

Sentsov and Kolchenko v. Russia: Application Number: 29627/16

Written Comments of REDRESS and FAIR TRIALS

2 April 2019

1. These written comments seek to assist the Court in considering the scope of the procedural obligation to prohibit the admission of evidence that is obtained under torture or other ill-treatment.
2. The comments will examine: (A) the scope, application, and purpose of the rule within the international legal architecture which prohibits the admission of evidence that is the product of torture or other ill-treatment; (B) the interaction between the prohibition of evidence obtained by torture and the right to a fair trial, and the burden of proof for triggering the procedure to exclude evidence, as well as key issues the court should take into account when considering whether evidence has been obtained by torture or other cruel, inhuman or degrading treatment; and (C) the importance of emphasising appropriate procedural safeguards in the context of police confessions and the admission of evidence.

A) The prohibition on torture and the use of 'torture evidence'

All evidence obtained by torture or other prohibited ill-treatment should be excluded from use at trial.

3. Articles 2 and 16 of the UN Convention against Torture (UNCAT), Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 5 of the Universal Declaration of Human Rights (UDHR) and Article 3 of the European Convention of Human Rights (ECHR) set out the right to freedom from torture under any circumstances. Since UNCAT's entry into force, the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment (CIDTP) has become accepted as a *jus cogens* norm.¹
4. A part of what it means for torture to be absolutely prohibited is that states are not able to endorse, adopt or recognise acts that breach the absolute prohibition on torture. This would include taking account of statements or other evidence procured through torture (which we will refer to as 'torture evidence'). If courts were to recognise statements procured by torture, this would be incompatible with the *jus cogens* nature of the prohibition and the *erga omnes* obligations that flow from it. Thus, Article 15 of UNCAT provides 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.

5. Whilst the ECHR does not include a specific provision equivalent to UNCAT Article 15, the jurisprudence of the European Court of Human Rights (ECtHR) has established that the

¹ See, for example, *Al-Adsani v UK*, Judgment of 21 November 2001, paras. 30, 60, 61, quoting International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Furundžija* (10 December 1998, case no. IT-95-17/I-T) at paras. 147, 153-154.

admission of torture evidence violates fair trial guarantees (see discussion below), and has established that any tainted statement:

...should never be relied upon as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct the authors of Article 3 of the Convention sought to proscribe or, in other words, to 'afford brutality the cloak of law'...²

6. This reflects the fact that it is not only a procedural violation to admit torture evidence potentially affecting the fairness of the trial; it strikes at the heart of the absolute prohibition on torture, and to admit the evidence would undermine not only the purpose of deterrence, but would also ignore the impact such admission would have on the justice system as a whole.

Does the prohibition apply to other forms of cruel, inhuman or degrading treatment or punishment?

7. Article 15 of UNCAT focuses exclusively on statements procured through torture, as opposed to any other form of prohibited ill-treatment.³ The earlier formulation in Article 12 of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment provides for the exclusion of evidence obtained not only by torture, but also by cruel, inhuman and degrading treatment. This is also the approach taken in a number of other standard-setting texts (including the ECHR, Article 3),⁴ by UN human rights experts⁵ and by the official interpretive bodies of a host of other treaties.⁶
8. The bases for understanding the rule on the inadmissibility of 'torture evidence' to also cover statements procured by other forms of CIDTP fall into two main categories:
 - a) The inadmissibility rule arises out of the absolute prohibition on torture (and other ill-treatment). As explained above, most treaties and standard-setting texts treat the prohibition on torture and other ill-treatment jointly as part of a single article, and

² *Harutyunyan v. Armenia*, Judgment of 28 June 2007, para. 63; *Jalloh v. Germany*, Judgment of 11 July 2006, para. 105.

³ A similar approach is adopted by Article 10 of the Inter-American Convention to Prevent and Punish Torture.

