EUROPEAN COURT OF HUMAN RIGHTS
GRAND CHAMBER

APPLICATION no. 22978/05

BETWEEN:

GÄFGEN

Applicant

v.

GERMANY

Respondent

INTERVENTION SUBMISSION BY
THE REDRESS TRUST

INTRODUCTION

1. *The Redress Trust* (REDRESS) makes these submissions pursuant to leave granted by the President of the Grand Chamber in accordance with Rule 44 § 2 of the Rules of Court.

2. It intervenes in this case in order to provide analysis and comparative law jurisprudence on:

   A. The definition of torture, including the threat of torture as constituting torture

   B. What is regarded as sufficiently adequate redress to confront the consequences of torture and other prohibited ill treatment

   C. The impact of the admission of evidence procured as a result of torture and other prohibited ill treatment on the fairness of any trial.

A. THE DEFINITION OF TORTURE, INCLUDING THE THREAT OF TORTURE AS CONSTITUTING TORTURE

3. Torture is explicitly defined in human rights law in Article 1 of the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), Article 2 of the Inter-American Convention to Prevent and Punish Torture, and Article 1 of the Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is further defined in Article 7(2)(e) of the Rome Statute of the International Criminal Court, complemented by its Elements of Crimes.

4. Torture is generally understood to contain four main elements: (i) the infliction of severe mental or physical pain or suffering; (ii) intention; (iii) for a purpose such as punishment, information, confession, intimidation, coercion or any reason based on discrimination of any kind; and (iv) by or at the instigation of a person in an official capacity.

5. Courts have taken a variety of approaches in elaborating the concept of torture and determining whether particular acts constitute torture as opposed to other prohibited acts of cruel, inhuman or degrading treatment or punishment. Whilst this Court has in some cases emphasized the severity of the treatment as the determining factor,[1] the requirement of a specific purpose has also been underscored.[2]

[1] Ireland v. United Kingdom, Series A No 25, (1978) 2 EHRR 25, para. 167.
[2] Greek case (1969) 12 YB 170, EComHR, at 186. See also, Kismir v. Turkey, Judgment of 31 May 2005, paras. 129–132; Aksoy v. Turkey, Judgment of 18 December 1996, Reports 1996-VI, para. 64; Salman v. Turkey [GC], Judgment of 27 July 2000, Reports 2000-VII, para. 114; Corsacov. v. Moldova, Judgment of 4 April 2006, para. 63; Menesheva v. Russia, Judgment of 9 March 2006, para. 60.

6. The Inter-American Commission and Court, like the International Criminal Tribunal for the former Yugoslavia (ICTY), require a higher intensity of pain for torture than for cruel, inhuman or degrading treatment, as well as a purpose.[3] The Human Rights Committee (HRC), however has not generally drawn a distinction between torture and other forms of ill-treatment. [4] In some cases, the HRC has determined that actions have amounted to torture *and* inhuman treatment;[5] in other cases the Committee has simply expressed the view that there has been a violation of Article 7,[6] without specifying whether the acts in question constituted torture or other prohibited ill-treatment.

7. Some experts have challenged the necessity for a hierarchy of suffering between inhuman treatment and torture.[7] For these authors, the only distinguishing element between torture and inhuman treatment should be the purpose required for torture. An argument in favour of this view is that it is difficult to define the threshold of intensity between serious suffering and severe suffering.

A.1 The criteria on which the act must be assessed

8. The assessment of whether a particular act constitutes torture or any other prohibited ground of ill-treatment is based both on objective criteria and the circumstances of the particular case and the particular experiences of the person subjected to the treatment.

9. There is broad agreement in the jurisprudence that no absolute threshold level of pain or suffering can be determined.[8] Rather, whether the severity amounts to torture is decided by evaluating the individual circumstances of the case, and as this Court has indicated, 'that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.'[9]

10. In assessing the seriousness of the acts charged as torture, the following aspects have been discussed:[10] the nature, consistency and context of the infliction of pain, including the period of time of the ill-treatment; the premeditation, purpose and institutionalization of the ill-treatment; the physical and mental condition of the victim, including, in some cases, factors such as the victim's age, sex, state of health, as well as position of inferiority.

