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# THE ADMISSIBILITY OF EVIDENCE TAINTED BY TORTURE AND ILL-TREATMENT

OVERVIEW PAPER

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COMPILATION OF CONTRIBUTIONS TO THE ONLINE DISCUSSION ON THE ATLAS OF TORTURE EXCHANGE PLATFORM

# THE ADMISSIBILITY OF EVIDENCE TAINTED BY TORTURE AND ILL-TREATMENT

This document has been produced in the framework of the joint activities on "The Admissibility of Evidence Tainted by Torture and Ill-Treatment" implemented in 2022 by the Ludwig Boltzmann Institute of Fundamental and Human Rights and the OSCE Office for Democratic Institutions and Human Rights, and funded by the OSCE Office for Democratic Institutions and Human Rights.

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**Acknowledgements**

The team would like to thank all the representatives of the organisations, who participated in the consultations and submitted written contributions. We greatly appreciate their commitment and engagement. Their inputs have greatly enriched the exchange and contributed to this initiative. A special thank you to Nora Katona, who supported the team until summer 2022 and provided comments on previous versions of the documents, and to Jennifer Roberts, who supported the activities until May 2022.

December 2022

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## INTRODUCTION

The use of torture not only amounts to an egregious human rights violation in itself, but also leads to other serious human rights violations, including the violation of the right to a fair trial. It taints the entire criminal justice process, eroding the rule of law and public trust in the system's ability to deliver justice. The exclusion of torture evidence is thus an important provision supplementing the absolute prohibition of torture.

The inadmissibility of evidence obtained by torture is explicitly enshrined by the UN Convention against Torture (CAT) under Article 15. The inadmissibility of torture-tainted evidence is also guaranteed under other international instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and reflected in regional standards. For example, under the European Convention on Human Rights (ECHR), the use of statements in breach of Article 3 (prohibition of torture and other ill-treatment) constitutes a violation of the right to a fair trial under Article 6 ECHR.[1]

At the 27th OSCE Ministerial Council in Tirana, OSCE participating States pledged to prohibit the use of information or a confession obtained through torture or other cruel, inhuman or degrading treatment or punishment as evidence in any proceedings except against a person accused of torture as evidence that this offence took place.[2]

Although the exclusionary rule seems to be firmly established in most legal cultures, challenges concerning its application in law and practice still arise. International human rights law does not regulate in detail how the rules on the inadmissibility of torture-tainted evidence should operate in practice, thus leaving several open questions.

Due to the non-derogatory nature of the prohibition of torture and ill-treatment and the serious human rights repercussions of those acts if left unaddressed, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the Ludwig Boltzmann Institute of Fundamental and Human Rights (LBI-GMR) organized a series of online discussions among international experts and civil society organizations to bring forward discussions on the matter. The online discussions consisted of two main complementary activities: an online discussion in writing on the Atlas of Torture Exchange Platform and an online workshop.

The online discussion on the Atlas of Torture Exchange Platform took place between 21 and 25 February 2022. In this framework, national and international experts were invited to contribute to the exchange by submitting short written contributions on the exclusionary rule. ODIHR and LBI-GMR collected 12 contributions covering different perspectives (international organizations, lawyers, civil society organizations) and regions (including national inputs from EU and OSCE countries).

An online workshop, which took place on 13 May 2022, offered the opportunity for further exchange. The workshop brought together different stakeholders and enabled a lively discussion on the most

[1] ECtHR, 'Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb)' (August 2021) §§ 220ff. See also Art 8(3) ACHR; Art 7 ACHPR and ACmHPR, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (2003).

[2] MC Decision No. 7/20 Prevention and Eradication of Torture, para. 8.

pressing issues concerning the exclusion of torture-tainted evidence and how different stakeholders can address them.

This paper summarizes the outcome of the rich expert discussions occurred in the framework of this initiative. The first part contains an overview of the main challenges and relating international standards as well as the key findings and the possible next steps identified. The second part is a collection of all the expert contributions received in the framework of this activity.

This initiative would not have been possible without the tremendous engagement and support by anti-torture advocates across the OSCE region. Their inputs and contributions offer an in depth picture of a complex problem and call for actions to address such pressing issue.

Strong exclusionary rules will not alone solve the problem of torture and ill-treatment, but can be powerful tools in the fight against torture, especially if embedded in broader reform efforts aiming at removing the incentives for coercive investigation techniques and the current efforts towards the implementation of the Principles on Effective Interviewing for Investigations and Information Gathering (Méndez Principles).

## OVERVIEW OF THE MAIN IMPLEMENTATION CHALLENGES AND RELATING INTERNATIONAL STANDARDS

### Scope of application of the exclusionary rule

Time and again it was reported that there is still confusion as to the scope of application of the exclusionary rule.

*The prohibition of the use of confessions and statements obtained through cruel, inhuman and degrading treatment*

Many countries prohibit in absolute terms the use of confessions and statements obtained through torture. An absolute prohibition means that the exclusionary rule operates without discretion for the judiciary, in other words there can be no balancing act. However, doubts continue to arise on whether the use of confessions and statements obtained as a result of cruel, inhuman or degrading treatment is subjected to the same standards.

Although not always consistent, international standards on the matter do show that the prohibition should be applied also to the use of confessions and statements obtained through cruel, inhuman and degrading treatment. While Article 15 CAT only refers to torture, in its 2008 General Comment on Article 2, the CAT Committee considered that "articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment".[3] Similarly, in the reporting procedure, the CAT Committee has criticised a country's legal framework for not explicitly providing for an exclusionary rule also for cruel, inhuman and degrading treatment.[4] However, the CAT Committee takes a more cautious approach in its jurisprudence, where it concluded that Article 15 does not apply to cruel, inhuman or degrading treatment in the case *Kirsanov v Russia* (see also below the contribution of Juan E. Méndez* "Torture-tainted evidence and the exclusionary rule").[5]

The European Court of Human Rights (ECtHR) has further clarified that statements and confessions obtained as a result of torture as well as other forms of ill-treatment under Article 3 ECHR are always inadmissible, irrespective of their probative value and of whether their use was decisive in securing the defendant's conviction (see also below the contribution of Nikolaos Sitaropoulos "Unfair trial due to torture-tainted evidence - European Court of Human Rights' judgments and their execution").[6] In *Gäfgen v Germany*,[7] the ECtHR stated that:

> "… In respect of confessions … the admission of statements obtained as a result of torture … or of other ill-treatment in breach of Article 3 … as evidence to establish the relevant facts in criminal proceedings rendered the proceedings as a whole unfair. This finding applied irrespective of the probative value of the statements and irrespective of whether their use was decisive in securing the defendant's conviction"

[3] CAT Committee, 'General Comment No 2 on the Implementation of Article 2' (2008) UN Doc CAT/C/GC//2.
[4] E.g. CAT Committee, 'Concluding Observations: Finland' (2019) UN Doc CAT/C/FIN/CO/710. See also CAT/C/FIN/8, § 110-112.
[5] CAT Committee, *Kirsanov v Russian Federation,* No 478/2011, § 11.4. Fort further details see Giuliana Monina, 'Article 15: Non-Admissibility of Evidence Obtained by Torture' in Nowak, Birk, Monina, The United Nations Convention Against Torture and Its Optional Protocol: A Commentary (2nd edition 2019 OUP) 417.
[6] ECtHR, *Jalloh v Germany*, App no 54810/00 (11 July 2006), § 105.
[7] ECtHR, *Gäfgen v Germany*, App no 22978/05 (1 June 2010), § 166.

*The prohibition of the use of other evidence gathered or derived from information obtained by torture and other ill-treatment*

Similarly, there is the issue as to whether the exclusionary rule applies to other evidence gathered or derived from information obtained by torture and other ill-treatment.

Here international standards are rather inconsistent. Even though the CAT Committee has never explicitly pronounced itself on the matter, its practice seems to accept that evidence deriving from torture and other ill-treatment may be covered by Article 15 and, thus, be considered inadmissible. For example, in the reporting procedure, it has required States Parties to report on "whether derivative evidence is admissible, if applicable in the State party's legal system".[8]

The ECtHR introduced different standards depending on whether the acts in question are to be classified as torture or cruel, inhuman and degrading treatment. It established that evidence deriving from the use of acts characterised as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value.[9] However, for evidence deriving from the use of acts classified as inhuman or degrading treatment, but falling short of torture, it set up different standards, establishing that the admission of such evidence should be considered in violation of Article 6 ECHR only if the use of inhuman or degrading treatment had a bearing on the outcome of the proceedings against the defendant and impacted the defendant's sentence in a decisive manner (see also below the contribution of Nikolaos Sitaropoulos "Unfair trial due to torture-tainted evidence - European Court of Human Rights' judgments and their execution").[10] This binary approach has been criticised not only because the prohibition of torture and other forms of ill-treatment has been defined in previous case-law as one of the most fundamental values of democratic societies, but also because in practice it may be difficult to distinguish between torture and other forms of ill-treatment. In *Gäfgen v Germany,* Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power described these tensions with enlightening words in a dissenting opinion:

*"10. The Court has repeatedly stated that Article 3 is an absolute right and that no derogation from it is permissible under Article 15 § 2 – even in the event of a public emergency. Being absolute, all violations thereof are serious and, in our view, the most effective way of guaranteeing that absolute prohibition is a strict application of the exclusionary rule when it comes to Article 6. Such an approach would leave State agents who are tempted to perpetrate inhuman treatment in no doubt as to the futility of engaging in such prohibited conduct. It would deprive them of any potential incentive or inducement for treating suspects in a manner that is inconsistent with Article 3. 11. We are mindful of the consequences that flow from a strict application of the exclusionary rule where violations of Article 3 are concerned …*

*12. …However, in our view, there is an equally vital, compelling and competing public interest in the preservation of the values of civilised societies founded upon the rule of law. In such societies, recourse to subjecting individuals to inhuman or degrading treatment, regardless of its purpose, can never be permitted. There is, in addition, a critical public interest in ensuring and maintaining the integrity of the*

[8] CAT Committee, 'Concluding Observations: Germany' (1998) UN Doc A/53/44, § 193; see also CAT Committee, *GK v Switzerland,* No. 219/2002, 7 May 2003, §§ 3.2, 6.9.; CAT, 'General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under Article 19 of the Convention (2005) UN Doc CAT/C/4/Rev.3, § 24.

[9] ECtHR, *Jalloh v Germany*, App no. 54810/00 (11 July 2006) § 105.

[10] See ECtHR, *Jalloh v Germany*, App no. 54810/00 (11 July 2006) § 107 and ECtHR, *Gäfgen v Germany*, App no. 22978/05 (1 June 2010). For more information, see also Fair Trial/Redress, 'Tainted by Torture: Examining the Use of Torture Evidence' (2018) <https://www.fairtrials.org/sites/default/files/publication_pdf/Tainted-by-Torture-Examining-the-Use-of-Evidence-Obtained-by-Torture.pdf >.

*judicial process and the admission into a trial of evidence obtained in violation of an absolute human right would undermine and jeopardise the integrity of that process. In our view, criminal activity may not be investigated nor an individual's conviction secured at the cost of undermining the absolute right not to be subjected to inhuman treatment as guaranteed under Article 3. To hold otherwise would involve sacrificing core values and bringing the administration of justice into disrepute."*

Considering the above, it would be particularly helpful to reflect on whether the distinction made in *Gäfgen* is still appropriate or, rather, if it is time to opt for a stricter application of the exclusionary rule. The current approach carries the risk of rendering the rules on the admissibility of torture-tainted evidence - and their preventive rationale - irrelevant in practice. Moreover, the ECHR standards as developed by ECtHR set up a fairly complicated and articulated system, which can be challenging to implement. Some States may in fact limit themselves in applying the lower standards in all cases in which evidence was obtained by cruel, inhuman or degrading treatment, without making a distinction between confessions and other evidence.

**Example from the practice**: The issue recently emerged in the CAT Committee reporting procedure regarding Finland. While evidence obtained through torture is absolutely prohibited, evidence obtained as a result of cruel, inhuman or degrading treatment is assessed differently and may be used "*unless such use would endanger the conduct of a fair trial, taking into consideration the nature of the case, the seriousness of the violation of law involved in the obtaining of the evidence, the significance of the method in which the evidence was obtained in relation to its credibility, the significance of the evidence in respect of the decision in the case, and the other circumstances*." [11] In its periodic report, the State explained that its national law is consistent with the requirements of Article 6 ECHR and the case law of the ECtHR, and that consequently no amendment is warranted.[12] The CAT Committee has yet to issue concluding observations in the eighth reporting cycle. In the previous reporting cycle, the CAT Committee noted with concern that the Code of Judicial Procedure allowed for the use of evidence obtained unlawfully, including through ill-treatment, if it does not prejudice a fair trial and recommended Finland to amend the Code of Judicial Procedure to prohibit the admissibility in judicial proceedings of evidence obtained through ill-treatment and remove the provisions that give courts discretionary authority when it comes to the use of evidence obtained unlawfully.[13]

## Other procedural obligations and domestic procedures to exclude evidence

Other factors that often cause challenges in the implementation of the exclusionary rule of torture-tainted evidence concern several procedural aspects. A short survey is included in the following.

### *The exclusionary rule should be provided explicitly in the law.*

In its concluding observations, the CAT Committee has recommended that the prohibition on the use of statements obtained by torture and other forms of ill-treatment as evidence in proceedings be clearly formulated in domestic law. [14] Yet some States do not comply with this recommendation.

[11] CAT Committee, National Report by Finland (3 December 2020) CAT/C/FIN/8, § 110 ff.
[12] Ibid, § 112.
[13] CAT Committee, Concluding Observations: Finland (20 January 2017) CAT/C/FIN/CO/7, § 10 ff.
[14] E.g. CAT Committee, Concluding Observations: Belgium (25 August 2021) CAT/C/BEL/CO/4, §37; Concluding Observation: Belgium (3 January 2014) CAT/C/BEL/CO/3, § 24; Concluding Observations: Sweden (4 June 2008) CAT/C/SWE/5, § 21ff; Concluding Observations: Sweden (6 June 2002) CAT/C/CR/28/6, § 7 (h).

**Example from the practice:** In Sweden, the rules of evidence are based on the principle of "free evaluation of evidence." In its fifth cycle of reporting before the CAT Committee, Sweden explained that "If it is established that a statement has been made as a result of torture, the court can reject that statement as evidence due to the fact that it would not have any effect or legal value. If it is established during the hearing that torture has been used, the court could either reject the evidence or, in cases where the witness or suspect has already been heard in the proceedings, rule that the evidence in question has no legal value. Consequently, the Swedish penal and procedural system, which is based on the principle of free examination of evidence, contains several effective provisions, including procedural safeguards, to prevent public officials from using torture in criminal investigations." The same was repeated in the national report of 2018.[15] In its concluding observations, the Committee recommended that Sweden ensure that the prohibition on the use of statements obtained by torture as evidence in proceedings is clearly formulated in domestic law.[16]

*Ensure that the legality of evidence can be assessed early on in the process and the exclusionary rule becomes applicable as soon as there is a prima facie allegation that the evidence is extracted by torture or other ill-treatment, after which a shift of the burden of proof to the State authorities should apply.*

During the consultations, it emerged that even when a general prohibition is in place, this is not efficient or barely used in practice and very few cases on the matter reach high courts. The reasons are manifold and should be explored more in detail. Some include, amongst others, the lack of effective mechanisms for shifting the burden of proof to the State authorities as soon as there is a prima facie allegation that the evidence is extracted by torture or other ill-treatment, the lack of mechanisms for early exclusion of evidence, as well as the lack of practical guidance.[17] In some countries, the situation is further exacerbated by a lack of appropriate procedural safeguards, such as audio-visual recording, access to a lawyer, access to independent medical examination, which makes it even more difficult for the defence to substantiate the allegations of torture and ill-treatment (see also below the contributions of Ilze Tramaka "Reducing reliance on torture evidence", Rupert Skilbeck "Excluding Confessions obtained by torture", Balázs Tóth "Theoretically effective, practically almost non-existent: the exclusion of evidence obtained by torture in criminal proceedings in Hungary", Natalia Taubina "Evidence of crime obtained by torture: law and practice").