⁴ See also: UN General Assembly, *International Covenant on Civil and Political Rights*, Article 7; OAU, *African Charter*, Article 5; OAS, *American Convention on Human Rights*, Article 5. See also, African Commission on Human and Peoples' Rights, *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines)* (2002), Guideline 29; Inter-American Commission on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Res. 1/08, 3-14 March 2008, Principle V. In *El Haski v. Belgium*, Judgment of 25 September 2012, para 85, the ECtHR stated that "...the use in criminal proceedings of statements obtained as a result of a violation of Article 3 – irrespective of the classification of the treatment as torture, inhuman or degrading treatment – renders the proceedings as a whole automatically unfair, in breach of Article 6..."

⁵ For example, UN General Assembly, *Report on torture and other cruel, inhuman or degrading treatment or punishment, submitted by Sir Nigel Rodley, Special Rapporteur*, 1 October 1999, A/54/426, para 12(e).

⁶ HRC, *CCPR General Comment No. 20*, para 12; HCR, *General Comment No. 32*, para 60; Committee against Torture, *General Comment No. 2*, para 6. The ECtHR took this position in a succession of cases, including *Söylemez v Turkey*, Judgment of 21 September 2006, para 23; *Jalloh v Germany*, ibid., para 99; *Haci Özen v Turkey*, Judgment of 12 April 2007, paras 101-105; *Levinta v Moldova*, Judgment of 16 December 2008, paras 97-100; *Gäfgen v Germany*, Judgment of 1 June 2010, para 166; *Stanimirovic v Serbia*, Judgment of 18 October 2011, paras 51-52.

therefore understand the obligations which flow from the prohibition as applicable to all forms of prohibited ill-treatment and not only to torture.⁷

- b) States are obliged to prevent torture as well as all other forms of prohibited ill-treatment. This is recognised in ECHR Article 3 as well as in UNCAT Articles 2(1) and 16(1). The rule on the inadmissibility of statements procured by torture (and other ill-treatment) derives at least in part from this obligation to prevent. In particular, the prohibition on torture requires states to take all possible measures to prevent it from occurring, to investigate allegations and, where sufficient evidence exists, to prosecute and punish those found guilty of the crime. Consequently, given States' obligations to prevent all forms of ill-treatment, the inadmissibility rule arguably applies to all forms of prohibited ill-treatment.⁸
- 9. Therefore, when we refer in these comments to 'torture evidence', this should be taken to include evidence obtained from torture or other forms of CIDTP.

Why prohibit the use of torture evidence?

- 10. There are several reasons why such evidence is prohibited:
 - a) To safeguard the fairness of a trial (as discussed below).⁹ Any statement made under torture is involuntary and inherently unreliable, due to the risk that it is made merely to avoid pain. The use of proper safeguards can also protect the State from false allegations of torture and CIDTP, therefore increasing the efficiency of trials and public trust in the criminal justice system.
 - b) To safeguard the torture victim's rights in the legal proceedings. The victim needs an effective remedy (in this case the exclusion of the evidence) for the violation of his or her right not to be subjected to torture.¹⁰
 - c) Using such evidence makes the trial court complicit by indirectly legitimising the torture. Such evidence must therefore be excluded in order to protect the integrity of the justice system.¹¹
 - d) Officials should be disincentivised from resorting to torture and other prohibited ill-treatment in the conduct of investigations.¹² Excluding such evidence is therefore a form of deterrence and encourages the prevention of torture. Better policing is thereby encouraged. Maintaining the prohibition on the use of torture evidence results in greater public trust in the police and the criminal justice system, and more co-operation from the public.

B) The prohibition of torture evidence and the right to a fair trial

Reliance upon torture evidence in proceedings violates the right to a fair trial, whatever the source of that evidence. Once a defendant has made a credible claim that there is a real

⁷ For example, UN Committee against Torture, *General Comment No. 2*, where the Committee noted that it 'considers that articles 3-15 are [...] obligatory as applied to both torture and ill-treatment'; *Jalloh v. Germany*, *ibid.*, para. 106.