A.2 Mental harm, including threats of torture, may constitute torture

11. For a particular act to constitute torture, it is not required that it causes a physical injury; mental harm in and of itself is a prevalent form of torture.[11] Indeed, it has been held that "the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault"[12] may constitute psychological torture. In the *Greek* case, acts constituting non-physical torture included mock executions and threats of death, various humiliating acts and threats of reprisals against a detainee's family.[13] In *Akkoc*, emphasising the threats concerning the victim's children causing intense fear and apprehension, the Court determined that the psychological pressure was of such an intensity that it constituted torture.[14]

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[3] Caesar v. Trinidad and Tobago (Merits, Reparations and Costs), Int-Am CtHR, Judgment of 11 March 2005. Series C No.123, paras. 50, 68, 87.
[4] HRC, General Comment 20 on Article 7, 10 March 1992, refers in para. 4 to the ''nature, purpose and severity'' of the treatment.
[5] For example, Grille Motta v. Uruguay, Communication No. 11/1977, U.N. Doc. CCPR/C/OP/1 at 54 (1984). para.14.
[6] Wilson v the Philippines, Communication No. 868/1999, UN Doc. CCPR/C/79/D/868/1999 (2003). para.7.4.
[7] M. Evans, ''Getting to grips with torture'', in Association for the Prevention of Torture, *The Definition of Torture*: Proceedings of an expert seminar Geneva 2001, pp. 33–49; N. Rodley, ''The definition(s) of torture in international law'', Current Legal Problems, No. 55 (2002), pp. 467–93; M. Nowak, ''What practices constitute torture? US and UN standards'', Human Rights Quarterly, No. 28 (2006), pp. 809–841, at p. 822.
[8] Prosecutor v Kunarac et al. (IT-96-23&23/1), ICTY, Appeals Chamber, Judgment of 12 June 2002, para. 149.
[9] *Selmouni v. France*, ECHR 1999-V, (2000) 29 EHRR 403, para.. 101.
[10] Prosecutor v. Krnojelac (IT-97-25), Trial Chamber, Judgment of 15 March 2002, para. 182; Prosecutor v. Brdjanin (IT-99-36), Trial Chamber, Judgment of 1 September 2004, para. 484.
[11] Prosecutor v. Limaj et al. (IT-03-66),Trial Chamber, 30 November 2005, para. 236. See, also, General Comment 20 on Art 7, ABOVE NOTE 4 at 24-25.
[12] The Greek case, above no.2, p.461.
[13] Ibid., at 186.
[14] *Akkoc v. Turkey*, Judgment of 10 October 2000, ECHR 2000-X, paras. 25, 116, 117.

12. This Court has found that, provided it is sufficiently real and immediate, a mere threat of conduct prohibited by Article 3 may itself give rise to a violation of Article 3.[15] Similar findings have been made by different bodies of the United Nations. The UN Human Rights Commission has resolved that "intimidation and coercion, ... , including serious and credible threats, as well as death threats, to the physical integrity of the victim or of a third person, can amount to cruel, inhuman or degrading treatment or to torture."[16] Similarly, the UN Special Rapporteur on Torture has found that: "the fear of physical torture may itself constitute mental torture",[17] and that "serious and credible threats, including death threats, to the physical integrity of the victim or a third person can amount to cruel, inhuman or degrading treatment or even to torture, especially when the victim remains in the hands of law enforcement officials."[18] The UN Committee against Torture has equally determined that "a threat could constitute torture".[19] It is immaterial whether or not the threat is carried out if it is of such a nature that it causes severe mental pain or suffering to the person threatened with serious physical violence.

13. International case law varies as to whether such a threat would actually constitute torture[20] or another form of prohibited ill-treatment,[21] and depends on the circumstances of the case and the impact on the particular individuals subjected to that treatment, in addition to the general ways in which the particular Court or treaty body distinguishes between the different forms of prohibited ill-treatment.

14. The Inter-American Court of Human Rights has followed this general approach and on occasion has determined threats of torture to constitute torture. In the cases of *Maritza Urrutia v. Guatemala*, and *Tibi v. Ecuador*, the Court affirmed:

> (…) it has been recognized that the threat or real danger of subjecting a person to physical harm produces, under determined circumstances, such a degree of moral anguish that it may be considered "psychological torture."[22]

In *Tibi v. Ecuador* the Court added:

> [t]he alleged victim was threatened and suffered harassment during the period when he was detained, and this made him feel panic and fear for his life. All this is a form of torture, under the terms set forth in Article 5(2) of the American Convention. (Par. 149)

In *Maritza Urrutia v. Guatemala* the Court admitted the following facts as torture:

> (…)In addition, she was subjected to very prolonged interrogations, during which she was shown photographs of individuals who showed signs of torture or had been killed in combat and she was threatened that she would be found by her family in the same way. The State agents also threatened to torture her physically or to kill her or members of her family if she did not collaborate. (par. 85).

15. Similarly, the United Nations Human Rights Committee has classified the threat of serious physical injury as a form of "psychological torture." In *Estrella v. Uruguay,*[23] in addition to electric shocks, beatings with rubber truncheons, punches and kicks, and being hung up with his hands tied behind his back, the victim was subjected to methods of psychological torture including the threat of torture, the threat of violence to relatives or friends, the threat of being despatched to his home country to be executed, the threat of making him witness the torture of friends and finally repeated threats of death by an officer. The HRC concluded that the victim was subjected to severe physical and psychological torture and considered the threats serious enough to amount to psychological torture.

