London, 12 May 2017

(Gaziantep Regional High Court, Case concerning Dr. Serdar Küni)

Amicus Curiae submission

I. INTRODUCTION

1. REDRESS is an international human rights nongovernmental organisation with a mandate to assist torture survivors to seek justice and other forms of reparation.[1] Over more than twenty years, it has accumulated a wide expertise on the various facets of the obligations on states flowing from the prohibition of torture under international law. REDRESS regularly takes up cases on behalf of individual torture survivors and has wide experience with interventions before national and international courts and tribunals.

2. REDRESS has been following the case of Dr Serdar Küni, a physician from Cizre and submitted a legal brief on matters within REDRESS' knowledge and expertise concerning the inadmissible of evidence procured by torture and ill-treatment, before the Şırnak 2nd Heavy Penal Court (case no: 2017/230) in advance of the hearing dated 24 April 2017. REDRESS' Director also attended that hearing in person.

3. We are hereby submitting an additional legal submission to assist the Gaziantep Regional High Court, with respect to legal issues we understand are before the Court. The purpose of the legal submission is to provide comparative information on jurisprudence and practice of other jurisdictions of relevance to Turkey, with the view to assisting the judges with the issues we understand are before it.

II. THE ISSUES COVERED BY THIS SUBMISSION

4. This submission covers the following issues:

   i) The breadth of terrorist offenses and the principle of legality;
   ii) The presumption of innocence in criminal trials and the application of the principle of *in dubio pro reo*;
   iii) Limits on the admissibility of evidence in a criminal trial
   iv) The prohibition of evidence procured by torture and other ill-treatment

III. THE BREADTH OF TERRORIST OFFENCES AND THE PRINCIPLE OF LEGALITY

5. In order to satisfy the principle of legality, the definition of criminal offences must be clear and precise, so that persons can know what behavior is prohibited by the law and to be sure that the law is not subject to interpretation which would unduly widen the scope of prohibited conduct. International bodies monitoring state compliance with human rights norms relating to fair trial tend to consider vague and broad definitions as problematic because they can be used by States to unnecessarily penalize and discourage otherwise legitimate and lawful behavior. As the Inter-American Court held in the *de la Cruz Flores case*, "when applying criminal legislation, the judge of the criminal court is obliged to adhere strictly to its provisions and observe the greatest rigor to ensure that the behavior of the defendant corresponds to a specific category of crime, so that he does not punish acts that are not punishable by

[1] For more information, see the website: www.redress.org.

law."[2] Such definitions also risk that the criminal law is applied without transparency.

6. The Inter-American Court of Human Rights noted this point in relation to terrorism legislation in Peru. It held that: "The Court considers that crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of *nullum crimen nulla poena sine lege praevia* in criminal law. This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty. Laws of the kind applied in the instant case, that fail to narrowly define the criminal behaviors, violate the principle of *nullum crimen nulla poena sine lege praevia* recognized in Article 9 of the American Convention."[3]

7. The Inter-American Commission on Human Rights in a case against Peru, made clear that "the definition of a type of criminal offense based on mere suspicion or association shifts the burden of proof, violates the fundamental presumption of innocence of the accused, and should be eliminated."[4]

8. In the *de la Cruz Flores case*, a criminal investigation was opened against the claimant and other persons because they "were members of the Peruvian Communist Party (*Sendero Luminoso*), and had provided medical care, treatment and operations, and supplied medication and medical equipment for the treatment of terrorist criminals[;] acts [which] constitute the crime established and penalized in article 4 of [D]ecree [L]aw [No.] 25,475."[5] The claimant was accused by the Prosecutor for having "used her professional activities in the field of medicine [… and] that her actions were designed to save rights [...] such as life;" and that "her participation had consisted in providing medical care to militants."[6] The Inter-American Court also noted the fact that the claimant had been required by Peruvian law to report her behavior to the authorities. In this respect, the Inter-American Court held that "the information a physician obtains in the exercise of his profession is privileged by professional confidentiality."[7] Accordingly, the Court determined that:

> "Consequently, in light of the above considerations, the Court believes that, when delivering the judgment of November 21, 1996, the State violated the principle of legality: by taking into account as elements that gave rise to criminal liability, membership in a terrorist organization and failure to comply with the reporting obligation, but only applying an article that did not define these behaviors; by not specifying which of the behaviors established in article 4 of Decree Law No. 25,475 had been committed by the alleged victim in order to be found guilty of the crime; for penalizing a medical activity, which is not only an essential lawful act, but which it is also the physician's obligation to provide; and for imposing on physicians the obligation to report the possible criminal behavior of their patients, based on information obtained in the exercise of their profession."[8]