⁸ M. Nowak and E. McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press, 2008), pp. 534-535, 572.

⁹ For example: *Söylemez v Turkey*, *ibid.*, para. 122.

¹⁰ Marc Thommen and Mojan Samadi, 'The Bigger the Crime, the Smaller the Chance of a Fair Trial? Evidence Exclusion in Serious Crime Cases Under Swiss, Dutch and European Human Rights Law', *European Journal of Crime, Criminal Law & Criminal Justice*, 24 (2016), pp. 65, 82.

¹¹ For example: *Othman (Abu Qatada) v The United Kingdom*, App no. 8139/09, 17 January 2012, para. 264.

¹² For example: *Gäfgen v. Germany*, *Ibid.*, para. 178.

risk that evidence was obtained by torture, the burden of proof should then shift to the State to prove that the evidence was not obtained by torture, if that evidence is to be admitted.

The interaction between the prohibition of torture evidence and the right to a fair trial

11. Any statement made under torture is involuntary and inherently unreliable, due to the risk that it is made merely to avoid pain.¹³ It also violates the presumption of innocence which requires the state to prove guilt, and protects a suspect's right to remain silent and not to be compelled to incriminate him or herself.¹⁴ In consequence, human rights courts have regularly determined that reliance in proceedings upon statements procured by torture violates the right to a fair trial.¹⁵ In *Othman v UK*, for example, the ECtHR held that where evidence obtained by torture is admitted in criminal proceedings, it constitutes a flagrant denial of justice.¹⁶ This principle not only applies to torture: the ECtHR has also emphasised that lack of compliance with procedural safeguards - and the intention to create a psychologically coercive atmosphere - also violates the right to a fair trial.¹⁷
12. Furthermore, the exclusionary rule prohibits the use of 'any statement' obtained by torture in 'any proceedings', regardless of whether the defendant against whom evidence is used is the victim of the torture or CIDTP. The exclusionary rule is not only intended to guarantee the right against self-incrimination; it is also intended to guarantee the fairness of the trial as a whole, and therefore necessarily covers evidence obtained by torture or CIDTP of a third party.¹⁸
13. The ECtHR has emphasised that the use of statements obtained as a direct result of torture or ill-treatment always raises serious issues regarding the fairness of proceedings, even if the evidence was not decisive in securing a conviction.¹⁹ The Court has reiterated that 'the use in criminal proceedings of statements obtained as a result of a violation of Article 3 – irrespective of the classification of the treatment as torture, inhuman or degrading treatment – renders the proceedings as a whole automatically unfair, in breach of Article 6.'²⁰

The exclusion of evidence obtained by torture and CIDTP: a distinct obligation and process

14. Article 15 of UNCAT applies to evidence which is 'established' to have been obtained as a result of torture, but if the burden of proving that the evidence was obtained by torture

¹³ *The People v B* (1980), Zambia Law Reports 219, para 26, cited in Daniel D. Ntanda Nsereko, 'The Poisoned Tree: Responses to Involuntary Confessions in Criminal Proceedings in Botswana, Uganda, and Zambia', *African Journal of International and Comparative Law*, 5 (1993), pp. 609, 617.

¹⁴ *John Murray v United Kingdom*, App no. 18731/91, 8 February 1996, paras 43-63; *Gäfgen v. Germany*, *ibid.*, 1 June 2010.

¹⁵ See the following ECtHR cases: *Söylemez v Turkey*, *ibid.*, para. 122; *Othman (Abu Qatada) v The United Kingdom*, *ibid.*, para. 264; *Magee v The United Kingdom*, App no. 28135/95, 6 June 2000, paras 43-46; *Jalloh v Germany*, *ibid.*, para 105. See also *Cabrera-García and Montiel Flores v Mexico*, Inter-American Court (2010), paras 176-177; African Commission on Human and People's Rights, *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, Communication 334/06, 01 March 2011.