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[15] Campbell and Cosans v. UK, (1982) 4 EHRR 293, para 26.
[16] See, e.g., UN Human Rights Council and Commission on Human Rights resolutions 'Torture and other cruel, inhuman or degrading treatment or punishment', Resolution 8/8, para. 7(b); UN doc. 2005/39, para. 8.
[17] UN Special Rapporteur on Torture, Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/56/156, 3 July 2001, para. 7.
[18] Ibid., para. 8.
[19] See, e.g., Concluding observations of the Committee against Torture: New Zealand, UN doc. A/48/44(SUPP) 26/06/1993, para. 148.
[20] See e.g. *Abdelli v. Tunisia*, UN doc. CAT/C/31/D/188/2001 [2003] UNCAT 14 (20 November 2003).
[21] See, e.g., *Mukong v. Cameroon*, UN doc. CCPR/C/51/D/458/1991 [1994] UNHRC 41 (10 August 1994).
[22] Maritza Urrutia Case (Merits, Reparations and Costs), Int-Am Ct HR, Judgment of 27 November 2003, Series C No. 103, para. 92; Tibi v. Ecuardor, (Preliminary Objections, Merits, Reparations and Costs) Judgment of 7 September 2004, Series C No. 114 para. 147.
[23] *United Nations. Human Rights Committee. Miguel Angel Estrella v. Uruguay*, Communication No. 74/1980, 29 March 1983, paras. 8.6 and 10.

16. Similar interpretations of the prohibition of torture have been made with respect to the relevant provisions in international humanitarian law.[24]

17. The ICTY has included, amongst the acts which are "likely to constitute torture" "[b]eating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, as well as threats to torture, rape, or kill relatives".[25]

B. THE SAME LEGAL CONSEQUENCES APPLY TO CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT AS TO TORTURE

18. Notwithstanding the determination of a threat as constituting torture or other forms of ill-treatment, it is submitted that in many respects, making the distinction between torture and other prohibited ill-treatment is unnecessary because the legal consequences attributed to the act in question are not influenced by such a distinction. This is particularly so in relation to Conventions which prohibit in a joint article, torture and other ill-treatment, such as the European Convention[26] and the International Covenant on Civil and Political Rights.[27] This is also the case for provisions of international humanitarian law.[28]

19. Whilst the UNCAT does differentiate between torture and other prohibited ill-treatment, Art 16(1) of UNCAT provides that 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture' are also prohibited. Even though the nature of the obligations on ratifying states flowing from torture differ from those relating to other prohibited ill-treatment, it has been recognized that the obligation to prohibit torture and other cruel, inhuman and degrading treatment or punishment is non-derogable and affords no exceptions, justifications or limitations.[29] The prohibition of torture and others forms of ill-treatment is absolute. This is reflected in international customary and treaty law. All of the international instruments that contain a prohibition expressly recognise its absolute[30], non-derogable character.[31] The absolute, non-derogable, and unmitigating character of these obligations has consistently been reiterated by human rights courts[32] and monitoring bodies.[33] Torture and cruel, inhuman or degrading treatment or punishment are absolutely prohibited irrespective of the circumstances and of the victim's behaviour.[34]

20. Furthermore, as will be described in the sections below, the obligation to afford an adequate and effective remedy and reparation for the harm suffered applies to all prohibited treatment, as do the obligations relating to

[24] Article 4 of the 1977 Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) prohibits at any time and in any place whatsoever "(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment" ... and "(h) threats to commit any of the foregoing acts". The Commentary on the Geneva Conventions and Protocol II published by the International Committee of the Red Cross, states with respect to subparagraph (h) of article 4: "This offence concludes the list of prohibited acts and enlarges its scope. In practice threats may in themselves constitute a formidable means of pressure and undercut the other prohibitions. The use of threats will generally constitute violence to mental well-being within the meaning of subparagraph (a)." Similarly, article 13 of the Third 1949 Geneva Convention relative to the Treatment of Prisoners of War states that "... prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity" and considers the violation of such obligation a serious breach to the Convention. With respect to interrogation, article 17 (Beginning of captivity) of the same Convention provides that "no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."

[25] Prosecutor v. Kvočka et al. (IT-98-30/1), ICTY, Trial Chamber, Judgment of 2 November 2001, para. 144.

[26] European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3: ''No one shall be subjected to torture or inhuman or degrading treatment or punishment.''

[27] ICCPR, Articles 4 and 7.

[28] See Article 3 common to all four Geneva Conventions of 1949, and Article 17 of the Third Geneva Convention of 1949 relative to the treatment of prisoners of war.

