

## Kavala v Türkiye (n° 2) APP. NO. 2170/24

### Written comments of REDRESS

1. These written comments seek to assist the Court in considering whether there has been a violation of Article 3 of the European Convention on Human Rights (**ECHR**) as a result of Türkiye's failure to implement the European Court of Human Rights' (**ECtHR**) judgment of 10 December 2019, finding Mr Kavala's detention to be arbitrary and politically motivated and ordering his immediate release.
2. The comments will examine: (1) the interface between torture, ill-treatment and indefinite periods of arbitrary detention, and how the uncertainty surrounding prolonged, arbitrary and unlawful detentions in breach of ECtHR judgments may have an analogous effect on detainees as an irreducible sentence of life imprisonment, and lengthy periods spent on death row or awaiting extradition proceedings; and (2) the circumstances in which failure to implement a judgment by the ECtHR - ordering an applicant's immediate release - may implicate the Member State's obligations to protect the individual from ill-treatment, especially in circumstances where the conditions of the applicant's continued detention may foreseeably entail violations of ECHR Article 3.

#### **(A) THE INTERFACE BETWEEN TORTURE, ILL-TREATMENT AND INDEFINITE ARBITRARY DETENTION**

*Summary: Subjecting an individual to indefinite periods of arbitrary detention causes profound human suffering, constituting inhuman or degrading treatment or punishment (ill-treatment), and in severe cases torture, in violation of ECHR Article 3.*

3. The ECtHR has acknowledged that the threshold for an Article 3 violation is relative;<sup>1</sup> it depends on all the circumstances of the case, including the personal characteristics of the victim and whether the victim was in a vulnerable situation.<sup>2</sup> The severity of ill-treatment also depends on the nature and context of the treatment or punishment in question, such as an atmosphere of heightened tension and emotions,<sup>3</sup> the manner and method of its execution,<sup>4</sup> and its purpose, underlying intention or motivation.<sup>5</sup> Further, ill-treatment is not limited to physical acts, but also covers the infliction of psychological suffering, through, *inter alia*, "feelings of fear, anguish, stress and inferiority capable of humiliating and debasing".<sup>6</sup>
4. In addition, the definition of torture under the UN Convention against Torture (**UNCAT**) makes it clear that elements determinative of torture include the relative intensity of the

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<sup>1</sup> ECtHR, *Ireland v. United Kingdom*, [no. 5310/71](#), 18 January 1978, at para. 162.

<sup>2</sup> ECtHR, *Khlaifia and Others v. Italy*, [no. 16483/12](#), 15 December 2016, at para. 160, with further references.

<sup>3</sup> ECtHR, *Soering v the United Kingdom*, [no. 14038/88](#), 7 July 1989, at para. 100.

<sup>4</sup> *Ibid.*

<sup>5</sup> ECtHR, *Tănase v. Romania*, [no. 41720/13](#), 25 June 2019, at para. 117; and *Abdu v. Bulgaria*, [no. 26827/08](#), 11 March 2014, at para. 36.

<sup>6</sup> *Identoba and Others v. Georgia*, [no. 73235/12](#), 12 May 2015, at para. 65, further citing ECtHR, *Gäfgen v. Germany*, [no. 22978/05](#), 1 June 2010, at para. 103; and ECtHR, *Eremia v. the Republic of Moldova*, [no. 3564/11](#), 28 May 2013, at para. 54. See also ECtHR, *Zontul v. Greece*, [no. 12294/07](#), 17 January 2012, para. 88-89; ECtHR, *Price v. United Kingdom*, [no. 33394/96](#), 10 July 2001, at para. 24-30; ECtHR, *Valasinas v. Lithuania*, [no. 44558/98](#), 24 July 2001, at para. 117; ECtHR, *Pretty v. United Kingdom*, [no. 2346/02](#), 29 April 2002, at para. 52; and ECtHR, *El-Masri v. the Former Yugoslav Republic of Macedonia*, [no. 39630/09](#), 13 December 2010, at para. 202.

suffering inflicted (whether physical or mental); the perpetrator's motive to deliberately inflict severe suffering; the purpose for which such suffering was inflicted; and the status of the perpetrator, acting in an official capacity, or with the acquiescence or consent of a public official.