¹⁶ *Othman (Abu Qatada) v The United Kingdom* *ibid.*, para. 282.

¹⁷ *Magee v The United Kingdom*, *ibid.*, paras 43-46.

¹⁸ Council of Europe, *Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb)* (2018) para 197; *El Haski v. Belgium*, App no. 649/08, 25 September 2012, para 85.

¹⁹ *Jalloh v. Germany*, *ibid.*, paras 99 and 105; *Harutyunyan v. Armenia*, *ibid.*, para 63.

²⁰ ECtHR, *Guide on Article 6*, *ibid.*, para 195, referring to the judgements in cases *Gäfgen v. Germany*, *ibid.*; *Ibrahim and Others v. the United Kingdom*, App nos. 50541/08, Grand Chamber Judgment of 13 September 2016; *El Haski v. Belgium*, *ibid.*; and *Cēsnieks v. Latvia*, Judgment of 11 May 2014.

rests entirely with the defendant, and the level of proof required is too high, the prohibition will effectively lose all meaning.²¹ This question has been the subject of a number of important decisions by regional courts and treaty monitoring bodies. According to international standards, there should be two distinct stages: (a) the initial stage of triggering the procedure; and then (b) the stage of establishing whether the evidence was obtained by torture.

15. The process for determining whether evidence should be excluded should be treated as separate to any criminal or other investigation into the act of torture or CIDTP. Both are important but have distinct objectives: the former exists (as discussed above) to prevent tainted evidence undermining the fairness and integrity of the ongoing trial; by contrast, the latter exists to ensure accountability and reparations for acts of torture.²² The aims and effectiveness of the exclusionary rule are undermined if the outcome of a separate criminal or administrative investigation into torture is regarded as necessary to exclude evidence. This is because it creates an unreasonably high evidential burden for the exclusion of evidence and it may also prolong a defendant's detention if the trial is put on hold in order to carry out the investigation.²³ Refusal of the trial court to examine the lawfulness of evidence itself effectively bars a defendant from the right to challenge and oppose the use of evidence at trial, damaging the fairness of proceedings.²⁴

Triggering the procedure

16. The UN Human Rights Committee has stated that the defendant must first make a *prima facie* case by advancing a plausible reason or producing a credible complaint of ill-treatment in order to trigger the procedure. The burden should then shift to the prosecution to prove that a confession was voluntary.²⁵ Similarly, the UN Committee Against Torture has determined that, once a defendant has demonstrated their claim that torture occurred is 'well-founded', the burden of proof should shift to the State to prove that the evidence was not obtained by torture if it is to be admitted.²⁶ This approach has also been adopted by former UN Special Rapporteurs on Torture and CIDTP, Manfred Nowak and Juan Mendez, who have stated (respectively) that 'a plausible reason'²⁷ or '*prima facie* claim'²⁸ that evidence has been obtained by torture is enough to trigger the exclusionary procedure, which then shifts the burden of proof to the State.

²¹ As the ECtHR stated in *El Haski* regarding torture evidence 'it will be necessary and sufficient for the complainant, if the exclusionary rule is to be invoked on the basis of Article 6(1) of the Convention, to show that there is a 'real risk' that the impugned statement was thus obtained. It would be unfair to impose any higher burden of proof on him.' *El Haski v Belgium*, *ibid.*, paras 88, 89. See also paras 92-99

²² UNCAT, Article 7.

²³ Fair Trials and REDRESS, *Tainted by Torture: Examining the Use of Torture Evidence* (2018) p.41 Section IV.3.3., available from: https://www.fairtrials.org/sites/default/files/publication_pdf/Tainted-by-Torture-Examining-the-Use-of-Evidence-Obtained-by-Torture.pdf.

²⁴ Council of Europe, *Guide on Article 6*, *ibid.*, para 191.

