UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES, *Appellant*, v. ABD AL-RAHIM HUSSEIN AL-NASHIRI *Appellee*	)))))))))))))	Dated: 25 September 2023

BRIEF AMICUS CURIAE OF EUROPEAN CRIMINAL BAR ASSOCIATION

VINCENT ASSELINEAU
6, Villa Saint-Jacques
75014 Paris FRANCE
(+33.01.53.80.47.47)
vincent@asselineau-avocats.com
Chair of European Criminal Bar Association

ALEXIS ANAGNOSTAKIS
9, Mavromichali str
10679 Athens GREECE
+30-210-3633291
alexis@anagnostakis-law-offices.com
Chair of ECBA Human Rights Committee

NICOLA CANESTRINI
46, Corso Rosmini
38068 Rovereto ITALY
(+39.0464.436688)
nicola.canestrini@canestrinilex,com
Member of ECBA Human Rights Committee

VÂNIA COSTA RAMOS
Alameda Quinta de Santo António 13c
1600-675 Lisbon, PORTUGAL
(+351) 21 710 61 60
vaniacostaramos@carlospintodeabreu.com
Vice Chair of European Criminal Bar Association

TABLE OF CONTENTS

Interest of Amicus Curiae 3
Introduction on Council of Europe, European Convention on Human rights 5
Prohibition of torture under the ECHR................................... 8
Right to a fair trial under the ECHR 11
Administration of evidence 12
Torture tainted vidence.. 13
Conclusions.. 17

INTEREST OF AMICUS CURIAE

This intervention is submitted on behalf of the European Criminal Bar Association ("the ECBA"), in accordance with [US statute allowing amicus curiae intervention] [Cite the specific U.S. statute or legal provision authorizing amicus curiae intervention].

The ECBA, established in 1997, has evolved to become the foremost independent organization representing specialist defense lawyers across all member states of the Council of Europe. The ECBA's objectives, as enshrined in its Statute, are to "*represent the views of defense lawyers practicing in the member states of the Council of Europe, and to promote the administration of justice and human rights under the rule of law within the member states of the Council of Europe and among the peoples of the world*."

The fundamental mission of the ECBA is to advance the proper administration of justice and the protection of human rights through the tenets of the rule of law. Over the years, it has assumed a pivotal role as one of the primary dialogues for European institutions, engaging both with the European Union and the Council of Europe, especially on matters pertaining to criminal justice, the safeguarding of the right to defense, and fundamental human rights. The ECBA is resolutely committed to championing the fundamental rights of individuals under investigation, suspects, accused individuals, and those who have been convicted. Its ranks comprise specialized defense lawyers across the member countries of the Council of Europe, and membership is open to all lawyers, whether in active legal practice or within the academic realm, who endorse these noble objectives.

ECBA's multifaceted activities include:

Observations and Representations: The ECBA consistently offers its expert insights and representations concerning proposed legislation, with particular attention to EU legislation. This vital role aids in shaping legal frameworks that respect and protect the rights of individuals within Europe.

Consultancy to European Institutions: The ECBA is frequently sought as a consultant by European institutions. Its contributions to expert meetings and discussions inform policy-making and foster a deeper understanding of the unique challenges and opportunities within criminal justice systems.

Interventions Before International High Courts: The ECBA actively participates in legal proceedings before esteemed European High Courts, including but not limited to the European Court of Human Rights, the UN Working Group on Arbitrary Detention and national Constitutional Courts. Its interventions serve to uphold the principles of justice, fairness, and the rule of law within Europe.

In light of its extensive involvement in the realms of law, justice, and human rights across Europe, the ECBA possesses a profound legal interest and moral duty to contribute to the ongoing proceedings in the case of United States v. Abd al-Rahim Hussein al-Nashiri. This intervention is an embodiment of the ECBA's institutional unwavering commitment to upholding justice and human rights on a global scale.

INTRODUCTION ON COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS

The Council of Europe was founded in 1949 after the Second World War to protect human rights and the rule of law, and to promote democracy. The Member States' first task was to draw up a treaty to secure basic rights for anyone within their borders, including their own citizens and people of other nationalities. The Council of Europe's core values are human rights, democracy and the rule of law: focusing on those core values, the Council of Europe brings together governments from across Europe – and beyond – to agree minimum legal standards in a wide range of areas. It then monitors how well countries apply the standards that they have chosen to sign up to.