At the international level, there are consolidated standards on the burden of proof. Since the decision *PE v France* of 2002, the **CAT Committee** has consistently held that Article 15 derives from the absolute nature of the prohibition of torture and implies, consequently, an obligation for each State party to ascertain whether or not statements constituting part of the evidence of a procedure for which it is

[15] CAT Committee, National Report by Sweden (21 December 2018) CAT/C/SWE/8,§ 166ff; and National Report by Sweden (10 February 2006) CAT/C/SWE/5, § 47ff.

[16] CAT Committee, Concluding Observations: Sweden (4 June 2008) CAT/C/SWE/5, § 21ff; Concluding Observations: Sweden (6 June 2002) CAT/C/CR/28/6, § 7 (h). However, no recommendation on Article 15 was formulated in the CAT Committee, Concluding Observations: Sweden (20 December 2021) CAT/C/SWE/CO/8.

[17] Workshop held on 13 May 2022. See also Fait Trial/Redress 'Tainted by Torture Examining the Use of Torture Evidence' (May 2018) <https://www.fairtrials.org/sites/default/files/publication_pdf/Tainted-by-Torture-Examining-the-Use-of-Evidence-Obtained-by-Torture.pdf> and Fair Trials, 'Unlawful evidence in Europe's courts: principles, practice and remedies' (October 2021).

competent have been made as a result of torture.[18] By doing so, the Committee has set up a positive obligation upon States to examine whether evidence brought before them could be tainted by torture. This positive duty of the State mitigates the general rules on the burden of proof, which would normally require the complainant to prove his/her claim before the Committee, and produces what is normally referred to as a 'shift of the burden of proof'. To trigger such procedure and thus the positive duty of the State, the complainant needs to allege prima facie evidence of the torture allegation, so as to demonstrate that his/her allegation are well-founded. Once the complainant has brought an arguable claim before the Committee, the fact that the State party does not refute the allegations nor include any specific information on the applicant's claim in its observations to the Committee may be enough for the Committee to find a breach of Article 15.

Similarly, the **ECtHR** has found that a prima facie allegation from the applicant suffice to trigger the procedure and shift the burden of proof to the State. It further clarified that even when it is not possible to establish a substantive violation of Article 3 ECHR based on the evidence brought before it, a procedural violation of Article 3 as well as a violation of Article 6 may nevertheless be found if the national courts in the criminal proceedings have failed to duly examine the applicant's argument concerning the unlawfulness of the evidence .[19] As mentioned by Judge Yudkivska in his concurring opinion:

*"The present judgment is a clear indication to the domestic courts that they must suppress not only evidence which is established to have been obtained as a result of ill-treatment, but must also discount any evidence where such treatment is prima facie alleged but cannot be proved on account of the police's reluctance to conduct an effective investigation in this respect. Otherwise the admission of evidence – where there are unresolved doubts that it may have been obtained in breach of the most fundamental value of the Convention – undermines the integrity of the justice system and public confidence in it."*

Yet, there are no reliable data on whether States parties are implementing these principles in practice and there seems to be generally little knowledge on how these standards should operate in the national systems (see also Notabene "The inadmissibility of torture tainted by torture: the case of Tajikistan").[20]

Moreover, proving that evidence was obtained by ill-treatment may be even more difficult in transnational proceedings. In the 2011 case *Ktiti v Morocco*, the CAT Committee clarified that the Moroccan authorities had to "verify the content of the author's allegations" that the evidence at the basis of the extradition procedure was obtained by torture in Algeria and by not doing so it violated Article 15. In this case, the applicant referred inter alia to the Committee's most recent concluding observations to substantiate its prima facie claim.

[18] CAT Committee, *PE v France*, No 193/2001, CAT/C/29/D/193/2001, 21 November 2002, § 10. Fort further details see Giuliana Monina, 'Article 15: Non-Admissibility of Evidence Obtained by Torture' in Nowak, Birk, Monina, The United Nations Convention Against Torture and Its Optional Protocol: A Commentary (2nd edition 2019 OUP).

[19] ECtHR, *Bokhonko v. Georgia*, App no. 6739/11 (22 October 2020) § 72-79 (on the procedural violation of Article 3 ECHR) and § 91 and 99 (on Article 6 ECHR).

[20] E.g. in Poland the CAT Committee noted with concern that statistical data concerning cases in which charges have been dismissed on account of admission of evidence or testimonies obtained under torture or improper treatment are not collected, and recommended to provide it to the Committee in the next periodic report. See CAT Committee, Concluding Observations: Poland (29 August 2019) CAT/C/POL/CO/7, § 12 (f).

Similarly, the ECtHR has concluded that it would be unfair to impose on the applicant a burden of proof that went beyond the demonstration of a "real risk" that the evidence in question had been thus obtained.[21] In doing so, the ECtHR pointed out it is necessary to give due regard to the special difficulties in proving allegations of torture and specified that a degree of flexibility in assessing the burden of proof might be necessary depending on the case. In particular, in *El Haski v Belgium*[22] the Court elaborated that:

*"In a criminal justice system where the courts are independent of the executive, where cases are prosecuted impartially, and where allegations of torture are conscientiously investigated, one might conceivably require a defendant to prove to a high standard that the evidence against him had been obtained by torture. However, in a criminal justice system which is complicit in the very practices which it exists to prevent, such a standard of proof is wholly inappropriate."*

**Example from the practice**: In the framework of the execution proceeding of the ECtHR judgment *El Haski v Belgium*, the Belgian Federal Prosecutor's Office has adopted specific instructions for the relevant authorities (Note 32/2013) in order to prevent the future use of declarations obtained under torture or through other inhuman or degrading treatment. The note states that when a suspect, who is in a foreign country, must be interviewed, it is necessary that a Belgian investigation judge, a federal magistrate, and the police are also present at the interview in the framework of an international judicial cooperation request, if it can be expected that the defence will invoke before the Belgium judge that the evidence had been obtained by torture or cruel, inhuman and degrading treatment or that an independent, impartial and serious investigation on the ill-treatment allegations may be difficult to conduct in that country.[23]

### *Ensure that there are effective procedure in place to create conditions for effective judicial review and guarantee adequate reparation in case of a violation of the exclusionary rule*

Once a violation of the prohibition of the use of evidence tainted by torture is found, the question arises as to how to ensure adequate remedies. The CAT Committee has recommended to *"ensure that a review of convictions based solely on confessions is conducted, especially if the confessions have been made under torture, and that prompt and impartial investigations are carried out into such cases, so that persons convicted on the basis of coerced evidence are afforded a new trial and adequate redress and the perpetrators are prosecuted and punished, including under the principle of command responsibility*."[24]

It is also worth analyzing the practice of the ECtHR and the Council of Europe's Committee of Ministers – Department of the Execution of Judgments of the ECtHR. Under Article 46 ECHR, the ECtHR may require, in addition to the payment of just satisfaction, the adoption of the following measures by the respondent state:

[21] ECtHR, *El Haski v Belgium*, App. No. 649/08 (25 September 2012).
[22] Ibid, § 90.
[23] Action Report from Belgique concerning the case El Haski v Belgium (No 649/08) adopted in May 2014, available <https://hudoc.exec.coe.int/eng?i=DH-DD(2014)601F>. The execution proceeding was closed with Res CM/ResDH(2014)110 adopted by the Committee of Ministers on10 September 2014.
[24] CAT Committee, Concluding Observations: Poland (29 August 2019) CAT/C/POL/CO/7, § 11ff.

- of individual measures to put an end to the violations and erase their consequences so as to achieve as far as possible restitutio in integrum; and
- of general measures preventing similar violations.

In practice, this often means that the applicant is awarded just satisfaction in respect of non-pecuniary and pecuniary damage, the re-opening of the criminal proceedings, as well as the wide dissemination of the relevant judgments of the European Court (see also below the contribution of Nikolaos Sitaropoulos "Unfair trial due to torture-tainted evidence - European Court of Human Rights' judgments and their execution").

*Ensure that exclusionary rules are embedded in a broader system of torture prevention guarantees*

Strong exclusionary rules alone will not solve the problem of torture and ill-treatment, but they can be powerful tools in the fight against torture and ill-treatment, especially if embedded in a broader system of torture prevention guarantees. Thus, it is important that discussions on the exclusionary rules are not conducted in isolation but are always considered as part of a more comprehensive torture prevention system.

In particular, it is crucial to strengthen at least the following safeguards from the very early stages of detention:

- Access to a lawyer and legal aid
- Access to information
- Access to a medical doctor
- Notification of the detention to a third party
- Audio-visual recording during interviews

As maintained by all anti-torture bodies and especially the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), these fundamental safeguards play a crucial role in preventing potential abuse during the early stages of custody, counting among the most effective safeguards to prevent torture.[25]

Moreover, it is equally necessary to achieve a shift in police culture and overcome those criminal justice systems still based on coercive investigation and confessions. In this sense, States parties should adopt effective information gathering techniques according to the Principles on Effective Interviewing for Investigations and Information Gathering (see also below the contribution of Juan E. Méndez* "Torture-tainted evidence and the exclusionary rule")[26]

[25] Richard Carver and Lisa Handley (eds), 'Does Torture Prevention Work?' (Liverpool University Press 2016) p 633; CPT, '12th General Report', CPT/Inf (2002) 15, § 44; SPT, 'Country Report: Romania' (2018) CAT/OP/ROU/1, § 29.

[26] Principles on Effective Interviewing for Investigations and Information Gathering (2021), New Principles on Effective Interviewing for Investigations and Information Gathering | Association for the Prevention of Torture (apt.ch); CPT on investigative interviewing and a necessary paradigm in police culture (2018), 28th General Report of the European Committee for the Prevention of Torture and Inhumane and Degrading Treatment or Punishment, p. 32 ff.

## KEY RECOMMENDATIONS AND POSSIBLE NEXT STEPS

Based on the discussions conducted in the framework of the activities, several important follow-up actions were identified, namely:

1. Clarifying and strengthening standards, especially with regard to a) the standards applicable to confessions and statements obtained by other forms of ill-treatment falling short of torture; b) the standards applicable to other evidence gathered or derived from information obtained by torture and especially by other forms of ill-treatment; c) The domestic procedures applicable to exclude the evidence obtained by torture and ill-treatment, especially concerning the introduction of an explicit regime for the admission of evidence alleged to have been obtained by torture or ill-treatment that put in place a strict reverse burden of proof (see also below the contributions of Ilze Tramaka "Reducing reliance on torture evidence", Rupert Skilbeck "Excluding Confessions obtained by torture")
2. Collecting further data and conducting research, especially on how the exclusion of torture tainted evidence is implemented at the national level
3. Raise awareness and strengthening the capacity of relevant national stakeholders by developing guidance documents and training material (see also below Catherine Kent "Implementing the Exclusionary Rule: Procedural Aspects, the Role of the Legal Profession and National Law, Policy and Practice")
4. Always ensure that exclusionary rules are embedded in a broader system of torture prevention guarantees, such as the proper functioning of procedural safeguards and the development of effective information gathering techniques according to the Principles on Effective Interviewing for Investigations and Information Gathering (Méndez Principles) (see also below the (see also below the contributions of Ilze Tramaka "Reducing reliance on torture evidence", Rupert Skilbeck "Excluding Confessions obtained by torture")

To successfully implement the identified follow-up actions, it would be ideal to ensure a broad engagement of all relevant stakeholders of the OSCE area from the very beginning. During the consultations, the following ideas for next step were collected.

- The **CAT Committee** could systematically review the implementation of Article 15 CAT in all reporting cycles and guide the States Parties with concrete and coherent recommendations, the implementation of which should be followed up in the next reporting cycle. The CAT Committee should also consider issuing a General Comment on Article 15 of the CAT to make the corpus of recommendations already developed more easily accessible and guide States parties in the implementation of this provision.

- The **European Court of Human Rights** could clarify its jurisprudence concerning exclusionary rules. It could particularly reflect on whether the distinction made in *Gäfgen* is still appropriate or, rather, if it is time to opt for a stricter application of the exclusionary rule. The current approach carries the risk of rendering the rules on the admissibility of torture-tainted evidence - and their preventive rationale - irrelevant in practice.

- The **European Union** could take further steps to eradicate torture and ill-treatment in the Member States. While considerable steps have been taken to set and guarantee minimum standards when it comes to certain safeguards in the criminal justice proceedings, additional

measures could be taken to ensure that evidence obtained by torture and ill-treatment is not used in criminal proceedings. The current debate at the EU level regarding the admissibility of evidence could offer an interesting opportunity. With the adoption of legislation on EU cross-border investigations (e.g. Directive 2014/41/EU on the European Investigation Order), ensuring the admissibility of evidence gathered in another Member State at trial has become a crucial interest of the EU. Moreover, as the rules on the collection, use, and admissibility of evidence are currently left to the laws of the Member States, academics have argued in favor of a new legislative EU proposal laying down common rules for the admissibility and exclusion of evidence in criminal proceedings (https://eucrim.eu/articles/admissibility-evidence-criminal-proceedings-eu/). While the discussions at the EU level do not only concern evidence tainted by torture and ill-treatment but illegal evidence more broadly, they could offer an opportunity to conduct further research in the area and on fundamental rights challenges and promising practices in the EU area.

- **Academia and research institutes** could research on exclusionary rules and how they are implemented in law and practice at the national level and issue evidence-based recommendation to national stakeholders. Based on these assessments, practical guides and training material could be developed to raise awareness about international standards and how to implement them into the national context. The development of such material can be particularly valuable if developed by/in close coordination with those who have to apply it in the first place. In Mexico, the Directorate General for Human Rights of the Supreme Court of Mexico has published a Protocol for judges on cases of Torture in 2021, including a chapter on exclusionary rules (see also below the contribution of Juan E. Méndez* "Torture-tainted evidence and the exclusionary rule").[27]

- **Civil society organizations and relevant professional categories (e.g. judiciary and bar associations)** should be closely involved in all initiatives mentioned above and can additionally develop joint efforts and initiatives to strengthen the operation of exclusionary rules. These could include strategic litigation before national and international courts, participating in the monitoring of the execution of international decisions, including by submitting opinions to the department for the Execution of ECtHR Judgments of the Council of Europe, as well as participation in UN treaty body procedures with alternative reports. Furthermore, they can engage in awareness raising and capacity-building activities and support in the gathering of data on the implementation of the rule and the development of practical guidance (see also below the contributions of Valentina Caledo and Tomás Pascual "Implementing the exclusionary rule in practice: the potential of civil society organisations", Catherine Kent "Implementing the Exclusionary Rule: Procedural Aspects, the Role of the Legal Profession and National Law, Policy and Practice").

[27] Mexico: Suprema Corte de Justicia de la Nacion, Protocolo para Juzgar Casos de Tortura y Malos Tratos, 2021 https://www.scjn.gob.mx/derechos-humanos/sites/default/files/protocolos/archivos/2022-01/Protocolo%20para%20juzgar%20casos%20de%20tortura%20y%20malos%20tratos.pdf

# Day 1: Evidence tainted by torture in law and practice - A regional perspective

## Nikolaos Sitaropoulos* - *"Unfair trial due to torture-tainted evidence - European Court of Human Rights' judgments and their execution"*

**Head of Division, Department for the Execution of ECtHR Judgments, Council of Europe. Views expressed herein are strictly personal.*

**Introductory remarks**

In its 2018 annual report (§65) the CPT observed that ill-treatment during or in the context of police interviews remains a very serious problem in a significant number of European states. In almost one third of the 47 Council of Europe member states, the CPT has collected evidence of police ill-treatment that may qualify as torture.