²⁵ *Deolall v Guyana*, CCPR/C/82/D/912/2000, 5 November 2004; *Singarasa v Sri Lanka*, CCPR/C/81/D/1033/2001, 23 August 2004.

²⁶ *GK v Switzerland* (unreported), 12 May 2003, Communication No 219/2002.

²⁷ UN General Assembly, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 14 August 2006, A/61/259, para 65; see also UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, 6 August 2008, A/63/223, para. 45(d).

²⁸ Human Rights Council Twenty-fifth session, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez (2014) A/HRC/25/60, p.8 para 33.

17. Many States follow this model, requiring only a low burden to be met in order to bring the issue before the court. For example:

- In Spain, according to recent case law, the relevant party must provide at least preliminary evidence which generates sufficient doubts as to whether the evidence was obtained illegally.²⁹
- In England and Wales, the Police and Criminal Evidence Act 1984 provides that where a criminal defendant provides some evidence that their confession was obtained by 'oppression', the burden of proof shifts to the prosecution to prove beyond a reasonable doubt that it was not obtained in such a way, if they wish to prove the admission against that defendant.³⁰ The statute provides that oppression includes 'torture, inhuman or degrading treatment and the use or threat of violence (whether or not amounting to torture)', but may also include other inappropriate interviewing practices. If a confession is challenged by the defence or by the court (of its own volition),³¹ the court must not allow the confession to be given in evidence unless the prosecution proves that it is admissible.³² The defendant is not obliged to give evidence or call witnesses in support of their case.³³
- In Germany, the accused has the right to raise procedural objections (including that evidence being used was obtained by torture) anytime during trial,³⁴ and can object to the opening of the trial if the evidence available is alleged to have been obtained by torture.³⁵ A specific opportunity to raise objections is offered to the defence under the criminal code: 'The presiding judge shall communicate the bill of indictment to the indicted accused and at the same time shall summon him to state, within a time limit to be set, whether he wants to [...] raise objections to the opening of main proceedings'.³⁶ The court then has to decide whether or not it considers the objection valid.

18. Raising a *prima facie* claim that evidence was obtained by torture or mistreatment of a third party raises additional difficulties for the defence, who may not have knowledge of the circumstances in which statements were obtained, or the identity of those who provided the statements. Additionally, in torture and ill-treatment cases, it is often not possible for defendants to obtain medical or other evidence that could help to substantiate their claims. Given the absolute nature of the prohibition on torture and CIDTP and the threat it poses to the fairness of proceedings, defendants should be able to rely on a range of different methods to raise a *prima facie* claim that evidence has been obtained by torture, including reputable NGO reports and allegations of torture in similar cases.

²⁹ Judgment of the Spanish Supreme Court No. 477/2013 (3 May 2013).

³⁰ Police and Criminal Evidence Act 1984, Section 76. This is also the recommendation adopted by the UN Special Rapporteur on Torture: see *Report of the Special Rapporteur on the question of torture*, E/CN.4/2003/68, 17 December 2002, para. 26(k), available from <https://www.ohchr.org/Documents/Issues/SRTorture/recommendations.pdf>

³¹ Ibid., Section 76(3).

³² Ibid., Section 76(2).

³³ *R v Davis* [1990] Crim. L.R. 860

³⁴ Strafprocessordnung, Section 238 (2)

³⁵ Ibid., Section 201 (1)

³⁶ Ibid.

