to allow any legal instrument to serve as the basis for providing access to a court.

The judicial decision in the present case calls for a natural-law approach; it cannot be made without examining the nature of the social relations involved (between the applicant and the respondent State, between Tunis and the respondent State), in order to establish whether does in fact exist a pressing social need. This approach calls for both a critical attitude and objectivity.

I like Masha Hessen's idea about the similarity of mathematics and legal proceedings: both mathematician and judge are searching for truth on the basis of strict, clear and consistent evidence. As in the present case, where there is no pre-existing rule on a national level to decide whether universal jurisdiction should apply or not, the judges should apply principles. In his book "Taking Rights Seriously"[1] Ronald Dworkin proposed the same idea: in order to reach the right decision, judges are obligated to turn to principles in the absence of rules. Moreover, since judges have an obligation to protect rights, they must step in and make decisions to protect such rights. He believed that a correct decision accurately weighs up principles, protects natural rights, and is consistent with society's morals.

In the majority of cases it is enough to confirm the existing regularities (patterns), but in very rare and difficult cases creativity is necessary to discover new regularities. This is an extremely difficult task, because there are always multiple factors distracting from the main path and making it

1. Dworkin Ronald, "Taking Rights Seriously", Harvard University Press, 1978.

difficult to reach a right decision. In mathematics, such factors are called singularities. The analysis becomes erroneous if their value is either exaggerated, or, conversely, is not taken into account. In the present case the singularities may be found in the applicant's behaviour, in the reaction of the national authorities and, finally, in the current state of international law.

Singularities

The first singularity, for example, relates to the belated application to the authorities. The applicant's civil action could have been refused on the grounds that he had failed to submit it within a reasonable time. The applicant ought to have applied to the court for compensation immediately after or within a reasonable period of receiving asylum, especially if it was obvious from the outset that criminal proceedings before a Tunisian court could not be recognised as realistic. However, the applicant appealed to the Swiss authorities only after he learned that one of the alleged criminals was in a Swiss hospital. Equally, the civil action could have been refused if the applicant failed to prove that he was subjected to torture rather than to inhuman and degrading treatment. These singularities are not however significant, since the national authorities did not use those arguments.

There are more serious errors in the evaluation of the singularities. For example, the denial of access to justice was justified by the respondent State on account of the applicant's lack of connection with that State. The majority also confirmed that the applicant's action involved no connection with the respondent State, and that conclusion has been drawn without any analysis (see paragraph 212 of the judgment). However, it should be obvious to any objective observer that the connection existed "at the time of the relevant events". The connection did not appear at the moment of granting the applicant citizenship or even the right to remain (one could also consider that this connection has grown over time). The relationship began at the moment when the respondent State granted the applicant political asylum, in that his application was based on credible evidence of ill-treatment.

Does the very fact of granting asylum affect relations between the Swiss and Tunisian States? The Court never analysed this issue in the present judgment, merely referring vaguely to possible diplomatic difficulties if the national courts were to examine the civil action on the merits. From the perspective of the current state of international law, these potential difficulties have no effect, since Switzerland and Tunisia are both independent sovereign States which have no right to interfere unilaterally in the internal affairs of another country. Moreover, the Tunisian authorities did not react to the claim for damages brought against them by the applicant before a Swiss court.

However, this assessment does not reflect the reality of the situation adequately. The fact is that one State, as was necessary to provide international protection against persecution, has granted asylum to a citizen of another State. In the sense of the 1951 Refugee Convention, this must mean that another State has failed to realise the principle that human beings are to enjoy fundamental rights and freedoms without discrimination. Taking such consequences into account, the Refugee Convention stressed that all States, in recognising the social and humanitarian nature of the problem of refugees, will do everything within their powers to prevent this problem from becoming a cause of tension between the States.

Since the applicant provided reliable information about the inhuman and degrading treatment committed against him by agents of another State, the respondent State recognised the fact of violence against the applicant by Tunisia. This fact must inevitably have consequences in relations between those States. Of course, this need not necessarily lead to the termination of diplomatic relations, which would be an extreme measure. Legally speaking, it would be more accurate to state that the consequences (in this case, measures of an individual nature) should be adequate to the damage caused. But the applicant did not ask for more from the respondent State. It is noteworthy that the Refugee Convention, in Article 16, provides that a refugee shall enjoy the same treatment as a national in matters pertaining to access to the courts.

The international principle of non-interference in the internal affairs of other States is still very strong. But the application of this principle is subject to new circumstances (realities) that must be taken into account. These circumstances include: the accession by both countries to the Convention against Torture, and the assumption by both countries of an international obligation to create domestic remedies against torture under Article 14 of the above Convention. Unfortunately, the applicant was refused an opportunity to enjoy those remedies; thus, in finding no violation of the Convention, the present judgment attaches too much importance to the principle of non-interference, notwithstanding the circumstances of the case and two relevant international treaties.

The case-law

International relations are indeed going through a critical phase. International organisations intervened in the present case as third parties and international experts such as the Institute of International Law or the United Nations Committee against Torture promote appropriate and effective reparation for victims of international crimes from liable persons (see paragraphs 62, 63 and 161-72 of the judgment). In contrast, national courts refuse to apply universal jurisdiction against foreign States (see paragraphs 72, 73, 77 and 78 of the judgment), with a few exceptions

(see paragraphs 69, 71). But those exceptions are precious; they prove that the world order would not be destroyed by universal jurisdiction. This case was an opportunity for the Court to move in that direction.

However, the Court abstained from an examination of the question of possible immunities from jurisdiction, although there was a formal reason to intervene in this area, in that the Swiss Federal Supreme Court declined its jurisdiction *ratione loci* to examine the applicant's appeal (see paragraphs 98 and 99). Instead, the Court quoted the opinion of the International Court of Justice in the landmark (and very recent) case of *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, judgment, *ICJ Reports* 2012) of 2012. The Court was not in position to evaluate that case seriously in comparison with the present case, but the two cases are different: the ICJ case is more of a historical nature and does not concern such a grave crime against humanity as torture, which is specially and exclusively protected at the level of an international convention. In contrast, the present case is directed towards the future. It concerns the development of effective international measures to protect fundamental rights and freedoms within the framework of multilateral international treaties, not of bilateral relations.

The present case seems very similar to *Jones v. Ministry of Interior Al-Mamlaka Al-*Arabiya *AS Saudiya (the Kingdom of Saudi Arabia)* (also mentioned by the Court in paragraph 72 of the judgment), where the claimants pleaded particulars of the severe, systematic and injurious torture which they claimed to have suffered. The House of Lords considered the balance currently struck in international law "between the condemnation of torture as an international crime against humanity and the principle that states must treat each other as equals not to be subjected to each other's jurisdiction." They admitted the relaxation of the absolutist principle, described by Lord Atkin in *Compania Naviera Vascongado v Steamship "Cristina"* [1938] AC 485, 490, as "well established" and "beyond dispute", that "the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages." This aspect, however, was not analysed by the Law Lords, who preferred to choose a different line, with propositions such as "the foreign state's right to immunity cannot be circumvented by suing its servants or agents".

The problem is that the House of Lords did not refer to the Convention against Torture at all. They referred to Articles 1-14 of the United Nations Convention on Jurisdictional Immunities of States and their Property (the "Immunities Convention"), but merely to underline its similarity with the provisions of domestic law. Nonetheless, Article 7 of the above Convention, on "Express consent to exercise of jurisdiction", provides that "a State cannot invoke immunity from jurisdiction in a proceeding before a court of

another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case by international agreement". This Article, in conjunction with Article 14 of the Convention against Torture, could provide a legal basis for the jurisdiction of Swiss courts.

It should also be noted that Article 12 of the Immunities Convention excluded the "immunity" argument from proceedings relating to pecuniary compensation for death or injury caused by an act attributable to the State. Immunity cannot be invoked in such proceedings except in certain circumstances which narrow the application of this clause, but the whole idea is remarkable. Moreover, the impugned proceedings are included in one list along with other civil claims: commercial transactions, employment contracts, ownership, possession and use of property, intellectual and industrial property, corporate law and so on (see Part III of the Immunities Convention).

Effective remedy

The State should bear responsibility for any act of torture committed by State agents. Adequate financial compensation for the torture would be painful for the State. It could serve as a powerful stimulus to stop such practices. In contrast, if diplomatic relations are severed, the problem would not be solved and more individuals will seek asylum. Therefore, claims for compensation for damages for torture should become an effective remedy. The majority, however, preferred to pursue a different approach – to prove that the key provision of the Convention against Torture on this matter does not impose universal jurisdiction on national authorities.

Article 14 of the Convention against Torture provides that "each State Party shall ensure in its legal system that the victim of 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 my view, this article imposes obligations on both of the States concerned, since both Switzerland and Tunisia have ratified the Convention. It should be noted that this primarily concerns Tunisia. I believe that Switzerland could have acted in accordance with the requirements of international law had the applicant's claim in the present case been examined by the domestic courts. That is, both the applicant and the Swiss authorities had legitimate expectations that such a claim could not be rejected on immunity grounds by Tunisia.

It is strange to see how the Court, which usually considers its task to ensure the creation by States of effective measures to protect fundamental rights and freedoms as required by the Convention, does the opposite in the present case - measures do exist, but the Court, like the domestic authorities, does not want to make them effective.

There exists a group of cases where the respondent State made it impossible for people to benefit from certain entitlements, by failing for years to adopt the implementing regulations. Such a situation has been examined by the Court in terms of a hindrance to the effective exercise of the right protected by the Convention, and, in particular, by Article 1 of Protocol No. 1, or in terms of a failure to secure the implementation of that right. The Court usually notes that since the positive obligations arose through the enactment of a statute or an international agreement, the applicants had a legitimate expectation of exercising those rights in practice (see *Broniowski v. Poland* [GC], no. 31443/96, ECHR 2004-V; *Malysh and Others v. Russia*, no. 30280/03, 11 February 2010; and *Yuriy Lobanov v. Russia,* no. 15578/03, 2 December 2010). In the context of this case-law, those principles require the State to fulfil in good time, and in an appropriate and consistent manner, the legislative promises it had made in respect of certain entitlements.

The above-recognised principles have become a part of customary international law. Therefore, the Convention against Torture should be implemented in practice to address legitimate expectations on the part of victims that they will be able to obtain compensation from a respondent State. Article 14 of the Convention against Torture does not provide for any geographical or other jurisdictional limitations to its application. Its context, object and purpose are expressed in its 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". Needless to say, this idea is covered by Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which addresses the most serious violations against human dignity and integrity.

Again, as regards the extra-territorial scope of the Convention against Torture, its authoritative interpretation by the respective Committee provides that "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 State 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 the State parties to ensure that all victims of torture and ill-treatment are able to access remedy and obtain redress."

Positivism as a dark side of international law

I cannot find any morality and justice in international law which, on one hand, allows tyrants and dictators to enjoy one of the best banking and

medical care systems in the world and, on the other hand, refuses access to the courts for their victims. The majority chose to make a legal judgment, not a moral open-ended judgment, although the latter approach would be the most appropriate in the present case.

Positivists believe that the law's authority does not derive from morality, but from acceptance and recognition by officials (see H.L.A. Hart, "The Concept of Law", Clarendon Law Series, 1961). Positivism therefore separates law from morality. The same approach is pursued by the majority, who came to the conclusion that the national courts are not legally bound to assume universal jurisdiction. In general, this is the correct position, but the present case is a special one, and here such a position undermines the provision of effective protection against torture, one of the most serious violations of human rights (an approach that has been recognised internationally). The presumption should be formulated in the opposite way: the national authorities are bound by common values, and they are obliged to do everything to give reality to the right of access to a court.

Positivism does not allow any criticism and it therefore legitimises any rules of statutory law existing at any time in question (or the absence of rules, as in the present case). In order to show that this position is erroneous, I like to give my students the example of slavery. When slavery was recognised by States, this did not mean that slavery was not contrary to fundamental rights and humanity.

In the case of *Dred Scott v. Sandford* (60 U.S. (19 How.) 393, (1857)) the US Supreme Court lost the opportunity to abolish slavery and serfdom. In contrast, it recognised slavery and found unconstitutional the Missouri State law abolishing slavery and granting civil rights to Afro-Americans, concluding that they could not enjoy the same rights as the other members of society. Had the US Supreme Court delivered a different judgment and supported the applicant's rights, who knows, such a decision might have prevented the Civil War in the United States. It seems to me that the present case is also very similar to that one and, therefore, it poses a real challenge for the European Court of Human Rights. Had the Court supported the applicant's right of access to a court, then the practice of torture would be minimised.

I must admit that the Court is in a very difficult situation, in that it does not have the same role as a national supreme court; it does not have the same relations with the national legislature as a national supreme court. The situation is aggravated by the international context. However, I do not remember that in other cases the Court was not in a position to promote effective remedies for the purpose of protecting fundamental rights. On the contrary, it has recognised that the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism (see *Cardot v. France*, 19 March 1991, § 34, Series A no. 200).

Consensus and margin of appreciation

The majority has found that there is no consensus about universal jurisdiction and, in particular, that the prevalence of universal civil jurisdiction is not yet sufficient to indicate the emergence of a customary rule which would have obliged the Swiss courts to find that they had jurisdiction. The problem is that there does exist a consensus about effective measures against torture, because the vast majority of States worldwide have ratified the Convention against Torture. What kind of new consensus is needed?

If there is no consensus, then, of course, we can wait for it. By the way, the slaves also waited about 3,000 years for an international consensus. The concept *de lege ferenda* rendered this process as drawn-out as possible. It is remarkable that the Court has mentioned this concept in paragraph 114 of the judgment. The critics of the Court's former activist approach should be satisfied: the concept of human rights becomes a legal ideal rather than a legally binding system. Indeed, the consensus approach is irrelevant for the present case.

The Court has already used this approach and disregarded the consensus problem when it deemed this necessary to protect fundamental rights. In the case of *Parrillo v. Italy* ([GC], no. 46470/11, ECHR 2015) it appeared that only five member States protected the embryo's right to life, and the Court based its judgment on the margin of appreciation. What that really meant was that the Court abstained from expressing its opinion on whether the life of an embryo requires protection under the Convention. I criticised that approach in a separate opinion, as it would allow other States which do not recognise the embryo's right to life to destroy embryos for any purpose.

In the case of *Khamtokhu and Aksenchik v. Russia* ([GC], nos. 60367/08 and 961/11, ECHR 2017) the Court was unable to note a widespread and consistently developing consensus ("international trend") in favour of abolishing life imprisonment or, on the contrary, confirming positive support for it. At the same time, the Court accepted that the exemption of certain groups of offenders from life imprisonment reflects the evolution of society and represents social progress in penological matters (ibid., § 86). The Court therefore confirmed again that the consensus issue is not relevant if the State is pursuing the aim of promoting the principles of justice and humanity (ibid., § 87).

The prevalence of values leaves much less importance to both the consensus and margin-of-appreciation tests. In contrast to its own case-law, the Court has presumed in the present case that the Swiss courts enjoyed a wide margin of appreciation in determining whether they had jurisdiction (see paragraph 203).