9. The position of the Inter-American Court in the above case is consistent also with international humanitarian law: "Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom."[9]

---

[2] *Case of De La Cruz-Flores v. Peru (Merits, Reparations and Costs),* Judgment of 18 November 2004, para 82
[3] *Castillo Petruzzi et al.* v. *Peru (Merits, Reparations and Costs)* Judgment of 30 May 1999, para. 121
[4] Annual Report of the Inter-American Commission: Peru, OEA/Ser.L/V/II.95, doc. 7 rev. (1996) Ch.V Section VIII, §4.
[5] *De la Cruz Flores case,* para 90
[6] Ibid, paras 91, 92
[7] Ibid, para 97
[8] Ibid, para 102
[9] Additional Protocol I (1977), Article 16(1), and Additional Protocol II (1977), Article 10(1)

IV. THE PRESUMPTION OF INNOCENCE IN CRIMINAL TRIALS AND THE APPLICATION OF THE PRINCIPLE OF *IN DUBIO PRO REO*

10. The presumption of innocence is a fundamental principle of human rights law recognised in all human rights instruments.[10] It lies at the heart of the notion of a fair procedure. It means that defendants are deemed innocent until proven guilty by court in a final judgment in accordance with the law. The presumption of innocence presupposes that the burden of proof is on the prosecution. Any doubt on guilt should benefit the suspect or accused person ('in dubio pro reo').[11] This is underscored by General Comment 32 of the United Nations Human Rights Committee: "The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt and requires that persons accused of a criminal act must be treated in accordance with this principle."[12]

11. The jurisprudence of human rights bodies affirms that the presumption of innocence requires that judges enter a conviction in a criminal case only when there is significant and probative evidence on each required element of the crime, leading to no other possible conclusion that the crime has been committed. A court's judgment must be based on evidence as put before it and not on mere allegations or assumptions.[13]

12. The presumption of innocence would be violated, for example, if an accused person were to be required to prove that a statement he or she made, or one that was made by someone else, was procured by torture.[14] Consistent with the presumption of innocence, the burden of proof is on the prosecution to show that statements have been given voluntarily.[15]

13. In one case before the United Nations Human Rights Committee, rather than the prosecution having to prove that a confession was voluntary, an accused person in Sri Lanka was required to prove that his confession – which he claimed had been coerced under torture – was involuntary and therefore should be excluded as evidence. The United Nations Human Rights Committee held that:

> "the Committee also notes that the burden of proving whether the confession was voluntary was on the accused. This is undisputed by the State party since it is so provided in Section 16 of the PTA. Even if, as argued by the State party, the threshold of proof is "placed very low" and "a mere possibility of involuntariness" would suffice to sway the court in favour of the accused, it remains that the burden was on the author. The Committee notes in this respect that the willingness of the courts at all stages to dismiss the complaints of torture and ill-treatment on the basis of the inconclusiveness of the medical certificate (especially one obtained over a year after the interrogation and ensuing confession) suggests that this threshold was not complied with. Further, insofar as the courts were prepared to infer that the author's allegations lacked credibility by virtue of his failing to complain of ill-treatment before its Magistrate, the Committee finds that inference to be manifestly unsustainable in the light of his expected return to police detention. Nor did this treatment of the complaint by its courts satisfactorily discharge the State party's obligation to investigate effectively complaints of violations of article 7. The Committee concludes that by placing the burden of proof that his confession was made under duress on the author, the State party violated

[10] See for example, International Covenant on Civil and Political Rights, Article 14(2), which confirms the international standard of the presumption of innocence: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." The Universal declaration of human rights Article 11 similarly provides that "[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial." See also, European Convention on Human Rights Article 6(2).
[11] Human Rights Committee (HRC), General Comment 32, CCPR/GC/32 23 August 2007, para 30; European Court: *Barberà,Messegué and Jabardo v Spain* Application No. 10590/83, 6 December 1988, para. 77; *Telfner v Austria* Application No. 33501/96, 20 March 2001, para. 15
[12] HRC General Comment 32, para 30.
[13] *Telfner v Austria* Application No. 33501/96, 20 March 2001, para 19.
[14] HRC, *Singarasa v Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001 (2004) para. 7.4.
[15] HRC General Comment No. 32, para. 41.