**(ii) Indefinite detention amounting to ill-treatment in breach of ECHR Article 3**

5. It is well-established that, because of the severe psychological effects it may have on the individual detained, indefinite detention without the prospect of release entails ill-treatment and, in certain circumstances, may constitute a form of torture. In *Vinter and Others v. the United Kingdom*, the ECtHR found it to be incompatible with human dignity and therefore contrary to ECHR Article 3 for a Member State to deprive a person indefinitely of their liberty without at least giving them a chance to regain that freedom.<sup>7</sup> This decision has since been affirmed by the ECtHR,<sup>8</sup> including in relation to “aggravated life sentences” under Turkish law, which provide for no possibility of conditional release and no review mechanism, thus creating an irreducible sentence that amounts to inhuman treatment.<sup>9</sup>
6. The principles established in *Vinter* have strong parallels with several decisions in domestic courts in Africa which have concluded that life imprisonment without the possibility of release amounts to ill-treatment. For example, in *Makoni v. Prisons Commissioner & Anor*, the Zimbabwe Constitutional Court held that “[a] life sentence imposed on a convicted prisoner without the possibility of parole or release on licence constitutes a violation of human dignity and amounts to cruel, inhuman or degrading treatment or punishment.”<sup>10</sup> Similarly, in the 2002 case of *State v. Bull & Another*, the Supreme Court of Appeal of South Africa held that the possibility of parole could save a whole life sentence from being cruel, inhuman and degrading punishment,<sup>11</sup> while in *State v. Tcoeb* the Supreme Court of Namibia proclaimed that:

“[A] sentence which compels any person to spend the whole of his or her natural life in incarceration, divorced from his family and his friends in conditions of deliberate austerity and deprivation, isolated from access to and enjoyment of the elementary bounties of civilized living is indeed a punishment of distressing severity.... To insist, therefore, that regardless of the circumstances, an offender should always spend the rest of his natural life in incarceration is to express despair about his future and to

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<sup>7</sup> ECtHR, *Vinter and Others v. United Kingdom*, [nos. 66069/09, 130/10 and 3896/10](#), 9 July 2013, at para. 113.

<sup>8</sup> See for example, ECtHR, *László Magyar v Hungary*, [no. 73593/10](#), 20 May 2014.

<sup>9</sup> ECtHR, *Öcalan v Turkey (No 2)*, [nos. 24069/03, 197/04, 6201/06 and 10464/07](#), 18 March 2014. The Court further noted that whilst it was true that under Turkish law the President of the Republic was entitled to order the release of a person imprisoned for life who was elderly or ill, that was release on compassionate grounds, separate from the notion of “prospect of release”. Likewise, although the Turkish legislature regularly enacted laws of general or partial amnesty, the Court had not been shown that there was such a governmental plan in preparation for the applicant or that he had thereby been offered a prospect. See also ECtHR, *Boltan v. Turkey*, [no. 33056/16](#), 12 February 2019, at para. 42; ECtHR, *Kaytan v. Turkey*, [no. 27422/05](#), 15 September 2015; and ECtHR, *Gurban v. Turkey*, [no. 4947/04](#), 15 December 2015.

<sup>10</sup> *Obediah Makoni v. Prisons Commissioner & Anor*, CCZ 8 of 2016; Constitutional Application CCZ 48 of 2015, [2016] ZWCC 8.

<sup>11</sup> *State v Bull & Another* (221/2000) [2001] ZASCA 105, 26 September 2001, at para. 23.

legitimately induce within the mind and the soul of the offender also a feeling of such despair and helplessness.”<sup>12</sup> [Emphasis added].

