

TREATY BODY MONITOR

International Service for Human Rights



Human Rights Monitor Series

COMMITTEE AGAINST TORTURE 38TH SESSION LUXEMBOURG, 5TH REPORT

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Information submitted to the Committee

Luxembourg appeared before the Committee against Torture (the Committee) on 3-4 May 2007 to present its fifth periodic report.¹ The report provided an overview of the measures relating to the implementation of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention)² by Luxembourg. It paid special attention to asylum seekers and to the draft of a new law aiming at shortening the proceedings. It also highlighted that an Ombudsman was established in August 2006. The Committee welcomed the report and the efforts made by Luxembourg in its replies. It also acknowledged that there were not any major problems regarding this country and that this State was at the forefront in protecting and promoting human rights. The Committee welcomed the links between the authorities and civil society as a reflection of social awareness and consciousness. Nevertheless, the President of the Committee hoped that the dialogue would reveal a few things that could be improved.

Two non-governmental organisations (NGOs) submitted reports regarding the human rights situation in Luxembourg. The briefing by the Global Initiative to End All Corporal Punishment of Children raised the issue of the lawfulness of corporal punishment at home. It stated that it was unaware of any progress on the intention of the Government to prohibit it, as it is already the case at school and in the penal system. The second joint report provided by the Christian Association against Torture (ACAT) and Info-Prison focused on

¹ CAT /C/81/Add.5, 5 April 2005. Available at <http://www.ohchr.org/english/bodies/cat/cats38.htm>.

² The full text of the Convention is available at <http://www.ohchr.org/english/law/cat.htm>.

the placement of minors in difficulty in detention centres; the unacceptable conditions of detention at the Luxembourg Prison Centre; the situation of administrative detainees; the treatment of asylum seekers and the non-ratification of the Optional Protocol to the Convention.

Themes and Issues

Luxembourg's delegation was headed by Ms Schaak of the Ministry of Justice. Also representing the delegation of Luxembourg was the Permanent Representative of Luxembourg to the United Nations Office in Geneva, Jean Feyder; the Deputy Permanent Representative; the Director for Organisation, Method and Employment of Luxembourg; the Director of the Luxembourg Penitentiary Centre; the Deputy State Prosecutor; and a representative from the Ministry of Foreign Affairs and Immigration.

The Committee focused its questions on asylum seekers and expressed concern about their placement in prisons, though these were temporary measures and asylum seekers were separated from convicts. It also enquired about two cases of extradition of asylum seekers. There were similar concerns about troubled juveniles that are held in the same building as juvenile offenders. This led the Committee to address the question of prison conditions and to share its concerns over the use of solitary confinement. Finally, it expressed its concerns about the principle of discretionary prosecution as this could enable prosecutors to choose not to prosecute cases of torture.

The delegation summarised the main content of its replies because they were only available in French when the session started. Throughout the discussion, it provided exhaustive responses to the questions of the Committee while defending the positions of its Government, especially regarding solitary confinement - where the delegation said it had no intention to abolish this measure and that it is far less restrictive than practices in prisons of other States.

Implementation of the Convention

The country rapporteur of the Committee, Mr Camara, highlighted that the fact Luxembourg that has not received any complaints of torture may come from the definition of torture under domestic law. If the national legislation had fully incorporated Article 1 of the Convention, the existence of cases of torture could have been found. Mr Camara emphasised that in the Convention, motives are part of the definition, and that violence based on discrimination falls under the definition of torture under the Convention. The delegation replied that Luxembourg was in keeping with Article 1 of the Convention, as Article 260 of the Criminal Code reflects the definition of the Convention nearly word for word.

The Committee raised the question of the applicability of the Convention in domestic law and the issue of compensation of the victims. The head of the delegation declared that international law takes precedence over national legislation and that the Convention was directly applicable before domestic courts. Therefore, if an act of torture had been committed, the State had to pay damages to the victim.

Prosecution

The Code of Criminal Procedure³ states that the public prosecutor has the discretion to decide whether to investigate a complaint and to prosecute. The Committee pointed out that there was an incompatibility between this system and the obligations stipulated by the Convention, which requires prosecution.⁴ The delegation replied that this provision was not a blank check for allowing non-follow up to an offence on account of two elements. First, there is a hierarchy in the parquet. To decide not to pursue prosecution, magistrates need to define the case and substantiate it via their superiors. An act of torture would be reported

³ Article 23.

⁴ Articles 6, 7 and 12.

to the General Prosecutor of the State. Second, acts of torture under Luxembourg law are viewed as a criminal offence and no prosecutor would ever think not to prosecute such a case.

In its concluding observations, the Committee called on Luxembourg to respect Article 12 of the Convention in letter and spirit, and to consider revising its system of prosecution. There would therefore not be any doubt as to the obligation of the authorities to open independent and impartial investigations in cases of reasonable allegations of torture.