Article 6 is a very special right

We should be very careful with the right of access to a court. Many jurisdictions have found that this right is absolute in the constitutional context. This means that limitations are possible, but not because this right is subject to regulation by the State, which enjoys a margin of appreciation as stated in paragraph 114 of the judgment (surprisingly, with further reference case-law in which the Court has found a violation of this right). It is important to remember the value of this right: it is vital to protect and realise all other fundamental rights stipulated in the Convention. Therefore, this right could be limited only for the reasons of excluding uncertainty and making the administration of justice more effective. Nothing else could prevent a human being from seeking justice before a court. The Convention itself and the Rules of the Court do satisfy those reasons, taking into consideration the six-month time-limit or the exhaustion of domestic remedies. Any other restriction contradicts the spirit of the Convention, because it cannot pursue a legitimate aim in principle and should therefore be deemed arbitrary.

It follows that the authorities of the respondent State could not deprive the applicant of the right to seek truth and justice before the Swiss courts, the only forum accessible to him. In line with the spirit of Article 6, the authorities could have proposed another type of civil action, which would have been more appropriate to the nature of his claim. On the contrary, the respondent Government observed that the forum of necessity is applicable to civil matters such as the protection of property, or family or inheritance claims, and is not applicable to compensation in respect of non-pecuniary damage for torture. They did not propose any other alternative to the applicant. In such a situation a clear and standard violation of Article 6 is usually found by the Court.

In paragraph 114 of the judgment the Court points out (for whose benefit?) that the limitations cannot impair the very essence of the right. This principle was unfortunately not applied in the present case. Indeed, the right of access to a court, by its very nature, calls for regulation by the State, but it would be contrary to the very concept of the Convention to say that there is no access to the courts if a certain type of claim is not regulated by national procedural law. Therefore, it is pointless to assess the proportionality of "the restrictions on the applicant's right of access to the court" in the present case (see paragraph 216 of the present judgment) because the denial of justice was disproportionate from the very beginning.

Nevertheless, the Court has examined the existence of a legitimate aim. I have already mentioned that a legitimate aim could arise from the need for legal certainty or the effective administration of justice. However, the Chamber considered that the legitimate aim could include the proper administration of justice and the effectiveness of the domestic proceedings

(see § 118 of the present judgment) without carrying out any serious analysis. Logically, the applicant replied that the Chamber had not explained what was to be understood by those concepts. Such an approach is a sign of positivism: there is an absence of criticism; the law is understood as a body of rules (to be obeyed, not necessary to be explained), and not as a system of underlying individual rights (interests). Thus, the Chamber created a new approach to the rule of law which is, in fact, a huge step backward and which undermines the Convention system.

The Grand Chamber "examined" the issue in the same manner. The majority of the Grand Chamber has found that the restriction pursued a legitimate aim for the following reasons:

– Practical difficulties (§ 124): a decision may not be enforced. (However, Tunisian State property and funds are located in Switzerland, and they were used for the purpose of obtaining medical treatment for the alleged perpetrator, the former Tunisian Minister of the Interior. In addition, it could be more important to seek for and obtain justice or to ascertain the truth. A finding of a violation could in itself serve as just satisfaction.)

– Further practical difficulties (§ 125): to discourage forum-shopping, since the resources allocated to domestic courts are being restricted. (The applicant has the necessary connections with the respondent State. According to the Court's case-law, the positive obligations of the State cannot be restricted for financial reasons. Also, it is important to note that the proportion of immigrants who have been tortured is very low.)

– Excessive workload for the domestic courts – practical difficulties again (§ 126).

– Potential diplomatic difficulties (§ 127). This is a non-judicial argument. Firstly, it undermines the fact that both countries have ratified the Convention against Torture. It is also noteworthy in that it reflects an out-dated vision of international relations and public international law as the law of sovereigns. Such law would be implemented in practice only if its implementation is to the benefit of the sovereign. This approach means that an individual's right could be sacrificed in favour of good relations between kings/heads of the State/Governments. This approach was possible before the era of human rights.

Nowadays, however, international law is under the moral influence of effective protection of fundamental rights and freedoms as one of the internationally recognised principles. That influence has already radically changed the perception of international law and international relations, and the Convention against Torture, indeed, is a very important factor in this process. I ought to point out that even without the above Convention, the prohibition of violations against human dignity, such as torture, slavery or racial discrimination, has already become *jus cogens*.

The present judgment is therefore contrary to *jus cogens*. This could be explained by the fact that the examination of the present case does not

include the following analysis: “To respect persons as ends, to view them as having basic human dignity, seems to be inextricably bound up with viewing persons as possessors of rights, as beings who are owed a vital say in how they are to be treated and those interests are not to be overridden simply in order to make others better off...” (see N. Bowie & R. Simon, The Individual and the Political Order, 1977). This means that the liberal approach creates a solid basis for the recognition, respect and protection of fundamental rights in all domains, including universal jurisdiction. In this context, the right of access to a court should be understood as a very important value. I believe that unless values are laid down, the protection of human rights – for which the Court is responsible – becomes ineffective.

DISSENTING OPINION OF JUDGE SERGHIDES

1. In 1992 the applicant, of Tunisian origin, was arrested by the Italian police in Parma (Italy), where he was resident, and was taken to the Tunisian consulate in Genoa. While there, he was served with a document accusing him of representing a danger for the security of the Italian State. He was then taken to Tunisia by Tunisian officials, and in the course of his subsequent detention in the premises of the Tunisian Ministry of the Interior was allegedly subjected to physical and psychological torture on the orders of A.K., the then Minister of the Interior. In August 1993 he fled Tunisia and took refuge in Switzerland, and the same year he filed an application for asylum. On 8 November 1995 he was granted political asylum in Switzerland on the basis of his allegations that he had been subjected to torture in Tunisia. On 8 July 2004 he instituted civil proceedings before the Court of First Instance of the Republic and the Canton of Geneva, in Switzerland, against the Tunisian State and A.K. The proceedings were aimed at obtaining compensation for non-pecuniary damage for the alleged acts of torture. Both that court and, subsequently, the Court of Justice of the Republic and the Canton of Geneva, which heard the applicant's appeal, declared his claim inadmissible on the grounds that they lacked territorial jurisdiction.

2. On 20 October 2006 the applicant lodged an appeal before the Federal Supreme Court, which on 22 May 2007 also rejected the applicant's claim on the grounds of lack of jurisdiction. More specifically, it dismissed his appeal on the grounds that the alleged acts of torture bore no connection close enough with Switzerland for them to fall under the jurisdiction of the Swiss courts as defined in section 3 of the Federal Act on Private International Law of 18 December 1987 (referred to hereafter as the "LDIP"), dealing with the forum of necessity (*forum necessitatis*). On 21 May 2007 – thus one day prior to the delivery of that judgment – the Federal Migration Office had authorised the applicant's naturalisation, which was confirmed on 25 May 2007 by the Versoix Municipal Council.

3. The applicant's complaint before the Court is about a breach of his right of access to a court within the meaning of Article 6 § 1 of the Convention. In paragraph 7 of his referral request the applicant formulates his complaint as follows:

> "Surely it is arbitrary or at least manifestly unreasonable, where a State makes provision for a forum of necessity, that that State should limit the right of access to a court, implicitly protected by Article 6 § 1 of the Convention, in the case of a victim of torture wishing to obtain civil redress for the harm caused by the acts in question, by giving a restrictive interpretation of the criterion of a 'sufficient connection' with that State under which such a connection may arise only out of the set of facts that gave rise to the harm (the acts of torture) rather than out of the procedure as a whole, when the same State would allow the same victim to rely on his civil claims in the context of criminal proceedings?"[1]

4. In concluding his referral request, in paragraph 65, the applicant comments on the question which he posed above, as follows:

> "The answer ... will in practice concern in very many cases the sole means available to torture survivors of obtaining some semblance of justice and a measure of reparation for the harm endured."

5. The applicant's complaint alleging a violation of his right of access to a court, inherent in Article 6 § 1, was intrinsically linked with the prohibition of torture enshrined in Article 3 of the Convention, a prohibition which, as held in *Bouyid v. Belgium* ([GC], no. 23380/09, §§ 81 and 89-90, ECHR 2015), is an absolute prohibition with no derogations and which "is also a value of civilisation closely bound up with respect for human dignity, part of the very essence of the Convention".

6. On 21 June 2016 a Chamber of the Court unanimously found admissible the applicant's application, but it nevertheless decided, by four votes to three, that there had been no violation of Article 6 § 1 of the Convention. The Grand Chamber in the present judgment also finds that there has been no violation of Article 6 § 1.

7. With all due respect, I do not share the view taken by the Grand Chamber. I rather share the view of the minority in the Chamber proceedings and I advance the following reasons for finding a violation of Article 6 § 1.

I. Has there been a denial of justice to the applicant, in breach of Article 6 § 1 of the Convention?

8. As decided in *Golder v. the United Kingdom* (21 February 1975, § 38, Series A no. 18), the right of access to a court is an implied right under Article 6 § 1 of the Convention and there must be implied limitations to it, regulated by the State.[2] In *Ashingdane v. the United Kingdom* (28 May 1985, § 57, Series A no. 93), the Court, in assessing the right of access to a court, held that "... the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired ..." It also held that "...a limitation will not be compatible with Article 6 para. 1 ... if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (ibid.).

---

1. See also the same formulation of the complaint in paragraph 4 of the applicant's Observations.

2. See generally, on the converging case-law of the European and Inter-American Courts of Human Rights with regard to the rights of access to justice and to a fair trial, Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice,* Oxford, 2011, at pp. 59 et seq.

9. According to the case-law of the Court,[3] if the interpretation given to a statute or act by a national court is arbitrary or manifestly unreasonable, or so unreasonable as to be striking and palpable on the face of it, the Court can intervene and find a violation. This is a principle governing the right of access to a court, and the Court in the present case rightly considers it so and examines it in paragraph 116 of the judgment under the heading "*The principles governing the right of access to a court*".

10. In paragraph 113 of the judgment, the second paragraph under the above-mentioned heading, it is rightly mentioned, with reference to the relevant case-law, that "[t]he right to a fair hearing, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the rule of law, which requires that all litigants should have an effective remedy enabling them to assert their civil rights ..." It is also rightly mentioned in the same paragraph, with reference to the relevant case-law, that "... Article 6 § 1 embodies the 'right to a court', of which the right of access, that is, the right to institute proceedings before courts in civil matters, is one particular aspect ..."

11. As has already been stated, in the present case the Federal Supreme Court decided in its judgment of 22 May 2007 that the relevant connecting factor vesting the Swiss courts with jurisdiction as a "forum of necessity" under section 3 of the LDIP was the set of facts, which had to relate to Switzerland. It therefore dismissed the applicant's civil action for just compensation in respect of acts of torture which occurred in Tunisia.

12. Was there a denial of justice because of the interpretation given and the application made to section 3 of the LDIP by the Federal Supreme Court? This is the question that will be examined under the following two headings.

(a) Whether section 3 of the LDIP was interpreted and applied by the Federal Supreme Court in an arbitrary and manifestly unreasonable manner

13. Although the text of sections 3 and 129 of the LDIP is quoted in paragraph 37 of the judgment, I will also quote it below to facilitate easier understanding of my argument:

---

3. See, *inter alia*, *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, § 61, ECHR 2015; *Hamesevic v. Denmark* (dec.), no. 25748/15, § 43, 16 May 2017; *Alam v. Denmark* (dec.), no. 33809/15, § 35, 6 June 2017; *Dulaurans v. France*, no. 34553/97, §§ 33-34 and 38, 21 March 2000; *Khamidov v. Russia*, no. 72118/01, § 170, 15 November 2007; *Anđelković v. Serbia*, no. 1401/08, § 24, 9 April 2013); *Anheuser-Buch Inc. v. Portugal* [GC], no. 73049/01, §§ 85-86, ECHR 2007-1; *Van Kück v. Germany*, no. 35968/97, § 57, ECHR 2003-VII; and *Merabishvili v. Georgia* [GC], no. 72508/13, § 42 of my concurring opinion, ECHR 2017 (extracts).

"Section 3 – Forum of necessity

Where this Act does not provide for any forum in Switzerland and proceedings abroad prove impossible or it cannot reasonably be required that they be brought, the Swiss judicial or administrative authorities of the locality with which the case has a sufficient connection shall have jurisdiction."

"Section 129 – Wrongful act

[1] The Swiss courts of the domicile or, in the absence of domicile, those of the defendant's habitual residence or place of business shall have jurisdiction to examine actions based on a wrongful act.

[2] Where the defendant has neither a domicile nor a place of habitual residence or place of business in Switzerland, the action may be brought before the Swiss court of the place in which the act took place or of its outcome.

..."

14. In interpreting and determining the applicability of section 3 of the LDIP, which led to the dismissal of the applicant's civil action, the Federal Supreme Court omitted to take into consideration that section 3 applies *only* "[w]here this Act does not provide for any forum in Switzerland" and failed to read this clause in conjunction with section 129 § 2 of the same Act, which *does* provide for a forum in Switzerland regarding wrongful acts, namely the Swiss court of the place in which a wrongful act took place or of its outcome.

15. With all due respect, by limiting the applicability as regards wrongful acts of section 3 of the LDIP, on which the forum of necessity is based, only to those acts which had taken place in Switzerland, the Federal Supreme Court was mistaken in the following two ways: (a) it did not take into account the first and most important precondition for the applicability of section 3, i.e., that the LDIP *does not* provide elsewhere for any forum in Switzerland, and (b) it did not take into account that section 129 § 2 of the LDIP *does* expressly provide for a forum regarding wrongful acts when they take place in Switzerland, by vesting Swiss courts with jurisdiction in such a case.

16. The error probably arose because of the inadvertence of the Federal Supreme Court in failing to see that section 3 and section 129 § 2 of the LDIP are mutually exclusive and therefore cannot apply together. On the contrary, through the interpretation given by the Federal Supreme Court to section 3, limiting its applicability regarding wrongful acts only to those such acts that had taken place in Switzerland, it made the provision of section 3 similar to that of section 129 § 2 of the LDIP, thus turning the nature of section 3 from a forum of necessity to an ordinary forum of jurisdiction, as well as in fact rendering section 129 § 2 useless and meaningless. I must clarify, of course, that when I say that section 3 and section 129 § 2 are mutually exclusive, I do not mean that the judge can pick the section he or she prefers and assume jurisdiction, since section 3 is

subject to section 129 § 2 and any other provision of the LDIP which vests a Swiss court with ordinary jurisdiction. So, it is more precise to say that whenever section 129 § 2 applies, section 3 cannot apply. The application of section 3 is thus excluded when the facts of a case bring it within section 129 § 2.

