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Tasting the Poisoned Fruit

The Admissibility of Evidence Derived from Torture and Ill-Treatment Across Human Rights Regimes

It has recently been made public that Magnus Gäfgen, who in 2002 kidnapped and murdered a child in Germany, has applied for release from prison. The case attracted widespread attention after police threatened him with severe suffering if he refused to reveal the child's location, and while his subsequent confession was ruled inadmissible, German courts admitted derivative evidence, including the child's body and tire tracks. Following this ruling, Gäfgen again confessed before the court and was ultimately convicted of murder and kidnapping and sentenced to life imprisonment (*Gäfgen v. Germany*, para. 32-33).

This renewed attention to the case provides an opportunity to revisit a key question: when real evidence – such as fingerprints, DNA traces or a weapon – is obtained through torture or other cruel, inhuman, or degrading treatment (“ill-treatment”), should it nevertheless be admissible, or must it be automatically excluded to safeguard both the absolute prohibition of torture and ill-treatment and the right to a fair trial? This blog post examines the approaches of various human rights regimes, with particular focus on the European Court of Human Rights (ECtHR), whose approach diverges notably from other international and regional human rights bodies.

General Approaches to Derivative Evidence

The treatment of derivative evidence – material discovered as a result of prior misconduct, such as the discovery of stolen goods during an unauthorized house search – varies across jurisdictions. In the United States, the “fruit of the poisonous tree” doctrine firmly excludes such evidence to discourage law enforcement from using improper methods. Other jurisdictions are more sceptical, viewing strict exclusion as potentially obstructing truth-finding and effective prosecution (e.g. *Ransiek/Lehnert*, pp. 674-675). Yet, there seems a notable point of consensus: evidence derived from torture must be excluded.

International and Regional Human Rights Approaches

Comparing various human rights instruments, particular attention must be paid to the interplay between the prohibition of torture and ill-treatment and the right to a fair trial, especially regarding the scope of both protections. Two questions are central: (1) Does the prohibition extend only to the use of statements, or does it also cover derivative evidence? and (2) Is a distinction drawn between torture and ill-treatment, and if so, does this distinction entail different legal consequences?

Article 15 United Nations Convention Against Torture (*UNCAT*) requires States to exclude any statement made as a result of torture, whether that should be interpreted broadly enough to include derivative evidence remains debated (see *Monina*, p. 422). However, in its General Comment (GC) No. 2 the Committee Against Torture (CAT) rejects any meaningful distinction between torture and ill-treatment. In practice, the line between the two is often difficult to define and conditions that give rise to ill-treatment frequently facilitate torture (*GC No. 2*, para. 3), accordingly, Article 15 UNCAT applies equally to ill-treatment (*GC No. 2*, para. 6).

Article 7 International Covenant on Civil and Political Rights (*ICCPR*) prohibits torture and ill-treatment, while Article 14 ICCPR guarantees the right to a fair trial. While Article 14(3)(g) ICCPR explicitly forbids compelling a person to testify against themselves, the Human Rights Committee (HRC) highlights that not only confessions but any evidence obtained in violation of Article 7 ICCPR is inadmissible, as Article 7 ICCPR is non-derogable in its entirety (*GC No. 32*, para. 6). This interpretation extends the exclusionary rule to derivative evidence without distinguishing between torture and ill-treatment.

Under the African Charter on Human and Peoples' Rights (ACHPR) and the American Convention on Human Rights (ACHR), similar approaches are followed. With regard to the right to a fair trial enshrined in Article 7 of the *ACHPR*, the African Commission on Human and Peoples' Rights has held that any confession or other evidence obtained by coercion or force is inadmissible

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(*Guidelines on the Right to a Fair Trial*, N(6)(d)(1), *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, para. 218). In the ACHR, Article 8(3)(h) similarly requires confessions to be made without coercion. In its case law the Inter-American Court of Human Rights (IACtHR) clarified that the exclusionary rule also extends to derived evidence to guarantee its absolute nature (*García and Flores v. Mexico*, para. 167).

The ICCPR, ACHPR, and IACtHR jurisprudence consistently exclude evidence obtained through torture or ill-treatment, including derivative evidence, without differentiating between the two. The UNCAT, though less explicit on derivative evidence, similarly rejects any distinction. Across these regimes, the absolute prohibition of torture and ill-treatment underpins the broad protection of the right to a fair trial.

The Diverging Approach of the ECtHR

Turning to the ECtHR, the right to a fair trial is guaranteed in Article 6 of the *European Convention on Human Rights* (ECHR), while Article 3 ECHR prohibits torture and ill-treatment. Neither provision contains explicit rules on admissibility of evidence. According to the ECtHR, admissibility is primarily a matter of domestic law; its own task is to assess whether the proceedings were fair overall (*Schenk v. Switzerland*, paras. 45-46; *Guide on Article 6*, paras. 210-211). To that end, it considers the nature of the unlawfulness, adversarial opportunities for the defence, the reliability of evidence and the circumstances of its collection, the adequacy of judicial review, and whether the evidence was decisive for the outcome (*Key Theme – Article 6 §1*, p. 1).