Once the process is triggered

19. The requirement for the State to bear the burden of proof in establishing that evidence was not obtained by torture recognises the fact that the State has responsibility for the treatment of individuals in its custody. The State should be able to demonstrate that appropriate safeguards against ill-treatment have been complied with.³⁷ A defendant, on the other hand, would not normally be in a position to establish how they were treated. Furthermore, the defendant will not always be the victim of the torture: a defendant may be seeking to exclude statements made by third parties. Former UN Special Rapporteur on Torture, Juan Mendez, stated that once a defendant has triggered the procedure, it is then for the State to 'investigate with due diligence whether there is a real risk that a confession or other evidence was not obtained by lawful means, including torture or other ill-treatment'.³⁸
20. This is an area in which clear guidance from the Court would be helpful, given that some States do not have a process for shifting the burden of proof to the State, leaving the defendant with the full burden of proving that evidence was obtained by torture. For example:
 - a) In France it is for the party alleging the irregularity and requesting the annulment of evidence to demonstrate that a given piece of evidence: (i) violates the law or a substantial formality; and (ii) hurts the interests of the party concerned.³⁹
 - b) In Russia, any evidence unlawfully obtained during an investigation (such as torture evidence) must in practice be declared inadmissible under the Russian Code of Criminal Procedure before it can be excluded from trial proceedings.⁴⁰ This process cannot happen in the trial proceedings themselves but rather in a separate procedure.⁴¹ Whilst the trial judge has discretion to issue a special order that the alleged violations be examined by the Prosecutor's Office or the Investigative Committee, the trial judge will not assume that torture or other ill-treatment has been used unless the relevant allegations have been separately investigated and confirmed.⁴²

C) Relevance of Procedural Safeguards in Police Custody

In examining whether there is a real risk that evidence has been obtained by torture, courts should examine whether key procedural rights have been complied with. These act both as torture prevention safeguards as well as safeguards for the right to a fair trial (which are well-established across the European region).

21. Establishing a real risk that evidence was obtained by torture should be sufficient to exclude evidence.⁴³ Different jurisdictions employ different procedures for establishing whether evidence has been obtained by torture. In most countries, there are no restrictions on the type of evidence that courts can take into account when assessing whether evidence was obtained by torture. However, there are several key procedural

³⁷ For examples, see Section C below.

³⁸ Human Rights Council Twenty-fifth session, *Report of the Special Rapporteur*, *ibid.*, p.8 para 33.

³⁹ French Code of Criminal Procedure, Article 802.

⁴⁰ Articles 7, 75, 88, and 235. See also: Amnesty International, *Russian Federation: Briefing to Committee against Torture*, October 2012, p. 10 (available from:

<https://www.amnesty.org/download/Documents/20000/eur460402012en.pdf>).

⁴¹ A separate 'Petition for Excluding Proof' is required under Articles 88 and 235.

⁴² Amnesty International, *Russian Federation: Briefing to Committee against Torture*, *ibid.*, p.10.

⁴³ *EI Haski v. Belgium*, *ibid.*, para 88.

safeguards, guaranteeing both the fairness of proceedings and a reduction in the likelihood of torture, which should be taken into account when making this assessment.

22. As is demonstrated by the exclusionary procedure of several Council of Europe States (discussed below), placing the ‘burden of proof’ onto a State can mean requiring the State to demonstrate that procedural safeguards during police interview have been complied with. It is well-established that torture occurs most frequently during the first few hours of detention, when police are under pressure to obtain information in order to make a criminal case.⁴⁴ In recognition of this, there are several human rights safeguards recognised under international and regional human rights law that support the prevention of torture (and the fairness of criminal trials) by establishing certain rights and protections at this crucial, early stage of the criminal justice process.⁴⁵ These safeguards include the right to have a third party notified of arrest, the right to a medical examination, notification of rights upon arrest, and the right of access to a lawyer.⁴⁶ In recognition of the importance of these early procedural rights protections, many Council of Europe states are now subject to binding legal obligations to respect those rights (as free-standing rights, not just as part of ensuring the “overall fairness” of the trial) as a result of EU law.⁴⁷
23. It is widely recognised, including by the UN Special Rapporteur on torture and other CIDTP, that these procedural safeguards not only serve to protect the right to a fair trial under Article 6 of the ECHR, but that they are also a key tool in the prevention of torture, especially where those safeguards are institutionalised.⁴⁸
24. The right of access to a lawyer during the earliest stages of criminal proceedings, in particular, is a well-established principle under the ECtHR’s jurisprudence on Article 6 ECHR, as well as crucial safeguard against torture and CIDTP.⁴⁹ In *Salduz v Turkey*, the ECtHR emphasised the importance of access to a lawyer in ensuring the fairness of proceedings and that confession evidence was properly obtained. Where statements have been made without the presence of a lawyer and have subsequently been retracted or challenged as false, to rely on those statements violates the fairness of proceedings.⁵⁰
25. There is a direct correlation between reliance on confession evidence and the incidence of torture.⁵¹ The ability to found a conviction on a confession provides a clear incentive for investigating authorities to coerce suspects into confessing to a crime, including through the use of torture. According to former UN Special Rapporteur on Torture, Juan Mendez, ‘[c]oerced confessions are regrettably admitted into evidence in many jurisdictions, in