17. The Federal Supreme Court at paragraph 3.3 of its judgment clearly states that the first criterion of section 3 of the LDIP, namely that the Swiss courts must not have jurisdiction by virtue of another provision, which must be applied cumulatively with the other two criteria, "is indisputably met". The Grand Chamber at paragraphs 88 and 207 of its judgment does not even refer to this important criterion, focusing only on the other two cumulative conditions of section 3, namely (a) the "*de facto* or *de jure* impossibility of bringing the dispute before the courts of another State"[4], and (b) the existence of a "sufficient connection" of the case with Switzerland. Of course, it is indisputable that the first criterion of section 3 of the LDIP was met, since no Swiss court had jurisdiction by virtue of another provision of the LDIP.

18. But the mistake starts from here, because – since it was taken for granted that this first criterion or condition was fulfilled – it was then completely overlooked later on, when examining the third condition of this section, i.e. the meaning of the "sufficient connection" of the case with Switzerland.

19. The first criterion was overlooked in the sense that the Federal Supreme Court did not take into account the fact that the Swiss courts have jurisdiction under section 129 § 2 of the LDIP concerning acts of torture when these have taken place in Switzerland. Had it considered this, the Federal Supreme Court would have seen that if the acts of torture had taken place in Switzerland, the Swiss courts would have been vested with jurisdiction under section 129 § 2 of the LDIP and therefore the first criterion of section 3 of the LDIP would not have been applied. Consequently, it would not have proceeded to interpret and limit the applicability of section 3 as regards acts of torture only to circumstances where those acts took place in Switzerland.

20. In view of the above considerations, the interpretation and application of section 3 of LDIP by the Federal Supreme Court was thus made *contra legem* and based on an error in law. With all due respect, the judgment of the Federal Supreme Court was reached *per incuriam*,[5] and it was, therefore, arbitrary and manifestly unreasonable. The contradiction, fallacy or confusion in the interpretation and application of section 3 can be depicted as follows:

1st (correct) premise:

4. Wording of the Court at paragraph 88 of the present judgment.

5. Regarding the meaning of a judgment given or reached *per incuriam,* see R. J. Walker, *The English Legal System,* 6th ed., London, 1985, at pp. 143-4, 148.

Section 3 of the LDIP does not apply when another section of the LDIP provides for a forum.

2nd (wrong) premise, which is contradictory to the first:

Section 3 of the LDIP must be interpreted and applied only in a case where a forum is provided by another section of LDIP, more specifically section 129 § 2. (Of course, this is not what the Federal Supreme Court said, but it is what it in fact did).

The resulting (incorrect) conclusion:

Section 3 does not apply in the present case because its applicability is confined only to acts of torture which occurred in Switzerland, and not abroad as happened in the present case.

21. The validity of the above criticism depends, of course, on whether the acts complained of by the applicant would have come under the meaning of "wrongful acts" in section 129 of the LDIP had they occurred in Switzerland. Indeed, some wrongful acts, such as those alleged by the applicant, may be both a crime (an offence) and a tort (civil wrong). Since section 129 does not distinguish between wrongful acts which can only be a tort and not at the same time a crime and those which may be both a tort and a crime, it should be interpreted as covering all wrongful acts. Besides, the contrary would not be logical, since what section 129 deals with is the civil aspect and consequences of wrongful acts, irrespective of whether there is also a criminal liability. Lastly, both the Swiss courts' judgments and the judgments of the Chamber and Grand Chamber in the present case treat the case as falling, *ratione materiae*, under the LDIP, i.e. that it is a case with a foreign element concerning private international law.

22. Indeed, the LDIP, as its title denotes, is an act on private international law. "Private international law" or "conflict of laws" is generally defined as "that part of law which comes into play when the issue before the court affects some fact, event or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system".[6] Private international law is a separate branch of law in every country, including Switzerland, and it concerns one or more of three questions, namely "jurisdiction of the [domestic] courts", "the choice of law" and "recognition and enforcement of foreign judgments".[7] The subject is "international" because the facts of the case or the parties to it are connected with a country or countries other than the country of the forum, and it is, of course, "private" international law, because it is not concerned with the relations of States with each other, but with the disputes of individuals or an individual and a foreign State arising out of private-law matters.

---

6. See Cheshire, North & Fawcett, *Private International Law,* 14th ed. (edited by J. J. Fawcett and J. M. Carruthers), Oxford-New York, 2008, at p. 5.
7. Ibid., at p. 7.

23. In the present case, the relevant issue was the jurisdiction of the Swiss courts in private international law in an action *in personam,* by which the plaintiff, the applicant, sought a judgment requiring the defendant to pay money or damages.[8] The case before the Swiss courts was a case of private international law not only to the extent that it was directed against A.K., but also to the extent that it was directed against the Tunisian State. As has already been noted, because of the Federal Supreme Court's finding that it lacked jurisdiction in private international law, the question arises whether this refusal to accept jurisdiction amounted to a violation of Article 6 § 1 of the Convention.

24. Section 129 § 2 of the LDIP, though not applicable, was nevertheless relevant in the present case. That is why it was referred to in the judgment,[9] irrespective of whether it was subsequently ignored as explained above. It was very important to refer to this section in the judgment, since, as has been stated above, it was relevant in determining the ambit of the applicability and scope of section 3 of the LDIP, which sets out clearly from the outset that it applies only "[w]here the Act does not provide for any forum in Switzerland". This expression serves to demarcate the forum of necessity from ordinary rules of jurisdiction, such as those contained in section 129 of the LDIP.

25. Even more importantly, however, the Federal Supreme Court, in approving the decision of the cantonal court, decided that the applicant's action did not come under section 129 because "... neither the wrongful act nor the resultant injury occurred in Switzerland (section 129(2) LDIP)".[10] Thus, the Federal Supreme Court ultimately considered that the alleged acts of torture suffered by the applicant would have come, *ratione materiae,* under the ambit of section 129 of the LDIP had they occurred in Switzerland.

8. See, on jurisdiction in actions *in personam*, A. J. E. Jaffey, *Introduction to the Conflict of Laws,* London-Edinburgh, 1988, pp. 108 et seq.

9. See paragraph 37 of the judgment.

10. See paragraph 3.2 of the Federal Supreme Court's judgment, quoted in paragraph 30 of the present judgment.

26. Despite this, and despite the fact that the Federal Supreme Court held that one of the three cumulative mandatory conditions for assigning jurisdiction under section 3 is that "the Swiss authorities do not have jurisdiction under another provision"[11] which, as it also noted was "indisputably fulfilled" "in the present case",[12] it nevertheless neglected to take this into account in interpreting the other mandatory condition, namely that "the case in question has a sufficient connection with Switzerland". In interpreting this last condition as being limited only to wrongful acts having taken place in Switzerland, it negated the first condition of its applicability, namely that no other provision is applicable, taken together with section 129 § 2 which applies when the wrongful acts have taken place in Switzerland.

27. The Federal Supreme Court stated in its judgment that it "adopts a pragmatic plurality in its search for the true meaning of the rule; in particular, it takes as a basis a literal understanding of the text only where this offers, with no ambiguity, a solution that is substantively just".[13] Before that, it held that "[a]n interpretation which deviates from the literal meaning of the text expressed in clear terms is allowable only where there are objective reasons for considering that the text fails to convey the true meaning of the provisions concerned. Such reasons may drive from the drafting history, from the aim and sense of the provision concerned and from the structure and layout of the law".[14] The Federal Supreme Court also held that "[i]n itself, the meaning to be attributed to the term *'cause'* is uncertain in the sense that it does not have a general definition in the laws of civil procedure of the French-speaking cantons"[15]. Despite these reasonable admissions, the restrictive interpretation of section 3 and the limitation of its applicability only to acts of torture that had taken place in Switzerland, was neither pragmatic, nor reasonable, nor effective, nor just, since the Federal Supreme Court did not take into account the clear meaning of the first condition for the applicability of section 3, namely that the Act does not provide for any forum in Switzerland, and read it in conjunction with section 129 § 2 of the LDIP.

28. Professor Bernard Dutoit[16], criticizing the Federal Supreme Court's judgment regarding the interpretation and application of section 3 of the LDIP, has argued that to require that the set of facts and not the procedure have a sufficient connection with Switzerland is to empty section 3 of the

11. See paragraph 3.3 of the Federal Supreme Court, quoted in paragraph 30 of the present judgment.
12. Ibid.
13. See paragraph 3.5 of the Federal Supreme Court's judgment, quoted in paragraph 30 of the present judgment.
14. Ibid.
15. Ibid.
16. See Bernard Dutoit, *Droit International Privé,* Commentaire de la loi fédérale du 18 décembre 1987, 5th Edition (revised and expanded), Basle, 2016, p. 18.

LDIP of its substance. He also stated that if such were to be the requirement adopted by the Federal Supreme Court with regard to section 3, that is, the set of facts, then there almost certainly exists one or even several other fora provided for by the LDIP precisely in order to take account of this sufficient connection of the facts of the case with Switzerland.[17]

29. Unfortunately, Professor Dutoit does not give any examples of these "several other fora". In the paragraph where he makes this argument, the Professor specifically refers neither to section 129 § 2 of the LDIP nor to the part of section 3 which states that it applies only when the Act does not provide for any other forum in Switzerland. He deals only with the third condition for the applicability of section 3: its sufficient connection with Switzerland. However, four paragraphs previously on the same page, Professor Dutoit had stated that section 3 applies where the Act does not provide for any forum in Switzerland, and refers in brackets to section 129 §§ 1 and 2 as an example of any other forum "(art. 2 ou art. 129, al. 1 et 2 LDIP)". Thus, when Professor Dutoit is referring to the existence of one or even several other fora provided by the LDIP, he most probably had in mind also section 129 § 2.

30. In any event, as I understand it, in interpreting section 3 of the LDIP, one must take into account that this section provides for a forum of necessity not only for wrongful acts but also for any case containing a conflict-of-laws element, which does not come under a forum provided by another section of the LDIP under the ordinary rules of jurisdiction. That is probably why Professor Dutoit speaks about "one or even several other fora". However, the said Professor does not expressly refer to the contradictory interpretation of section 3 and section 129 § 2 and their *contra legem* interpretation by the Federal Supreme Court, which is the important point I raise in my opinion.

31. As rightly observed by Harris, O'Boyle & Warbrick in their book *Law of the European Convention on Human Rights*, which is also relevant for the interpretation and application of sections 3 and 129 § 2 of the LDIP:[18]

> "The right of effective access also supposes that there is a 'coherent system' governing recourse to the courts that is sufficiently certain in its requirements for litigants to have 'a clear, practical and effective opportunity' to go to court. A number of cases in which uncertainty in the law or its application has led litigants to act in a way that has prejudiced their access to a court have been decided in their favour on this basis."[19]

---

17. Ibid, at p. 18. What he actually wrote was as follows: "Exiger que le complexe de fait *(Sachverhalt)* et non pas la procédure ait un lien suffisant avec la Suisse, c'est vider l'art. 3 LDIP de sa substance car, en tel cas, il existera presque sûrement un ou même plusieurs fors prévus par la LDIP précisément pour tenir compte de ce lien suffisant des fait avec la Susse … "

18. See Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights* Third edition, Oxford, 2014.

19. Ibid., at p. 402, and footnotes 329-330 on that page, where there is reference to the

> "The right of access also requires that procedural requirements governing recourse to the courts that are open to more than one interpretation should not be given a 'particularly strict' interpretation or application, so as to prevent litigants making use of an available remedy."[20]

32. In view of the above, and considering the nature of the forum of necessity under section 3 of the LDIP as a residual and emergency jurisdiction, and its parliamentary history, where doubt exists as to whether an element or link should be considered a sufficient connection with Switzerland, thus allowing the court to assume jurisdiction, the presumption should be in favour of jurisdiction. As pertinently stated by Bennion "[a] court or tribunal must not decline a jurisdiction which it is satisfied Parliament intended to confer on it ..."[21]

33. As an interpretative method or tool, the principle of effectiveness may be of assistance not only in interpreting and applying Convention provisions but also domestic provisions. The principle of effectiveness plays a significant role not only when the Court exercises its supervisory power as a guarantor of human rights, but also when the respondent State exercises its margin of appreciation and the principle of subsidiarity is applied. Of course, as is rightly noted in paragraph 116 of the judgment, it is for the national courts to interpret and apply the domestic law and it is only when their interpretation is manifestly unreasonable or arbitrary that the Court may intervene. However, if the domestic courts' interpretation of a provision of the domestic law does not take into account the principle of effectiveness, there may be a risk that the right to an effective remedy under Article 13 and the right of access to a Court under Article 6 § 1 be violated, which would amount to a denial of justice. On the contrary, by using the principle of effectiveness as an underlying and guiding principle in interpreting and applying Convention provisions and provisions of domestic law, one always retains the substance of the right of access to a court or any other human right.

34. One of the advantages of the principle of effectiveness is that it serves to ensure that each of the provisions of the Convention or of a domestic act, as the case may be, and the Convention or the domestic act, as a whole,[22] be given full weight and effect, consistent with the language used

---

relevant case-law.

20. Ibid., at p. 404, and footnotes 350-351 on that page, where there is reference to the relevant case-law.

21. See F.A.R. Bennion, in Bennion on Statutory Interpretation: a Code, Fifth Edition, London, 2008, section 19, p. 106. In this connection, the following Latin maxims may be relevant: *boni judicis est ampliare jurisdictionem* (Chancery Precedents 329); *est boni judicis amliare jurisdictionem* (Gilbert's Reports 14).

22. As held in *Stec and Others v. United Kingdom* (dec.), nos. 65731/01 and 65900/01, § 48, ECHR 2005-X: "The Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions…."

and according to their object and purpose,[23] thus leaving no room for absurdity or impossibility.[24] This aspect of the principle of effectiveness is usually defined by the Latin maxim *ut res magis valeat, quam pereat*,[25] literally meaning that "it is better for a thing to have effect than to perish". In the present case, in my humble view, one can see that the result of the interpretation and application given to section 3 of the LDIP by the Swiss courts was manifestly unreasonable and arbitrary. This could be explained because the principle of effectiveness was not applied in reading the relevant provisions of the LDIP, the one in conjunction with the other, and the Act as a whole, so as to give full weight and effect to its object and purpose and achieve internal harmony or coherence as regards its interpretation. Of course, the concepts that the Convention or a domestic act must be read a whole, and "that the law should be coherent and self-consistent"[26], could be regarded as separate principles and interpretative

---

23. Regarding the importance of taking into account the object and purpose of the Convention, the Court held in *Soering v. the United Kingdom* (7 July 1989, § 87, Series A no. 161): "In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 90, § 239). Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, *inter alia*, the *Artico* judgment of 13 May 1980, Series A no. 37, p. 16, § 33). In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society' (see the *Kjeldsen, Busk Madsen and Pedersen* judgment of 7 December 1976, Series A no. 23, p. 27, § 53)."
This is also consistent with Article 31 § 1 of the Vienna Convention on the Law of Treaties of 1969 (VCLT), to which the Court often refers, and which reads as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".
24. This is an aspect of the principle of effectiveness described by Berlia as the rule of efficiency, or "*la règle de l'effet utile*". See G. Berlia, "Contribution à l'interprétation de traités", in *Collected Courses of the Hague Academy of International Law,* 114 (1965-I), pp. 396 ff. See also F.A.R. Bennion, *op. cit.,* Appendix B, p. 1384, who refers to the "presumption that the court is intended to avoid an anomalous or illogical result". Similarly to the Latin legal maxim *ut res magis valeat, quam pereat*, the maxim *interpretatio talis in ambiguis semper fienda est, ut evitetur inconveniens et absurdum* provides that, in ambiguous cases, when there are ambiguities, an interpretation should be given such that what is unsuitable and absurd may be avoided (see 4 *Institutes* of Lord Coke 328). Again, the maxim *quoties in stipulationibus ambigua oratio est, commodissimum est id accipi quo res de quo agitur in tuto sit* states that, whenever in stipulations the language is ambiguous, it is most correct to accept it in that sense by which the matter with which it deals may be protected (*see Digest, or Pandects* of Justinian 45, 1, 80).
25. Sir William Blackstone said that "[o]ne part of a statute must be so construed by another, that the whole may (if possible) stand: maxim *ut res magis valeat, quam pereat*". (See Sir William Blackstone, *Commentaries on the Laws of England,* 10th ed., London MDCCLXXXVII, § 3, p. 89).
26. See this principle in Bennion, *op. cit.*, at p. 1384.

tools in themselves, but they could simultaneously be considered as properties, faculties or elements of the principle of effectiveness. With due respect, the principle of effectiveness was not applied by the Swiss courts in the present case as they interpreted the relevant provisions of the LDIP in a manner that was incompatible with the relevant provisions of the Convention, namely, Article 6 of the Convention as well as Articles 1 and 13 of the Convention.