The right to a fair trial under Article 6 ECHR, which is not an absolute right, in practice may be linked to Article 3 ECHR (prohibition of torture), which enshrines an absolute freedom. As the ECtHR has stated (*Gäfgen v. Germany* [GC] 2010, §178), the need to repress and effectively protect individuals from ill-treatment during investigations may require the exclusion from use at trial of real evidence which has been obtained as the result of any violation of Article 3.

### I. ECtHR case-law concerning torture-tainted evidence

- Fair trial guarantees start with a criminal charge

The guarantees surrounding the right to a fair trial under Article 6 ECHR apply from the moment that a "criminal charge" exists within the meaning of the ECtHR case-law. Thus they are relevant during pre-trial proceedings. The Court has noted that the investigation stage may be of particular importance for the preparation of the criminal proceedings: the evidence obtained during this stage often determines the framework in which the offence charged will be considered at the trial. An accused may therefore find themselves in a particularly vulnerable position at that stage, the effect of which may be amplified by increasingly complex legislation on criminal procedure, especially evidentiary ones (*Ibrahim and Others v. UK* [GC], 2016, §253).

- Absolute prohibition of use of confessions made in violation of Article 3 ECHR

As regards the use, as fact-establishing evidence, of confessions (statements) resulting from torture or other ill-treatment in breach of Article 3 ECHR, this practice renders criminal proceedings as a whole unfair. The European Court has underlined that this applies irrespective of the probative value of the statements and irrespective of whether their use was decisive in securing the defendant's conviction. (*Gäfgen v. Germany* [GC], 2010, §166, *Ibrahim and Others v. UK* [GC], 2016, §254).

- Prohibition of use of other incriminating evidence tainted by torture

Under the ECtHR case-law (*Jalloh v. Germany* [GC], 2006, §105), incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim's guilt.

- Incriminating evidence obtained through other forms of ill-treatment

The admission of evidence obtained as a result of an act qualified as inhuman treatment in breach of Article 3, but falling short of torture, may breach Article 6, if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on their conviction or sentence (*El Haski v. Belgium*, 2012, §85). The ECtHR has underlined that all the above principles apply not only where the victim of the treatment contrary to Article 3 is the actual defendant but also where third parties are concerned (*Othman (Abu Qatada) v. UK*, 2012, §263-267, *Ćwik v. Poland*, 2020, §77 and §89, in the latter case, in particular, ill-treatment was inflicted on a third party by private individuals).

- Ill-treatment and one's right to silence (privilege against self-incrimination)

The European Court has attached particular importance to one's right to silence and the privilege against self-incrimination, considering them international standards which lie at the heart of the notion of a fair procedure under Article 6. They do not, however, extend to the use of material obtainable from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect, such as documents acquired pursuant to a warrant, breath, blood, urine, hair or voice samples and bodily tissue for the purpose of DNA testing (*Jalloh v. Germany* [GC], 2006, §§100-102, *Ibrahim and Others v. UK* [GC], 2016, §§266-269).

In order to determine whether one's right to silence has been violated, three major factors have been examined by the European Court: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put (*Jalloh v. Germany* [GC], 2006, §117)

- Domestic courts' obligation to examine allegations of ill-treatment casting doubt on the quality of evidence

Under the ECtHR's case-law, domestic courts should examine the quality of the evidence including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. Thus, the burden of proof is on the prosecution and any doubt should benefit the accused (*Bokhonko v Georgia*, 2020 §92). In cases where a defendant makes a *prima facie* case about the real evidence, forming the basis of conviction, potentially obtained through ill-treatment, national courts are under an obligation to "adequately examine" such an argument and assess the quality of the evidence (ibid. §96, see also *Iordan Petrov v. Bulgaria*, 2012 §140, where the ECtHR refers to the domestic courts' obligation to carry out an *"analyse approfondie"* of the facts of the case if ill-treatment allegations are put forward).

Also, in cases where a defendant submits that the impugned evidence emanates from torture or other forms of ill-treatment on a third person in a third state, the domestic court may not admit this evidence without having first examined the defendant's arguments concerning it and without being satisfied that no such risk exists (*El Haski v. Belgium*, 2012, §§88-89).

## II. Execution of ECtHR judgments concerning torture-tainted evidence

- States' obligation to provide redress to victims

All victims of ECHR violations should be entitled, as far as possible, to an effective *restitutio in integrum.* Under Recommendation No. R (2000) 2 of the Council of Europe Committee of Ministers, states' legal systems should make it possible to re-examine a case, and reopen proceedings, following a judgment by the ECtHR finding a violation of the ECHR, "especially where: i. the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and ii. the judgment of the Court leads to the conclusion that *a.* the impugned domestic decision is on the merits contrary to the Convention, or *b.* the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of."

Thus, in cases where applicants' convictions are found by the ECtHR to have been tainted by torture or other forms of ill-treatment, the Committee of Ministers, supervising the execution of ECtHR judgments, systematically examines whether applicants had the possibility at national level to request and obtain re-examination and reopening of their cases.

For example, in *El Haski v. Belgium*, the applicant requested and obtained by decision of the Court of Cassation the quashing of the criminal proceedings at issue and the reopening of the trial in order to rectify the violation committed. In *Iordan Petrov v. Bulgaria*, in the reopened proceedings, the confessions obtained in breach of Article 3 were excluded from the case-file, the applicant's conviction was upheld by a final judgment of the Supreme Court of Cassation and the court reduced his sentence from life imprisonment without commutation to life imprisonment. Also in some cases of the *Stanimirović group of cases v. Serbia*, applicants requested the reopening of the impugned criminal proceedings and in the reopened proceedings the applicants were acquitted of all charges. In the more recent case of *Ćwik v. Poland*, the Committee of Ministers was informed that reopening of criminal proceedings against the applicant was possible under the Code of Criminal Procedure but no request in this respect has been submitted by the applicant (see also similar situation in *Hajrulahu,* part of the *Kitanovski group of cases v. the former Yugoslav Republic of Macedonia*)

- States' obligation to prevent recurrence of similar ECHR violations

Respondent states are also under an obligation to take general (legislative, regulatory or awareness-raising) measures to prevent similar human rights violations after an ECtHR judgment. Occasionally the ECtHR may identify the problem of ill-treatment during police interrogation as systemic at national level and provide indications/guidance concerning possible general measures to be taken by the respondent state. For example, in *Kaverzin v. Ukraine* (2012) the Court considered it necessary to stress that Ukraine must urgently put in place specific reforms in its legal system in order to ensure that practices of ill-treatment in custody are eradicated, that effective investigation is conducted in accordance with Article 3 of the Convention in every single case where an arguable complaint of ill-treatment is raised and that any shortcomings in such investigation are effectively remedied at the domestic level (see also *Kaverzin group of cases* pending before the Committee of Ministers, concerning violations of Article 3).

In certain countries it appears to have been considered sufficient, by the respondent states and the Committee of Ministers, to publicise and widely disseminate the ECtHR judgments to competent national authorities, given that national legislation appeared to be ECHR-compliant while the Article 6 violations seemed to be due to judicial practice (see e.g. *Iordan Petrov v. Bulgaria*, *Gäfgen v. Germany*, *Jalloh v. Germany* — as regards the violation of Article 3 in Jalloh, the practice of administering emetics to obtain evidence was expressly abandoned in the Länder, which had used it - Berlin, Bremen, Hamburg, Hessen and North Rhine-Westphalia —*Stanimirović group of cases v. Serbia*).

In other countries more measures have been considered necessary. For example, in *El Haski v. Belgium* the Federal Prosecutor's Office issued instructions to competent authorities in order to prevent the future use of declarations obtained under torture or through other inhuman or degrading treatment. Moreover, a new law amended the Code of Criminal Procedure explicitly proscribing use of evidence obtained irregularly, thus also indirectly excluding the evidence obtained through torture.

Domestic case-law changes may also be considered able and necessary to prevent similar Convention violations. For example, in the *Kitanovski group of cases v. the former Yugoslav Republic of Macedonia*, the authorities have informed the Committee of Ministers about a number of Convention-compliant judgments delivered by the Supreme Court in 2009, 2013 and 2014 demonstrating that the domestic courts have a well-established and ECHR-compliant practice of excluding ill-treatment tainted evidence from criminal trials.

**Concluding remarks**

In the aforementioned major cases where the ECtHR has found violations of Article 6 ECHR, the judgments appear to have considered as root cause of the violations domestic courts' practice concerning the exclusionary rule which was non-ECHR compliant, rather than flawed domestic legislation. Hence, the wide dissemination and publication of the ECtHR judgments and the effective alignment of domestic courts' practice with the ECtHR case-law appears to be considered to provide, in most cases, sufficient guarantees for preventing recurrence of similar violations.

Despite the fact that the CPT in recent years continued to encounter instances of ill-treatment during police interviews in a significant number of European states, as noted earlier, certain states appear to be determined to take firm action in order to fight torture and other forms of ill-treatment by law enforcement which seems to be the major source of the problem in practice. This is illustrated by a number of European states' decision or plan to abolish prescription for acts of torture (this has happened in 2021 in Armenia, Romania and North Macedonia and earlier in Moldova and Turkey), or high-level political statements showing determination to eradicate police ill-treatment (in March 2021, the Greek Prime Minister during his speech in Parliament expressed the state's determination to address the causes and its strong commitment to setting the stage for a change of culture among law enforcement officers; Sidiropoulos and Papakostas group of cases v. Greece). This trend is encouraging, promising further alignment of national criminal law and practice with the fundamental values concerning human dignity and one's right to a fair trial.

## DAY 1 – ILZE TRALMAKA

# Ilze Tralmaka* "Reducing reliance on torture evidence"

**Senior Legal and Policy Officer, Fair Trials*

International law prohibits reliance on 'torture evidence' for multiple reasons. Firstly, the statements made as result of torture are involuntary, inherently unreliable and violate the right to a fair trial. Secondly, to rely on such evidence undermines the rights of the torture victim. Thirdly, it indirectly legitimises torture and in so doing taints the justice system and finally, prohibiting reliance on fruits of torture acts as a form of deterrence and prevention. In reality, however, reliance on torture evidence or at least evidence obtained indirectly from torture is still being used in criminal justice systems around the world (*Fair Trials and REDRESS, Tainted by Torture. Examining the Use of Torture Evidence*, 2018, pp.15-25). Despite a clear exclusionary rule applicable to statements obtained by torture on the international and regional level (Article 15 CAT, see also ECtHR*, Gäfgen v. Germany* [GC], App. No. 22978/05, 1 June 2010*,* § 166) some countries do not prohibit reliance on torture evidence at all. More commonly, countries have some form of exclusionary rule in respect of torture evidence, but such rules tend to be incomplete and fail to meet the key components of the rule as defined by international law (Fair Trials and REDRESS, *op. cit*, p. 59). There is also confusion about the scope of application of the exclusionary rule to other forms of cruel, inhuman and degrading treatment and to the evidence obtained indirectly from torture and other forms of ill-treatment (Fair Trials and REDRESS, *op. cit.*, p. 59). This means that in practice, torture evidence is still used in criminal trials around the globe.

**Prevention**

Focusing on *post-factum* remedies such as the application of the exclusionary rule alone will not solve the problem. In addition to a strong exclusionary rule, ending reliance on torture evidence calls for systemic solutions which remove the incentives for coercive investigation techniques in the first place.

First and foremost, interviewing must be conducted with all appropriate procedural rights and safeguards. The presence of a lawyer in the interview is an essential safeguard against torture and other forms of ill-treatment (*Fair Trials and REDRESS, op. cit.,* p. 49). The presence of a lawyer in

person in one room with the suspect can not only help to prevent torture, but also detect and stop ongoing ill-treatment that may take place outside of the interview room. For this reason, remote legal assistance is less effective than a lawyer's presence in-person (*Fair Trials, Beyond the Emergency of COVID-19 pandemic: lessons for defence, 2020, p. 27*), where it is easier to detect any visible signs of torture.

Secondly, law-enforcement officers need to be trained on the inherent unreliability of statements made under coercion that undermine the main objective of a criminal investigation – truth finding. Law enforcement officers also need to be more knowledgeable on the benefits of using appropriate interviewing techniques in accordance with international standards (*e.g. the Mendez Principles, Principles on Effective Interviewing for Investigations and Information Gathering, 2021*).

Thirdly, an important additional safeguard is mandatory video and audio recording of suspect interviews (Fair Trials and REDRESS, *op. cit*. , p. 49). It is important to stress however that, contrary to what appears to be the suggestion of the European Court of Human Rights in *Doyle v. Ireland* (ECtHR, *Doyle v. Ireland,* App. No. 51979/17, 23 May 2019, § 99), video recording of the suspect interview cannot replace the presence of a lawyer. A video recording does not record what happens before or after the interview, nor is it manipulation-proof. Video recordings can be manipulated, for example, by presenting only excerpts of the recording in trial (as was the case in *Doyle*) or strategic placement of the camera to reflect only part of the goings on in the interview room.

Fourthly, detention is a well-known contributing factor to increased risk of coercion on the suspect. Therefore systemic solutions aimed at reducing overreliance and abusive use of pre-trial detention would also reduce the occurrence of torture. It is key that pre-trial detention hearings are conducted in-person. The European Committee for the Prevention of Torture or Inhuman or Degrading Treatment or Punishment has stressed that "*All persons detained by the police whom it is proposed to remand to prison should be physically brought before the judge who must decide that issue. Bringing the person before the judge will provide a timely opportunity for a criminal suspect who has been ill-treated to lodge a complaint. Further, even in the absence of an express complaint, the judge will be able to take action in good time if there are other indications of ill-treatment (e.g. visible injuries; a person's general appearance or demeanour)*" (CPT, 12th General Report, CPT/Inf(2002)15-part, § 45).

And finally, the effort to conclude criminal investigations 'quickly and efficiently' by resorting to coercive investigation methods can be a symptom of overburdened justice systems. The inability to cope with heavy caseload may push law-enforcement officers to look for ways to close cases quickly or to produce more "results". For this reason, an increasing number of cases are resolved without a full trial, through confessions or plea bargains. In many such trial waiver procedures, the suspect needs to confess. In such cases, the need to obtain a confession is a major incentive for use of torture or other forms of ill-treatment. Decriminalisation and redistribution of resources to help justice systems deal with the existing caseload and thus reducing reliance on confession in criminal prosecutions has the potential to address a major driver of torture (Fair Trials and REDRESS, *op. cit*., p. 60).

**Effective exclusion**

Dealing with torture evidence in the trial stage of criminal proceedings can be difficult. As mentioned above, the scope and application of the exclusionary rule, even where a clear rule exists in

international law (as is the case for statements obtained by torture) is still problematic in legislation and practice on a national level.

In addition, Fair Trials' recent research on the use of illegally obtained evidence shows a certain reluctance from judges to apply the exclusionary rule to illegally obtained evidence. Where exclusion of evidence may result in an acquittal, judges are reluctant to take a principled stance on unlawful evidence (Fair Trials, *Unlawful evidence in Europe's courts: principles, practice and remedies*, 2021 p. 46). The same reluctance is also seen on an international level with the International Criminal Court's Trial Chamber X recently taking a compartmentalized view of the interview process in *Al Hassan* and refusing to look into torture allegations outside of the interview room (Fair Trials, *op. cit.*, 2021, p. 46).