⁴⁴ Association for the Prevention of Torture, *Preventing Torture in the OSCE Region through Implementation of the UN Convention against Torture* (2014), available from: <https://www.osce.org/odihr/117487?download=true>

⁴⁵ For example, UNCAT requires states to put in the ‘effective legislative, administrative, judicial or other measures to prevent acts of torture’ (Article 2(1)) and the UN Committee against Torture has specifically recognised the importance of early procedural rights safeguards in preventing torture (see *Gerasimov v Kazakhstan*, Communication No. 433/2010, CAT/C/48/D/433/2010, 10 July 2012).

⁴⁶ See, *inter alia*, UN General Assembly, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (2013) A/68/295.

⁴⁷ Resolution of the Council of 30 November 2009 on a *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, 2009/C 295/01.

⁴⁸ *Report of the Special Rapporteur on the question of torture*, E/CN.4/2003/68, *ibid.*, para. 26.

⁴⁹ Convention Against Torture Initiative, *UNCAT Implementation Tool 2/2017, Safeguards in the first hours of police detention*, p.4, available from: <https://cti2024.org/content/docs/CTI-Safeguards-final%20rev.pdf>; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ‘Access to a lawyer as a means of preventing ill-treatment’, Extract from the 21st General Report of the CPT (2011); Council of Europe, *Guide on Article 6*, *ibid.*, para 398; *Salduz v. Turkey*, Judgment of 27 November 2008.

⁵⁰ *Salduz v. Turkey*, *ibid.*, paras 56-62.

⁵¹ Richard Carver and Lisa Handley, *Does Torture Prevention Work?*, Oxford University Press, (2017)

particular where law enforcement relies on confessions as the principal means of solving cases and courts fail to put an end to these practices.⁵² The UN Human Rights Committee and the European Committee for the Prevention of Torture have called for states to reduce reliance on confession evidence by developing other investigative techniques.⁵³ A major study into the impact of torture prevention measures found that '[w]hen police investigators make use of alternative forms of evidence, and the judicial process insists they do, the motive for, and risk of, torture decline'.⁵⁴

26. The ECtHR has established in its case law that Article 3 requires not just the enactment of legislation criminalising ill-treatment, but also the positive obligation on States to enforce their own legislation in a way which provides real and effective protection for individuals within their jurisdiction.⁵⁵ For example, in *Z v UK* the Court concluded that:

These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge...⁵⁶

27. In recognition of the relationship between procedural rights, the right to a fair trial and the prevention of torture and coercion, some countries require the court to be satisfied that procedural safeguards have been met before admitting confession evidence. For example:

- a) In Germany, violations of procedural rights accorded to suspects (such as a violation of the obligation to notify a suspect of their right to remain silent) can lead to a confession being deemed to be inadmissible.⁵⁷
- b) In England and Wales, if there is a suggestion that a confession may have been obtained as a result of oppression, the burden of proof shifts to the State (as discussed above) and the prosecution must prove that the confession evidence was not obtained in this way by showing that procedural safeguards against oppression were complied with. This includes, for example, giving the accused appropriate cautions, providing an appropriate adult where required and compliance with Codes of Practice.⁵⁸
- c) In addition, audiovisual recording is carried out for all police interviews in England and Wales, and has been introduced in Ireland following the recommendation of the Committee for the Prevention of Torture.⁵⁹