The European Convention on Human Rights (hereinafter "ECHR" or "Convention") is the first convention adopted by the Council of Europe and the cornerstone of all its activities. It was adopted in 1950 and entered into force in 1953. Its full title is the 'Convention for the Protection of Human Rights and Fundamental Freedoms'. The Convention guarantees specific rights and freedoms and prohibits unfair and harmful practices. The Convention secures, among else: the right to life (Article 2), freedom from torture (Article 3), freedom from slavery (Article 4), the right to liberty (Article 5), the right to a fair trial (Article 6), the right not to be punished for something that wasn't against the law at the time (Article 7), the right to respect for family and private life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of assembly (Article 11), the right to marry and start a family (Article 12), the right not to be discriminated against in respect of these rights (Article 14), the right to protection of property (Protocol 1, Article 1), the right to education (Protocol 1, Article 2), the right to participate in free elections (Protocol 1, Article 3), the abolition of the death penalty (Protocol 13).
Its ratification is a prerequisite for joining the Council of Europe, currently composed of 46 member States, including the 27 Member states of the European Union.

The European Court of Human Rights (hereinafter "ECtHR" or "Strasbourg Court") oversees the implementation of the Convention in the 46 Council of Europe member states. Individuals can bring complaints of human rights violations to the Strasbourg Court once all possibilities of appeal have been exhausted in the member state concerned.

Since its creation in 1959, the Court – which sits in single or grand chamber (GC) - has delivered more than 16,000 judgments. These

rulings have resulted in numerous changes to legislation and have helped to strengthen the rule of law in Europe. Through the Court's case-law, the European Convention on Human Rights has become a dynamic and powerful living instrument in response to new challenges and the ongoing promotion of human rights and democracy in Europe.

Even if the Courts' rulings are binding only for the parties, the Court's judgments and decisions serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, 1978, § 154 and *Jeronovičs v. Latvia* [GC], 2016, § 109).

The mission of the system set up by the Convention is thus to determine, in the general interest, issues of public policy, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (*Konstantin Markin v.Russia* [GC], 2012, §89). Indeed, the Court has emphasized the Convention's role as a "constitutional instrument of European public order" in the field of human rights (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], 2005, § 156, and more recently, *N.D. and N.T. v. Spain* [GC], 2020, § 110).

In 2021, the principle of subsidiarity has been inserted into the Preamble to the Convention. This principle "*imposes a shared responsibility between the States Parties and the Court*" as regards human rights protection, and the national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the rights and freedoms defined in the Convention and the Protocols thereto (*Grzęda v. Poland* [GC], § 324).

The Council of Europe and the European Union (hereinafter "EU") share the same fundamental values – human rights, democracy and the rule of law – but are separate entities which perform different, yet complementary, roles. The European Union, i.e. the European supranational political and economic union of 27 member states, refers to those same European values as a key element of its deeper political and economic integration processes. It often builds upon Council of Europe standards when drawing up legal instruments and agreements which apply to its member states. Furthermore, the European Union regularly refers to Council of Europe standards and monitoring work in its dealings with neighbouring countries, many of which are Council of Europe member states.

The Charter of Fundamental Rights of the European Union (hereinafter "EU Charter") enshrines into primary EU law a wide array of fundamental rights enjoyed by EU citizens and residents. It is legally binding for all member States of the EU; in addition, the European Union has laid down minimum safeguards in criminal proceedings, namely the right to access to a lawyer, the entitlement to free legal advice, the right to be informed of the accusation, the right to interpretation and translation, and the right to remain silent.

PROHIBITION OF TORTURE UNDER THE ECHR

Article 3 of the Convention rules that "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*"[1].

Article 3 enshrines one of the most fundamental values of democratic societies; in this respect, the Court has emphasized that the prohibition of torture has achieved the status of *jus cogens* or a peremptory norm in international law[2]. Indeed, the prohibition of torture and inhuman or degrading treatment or punishment is a value of civilization closely bound up with respect for human dignity (*Bouyid v. Belgium* [GC], 2015, § 81). The prohibition in question is absolute, no derogation from it being permissible even in the event of a public emergency threatening the life of the nation or in the most difficult circumstances, such as the fight against terrorism and organized crime or influx of migrants and asylum-seekers, irrespective of the conduct of the person concerned (*A. and Others v. the United Kingdom* [GC], 2009, § 126; *Mocanu and Others v. Romania* [GC], 2014, § 315; *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], 2012, § 195 and *Z.A. and Others v. Russia* [GC], 2009, §§ 187-188) or the nature of the alleged offence committed by him or her (*Selmouni v. France*, [GC], 1999, § 95, *Ramirez Sanchez v. France* [GC], 2006, § 116 and *Gäfgen v. Germany* [GC], 2010, § 87).