Effective application of the exclusionary rule is also difficult in practice. Our research shows that most civil law systems are built in a way that only allows challenges of the legality of evidence in the trial stage. A decision on the legality of evidence is often taken by the same judges that will rule on the guilt or innocence (Fair Trials, *op. cit.*, 2021, p. 45-46). However, at the trial stage it is often too late to distinguish which evidence was obtained illegally and which was gathered independently. Illegal evidence gathering methods are also often unrecorded and are not used to obtain direct evidence but rather information that leads to new, seemingly untainted evidence (Fair Trials, *op. cit.*, 2021, pp. 35-36). Even if it was possible to trace the origin of the evidence at this stage, the fruit of poisonous tree doctrine is almost never applied in civil law systems (Fair Trials, *op. cit.*, 2021, pp. 35-36). Thus violations of rights can result in tangible benefit for prosecutions.

States need to create conditions for effective judicial review of the legality of evidence early in the process. In principle an opportunity to independently examine legality of evidence at the pre-trial stage would help detect and exclude torture evidence early on. A crucial piece in this process is keeping detailed records about the evidence gathering process which are also disclosed to the defence. A lack of information about the evidence gathering process to both defence and judges is a major obstacle to the effective review of the legality and potential exclusion of unlawful evidence (Fair Trials, *op. cit.*, 2021, pp. 43-45). It also prevents holding authorities to account for their actions, and fails to create a disincentive for the use of torture.

## DAY 2 - RUPERT SKILBECK

# Day 2: Evidence tainted by torture in law and practice - The perspective of legal practitioners

## Rupert Skilbeck* "Excluding Confessions obtained by torture"

** Director of REDRESS, which brings legal claims on behalf of survivors of torture around the world.*

**Introduction**

In the early 1980s, the British public had lost confidence in the police, due to the many miscarriages of justice that had taken place in the 1970s, most notably those of the Birmingham Six and the Guildford Four. Many ordinary people in the street were of the view that the police had used torture to obtain false confessions. The criminal justice system until that time relied on the "Judges' Rules" to regulate the admissibility of such confessions, which were easily manipulated by those with an ulterior purpose. Lord Denning, as Master of the Rolls (the most senior civil judge in England and Wales) when faced with a civil claim brought by the Birmingham Six for the miscarriage of justice against them was clear as to what his ulterior purpose was:

*"Just consider the course of events if their action were to proceed to trial… If the six men failed it would mean that much time and money and worry would have been expended by many people to no good purpose. If they won, it would mean that the police were guilty of perjury; that they were guilty of violence and threats; that the confessions were involuntary and improperly admitted in evidence; and that the convictions were erroneous… That was such an appalling vista that every sensible person would say, 'It cannot be right that these actions should go any further'."*

The government thought otherwise. A Royal Commission on Criminal Procedure made recommendations for significant changes in a 1981 report, which led to the Police and Criminal Evidence Act 1984, which contained significant anti-torture safeguards.

**Counsel for the Prosecution**

As a junior barrister in the 1990s I often acted for the prosecution, both the Crown Prosecution Service and Customs and Excise who were responsible for the prosecution of drug importation cases. One of the peculiarities of the English criminal justice system is that barristers can act for both the prosecution and the defence, sometimes on the same day (although obviously not in the same case :)). In drugs cases there are often confessions, but these can sometimes be unreliable where suspects are either on drugs or withdrawing from them. While this (probably) would not amount to torture or ill-treatment, there was a risk that the police might take advantage of the situation in an oppressive way.

Section 76 of the Police and Criminal Evidence Act (PACE) puts in place a strong reverse burden of proof. It was for me as the representative of the Crown to convince the judge – to the criminal standard – that the confession had not been obtained by "oppression". This was done by calling the police officer or customs officer who had conducted the interview to describe how they had carefully followed the procedures set out in Code C of PACE to the letter, and often by calling the custody sergeant who had responsibility for ensuring that all those entering a police station were properly processed, and who kept a detailed log of what happened to that detainee minute by minute. Code C also required the tape recording of interviews, and so the court could consider the words or even tone of voice of the interview itself. And PACE also required that a lawyer was present, which was almost always the case.

A reverse burden of proof is a very powerful tool, if judges take it seriously. There is essentially a presumption that the confession was unlawful, unless the state can prove otherwise. For the prosecution, this required a concerted effort for the confession to be admitted in evidence. For the police, it required them to follow strict procedures. The legislation had an instant impact, making it almost impossible for forced confessions to be used to secure a conviction, and at a stroke eliminating one of the strongest incentives for torture.

**Tainted by Torture**

REDRESS and Fair Trials conducted research a few years ago into the use of evidence obtained by torture in the criminal justice process, and produced a report Tainted by Torture that presented our findings. International law is quite clear that there must be safeguards against torture in the criminal justice system, including a strong reverse burden of proof when it comes to the consideration of forced confessions. Yet our research demonstrated that a clear presumption was lacking from most national systems, even those of quite developed democracies.

As has been well documented, in many countries the police rely on confessions as their main form of securing convictions, in the absence of other effective investigation methods, and given the scarce resources available to them. Our research revealed that even in those countries where there was a legal process to exclude evidence, it was often not effective in practice. There was a particular problem in monist systems, where international law was deemed to apply directly, but without a practical safeguard in place that controlled the way that a decision to exclude a confession was made, those international standards were worthless. In many countries there was no regime at all, but only a general approach to considering the probative value of evidence.

The report came up with a number of suggestions for how things could be improved. More training for police and judges. A focus on rights-compliant investigations. Further research. Gathering of data. But most simply – the introduction of an explicit regime for the admission of evidence alleged to have been obtained by torture or ill-treatment that put in place a strict reverse burden of proof.

**A proposal**

What would be the impact of the introduction of a relatively simple safeguard against torture? In England and Wales it was accompanied by other safeguards such as the use of a custody sergeant, and the tape recording of interviews, as well as the provision of a 'duty solicitor' to provide legal advice. And the cost of PACE ended up being much greater than initially anticipated, mainly due to the lawyers. But given advances in technology, the cost of recording interviews must now be minimal compared with the cost of unpicking miscarriages of justice.

Of course, the reverse burden of proof and tape recording of interviews are only one of a number of safeguards that can be put in place, most notably the encouragement of an alternative to beating and

threatening suspects, through the use of investigative interviews as promoted in the recent Mendez Principles for Effective Interviewing.
But the human rights advocate in me wonders: what would be the impact if we ran a concerted five year campaign to introduce a robust reversal of proof in 50 jurisdictions? And give other 20-something junior prosecutors the same challenge that I faced to persuade the judge that torture had not taken place?

## DAY 2 – CATHERINE KENT

# Catherine Kent* "Implementing the Exclusionary Rule: Procedural Aspects, the Role of the Legal Profession and National Law, Policy and Practice"

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The exclusionary rule is clearly enshrined in international law, standards and norms (see, e.g., Article 15, UN Convention against Torture (UNCAT); Report of the Special Rapporteur on torture, Juan E. Méndez (April 2014) [17, 22]). Despite this, a gap in national implementation remains and routine reliance on torture-tainted evidence persists, including in countries with an express exclusionary regime (REDRESS and Fair Trials. Tainted by Torture: Examining the Use of Torture Evidence 1 (2018) pgs. 8, 37-38). This blog post outlines procedural aspects of domestic implementation in law, policy and practice in the context of judicial proceedings and highlights the role of the legal profession in upholding the exclusionary rule to prevent the admissibility of torture-tainted evidence.

**Domestic frameworks**
Many countries' legislative frameworks contain normative provisions regarding the exclusionary rule (see, e.g., APT and CTI. Guide on anti-torture legislation (2016) pg. 28). However, international human rights law permits States discretion regarding the specific nature of exclusionary procedures (Fair Trials and OSCE ODIHR. Eliminating incentives for torture in the OSCE region: Baseline study and practical guidance (2020) (hereinafter "Eliminating Incentives Report" [36]). As noted by the Convention against Torture Initiative (CTI):
*"States have developed, in accordance with their laws and judicial practices, various processes to exclude evidence obtained by torture or ill-treatment. Some States adopt a two-stage process: an initial stage of triggering an exclusion procedure, either requiring a credible complaint of torture or ill-treatment, or initiated by the judge; and second, a stage of establishing whether the material at issue was obtained by torture or ill-treatment." (CTI. UNCAT Exclusionary Rule Tool 8/2020: Non-Admission of Evidence Obtained by Torture and Ill-Treatment: Procedures and Practices (2020) (hereinafter "CTI Tool 8/2020") pg. 9.)*
This can occur at different points in judicial proceedings, including during pre-trial/preliminary hearings or as a "trial within a trial" (voir dire). Such an approach ensures that the defendant can testify about the admissibility of evidence without the risk of self-incrimination from cross-examination on matters that could influence a guilty verdict (CTI Tool 8/2020, pg. 9).

National legislative frameworks should define clear procedures to be taken by courts if evidence appears to have been obtained through torture or ill-treatment and establish mechanisms by which evidence may be declared inadmissible (c.f. Report of the Special Rapporteur on torture, Juan E. Méndez (April 2014) [24]). Under Article 173 of the French Code of Criminal Procedure, the investigating judge or a prosecutor can initiate a procedure to exclude evidence if they suspect it was obtained by torture, upon which an evidence validity challenge is referred to the Investigation Chamber of the Court of Appeal (CTI Tool 8/2020, pg. 6). National frameworks should also include provisions on the handling of evidence itself. For example, under Article 141(5) of the Swiss Criminal Procedure Code, any records relating to inadmissible evidence "shall be removed from the case documents, held in safekeeping until a final judgment has concluded the proceedings, and then destroyed".

Additionally, national legislation must ensure the mandatory exclusion of torture-tainted evidence, prohibiting the exercise of discretion by national authorities where torture or ill-treatment is alleged (UN Committee against Torture. Report on Mexico (25 May 2003) [220(f)]; Report of the Special Rapporteur on torture, Juan E. Méndez (April 2014) [82(d)]). In Malawi, under Section 176 of the Criminal Procedure and Evidence Act, forced confessions are admissible if the judge "is convinced beyond reasonable doubt that the confession is materially true" (Initial Report submitted by Malawi to the UN Committee against Torture (March 2020) [69]).

National legislation can, in theory, be reinforced by judicial directives that are binding on judicial authorities. In 2003 and 2004, the Plenum of the Supreme Court of Uzbekistan issued two directives that explicitly prohibit the use of torture to extract confessions and declare torture-tainted evidence inadmissible in court proceedings (Amnesty International. Secrets and Lies: Forced Confessions under Torture in Uzbekistan 1 (2015) pg. 41).

**The judiciary**

The courts are guarantors of the exclusionary rule, fair trial rights and due process, as well as having an "essential role in overseeing the main components of accountability" (Interim report of the Special Rapporteur on torture, Nils Melzer (July 2021) [28, 39]). The UN Committee against Torture has held that Article 15, UNCAT, implies a positive obligation for State parties to ascertain whether or not statements admitted as evidence in any proceedings for which it has jurisdiction have been made as a result of torture (Communication No. 193/2001: P.E v France (December 2002) [6.3]).

In recent communications, the Committee has found a violation of Article 15 where State parties have failed to verify the substance of a claim that a confession had been obtained under torture and used those confessions in judicial proceedings against the defendant (see, e.g., Communication No. 549/2013: Abdulrahman Kabura v Burundi (January 2017) [7.7]). This includes where courts have failed to, inter alia, "give serious consideration to…allegations of torture when convicting [defendants] on the basis of…confessions" (UN Committee against Torture. Communication No. 477/2011: Ali Aarrass v Morocco (June 2014) [10.8-10.9]). Courts should enquire whether there is a "real risk" that the evidence has been obtained by torture or ill-treatment and, if so, the evidence should not be admitted (Report of the Special Rapporteur on torture, Juan E. Méndez (April 2014) [82(f)]).

Courts must have an independent procedure to ascertain whether a confession was made voluntarily (UN Committee against Torture. Report on Mexico (May 2003) [202]). They should have the power to exclude torture-tainted evidence, irrespective of any separate criminal investigation into allegations of torture (Eliminating Incentives Report (2020) pg. 36). Courts should not admit extrajudicial confessions that are not corroborated by other evidence or that have been recanted (Eliminating Incentives Report (2020) pg. 37; Report of the Special Rapporteur on torture, Juan E. Méndez (April 2014) [65]).

The Committee against Torture has also required State parties to, inter alia, judicially review all cases in which convictions were based solely on confessions obtained through torture (Concluding Observations on Afghanistan (June 2017) [28]). In the case of Bayarri v. Argentina, the Inter-American Court of Human Rights held that the Chamber of Appeals' declaration that a forced confession was invalid and annulment of procedural actions arising therefrom constituted an effective measure to stop the consequences of a violation of judicial guarantees (Judgment: Preliminary Objection, Merits, Reparations and Costs (October 2008) [108]).

In practice, many judiciaries lack guidance on the operationalisation of the exclusionary rule. For example, as of 2016, no 'practice direction' or procedural guidance existed for Tunisian judges on steps to take when allegations of forced confessions are raised in court (REDRESS. Legal Frameworks to Prevent Torture in Africa: Best Practices, Shortcomings and Options Going Forward (2016) pg. 35). The UN Committee against Torture has called on Peru to "build the institutional capacity needed in order to disallow statements obtained under torture" and "[c]compile information on criminal proceedings in which judges, either on their own initiative or at the request of parties to the case, have ruled that [torture-tainted] evidence is inadmissible, and the measures taken in that regard" (UN Committee against Torture. Concluding Observations: Peru (December 2018) [19(a) and ©]).

**Public prosecutors**

As per the UN Guidelines on the Role of Prosecutors (1990), prosecutors shall, inter alia, "respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system" ([12]). Specifically:

*"When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice" ([16]).*

A similar position is adopted in Article F(l) of the African Commission on Human and People's Rights' Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) and the International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (1999) ([4(3)(f)]). The latter also highlights that prosecutors shall "examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained" ([4(3)(e)]).

**Defence lawyers**

Legal and procedural safeguards play a vital role in creating a conducive environment to prevent forced confessions, including access to a lawyer in the first hours of detention and throughout judicial proceedings (see, e.g., Principles on Effective Interviewing for Investigations and Information Gathering (2021) [61-62]). As per the UN Basic Principles on the Role of Lawyers (1990), lawyers shall, inter alia, "seek to uphold human rights and fundamental freedoms recognized by national and international law" ([14]). As part of their duties towards their clients, lawyers should be able to, inter alia, take "legal action to protect their interests" ([13(b)]), including filing motions to dismiss torture-tainted evidence or lodging a criminal complaint of torture. For example, Article 182 of the Chinese Criminal Procedure Law was amended in 2012 to "formalize pre-trial conferences between judges, prosecutors, and defendants and their counsel", providing the defence with an opportunity to present

a formal motion to exclude forced confessions that the court reviews at trial (Amnesty International. No End in Sight: Torture and Forced Confessions in China (2015) pgs. 38-39).

**Ways forward**

Recognising that the independence of the legal profession is an essential guarantee for the protection and promotion of human rights and, specifically, the implementation of the exclusionary rule, States must ensure that judges, prosecutors and defence lawyers can conduct their work without intimidation, hindrance, harassment or improper interference (see, e.g., UN Basic Principles on the Independence of the Judiciary (1985) [2, 4]).

States should also adopt clear legislation, directives, codes of practice, instructions and guidance on procedures and mechanisms to identify, challenge, determine admissibility and exclude torture-tainted evidence. Sharing examples of best practice and lessons learnt on the Atlas of Torture Exchange Platform is welcome in this regard.

Said national laws, policies and practices should be readily known to, inter alia, judges, prosecutors and defence lawyers and should be fully implemented in practice. In this regard, human rights courts and bodies have required States to provide training to legal professionals on identifying and investigating forced confessions (see, e.g., UN Committee against Torture. Concluding Observations on Cambodia (20 January 2011) [28]), which can serve as a guarantee of non-repetition (Inter-American Court of Human Rights. García Cruz and Sánchez Silvestre v. Mexico. Judgment: Merits, Reparations and Costs (November 2013) [92-93]).