article 14, paragraphs 2, and 3(g), read together with article 2, paragraph 3, and 7 of the Covenant."[16] [emphasis added]

14. In international criminal law, the principle has been incorporated into the statutes and jurisprudence of international criminal tribunals and the International Criminal Court. The Yugoslavia Tribunal clarified that this standard "requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused".[17] The Rules of Procedure and Evidence of the ICTY (98-bis) specify that the Trial Chamber should 'enter a judgment of acquittal on any count if there is no evidence capable of supporting a conviction'. That decision point can only be reached if the prosecutor has not carried the burden of proving the guilt of the accused with evidence that is "capable of supporting a conviction."

V. THE LIMITS ON THE ADMISSIBILITY OF EVIDENCE IN A CRIMINAL TRIAL

15. Whether evidence can be admitted at trial, and what weight will be given to that evidence, will depend on a number of factors described below.

16. The European Court of Human Rights jurisprudence makes clear that uncorroborated hearsay evidence cannot be the sole and decisive basis for a conviction, otherwise it would stand in violation of article 6(3) of the European Convention on Human Rights and the right to a fair trial. Where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny.[18] The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.

17. In international criminal law, the jurisprudence takes into account similar factors. The rules of evidence are flexible, provided the judges determine it is of probative value and its admission would not prejudice a fair trial or seriously damage the integrity of the proceedings. Admitting evidence procured by torture would ipso facto seriously damage the integrity of the proceedings. At the International Criminal Court, whether evidence will be admitted will depend on a three-prong test, in accordance with Article 69(4) of the Rome Statute.[19]

    i) The first step is for the Court to determine whether or not the evidence presented is *prima facie* relevant to the case, as it relates to matters in the investigation of charges against the accused. Thus, evidence which is outside the timeframe relating to the charges would not be admissible.

    ii) Secondly, the Chamber must determine the probative value of the evidence.

    iii) Thirdly, the Chamber must, where relevant, weigh the probative value of the evidence against its prejudicial effect. In the *Katanga case*, the Trial Chamber indicated that if the purpose of the evidence is not immediately apparent then it is up to the party presenting it to show how it might prove or disprove a material fact in the case.[20]

[16] *Singarasa v Sri Lanka*, para. 7.4
[17] *Prosecutor v Milan Martić* (IT-95-11-A), ICTY Appeals Chamber (8 October 2008) paras. 55, 61.
[18] *Al-Khawaja and Tahery v. the United Kingdom* ([GC], Application nos. 26766/05 and 22228/06, paras 119 and 147, 15 December 2011
[19] *Lubanga*, ICC T.C. I, (ICC-01/04-01/06), Decision on the admissibility of four documents, 13 June 2008 (I)
[20] *Katanga & Ngudjolo*, ICC T.C. II, (ICC-01/04-01/07), Decision on the Bar Table Motion of the Defence of Germain Katanga, 21 October 2011, para. 16

VI. THE PROHIBITION OF EVIDENCE PROCURED BY TORTURE AND OTHER ILL-TREATMENT

18. The prohibition of torture is universally recognised and is enshrined in all the major international and regional human rights instruments. It is binding in Turkey by virtue of Turkey's adherence to the International Covenant on Civil and Political Rights (ICCPR) (article 7), the UN Convention Against Torture and other Cruel, Inhuman and Degrading Treatment and Punishment (UNCAT), the European Convention on Human Rights (ECHR) (article 3), and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Moreover, article 17 of the Constitution of the Republic of Turkey protects "the right to life and the right to protect and improve his/her corporeal and spiritual existence" and explicitly provides at article 17(3) "[n]o one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity". Article 148(1) of the Turkish Criminal Procedure Code prohibits **"**[a]ny bodily or mental intervention that would impair the free will (of the accused), such as misconduct, torture, administering medicines or drugs, exhausting, falsification, physical coercion or threatening, using certain equipment".

19. The exclusionary rule prohibits the invoking of any statement made as a result of torture as evidence in any proceedings (except against a person accused of torture as evidence that the statement was made).

20. It is contained in article 15 UNCAT which states:

> [e]ach 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.