Despite this relatively broad fairness test and its position that admissibility is generally a matter for domestic courts, the ECtHR excludes certain evidence outright. Confessions obtained through torture or ill-treatment are deemed inadmissible, irrespective of their impact on the conviction (e.g. *Gäfgen v. Germany*, para. 166), and real evidence derived from torture is similarly excluded to avoid indirectly legitimising conduct proscribed by Article 3 ECHR (*Jalloh v. Germany*, para. 105). In this respect, its case law aligns with other human rights regimes.

The divergence emerges in cases of ill-treatment. The ECtHR stated that it left open the question whether evidence obtained through ill-treatment automatically renders a trial unfair (*Gäfgen v. Germany*, para. 173). In practice, the Court applies its fairness test and focuses on whether the admitted evidence affected the fairness of the trial. It considers in particular the impact on the rights of the defence, especially whether the applicant had an opportunity to challenge the authenticity of the evidence and oppose its use, thereby safeguarding equality of arms, as well as whether the evidence had an impact on the outcome of the trial (*Guide on Article 6*, para. 212). If the evidence did not serve as a basis for the conviction, the Court considers there to be a break in the causal chain between its unlawful obtention and the defendant's conviction (*Gäfgen v. Germany*, para. 180). In line with this, the ECtHR finds a violation of Article 6 ECHR only where the breach of Article 3 ECHR had a bearing on the outcome, as it is then that the fairness of the criminal trial and the effective protection of the absolute prohibition under Article 3 ECHR would be at stake (*Guide on Article 6*, para. 217).

Why, then, does the ECtHR distinguish between torture and ill-treatment, when no other human rights body does? Neither the wording of nor the *Guide* on Article 3 ECHR suggest that the two categories carry different legal consequences; both are absolutely prohibited. The ECtHR's methodology – assessing overall fairness rather than admissibility per se – may explain this approach. Yet this explanation is unconvincing, since the Court has not hesitated to adopt strict exclusionary rules where necessary to safeguard the absolute nature of Article 3 ECHR – at least in cases involving torture.

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The ECtHR's reasoning is contradictory. It concedes that the admission of evidence obtained through ill-treatment carries serious risks: it may incentivise law-enforcement authorities to resort to unlawful methods and undermine the integrity of the judicial process – a value it regards as central to societies governed by the rule of law (*Gäfgen v. Germany*, paras. 175, 178). At the same time, the Court argues that excluding reliable real evidence may seriously impede the effective prosecution of crime, undermining the strong interests of victims, their families, and the public in prosecution and punishment (*Gäfgen v. Germany*, para. 175). These arguments are equally true for evidence obtained through torture, yet while the Court imposes an automatic exclusionary rule in those cases, it weighs these competing interests when the evidence arises from ill-treatment. The ECtHR maintains that, unlike Article 3 ECHR, Article 6 ECHR is not absolute, and thus allows for such a balancing of interests (e.g. *Gäfgen v. Germany*, para. 178), thereby effectively subjecting the absolute provisions of Article 3 ECHR to a balancing of interests through the “back door”.

Several dissenting judges in the *Gäfgen* case also emphasised that the absolute nature of Article 3 ECHR can only be ensured through a strict exclusionary rule under Article 6 ECHR, without distinguishing between torture and ill-treatment, and that if effective prosecution suffers as a result, responsibility for this lies with the State authorities (*Partly Dissenting Opinion of Rozakis et al.*, paras. 9-11).

Finally, the ECtHR also justified its stance by pointing to the absence of a clear consensus among the Contracting States, other national courts and other human rights monitoring institutions, regarding the precise scope of the exclusionary rule (*Gäfgen v. Germany*, para. 174). In light of the review of the approaches of the human rights monitoring institutions above, this argument is surprising. While the Court referred to certain statements from the HRC and the CAT (*Gäfgen v. Germany*, paras. 69-74) it did not address the GCs issued in 2007 and 2008 analysed earlier, which had been available before its 2010 judgment. Those GCs, though not definitively settling the exclusionary rule's scope, clearly rejected any distinction between torture and ill-treatment. Had the Court also incorporated the approaches of other regional human rights institutions into its analysis, in addition to the international fora's it considered, the argument for extending the exclusionary rule would have been even stronger. Thus, while the ECtHR's concern about the lack of consensus among Contracting States cannot be dismissed entirely, its reliance on other human rights monitoring institutions appears selective and rather thin.

Conclusion

Respecting the absolute nature of the prohibition of torture and ill-treatment requires automatic exclusion of derivative evidence, simultaneously ensuring the right to a fair trial. A distinction between torture and ill-treatment is neither supported by the wording of the relevant provisions nor does it appear meaningful in substance. In this respect, the ECtHR's reasoning appears self-contradictory. Given that other human rights instruments adopt a largely uniform approach, it would be desirable for the ECtHR to revisit this issue.