# Day 3: Domestic perspective – Practice and recommendations

## Juan E. Méndez* "Torture-tainted evidence and the exclusionary rule"

*Juan E. Méndez, Faculty Director of Anti-Torture Initiative*

**Introduction**

The exclusionary rule (Article 15 of the UN Convention Against Torture) is an important piece of the elaborate and sophisticated normative framework of International Law surrounding torture and ill-treatment. All my predecessors and my successor as Special Rapporteur on Torture (SRT) have had – like me – multiple occasions to comment on it in country reports and in Observations regarding communications sent to us denouncing instances of torture. Nevertheless, the conventional clause in the CAT contains language that has given rise to equivocal interpretations of the State's obligation in the presence of evidence possibly obtained by torture, and more seriously has lent itself to bad faith interpretations of the clause.

**Challenges in the language of CAT**

Article 15 mandates exclusion of evidence that has been determined to have been obtained under torture. This language is deficient because it provides States and authorities with an easy way out: in many countries, courts and prosecutors insist on admitting statements or declarations unless the defendant proves the existence of torture to the court's satisfaction. This constitutes an unwarranted shift in the burden of proof to the defendant, who is most often in the worst possible position to provide evidence of torture, especially if the defendant is still in custody and without the wherewithal to obtain the services of a qualified forensic doctor. An interpretation in good faith, and consistent with the State's other due process obligations, would insist that it is up to the prosecution to prove that the statement or declaration and all other means of evidence have been lawfully obtained. In addition, Art. 15 refers only to statements and declarations. In some jurisdictions, evidence that was obtained in a search, seizure or a statement of a second suspect and only indirectly originated from torture is frequently admissible. The object and purpose of the exclusionary rule is not only to provide for a fair trial but also to discourage torture, as stated in the US Supreme Court case called Mapp v. Ohio (Supreme Court of the US, 367U.S.643 (1961)). An interpretation consistent with that object and purpose of the norm would apply the "fruit of the poisonous tree" doctrine and exclude all evidence directly or indirectly related to torture.

In a thematic report on torture-tainted evidence that I presented in my capacity as UN Special Rapporteur on Torture I advocated for this more protective, teleological interpretation of the words of Article 15 (Human Rights Council, Report of the Special Rapporteur on Torture, A/HRC/25/60, 10 April 2014). In addition, Article 15 does not mention torture obtained by methods that constitute cruel, inhuman or degrading treatment, i.e., ill-treatment that does not meet the intensity or specific intent required for torture. For its part, Article 16, in defining that kind of ill-treatment, makes applicable to it various preceding articles, although not specifically mentioning the exclusionary rule. However, the list of other provisions that are applicable to CIDT is preceded by the words "…in particular…", which can only mean that the list is not meant to be exhaustive. And the provisions of fair trial in general International Human Rights law make it clear that any and all forms of coercion are prohibited and must therefore be subject equally as torture to the exclusionary rule. Regional courts have made this obligation to exclude evidence obtained by means short of torture, albeit with various scopes of application (ECtHR, Gafgen v Germany, 1 June 2010; IACtHR, Cabrera Garcia and Montiel Flores v Mexico, 2010.)

Finally, Article 15 obliges States to exclude evidence obtained by torture in any proceeding against the person making the declaration. Proceeding is a broad concept that refers not only to criminal prosecutions but includes also disciplinary and other administrative processes. There is no question, therefore, that the exclusionary rule applies equally to evidence used, for example, in immigration decisions and in asylum and refugee determinations. In the context of the Global War on Terror, some powerful States took the position that there was no obligation to exclude information obtained under torture if it was not used as evidence in proceedings. For example, in planning intelligence or military operations. Also, that the exclusionary rule applies only to evidence obtained by the State's own agents, but not to that obtained by intelligence services of other States. Finally, those powerful States also adhered to the notion that all the obligations acquired through ratification of CAT and other human rights treaties were strictly territorial, i.e., that they did not apply to wrongful acts conducted by the States' agents when operating overseas. Notably, that also left open a wide gate to encourage the practice of torture by their own agents, also in contravention with the object and purpose of the exclusionary rule.

**The exclusionary rule in domestic law**

It is up to the domestic jurisdiction to establish procedures to give effect to the exclusionary rule through legislation and regulation, and for domestic courts to decide if those procedures comply with constitutional as well as conventional standards. In many countries, however, procedural law is not clear as to what the court has to do if an issue arises as to the possibility that a piece of evidence may have been obtained under torture. In such cases, courts may decide that there is a possibility that torture occurred and pass that along the matter to a prosecutor - where it dies because most prosecutors prefer not to investigate further and file charges against suspected perpetrators. In some countries, courts do not follow up on referral to the prosecutor, claiming that the notion of prosecutorial discretion is part of the sphere of autonomy of the prosecutor's office and off-limits to judicial supervision. And yet torture is an international crime that obliges the State to investigate, prosecute and punish every incident of torture and ill-treatment. For that reason, exercises of prosecutorial discretion must be judicially reviewable under standards of reasonableness, in order to eliminate or sharply reduce the effects of impunity for torture.

Again on the implementation of the exclusionary rule, courts in many countries receive claims of torture of defendants and perhaps make some effort at corroboration, say by ordering a medical examination to be performed according to Istanbul Protocol standards. But then courts defer the decision on the exclusionary rule to the trial of the defendant. This of course could take several years

and, if the crime is serious enough, the defendant would spend that time in preventive detention. A proper application of the exclusionary rule should be prompt, as it is an important way to operationalize the presumption of innocence. If a confession is excluded, the proceedings should continue if backed by other evidence, including the holding of a trial and a decision to convict or acquit. Even if the court eventually acquits by excluding crucial evidence, the person may have spent four or five years in prison on the basis of torture-tainted evidence. It is important, therefore, to conduct an autonomous and prompt investigation specifically on the claim of torture and, if proven, the resulting evidence – and other evidence derived from the mistreatment – must be excluded ab initio.

**Encouraging developments**

In Mexico, the Supreme Court in 2014 issued a non-binding directive called Protocolo de Actuacion en casos de Tortura that was addressed to lower courts on how to act in cases where torture is alleged or where a magistrate presumed that unlawful methods may have been part of the investigation. This directive was thorough and detailed but its non-binding character probably resulted in a very limited impact in the practice of lower courts. In 2017 the Congress passed a very comprehensive law called Ley General sobre Tortura that, among other things, applies not only in the federal system but is mandatory in all States of the federation (Ley General para Prevenir, Investigar y Sancionar la Tortura y Otros Tratos o Penas Crueles, Inhumanos o Degradantes, 16 July 2017). In November 2021 the Supreme Court issued another directive reasserting the 2014 Protocol, this time with more detailed and complete instructions than in the 2014 directive (Corte Suprema de Justicia, Protocolo para Juzgar Casos de Tortura y Malos Tratos, www.scjn.gob.mx). It is expected that it will result in more practical and expeditious ways for higher courts to supervise and control how lower courts implement the exclusionary rule as well as the obligation to investigate, prosecute, and punish torture.

In Brazil, the Supreme Court also instituted a system of Audiencias de custodia in 2015. It was also done by means of a non-binding directive to State and federal courts below. Significantly, however, in a matter of months several State courts had implemented the system and in later years it has been extended to the whole country. In essence, the practice is now that, within 24 hours of deprivation of liberty, the detained individual has to be brought before a court so that a magistrate can: 1) determine the legality of the arrest; 2) decide whether action is needed regarding detention conditions, interrogation, etc. A doctor is available who can conduct a medical examination under the Istanbul Protocol if a claim of torture is made or if the magistrate has reason to believe that mistreatment has occurred. Despite the fact that, for now, courts continue to accept a broad and questionable standard of flagrante delicto as justification of arrests, the system of custody hearings is by all accounts functioning smoothly and efficiently.

Also in Brazil, the Court of Appeals (Fourth Criminal Chamber) of the State of Rio de Janeiro issued a historic decision on 15 February 2022, in a case known as Sala Vermelha (“Red room”). The decision upheld the lower court acquittal of six young men detained by Army agents in 2018. They had been taken to a military facility upon arrest – for which the Court found no justification in law – and they had confessed to crimes under torture. The appellate decision established clearly that torture had occurred, as had been certified by a lower court in the opportune moment at the custody hearing. In March 2019 all suspects had been reexamined at the Medico-Legal Institute, with the assistance of international forensic experts, at which time the detainees were found to be suffering from post-traumatic stress disorder as a consequence of the torture they had endured.

## DAY 3 – VALENTINA CALEDO AND TOMÁS PASCUAL

# Valentina Caledo* and Tomás Pascual* "Implementing the exclusionary rule in practice: the potential of civil society organisations"

*Valentina Cadelo, Senior Adviser, Law and Advocacy at the Association for the Prevention of Torture*
*Tomás Pascual, Fellow in Criminal and Judicial Systems at the Association for the Prevention of Torture*

**Introduction**

The inadmissibility of evidence obtained by torture (also known as the "exclusionary rule", and found in Article 15 of the UNCAT) is a crucial aspect of States' obligations to prevent torture. It removes one of the main incentives for law enforcement officials to use torture or ill-treatment – to elicit confession. Further, in the words of the UN General Assembly, the "adequate corroboration of statements, including confessions, used as evidence in any proceedings constitutes one safeguard for the prevention of torture and other cruel, inhuman or degrading treatment or punishment" (GA Res 67/161 of 20 December 2012, para 16).

The main responsibility to ensure implementation of the exclusionary rule lies with the different state institutions, as the State is the primary bearer of the duty to prevent torture. However, many other actors, such as civil society organisations (CSOs), play a critical role in the effective implementation of this rule and, accordingly, further contribute to prevent torture in practice.

Against this background, this blog post provides a few reflections on how CSOs involved in the area of torture prevention may actively contribute to ensure the prohibition of evidence tainted by torture is better applied in law and practice.

Drawing on the experience acquired by the Association for the Prevention of Torture (APT), this contribution highlights the critical role that CSOs play while:

Intervening as a third party in the courts' review of domestic regimes to ensure compliance with existing standards on the prohibition of evidence tainted by torture and its effective implementation in law and practice; and

Supporting and promoting the development of new, comprehensive and systemic frameworks that concretely assist the effective application of the exclusionary rule in domestic law and practice.

**I. Third-party interventions before courts: a unique opportunity for CSOs to promote State compliance with international standards on the exclusionary rule**

Third-party interventions constitute an important way for CSOs to engage actively in a dialogue with courts as well as to contribute to the review of domestic regimes that fall short of international standards. Typically, they provide CSOs with the opportunity to submit additional information and/or expand on specific legal issues that are of wide public importance and could have a big impact on the interpretation or protection of human rights law in a country.

Over the past years, the APT actively engaged with courts both at the regional and national level to promote State compliance with international standards on the exclusionary rule. Recent examples include the APT amicus curiae brief presented before the Inter-American Court of Human

Rights (IACtHR) in 2010, as well as APT submissions to the Mexican Supreme Court in 2014 and the Costa Rica Constitutional Court in 2017.

While each of the above mentioned submissions holds its own value, the APT amicus curiae brief presented in the IACtHR case of Teodoro Cabrera García and Rodolfo Montiel Flores against the United Mexican States 1 perhaps constitutes one of the most significant examples of how CSOs third-party interventions may effectively contribute to elucidating international standards on the exclusionary rule, and accordingly promote its effective implementation at the national level.

The APT amicus curiae brief provided analysis and comparative law jurisprudence on the duty of States to prevent torture and to ensure that evidence is not obtained through this practice. The document focused on different aspects of the principle of non-admissibility of evidence obtained by torture, including its absolute and non-derogable nature; its purpose and relationship with fair trial rights; as well the burden of proof. Finally, the piece tackled the evidentiary value of confessions, with a particular reference to the principle of procedural immediacy in Mexico.

In its judgement, the IACtHR considered several arguments enclosed in the APT amicus curiae brief. Most importantly, it concluded that Mexico breached Article 8.3 of the American Convention on Human Rights, by not excluding evidence obtained by torture in judicial proceedings (Judgement of 26 November 2010, para. 177). Further, in line with APT's arguments, the Court stated, "statements obtained under duress are seldom truthful, because the person tries to say whatever is necessary to make the cruel treatment or torture stop". Consequently, "accepting or granting evidentiary value to statements or confessions obtained by coercion, which affect the person or a third party, constitutes, in turn, an infringement of a fair trial." Additionally, the Court noted that "the absolute nature of the exclusionary rule is reflected in the prohibition on granting probative value not only to evidence obtained directly through coercion, but also to evidence derived from such action" (Judgement of 26 November 2010, para. 167).

**II. CSO-led initiatives that support the effective implementation of the exclusionary rule in practice: a new opportunity for CSO engagement**

CSOs can also play a critical role on a broader level, particularly by addressing institutional incentives and other systemic factors that prevent the effective implementation of the exclusionary rule in practice.

As recent research shows, the effective implementation of the exclusionary rule is often tied to how the criminal justice system operates. For instance, criminal justice systems that rely mostly on confessions as the main evidence on which convictions are founded, will most likely face challenges in ensuring effective application of the exclusionary rule in practice. Conversely, criminal justice systems that exclude confession based evidence are likely to be more effective in the implementation of the exclusionary rule.

In this context, the new Principles on Effective Interviewing for Investigations and Information Gathering, also known as the Méndez Principles, are a concrete example of a CSO-led initiative that offers solution-oriented guidance for the effective implementation of the exclusionary rule in domestic law and practice, while addressing existing incentives and other systemic factors that impede the correct functioning of criminal justice systems in line with international standards on torture.

The Principles are the culmination of a four year consultation process led by the APT together with the Anti-Torture Initiative (ATI) and the Norwegian Center for Human Rights (NCHR). The process involved police investigators, academics, human rights lawyers and CSO representatives from all over the world, and the Principles were drafted by a multidisciplinary, gender balanced, and geographically representative group of international experts.

In a nutshell, the Principles aim to move away from coercive and confession-based questioning towards the promotion of rapport-based interviewing combined with the implementation of safeguards during criminal justice investigations and other forms of information gathering processes.
Built on the premise that confession oriented criminal justice systems incur a higher risk of torture, the Principles do not merely reiterate international standards on the inadmissibility of evidence tainted by torture. Rather, they provide concrete guidance on how to implement this rule in practice.
Notably, the Principles state that judicial authorities play an essential role in ensuring the effective implementation of such a rule, thereby calling for the removal of incentives for investigation authorities to obtain a confession by any means and promote the use of ethical and scientifically proven interviewing methods instead. Further, judicial authorities are called upon to ensure that only lawfully obtained evidence is admissible in any proceedings and accordingly to be vigilant to any signs that a statement may have been made under coercion or ill-treatment (Méndez Principles, Principle 6, paras. 218-219).
The Principles also provide for a duty to report where criminal justice professionals see, hear of, or suspect interview-related wrongdoing. Similarly, considering that an over-reliance on confessions in judicial proceedings provides an improper incentive for interviewers to seek confessions as the sole objective, they call for a shift in the ultimate goal of an interview, with the objective being to collect reliable and accurate information and not a confession. (Méndez Principles, Principle 5, paras. 185-187).
Finally yet importantly, the Principles stress that excluding evidence obtained under torture or other ill-treatment is an interviewee's right and accordingly it constitutes an effective remedy against wrongdoing by interviewers (Méndez Principles, Principle 5, para. 203).