[29] Committee against Torture, General Comment No.2: Implementation of article 2 by states parties, UN doc. CAT/C/GC/2, 24 January 2008, para.3.

[30] See for example Article 2(2) of the UN Convention against Torture and article 5 of the Inter-American Convention to Prevent and Punish Torture.

[31] The prohibition of torture is specifically excluded from the derogation provisions of human rights treaties of general scope: Article 4(2) ICCPR; Article 3 UN Torture Declaration; Article 15 European Convention of Human Rights; Article 27(2) American Convention on Human Rights; and Article 59 Arab Charter of Human Rights. No clause on derogation for national emergency is contained in the African Charter of Human and Peoples' Rights

[32] For European cases see for instance *Ireland v. the UK*, above note 1, para. 163 and *Selmouni v. France*, *ABOVE NOTE 9*, para. 95; For Inter-American cases see for example *Maritza Urrutia v. Guatemala*, ABOVE NOTE 22, para. 89.

[33] Committee against Torture, General Comment 2, ABOVE NOTE 29, para.1.

[34] *Labita v. Italy,* judgement of 6 June 2000, para 119.

the prohibitions on the use of evidence procured through such treatment and any other consequences flowing from such usage.

C. WHAT IS REGARDED AS SUFFICIENTLY ADEQUATE REDRESS TO CONFRONT THE CONSEQUENCES OF TORTURE AND OTHER PROHIBITED ILL-TREATMENT

C.1 The Right to a Remedy and Reparation in International Law

21. As a matter of general public international law, any violation of an international law obligation gives rise to an obligation to make reparation.[35] The right to a remedy and to reparation has been affirmed by a range of treaties,[36] United Nations bodies,[37] regional courts,[38] as well as in a series of declarative instruments.[39]

22. The right to a remedy and reparation is itself guaranteed and has been recognised as non-derogable. The United Nations Human Rights Committee has stated,

> Article 2, paragraph 3, of the Covenant ... constitutes a treaty obligation inherent in the Covenant as a whole. Even if a state party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the state party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.[40]

23. The aim of reparation is to eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if the act had not been committed.[41] Reparation can take many forms, and the content of the right to a remedy depends on the nature of the substantive right at issue. It must be "effective" in practice as well as in law.[42] This Court, as well as the Inter-American Court on Human Rights have repeatedly emphasised that the right to a remedy must be effective and not merely illusory or theoretical[43] and must be suitable to grant appropriate relief for the legal right that is alleged to have been infringed.

C.2 The nature of adequate and effective remedies and reparation in cases of torture and other prohibited ill-treatment

24. This Court has stated in its jurisprudence that the word “victim” denotes the person directly affected by the act or omission which is in issue, the existence of a violation being conceivable even in the absence of prejudice.[44] However, the fact that the national authorities have acknowledged, and then afforded redress for, the breach of the Convention, may warrant the reconsideration of the applicant's status as a victim.[45]

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[35] Permanent Court of International Justice, *Factory at Chorzow (Claim for Indemnity) case, (Germany* v. *Poland), (Merits)*, PCIJ (ser. A) No. 17, 1928, p. 29.

[36] For example, the International Covenant of Civil and Political Rights (ICCPR (1966) (Arts. 2(3), 9(5) and 14(6)), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965) (Art. 6), Convention of the Rights of the Child (1989) (Art. 39); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (UNCAT) (Art. 14), and Rome Statute for an International Criminal Court (1998) (art. 75). It has also figured in regional instruments, e.g. ECHR, (Arts. 5(5), 13 and 41); the American Convention on Human Rights (ACHR) (1969) (Arts. 25, 63(1) and 68); and the ACHPR) (1981) (Art. 21(2)). See also, the International Convention for the Protection of all Persons from Enforced Disappearance (ICPPED), of 2006, not yet entered into force (Art. 24). At time of writing, the Convention has 73 signatures and 4 ratifications.

[37] See, for example, Human Rights Committee (HRC), General Comment (GC) No. 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN doc. No. CCPR/C/21/Rev.1/Add.13, 26 May 2004 paras. 15-17; Committee against Torture, General Comment 2, ABOVE NOTE 29, para. 15.

[38] See, e.g., Velasquez Rodriguez Case, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) (Judgment of 29 July 1988), para. 174. See also Papamichalopoulos v. Greece (Art. 50) (1995), (Appl. no. 14556/89) ECHR Judgment (31 Oct. 1995), para. 36.

[39] *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*, Res’n 2005/35 (UN Doc. No. E/CN.4/RES/2005/35 (2005)) and GA Res’n 60/147 (UN Doc. No. A/RES/60/147 (2006)). See also the UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by General Assembly resolution 40/34 of 29 Nov. 1985; and the Universal Declaration of Human Rights (UDHR) (1948) (Art. 8).