**(ii) Arbitrary detention amounting to torture or ill-treatment in breach of Article 3**

7. The risk of indefinite detention constituting torture is heightened where the sentence has been imposed arbitrarily.<sup>13</sup> The notion of “arbitrariness” in this context is not to be equated solely with detention which is “against the law” but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.<sup>14</sup> Arbitrary detention, understood in these terms, has the capacity to inflict severe suffering<sup>15</sup> because of the uncertainty, disorientation, and despair that it engenders,<sup>16</sup> in a similar way to indefinite detention (as discussed above). It further creates a context of extreme powerlessness, whereby the individual detained is purposefully deprived of any control over their situation and the ability to rationalise the denial of their freedom as a punishment for doing something wrong.<sup>17</sup> This power imbalance between the victim and the perpetrator amplifies the inhumanity associated with such detention and increases its likelihood of meeting the torture threshold under UNCAT.<sup>18</sup>
8. Various human rights bodies and experts, including the UN Special Rapporteur on Torture, have issued reports and communications which have reached conclusions on the connection between arbitrary detention, torture and other forms of ill-treatment.
9. For example, the UN Human Rights Committee found that indefinite immigration detention in Australia to be in breach of Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) of the International Covenant on Civil and Political Rights (**ICCPR**), considering that:

“[T]he combination of the arbitrary character of the authors’ detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to

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<sup>12</sup> *State v Tcoeb* 1996(1) SACR 390 (Nm), at para. 1004-1005.

<sup>13</sup> This applies at the very latest from the point at which detention can no longer be justified. See ECtHR, *J. N. v United Kingdom*, [no. 37289/12](#), 19 May 2016; ECtHR, *V.M v. United Kingdom*, [no. 49734](#), 1 September 2016; and *R (VC) v. SSHD* [2018] EWCA Civ 57. Further, in ECtHR, *Öcalan v. Turkey*, [no. 46221/99](#), 12 May 2005, at para. 169 where the Court acknowledged that - albeit in the context of the application of the death penalty in violation of ECHR Article 2 - the ‘arbitrariness’ of a sentence aggravates the human suffering experienced, noting that: “The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human suffering. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence (...)”.

<sup>14</sup> UN Human Rights Committee, ‘Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2233/2013’, [UN Doc CCPR/C/116/D/2233/2013](#), 2 May 2016, at para. 10.3.

<sup>15</sup> As understood in terms of the definition of torture contained in Article 1 of the UNCAT.

<sup>16</sup> Carla Ferstman, [Conceptualizing Arbitrary Detention – Power, Punishment and Control](#), Bristol University Press, 2024, at page 63.

<sup>17</sup> *Ibid.*

<sup>18</sup> There is an understanding that a defining feature of torture is the infliction of pain or suffering on a victim that is powerless. For example, Manfred Nowak, in his former role as UN Special Rapporteur on Torture, noted that “another element which distinguishes torture from cruel, inhuman or degrading treatment or punishment is the powerlessness of the victim. Torture is predominantly inflicted on persons deprived of their liberty in any context and therefore rendered particularly vulnerable to abuse”. See UN Human Rights Council, ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak’, [UN Doc A/HRC/13/39](#), 9 February 2010, at para. 44.

the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them and constitute treatment contrary to Article 7 of the Covenant”.<sup>19</sup>

10. Similarly, the UN Special Rapporteur on Torture found that Australian legislation on the detention of migrants “violates [UNCAT] because it allows for the arbitrary detention and refugee determination at sea, without access to lawyers”.<sup>20</sup>
11. In the context of continued detention of persons at Guantanamo Bay, Cuba, the UN Special Rapporteur on Torture concluded in 2013 that the indefinite detention of individuals at Guantanamo without charge had gone “far beyond the minimally reasonable period of time, causing a state of suffering, stress, fear and anxiety, which in itself constitutes a form of cruel, inhuman and degrading treatment”.<sup>21</sup> In 2015, the Inter-American Commission on Human Rights likewise concluded that “even in extraordinary circumstances, the indefinite detention of individuals, most of who have not been charged, constitutes a flagrant violation of international human rights law and in itself constitutes a form of cruel, inhuman, and degrading treatment”.<sup>22</sup>
12. In his March 2020 report on “psychological torture”, the UN Special Rapporteur on Torture expressly recognised that “sustained institutional arbitrariness fundamentally betrays the human need for communal trust and, depending on the circumstances, can cause severe mental suffering, profound emotional destabilisation and lasting individual and collective trauma”.<sup>23</sup> In the same report, the Special Rapporteur observed that victims of prolonged arbitrary confinement had demonstrated severe and persistent mental and physical health consequences, and that such consequences intensified the longer a situation of arbitrary detention lasted, and the less affected detainees could do to influence their own situation. In particular, he noted that “the constant exposure to uncertainty and judicial arbitrariness and lack of (...) or insufficient communication with lawyers, doctors, relatives and friends induces a growing sense of helplessness and hopelessness that over time may lead to chronic anxiety and depression.”<sup>24</sup> In light of the above, he concluded that:

“when institutional arbitrariness or persecution intentionally and purposefully inflicts severe mental pain or suffering on powerless persons, it can constitute or

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<sup>19</sup> UN Human Rights Committee, *M.M.M. v. Australia*, [UN Doc CCPR/C/108/D/2136/2012](#), 28 October 2013, para. 10.7. See also *C. v. Australia*, [UN Doc CCPR/C/76/D/900/1999](#), 28 October 2002, at para. 8.2-8.4., where the UN Human Rights Committee determined that Australia’s decision to keep the applicant indefinitely in immigration detention amounted to a violation of Article 7 of the ICCPR because it was evident that detention had caused a significant deterioration in the applicant’s mental health. The Committee observed that: “the continued detention of the author when the State Party was aware of the author’s mental condition and failed to take the steps necessary to ameliorate the author’s mental deterioration constituted a violation of his rights under Article 7 of the Covenant.”

<sup>20</sup> Juan Méndez, ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez’, [UN Doc A/HRC/28/68](#), 5 March 2015.

<sup>21</sup> Juan Méndez, ‘[Statement of the UN Special Rapporteur on Torture at the Expert Meeting on the Situation of Detainees Held at the US Naval Base at Guantánamo Bay](#)’, 3 October 2013.

<sup>22</sup> Inter-American Commission on Human Rights (IACCommHR), ‘[Toward the Closure of Guantánamo](#)’, [OAS/Ser.L/V/II. Doc 20/15](#), 3 June 2015, at para. 134.

<sup>23</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer’, [UN Doc A/HRC/43/49](#), 20 March 2020, at para. 63.

<sup>24</sup> *Ibid.* at para. 66.

contribute to psychological torture. In practice this question is of particular, but not exclusive, relevance in relation to the deliberate instrumentalization of arbitrary detention and related judicial or administrative arbitrariness”.<sup>25</sup>

13. The UN Special Rapporteur on Torture expressed similar concerns in individual communications sent in the cases of Bradley/Chelsea Manning and Julian Assange noting (*inter alia*) that:

“the arbitrary character of detention, its protracted and/or indefinite duration, the refusal to provide information, the denial of basic procedural rights and the increasingly intrusive, invasive and oppressive conditions of detention due to constant surveillance and harassment can cumulatively inflict serious psychological harm which may well amount to torture or other ill-treatment. Thus, even factors that may not necessarily amount to torture or ill-treatment when applied as an isolated measure and for a very limited period of time, such as unjustified detention, delayed access to procedural rights or moderate physical discomfort, can cross the relevant threshold if applied cumulatively and/or for a prolonged or open-ended period of time”.<sup>26</sup> [Emphasis added]

14. Finally, concerns about the risk of torture and ill-treatment have also been raised in situations where persons are detained indefinitely on overly broad grounds in the name of terrorism prevention. Thus, in his 2009 report the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism strongly criticised the United States for having created “a comprehensive system of extraordinary renditions, prolonged and secret detention, and practices that violate the prohibition against torture and other forms of ill-treatment.”<sup>27</sup> This report was subsequently cited in the case of *El-Masri v. Macedonia*, where the ECtHR found that the applicant’s solitary incarceration in a hotel in Skopje had intimidated him on account of his apprehension as to what would happen to him next and must have caused him emotional and psychological distress owing to the uncertainty about his fate.<sup>28</sup> The Court concluded that such treatment was intentionally meted out to the applicant to extract a confession and/or information about his alleged ties with terrorist organisations, and so amounted to a violation of ECHR Article 3.<sup>29</sup>

### **(iii) Conclusion**

15. Collectively, these cases and reports demonstrate a growing international consensus recognising that indefinite arbitrary detention may, in and of itself, constitute a form of

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<sup>25</sup> *Ibid.* at para. 63.