**Conclusion**

As highlighted in this blog post, CSOs can play a crucial role in ensuring that the rule on the exclusion of evidence tainted by torture is effectively implemented in practice, both by intervening as third parties in judicial proceedings and by leading initiatives promoting new frameworks that best address existing shortcomings in the criminal justice system that prevent its full implementation.
The examples cited here, however, represent only two of many more ways for CSOs to actively contribute to the effective implementation of the exclusionary rule in practice. Due to their independence and vital role in fostering consultative and transparent processes, CSOs are indeed in a unique position to act as traction forces for change and accordingly advocate for necessary reforms in both law and practice.
In this context, discussions such as those organized by ODIHR and the Ludwig Boltzmann Institute of Fundamental and Human Rights are a particularly welcomed step as they provide the perfect opportunity for CSOs to exchange on new ideas with relevant stakeholders, identify potential avenues for cooperation and ultimately bring forward ongoing efforts to prevent torture. In this spirit, the APT looks forward to having a fruitful exchange with all the participants and continue working together on the prevention of torture. #TogetherWeCanEndTorture

## DAY 4 - ZOI ANNA KASAPI

# Day 4: Evidence tainted by torture in law and practice - Domestic perspectives from the European Union

## Zoi Anna Kasapi* "Tainted evidence seeping through the cracks"

*Zoi Anna Kasapi (LL.M.), Greek lawyer and scientific officer at the Centre for European Constitutional Law*

**Introduction**

This blog attempts to analyse the legislative, practical, and policy factors linked to the observed culture of impunity within the Greek criminal justice and law enforcement system in cases involving alleged torture and ill-treatment perpetrated by police officers. By doing so, it will illuminate a potential path for tainted evidence to find their way into the criminal proceedings.

**The legislative framework**

The Greek legislative framework contains a number of provisions prohibiting torture and ill-treatment. As an European Union (EU) and Council of Europe Member State, Greece is subject to the relevant provisions of the EU Treaties, the Charter of Fundamental Rights, the relevant secondary EU law, as well as to the European Convention on Human Rights (ECHR) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Greece has also ratified the UN Convention Against Torture and its Optional Protocol, which establishes a system of regular visits to places of detention by independent observers.

In addition to the safeguards established in international and regional instruments, domestic laws prohibit torture and mandate the punishment of its perpetrators, starting with article 7 of the Constitution. The Criminal Code and the Code of Criminal Procedure contain specific provisions proscribing the use of torture, bodily harm, and intimidation by officers of the law conducting investigations (whether civilian or military), as well as the use of evidence obtained in such manner in criminal proceedings.

Despite the existence of the above safeguards, the Greek legislative framework has been criticised by both the Council of Europe Committee for the Prevention of Torture (CPT) and the UN Committee Against Torture (CAT) for failing to comply with international standards on the definition and punishment of torture. Although certain amendments to the framework were made in 2019, following CAT and CPT recommendations (e.g., the inclusion of a provision on the punishment of torture performed with a discriminatory motive), a number of concerns in relation to the effective and appropriate prosecution and punishment of torture were left unaddressed.

First, the newly amended Criminal Code introduces an arbitrary distinction between different types of torture, and reduces the maximum sentence allowed under the previous framework. Under the new

law, torture performed "systematically", using certain specific methods (electroshock, mock executions, etc.), incurs a prison sentence of a minimum of ten years, whereas "ordinary" torture incurs a prison sentence of up to ten years. This is a distinction with great practical significance, both in terms of the actual time served in the vast majority of cases involving torture, and in terms of the applicable rules on commuting prison sentences. It is worth noting that both these sentences constitute a regression from the previous framework, which provided for a prison sentence of up to twenty years and did not distinguish between different types of torture. Second, in addition to allowing the conversion of prison sentences for torture into non-custodial sentences, Greece also continues to apply limitation periods to the prosecution of torture, despite being strongly urged by international actors to abolish them.

**Practical Barriers**

While Greek authorities consistently refute allegations on the widespread use of torture and ill-treatment against persons in police custody, the CPT has recorded a multitude of suspect or confirmed incidents and considers the indications that such actions systemically take place as "overwhelming". It has, thus, urged Greece to take concrete action, going as far as warning to set in motion the procedure of Article 10, paragraph 2 of the Convention, and issue a statement publicly condemning the State's practices (see the CPT Report on its visit to Greece from 28 March to 9 April 2019).

The CPT has highlighted the following key areas of concern:

- Inadequate investigations, which are not carried out promptly, expeditiously or thoroughly;
- Ineffective mechanisms for the gathering of forensic medical evidence in instances of alleged torture; and
- Systematic conversion of all prison sentences into non-custodial sentences.

Similar concerns have been raised by the CAT, in the context of its concluding observations on the seventh periodic report of Greece. Despite the CAT specifically requesting it, Greece has failed to provide complete information on the number of complaints of torture or ill- treatment, the corresponding investigations and prosecutions, or disciplinary action taken against the offenders, including their removal from public service pending the outcome of the investigations against them. Greece has also failed to provide any examples of cases dismissed by the courts due to the submission of evidence or testimonies/confessions having been obtained through torture or ill treatment.

The above mentioned legislative deficiencies and problematic practices in relation to the investigation and prosecution of torture perpetrated by law enforcement officers have led to the establishment of a culture of impunity, as observed by the CPT and corroborated by a number of convictions by the European Court of Human Rights for lenient sentencing and ineffective investigations (see cases of Zontul and Makaratzis, among others). This culture leaves open the possibility of evidence obtained through torture to be used in criminal proceedings, especially in cases involving migrants, Roma, and other vulnerable groups.

**Policy barriers - The National Mechanism**

Despite the fact that it does not officially acknowledge the issues raised above, the Greek State has established a "National Mechanism for the Investigation of Arbitrary Incidents by Law Enforcement and Prison Officers" within the Ombudsman's Office. The Mechanism began its operation in June 2017 with a mandate to collect, record, assess and further transmit to the competent bodies complaints about the actions of law enforcement officers regarding a) torture and other violations to human dignity; b) intentional and unlawful violations against life, physical integrity, health, personal or sexual freedom; c) unlawful use of a firearm; or d) racial or hate-motivated crimes.

On the basis of his mandate as the Mechanism, the Ombudsman evaluates complaints and may decide to either investigate them himself, refer the incident to the competent disciplinary body and oversee the investigation, or inform the state prosecutors, if there are indications of criminal liability. Moreover, the Mechanism follows up on the implementation of relevant judgments by the European Court of Human Rights, and may order the re-opening of investigations pursuant to the finding of a violation of article 3 ECHR.

The Mechanism examines a large number of cases within its mandate (321 cases in 2017-18, 208 cases in 2019, 263 cases in 2020) and has reverted approximately half of these to the competent disciplinary bodies for supplementary evidence, corrections, re-evaluation of evidence, reasoning or outcome, and lack of compliance with substantive or procedural rules. Nevertheless, a number of barriers related to the scope of its mandate and the resources available to it render the Mechanism largely ineffective. The Mechanism does not have the power to compel action by the police but can only make recommendations, which are oftentimes ignored. In addition, it lacks the necessary capacity to properly oversee the disciplinary proceedings or to investigate cases on its own, as the posts envisaged in the law establishing it were never filled and its work is carried out by the Ombudsman's non-specialised personnel.

In November 2019, the Minister for Citizen Protection, pressed by the outcry caused by a surge in public displays of police brutality – often filmed by citizens - established an independent "unofficial" Committee, tasked with observing the implementation of the Mechanism's recommendations by the police. The Committee submitted a report to the Greek Parliament, confirming:

- The culture of impunity for law enforcement officers involved in incidents of violence and ill-treatment;
- The unwillingness of the police to collaborate with the Mechanism, as evidenced by the constant delays in delivering requested documents and information;
- Deficiencies in the exercise of investigative duties by the police, such as neglecting to take depositions from material witnesses, including the doctors who were charged with the care of the victims, or to ask key questions;
- The existence of bias in the investigations performed by the disciplinary bodies, demonstrated by the fact that "strikingly similar" statements made by the police officers involved in the incidents were accepted without question and awarded much greater weight than the statements made by citizens usually are; and, finally,
- The incomplete or faulty reasoning of disciplinary decisions, in particular in relation to the investigation of potential racist motives.

The report concluded on a number of recommendations to the Minister, including the establishment of the Committee as a permanent, independent body, and the reinforcement of the National Mechanism. However, the Committee was disbanded shortly after the submission of its report.

**Conclusions**

The above points paint a clear albeit grim picture on the use of torture and ill-treatment by the Greek police. The systematic resort to these methods during the initial stages of the criminal investigation, to coerce confessions, obtain information or plainly intimidate – often vulnerable – suspects, accused persons or witnesses, combined with the apparent absence of examples of cases dismissed by the Greek courts on these grounds, leads to the inevitable conclusion that evidence obtained through torture often seeps through the cracks of the Greek criminal justice system and is potentially used to convict persons accused of crimes.

## DAY 4 – KRASSIMIR KANEV

# Krassimir Kanev* "Coerced interrogations: key challenges for the Bulgarian criminal justice system"

** Director of the Bulgarian Helsinki Committee*

**Introduction**

Ill-treatment by the police during arrest and inside the police stations is widespread in Bulgaria. Over the past seven years the Bulgarian Helsinki Committee conducted several surveys on representative samples of prisoners about their experiences during pre-trial proceedings. According to the most recent survey conducted in the period June-November 2021 on a representative sample of 1 010 convicted prisoners from all the prisons in Bulgaria, whose pre-trial proceedings started after 1 July 2019, 24% of the respondents stated that physical force had been used against them during arrest and 21% - that such force had been used against them inside police custody during their 24-hour police detention. Two representative surveys among prisoners, conducted in the period 2015-2017 came up with very similar results. The European Court of Human Rights (ECtHR) has pronounced dozens of judgments against Bulgaria relating to ill-treatment of detainees, some of which resulted in their death. In March 2015, the European Committee for the Prevention of Torture (CPT) issued a public statement concerning Bulgaria in which it stated that "men and women (including juveniles) in the custody of the police continued to run a significant risk of being ill-treated, both at the time of apprehension and during subsequent questioning" (CPT/Inf (2015) 17, § 5).

While the use of proportional force during arrest may be justified in some cases, its use in the police station is very hard to justify. In-depth interviews with prisoner -victims of ill-treatment by the police reveal its methods. In most of the cases police operatives beat up detainees with fists, kicks, truncheons and other hard objects all over the body. Occasionally, they use more "sophisticated" methods, e.g., generators of electricity, connected to their immobilized fingers with wires. The interviews also reveal its purpose, which in most cases is to obtain information: either self-incriminating confessions or information about the involvement in the particular crime of third parties.

**Police detention and "explorative interviews"**

Under the Bulgarian law, the 24-hour police detention is not part of the criminal proceedings and, in theory, the self-incriminating statements of the detainees cannot be included in the criminal file and cannot be relied on by the court for conviction. But in 2018 the ECtHR found a violation of Article 6 §§ 1 and 3 © of the Convention in the case Dimitar Mitev v. Bulgaria where a detainee was questioned without the presence of a lawyer by police operatives to whom he made a confession. The operatives were subsequently questioned by the court in the criminal proceedings against him and their testimonies served as a basis for his conviction.

According to the Ministry of Interior Act (MIA), police may detain a person for 24 hours if there is data that he/she had committed a criminal offense. Such a person however is not considered a "suspect" within the meaning of the EU Roadmap directives by the Bulgarian law and doctrine, which are thus deemed inapplicable to police detention. This is why the safeguards they envisage are not implemented at that stage. In the 2021 survey, more than 61% of the respondents stated that they did not have a lawyer at all during their 24-hour police detention. Another 22% stated that they had a contact with a lawyer at the end of this detention when the latter came to participate in the opening

of the formal investigation. Thus, more than 83% of the respondents said that they did not have effective participation of a lawyer during their police detention.

Though not part of the formal criminal proceedings, the 24-hour police detention in Bulgaria is the period when most of the evidence against the detainees is gathered. Article 10, para. 1 of the MIA provides for the possibility of the police operatives to conduct "explorative interviews" with the detainees. Although the statements obtained during these interviews (often under torture or other forms of coercion) cannot be used as such in the subsequent formal criminal proceedings, the evidence derived as a result is valid if properly processed. E.g., the operatives torture a detainee to confess a theft and ask where he/she hid the stolen items. After confession, they conduct a search in the framework of the formal criminal proceedings. The items found are valid evidence, which can be relied on by the court in the subsequent proceedings. Moreover, faced with the high probability of a conviction, the detainee repeats the confession obtained during the "exploratory interview" after the opening of the formal criminal proceedings in order to get a more lenient treatment and sentence and refrains from complaining against his/her torturers.

**Concluding remarks**

The problem with the use of evidence obtained through torture and other forms of coercion in Bulgaria is serious. It is multi-dimensional, rooted in the legislation, in the established methods to investigate crimes, in the attitudes of the law-enforcement officials, as well as in those of the public in general. It has to be dealt with in all of these fields. As a first step, all actions involving a person detained by the police should be made part of the formal criminal proceedings with all the necessary safeguards. No "exploratory interview" should be allowed without the presence of a lawyer. There should be systematic video recording of interrogations of suspects by the police, as well as obligatory medical checks by an independent doctor upon police detention. There should also be a wider legislative prohibition on the use of derivative evidence, obtained through any form of ill-treatment. All this requires a comprehensive reform of the legislation. Despite repeated recommendations by the CPT, the UN Committee against Torture and other international bodies, this has not happened yet and there does not seem to be sufficient political will to implement such a reform at present.

The oversight of police detention by independent monitors should also be strengthened. The National Preventive Mechanism in Bulgaria is a modest operation, insufficiently staffed and poorly funded. It does not have the capacity to visit all police stations in Bulgaria, as well as other places of detention where it can obtain information on police ill-treatment. Human rights NGOs should be allowed to visit places of police detention and carry out effective monitoring. A good practice is the establishment of independent complaint boards against unlawful actions by the police at the level of each territorial police department.

## DAY 4 - BALÁZS TÓTH

# Balázs Tóth* "Theoretically effective, practically almost non-existent: the exclusion of evidence obtained by torture in criminal proceedings in Hungary"

** Attorney-at-law, Hungarian Helsinki Committee*

As in the case of so many other issues, the Hungarian law is in compliance with the basic international human rights requirements with regard to evidence obtained by torture as well. The Criminal Procedure Act provides that facts derived from evidence obtained by the court, the prosecution service, the investigating authority or any other authority by means of a criminal offence, by other prohibited means or by substantial violation of the rights of the participants in criminal proceedings shall not be admissible as evidence. And even though the concept of torture is not defined and consequently not penalized in the domestic Criminal Code, coercive interrogation is defined as an official applying violence, threats, or using other similar methods with the aim of extracting a confession or declaration, or forcing a person not to make one, and that is sanctioned by the criminal law. This is an acceptable formulation of criminalizing the obtaining of evidence by torture, although with different wording than the definition of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Were it not for the concept of coercive interrogation included in the Criminal Code, the exclusionary provision would still apply to any act of torture as understood by the relevant international human rights bodies, since any kind of torture unquestionably constitutes a substantial violation of the rights of the participants in criminal proceedings.

Evidence obtained via torture can be excluded (i) if the respective officials have been already convicted for the coercive interrogation; (ii) if the defendant or the witness already reported the ill-treatment or coercive interrogation, but the criminal procedure is ongoing and no indictment or judgment has been reached yet; and (iii) the judge can exclude evidence even if the defendant or the witness himself/herself does not claim that he/she was ill-treated, but the judge comes to this conclusion ex officio. The typical version of the latter case is when a defendant alleges in the judicial phase of the criminal procedure that his/her statement or confession was obtained by force and therefore should be excluded from the evidence. In such a case the judges usually summon all those police officers, prosecutors or others who were present at the hearing where the defendant allegedly was subjected to torture, who will be obliged to testify under the penalty of perjury. In addition, the judge might turn to the head of the given police authority and request information about any internal investigation carried out into the circumstances of the interrogation. Based on these pieces of information, the judge shall decide whether to exclude the given evidence or not.