[40] HRC GC No. 29 on States of Emergency (Art. 4) (31 August 2001), (U.N. Doc. No. CCPR/C/21/Rev.1/Add.11) at para. 14.

[41] UN General Assembly resolution 56/83, Annex, *Responsibility of States for Internationally Wrongful Acts*.

[42] Aksoy v. Turkey, Judgment of 18 December 1996, para. 95. See also, Council of Europe, Recommendation Rec(2004)6 of the Committee of Ministers (COM) to member states on the improvement of domestic remedies (adopted by COM on 12 May 2004, at its 114th Session).

[43] Inter-American Court on Human Rights, “Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 ACHR)” Advisory Opinion OC-9/87 (Oct. 8, 1987) at para. 24. See also, *Cordova v. Italy (No. 1)* Applic. No. 40877/98, European Court of Human Rights (2003), para. 58.

[44] Adolf v. Austria, Judgment of 26 March 1982, Series A no. 49, p. 17, para. 37

[45] Busa v. Hungary, Commission, First Chamber, 28453/95, 15 January 1997.

25. In torture cases, this Court has indicated that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention. It has failed to deprive applicants of their "victim" when in the totality of the circumstances of the case, the measures taken do not correspond with the violations alleged by the applicant.[46] For an applicant to be deprived of "victim" status, it must be shown that any redress that was afforded to the applicant was sufficient and that the violation was adequately remedied,[47] in light of the circumstances of the case. According to this Court, the nature of remedies varies according to the rights protected: the type of the violation and the conditions of the victims.[48]

26. International jurisprudence has recognised that adequate and sufficient remedies for torture and other prohibited ill-treatment include, inter alia:

    (i) an investigation capable of leading to the identification and punishment of those responsible for any ill-treatment;[49]

    (ii) an effective criminal justice system capable of effectively sanctioning those who perpetrate torture and other prohibited ill-treatment and deterring the commission of future offences, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.[50] The punishment for a violation of Article 3 should reflect the gravity of the offence, otherwise as this Court has elsewhere stated, the State is "in effect foster[ing] the law enforcement officers' 'sense of impunity' and their 'hope that all [would] be covered up".[51] The obligation of the State to punish the agents responsible must be complied with seriously and not as a mere formality.[52] As stated by the UN Committee against Torture, "States parties must make the offence of torture punishable under its criminal law, in accordance, at a minimum, with the elements of torture as defined in article 1 of the Convention, and the requirements of article 4,"[53] a requirement that is also inherent in the positive obligation of States Parties under human rights treaties to repress and prevent violations. In *Urra Guridi v. Spain*, the UN Committee against Torture underscored that States Parties are obligated to impose appropriate penalties against those held responsible for committing acts of torture, taking into account the grave nature of such acts: "The Committee considers that, in the circumstances of the present case, the imposition of lighter penalties and the granting of pardons to the civil guards are incompatible with the duty to impose appropriate punishment."[54] Similarly, the Council of Europe's Committee of Ministers has underscored the need to establish "sufficiently deterring minimum prison sentences for persons found guilty of grave abuses such as torture and ill-treatment,"[55] and has welcomed "the enhanced accountability of the security forces" ... "as a result of the introduction of minimum prison sentences for crimes of ill-treatment and torture, which may no longer be converted into fines or suspended."[56] In addition to criminal sanctions, this Court has emphasised the importance of administrative sanctions such as suspensions and dismissals in the case of torture and other prohibited ill-treatment.[57]

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[46] Mikheyev v. The Russian Federation (Application No.77617/01) Judgment of 26 January 2006, para.90.
[47] Staykov v Bulgaria (Application no. 49438/99)12 October 2006, paras. 90, 93.
[48] Soering v. United Kingdom App. No. 14038/88 Judgment of 7 July 1989 and Vilvarajah *v. United Kingdom* App. No. 13163/87 Judgment of 30 October 1991).
[49] *Assenov v. Bulgaria* 28 September 1998, *Reports* 1998-VII, p. 3290, para 102.
[50] Osman v. the United Kingdom judgment of 28 October 1998, *Reports* 1998-VIII, p. 3159, § 115).
[51] *Nikolova and Velichkova para 63. See, also,* Okkali v. Turkey, Application No. 52067/99, Judgment of 17 October 2006
[52] "Street Children" (Villagrán-Morales et al.) v. Guatemala, Judgment of 26 May 2001 (Reparations and Costs), para. 100.
[53] Committee against Torture, General Comment 2, ABOVE NOTE 29, para.8.
[54] *Guridi v. Spain*, Communication No. 212/2002, CAT/C/34/D/212/2002 24 May 2005, para. 6.7.
[55] Council of Europe, Committee of Ministers, Interim Resolution ResDH(2002)98, 'Action of the security forces in Turkey Progress achieved and outstanding problems' General measures to ensure compliance with the judgments of the European Court of Human Rights in the cases against Turkey listed in Appendix II (Follow-up to Interim Resolution DH(99)434) .
[56] Council of Europe, Committee of Ministers, Interim Resolution ResDH(2005)43, 'Actions of the security forces in Turkey Progress achieved and outstanding problems General measures to ensure compliance with the judgments of the European Court of Human Rights in the cases against Turkey concerning actions of members of the security forces (listed in Appendix III), *Adopted by the Committee of Ministers on 7 June 2005.*
[57] Abdülsamet Yaman v. Turkey, Application no. 32446/96, Judgment of 2 November 2004; Türkmen v. Turkey, Application no. 43124/98, Judgment of 19 December 2006.