<sup>26</sup> ‘Statement by the Special Rapporteur on Torture on the situation of Mr Julian Assange’, [UN Doc UA GBR 6/2019](#), 29 October 2019.

<sup>27</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Marin Scheinin’, [UN Doc A/HRC/10/3](#), 4 February 2009, at para. 51.

<sup>28</sup> ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, [no. 39630/09](#), 13 December 2012, at para. 202.

<sup>29</sup> See also ECtHR, *Dikme v. Turkey*, [no. 20869/92](#), 11 July 2000, at para. 82 and 95, where the Court found that the “applicant undeniably lived in a permanent state of physical pain and anxiety owing to his uncertainty about his fate and to the blows repeatedly inflicted on him during the lengthy interrogation sessions to which he was subjected throughout his time in police custody”.

torture or ill-treatment, due to the significant, often long-lasting suffering, it causes. The link to torture is even more pertinent where arbitrary detention has been imposed for a prohibited purpose under UNCAT, including to intimidate the victim,<sup>30</sup> cause humiliation,<sup>31</sup> discrimination<sup>32</sup> and punishment.<sup>33</sup> These prohibited purposes would clearly be established where indefinite arbitrary detention is resorted to as a means to instil fear in, or punish, political activists or human rights defenders.<sup>34</sup> In the same vein, the intentionality of a State in perpetrating or sanctioning acts of torture would be made out where the individual has been arbitrarily detained as part of an institutional policy, for a State purpose or, as explained at (B) below, in defiance of an international judgment ordering a cessation of the violation.

16. Accordingly, State-sanctioned indefinite arbitrary detention constitutes torture or at the very least ill-treatment in breach of ECHR Article 3, where it is undertaken for the prohibited purposes of punishment and/or intimidation, and where the detention causes severe suffering to the detainee.

**(B) MEMBER STATES HAVE POSITIVE OBLIGATIONS UNDER THE ECHR TO PREVENT, PROTECT INDIVIDUALS FROM, AND REMEDY ALLEGATIONS OF, ILL-TREATMENT OR TORTURE**

*Summary: The failure to implement a judgment by a domestic or international court – ordering the immediate release of an individual found to be indefinitely and arbitrarily detained – breaches a Member State’s obligation under ECHR Article 3 to prevent, protect against, and remedy torture and other forms of ill-treatment.*

17. While indefinite arbitrary detention can amount, in and of itself, to torture or ill-treatment, it may also expose the applicant to other specific acts of torture and ill-treatment that commonly accompany such detention. Human rights courts and tribunals (including the ECtHR) have recognised that the risk of indefinite arbitrary detention might include prolonged incommunicado detention,<sup>35</sup> poor prison conditions,<sup>36</sup> denial of medical

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<sup>30</sup> Inter-American Court of Human Rights (IACtHR), *Gomez-Paquiyaury Brothers v Peru* (Merits, Reparations and Costs) [Series C No 110](#), 8 July 2004, at para. 116.

<sup>31</sup> ICTY Trial Chamber, *Prosecutor v Kvočka et al*, Trial Judgment, [IT-98-30/1-T](#), 2 November 2001, at para. 152.

<sup>32</sup> ICTY Trial Chamber, *Prosecutor v Kunarac et al*, Trial Judgment, [IT-96-23 and IT-23/1-T](#), 22 February 2001, at para. 654.

<sup>33</sup> Opinion of the Commission of 5 November 1969 in the [Greek Case](#) (1969) XII Yearbook, at para. 461.

<sup>34</sup> See for example, ECtHR, *Kavala v. Türkiye*, [no. 28749/18](#), 10 December 2019, at para. 230 where the ECtHR found a violation not only of Art 5(1) (right to liberty) but also Art 18 (restrictions applied for any purpose other than those for which they have been prescribed), insofar as “in the Court’s opinion, the various points examined above, taken together with the speeches by the country’s highest-ranking official (quoted above), could corroborate the applicant’s argument that his initial and continued detention pursued an ulterior purpose, namely to reduce him to silence as a human-rights defender”.