21. The CAT has stated the exclusionary rule "is a function of the absolute nature of the prohibition of torture". [21] It has stressed the "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".[22]

22. Referring to article 3 ECHR, the European Court of Human Rights (the Strasbourg Court) stated, in *Othman v UK*:

> International law, like the common law before it, has declared its unequivocal opposition to the admission of torture evidence. There are powerful legal and moral reasons why it has done so.[23]

23. Article 38 of the Constitution of the Republic of Turkey provides that "[f]indings obtained through illegal methods shall not be considered evidence". Such illegal methods must include torture.

24. Article 148(3) of the Turkish Criminal Procedure Code provides that "[s]ubmissions obtained through the forbidden procedures shall not be used as evidence, even if the individual had consented". Those "forbidden procedures" are listed at article 148(1) and (as cited in paragraph 4 above) include "misconduct, torture, administering medicines or drugs, exhausting, falsification, physical coercion or threatening, using certain equipment". Under article 206(2)(a) of the Criminal Procedure Code, the "request of presentation of any evidence shall be denied" if it is "unlawfully obtained". Only "legally obtained evidence" can be relied upon.[24]

The exclusionary rule applies to any statement in any proceedings

25. It is clear that the exclusionary rule is not limited to statements made by the accused in the proceedings at hand. It would also apply to statements or confessions made by other persons under torture, which are sought to be used against the accused person.

[21] CAT, *G.K. v. Switzerland* Communication No. 219/2002 UN Doc CAT/C/30/D/219/2002 (7 May 2003), para. 6.10.
[22] CAT, *P.E. v. France* Communication No. 193/2001 UN Doc. CAT/C/29/D/193/2001 (21 November 2002), para 6.3.
[23] Application No. 8139/09 (17 January 2012), para. 264.
[24] Article 217(2) Turkish Criminal Procedure Code.

26. In *Othman,* the Strasbourg Court stated: "Article 15 applies to "any statement" which is established to have been made as a result of torture, not only those made by the accused".[25]

27. In 1999, the then UN Special Rapporteur on Torture commented on the scope of the exclusionary rule:

> [a]ny 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.[26] [emphasis added]

The exclusionary rule applies both to torture and other prohibited ill-treatment

28. The Committee Against Torture has consistently indicated that statements obtained both by torture and other prohibited ill-treatment may not be used as evidence in any proceedings. In its General Comment on Article 2, it stated: "[t]he Committee considers that articles 3-15 (of UNCAT) are likewise obligatory as applied to both torture and ill-treatment".[27]

29. The Human Rights Committee also considers the exclusionary rule to apply to both torture and other prohibited ill-treatment. As noted, the HRC locates the exclusionary rule in article 7 ICCPR, which prohibits torture and cruel, inhuman or degrading treatment or punishment.[28]

30. The Strasbourg Court has stressed, in *Othman,* 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".[29] [emphasis added]

31. **The burden of proving that a particular statement was procured under torture does not simply rest on the party asserting it.** Indeed, international jurisprudence makes clear that the exclusionary rule imposes a positive obligation on States to verify whether statements said to have been made under torture have indeed been made under such conditions. As the UN Special Rapporteur summarises:

> A defendant must only advance a plausible reason as to why the evidence may have been procured by torture or other ill-treatment. Thereafter the burden of proof must shift to the State and the courts must inquire as to whether there is a real risk that the evidence has been obtained by unlawful means. If there is a real risk, the evidence must not be admitted.[30]

32. In *P.E. v France,* the CAT observed that the exclusionary rule implies "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."[31] As the UN Special Rapporteur has noted: "It is therefore 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."[32]

33. In *El Haski v Belgium,* the Strasbourg Court (dealing with allegations that the evidence to be used in proceedings against Mr. El Haski were obtained by the torture of another person in a third state), held that, once a party had established a "real risk" that impugned statements were obtained by torture:

---

[25] Application No. 8139/09 (17 January 2012), para . 266.
[26] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Sir Nigel Rodley, UN Doc. A/54/426 (1 October 1999), para. 12(e).
[27] UN Doc. CAT/C/GC/2 (24 January 2008), para. 6.
[28] HRC, 'General Comment No. 20: Article 7 (prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (1992) UN Doc. HRI/GEN/1, para. 12.
[29] Application No. 8139/09 *(*17 January 2012), para. 85.
[30] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez , A/HRC/25/60 (10 April 2014), para. 67.
[31] *P.E. v. France* Communication No. 193/2001 UN Doc. CAT/C/29/D/193/2001 (21 November 2002) , para. 6.3.
[32] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez , A/HRC/25/60 (10 April 2014), para. 33.