This means that in an ideal reality it could never happen that evidence obtained via any kind of torture would be used in a criminal procedure in Hungary. If we were to rely only on statistics, they would show that coercive interrogation is almost non-existent in this country. Between 2016 and 2020, 174 reports for coercive interrogation were rejected, and 369 investigations were terminated. The number of indictments submitted during this five-year period was 8, all of which happened in the same year, in 2017. This means that according to the official evaluation of the reports into such cases, 98.5% of the reports are unfounded, and in four out of five years' coercive interrogation did not take place at

all in Hungary. As for the judgements, between 2016 and 31 August 2021, there were 9 convictions and 3 acquittals altogether, however, in the last five years of that six-year period the total number of convictions was 3.
This means that in a country of ten million people and hundreds of thousands of crimes per year, the average number of coercive interrogations is close to zero. Considering that number, one should not be surprised that the area of exclusion of evidence obtained through torture is virtually non-researched at all. It is reasonable to assume that in a country where years can pass by without a single conviction for coercive interrogation, nothing meaningful could be found by only analysing the decisions excluding evidence obtained by torture; and researching cases where allegations of torture were made (or should have been made) by the defence but were dismissed by the judge would pose multiple methodological difficulties.

**What can be reasons for the rare occasions of successful investigations into coercive interrogation cases?**
As shown by the judgments of the European Court of Human Rights, it is a recurring issue in Hungary that investigations into police ill-treatment, conducted by the prosecution service, are not effective. Shortcomings identified in this regard include not hearing the victim, the suspected police officers or witnesses; and the lack of genuine efforts by the authorities and/or the courts to resolve contradictions between testimonies and medical reports. But, as the Hungarian Helsinki Committee has also repeatedly raised in its communications submitted to the Committee of Ministers of the Council of Europe with regard to the non-implementation of said judgments, there are many more factors that contribute to this phenomenon. Here is a short list of the most pressing ones:

- Installing recording devices in all police detention facilities is still not obligatory. The lack of such a legal obligation resulted in the fact that as of February 2020, there were only 114 cameras recording in the 297 custody suites in the country.
- Police vehicles are not equipped with operational image and sound recording devices in adequate numbers, and police body cameras are rare exceptions. As of October 2021, only 1.4% of all police vehicles were equipped with recording devices capable of recording both image and sound, and there were only 70 body cameras in the whole country.
- Video recording of interrogations is not obligatory and can only be initiated if the defendant advances the costs of that. In practice, in most of the interrogation facilities it would technically be almost impossible to carry out the proper recording of the interrogations and covering the costs of it might also be difficult for indigent defendants.
- Victims of alleged police abuse are not examined by an independent doctor with training in forensic medicine, and it is not obligatory to take photographs of the injuries.
- As a rule, medical examinations (whether they are carried out in police establishments or in hospitals) are conducted in the presence of police staff, many of whom may have committed the abuse.

In light of all these shortcomings, it is no wonder that reports are mostly unsuccessful, and investigations rarely lead to indictments and convictions. Accordingly, the rule on excluding torture-tainted evidence can be rarely applied by the courts on the basis of an ongoing criminal procedure against the police officers or on the basis of their conviction.
It is of no avail either that coercive interrogation can be reported by anybody (i.e. not just the person who was subject to torture), as these acts mostly happen out of sight of third persons. Neither is the explicit obligation of officials to report and initiate a criminal procedure if they become aware of a

criminal offence, since the loyalty among police officers seems to be most often stronger than the sense of legal obligation.

Regarding a lack of evidence corroborating the occurrence of torture, it does not help either that procedural or evidentiary rules – i.e. level of certainty required for the decision to exclude an evidence – do not complicate the issue, as there is no separate procedure or evidentiary rule pertaining to the exclusion of evidence. Without evidence, even the best judge cannot make a good decision, even if the legal system makes it easy for them to do so from a procedural point of view.

## DAY 5 - NATALIA TAUBINA

# Day 5: Evidence tainted by torture in law and practice - Domestic perspectives from the OSCE region

## Natalia Taubina* "Evidence of crime obtained by torture: law and practice"

**Director of Public Verdict Foundation*

**Introduction**

The Russian Constitution, in its Article 50, Part 2, prohibits any use of evidence obtained in violation of federal law. According to Article 75, Part 2, of the Russian Criminal Procedure Code, the following types of evidence are considered inadmissible:

1. any statement made by a suspect or accused during pre-trial proceedings in a criminal case in the absence of a lawyer, unless this statement is subsequently confirmed in court;
2. any victim or witness statement which is based on speculation, assumption or hearsay, as well as any statement from a witness for which he or she cannot indicate the source of information;
3. other evidence obtained in violation of the Russian Criminal Procedure Code.

On 29 November 2016, the Russian Supreme Court Plenary adopted its Ruling no. 55 "On Court Sentence." This Ruling states in paragraph 1 that "by virtue of provisions of … Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms … a sentence may only be considered lawful if adopted following a fair trial." Let us recall that Article 6 of the Convention covers, inter alia, issues such as presumption of innocence, the right to defence, and use of evidence (including the use of evidence obtained through torture, provocation, or invasion of privacy). The Supreme Court's Ruling states in paragraph 12: "If the defendant wants to change his or her testimony made in the presence of a defence lawyer by saying that such testimony was made under duress due to the use of illegal methods of investigation, the court must take sufficient and effective measures to verify such statement of the defendant." The Ruling further states, "If there are grounds for verifying the defendant's statement in the manner prescribed by Article 144 of the Criminal Procedure Code, the court should forward such statement to the head of the relevant pre-trial investigation authority. Such verification does not relieve the court from the obligation to examine the findings from this verification and reflect the court's conclusions in the sentence" (paragraph 13 of Ruling no. 55).

Thus, the regulatory framework enables a sufficient and effective response to a defendant's allegations of ill-treatment during the pre-trial investigation, in particular in the case of having made a confession under torture. Russian law gives courts every reason to require that the investigating authority should verify torture allegations and to examine evidence in the main trial taking into account the defendant's

claim of torture. For example, courts may exclude such evidence. However, during the Public Verdict Foundation's 15 years of work, we have not seen a single such case.

**I. What happens in practice?**

Unfortunately, things look different in practice, and courts fail to protect persons subjected to torture during pre-trial investigations.

Our observations vary across courts and trials, but the one thing they all have in common is their lack of substantive response to torture reports.

**Situation 1**: A defendant in a criminal case states in court that he was tortured during the pre-trial investigation. Previously, he reported the torture to the investigator, and the Investigative Committee reviewed his complaint but refused to initiate a criminal case.

The court examines the findings from the torture complaint investigation. If the defendant has not challenged the investigator's decision, the court interprets it as the defendant's acceptance of this decision. The court then upholds the investigator's position and finds no violation in the law enforcement officers' conduct.

**Situation 2**: A defendant in a criminal case reports torture at the investigation stage, but the investigating authority refuses to initiate a criminal case into the torture allegations, and the defendant appeals this refusal in court.

If the court denies the appeal and upholds the refusal to investigate the alleged torture, then the trial court, which considers the defendant's main case, will rely on the former court's judgment. The trial court will say that the torture report does not require a separate consideration because it has been previously examined by a court, no crime has been found, and there is no need to institute criminal proceedings into the torture allegations.

**Situation 3**: At the final stage of the pre-trial (preliminary) investigation of a criminal case, the defendant complains of torture or appeals the refusal to initiate criminal proceedings into torture or challenges the investigator's inaction concerning his torture complaint. The court, to which the defendant appeals, will say that since the complaint affects the main criminal case, it should be examined by the trial court which hears the defendant's main case.

However, rather than return the complaint to the applicant, the court registers the complaint and makes a de jure decision on it (by stating that the complaint should be examined by the trial court that hears the main case). The trial court will then refuse to give the torture complaint a separate consideration under the pretext that another court has already examined the matter (see Situation 2). This denies the individual any opportunity whatsoever to have their torture complaint investigated.

**Situation 4**: A defendant reports torture for the first time during his or her main trial.

Seeing that the defendant has never raised the issue before, the court will ask why the defendant has not reported torture earlier. In most cases (we at the PVF have copies of court records in dozens of criminal trials), the defendants or their lawyers refer to "pressure from cellmates," "threats from prison officers or investigators to impose tougher detention conditions," etc. Courts, however, dismiss such explanations and refuse to examine them critically, to initiate separate proceedings into torture reports or to forward such reports to investigating authorities for verification. Moreover, courts do not exclude as inadmissible the evidence obtained from the defendant through torture. As a result, the criminal proceedings continue uninterrupted, and the torture complaint ends up ignored altogether without affecting the final judgment in any way.

An example of this situation would be the case of defendant Zh. in Krasnoyarsk, who, prior to his testimony to the jury, was assaulted and beaten to force self-incrimination. Mentioning pressure and torture in front of jurors is not allowed – such matters are discussed in their absence. So in the absence of the jury, the defendant removed his clothes in the courtroom to show the evidence of ill-treatment,

but the court failed to respond in any way. Eventually, the defendant refused to self-incriminate and pleaded not guilty. The jury acquitted him.
The Situation 1 described above where the torture victim complains during the pre-trial investigation would have been adequate – except for the widespread absence of effective investigation of torture reports in Russia.

**II. Ineffective investigation**

The ineffectiveness of torture investigations is due primarily to the Russian authorities' poor performance in searching for, obtaining, and assessing evidence of torture complaints. These are the responsibilities of the investigator tasked in the Russian criminal justice system with conducting pre-trial investigations into allegations of torture.
Criminal investigators are empowered by Russian law to act independently at their own discretion; the legal theory considers this provision necessary to ensure independence of the investigation. But in the Russian law enforcement practice, this principle is often abused as a universal justification of an investigator's inaction. For example, an investigator may fail to appoint an expert examination; when a torture victim or their lawyer appeals the investigator's inaction in court, the latter will often disregard the victim's arguments as to why an expert examination is essential for an objective picture of events. Usually, courts refuse to examine the investigator's actions or inaction critically and refer to the investigator's independence to dismiss the torture victim's complaint.
Independent investigation – supported, at least in theory, by the legally stipulated independence of the investigator – must also follow proper practices such as the impartial assessment of available information and evidence. An investigator is required to assess evidence for reliability and significance without prejudice as to the source of this information.
In practice, however, most investigators are biased against torture victims. If torture is reported by someone accused of a crime, their statement and their version of the events often get rejected by the investigator who typically argues that "a criminal's words cannot be trusted."
An effective investigation is impossible unless the investigator acts promptly to identify and document available evidence. But in many cases, investigators neglect this duty in the context of torture allegations.
Adding complexity to evidence collection is the fact that virtually all such evidence is under full and exclusive control of the alleged torture perpetrators. This is described in some detail in the Russian NGO Coalition's Shadow Report submitted to the UN Committee against Torture in 2018. An investigator tasked with verification of a torture report (alleging torture in police custody or in prison) can only use evidence to which they are given access by police officers or penitentiary/pre-trial detention personnel, including the medical staff who often fail to document physical, let alone psychological, impacts of torture, nor do they report torture to the law enforcement authorities, unlike medics in civilian hospitals.
Access to all video surveillance recordings in places of detention is exclusively at the disposal of these institutions. The administrators of such institutions often refuse to make such recordings available citing that they are "for official use only." We have documented refusals to disclose recordings requested by investigators. Very common is the situation where certain recordings are requested in court proceedings, but prison administrations claim that they have been either damaged or deleted.
In our practice, we have often noted cases where medical examinations of inmates are conducted superficially, sometimes with prison bars separating the medic from the inmate, and signs of torture are not properly documented. As a result, crucial evidence of ill-treatment is lost forever.
For example, in one of the cases assisted by PVF, we obtained video footage of a medical examination of V. after he was beaten at Penal Colony IK-1 in Yaroslavl in April 2017. It can be seen clearly in the

video that V. was in a room behind bars, separated from the medic who was outside. In the video, V. shows traces left by the beatings, including huge hematomas which can be clearly seen. However, in its report to the European Court on the implementation of the interim measures indicated in V.'s case, Russia claimed that medics had not documented any injuries.

**III. Fabricating false evidence of innocence**

Another common problem is the use of so-called "activists" in penal colonies (prisoners who cooperate with the prison administration). These inmates are often used as alleged eyewitnesses testifying that there was no beating. Since the administrations of penitentiary institutions have full control over the evidence of torture, they use their power to put pressure on witnesses, forcing them to give false statements.

**IV. Pressure on victims of torture and ill-treatment**

Bringing retaliatory charges against individuals who report torture to the authorities is a widespread practice. In particular, applicants often face "false accusation" charges, in which their torture report is treated as a false accusation. The Russian NGO Coalition's Shadow Report covers this issue extensively as well. Convicted prisoners are particularly vulnerable to false accusation charges. Indeed, they are likely to face persistent and serious threats of prosecution under this article to force them to withdraw torture complaints. But in our practice, we have also noted cases of people in the community who reported torture by police and faced charges and trials under Article 306 (false accusation). Being sentenced under Article 306 effectively deprives a person from any further opportunity to have their torture complaint investigated.

**V. What has been the impact of the European Court's judgments on the enforcement practice?**

According to the Russian Criminal Procedure Code, the European Court of Human Rights (ECtHR) judgments are considered "emerging new circumstances" that warrant re-examination of prior decisions of domestic courts which are already in effect (Article 413, part 4 (2) of the Criminal Procedure Court).

Below are some observations on how the European Court's judgments against Russia in cases alleging torture have influenced the possibility of having domestic proceedings reopened in cases where confessions under duress were used as evidence of guilt.

In the Mikheyev group of cases, the Court found Russia in violation of Article 3 (prohibition of torture) in 172 cases, and in 27 cases, the Court also found a violation of Article 6 (right to a fair trial) due to the use of confessions extracted under torture as evidence in court. According to a Memorandum prepared by the Department for the Execution of ECtHR Judgments and providing an overview of the current situation with respect to the individual measures in the Mikheyev group of cases (H/Exec(2021)18 – 16 November 2021, H/Exec(2021)18 - Memorandum - Mikheyev v. Russian Federation group of cases (coe.int)), only in one of the 27 cases, was the applicant acquitted after his prior conviction based on statements made under duress was quashed. In another case, the new proceedings were discontinued following the applicant's death, and in yet another, the case was remitted for re-examination in 2014, but the Russian Federation has not yet provided information on the outcome. In six cases, the new proceedings upheld the original guilty verdicts and sentences. Moreover, in two cases, Abdulkadyrov and Dakhtayev, 35061/04, and Mukayev, 22495/08, the Presidium of the Supreme Court found the applicants' reports of torture inconsistent and unconfirmed by the domestic inquiries, including the one held subsequent to the Court's judgment. In 18 other cases, the Memorandum prepared by the Department for the Execution of Judgments indicates, "information is awaited as to whether the applicant has sought a reopening of the domestic proceedings against him."

These statistics lead us to the following conclusions:

- the procedure whereby proceedings must be automatically reopened in cases where the Court has found a violation of Article 6 involving the use of evidence obtained under duress is not working properly;
- ECtHR applicants are not aware of the possibility to request the Russian Supreme Court to re-examine the main criminal case against the applicant;
- the outcomes of domestic inquiries into torture reports continue to have a bearing on domestic courts' decisions.

The situation gets even more complicated when the Court finds a violation of Article 3, establishing that torture was used to extract a confession, but does not find a separate violation of Article 6. In such cases, if the applicant seeks a reopening of the domestic proceedings against him by filing a request with the Russian Supreme Court, the request will be left without consideration.