The prohibition under Article 3 of the Convention does not relate to all instances of ill-treatment (*Savran v. Denmark*, [GC], 2021, § 122). According to the Court's well-established case-law, in general, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of that level is relative and depends on all the circumstances of the case, such as duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (*Muršić v. Croatia* [GC], 2016, § 97). In order to determine whether the threshold of severity has been reached, other factors may be taken into consideration, in particular: **(a)** the purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it, although the absence of an intention to humiliate or debase the victim cannot conclusively rule out a finding of a violation of Article 3 of the Convention; **(b)** the context in which the ill-treatment was inflicted, such as an atmosphere of

---

[1] The same right is guaranteed by the EU Charter in Article 4. By virtue of Article 52(3) of the Charter, it has the same meaning and the same scope as the ECHR Article.

[2] The August 2022 updated "Guide on Article 3 of the European Convention on Human Rights - Prohibition of torture" recalls leading, major, and/or recent ECtHR's judgments and decisions.

heightened tension and emotions; and **(c)** whether the victim is in a vulnerable situation (*Khlaifia and Others v. Italy* [GC], 2016, § 160).

In order to determine whether a particular form of ill-treatment should be qualified as **torture**, the Court will have regard to the distinction embodied in Article 3 between this notion and that of inhuman or degrading treatment[3].

The framers had the **intention** that the Convention, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing **very serious and cruel suffering**; the same distinction is drawn in Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter "UNCAT"; see *Ireland v. the United Kingdom*, 1978, § 167, *Selmouni v. France* [GC], 1999, § 96 and *Ilaşcu and Others v. Moldova and Russia* [GC], 2004, § 426).

In addition to the severity of the treatment, there is a **purposive element**, as recognized in the UNCAT, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information or a confession, inflicting punishment or intimidation (*Selmouni v. France* [GC], 1999, § 97; *Salman v. Turkey* [GC], 2000, § 114; *Al Nashiri v. Poland*, 2014, § 508 and *Petrosyan v. Azerbaijan*, 2021, § 68).

For instance, treatment was found to amount to "**torture**" when:

- the applicant was stripped naked, with his arms tied together behind his back and suspended by his arms ("Palestinian hanging") by State

[3] The distinction between torture, inhuman treatment or punishment and degrading treatment or punishment derives principally from a difference in the intensity of the suffering inflicted (Ireland v. the United Kingdom, 1978, § 167). The Court has considered treatment or punishment to be "**inhuman**" because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (Labita v. Italy [GC], 2000, § 120 and Kudła v. Poland [GC], 2000, § 92). Treatment is considered to be "**degrading**" when it humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance. Furthermore, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3 (Gäfgen v. Germany [GC], 2010, § 89; Ilaşcu and Others v. Moldova and Russia [GC], 2004, § 425; M.S.S. v. Belgium and Greece [GC], 2011, § 220). It should be noted that the Convention is considered a living instrument which must be interpreted in the light of present-day conditions": acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. The Court has taken 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 (*Selmouni v. France* [GC], 1999, § 101).

agents while in police custody in order to extract a confession (*Aksoy v. Turkey*, 1996, § 64);

- the applicant was raped and subjected to a number of acts of other physical and psychological ill-treatment while in custody (*Aydın v. Turkey*, 1997, §§ 83-87);

- the applicants were deprived of sleep, subjected to "Palestinian hanging" and "falaka", sprayed with water, beaten for several days while in custody in order to extract a confession (*Batı and Others v. Turkey*, 2004, § 110 and §§ 122-124);

- the applicant, a detainee who was on hunger strike, was forced fed, despite the absence of medical necessity and with the use of handcuffs, a mouth-widener, a special rubber tube inserted into the food channel and, in the event of resistance, with the use of force *(Nevmerzhitsky v. Ukraine*, 2005, § 98);

- the applicant was subjected to combined and premeditated measures involving handcuffing, hooding, forcibly undressing, forcibly administrating a suppository while held on the ground without any medical necessity, in the framework of "extraordinary rendering", geared to obtaining information from the applicant or punishing or intimidating him (*El-Masri v. the former Yugoslav Republic of Macedonia* [GC], 2012, § 205);

- severe beatings by police officers resulting in the death of the applicants' relative (*Satybalova and Others v. Russia*, 2020, § 76; see also *Lutsenko and Verbytskyy v. Ukraine*, 2021, §§ 79-80 where Mr Verbyskyy was beaten to death by non-State agents hired by police in the context of the Maidan protests).