<sup>35</sup> UN Human Rights Committee, *El-Megreisi v. Libya*, [UN Doc CCPR/C/46/D/440/1990](#), 23 March 1994, at para. 5.4; *Aber v. Algeria*, [UN Doc CCPR/C/90/D/1439/2005](#), 16 August 2007, at para. 7.3; IACtHR, *Suárez-Rosero v Ecuador* (Merits), [Series C No 35](#), 12 November 1997, at para. 90–91.

<sup>36</sup> UN Human Rights Committee, *Womah Mukong v. Cameroon*, [UN Doc CCPR/C/51/D/458/1991](#), 10 August 1994, at para. 9.4; ECtHR, *Hénaf v France*, [no. 65436/01](#), 27 February 2004, at para. 55–60; IACtHR, *Loayza Tamayo v Peru* (Merits) [Series C No 33](#), 17 September 1997, at para. 46(d). See also IACtHR, *Caso Garcia Asto y Ramirez Rojas v Peru* (Preliminary Objection, Merits, Reparations and Costs), [Series C No 137](#), 25 November 2005, where the IACtHR concluded that the conditions of detention imposed on the applicant, as well as the incommunicado detention, the solitary confinement regime, and the restriction of visits by his family members constituted cruel, inhuman and degrading treatment.

treatment,<sup>37</sup> and their cumulative impact on the individual is likely to increase the longer the person is detained.<sup>38</sup> For example, the UN Working Group on Arbitrary Detention has recognised that: “prolonged detention (...) increases the likelihood that individuals will be subjected to solitary confinement and/or situations of detention that are contrary to the prohibitions of torture and other forms of ill-treatment”.<sup>39</sup>

18. The prohibition against torture and ill-treatment, as encapsulated in ECHR Article 3, gives rise to an obligation on States to take appropriate and effective steps to prevent the violations<sup>40</sup> and provide a remedy to victims.<sup>41</sup>

## **(ii) Member States’ duty to prevent torture or ill-treatment**

19. Alongside the ECtHR’s jurisprudence on the matter (referred to above), the Inter-American Court of Human Rights (**IACtHR**) has established that the duty to prevent is breached where a State has been ordered by a domestic or international court to put an end to conduct amounting to a violation of fundamental rights and does not comply. For example, it has found that the application of the death penalty to persons protected by provisional measures ordering a stay of execution, constituted an arbitrary deprivation of the right to life:

“[I]t is the responsibility of the State to adopt measures to protect all persons subject to its jurisdiction and this duty is particularly compelling in the case of persons with petitions pending before the supervisory organs of the American Convention. Nevertheless, the Court observes that the duty not to carry out executions while petitions or cases are pending before the Commissions or this Tribunal, respectively, derives not only from an order of the Court, but also from the American Convention itself, pursuant to its Article (1). Accordingly, any reading of death warrants or

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<sup>37</sup> ECtHR, *Blokhin v. Russia*, [no. 47152/06](#), 23 March 2016, at para. 136; and ECtHR, *Mozer v. Moldova and Russia*, [no. 11138/10](#), 23 February 2016, at para. 178.

<sup>38</sup> ECtHR, *Ananyev and Others v. Russia*, [nos. 42525/07 and 60800/08](#), 10 January 2012, at para. 142; ECtHR, *Idalov v. Russia*, [no. 5826/03](#), 22 May 2012, at para. 94 and *Muršić v. Croatia*, [no. 7334/13](#), 20 October 2016, at para. 101.

<sup>39</sup> UN Working Group on Arbitrary Detention, ‘Report of the Working Group on Arbitrary Detention’, [UN Doc A/HRC/22/44](#), 24 December 2012, at para. 73. The ECtHR has held on several occasions that detention in solitary confinement can amount to torture or inhumane or degrading treatment in breach of Article 3 ECHR. See ECtHR, *Ilascu and Others v. Moldova and Russia*, [no. 48787/99](#), 8 July 2004; ECtHR, *Ramirez Sanchez v. France*, [no. 59450/00](#), 4 July 2006; ECtHR, *Öcalan v. Türkiye (No 2)*, [nos. 24069/03, 197/04, 6201/06 and 10464/07](#), 18 March 2014; and ECtHR, *Harakchiev and Tolumov v. Bulgaria*, [nos. 15018/11 and 61199/12](#), 8 July 2014.