The Committee sought more details about universal jurisdiction and paragraph 53 of the States' reply dealing with the question of legal action against a Luxembourg citizen for acts of torture committed abroad. It asked whether, if there was a presumption of torture, there could be an ex-officio judgement of the case in the domestic courts of Luxembourg. If not, according to the Committee, there was a legal vacuum. The Committee also enquired whether there would be certain cases where Luxembourg would not use universal jurisdiction, in the absence of an extradition request for example, and this, according to a member of the Committee, would be in contradiction with the law. Luxembourg responded that there are clear provisions in its criminal code concerning universal jurisdiction. The court has active competence in order to avoid that a person who commits acts of torture or terrorism abroad remains unpunished. A member of the delegation declared that Luxembourg is competent to judge on its own territory any person that could not be extradited. However, there needs to be a causal link with Luxembourg and this can be the physical presence of the individual in the territory.

Regarding extra-territorial jurisdiction, the criminal code provides that any citizen of Luxembourg who committed a crime such as torture abroad can be tried and prosecuted in Luxembourg.

Administrative detention and asylum seekers

In her introductory statement, the head of the delegation Ms Schaak introduced the new legislation of 5 May 2005 that establishes the concept of subsidiary protection in addition to refugee status. This new law provides for specific procedural rules regarding hearings, remedies and appeals, as well as for a new, accelerated procedure to deal with asylum more quickly. This law also includes more specific rules for the protection of unaccompanied minors. An appeal can be made not only against the legality of the decision, but also on the grounds of appropriateness and timeliness. This can lead to the suspension of the provisions, meaning that the person cannot be expelled until the procedure is completed.

The Committee expressed concern on the use of the term "safe third country" in the draft law aimed at expediting asylum proceedings, because this could mean that persons from these countries would not be granted refugee status. On this issue, the delegation specified that the law had already been passed and that it used a different terminology, employing the terms 'safe third country' and 'safe country of origin', but applying a different meaning to the term 'safe third country'. According to the delegation, the concept of "safe third country" is the country where an asylum seeker has spent time and where he could have sought asylum but did not do so. This is safe for him to return there. A "safe country of origin" is a country from which this person comes from and his application will be dealt with in the accelerated procedure. There is a presumption that the request will be rejected but the application will be examined and the decision granted individually. The delegation specified that they did not have a list of safe country of origin yet, but that it was being drawn up.

On the new law of 5 May 2006 that was adopted to adapt to EU directives, the Committee enquired whether the criteria to grant subsidiary protection included a discretionary factor. A member of the Committee cited a case where a person was returned to her country of origin and would not have proper medical care there and this could amount to inhumane treatment. The delegation replied that there was no discretionary criteria because the criteria given by the EU directive was clear: a serious clear reason is needed that if a person is sent back she will run a real risk of serious danger.

The Committee was also concerned that article 6(12)⁵ of the new law could jeopardise the principle of non-refoulement because it suggests that an asylum seeker can be handed over for “other reasons” to a “third country”. The delegation specified that this provision was not a blank check and that it has not been used. The intention was to avoid an EU/international mandate to prosecute crimes of torture at an international level from being blocked by an asylum seeker.

The issue of detention of aliens was dealt with by the delegation when it summarised its replies to the list of issues of the Committee. The Director of the Luxembourg Penitentiary Centre explained that aliens that entered illegally in the Grand Duchy were detained in the main State prison because of lack of resources. He insisted that this was temporary and that a future special day centre will be built. The construction work should start at the end of the year. He added that aliens were kept separated from other inmates. He then described their conditions of detention as not being comparable to those of convicts. For example, they cannot be forced to work and they have no restriction on the right to correspondence. He also highlighted the importance of being in contact with NGOs. This had been developed by authorising refugee groups to organise an office in the centre. Several NGOs have also been authorised to visit the day centre. On this issue, the country rapporteur expressed his disagreement, and declared that it was problematic for the freedom of movement of this person, especially when she has not committed a crime. The representative from the Ministry for Foreign Affairs and Immigration pointed out that placing people in closed detention was the exception (where the asylum seeker has asked for asylum to avoid expulsion from the territory; if he refuses to cooperate in terms of identity and itinerary; under the accelerated procedure; and where Luxembourg is awaiting the transfer of the asylum seeker to a EU State competent to review the asylum request under the Dublin Convention). He specified that according to legislation each person was entitled to social assistance, housing and free circulation in the territory. He pointed out that the jurisprudence referred to by Mr Camara dated back from 2000 and was no longer relevant. At that time, the administrative tribunal felt that prison was inappropriate for these persons and they were placed in hotels under police guards as an alternative.