> The domestic court may not then admit the impugned evidence without having first examined the defendant's arguments concerning it and without being satisfied that, notwithstanding those arguments, no such risk obtains. This is inherent in a court's responsibility to ensure that those appearing before it are guaranteed a fair hearing, and in particular to verify that the fairness of the proceedings is not undermined by the conditions in which the evidence on which it relies has been obtained (…).[33]

34. In examining the risk that the impugned evidence in this case was obtained by torture, it is of relevance that the CAT, in its latest Concluding Observations on Turkey, stated that it was:

> > seriously concerned about numerous credible reports of law enforcement officials engaging in torture and ill-treatment of detainees while responding to perceived and alleged security threats in the south-eastern part of the country (e.g. Cizre and Silopi) in the context of the resurgence of violence between the Turkish security forces and the Kurdistan Workers' Party (PKK) following the breakdown of the peace process in 2015.[34]
>
> The United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, following his visit to Turkey from 27 November to 2 December 2016, stated that "[m]any inmates reported that they had been arrested based on false accusations made against them under torture."[35]

35. The Constitutional Court of the Republic of Turkey has found a breach of article 17(3) of the Constitution in circumstances where "the public authorities did not immediately take an action upon the applicant's allegations of torture and ill-treatment" and where "due diligence was not paid for the finalization of the investigation and prosecution in a rapid and effective manner".[36] Similarly, it has found a breach of article 17(3) where investigations were not conducted in an "impartial, independent, rapid and comprehensive manner" into allegations of torture and ill-treatment where the authorities did not "endeavour to earnestly find out the facts".[37]

36. The use of evidence obtained by torture or other prohibited ill-treatment in judicial proceedings violates not only the exclusionary rule, but also seriously impacts the fairness of the proceedings.

37. Regarding evidence obtained specifically from torture, it was stated in *Othman:*

> > the admission of torture evidence is manifestly contrary, not just to the provisions of Article 6, but to the most basic international standards of a fair trial. It would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome. It would, therefore, be a flagrant denial of justice if such evidence were admitted in a criminal trial.[38]

38. As for evidence obtained by other prohibited ill-treatment, it was stated by the Strasbourg Court in *El Haski v Belgium* that its admission would breach article 6 "if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence".[39] In addition, "these principles apply not only where the victim of the

---

[33] Application No. 649/08 (25 September 2012), paras 88 and 89.
[34] CAT, 'Concluding observations on the fourth periodic reports of Turkey' UN Doc. CAT/C/TUR/CO/4 (2 June 2016), para.11.
[35] Preliminary observations and recommendations of the United Nations Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, Mr. Nils Melzer on the Official visit to Turkey – 27 November to 2 December 2016 (2 December 2016) available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20976.
[36] 'Judgment of Şenol GÜRKAN (Application No: 2013/2438)' in *The Constitutional Court of the Republic of Turkey: Annual Report 2015* (The Publications of the Constitutional Court, 2016) 150-151.
[37] 'Judgment of Arif Haldun SOYGÜR (Application No: 2013/2659)' in *The Constitutional Court of the Republic of Turkey: Annual Report 2015* (The Publications of the Constitutional Court, 2016) 154-155.
[38] Application No. 8139/09 (17 January 2012), para. 267.
[39] Application No. 649/08 (25 September 2012), para 85.

treatment contrary to Article 3 is the actual defendant but also where third parties are concerned".[40]

39. In *Göçmen v Turkey*, the applicant alleged he had been forced to make statements under torture and in the absence of his lawyer.[41] The Strasbourg Court found a breach of article 3 ECHR, and a breach of article 6 due to the absence of procedural guarantees preventing the use of those statements at his trial.[42] The Strasbourg Court deplored the fact that the domestic court had not dealt with the admissibility of those statements as a preliminary issue.[43]

All of which is respectfully submitted.

For REDRESS

_____

Carla Ferstman (Director)

12 May 2017, London, United Kingdom

[40] Application No. 649/08 (25 September 2012) para 85.
[41] Application No. 72000/01 (17 October 2006), paras 36 and 67.
[42] Application No. 72000/01 (17 October 2006), para 75.
[43] Application No.. 72000/01 (17 October 2006), para 73.