<sup>40</sup> See for example ECtHR, *A v. UK*, [no. 25599/94](#), 23 September 1998, at para. 22; ICTY, *Prosecutor v. Furundžija*, [IT-95-17/1-T](#), 10 December 1998, at para. 148; UNCAT Article 2 (the general duty to prevent acts of torture), Article 3 (the non-return provision), Articles 4 and 5 (the universal jurisdiction provisions), Article 9 (the international co-operation provision), Article 10 (the education and training provision), article 11 (the review provision), Articles 12-14 (the investigation, complaint and redress provisions), Article 15 (the exclusionary rule), and Article 16 (the obligation of prevention in relation to other forms of ill-treatment).

<sup>41</sup> See ECtHR, *Assanidze v. Georgia*, [no. 71503/01](#), 8 April 2004, at para. 198; ECtHR *Cocchiarella v. Italy*, [no. 64886/01](#), 29 March 2006, at para. 38; and ECtHR *Scordino v. Italy*, [no. 36813/97](#), 29 March 2006, at para. 140.

executions of a person, whose petition is before the Inter-American System may constitute a violation of the State's duty to guarantee the right to life."<sup>42</sup>

Likewise, the IACtHR has implicitly recognised that a State's failure to execute a judgment can prolong a victim's exposure to torture or ill-treatment. Thus, the Court observed that Paraguay's failure to comply with a domestic court ruling granting a writ of generic habeas corpus (which ordered an improvement in the applicants' detention conditions) resulted in them having to continue "to endure unsanitary and overcrowded conditions, without proper health care, ill-fed, under the constant threat of being punished, in an atmosphere of tension violence, abuse, and unable to effectively enjoy a number of their human rights".<sup>43</sup>

20. Relying on this jurisprudence, an analogous argument can be made that a failure to release an individual subjected to indefinite arbitrary detention in defiance of a court judgment constitutes a violation of the State's duty to guarantee the right to be free from torture or ill-treatment.

#### **(ii) Member States' duty to remedy acts of torture or ill-treatment**

21. Concomitant with States' duty to prevent torture or ill-treatment is the right of victims to a remedy for the violations suffered.<sup>44</sup> Reinforcing the established ECtHR jurisprudence on the right of victims to a remedy, the Committee for the Prevention of Torture in Africa has recently specifically acknowledged that failure to afford redress to victims may violate their right for human dignity, as guaranteed under Article 5 of the African Charter on Human and Peoples' rights.<sup>45</sup>
22. Notably, the right to a remedy or redress is not limited to monetary compensation, but entails restitution, rehabilitation, satisfaction and guarantees of non-repetition.<sup>46</sup> It also imposes a duty on States to ensure that competent authorities enforce remedies when granted, including by implementing binding court judgments.<sup>47</sup> To hold to the contrary would lead to situations incompatible with the principle of the rule of law<sup>48</sup> and deprive

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<sup>42</sup> IACtHR, *Boyce y otros v. Barbados* (Preliminary Objection, Merits, Reparations and Costs), [Serie C No. 169](#), 20 November 2007, at para. 114. See also IACtHR, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (Merits, Reparations and Costs), [Serie C No. 94](#), 21 June 2002, at para. 198 in which it was stated that "Trinidad and Tobago's execution of Joey Ramiah constitutes an arbitrary deprivation of the right to life. This situation is aggravated because the victim was protected by Provisional Measures ordered by this Tribunal, which expressly indicated that his execution should be stayed".

<sup>43</sup> IACtHR, *Juvenile Reeducation Institute v. Paraguay* (Preliminary Objections, Merits, Reparations and Costs), [Serie C No. 112](#), 2 September 2004, at para. 250-251.