The concluding observations of the Committee recommended that the State party take all necessary measures to avoid detaining asylum seekers when their behaviour does not compromise public order or national security. It should ensure that they are brought before a judge to verify the legality of their detention. The Committee concluded that Luxembourg should not detain aliens in prisons. The Committee also recommended that Luxembourg amend article 6(12) of the law of 5 May 2006 so as to include a provision stating that no one will be sent, expelled or extradited to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Prisons conditions

The Committee was concerned about allegations of racist and arbitrary behaviour by persons responsible for supervising detainees, as raised by the NGO ACAT. The Director of the Luxembourg Penitentiary Centre declared that such allegations were brought very rarely to his attention and that internal investigations did not show the existence of any problem. He added that the atmosphere of the prison was fragile in the past, as reported by the European Committee for the Prevention of Torture (CPT). The CPT subsequently recommended the recruitment of additional staff, and this resulted in the disappearance of arbitrary behaviour.

Responding to the concerns of the Committee on solitary confinement, Luxembourg focused mainly on the procedure and not the actual use of solitary confinement. During the summary of the replies, the delegation declared its intention to maintain the system of solitary confinement and insisted that it was far less restricted than in other countries. The delegation declared that it agreed with the Committee that any restriction of human rights should be decided under judicial authority. However, strict cell procedure is a prison regime

⁵ “By way of exception from the above, an applicant for asylum may be handed over or, where appropriate, extradited either to another European Union Member State by virtue of the obligations deriving from a European arrest warrant or for other reasons, or to an international criminal tribunal or court”.

modality that falls under the competence of the prison authorities and is not regulated by the criminal code. The strict cell regime is applied by an administrative authority in the form of the prosecutor's office, and not by the prison. Any appeal against this can be made against an administrative authority involving three judges.

In its concluding observations, the Committee encouraged Luxembourg to strengthen the training of law enforcement officers and those working with detainees to respect the physical and psychological integrity of detainees without discrimination. The Committee reiterated its recommendation to reinforce the judicial control of the strict cell regime and to have it strongly regulated by law. It called on Luxembourg to put an end to this regime.

Juveniles

The Committee raised the issue of detained juveniles. It was especially worried about the fact that young offenders were detained in the same centre as juveniles in difficulty, though there are separate units. The Committee already touched upon the question in 2002 and recommended that the Government ensure that minors are not placed in adults' prisons as a disciplinary measure. The CPT has also repeatedly made the same demand. The delegation declared that the punitive system does not apply to minors. They cannot be held responsible until they are 18. Instead, Luxembourg seeks protective measures. It is only if these measures (warnings, reprimands, involvement of parents and foster care) do not work that minors will be placed in the State socio-educational centres as a last resort. The head of the delegation insisted that children in conflict with the law and troubled children are in the same centre but are kept separated.

Following this reply, the Committee shared the concerns voiced by the Committee on the Rights of the Child and at the EU level that visited the centres. It pointed out that although minors are not criminally responsible they are placed in a *de facto* situation of liability. The Committee asked whether there would be some units established to host these minors. The head of the delegation specified that there have been delays in the construction of the Dreibern Security Unit for minors aimed at avoiding their imprisonment. The work should start in 2008. Currently, minors are legally placed in adult penitentiary centres only for cases of absolute need. The maximum duration is ten days but in general minors stay there for a day or two and are monitored by a psycho-social unit while in the prison. This placement, which is rare, is always based on the decision of a youth judge.

In its concluding observations, the Committee insisted that young offenders should not be placed in adult prisons for disciplinary measures, and that they should be kept separated from minors with difficulties.

Violence in the family

The Committee raised the question of domestic violence and expressed concern over the Act of 8 September 2003 that "increases the minimum penalty where the author is a civil servant or public official and the offence is committed against the spouse or an ascendant or descendant relative".⁶ The delegation did not focus on this question and provided a general reply. The person dealing with police issues specified that the measures dealt with in the 2003 law were administrative and not criminal because the person does not need to have committed an offence, but just be prepared to commit it. They include the expulsion of the person and restriction from going home for ten days after the offence. He specified that there was no favour or lack of favour regarding civil servants. The Criminal Code only comes into play after investigation of the facts by the police. It provides for aggravated measures for a civil servant if he commits an offence in the course of his job, but not in his private life.

The Committee was also concerned by the lack of strict regulations of corporal punishment. The delegation acknowledged that there was no regulation for its use in the family. However, Luxembourg pointed out that

⁶ Paragraph 23 of Luxembourg's report.

there were phone numbers and a website for children who may feel they were being abused. The head of the delegation declared that Luxembourg was aware that this was not enough and announced that the Ministry of family had proposed a significant bill to outlaw corporal punishment that included physical and sexual violence.