35. The principle of effectiveness also serves to guarantee that all the provisions of the Convention or a domestic act, as the case may be, are useful and necessary to convey the intended meaning.[27] Through the Federal Supreme Court's interpretation of section 3 of the LDIP, this provision was made applicable as regards acts of torture only when the connecting factor is the same as the connecting factor provided for in section 129 § 2 of the LDIP, something that is impossible because of the opposing first condition of section 3. Thus, by this interpretation, which was contrary to the principle of effectiveness, the first condition of section 3 was rendered incapable of conveying its intended meaning and function and section 129 § 2 of the LDIP was rendered useless or meaningless.

36. Though the case-law of the Court frequently refers to manifestations or applications[28] of the principle of effectiveness, if we may describe them as such (e.g. holding that the human-rights safeguards guaranteed by the Convention must be practical and effective and not theoretical and illusory; developing positive obligations, both substantive and procedural; maintaining a dynamic and evolutive approach; considering the Convention as a living instrument, etc.), it unfortunately very rarely refers to the principle itself or to the principle of effectiveness in so many words. However, the case-law frequently refers to the practical and effective manner in which the Convention provisions must be interpreted and applied; it is obvious that this is nothing other than the use of the principle of effectiveness as an interpretative method or tool. The following extract from *El-Masri v. the former Yugoslav Republic of Macedonia* ([GC], no. 39630/09, § 134, ECHR 2012) clearly shows that the principle of effectiveness concerns the interpretation not only of substantive provisions

---

27. This is an aspect described by Berlia as the rule of useful effect, "*la règle de l'effet utile*". See G. Berlia, *op. cit.* See also Bennion, *op. cit*. for relevant presumptions, namely: "presumption that the court intended to avoid a futile or pointless result"; "presumption that the court intended to avoid an inconvenient result"; "presumption that the court intended to adopt a construction that will not permit evasion of the enactment."

28. Or perhaps "dimensions" or aspects of the principle of proportionality. Daniel Rietiker in his article "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and its Consistency with Public International Law – No Need for the Concept of Treaty *Sui Generis*", in *Nordic Journal of International Law*, vol. 79, no. 2 (2010), 245 at pp. 259-275, examines the "substantive", "temporal" and "systemic" dimensions of the principle of effectiveness.

but also of the procedural provisions of the Convention, and that it impacts on the obligations imposed on Governments:

> "134. The Court reiterates that the Convention is an instrument for the protection of human rights and that it is of crucial importance that it is interpreted and applied in a manner that renders these rights practical and effective, not theoretical and illusory. This concerns not only the interpretation of substantive provisions of the Convention, but also procedural provisions; it impacts on the obligations imposed on Governments, but also has effects on the position of applicants."

37. It is the task of the Court under Article 32 of the Convention to interpret and apply the Convention provisions and it is also its task under Article 19 to ensure the observance of the engagements undertaken by the High Contracting Parties to the Convention. Thus, the need to ensure the effectiveness of the Convention is the most important task of a judge of the Court, as well as of the national judge, when dealing with the interpretation and the application of the Convention provisions; this is also clear from the above extract from *El-Masri.* It is my view that direct invocation of the principle of effectiveness should not only always be important but also indispensable. In *Uniya OOO and Belcourt Trading Company v. Russia* (nos. 4437/03 and 13290/03, 19 June 2014), the Court, dealing with an Article 1 of Protocol No. 1 case, held that it "is mindful of the principle of effective protection of the rights guaranteed by the Convention" (§ 284). The Court added that: "Normally, to redress a violation of someone's rights under Article 1 of Protocol No. 1 the State should not only award an adequate compensation but actually pay it to the victim" (ibid.). This is exactly what the applicant in the present case was seeking, but he based his complaint on another provision of the Convention.

38. Undoubtedly, the meaning of the phrase "sufficient connection" in section 3 of the LDIP is general, wide and vague. But even in ambiguous cases, as has been stated above, by following the principle of effectiveness, one will be prevented from choosing an interpretation which is manifestly unreasonable or arbitrary or leads to absurd results. By following this principle in interpreting section 3 in the present case, one will be prevented from losing sight of: (a) the aim of section 3 of the LDIP, as *a forum necessitatis,* (b) the aim of section 129 § 2 of the LDIP, as an ordinary forum of jurisdiction, (c) the aim of Article 6 § 1 of the Convention, safeguarding the right of access to a court, and (d) the nature of the applicant's complaint before the Swiss courts as an Article 3 complaint.

39. In the private international law of most countries worldwide, including Switzerland (see section 133 § 2 of the LDIP), the place where the tort or the wrong act was committed, that is, the *locus commissi delicti,*[29] is one of the relevant connecting factors for the choice-of-law rule, in other words for the determination of the relevant applicable law. In the present case, the Federal Supreme Court (see paragraph 3.5 of its judgment) also considered this to be the ground for its jurisdiction under section 3 of the LDIP and assigned to it a "temporal dimension" (see paragraph 213 of the judgment), to the effect that whatever happened after the occurrence of the alleged acts of torture, for example the applicant's acquisition of domicile and habitual residence for himself and his family in Switzerland, or the granting of refugee status in Switzerland, was deemed irrelevant.

40. However, the material time for a court to decide whether it has jurisdiction should be when the question arises. This approach is supported by the wording of section 3 of the LDIP, which uses the verb "has" in the present tense instead of the verb "had" in the past tense. Besides, there is sufficient Swiss case-law supporting the argument that the decisive time under section 3 of the LDIP is when the action is lodged (see paragraphs 40-44 and 214 of the judgment), though it could also be reasonably argued that the decisive time is the date of trial or even the date of delivery of the court's judgment.

41. But what seems to me manifestly unreasonable is to consider, under section 3 of the LDIP, the *locus commissi delicti* as a connecting factor for accepting the jurisdiction of a Swiss court as a forum of necessity when the acts of torture have taken place in Switzerland, while the same acts give ordinary jurisdiction to the Swiss courts under section 129 §§ 1 and 2 of the LDIP. And what is even more strange is that this connecting factor, thus the *locus commissi delicti*, becomes relevant under section 129 §§ 1 and 2 only if the defendant *does not* have (a) his domicile, or (b) his habitual residence, or (c) his place of business, in Switzerland. As to the point in time these last connecting factors have to be present in order to vest the Swiss court with jurisdiction, it is apparent from these provisions that this is the point at which the action is brought before the Swiss court. It is therefore paradoxical for the Federal Supreme Court to hold, on the one hand, that when the acts of torture have taken place in a foreign country, only the facts related to that period of time are relevant, to the effect that they exclude its jurisdiction, irrespective of any sufficient connection between the applicant and Switzerland at the time that he lodged his action, and on the other hand, that if the acts of torture take place in Switzerland, the issue of whether the defendant has his domicile or habitual residence or place of business in Switzerland is examined with reference to the time that the action is lodged,

29. See A. J. E. Jaffey, "Choice of law in tort: a justice-based approach", *Legal Studies,* vol. 2, no. 1, 98, pp. 102 et seq.; P. M. North & J. J. Fawcett, *Cheshire and North Private International Law,* 11th ed., London, 1987, pp. 514-15.

and that these three connecting factors take priority over the *locus commissi delicti,* as explained above.

42. My conclusion is that the interpretation and application of section 3 of the LDIP by the Federal Supreme Court was arbitrary and manifestly unreasonable, leading to a denial of justice, and, therefore, to a violation of the right of access to a court, contrary to Article 6 of the Convention.

43. This could easily be the end of my opinion, without examining any other ground of violation of Article 6 § 1. However, I will proceed to examine another issue, which can be raised either alternatively or as providing an additional ground for finding a violation of Article 6 § 1.

(b) Whether section 3 of the LDIP was restrictively interpreted and applied by the Federal Supreme Court, and whether, in this connection, there are further grounds indicating that section 3 was interpreted in an arbitrary and manifestly unreasonable manner

44. So far, I have tried to show, with due respect, that section 3 of the LDIP was interpreted by the Federal Supreme Court in an arbitrary and manifestly unreasonable manner due to a fundamental error: the applicability of this provision regarding wrongful acts was limited only to situations where these acts have taken place in Switzerland, while this is expressly excluded by the same section read in conjunction with section 129 § 2 of the LDIP.

45. Of course, by its nature, such an interpretation and application of section 3, which was *contra legem,* could not but be restrictive, since it limits the applicability of section 3 to something prohibited by the Act, that is, the LDIP.

46. But assuming that this fundamental logical and interpretative pitfall did not occur, because there were no such provisions to prohibit it, would the interpretation of the Federal Supreme Court still be restrictive? This is the next question I shall examine.

47. According to the Court's case-law, a restrictive interpretation of the rights guaranteed in the Convention provisions would not correspond to the aim and purpose of these provisions.[30] It is a basic principle of the Convention system and of public international law that any restrictive

30. See more on this in *Merabishvili v. Georgia*, cited above, § 30 of my concurring opinion). The principle of effectiveness requires that a right under the Convention, and of course Article 6 § 1, be given its proper weight and effect according to its object and purpose, and that it be construed widely and any limitations or exceptions to it construed strictly and narrowly. This is all the more true where the exception is implied and not expressed, such as when dealing with Article 6 § 1. See further in *Frydlender v. France* [GC], no. 30979/96, § 40, ECHR 2000-VII, and *Regner v. the Czech Republic,* [GC], no. 35289/11, §§ 36-53 of my dissenting opinion, ECHR 2017 (extracts).

interpretation of human-rights provisions contradicts the principle of effectiveness and is not part of international law.[31] It is my view that this principle applies not only to the human-rights provisions contained in the Convention but also to those in any other international or national instrument. As regards limitations to the right of access under Article 6 of the Convention, the present judgment rightly states in paragraph 114:

> "... those limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired ..."

The same must apply in relation to the LDIP, and in particular to section 3, which should not be interpreted and applied in such a restrictive way that the very essence of the right of access to a court within the meaning of Article 6 of the Convention is impaired.

48. The interpretation given to section 3 by the Federal Supreme Court was nevertheless unreasonably restrictive, because it limited its applicability only to situations where the wrongful acts had taken place in Switzerland; in so doing, it limited the meaning and ambit of the connecting factor provided in section 3, namely "the sufficient connection the case may have with Switzerland", to a specific fact, although this connecting factor is itself too general, wide and vague.

49. The Federal Supreme Court itself also admits that the interpretation it gave to section 3 was a restricted one.[32] It also acknowledges that "the meaning to be attributed to the term *'cause'* [in the French version of section 3] is uncertain" in the sense that it does not have a general definition in the laws of civil procedure of the French-speaking cantons ..."[33] However, if the meaning of the term "*cause*" in French or "case" in English is uncertain, this is an additional reason, in my view, for not interpreting it restrictively. As Judges Karakaş, Vučinić and Kūris pointed out in paragraph 7 of their joint dissenting opinion in the Chamber proceedings:

> "... the Federal Supreme Court chose, in its judgment of 22 May 2007, a restrictive interpretation, although there was nothing, either in the law, or the case-law, or the legal writings, forcing it to do so. In our opinion, the Federal [Supreme] Court denied the applicant justice."

---

31. *Ibid.,* at §§ 27 and 29.

32. See paragraph 3.4 of the Federal Supreme Court's judgment, quoted in paragraph 30 of the present judgment: "Section 3 of the LDIP , which must be interpreted restrictively …" as well as paragraph 3.5 of the Federal Supreme Court's judgment, also quoted in paragraph 30 of the judgment: "In the case in point, it must be acknowledged that a comparison with the German and Italian versions assists in the interpretation of the French text, supporting the view that the term '*cause'* should be assigned the restricted meaning of 'set of facts' …". See also paragraph 131 of the judgment, which states that the Chamber considered that the Federal Supreme Court's interpretation was restrictive.

33. See paragraph 3.5 of the Federal Supreme Court's judgment, quoted in paragraph 30 of the present judgment.

50. In paragraph 51 of his written Observations before the Grand Chamber the applicant refers to the following passage from paragraph 3.4 of the Federal Supreme Court's judgment, from which it is clear that that court acknowledged that section 3 of the LDIP, based on its parliamentary history, was not intended to be applied restrictively but, quite the opposite:

> "In this regard, the Federal Council observed, in an authentic interpretation of that provision that 'there are cases where the connection with Switzerland is so tenuous as not to justify setting in motion the whole machinery of justice in order to settle them. But Article 3 provides for an exception to this principle. The Swiss authorities are bound to declare themselves competent even in cases presenting a highly tenuous connection with our country where it is impossible to bring an action or lodge an appeal abroad' (... see also: Message concerning a law on private international law, *Feuille federal* 1983 I 290)."[34]

51. In my view, the applicant rightly comments in paragraph 52 of his Observations, after quoting the above passage from the Federal Supreme Court's judgment, as follows:

> "52. Having thus drawn attention to the legislator's intention, and having even conceded that the provision concerned 'constitutes a safety valve designed to prevent denials of justice in the event of a negative conflict of jurisdiction', the Federal Supreme Court nevertheless went on to depart from this approach in indicating that 'Article 3 LDIP must be interpreted restrictively' (para. 3.4) and denying the existence of a sufficient connection between the applicant and Switzerland."

52. With all due respect, the above stance on the part of the Federal Supreme Court was on the face of it contradictory, and did not offer a reasonable explanation for such a stance; I regret to say that I consider that this was another ground for holding that the interpretation given to section 3 by the Federal Supreme Court was arbitrary and so unreasonable as to be prima facie striking and palpable.