The Court has not ruled out that a **threat** of torture can also amount to torture, as the nature of torture covers both physical pain and mental suffering. In particular, the fear of physical torture itself may in certain circumstances constitute mental torture. However, it has underlined that the classification of whether a given threat of physical torture amounted to psychological torture or to inhuman or degrading treatment depended upon all the circumstances of a given case, including, notably, the severity of the pressure exerted and the **intensity** of the mental suffering caused (*Gäfgen v. Germany* [GC], 2010, § 108).

RIGHT TO A FAIR TRIAL UNDER THE ECHR

Several fair trial rights enshrined in international and regional human rights law can safeguard suspects from being tortured or ill-treated to obtain a confession during the investigative stage of detention, where the risk of torture or other ill-treatment is highest. In particular, these include the right to the presumption of innocence, the right against self-incrimination, the right to legal assistance, the right to have a third party informed of arrest and the right to be notified of one's rights[4].

Article 6 of the Convention rules in the relevant part that "*in the determination of (..) any criminal charge against him, everyone is entitled to a fair (..) hearing (..) by a (..) tribunal established by law. (..)"*[5] It should be noted that the guarantees surrounding the right to a fair trial under Article 6 ECHR apply from the moment that a "*criminal*

[4] Under European Union law, Articles 47-49 of the EU Charter protect the right to a fair trial, the presumption of innocence and right of defence; as pointed out above, the EU has adopted 6 directives on procedural rights for suspects and accused persons starting from 2009. More in detail, the EU established (minimum) additional and mandatory rules on the right to information, the right to interpretation and translation, the right to legal assistance, the right to be presumed innocent and to be present at trial, special safeguards for children suspected and accused in criminal proceedings and the right to free legal aid in the so-called EU Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, as outlined at: European Commission, Rights of suspects and accused", (2019).

[5] Although not specifically mentioned in Article 6 of the Convention, the right to remain silent and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 § 1. The right not to incriminate oneself in particular presupposes that the authorities seek to prove their case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see, inter alia, Saunders, 1996, Reports 1996-VI, § 68; J.B. v. Switzerland, 2001, 64).
Full text of article 6 reads as follows: "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order
or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

charge" exists within the meaning of the ECtHR case-law. Thus they are relevant during pre-trial proceedings.

The Court has noted that the investigation stage may be of particular importance for the preparation of the criminal proceedings: the evidence obtained during this stage often determines the framework in which the offence charged will be considered at the trial. An accused may therefore find themselves in a particularly vulnerable position at that stage, the effect of which may be amplified by increasingly complex legislation on criminal procedure, especially evidentiary ones (*Ibrahim and Others v. UK* [GC], 2016, §253).

Administration of evidence

Regarding the trial phase, while Article 6 guarantees the right to a fair hearing, generally it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (*Jalloh v. Germany* [GC], 2006, §94 ff.): it is therefore not the role of the ECtHR to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not.

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 violation of another Convention right is concerned, the nature of the violation found (*Khan v. the United Kingdom*, 2000, § 34; *P.G. and J.H. v. the United Kingdom*, 2001, § 76; *Allan v. the United Kingdom*, 2002, § 42).

In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defense have been respected. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (*Bykov v. Russia* [GC], 2009, § 89; *Jalloh v. Germany* [GC], 2006, § 96). In this connection, the Court also attaches weight to whether the

evidence in question was or was not decisive for the outcome of the criminal proceedings (*Gäfgen v. Germany* [GC], 2010, § 164)[6].

Torture tainted evidence

However, particular considerations apply in respect of the use in criminal proceedings of evidence obtained in breach of Article 3.

The use of such evidence, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction (*Jalloh v. Germany* [GC], 2006, §§ 99 and 105; *Harutyunyan v. Armenia*, 2007, § 63; see, by contrast, *Mehmet Ali Eser v. Turkey*, 2019, § 41, where no statements obtained by coercion were in fact used in the applicant's conviction).