(iii) Effective civil remedies such as compensation, and as full a rehabilitation as possible. The jurisprudence of international and regional human rights bodies and courts evidences that compensation for torture and other forms of ill-treatment are to be awarded for pecuniary and non-pecuniary injury. This general rule is also reflected in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law.[58] The distinction between violations held to amount to torture and those held to amount to other forms of ill-treatment may be relevant for the amount of damages but it does not affect the rule that non-pecuniary damages should be awarded. The Committee against Torture found that a violation of article 16 of the Convention entails a duty to provide compensation notwithstanding the fact that article 16 does not refer explicitly to article 14.[59] The sole criterion for the award of non-pecuniary damages consistently used in the relevant jurisprudence is the suffering caused by the violation concerned. In the case of *Wilson v. the Philippines*, the Human Rights Committee held that in respect of violations of article 7 and 10 of the ICCPR "compensation due to the author should take due account both of the seriousness of the violations and the damage to the author caused."[60] The Inter-American Court of Human Rights does not require proof of non-pecuniary damages in cases where it "is obvious to the Court that the victim suffered moral damages, for it is characteristic of human nature that any one subjected to the kind of aggression and abuse proven in the instant case will experience moral suffering."[61] This Court has repeatedly affirmed that a judgment is not sufficient to constitute just satisfaction in cases of serious violations, such as article 3, and awarded non-pecuniary damages for such a breach.[62] Non-pecuniary damages for mental suffering are independent of, and form an element of reparation in addition to the procedural obligation, derived from article 3 or article 13, namely to investigate allegations of torture and other ill-treatment effectively and to prosecute and punish the perpetrators (see above 26 (i) and (ii)). In light of the foregoing examination of the jurisprudence of human rights bodies, including of this Court, the award of non-pecuniary damages is not dependant on factors extraneous to the violation, such as the conduct of the victim prior to the violation. Such factors are immaterial in the context of absolute prohibitions, such as under article 3, as the objective of compensation as a form of reparation is to undo the harm done as much as possible.[63] Further, the award of compensation constitutes a preventive measure in its own right as the costs incurred act as a disincentive to a state party (and its organs as well as individual officers) to commit similar breaches in future.[64]

(iv) Restitution, including of rights and addressing the continuing impact of the torture (the inability to use involuntary confessions).

(v) Measures to guarantee non-repetition (such as training of police, public condemnation of the practice of torture, strengthening legislation, as appropriate.

27. Further it has been recognized that access to a remedy and the different forms of reparation set out above are all relevant, cumulatively. The existence of one form of reparation does not extinguish the states' obligation to afford other forms, to the extent that they are relevant in the particular case.[65]

D. THE IMPACT OF THE ADMISSION OF EVIDENCE PROCURED AS A RESULT OF TORTURE AND OTHER PROHIBITED ILL TREATMENT ON THE FAIRNESS OF ANY TRIAL

D.1 History of the exclusionary rule

[58] Principle 20, Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, UN Doc. A/RES/60/147, 16 December 2005
[59] Hajrizi Dzemajl v Yugoslavia, Communication 161/2000, UN Doc. CAT/C/29/D/161/2000, para.9.6.
[60] Wilson v. The Philippines, Communication No 868/1999, UN Doc. CCPR/C/79/D/868/1999, para.9.
[61] Loayza-Tamayo v. Peru (Reparations and Costs) Int-Am Ct HR, Judgment of 27 November 1998. Series C No. 42, para.138.
[62] See for example Selcuk and Asker v Turkey, (1998) 26 EHRR 477, paras.117, 118.
[63] Permanent Court of International Justice, *Factory at Chorzow (Claim for Indemnity) case, (Germany* v. *Poland), (Merits)*, PCIJ (ser. A) No. 17, 1928, p. 29.
[64] See for recognition of the general principle that reparation constitutes a preventive measure, Committee against Torture, General Comment 2, ABOVE NOTE 29, para.25.
[65] Basic Principles on the Right to a Remedy and Reparation, ABOVE NOTE 39, in particular principle 18.