53. Professor Bernard Dutoit[35] criticizes the Federal Supreme Court's judgment for its restrictive interpretation of section 3 of the LDIP, using the following arguments[36] (the numbering, however, is mine), which I consider to be valid:

---

34. See also reference to this point at paragraph 39 of the present judgment, under the heading "The preparatory work with regard to section 3 of the LDIP".

35. See Bernard Dutoit, *Droit International Privé,* Commentaire de la loi fédérale du 18 décembre 1987, 5th Edition (revised and expanded), Basle, 2016, p. 18.

36. The relevant text from Professor Dutoit's book (p. 18) reads as follows:

"On se permettra d'émettre quelques doutes sur une telle interprétation du mot 'causa' à l'art. 3 LDIP. Certes, les versions française d'une part, allemande et italienne de l'autre, diffèrent quant au sens à donner à ce mot. Mais ne convenait-il pas de lui donner les sens le plus conforme à la *ratio* de cette disposition, qui est d'éviter un déni de justice? Or opter pour le contenu restrictif du mot 'cause', c'est précisément aller à l'encontre du but recherché par l'art. 3 LDIP, ainsi qu'il apparaît en l'espèce : pourquoi la situation d'un réfugié tunisien, qui a obtenu l'asile politique en Suisse où il vit depuis plus de dix ans avec sa famille, devrait-elle échapper à l'art. 3 LDIP, alors que l'intéressé ne dispose

(a) The term "cause" in the French version of section 3 of the LDIP, which has diverging meaning from the German and Italian versions, should be given the meaning most consistent with the purpose of the provision, which is to prevent the denial of justice.

(b) Opting for a restrictive interpretation of the above term militates against the purpose of section 3 of the LDIP, as can be seen from the facts of the present case. Why should the situation of a Tunisian refugee such as the applicant, who has been granted political asylum in Switzerland and has lived there with his family for more than ten years, be considered as an irrelevant link for the purposes of section 3 of the LDIP, although the person concerned obviously has no other forum abroad to secure his rights? If a domicile of more than ten years in Switzerland does not constitute a sufficient link with that country, when will this link exist?

(c) The Federal Supreme Court's argument that, since the facts of the case have no connection with Switzerland, no question arises as to whether any connection with Switzerland is sufficient, clearly amounts to a distortion of the very objective of section 3 of the LDIP.

(d) To require that the set of facts and not the procedure have a sufficient connection with Switzerland is to empty section 3 of the LDIP of its substance.

54. The Federal Supreme Court held that the "case" under section 3 of the LDIP "concerns the set of facts and the legal argumentation – rather than the person of the applicant which must have a sufficient connection with Switzerland".[37] However, it appears from the section of the present judgment under the heading "C. Domestic practice concerning section 3 of the LDIP"[38] that the domestic practice in Switzerland has accepted claimants' Swiss nationality or Swiss residence as a sufficient connection with Switzerland for the purposes of section 3. This is also clearly acknowledged by the Government in their Observations. For example, in paragraph 27 of the Government's Observations it is stated that "[i]n the law of the persons and family law a 'sufficient connection' has been accepted where the plaintiff had Swiss *nationality*." Paragraph 28 of the same

---

manifestement d'aucun autre for à l'étranger pour y faire valoir ses droit ? Si un domicile de plus de dix ans en Suisse ne constitue pas un lien suffisant avec notre pays, quand ce lien existera-t-il ? Quant à prétendre avec le Tribunal fédéral que 'les faits de la cause ne présentent aucun lien avec la Suisse, si bien que la question de savoir si le lien avec ce pays est suffisant ou non ne se pose pas' (cons. 3-5 *in fine*), cela constitue clairement une distorsion de l'objectif même visé par l'art. 3 LDIP. Exiger que le complexe de fait *(Sachverhalt)* et non pas la procédure ait un lien suffisant avec la Suisse, c'est vider l'art. 3 LDIP de sa substance car, en tel cas, il existera presque sûrement un ou même plusieurs fors prévus par la LDIP précisément pour tenir compte de ce lien suffisant des fait avec la Suisse …".

37. See paragraph 3.5 of the Federal Supreme Court's judgment, quoted in paragraph 30 of the present judgment.

38. See paragraphs 40-44 of the present judgment.

Observations states that "[o]ther judgments all in family law, were based on the *place of residence of the person bringing the action* in order to justify proceedings before the Swiss courts on the basis of section 3 PILA [i.e. the LDIP]" (emphasis in the original).

55. Besides, a "sufficient connection" cannot exist only if the relevant act occurs in Switzerland, because section 3 applies not only to torts and contracts but also to personal relations, such as matrimonial cases where no question arises of an act that may have taken place. The Court rightly notes in paragraph 209 of the present judgment that "the courts enjoy considerable discretion in defining the connecting links and applying them on case-by-case basis" and "in so doing the domestic courts most frequently take account of the nature of the dispute or the identity of the parties". This admission is extremely significant. The restrictive interpretation given to section 3 of the LDIP by the Federal Supreme Court and the Grand Chamber in the present case is refuted by this very admission. In the present case the nature of the original event is very important, in that the alleged acts are acts of torture falling within the scope of Article 3 of the Convention, one of the most fundamental provisions of the Convention and one which contains an absolute prohibition. As regards the identity of the parties, connecting factors such as nationality, domicile and residence may be relevant. These factors concern the person of an applicant, in other words his status, and are totally irrelevant to the question of where the alleged acts of torture took place. It is clear from the above considerations that the meaning of a "sufficient connection" varies from topic to topic, but there is nothing to exclude the applicant's residence and domicile from being taken into consideration in establishing whether the case has a sufficient connection with Switzerland. As was noted in *Marckx v. Belgium* (13 June 1979, § 42, Series A no. 31), which also supports what is maintained with regard to the issue of arbitrariness, "[i]t is for the respondent State, and the respondent State alone, to take the measures it considers appropriate to ensure that its domestic law is coherent and consistent".[39] However, this principle was not followed by the Swiss courts as regards the interpretation and application of section 3 of the LDIP, probably because the principle of effectiveness was overlooked.

56. Paradoxically, the applicant's long residence and domicile with his family in Switzerland, for more about 13 years and 9 months (from August 1993 when he arrived in Switzerland until 22 May 2007, i.e. the date of the Federal Supreme Court's judgment), or in any case for more than ten years (if we consider the relevant date as that on which the appeal was lodged before the Federal Supreme Court, that is, 22 May 2007, or the date the action was lodged before the first-instance court, that is, 8 July 2004), his refugee status in Switzerland, and his naturalisation procedure (which

39. On internal coherence, see further in paragraph 34 above.

was in the final stages of authorisation), were not taken into consideration by the Federal Supreme Court as sufficient links. But these were strong arguments in favour of the applicant's case, which the Federal Supreme Court should not have overlooked.

57. The above argument - which was also set out by Professor Bernard Dutoit as explained above - was also very well exposed in the above-mentioned joint dissenting opinion of judges Karakaş, Vučinić and Kūris in the Chamber proceedings. They argued that section 3 of the LDIP had been interpreted in a very restrictive manner and that the Federal Supreme Court's judgment interpreting this section and dismissing the applicant's action was not compatible with the right to access to a court guaranteed by Article 6 § 1 of the Convention, and that it also violated the principle of proportionality. In this connection the following observations are made in paragraphs 6-11 of the opinion, which I consider a valid and correct argumentation:

> "6. The question which concerns us in the present case is whether the Federal [Supreme] Court's decision dismissing the applicant's claim on the basis of section 3 of the Federal Law on Private International Law was compatible with the right of access to a court guaranteed by Article 6 § 1 of the Convention or whether that restriction was disproportionate to the aim pursued.
>
> 7. The [Federal] Supreme Court rejected the application of the principle of the forum of necessity on the ground that there was not a sufficient connection, by interpreting the above-cited section 3 in a very restrictive manner. Yet, according to that section, the existence, in itself, of 'a sufficient connection' would enable the forum of necessity to be applied in favour of the applicant. Although it cites the Federal Council's interpretation of that provision (see paragraph 22 of the judgment, point 3.4 of the Federal [Supreme] Court's decision) and refers to the legal writings which argue that the forum of necessity must be recognised, in particular, in situations of political persecution, the Federal Supreme Court chose, in its judgment of 22 May 2007, a restrictive interpretation, although there was nothing, either in the law, or the case-law, or the legal writings, forcing it to do so. In our opinion, the Federal [Supreme] Court denied the applicant justice.
>
> 8. The applicant fled to Switzerland in 1992 [correct year 1993][40] and was granted political asylum on 8 November 1995. He obtained Swiss citizenship through naturalisation following a favourable opinion issued on 6 November 2006 by the Canton of Geneva, endorsed by authorisation from the Federal Migration Office dated 21 May 2007, and his naturalisation was confirmed on 25 May 2007 by the Versoix Municipal Council.
>
> 9. We wish to draw attention to the date of the Federal [Supreme] Court's judgment, that is, 22 May 2007, which ruled that there was not a sufficient link between the applicant's case and Switzerland! In this regard, we would again point out that the Federal Migration Office authorised the applicant's naturalisation one day prior to the Federal [Supreme] Court's judgment, that is on 21 May 2007, and that the only procedure that occurred subsequent to that date was the confirmation by the Town of Versoix on 25 May 2007. The applicant had been resident in Switzerland for eleven and a half years at the time that the Federal [Supreme] Court delivered its

40. See paragraph 17 of the present judgment and paragraph 11 of the Chamber judgment.

judgment on 22 May 2007, and he obtained Swiss nationality on 25 May 2007, with prior authorisation of which the Federal Supreme Court could not have been unaware, since it was dated 21 May 2007, or one day before that court's decision.

10. The applicant's place of residence, refugee status, the naturalisation procedure with the favourable opinion of 2006 and the authorisation of 21 May 2007, taken together with the presence in Swiss territory of the person suspected of having committed the alleged acts of torture, that is, under the jurisdiction of the State concerned, enabled a sufficiently strong connection to be established in order to apply section 3 of the Federal Law on Private International Law and to examine the applicant's claim on its merits.

11. In the light of the above, the Federal [Supreme] Court's interpretation of this provision in the present case is arbitrary and manifestly unreasonable."

58. In paragraph 3 of his Observations, the applicant refers to a fact that the Chamber failed to note, namely that the naturalisation order extended to his wife and his two children, who had been born in June 1996 and January 1998 respectively.

59. It is interesting to note that the interpretation given by the Federal Supreme Court to section 3 of the LDIP was found by the three judges' joint dissenting opinion, in the light of the facts of the case, to be not only restrictive but also arbitrary and manifestly unreasonable, in that it failed to take into account all of the facts proving the strong link the applicant and his case had with Switzerland. This test of unreasonableness and arbitrariness is different from the first test examined under the previous heading, which is based on a *contra legem* interpretation.

60. As has been noted above, the Federal Supreme Court admitted that the meaning of the term "cause" in the French text of section 3, translated as "case" in English, is uncertain, and so it preferred to use the meaning the corresponding term had in the German and Italian versions, which indicate that it is "the set of facts and legal argumentation rather than the person of the applicant which must have a sufficient connection with Switzerland".[41] But even if we take the view that the term "*cause*" in French or the term "case" in English means "set of facts", it should not be limited in respect of wrongful acts only to the occurrence of such acts, but also to all the facts relating to and concerning the case. One of these facts was that – after the applicant's alleged torture in Tunisia – he fled to Switzerland, where he has stayed with his family for many years. Another fact is that he sought refuge in 1993 in Switzerland, where he applied for asylum in the same year and where the Swiss authorities granted him asylum on 8 November 1995. A further fact is that he had applied for naturalisation in order to acquire Swiss nationality, and the procedure was at quite an advanced stage. Indeed, the Federal Migration Office authorised the applicant's naturalisation one day before delivery of the Federal Supreme Court's judgment. Lastly, it was a

41. See paragraph 3.5 of the Federal Supreme Court's judgment, quoted in paragraph 30 of the present judgment.

fact that it was impossible for the applicant to lodge a civil action in Tunisia.[42]

61. Although this last fact mainly concerns the second condition for the applicability of section 3 (that is, "and proceedings abroad prove impossible or it cannot reasonably be required that they brought"), it is also a fact which, together with the applicant's long residence and domicile and his refugee status in Switzerland, relates to the applicant's "case" within the meaning of section 3 of the LDIP and has a sufficient connection with Switzerland.

62. Even section 129 § 2 of the LDIP, which uses as a connecting factor the "place in which the act took place", adds to it "or of its outcome", thus showing that the outcome of the wrongful act is also a relevant connecting factor and has to be taken into consideration. The outcome of the applicant's alleged torture could also be his alleged "suffering" as a result of it, for which he filed the civil action in Switzerland, an option unavailable to him in Tunisia, where the alleged torture had occurred. It follows that the alternative connecting factors in section 129 § 2 of LDIP, namely "the place in which the act took place" and "the place of the outcome of the wrongful act" may assist in the interpretation of section 3 of LDIP, in that the place of the outcome of the wrongful act may be the place where an applicant is able to proceed with an action seeking damages for that wrongful act.

63. Non-pecuniary damage is, by its very nature, also related to the place where the victim resides or is domiciled after the acts of torture have occurred. This is because non-pecuniary damage also concerns continuing mental conditions, such as anguish, distress and feelings of helplessness, frustration, mistrust, humiliation, psychological pain, etc., arising from the alleged physical and psychological torture, which will probably accompany the victim of torture throughout his life.

---

42. See paragraph 22 of the present judgment and paragraph 15 of the Chamber judgment. On this point, the Court of Justice of the Canton of Geneva, in paragraph 4.3 of its judgment of 15 September 2006 in the present case, stated as follows: "In the present case, it is clear that the appellant, being a refugee, cannot return to his country in order to bring an action. He has also demonstrated that it is extremely difficult for him to be represented for that purpose. Moreover, the documents provided show that, as matters currently stand in Tunisia, any attempts by the victims of acts of torture carried out by State agents to file a complaint are systematically obstructed, including by the use of threats and physical violence, and no action is taken pursuant to such complaints. The applicant has, therefore demonstrated that he is unable to bring the present action in Tunisia."
The Federal Supreme Court at paragraph 3.3 of its judgment of 22 May 2007 avoided a decision on the second criterion of section 3 of the LDIP, namely that "the proceedings abroad prove impossible", in view of the fact that the third criterion of section 3 was not in its view met; however, in dealing with the facts under section A it seems to accept this impossibility, by stating: "On 22 July 2003, Abdennacer Naït-Liman applied to a Tunisian lawyer to represent him with a view to bringing a civil action for damages against A. K. and the Republic of Tunisia. In a reply dated 28 July 2003, the lawyer concerned indicated that such an action had never succeeded and advised him not to submit such a claim."