Therefore, 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 (*Gäfgen v. Germany* [GC], 2010, § 166; *Ibrahim and Others v. the United*

---

[6] As to the examination of the nature of the alleged unlawfulness in question, the test has been applied in cases concerning complaints that evidence obtained in breach of the defence rights has been used in the proceedings. This concerns, for instance, the use of evidence obtained through an identification parade (*Laska and Lika v. Albania*, 2010), an improper taking of samples from a suspect for a forensic analysis (*Horvatić v. Croatia*, 2013), exertion of pressure on a co-accused, including the questioning of a co-accused in the absence of a lawyer (*Erkapić v. Croatia*, 2013; *Dominka v. Slovakia* (dec.), 2018; *Stephens v. Malta (no. 3)*, 2020, §§ 64-67; *Tonkov v. Belgium*, 2022, §§ 64-68); use of planted evidence against an accused (*Layijov v. Azerbaijan*, 2014, § 64; *Sakit Zahidov v. Azerbaijan*, 2015, §§ 46-49; *Kobiashvili v. Georgia*, 2019, §§ 56-58), unfair use of other incriminating witness and material evidence against an accused (*Ilgar Mammadov v. Azerbaijan (no. 2)*, 2017; *Ayetullah Ay v. Turkey*, 2020); use of self-incriminating statements in the proceedings (*Belugin v. Russia*, 2019, § 68-80); and use of expert evidence in the proceedings (*Erduran and Em Export Dış Tic A.Ş. v. Turkey*, 2018, §§ 107-112; see also *Avagyan v. Armenia*, 2018, § 41, and *Gülağacı v. Turkey* (dec.), 2021, §§ 35-40). The same test has been applied in cases concerning the question whether using information allegedly obtained in violation of Article 8 as evidence rendered a trial as a whole unfair under the meaning of Article 6. This concerns, for instance, cases related to the use of evidence obtained by (unlawful) secret surveillance (*Bykov v. Russia* [GC], 2009, §§ 69-83; *Khan v. the United Kingdom*, 2000, § 34; *Dragojević v. Croatia*, 2015, §§ 127-135; *Niţulescu v. Romania*, 2015; *Dragoş Ioan Rusu v. Romania*, 2017, §§ 47-50; *Falzarano v. Italy* (dec.), 2021, §§ 43-48; *Lysyuk v. Ukraine*, 2021, §§ 67- 76), and search and seizure operations (*Khodorkovskiy and Lebedev v. Russia*, 2013, §§ 699-705; *Prade v. Germany*, 2016; *Tortladze v. Georgia*, 2021, §§ 69, 72-76, concerning the search of the premises of an honorary consul; *Budak v. Turkey*, 2021, §§68-73 and 84-86, concerning, in particular, the importance of examining the issues relating to the absence of attesting witnesses).

Kingdom [GC], 2016, § 254; *El Haski v. Belgium*, 2012, § 85; *Cēsnieks v. Latvia*, 2014, §§ 67-70). The same principles apply concerning the use in criminal proceedings of statements obtained as a result of ill-treatment by private parties (*Ćwik v. Poland*, 2020).

This also holds true for the use of **real evidence** obtained as a direct result of acts of torture (*Gäfgen v. Germany* [GC], 2010, § 167; *Jalloh v. Germany* [GC], 2006, § 105). The admission of such evidence obtained as a result of an act classified as inhuman treatment in breach of Article 3, but falling short of torture, will only 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 (*Gäfgen v. Germany* [GC], 2010, § 178; *El Haski v. Belgium*, 2012, § 85; *Zličić v. Serbia*, 2021, § 119).

These principles apply not only where the victim of the treatment contrary to Article 3 is the actual defendant but also where third parties are concerned (*El Haski v. Belgium*, 2022, § 85; *Urazbayev v. Russia*, 2019, § 73). In particular, the Court has found that the use in a trial of evidence obtained by torture would amount to a flagrant denial of justice even where the person from whom the evidence had thus been extracted was a third party (*Othman (Abu Qatada) v. the United Kingdom*, 2012, §§ 263 and 267; *Kaçiu and Kotorri v. Albania*, 2013, § 128; *Kormev v. Bulgaria*, 2017, §§ 89-90).

In cases where a defendant makes a *prima facie* case about the real evidence, forming the basis of conviction, potentially obtained through ill-treatment, national courts are under an obligation to "adequately examine" such an argument and assess the quality of the evidence (ibid. §96, see also *Iordan Petrov v. Bulgaria*, 2012 §140, where the ECtHR refers to the domestic courts' obligation to carry out an *"analyse approfondie"* of the facts of the case if ill-treatment allegations are put forward).