On 9 June 2011, Mr Panchenko was found guilty by the Altai Regional Court and sentenced to 24 years in prison. The verdict was based on Panchenko's confession. On 4 February 2020, the ECtHR issued its judgment in Panchenko v. Russia (no. 20605/11) as part of the Nigmatullin and others v. Russia group of cases (47821/09 and 9 others). The Court found a violation of Article 3 of the Convention under its substantive and procedural limbs in respect of all applicants. The court found that Panchenko was tortured with a view to extracting a confession. In December 2020, the applicant appealed to the Supreme Court seeking a reopening of the domestic proceedings against him based on the Court's judgment. On 21 January 2021, the Supreme Court sent back Panchenko's request without consideration.

In December 2021, the Council of Europe Committee of Ministers adopted a decision on the Mikheyev group of cases, urging the Russian authorities, inter alia, to ensure that all evidence obtained under torture is prima facie inadmissible and cannot be used by prosecutors and criminal courts for the purposes of constructing criminal charges or convictions.

**Conclusions**

The above leads us to the following key conclusions:

- In Russia, courts fail at their task of banning evidence obtained through torture.
- Courts do not provide an effective mechanism for either responding to torture complaints or excluding evidence obtained through torture, nor do they properly consider reports of torture in assessing evidence in criminal trials generally.
- Instead of examining evidence in this category of cases, Russian courts often base their judgments on prejudice and assumptions rather than verifiable information.
- No proper system is in place for re-examination of domestic court decisions based on new circumstances, such as the finding by the European Court of Human Rights of violations with respect to domestic court proceedings in criminal cases.

Regarding the fourth point, it would be useful to discuss how it works in other countries and what needs to be done to ensure a proper system of re-examination. Also, it would be good to discuss any further steps/strategies within the framework of implementation of the individual measures to ensure re-examination of domestic decisions based on the finding by the European Court of Human Rights of violations with respect to domestic court proceedings in criminal cases.

## DAY 5 - VADYM CHOVGAN

# Vadym Chovgan* "Ukrainian life sentences based on torture: is there a way out of prison?"

*Legal consultant at Danish Institute against Torture – DIGNITY*

**Introduction**

Ukraine is Europe's champion according to the number of life sentenced prisoners who have no realistic prospect of release. There are over 1500 such persons in Ukrainian prisons.

Many of them claim that they were tortured during investigation to confess about the crimes they did not commit. They alleged torture during trial, but it did not influence their final verdicts. Once convicted, it became close to impossible for them to prove and exclude evidence that was tainted by torture.

**I. Dark 90s and 2000s**

After the abolition of the death penalty in Ukraine in 1997-98, for over a decade more than 100 life sentences were passed every year. In recent years, there have been 15-20 such sentences per year. To some extent the drastic decrease could be explained by a reduction in crime rates. But mostly it appears to be caused by a more lenient approach of judges to penalties and their more critical assessment of evidence, particularly in the case of alleged torture. That was not the case in the past – torture was a common instrument to prove crimes, especially if it was about an aggravated murder punishable by a life sentence.

National human rights organizations claim that up to 10% of lifers' cases raise reasonable doubts as to their lawfulness. Such cases would involve torture and self-incrimination. However, there are no realistic mechanisms to correct these alleged mistakes of the past.

**II. Mechanism for "old" lifers**

Until 2012, lifers were sentenced according to the Code of Criminal Procedure of 1960, which was mostly developed during the Soviet times. The provisions of the old code did not contain proper guarantees against accepting evidence obtained through torture. Confession-based verdicts were a norm, even after 1991 when Ukraine became independent. Further, the proportion of acquittals remained around 0.2-0.3%.

In 2012, a new Code of Criminal Procedure was adopted. It was generally considered compliant with the respective international standards such as the ECtHR case law. The exclusionary rule of the new code was taken seriously in practice, which contributed to the above-mentioned reduction in the number of life sentences. The new code clearly stated that evidence cannot be based on self-incrimination, which significantly reduced incentives for torture in the practice of law enforcement bodies.

"Old" lifers, e.g. those who were tried under the old Code, attempted to apply to national courts in order to get their sentences reviewed based on the new standards. They used the extraordinary circumstances clause that allows reviewing definite verdicts in case of "forging evidence" or "abuse" on the part of investigators, prosecutors or judges.

However, the courts have consistently refused to admit such applications. The main reason has been that the claimed circumstances were not extraordinary (literally 'newly discovered' (нововиявлені)).

Thus, if a prisoner alleged tortured or even had old evidence that he was tortured during trial, it would not be considered 'newly discovered' circumstances and would not qualify as a ground for review. In practice, 'newly discovered' means that the facts were unknown during the trial even if they disclose that torture was used to extract a confession used as evidence.

**III. Efforts to establish an additional mechanism**

In light of these obstacles to get sentences reviewed, national human rights activists and legal experts tried to introduce an extraordinary mechanism. In 2015, together with MPs, they put forward the draft law 2033a that proposed the creation of a mechanism allowing for the review of old cases, if the verdict was grounded on:

- A self-incrimination statement, which a person later denied claiming that it was extracted by torture, or if such a statement was obtained through another violation of rights (e.g. without presence of a lawyer);
- Testimonies obtained from a person who initially was a witness and then became a suspect;
- Distorted circumstances that do not correspond to the facts;
- Circumstances based on evidence that was obtained through violation of the defendants' rights at any stage.

I list the above grounds because they demonstrate the range of issues that are still impossible to use as procedural grounds to initiate a review of the "old" life sentences.

The draft law was adopted in the first reading. But later it got stalled with little chance for ultimate adoption. There are a few possible reasons for that: a) a part of the professional community considered that it would violate a principle of legal certainty by creating an extraordinary mechanism in addition to the existing ones (i.e. 'extraordinary circumstances'); b) political reluctance to acknowledge mistakes of the past in such sensitive cases disturbing society; c) lobbying by some representatives of the judiciary and law enforcement who might have to face negative legal consequences if some lifers were acquitted as a result of the law, e.g. forging criminal cases.

**Conclusions**

Mechanisms to dispel doubts about justifications of life sentences, even if doubts are about the use of torture, might be difficult to establish. The efforts may face barriers of the traditional legal system, which is not built to deal with consequences of a different legal reality in the past. In addition, penal populism as well as lobbying by the alleged perpetrators of torture may create additional obstacles.

In your countries, is there an extraordinary mechanism allowing for the review of life sentences in case of doubts similar to those described above?

Many long-term prisoners claim they are innocent. Not all of them are. Should it be considered an unjustified legal favour to give life prisoners an additional, extraordinary chance to prove their innocence?

## DAY 5 - NOTABENE

# Notabene* "The inadmissibility of evidence tainted by torture: the case of Tajikistan"

** Notabene is one of the leading think-tank organizations Tajikistan in the field of human rights and civil society development.*

**Introduction**

On 10 February 1995, the Convention against Torture entered into force in Tajikistan. By acceding to this treaty, the Tajik authorities have undertaken to protect all persons under their jurisdiction from torture and other forms of ill-treatment and to reflect in law and in practice the principles enshrined in the Convention. Unfortunately, torture and forced confessions of suspects remain a pressing problem in Tajikistan.

Recently, the government has taken measures to strengthen the prevention of torture and ill-treatment. In the following, we analyze some of the most significant developments.

**The crime of torture:**

In 2012, the Criminal Code of the Republic of Tajikistan (hereinafter referred to as the CC of the RT) was amended with the article 1431 "torture". On January 2, 2020, legal amendments were adopted to Article 1431 ("torture") to include "a third person" as the subject of the crime in the definition of torture. At present, article 1431 includes the definition of torture as "intentional infliction of physical and (or) mental suffering committed by the person conducting the inquiry or preliminary investigation, or by another official, either with their instigation or with the tacit consent or with their knowledge by another person in order to obtain information or confession from a tortured or third person or punish him for an act that he or a third party has committed or is suspected of committing, as well as to intimidate or coerce him or a third party or for any other reason based on discrimination of any kind". Article 1431 also provides for aggravating circumstances affecting the severity of punishment, such as committing torture: a) repeatedly; b) by a group of persons by prior agreement; c) against a woman known to the perpetrator to be pregnant, or a person known to be a minor or a person with a disability; d) with the infliction of a moderate bodily harm (part 2), if they are: a) committed with the infliction of serious bodily harm; b) causing the death of the victim through negligence or other serious consequences (part 3).

Article 1431 of the Criminal Code of Tajikistan consists of the concept and qualifying elements, in accordance with which the punishment is provided. The amendments from 2020 also increased sanctions: in part 1 - from five to eight years in prison (previously it was: two to five years); with the deprivation of the right to hold certain positions or engage in certain activities for up to five years (previously up to three years); in part 2 - from eight to 12 years of imprisonment (previously from five to eight) with the deprivation of the right to occupy certain positions or engage in certain activities for a period of five to 10 years (previously: up to five years) and in part 3 - from 12 to 15 years imprisonment (previously from 10 to 15). Fines were also removed from the possible sanctions under Article 143 Part 1 of the Criminal Code. At present, the concept and sanctions for torture are in line with the standards of the Convention against Torture.

**Fundamental legal safeguards:**

As mentioned above, on 14 May 2016, the President signed amendments to the Law on Detention Procedures and Conditions for Suspects, Accused Persons and Defendants (further Law on Detention Procedures) and to the Criminal Procedure Code (CPC), improving legal safeguards in detention for those held under criminal proceedings. For example, the amendments provided for improved detention registration procedures and the rights to promptly inform family and legal counsel. The amendments also stipulated that detention begins from the moment of de-facto deprivation of liberty and that the identity of all detaining officers should be recorded. In addition, an obligatory medical examination was introduced prior to placement a suspect in a temporary police detention facility.
On 2 January 2020, President Rahmon signed laws and amendments relating to torture/ill-treatment, some of which further strengthened legal safeguards in detention particularly in regard to minors.
On 4 July 2020, amendments were made to the CPC removing "gravity of the punishment" as grounds for remanding a suspect in custody. Also, on 2 February 2021, amendments to the Law on Detention Procedures entered into force, meaning a lawyer can now access detainees on the basis of the legal license, and no longer requires permission from the investigator.
However, the above amendments are not consistently implemented in practice. Most allegations of torture and ill-treatment continue to originate in the time between the arrest and the placing of the suspect in a temporary police detention facility.
In addition to ensuring the consistent implementation in practice of existing legal safeguards, further amendments are needed. For example, Article 92, part 3 of the CPC, which applies to adults and minors alike, provides that a maximum of 72 hours may elapse from the moment of apprehension until a detainee is brought before a judge. The Human Rights Committee and the Special Rapporteur on Torture recommended that this period be limited to a maximum of 48 hours. In paragraph 83 of its 2007 General Comment No. 10, the Committee on the Rights of the Child recommended that for minors this time period should not exceed 24 hours.
After the May 2016 amendments the CPC now unequivocally stipulates that detainees are entitled to access to a lawyer as of the moment of their actual detention. However, this provision is not consistently implemented in practice (For additional information please see: https://www.iphronline.org/tajikistan-torture-ill-treatment-the-death-penalty-and-the- shrinking-space-for-ngos.html).
The February 2021 amendments clarified that lawyers need only show their practice license in order to access their clients in detention; this legislation applies to all types of detention facilities in the country. This is a significant development, but further monitoring is required to assess its implementation.
Independent lawyers faced major obstacles to accessing their clients in pre- and post-trial detention facilities. In the period under review, they were typically refused access to detainees held in pre-trial detention facilities under the State Committee for National Security. Staff of investigation-isolation facilities (SIZOs according to the Russian acronym), often referred to internal regulations preventing them from granting access to lawyers.

**Complaints and investigations:**
Complaints about torture and ill-treatment are often not investigated effectively because the investigating institutions are not sufficiently independent. No separate and independent mechanisms capable of carrying out effective criminal investigations and prosecutions have been set up in Tajikistan despite recommendations by the CAT, the Human Rights Committee (HRC) and the Special Rapporteur on torture. The authorities have repeatedly stated that what they claim to be a low number of torture cases does not warrant this.

The Prosecutor General's Office, through dedicated units of prosecutors, is tasked with leading investigations into cases opened under Article 1431, but even in these cases investigative activities are often conducted by police. When a complaint is lodged with the Prosecutor General's Office against the decision of a local prosecutor's office not to open a criminal case into allegations of torture/ill-treatment or to suspend the investigation, the Prosecutor General's Office often refers the case back to the same local prosecutor's office if it considers that the case needs further checking. In this way cases can be bounced back and forth between prosecutors' offices for months or even years.
On 7 September 2019, the Prosecutor General adopted an "Instruction on Methods for Prosecutorial Supervision of the Legality of Prevention, Detection and Investigation of Torture", containing key principles outlined in the Convention against Torture and the Istanbul Protocol. It sets out a detailed mechanism for the investigation of allegations of torture and establishes a step-by-step procedure for the medical examination of victims based on the standards of the Istanbul Protocol. The Instruction is a binding document for employees of prosecutors' offices.

**The inadmissibility of evidence obtained by torture:**
Article 15 of the Convention against Torture states that "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made". This obligation is absolute and there are no exceptions to it.
In line with the May 2016 amendments to the CPC, evidence is considered inadmissible if it is obtained by way of torture, ill-treatment, violence, threats, deception or other unlawful activities (Article 88-1, "inadmissible evidence"). Questions of inadmissibility of evidence and limitations on their use in the criminal procedure are decided by the police inquirer, the investigator, the prosecutor, the court, the judge, either on their own initiative or following a petition by the parties. Evidence of torture or ill-treatment of a suspect, accused or defendant have to be checked and evaluated regarding the admissibility of their statements as evidence, no matter whether a complaint or a petition have been filed by the victim or the lawyer. The inquirer, investigator, prosecutor, court or judge who decide about the question of admissibility are obliged to clarify in each case which specific violation took place and issue a decision with a justification. When evidence is ruled to be inadmissible due to torture or ill-treatment, the police inquirer, investigator, prosecutor, court or judge take measures within their respective remits pertaining to the responsibility of those individuals who allowed the abuse. All evidence ruled to be inadmissible is considered invalid.
However, there is no reliable enforcement mechanism in place to guarantee the implementation of this legislation in practice. Often, judges dismiss torture allegations by defendants or close the inquiry following an interview with the alleged perpetrators. Or, when lawyers petition during the trial that Article 88-1 be applied, judges often delay their decision until the verdict is pronounced, which violates Article 175 of the CPC ("obligatory consideration of petitions"). To date, there are no statistics on the number of criminal cases in which the provisions of article 88, paragraph 1, of the Code of Criminal Procedure have been applied in cases involving the use of torture. This is due, inter alia, to the fact that there is no separate section in the system of judicial statistics on the application of the law by the courts. The Coalition against Torture and Impunity was also unaware of any case in which article 88-1 had been used in practice in cases of torture.
For example, an analysis of complaints received by the Coalition against Torture and Impunity between 2015 and 2019 (a total of 97 complaints were analysed) shows that in 68 cases during the trial, lawyers and/or victims of torture have alleged torture during detention and criminal investigations. In 7 cases, the court ordered the Prosecutor's Office to verify the allegations of torture, in 8 cases the court examined the allegations of torture, and in the remaining cases the court did not respond to the

allegations of torture. As a result of a procuratorial inspection, criminal proceedings were refused in seven cases. The defence did not have access to the verification materials. In none of the cases were the provisions of article 88, paragraph 1, of the Code of Criminal Procedure applied.

**Conclusion**

Despite positive steps in recent years, torture and other forms of ill-treatment are still pervasive problems in Tajikistan. The authorities do not publish unified and comprehensive statistics on complaints, investigations and convictions relating to torture and other forms of ill-treatment. Some government agencies release their own statistics at press conferences and in government reports to UN bodies, but they only cover crimes opened under Article 143.1 ("torture") although cases involving allegations of torture and other forms of ill-treatment are often opened under other articles of the Criminal Code such as "abuse of power", "exceeding official duties" or "failure to carry out or inappropriately carrying out duties".