64. Furthermore, as is clear from its judgment, the Federal Supreme Court interpreted the term "case" as covering the set of facts and the legal argumentation. But what was the meaning of legal argumentation? The Federal Supreme Court made no comment on this point. In my view, however, legal argumentation presupposes and/or includes the capacity to argue the case, which the applicant could only exercise in Switzerland. Besides, legal argumentation relates to both the substance and the procedure of the case. The word "case" is so broad, wide and vague that it can mean many other things apart from the facts of the case. It may mean the evidence, the procedure, the remedies, the parties and their status, etc. In the *Oxford Dictionary of Law* edited by Jonathan Law and Elizabeth A. Martin,[43] under the entry "case", the following explanation or meaning is given:

> "**1**. A court action. **2**. A legal dispute. **3**. The arguments, collectively, put forward by either side in a court action. **4.** (*action on the case*) A form of action abolished by the Judicature Acts 1873-75".[44]

All the above possible meanings of the term "case" show that the interpretation given by the Federal Supreme Court to this term, limiting it only to the occurrence of the acts of violence, was overly restrictive.

65. Facts relevant to the case may also include those mentioned in paragraphs 19-21 of the judgment under the heading "The Criminal complaint against the Tunisian Minister of the Interior in office at the time of the alleged facts" [i.e. A.K.], which, however, are not taken into account in the Court's reasoning:

> "19. 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 ..., for severe bodily injury, illegal confinement, insults, causing danger to health, coercion and abuse of authority. The applicant applied to join these proceedings as a civil party seeking damages.
>
> 20. On the same date the Principal Public Prosecutor transmitted to the head of the security police, by internal mail, a request to 'attempt to locate and identify the accused individual, who [was] supposedly hospitalised in the Geneva University Hospital, for heart surgery' and 'if possible, to arrest him and bring him before an investigating judge'. On receipt of this request, the police immediately 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.
>
> 21. On 19 February 2001 the Principal Public Prosecutor made an order discontinuing the proceedings on the grounds that A.K. had left Switzerland and that the police had been unable to arrest him..."

43. Oxford, 2009.
44. Ibid., at p. 81.

66. With regard to the above important facts, the three dissenting judges Karakaş, Vučinić and Kūris stated – appropriately, in my view – as follows in paragraphs 13-14 of their joint separate opinion in the Chamber proceedings:

> "13. The domestic courts, together with the majority of the Chamber, have thus neglected the Swiss authorities' failure to take account of the criminal complaint lodged by the applicant against the suspect, although the latter was at that time present in Switzerland.
>
> 14. From the moment that the individual suspected of having committed the acts of torture complained of had spent time in Switzerland, the State's international obligations came into play and the domestic courts thus had jurisdiction for bringing criminal proceedings, during which functional immunity could not be relied on in respect of torture."

67. In interpreting section 3 of the LDIP, one must not lose sight of the fact that this Act treats domicile or habitual residence as relevant connecting factors, and, of course, as sufficient connections with Switzerland, by using them generally throughout the text. For instance, in section 129 § 2 of the LDIP dealing with wrongful acts, the connecting factor of "the place in which the act took place or of its outcome" is relevant only when "the defendant has neither a domicile nor a place of habitual residence or place of business in Switzerland". Another example is section 2 of the LDIP, which provides:

> "Unless specially provided otherwise in this Act, the Swiss judicial or administrative authorities of the defendant's domicile shall have jurisdiction."

68. Habitual residence is also important as a connecting factor for the purposes of the LDIP when dealing with the applicable law. This is clear from the provisions of section 133 §§ 1 & 2 of the LDIP[45] which provide that the applicable law is to be the law of the State in which the wrongful act was committed only where the perpetrator and the injured party do not have their habitual residence in the same State. This was also the situation in the present case, in that the two parties in the action before the Swiss courts, the applicant and A.K., had different habitual residences. From this it is clear that the law to be applied by the Swiss courts in the present case ("the applicable law"), provided that they assumed jurisdiction, would be the law of Tunisia.

69. The provision of section 133 § 2 of the LDIP, though dealing with the applicable law, assumes that the Swiss courts have jurisdiction in cases similar to the present one. Otherwise, there would be no point in making a

---

45. See the text of this section in paragraph 37 of the judgment. According to section 133 § 1 of the LDIP, "[w]here the perpetrator and the injured party have their habitual residence in the same State, the claims submitted in respect of a wrongful act shall be governed by the law of that State", irrespective of whether the wrongful act was committed elsewhere. Again, from this provision one can draw an argument how relevant connecting factor is the habitual residence of the parties.

provision for the *lex loci delicti commissi* ("law of the place where the delict was committed") as the applicable law where there is a conflict of laws, in circumstances similar to those in the present case, if the Swiss courts were not given jurisdiction in such cases.

70. If residence is so important as a connecting factor in the LDIP generally, it would not be logical to ignore or exclude it when examining whether a given case has a sufficient connection in Switzerland for the purposes of section 3. The connecting factor provided for in section 3 is so general, wide and vague as to include any specific factors, such as the applicant's nationality, domicile, residence, etc., depending on the circumstances of the case. These specific factors, however, are not included as independent connecting factors, but as relevant facts supporting the case's connection or link with Switzerland. Section 3 deals with the forum of necessity for any kind of case and not only for wrongful acts. It is to be noted that, like sections 2 and 129 of the LDIP, section 3 deals both with jurisdiction in private international law or in external conflict of laws, and also with territorial jurisdiction (that is, local jurisdiction). This is clear from the use of the term "locality" in the phrase "the Swiss judicial or administrative authorities of the locality".

71. As is rightly observed in paragraph 114 of the Chamber judgment, those States in Europe which have adopted the concept of forum of necessity consider nationality, domicile or habitual residence as a sufficient connection between the facts of the dispute and their jurisdiction, that is, the requested forum State.[46] Although this comparative survey is mentioned in

---

46. In paragraph 73 of his Observations, the applicant fully agrees with what is stated in the Chamber judgment, namely that "the connections usually regarded as sufficient are nationality, domicile or habitual place of residence", and adds the following in paragraphs 74-75:

"74. The applicant could not agree more! He observes that none of the States applying the forum of necessity require the existence of criteria which relate solely to the legal basis of the dispute and are thus independent of the actual person of the applicant. The criteria set out are for most of the countries concerned, defined in general on non-specific terms ('close connections', 'sufficient connection', etc. …), while in other countries which address the issue in more precise terms the criteria all concern the relationship between a party to the dispute and the forum State and not the legal basis of the dispute:

- Austria: nationality, legal or habitual resident;
- Belgium: nationality, domicile or habitual residence;
- Estonia: residence;
- France: a certain attachment;
- Germany: nationality or habitual resident;
- Poland: temporary or permanent residence;
- Portugal: nationality or habitual residence;
- Romania: citizenship or residence.

In the case of the Netherlands the criteria are more flexible still, 'no particular connection with the Netherlands being required".

75. The applicant shares the view that the criteria of domicile, habitual residence, or indeed of nationality, are amply sufficient to bring the forum of necessity into play in cases where

the Chamber judgment, it is nevertheless, ignored at the end by that judgment, when concluding on the interpretation of section 3 of the LDIP.

72. In paragraphs 84-90 of the present judgment, under the heading "B. The forum of necessity", reference is made to a comparative-law analysis on the issue of the forum of necessity. Despite this, however, no mention is made of what the other member States of the Council of Europe which have adopted the concept consider to be a relevant connecting factor for their jurisdiction.

73. It is important to note in this connection that paragraph 85 of the General Report[47] concerning a study undertaken at the request of the European Commission on Residual Jurisdiction (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), in the chapter dealing with the *forum necessitatis*, contains the following information:

> "There is a general consensus that the required connection exists at least when the plaintiff is domiciled or habitually resident in the forum State, or even when he is a citizen of that State".

74. In paragraph 15 of the joint dissenting opinion by the three judges in the Chamber judgment, after a reference to the admission in paragraph 114 of that judgment with regard to what other member States of the Council of Europe regard as sufficient connections with their jurisdiction, it is rightly argued that "section 3 of the Federal Law on Private International Law is part of the consensus within the member States of the Council of Europe providing for a sufficient connection". It went on: "The problem, however, lies in the Federal [Supreme] Court's restrictive interpretation".

75. "Sufficient connection", which is a vague, wide and general term, does not actually refer to any particular connecting factor, but to the *degree* of connection any relevant factor, fact or link must have with Switzerland. The adjective "sufficient" contains this meaning of the appropriate degree of connection with Switzerland. The term "connection" in section 3 of the LDIP may cover any relevant connecting factor. Thus, a "sufficient connection" may be a constellation covering any relevant connecting factor, including the applicant's status. Under the ordinary grounds of jurisdiction of the Swiss courts (see section 129 §§ 1 and 2 of the LDIP), the relevant connecting factors are the domicile or habitual residence or place of business of the respondent in Switzerland, and only when these are not present does one go to the place in which the wrongful act took place. Thus,

---

the action cannot be brought before the courts of another State."

47. Final Version dated 3 September 2007 (page 66), available on internet: http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf. The applicant also mentions this Report in paragraph 54 of his referral request. The Report was prepared by Professor Arnaud Nuyts.

it is logical to argue that the forum of necessity under section 3 may cover the applicant's domicile, habitual residence and place of business.

76. The interpretation given by the Federal Supreme Court to section 3 of the LDIP should have been compatible with Article 1 of the Convention, which provides as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

77. In *Ireland v. the United Kingdom* (18 January 1978, § 278, Series A, no. 25), the Court held that Article 1 "demarcates the scope of the Convention *ratione personae, materiae* and *loci*". As is clear from the drafting history of this Article, the term "residing" was considered too restrictive and was replaced by the words "within their jurisdiction".

78. In this connection the Committee of Experts noted the following, showing what the drafters of the Convention had considered as a restrictive connecting factor, or not, for the jurisdiction *ratione personae, materiae* and *loci* of each High Contracting Party in securing human rights:

> "3. The Assembly draft had extended the benefits of the Convention to 'all persons residing within the territories of the signatory States'. It seemed to the Committee that the term 'residing' might be considered too restrictive. It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territories of a signatory States, even those who could not be considered as residing there in the legal sense of the word. This word, moreover, has not the same meaning in all national laws. The Committee therefore replaced the term 'residing' by the words 'within their jurisdiction' which are also contained in Article 2 of the Draft Covenant of the United Nations Commission."[48]

79. The present application was lodged against Switzerland, a High Contracting Party, alleging a violation of Article 6 § 1 of the Convention by denying access to a court. Article 1 of the Convention is rendered relevant by virtue of Article 34 of the Convention and applied every time an application is lodged against one of the High Contracting Parties, as was the application against Switzerland in the present case. In my view, since the applicant was "within [Switzerland's] jurisdiction" for the purposes of Article 1 of the Convention, a positive obligation arose which Switzerland, as a High Contracting State, was required to fulfil, namely to provide the applicant with access to a court as regards his claim for non-pecuniary

48. See Council of Europe, Collected Edition of *Travaux Préparatoires* of the European Convention on Human Rights, Volume III, Committee of Experts 2 February – 10 March 1950, The Hague, 1976, at p. 260. See also on the drafting history of Article 1 of the Convention, *Banković and Others v. Belgium and Others* (dec.) [GC] no. 52207/99, §§ 19-21, ECHR-2001 XII; William A. Schabas, *The European Convention on Human Rights – A Commentary,* Oxford, 2015, at pp. 84 et seq.; Morten Peschardt Pedersen, "Territorial Jurisdiction in Article 1 of the European Convention on Human Rights", *Nordic Journal of International Law,* vol. 73, no. 1, 2004, 279, at pp. 281 et seq.

damages in respect of an alleged violation of his right to be free from torture, secured by Article 3 of the Convention.

80. In my view, it is immaterial that the applicant's civil action in Switzerland was brought against Tunisia, which is not a High Contracting Party, because this is not the issue in the present case.[49] Yet even if this were to be material, and the Swiss court had no obligation under Article 1 of the Convention, again, section of 3 of LDIP should not have been interpreted in a way that was inconsistent with Article 1 of the Convention.

81. If the civil action were against a State which was a High Contracting Party, then there would be no doubt that the Swiss court would have had jurisdiction directly under Article 1 of the Convention, without there being any need to refer to section 3 of the LDIP, which in any event has to be interpreted in line with Article 1 of the Convention. However, if section 3 must be interpreted in line with Article 1 of the Convention whenever an application is against one of the other 46 High Contracting Parties, it would be illogical for it to be interpreted differently because the respondent was not a High Contracting Party, as happened in the present case in the applicant's civil action before the Swiss courts.

82. This view is fully supported by the following passage from Lowrens R. Kiestra's book *The Impact of the European Convention on Human Rights on Private International Law,* where reference is also made to the Court's case-law:[50]

> "The authorities of the Contracting Parties are obliged to secure to everyone within their jurisdiction the rights and freedoms guaranteed in the ECHR, as Article 1 ECHR prescribes. If a litigant of another Contracting Party or a third country brings proceedings before a court of one of the Contracting Parties, the decision of that court to either assert jurisdiction or not, based on the forum's jurisdictional rules, has to be in line with the ECHR. The moment the foreign litigant brings proceedings in a court of one of the Contracting Parties, he or she is within the jurisdiction of that Contracting Party in the sense of Article 1 ECHR. The jurisdictional rules of the forum cannot limit the applicability of the ECHR in this regard. If this were different, the right of access to a court would become meaningless.

---

49. It is interesting to note the comments of Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights,* Antwerp – Oxford, 2006, (chapter 1 revised by Leo Zwaak) at p. 14: "… in several cases the Commission and the Court held that although Article 1 sets limits on the scope of the Convention, the concept of 'jurisdiction' under this provision does not imply that the responsibility of the Contracting Parties is restricted to acts committed on their territory. … As a general rule, the notion of 'jurisdiction' within the meaning of Article 1 of the Convention must be considered as reflecting the position under public international law."
In *Assanidze v. Georgia* ([GC], no. 71503/01, § 141, ECHR 2004-II), the Court pertinently held: "Unlike the American Convention on Human Rights of 22 November 1969 (Article 28), the European Convention does not contain a 'federal clause' limiting the obligations of the federal State for events occurring on the territory of the states forming part of the federation."

50. See Louwrens R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law,* Maastricht, The Netherlands, 2014.

The Court seemingly confirmed this stance in *Markovic and Others v. Italy*. ... The applicants in *Markovic* were all citizens of Serbia and Montenegro (not a Contracting Party at the time) who had initiated civil proceedings for damages in Italy against Italy on behalf of relatives who had died in the aforementioned attack. However, the Italians courts held that they had not jurisdiction to hear the case, as – in short – the impugned acts, acts of war were not open to judicial review. In this case a number of interesting issues relating to both Article 1 and Article 6 ECHR were raised. One was whether the applicants came within the jurisdiction of Italy within the meaning of Article 1 ECHR. The Court held on this issue that while the extraterritorial nature of the events which allegedly underlay the applicant's action for damages may have an impact on the applicability of Article 6 ECHR and the outcome of the proceedings, it is beyond dispute that this does *not* affect the jurisdiction *ratione loci* and *ratione personae* of the respondent State. The Court came to the following conclusion, which would appear to leave little doubt:

'If civil proceedings are brought in the domestic courts, the State is required by Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6 [ECHR]. The Court considers that, once a person brings a civil action in the courts or tribunals of a State, there indisputably exists, without prejudice to the outcome of the proceedings, a 'jurisdictional link' for the purposes of Article 1 [ECHR]'.