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

The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence in issue: public interest concerns cannot justify measures which extinguish the very essence of an applicant's defense rights, including the privilege against

self-incrimination guaranteed by Article 6 of the Convention (mutatis mutandis, *Heaney and McGuinness v. Ireland*, 2000, §§ 57-58).

Even if the right to a fair trial under Article 6 ECHR is not an absolute right, in practice it may be linked to prohibition of torture established under art 6, which enshrines an absolute freedom.

As the ECtHR has stated (*Gäfgen v. Germany* [GC] 2010, §178), the need to curb ill-treatment and effectively protect individuals therefrom during investigations may require the exclusion from use at trial of real evidence which has been obtained as the result of any violation of Article 3 ("exclusionary rule"): however, the Court considers that both a criminal trial's fairness and the effective protection of the absolute prohibition under Article 3 in that context regarding use of "real evidence" are only at stake 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. In any case, even if the admission of such evidence was not decisive in securing the conviction an issue may arise under Article 6 § 1 in respect of evidence obtained in violation of Article 3 of the Convention (*İçöz v. Turkey* (dec.), 2003, and *Koç v. Turkey* (dec.), 2003).

As regards the use of evidence obtained in breach of the right to silence and the privilege against self-incrimination, the Court has acknowledged that these are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6 ((*Jalloh v. Germany* [GC], 2006, §100). Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (*ibidem*).

Trying to summarize the Courts' view:

(i) absolute prohibition of use of <u>confessions</u> made in violation of Article 3 ECHR (torture, inhuman or degrading treatment)

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

(ii) prohibition of use of <u>real evidence</u> tainted by torture

In this context, ECtHR's case law characterizes as real evidence material obtainable from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect, such as documents acquired pursuant to a warrant, breath, blood, urine, hair or voice samples and bodily tissue for the purpose of DNA testing.

Under the ECtHR case-law (*Jalloh v. Germany* [GC], 2006, §105), incriminating evidence consisting of so called "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.

(iii) assessment of incriminating real evidence obtained through forms of ill-treatment different from torture (inhuman or degrading treatment)

The admission of evidence obtained as a result of an act qualified as inhuman treatment in breach of Article 3, but falling short of torture, may breach Article 6, if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on their conviction or sentence (*El Haski v. Belgium,* 2012, §85).

The ECtHR has underlined that all the above principles apply not only where the victim of the treatment contrary to Article 3 is the actual defendant but also where third parties are concerned (*Othman (Abu Qatada) v. UK*, 2012, §263-267, *Ćwik v. Poland*, 2020, §77 and §89, in the latter case, in particular, ill-treatment was inflicted on a third party by private individuals).

CONCLUSIONS

The absolute prohibition on the use of evidence obtained by torture stems from the prohibition on torture itself.

The *Amicus curiae* stresses that in order to absolutely prohibit and oppose the use of torture, evidence obtained through the use of torture must also be absolutely prohibited.

In the aforementioned fundamental cases where the ECtHR has found violations of the right to a fair trial enshrined in article 6 ECHR, the judgments appear to have considered as root cause of the violations the domestic courts' practice concerning the exclusionary rule which was non-ECHR compliant, rather than flawed domestic legislation.

The ineffectiveness of efforts to put an end to the practice of torture or other ill-treatment is indeed often the result of the fact that evidence tainted by torture or other ill-treatment is admitted during trials.

The admission of evidence, including "real" evidence obtained through a violation of the absolute prohibition of torture and other ill-treatment in any proceedings, constitutes an incentive for law-enforcement officers to use investigative methods that breach these absolute prohibitions. It indirectly legitimizes such conduct and objectively dilutes the absolute nature of the prohibition. A strong exclusionary rule prevents the use of tainted evidence at trial, thereby removing a key incentive – gain evidence for a subsequent conviction - for the use of torture and ill-treatment.

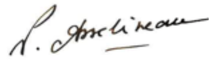
We would like to conclude by recalling the words of the European Court of Human Rights

"*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" (*Jalloh v. Germany* [GC], 2006, §105).

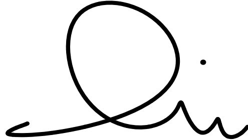
Respectfully,

VINCENT ASSELINEAU
Chair of European Criminal Bar Association



ALEXIS ANAGNOSTAKIS
Chair of ECBA Human Rights Committee

NICOLA CANESTRINI
Member of ECBA Human Rights Committee



VÂNIA COSTA RAMOS
Vice Chair of European Criminal Bar Association