28. The rationale behind the general prohibition of the admission of evidence obtained by torture includes the following elements (i) the unreliability of evidence obtained as a result of torture (ii) the outrage to civilised values caused and represented by torture (iii) the public policy objective of removing any incentive to undertake torture anywhere in the world (iv) the need to ensure protection of the fundamental rights of the party against whose interest the evidence is tendered (and in particular those rights relating to due process and fairness) and (v) the need to preserve the integrity of the judicial process.

29. In 1975, the UN General Assembly adopted a Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[66] Article 12 of the Declaration against Torture provides: "Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings."

30. The UN Human Rights Committee issued General Comment No. 7 on Article 7 of the ICCPR in 1982. It provides:

> "1. … The Committee notes that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make it a crime. .
> …
> Among the safeguards which may make control effective are ... *provisions making confessions or other evidence obtained through torture or other treatment contrary to article 7 inadmissible in court...*
>
> 2. As appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood..."[67] [emphasis added]

31. UNCAT was adopted for signature on 10th December 1984[68] and entered into force on 26 June 1987. Article 15 provides:

> "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."

32. No State Party to UNCAT has made a reservation to Article 15.[69] This, it is submitted, is strong evidence of its normative quality and is consistent with the widespread acceptance that has always been afforded to the exclusionary rule.

33. One year after UNCAT was adopted and opened for signature, the Organisation of American States concluded the Inter-American Convention to Prevent and Punish Torture 1985. Article 10 of this Convention contains an exclusionary rule similar to Article 15 UNCAT:

> "No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means."

34. In 1992, the Special Rapporteur on Torture, Mr P. Kooijmans, in his report to the UN Commission on Human Rights, analysed the rationale for the exclusionary rule and observed in forceful terms how the toleration of torture by, *inter alia,* the courts' acceptance of statements obtained under torture was responsible for the "flourishing of torture". He noted that by excluding such evidence the courts could make torture "unrewarding and therefore unattractive". He continued as follows:[70]

> "588. The Committee further states that those who violate article 7, whether by encouraging, ordering, *tolerating* or perpetrating prohibited acts, must be held responsible… [emphasis added]

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[66] For the background to the Declaration, see JH Burgers and H Danelius, The United Nations Convention Against Torture (Nijhoff, 1988), pp 13-16. On the day it adopted Resolution 3452 (XXX), the General Assembly also adopted Resolution 3453 (XXX) in which it requested the Commission on Human Rights to study the question of torture and any necessary steps for ensuring the effective observance of the Declaration.
[67] HRC General Comment No. 7 (1982) paras 1-2 (emphasis added)
[68] General Assembly Resolution 39/46, adopted without a vote. The UN Bibliographic Information System (UNBISnet), an online index to UN documentation, includes a database called Voting Records giving access to voting information for General Assembly resolutions adopted either without a vote or with a recorded vote since 1983.
[69] See http://www.ohchr.org/english/countries/ratification/9.htm#N12.
[70] UN doc. E/CN.4/1993/26, 15 December 1992.

> 589. Without exception, these measures have been recommended by the Special Rapporteur. If each and every State took such measures and vigorously supervised their implementation by the various branches of State authority, no torturer could do his dirty work in the expectation that he could evade punishment. For it is impunity which makes torture attractive and feasible. Far too often the Special Rapporteur receives information…that courts admitted and accepted statements and confessions in spite of the fact that during trial the suspect claimed that these had been obtained under torture…
>
> 590. It is no exception that this chain of situations, which are all extremely conducive to the practice of torture, is in clear violation of the prevalent rules. Laxity and inertia on the part of the highest executive authorities and of the judiciary in many cases are responsible for the flourishing of torture.
>
> 591. Governments should be aware that they cannot go on condemning the evil of torture on the international level while condoning it on the national level. The judiciary in each and every country should bear in mind that they have sworn to apply the law and to do justice and that it is within their competence, even when the law is not in conformity with international standards, to bring the law nearer to these standards through the interpretation process. The judiciary should be aware that there is no place for impartiality if basic human rights are violated because, by virtue of their oath, they can only choose the side of the downtrodden. It is within their competence to order the release of detainees who have been held under conditions which are in flagrant violation of the rules; it is within their competence to refuse evidence which is not freely given; it is within their power to make torture unrewarding and therefore unattractive and they should use that power[71]."