This, of course does not mean that courts of Contracting Parties would have to assert jurisdiction in the private international law sense in all cases. As will be further discussed below, Article 6(1) ECHR, the right of access to a court, requires regulation by the State and is therefore inherently limited. Such limitation may be allowed under Article 6(1) ECHR. The (courts of the) Contracting Parties cannot simply dismiss the invocation of Article 6(1) ECHR in this regard by finding that they have no jurisdiction in the private international law sense and by concluding that the ECHR therefore does not apply."[51]

83. It is to be noted that the *Markovic* case,[52] to which the above passage refers, was a Grand Chamber case, so my argument under Article 1, which is supported by the above case, is backed by the greatest possible weight and authority.

84. Section 3 of the LDIP would not have been given a restrictive interpretation in respect of acts of torture had account been taken of the provisions of Article 14 § 1 of the 1984 UN Convention against Torture or, otherwise, had a compatible interpretation with this provision been given. This 1984 Convention was ratified by Switzerland on 2 December 1986 and entered into force on 26 June 1987. Article 14 § 1 of the UN Convention against Torture reads:

"1. 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 ...."

85. As is rightly stated by the Grand Chamber in paragraph 110 of the present judgment, "the rights of victims from acts of torture to obtain

51. Ibid., at pp. 94-95.
52. See *Markovic and Others v. Italy* [GC], no. 1398/03, § 54, ECHR 2006-XIV.

compensation is today recognised by Swiss law" and "[m]oreover it is not in dispute between the parties that this right is a civil one". Thus, in paragraph 111 of the judgment it is concluded that "Article 6 § 1 of the Convention is applicable in the present case". In paragraph 38 of the judgment, reference is made to Article 41 of the Swiss Code of Obligations which provides for liability for a wrongful act. However, according to section 133 § 2 of the LDIP, the relevant applicable law in the present case should not be the *lex fori,* that is, Article 41 of the Swiss Code of Obligations, but the *lex loci commissi delicti,* that is, the Tunisian law.

86. Equally, section 3 of the LDIP would not have been given a restrictive interpretation as regards acts of torture had the provisions of Article 16 § 1 of the United Nations Convention relating to the Status of Refugees of 28 July 1951 been taken into account or, otherwise, had a compatible interpretation with this provision been given. Article 16 § 1 of this UN Convention reads:

> "1. A refugee shall have free access to the courts of law on the territory of all Contracting States ...."

This Convention entered into force on 22 April 1954. It was ratified by Switzerland on 21 January 1955 and entered into force in respect of that State on 21 April 1955.

87. In enacting the LDIP, where the legislature intended to make "the place where the wrongful act was committed" relevant as a connecting factor with regard to jurisdiction and the applicable law for wrongful acts, it expressed itself clearly by saying so in sections 129 § 2 and 133 § 2 respectively of that Act. Since it did not do the same with regard to the forum of necessity in section 3 of the LDIP and instead used a more general connecting factor, namely, that "the case must have a sufficient connection", it may be presumed that it was not its intention to limit the jurisdiction of the Swiss courts under section 3 when the wrongful act had occurred in Switzerland.

88. Lastly, the Swiss legislature decided, as regards wrongful acts, that the "domicile", "habitual residence" and "place of business" of the defendant in Switzerland, and the *loci commissi delicti* being in Switzerland, were to be the relevant connecting factors vesting the Swiss courts with ordinary jurisdiction under section 129 §§ 1 and 2 of the LDIP. It is apparent that these could not also be the connecting factors for the Swiss courts' jurisdiction under section 3 of the LDIP, dealing with the forum of necessity. But since the "domicile", "habitual residence" or "place of business" of the defendant are considered by the legislature as the relevant connecting factors for the ordinary jurisdiction of the Swiss courts, it is most logical to argue that the claimant's "domicile", "habitual residence" or "place of business" are relevant connecting factors which fall

under the wide phrase "a sufficient connection" with Switzerland within the meaning of section 3 of the LDIP.

II. My disagreement with the judgment's approach

89. My disagreement with the present judgment's approach lies in the following aspects:

(a) The judgment does not examine and take into account the fact that section 3 of the LDIP was interpreted and applied by the Federal Supreme Court in an arbitrary and manifestly unreasonable manner, as I have explained in section I (a) above (see paragraphs 13-43), and that, as a result, it does not conclude that there has been a denial of justice to the applicant, in breach of Article 6 § 1 of the Convention.

(b) The judgment does not find that section 3 of the LDIP was restrictively interpreted and applied by the Federal Supreme Court, as I have explained in section I (b) above (see §§ 44 to 88), and that, as a result, it does not conclude that there has been a denial of justice to the applicant, in breach of Article 6 § 1 of the Convention.

(c) Unlike the judgment, I find that there has been a violation of Article 6 § 1 of the Convention in the present case. Our different conclusions are due to the interpretation and application of section 3 of the LDIP. For the reasons stated above, I believe that section 3 recognises the right of the applicant to bring an action for compensation in respect of acts of torture which took place in Tunisia, because his case had a sufficient connection with Swiss jurisdiction.

(d) As regards the merits of the case, the judgment examines the case in relation to two issues: (a) whether the restriction on the applicant's right of access to a court pursued a legitimate aim; (b) whether the restriction was proportionate; it concludes by giving an affirmative answer to these questions and finding that there has been no violation of Article 6 § 1 of the Convention.

90. In my humble view, since the interpretation given to section 3 of the LDIP by the Federal Supreme Court was made *contra legem* and was so restrictive that it resulted in the applicant being deprived of his right to have access to a court, contrary to Article 6 § 1 of the Convention, the examination of the above two issues, which the Court decided in the affirmative, is rendered unnecessary or, even more precisely, irrelevant.

91. Irrespective of my conclusion that it was irrelevant to examine the two issues on the merits that were raised and decided by the Court, I will, nevertheless, proceed to examine them in order to provide some alternative or further arguments supporting my opinion that there has been a violation of Article 6 § 1 of the Convention in the present case.

(a) Legitimate aim

92. First, I will start with the issue of whether the restriction on the applicant's right of access to a court pursued a legitimate aim. In this connection, I would make the following observations:

(a) It is not possible for a restriction on the applicant's right of access to a court to have pursued a legitimate aim when that restriction was made *contra legem* or was based on an error in law, as explained above, that is, when the applicability of section 3 of the LDIP as regards wrongful acts was limited by the Federal Supreme Court only to cases when these acts took place in Switzerland, overlooking the contrary express provision of the same section making it applicable only where the LDIP does not provide for any forum in Switzerland, in spite of the fact that such a forum is expressly provided for in section 129 § 2 of the LDIP in respect of wrongful acts committed in Switzerland.

(b) In paragraphs 123-128 of the present judgment, five aims are mentioned, and are considered by the majority to be legitimate in terms of the impugned restriction on the applicant's right of access to a court. In my view, however, what the Court considers in paragraphs 123-128 as the legitimate aims pursued by the restriction in the present case are not, by their very nature (with one exception, which in any event does not apply in the present case), legitimate aims within the scope of Article 6 § 1 of the Convention. Besides, they concern assumptions or hypothetical State policies which are unsubstantiated and have no basis in the legislature or the Swiss case-law, including the Federal Supreme Court's judgment in this case. Having said that, I will examine also separately what the Court considers as the legitimate aims of the impugned restriction.

93. In paragraph 123, the Court considers as a legitimate aim the difficulties that would be faced by the Swiss courts in gathering and assessing evidence, given that the alleged acts of torture took place in Tunisia in 1992. However, it omitted to take into account that furnishing evidence for the applicant's case was his own responsibility and task,[53] and not the responsibility of the Swiss courts; were he unable to substantiate the claims made in his action, it could simply be dismissed, as would any other action, not concerning private international law, which was not well substantiated or proven. Besides, with regard to "Article 6 of the Convention, access to justice could not be viewed as subject to the ease with

53. See relevant legal Latin maxims: *probandi necessitas incumbit illi qui agit* (see *Institutes* of Justinian 2, 20, 4) meaning the necessity of proving lies upon he who sues; *affirmanti, non neganti, incumbit probatio* (see Wharton's *Law Lexicon*, 30), meaning that he who affirms, not he who denies, must bear the burden of proof; *affirmantis est probatio* (see 9 Cushing's *Mass. Reports* 535), meaning that he who affirms must prove; *actori incumbit (onus) probandi* (or *probatio*) meaning that the burden of proof lies on the plaintiff.

which evidence could be gathered"[54] and "the risk of losing a case can in no way be regarded as a legitimate ground for restricting the right of access to a court".[55]

94. In paragraph 124 of the present judgment, the Court considers as another legitimate aim of the impugned restriction the difficulties associated with enforcement of a possible judgment in the applicant's action. However, "[t]he feasibility of enforcing abroad a judgment delivered in Switzerland is not in any way a precondition for recognising the jurisdiction of its courts: the LDIP makes no provision for a restriction of this kind. Moreover, this argument does not figure in the *ratio decidendi* of the Federal Supreme Court's judgment. Seeking to read into Article 3 LDIP, a *posteriori,* a condition which it does not contain is thus unacceptable."[56] Furthermore, "[i]t has not be established, and has never been alleged that a Swiss judgment, rendered in the case in issue, on a claim of non-pecuniary injury would be contrary to Tunisian public policy."[57] Besides, the Court is not sure ("it is doubtful") whether a judgment delivered in the circumstances of the case could effectively be enforced in Tunisia.

95. In paragraph 125 of its judgment, the Court considers "a State's wish to discourage forum shopping, in particular in a context in which the resources allocated to domestic courts are being restricted", as another legitimate aim of the impugned restriction. Of course, discouraging forum-shopping could be a legitimate aim, but this was not the legislature's purpose in enacting section 3 of the LDIP, as has been seen from the drafting history. Besides, even were this a legitimate aim for restricting the interpretation of section 3, it would not be applicable to the circumstances of the applicant, who has been resident for so many years in Switzerland, which assisted him by granting asylum in view of his inability to return to his own country. It is contradictory for Switzerland to grant political asylum to the applicant on the one hand, on the basis of his allegations that he was subjected to torture in Tunisia and, on the other hand, to consider him as attempting to forum-shop when he resorts to the Swiss courts and seeking non-pecuniary damage in respect of those alleged events in Tunisia. After all, as was clearly noted by the applicant:

> "It should be noted, above all that the applicant is not in any way asking Switzerland to repair the harm but simply that it should make its judicial system available in order that the person directly responsible for the acts of torture endured be required to make reparation for the consequences of his acts." (emphasis in the original text)

54. See paragraph 117 of the applicant's written Observations.
55. See paragraph 119 of the applicant's Observations.
56. See paragraph 120 of the applicant's Observations.
57. See paragraph 126 of the applicant's Observations.

However, the judicial system of Switzerland was not made available to him, although this country has embraced him by granting asylum and, ultimately, nationality.

96. In paragraph 126 of its judgment, the Court considers as a legitimate aim the fear expressed by the Government "to the effect that accepting an action such as the applicant's where the connection with Switzerland at the relevant time was relatively tenuous would be likely to attract similar complaints from other victims in the same situations with regard to Switzerland, and thus to result in an excessive workload for the domestic courts". However, this argument is based only on an allegation of fear expressed by the Government, which was not substantiated and in any event was not made by the Federal Supreme Court. Besides, as has been explained above, the applicant's case had not only a sufficient but also a real or substantial connection with Switzerland throughout the entire period that the judicial proceedings were pending before the Swiss courts.

97. The same paragraph contains an allegation that "[i]t follows that a reasonable restriction on admissible complaints is likely to ensure the effectiveness of the judicial system". In my humble view, the Federal Supreme Court's restrictive interpretation of section 3, adopted here by the Grand Chamber, was not reasonable, but was manifestly unreasonable and arbitrary and amounted to a denial of justice. So, any unreasonable restriction on similar admissible complaints could not but run counter to the effectiveness of a national judicial system and of the provisions of Article 6 § 1 of the Convention. In this connection, the applicant rightly remarks in paragraph 113 of his Observations:

> "113. It can thus be seen that the Court, in its decisions over several decades on the civil limb of Article 6 of the Convention, has *very extensively expanded litigants' access to the courts*. In none of the cases referred to was the argument of the additional burden on the courts invoked, still less did such an argument prevail[s]." (emphasis in the original text)

In paragraph 116 of his Observations the applicant appropriately, in my view, also argues:

> "116. And finally, the argument of an excessive burden of work loses any remaining value and relevance when it is considered that Switzerland already allows the victims of international crimes *perpetrated abroad to lodge civil claims in* the framework of criminal proceedings." (emphasis in the original text)

98. In paragraph 127 of the judgment, the Court accepts as a subsidiary consideration justifying the impugned restriction the argument "that a State cannot ignore the potential diplomatic difficulties entailed by recognition of civil jurisdiction in the conditions proposed by the applicant". In my view, this consideration, apart from being hypothetical, is not a legal one. It should not therefore be used in assessing the fundamental right of access to a court under Article 6 § 1. In addition, there is nothing in section 3 of the

LDIP or any other provision of this Act or in the Federal Supreme Court's judgment which provides a basis for such a consideration.

99. As has been stated above, the right of access to a court is an implied right. Although implied in Article 6 § 1 of the Convention, which provides for an absolute right (subject only to the exceptions when a trial may be conducted *in camera*), the right of access to a court is nevertheless, according to the Court's case-law, a qualified or limited right, since it can be regulated by the State. There is no reference in Article 6 § 1 of the Convention to any specific legitimate aims, as is the case, for example, in the second paragraph of each of Articles 8-11 of the Convention. Although, in justifying a restriction on the right of access to a court, States are free to rely on an aim not contained in the list of aims provided in these other provisions of the Convention, for such an aim to be legitimate it must be compatible with the rule of law, the general objectives of the Convention[58] and the particular nature of the said right. In my view, however, for the sake of coherence in the Convention such aims should, as far as possible, be, *mutatis mutandis*, similar to those of Articles 8-11. Adopting aims in the present case which are not legitimate and which in any event militate against the legitimate aims set out in other provisions of the Convention, namely Articles 8-11 § 2, such as "protection of the rights of others" and "prevention of crime", is indisputably outside the scope and the spirit of the Convention. As pertinently observed by the NGO *Citizens' Watch* at paragraph 19 of their third-party observations before the Grand Chamber in the present case:

> "If perpetrators feel safe in the jurisdiction where they enjoy powerful positions or otherwise shielded from domestic court proceedings against them, civil and/or criminal, they can still be brought to account in other jurisdictions. Sometimes, civil proceedings are more effective than criminal proceedings in pursuing the objective or eradicating impunity, as they unequivocally 'set price' of human rights violations and prevent violators from enjoying fruits of their crimes."