<sup>44</sup> ECHR Article 13 and UNCAT Article 14. See also, ECtHR, *Cocchiarella v. Italy*, [no. 64886/01](#), 29 March 2006, para. 38; ECtHR, *Scordino v. Italy*, [no. 36813/97](#), 29 March 2006, para. 140; IACtHR, *Fleury v. Haiti* (Merits and Reparations), [Serie C No. 236](#), 23 November 2011, at para. 115; IACtHR, *Neptune v. Haiti* (Merits, Reparations and Costs), [Serie C No. 182, 152](#), 6 May 2008, at para. 152.

<sup>45</sup> African Commission on Human & People's Rights Committee for the Prevention of Torture in Africa, '[Report on Article 5 of the African Charter's Jurisprudence](#)', 2023, at para. 13.

<sup>46</sup> Committee against Torture, *General Comment 3: Implementation of article 14 by States parties*, [UN Doc. CAT/C/GC/3](#), 13 December 2012.

<sup>47</sup> See Article 2(3) of the ICCPR which obliges States Parties to "ensure that the competent authorities shall enforce such remedies when granted".

<sup>48</sup> ECtHR, *Kenedi v. Hungary*, [no. 31475/05](#), 26 May 2009, at para. 47; and ECtHR, *Kaic and Others v. Croatia*, [no. 22014/04](#), 17 July 2008, at para 40.



victims of their right to judicial protection. As recognised by the ECtHR in *Assanidze v. Georgia*:

“[A] judgment in which [the ECtHR] finds a breach imposes on the respondent State a legal obligation under [Article 46 of the Convention] to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (...). It follows (...) that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation (...) to choose, subject to supervision by the Committee of Ministers, the general and/or if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court (...).”<sup>49</sup>

23. Similarly, in *Guachalá Chimbo et al. v. Ecuador*, where the State was found to have failed to comply with a habeas corpus order in the context of an enforced disappearance, the IACtHR stressed that:

“Both compliance with and execution of judgments constitute components of the right of access to justice and effective judicial protection. Similarly, the effectiveness of a judgement depends on its execution, because the right to judicial protection would be illusory if the State’s legal system allowed a final and mandatory judicial decision to remain ineffective to the detriment of one of the parties”.<sup>50</sup>

24. Accordingly, we would submit that a failure to implement a binding judgment ordering the cessation of an act constituting torture or ill-treatment breaches States’ obligation to remedy such violations pursuant to ECHR Article 3.

### **(iii) Conclusion**

25. Based on the foregoing, it would be consistent with the cited international jurisprudence and the practice of the above-mentioned tribunals to conclude that States have an obligation under ECHR Article 3 to prevent and remedy acts of torture and ill-treatment within their jurisdiction. This obligation would be breached in circumstances where a State failed to enforce a binding judgment by an international court or tribunal ordering the release of an individual arbitrarily detained because such a failure would: (a) result in the prolonging of the violations endured and/or increase the likelihood of violations (or further violations) occurring; and (b) deprive the applicant of their right to judicial protection as a type of redress.

## **(C) CONCLUSION**

26. The deliberate instrumentalisation of indefinite arbitrary detention produces significant human suffering, amounting to ill-treatment and, in severe cases, torture in breach of ECHR Article 3. This engages the responsibility of the instigating State to prevent and remedy the violation. A State fails to fulfil such obligation when it refuses to release an individual found to be indefinitely arbitrarily detained in defiance of a judgment by a domestic or international court.

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<sup>49</sup> ECtHR, *Assanidze v. Georgia*, [no. 71503/01](#), 8 April 2004, at para. 198.

<sup>50</sup> IACtHR, *Case of Guachalá Chimbo et al. V. Ecuador* (Merits, Reparations and Costs), [Series C No. 423](#), 26 March 2021, at para. 210.

27. Failure to comply with such judgment has also significant broader ramifications for the integrity of the international rules-based order, setting a dangerous precedent that erodes the right of victims to be free from torture and ill-treatment. Accordingly, REDRESS invites the Court to recognise that:

- a) Subjecting an individual to indefinite periods of arbitrary detention constitutes a violation of ECHR Article 3.
- b) Failure to comply with, and enforce, a judgment ordering the immediate release of an individual arbitrarily detained indefinitely breaches States' corresponding obligations to prevent, protect individuals from, and provide redress for violations of Article 3.