Specific cases

The Committee focused on the two cases that have occurred in Luxembourg. The first one concerned a Belarusian national, Mr Igor Beliatskii, who was refused asylum in Luxembourg and therefore expelled to his country. The Committee asked further details about his expulsion because a letter of complaint had been sent by an NGO on this issue. The delegation replied that the asylum request of Mr Beliatskii had been rejected on the grounds that it was inconsistent, vague and contradictory. He refused to return to Belarus voluntarily and was held in a detention centre. For security reasons, a “body cuff” was used, as well as a mask to prevent him from spitting on policemen. After returning to Belarus, it was found that Mr Beliatskii was able to move freely in his country and that his fears were unfounded. The Chairman of the Committee thanked Luxembourg for the information but emphasised that declaring the mask was to prevent the person from spitting was not sufficient.

The second case dealt with Mr Biarim who had requested asylum in Luxembourg and later asserted that he had been tortured during an interrogation by the Ministry of Foreign Affairs. German authorities informed Luxembourg that the request of this person in Germany had been rejected. They also said this person was known to be violent and was HIV/AIDS positive. Therefore, because of the Dublin system, this person had to go back to Germany. He refused and attacked the police. The police brought a case against him for attempted homicide as he deliberately tried to contaminate a policeman with HIV/AIDS. The Committee wanted to know why Mr Biarim directly referred to the European Court of Human Rights (ECtHR). The delegation replied that this person did not complain in Luxembourg nor seized the administrative jurisdiction. The ECtHR sent an urgent question to Luxembourg, which replied. The Court then stopped its action and Luxembourg assumed that the case had been declared inadmissible by the ECtHR.

Regarding the first case, the Committee recommended that the State should take all necessary measures to investigate allegations of torture or ill-treatment, including during the expulsion process. It should also authorise the presence of human rights observers and independent medical personnel during forced expulsion as well as a systematic medical examination before, or after in the case of a failed expulsion process.

Other issues

Among other issues that were discussed, the Committee enquired into the existence of laws forbidding genital mutilation and how Luxembourg deals with this issue. The delegation replied that a law criminalizing genital mutilation was being drafted and that reference to this issue had been included at the insistence of the UN. It explained that the penal code currently regulates intentional assault and battery that resulted in serious mutilation. Finally, it added that the medical college can also take disciplinary measures when needed.

The Committee invited Luxembourg to consider ratifying the Optional Protocol to the Convention.⁷ The head of the delegation acknowledged that this was of great importance.

Conclusions and Next Steps

As the session ended, the Committee reiterated its warm and sincere thanks to the delegation of Luxembourg for the fruitful dialogue and the satisfactory replies they provided.

⁷ Luxembourg signed the Optional Protocol on 13 January 2005.

The delegation thanked the Committee for the constructive dialogue although its positions were not always understood given the difference between legal systems.

Previously, other treaty bodies made recommendations on issues dealt with by the Committee during its review of the report of Luxembourg. On the question of asylum-seekers, the Committee on the Rights of the Child recommended that Luxembourg take all necessary measures for adequate reception of unaccompanied and separated children applying for asylum.⁸ The Committee on Economic, Social and Cultural Rights advised the State to take effective measures to expedite processing of applications for asylum so that persons concerned may enjoy all rights that refugee status confers upon them.⁹ On the question of juvenile justice, the Committee on the Rights of the Child recommended that Luxembourg bring its system into line with international norms, establish separate detention facilities for persons under 18 and keep juveniles who are in conflict with law separate from those with social or behavioural problems set up independent monitoring body to inspect regularly juvenile facilities.¹⁰ The Committee on the Elimination of Discrimination against Women urged the State to develop policy and legislation to prevent and eliminate domestic violence¹¹ and the Committee on Economic, Social and Cultural Rights¹² recommended that it enact the draft law on domestic violence introduced in May 2001, by which violent spouse may be forced to leave family home, as soon as possible. As mentioned previously in this report, such a law was passed in 2003. Regarding corporal punishment, the Committee on the Rights of the Child reiterated its previous recommendation to introduce provisions expressly prohibiting corporal punishment within the family, and strengthen efforts to raise awareness of alternative, non-violent forms of discipline.¹³

⁸ CRC/C/15/Add.250, para. 54 (CRC, 2005).

⁹ E/C.12/1/ADD.86, para. 28 (CESCR, 2003).

¹⁰ CRC/C/15/Add.250, para. 61 (CRC, 2005).

¹¹ A/58/38(SUPP), para. 411 (CEDAW, 2003).

¹² E/C.12/1/ADD.86, para. 36 (CESCR, 2003).

¹³ CRC/C/15/Add.250, para. 39 (CRC, 2005).

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The *Treaty Body Monitor* forms part of the Human Rights Monitor Series produced by ISHR. It reports on each country reviewed by the seven treaty bodies and provides an overview of every treaty body session. It is currently an online publication that can be found at <http://www.ishr.ch/hrm/TMBs>.

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