35. Two years later, the HRC itself returned to Article 7 of the ICCPR in its General Comment 20 (1994):

> "It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.[72]"

36. In 1999 the UN Special Rapporteur made further important comments on the exclusionary rule, and in particular about its scope:

> "Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned *or against any other person in any proceedings".*[73] [Emphases added]

37. In 2002, the Committee against Torture overtly followed the lead of the HRC in linking the exclusionary rule (in its case in Article 15 UNCAT) to the general prohibition on torture itself. In *P.E. v. France* the Committee observed that

> "…the generality of the provisions of Article 15 derive from the absolute nature of the prohibition of torture and imply, 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 competent have been made as a result of torture.[74]"

38. One year later, the International Criminal Tribunal for Rwanda ('ICTR') adopted its version of the exclusionary rule in 2003, which is similar to the rule adopted by the ICC. Rule 95 (Exclusion of Certain Evidence) of the ICTY's Rules of Procedure and Evidence states:

> "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."

39. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda ('ICTR') contain an identical provision[75].

40. The Council of Europe has also endorsed and adopted the exclusionary rule. On 26th April 2005, the Parliamentary Assembly of the Council of Europe adopted Resolution 1433 (2005) on the Lawfulness of detentions by the United States in Guantanamo Bay. In paragraph 8 the Assembly called on the US Government:

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[71] Ibid.
[72] Human Rights Committee, General Comment No. 20 (1994), ABOVE NOTE 4, para. 12.
[73] UN Doc. A/54/426, 1 October 1999, para. 12.
[74] *P.E. v. France*, Communication No. 193/2001, UN doc. CAT/C/29/D/193/2001 (2002), para. 6.3.
[75] ICTR Rules of Procedure and Evidence, Rule 95 (Exclusion of Evidence on the Grounds of the Means by which it was obtained): "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."

> "vi. to respect its obligations under international law and the Constitution of the United States to exclude any statement established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment, except against a person accused of such ill-treatment as evidence that the statement was made".

Similarly, in paragraph 10 the Assembly called on Member States of the Council of Europe:

> "iv. to respect their obligations under international law to exclude any statement established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment, except against a person accused of such ill-treatment as evidence that the statement was made".

D.2 Scope of the exclusionary rule

41. It is arguable that the rule covers evidence that has been or might have been obtained by torture or other prohibited forms of ill-treatment. Article 12 of the Declaration against Torture, the HRC's location of the exclusionary rule in Article 7 of the ICCPR and the consistent approach of the UN Special Rapporteur on Torture support such an approach. On the other hand, Article 15 UNCAT and Article 10 of the Inter-American Convention to Prevent and Punish Torture are cast in narrower terms.

42. Art 15 says nothing about derivative evidence, that is, evidence found as a result of a statement made under torture. However, its exclusion would be consistent with the purpose behind UNCAT of removing the incentive for states to engage in torture. The Supreme Court of Appeal of South Africa endorsed such reading in a recent landmark judgment in the case of *Mthembu v The State* in which it ruled out evidence obtained as a result of torture, including the "fruits of the poisonous tree." The Supreme Court of Appeal held in particular that any use of evidence obtained through torture automatically renders proceedings unfair, a finding that must apply in equal measure to other forms of ill-treatment. It reasoned that:

> "Ramseerop [the accomplice] made his statement to the police immediately after the metal box was discovered at his home following his torture. That his subsequent testimony was given apparently voluntarily does not detract from the fact that the information contained in that statement pertaining to the Hilux and metal box was extracted through torture…It is also apparent from his testimony that, even four years after his torture, its fearsome and traumatic effects were still with him. In my view, therefore, there is an inextricable link between his torture and the nature of the evidence that was tendered in court. The torture has stained the evidence irredeemably… In the long term, the admission of torture-induced evidence can only have a corrosive effect on the criminal justice system. The public interest, in my view, demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial."[76]

43. In determining whether there may be a violation of Article 6, this Court has indicated that: "The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where a violation of another Convention right is concerned, the nature of the violation found."[77] It has further determined that the use of evidence obtained by torture renders the trial as a whole unfair.[78]This Court has made similar findings in respect of violations of Article 3 falling short of torture.[79]

ALL OF WHICH IS RESPECTFULLY SUBMITTED

C. Ferstman and L. Oette
REDRESS

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[76] *Mthembu v The State (*379/2007)[2008] ZASCA 51 (10 April 2008), paras.34, 36.

[77] *Allan v. the United Kingdom*, Application no. 48539/99, §ECHR 2002-IX, paras.42 and 43.

[78] *Harutyunyan v. Armenia*, Application no. 36549/03, Judgment of 28 June 2007. It is noted at para. 63 that "The use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. 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, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to "afford brutality the cloak of law" (see, as the most recent authority, *Jalloh v. Germany* [GC], no. 54810/00, §§ 99 and 105, ECHR 2006-...)."

[79] *Jalloh v. Germany, Application no. 54810/00, ECHR 2006-IX, paras.99, 104-107.*