28. Where the state cannot show that procedural safeguards, such as notification of rights, access to independent legal advice, medical examinations and judicial review of detention have been complied with, it will have failed to establish that there was no real risk of torture or CIDTP. Where statements are not made in court and no reasonable explanation

⁵² UN OHCHR, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Ernesto Mendez*, 5 August 2016, A/71/298, para 99.

⁵³ UN Human Rights Committee, *Concluding Observations: Japan*, 18 December 2008, CCPR/C/JPN/CO/5, para 19; CPT Standards, 12th General Report CPT/Inf (2002), 15, para 35

⁵⁴ Association for the Prevention of Torture, *'Yes, Torture Prevention Works': Insights from a global research study on 30 years of torture prevention* (2016), pp. 6-7

⁵⁵ *A. v UK*, Judgment of 23 September 1998, para. 22.

⁵⁶ *Z. v UK*, Judgment of 10 May 2001, paras. 73-74. There is considerable evidence to show that individuals who have experienced torture or CIDTP should be considered to be "vulnerable": see for example, the *UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol)*, 9 August 1999, Chapter VI(A).

⁵⁷ Section 136 Strafprozessordnung

⁵⁸ *R v Fulling* [1987], 2 All E.R. 65; Police and Criminal Evidence Act 1984, Section 76.

⁵⁹ Convention Against Torture Initiative, *ibid.*, p.7.

is given on how they were obtained, this should raise doubts over the validity of the statement. Former UN Special Rapporteur on Torture, Juan Mendez, has argued that:

If doubts arise about the voluntariness of a person's statements, as when no information about the circumstances of the statement is available or when pursuant to arbitrary, secret or incommunicado detention, the statement should be excluded regardless of direct evidence or knowledge of abuse.⁶⁰

29. In recognition of the strong link between reliance on confessions and the incidence of torture and CIDTP in justice systems, states should be encouraged to develop other investigative techniques, as a measure to safeguard against torture and ill treatment by not relying entirely on confessions to prove a case. Many countries require specific protections to be complied with, in order to ensure that confessions and statements relied on in court are not made as a result of torture, coercion or ill treatment. In his 2016 interim report to the UN General Assembly, Juan Mendez, the former UN Special Rapporteur on Torture, further developed the link between torture and confessions, advocating for the development of a new universal protocol for non-coercive interviews, and stating that:

National legislation must accept confessions only when made in the presence of competent and independent counsel (and support persons when appropriate) and confirmed before an independent judge... Courts should never admit extrajudicial confessions that are uncorroborated by other evidence or that have been recanted...⁶¹

Conclusion

30. All evidence obtained by torture or other prohibited ill-treatment should be excluded from use at trial. Failure to do so violates the right to a fair trial, whatever the source of that evidence. The procedure to exclude torture evidence is separate to any criminal or administrative investigation into torture. Although investigations into acts of torture remain crucial to the absolute prohibition on torture and CIDTP, separate investigations or criminal complaints must not impede a defendant's ability to effectively challenge the admissibility of evidence at trial. Once a defendant has made a credible claim that there is a real risk that evidence was obtained by torture, the burden of proof should then shift to the State to prove that the evidence was not obtained by torture, if that evidence is to be admitted. In examining whether there is a real risk that evidence has been obtained by torture, courts should examine whether key procedural rights have been complied with. These act both as torture prevention safeguards as well as safeguards for the right to a fair trial (which are well-established across the European region).



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⁶⁰ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Ernesto Mendez, A/71/298, 5 August 2016, para 99.

⁶¹ Ibid.