100. One must always bear in mind that regulating a right is different from depriving [a person] of or destroying a right, and the regulation of a right should never have such a destructive effect. Article 17 of the Convention clearly provides that nothing in the Convention should be interpreted as implying for any State any act aimed at the destruction of any of the rights set forth in the Convention. Thus, a State cannot, on the pretext of regulating the right of access to a court, take steps to destroy it.[59]

---

58. See, similarly, *Ždanoka v. Latvia* ([GC], no. 58278/00, § 115 (b), ECHR 2006-IV), regarding implied limitations to Article 3 of Protocol No. 1.

59. According to the wording of Article 17 of the Convention, all the rights and freedoms set forth in the Convention, including Article 6, are eligible for the application of Article 17. See, however, a different view, contending that not all the articles of the Convention are eligible for the application of Article 17, and that Articles 5, 6 and 7 are not eligible articles, since, due to their procedural nature, they cannot serve as instruments for

(b) Proportionality test

101. Now I will turn to the issue raised by the Court as to whether the restriction was proportionate.

102. When the aim is for a restriction to a right which is not legitimate, every proportionality test between the means employed and the aim pursed is bound to fail in advance or even before it is attempted. To be more precise, no question of proportionality arises in the event of such a restriction, since the principle of proportionality, which is a basic principle of the Convention and of a democratic society, applies only when what are to be weighed up in the balancing exercise are a right and a restriction that is based on an aim which is legitimate rather than illegitimate. As Ioannis Sarmas, a Greek supreme court judge, rightly put it in his book *The Fair Balance – Justice as an Equilibrium Setting Exercise,*[60]

> "Proportionality requires the decision dealing with conflicting interests to combine in a harmonious whole the appropriateness of the means selected to achieve the objective. In order to be proportional a decision should, not only be adequate to achieve its objective; it *should also avoid a burden from being imposed [on] others without legitimate reason*."[61] (emphasis added).

103. Even in a case where the aim is legitimate, if the proportionality test leads to no access to a court at all, without merely regulating this right, it is certain that there must be an error somewhere in the balancing test or in the interpretation and application of the relevant provision of the domestic law, as occurred in the present case.

104. Under the question of proportionality the Court "discerns" and examines "two concepts of international law that are relevant for the present case: the forum of necessity and universal jurisdiction" (see paragraph 176 et seq. of the present judgment). The Court starts by saying that "[a]lthough the applicant submitted before the Grand Chamber that he was not relying on universal jurisdiction, the Grand Chamber considers that, in substance, his arguments come very close to such an approach" (ibid.). It then examines the concept of universal civil jurisdiction in respect of acts of torture, only to conclude "that international law did not oblige the

---

destructive activities (see Paulien Elsbeth de Morree, *Rights and Wrongs under the ECHR – The Prohibition of Abuse of Rights in Article 17 of the European Convention on Human Rights,* Utrecht, 2016, at pp. 73 et seq., esp. 80). I do not support this view, however, because the wording of the Article 17 is clear in this respect. Besides, Articles 5, 6 and 7, apart from being procedural in nature, also have a substantive nature, and, in any event, their nature has nothing to do with the application of Article 17.

60. See Ioannis Sarmas, *The Fair Balance – Justice as an Equilibrium-Setting Exercise,* Athens-Thessaloniki, 2014.

61. Ibid., p. 135.

Swiss authorities to open their courts to the applicant pursuant to universal civil jurisdiction for acts of torture" (see paragraph 198 of the judgment). At the end of the judgment (see paragraph 220), the Court, based "on the dynamic nature of this area", "does not rule out the possibility of developments in the future", and "... invites the State Parties to the Convention to take account [...] of any developments facilitating effective implementation of the right to compensation for acts of torture ..."

105. I find it unnecessary to deal with the concept of universal civil jurisdiction, not only for the reasons explained above with regard to the Federal Supreme Court's manifestly unreasonable, arbitrary and restrictive interpretation of section 3 of the LDIP, but also because the applicant had expressly declared[62] that he was not basing his application on the concept of universal civil jurisdiction and, in consequence, his case should not have been examined, in accordance with the principle of *non ultra petita*[63] (beyond the request). The concept of universal civil jurisdiction for acts of torture is a very serious and important issue and should not have been examined by the Court in a case, such as the present one, where the applicant specifically does not invoke it, merely for the Court to conclude that, at present, there is no such jurisdiction, even if it ultimately expresses encouragement and its wish that such jurisdiction will exist in future.

106. The Grand Chamber then examines whether the Swiss authorities were obliged under international law to open their courts to the applicant by virtue of the forum of necessity (see paragraphs 199 et seq. of the present judgment). It concludes in the negative. Based on a study conducted by it, which examined the laws of 40 States, including Switzerland, and from which it transpires that the concept of forum of necessity exists in only 12 European States and has recently been recognised in Canada (see paragraph 200), the Court finds that there exists no international custom rule enshrining the concept of a forum of necessity (see paragraph 201). It further adds that "there is no international treaty obligation obliging the States to provide for a forum of necessity" (see paragraph 202).

107. Having decided that international law did not impose an obligation on the Swiss authorities to open their courts with a view to ruling on the merits of the applicant's compensation claim, on the basis of either universal civil jurisdiction in respect of acts of torture or a forum of necessity, the Grand Chamber concludes that the Swiss authorities enjoyed a wide margin of appreciation in this area and therefore proceeds to

---

62. In paragraph 57 of his referral request he stated: "The applicant emphasises once again that it is not the purpose here to argue that Article 6 of the Convention should be interpreted as implying the recognition of a broad universal civil jurisdiction."
Also, in paragraph 104 of his Observations he stated: "It must be understood that the applicant has not in any way 'invoked' universal jurisdiction." The same point is also argued at paragraph 6 of his Observations.

63. See legal Latin maxim *ne eat iudex ultra et exra petita partium*.

ascertain whether that margin of appreciation was overstepped in the present case.

108. With due respect, the Grand Chamber's search for whether there existed a relevant customary international law is irrelevant, for two reasons: (a) firstly, because the applicant did not base his argument on international civil jurisdiction; and (b) secondly, because the doctrine of a forum of necessity is a concept of private international law rather than of public international law, and so any customary international rule has no application to it.

109. From my perspective, it is immaterial whether the forum of necessity as a concept of private international law is available in other countries. The Court should have focused its attention on the fact that the concept of necessity does indeed exist in Swiss private international law, and the interpretation and application of section 3 of the LDIP should not have been prima facie manifestly unreasonable and arbitrary or overly restrictive, to the extent of leading to a denial of the right of access to a court and of justice, in contravention of Article 6 § 1 of the Convention.

110. Public international law should not have been employed in order to decide whether or not the Swiss authorities enjoyed a wide margin of appreciation in an issue concerning private law. It is the provisions of Article 6 § 1 of the Convention as interpreted by the Court's case-law, the provisions of the LDIP and the facts of the present case which should be employed to determine the extent of the margin of appreciation enjoyed by the Swiss authorities in this area. But even were the conclusion to be that the Swiss authorities enjoyed a wide margin of appreciation, they would not be allowed under the Convention to interpret and apply section 3 of the LDIP in an manifestly unreasonable, arbitrary and overly restrictive manner.

111. In paragraph 205 of the judgment, the Court makes it clear that "[i]n order to determine whether the Swiss authorities exceeded their margin of appreciation in the present case, the Court must examine, in turn, section 3 of the LDIP and the relevant decisions of the Swiss courts, particularly the Federal Supreme Court's judgment of 22 May 2007". I agree with this statement, but I would add that all of the relevant provisions of LDIP should have been taken into account in examining this issue, and not section 3 of this Act alone. Furthermore, the Court should have taken into account the provisions of Articles 1, 3, 6 and 13 of the Convention and assessed whether in the present case, in which the applicant had a substantial and long-standing relationship with Switzerland, the Swiss rules of international jurisdiction and the Swiss choice-of-law rules, as interpreted and applied by the Swiss courts, had deprived him of access to a court and to justice.

112 In paragraph 206 of the judgment it is stated that "[w]ith regard to section 3 of the LDIP, the Court notes at the outset that the mere fact of introducing a forum of necessity, designed as it is to widen the jurisdiction of the national courts rather than reduce it, clearly cannot constitute

overstepping by the legislature of its margin of appreciation". As a general statement, this is correct, but one must make the following clarifications:

(a) The doctrine of "forum of necessity", as its name denotes, is based on "necessity". "Necessity" grants an applicant or plaintiff the right to sue on account of some objective obstacles he or she would encounter elsewhere – that is, in another country. It is an emergency jurisdiction, since a court may be called upon to exercise a jurisdiction that it ordinarily lacks on the ground that there is no other forum in which the suit or action may be instituted or reasonably expected.

(b) The genuine or classic meaning of the doctrine of "forum of necessity" is not the one included in the provision of section 3 of the LDIP. Its real meaning is that the court before which the proceedings are brought, thus the forum court, can take or assume jurisdiction even if there is no real and substantial connection, if it is necessary for it to do so in order to avoid a denial of access to a court and to justice. However, this is not what section 3 of the LDIP does, since it requires as a condition for its applicability that the case must have a sufficient connection with Switzerland. The Court of Appeal for Ontario (ONCA) very appropriately drew an explicit connection between "necessity" and "access to justice" in *Van Breda v. Village Resorts Limited et al.*[64] Justice J. A Sharpe, who delivered the ONCA's unanimous judgment, pertinently stated the following at paragraph 100 of that judgment:

> "The forum of necessity doctrine recognises that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction. The forum of necessity doctrine does not redefine real and substantial connection to embrace 'forum of last resort' cases; it operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction. In my view, the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be accommodated by explicit recognition of the forum of necessity exception rather than by distorting the real and substantial connection test".

(c) The legal system of a State may not recognise the doctrine of necessity in its proper meaning as set out by the ONCA, but may instead have wide rules of ordinary international jurisdiction, for example by employing connecting factors such as the nationality, domicile, residence or place of business of the plaintiff or defendant, or any other sufficient connection with the forum. Substantial or sufficient connection with a country is by its nature a connecting factor belonging to ordinary international jurisdiction because there is nothing exceptional in it, since this factor is deeply rooted in or related to the forum. What is considered as a forum of necessity varies from country to country and depends on each

64. Judgment of 2 February 2010. See 2010 ONCA 84; 98 OR (3d) 721.

country's ordinary rules of international jurisdiction. A State which adopts no forum of necessity may, nevertheless, through its wide rules of international jurisdiction, provide easier or more efficient access to justice than a State with a forum of necessity which is itself strict, particularly when it is interpreted and applied in an overly strict manner.

(d) In view of the above, the comparative study conducted by the Court regarding the number of States which have adopted this doctrine of necessity is of no help at all in deciding the issues in question in the present case; in particular, it cannot offer assistance as to whether the States' margin of appreciation on this issue should be a wide one.

(e) In any event, even if no State in the world apart from Switzerland were to adopt the concept of a forum of necessity, the principle that domestic law should not be interpreted in an arbitrary or manifestly unreasonable manner by domestic courts should also apply in relation to the interpretation of the statute adopting this concept and this statute should apply to all people equally. By comparison, Article 6 of the Convention does not compel States to institute a system of appeal courts. However, if a State does institute such a system and nevertheless debars certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions, it will be in breach of Article 6, read in conjunction with Article 14.[65] Likewise, the principle forbidding arbitrary or unreasonable interpretation applies in the present case, even though States are similarly under no obligation to adopt a forum of necessity.

(f) Irrespective of what has been stated above, the third criterion of section 3 of the LDIP, namely a "sufficient connection" between the case and Switzerland, is a vague, wide and general concept, and is surely less demanding than "real and substantial connection". This third criterion of section 3 of the LDIP ought to have been interpreted by the Federal Supreme Court and the Grand Chamber according to its literal meaning and the nature of the issue in question, and not been restricted to or substituted by another connecting factor, namely "the place where a wrongful act took place". "Sufficient connection" means enough or adequate connection for the forum of necessity to be activated on an exceptional basis. As has been stated above, I consider that the "sufficient connection" test is not attached exclusively to a place or to a person's status or capacity: it covers anything in the facts of the case which, in the court's discretion, may give it exceptional jurisdiction to deal with an action. As stated above, in view of the nature of the forum of necessity under section 3 of the LDIP and its parliamentary history, where doubt exists as to whether an element or link should be considered a sufficient connection with Switzerland so as endow

65. *Case "relating to certain aspects of the Laws on the use of languages in education in Belgium"* (merits), no. 1474/62, § 9, Series A no. 6.

the court with jurisdiction, the presumption should be in favour of jurisdiction. Furthermore, as the Court stated in its judgment (see paragraph 209), in exercising their judicial discretion "on a case-by-case basis" the domestic courts "take account of the nature of the dispute or the identity of the parties".

(g) The right of access to a court under Article 6 § 1 of the Convention does not differentiate between legal systems which adopt the doctrine of forum of necessity and legal systems which do not, and, of course, it is not the Court's role to do so. As previously noted, when dealing with the question whether or not the right of access to a court has been violated, the whole of a State's legal system should be taken into account.

113. The present case must be distinguished from *Al-Adsani v. the United Kingdom*, [GC] no. 35763/97, ECHR 2001-XI, where the torture was allegedly carried out by the Kuwaiti authorities and the Court in that case decided that "[i]n these circumstances the application of the provisions of the [State Immunity] 1978 Act to uphold Kuwait's claim to immunity cannot be said to have amounted to an unjustified restriction on the applicant's access to a court".[66] By contrast, in the present case the Swiss Federal Supreme Court held that it was not necessary to examine the issue of immunity from jurisdiction, in that it was dismissing the appeal on the grounds that there did not exist a sufficient connection between the facts of the case and Switzerland. In consequence, the Grand Chamber also refrained from examining the immunity issue. In conclusion, the two cases, the present one and *Al-Adsani*, were decided on a different basis.[67]

III. Conclusion

114. Like the three dissenting judges in the Chamber proceedings, I conclude that "the dismissal of the applicant's action without an examination of the merits by the Swiss courts impaired the very essence of the applicant's right of access to court" and that his consequent "inability to seek redress" was "equivalent to a denial of justice" (see paragraph 18 of that opinion). In other words, the fact that the applicant was precluded from bringing his claim before the Swiss courts amounted, in the circumstances of the present case, not only to a denial of procedural access to justice and also to a denial of effective subjective access to justice, but, in the final analysis, to a denial of any substantive access to justice at all.

115. There has, therefore, been a violation of Article 6 § 1 of the Convention.

---

66. See paragraph 67 of that judgment.

67. See paragraph 4 of the Federal Supreme Court's judgment, quoted in paragraph 30 of the Grand Chamber's judgment in the present case.

116. There is no point, being in the minority, in dealing with the amounts of non-pecuniary damage and costs that I would consider reasonable in the circumstances of the case, so I will refrain from examining these issues.