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LEGAL AID AND THE ACCESS TO FORENSIC EXAMINATIONS BASED ON THE ISTANBUL PROTOCOL.

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ABSTRACT: Access to justice requires an inclusive vision of the people-centered justice ecosystem that encompasses more than just legal services. In many countries, one of the major challenges is ensuring the due process of law to victims of torture. According to the international standards, soon after detention, all defendants are entitled to have legal advice and representation, and to receive a medical examination by an independent medical doctor. Furthermore, one of the ways to ensure the fairness of a court decision is using forensic science in its different fields. The use of the exclusionary rule relies chiefly on prompt expert examinations. The article exams the case of seven Brazilian men who were tortured in a military base in Rio de Janeiro. Only the day after custody they were presented to a magistrate, who disregarded their allegations of torture and sustained their arrest. Another medical examination was applied with the guidance of international medical experts and in line with the Istanbul Protocol. The reports confirmed that the men's allegations of torture were "highly consistent" with their injuries and psychological state. Relying on these reports, the state court acquitted all seven men. A fair trial in cases of alleged torture becomes possible when: 1) the detainee has immediate access to the justice system, including legal representation, forensic examination and being presented before a judge; 2) the state provides independent experts in different fields, especially when a state agent is responsible for the alleged torture; 3) the exclusionary rule covers any evidence obtained as a result of inhuman or degrading treatment or punishment; 4) access to justice must be comprehensive, multidisciplinary, and provided by legal and non-legal providers who are fully supplied by the state, regardless of a person's lack of means; 5) acts of torture must be redressed, including

not only full pecuniary reparation, but also the rehabilitation of the victim in relation to what the victim may need.

Keywords: Access to Justice, right to a fair trial, forensic examination, Istanbul Protocol, Minnesota Protocol, Interamerican Court of Human Rights, European Court of Human Rights, Brazil.

1. Introduction

Access to justice is a fundamental right and a crucial topic on the UN 2030 Agenda (SDG 16.3), since sustainable peace and development cannot be achieved without justice. The OECD report "Equal Access to Justice for Inclusive Growth: Putting People at the Centre" (2019) highlighted that the lack of access to justice can be both a result and a cause of disadvantage, since unmet legal needs potentially result in social and health problems, lost productivity, and reduced access to economic opportunities, education and employment. According to the OECD, "a conservative estimate places the annual costs of legal problems in a range going from 0.5% to 3% of the GDP in most countries"[1]. The report also recommends a vision for re-orienting the systems of delivering justice services towards a people-centered justice model and a holistic ecosystem that encompasses several justice commitments.

To ensure that every person has effective access to justice, mechanisms and systems must be available for fair resolution of disputes, redress for human rights violations and accountability for wrongdoings.

The "United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems", establishes that "States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process"[2]. Regarding the rights of persons arrested, the "Principles and Guidelines" clearly endorse the access to legal advice and representation as early as possible, immediate presentation before the court and information of any mechanism available for filing complaints of torture or ill-treatment. These measures have been shown to be fundamental to implementing effective public policies for access to justice and torture prevention.

[1] Building a Business Case for Access to Justice: An OECD White Paper in collaboration with the World Justice Project <https://www.oecd.org/gov/building-a-business-case-for-access-to-justice.pdf> accessed 17 March 2023.
[2] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: Principle 7. Prompt and effective provision of legal aid, Par 27. <https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf> accessed 18 March 2023.

The UN Human Rights Committee has also stressed that the protection of detainees requires prompt and regular access to be given by doctors and lawyers[3], indicating that access to justice shall be more comprehensive than access to legal services. Indeed, the assessment by a forensic doctor or a psychiatrist is critical to the public defender or defense lawyer to invalidate any evidence obtained as a result of inhuman or degrading treatment or punishment, and to support the request for release and discharge, as well as the redress for any violence suffered.

In this same direction, the European Convention on Human Rights (ECHR) enshrines the right to a fair trial (art. 6). Grounded on this principle, the application of expert opinions is considered by the European Court of Human Rights (ECtHR) to be one of the main tools to establish the truth in cases.[4]

The Interamerican Court of Human Rights has been holding *stare decisis* on this topic:

> "Thus, failure to carry out a medical examination on a person who was in the custody of the State or carrying out the examination without complying with the standards applicable, cannot be used to question the veracity of allegations of mistreatment by alleged victim. Likewise, the absence of physical signs does not imply that there was no abuse, as it is often the case that these acts of violence against people do not leave marks or permanent scars"[5].

The effective provision of legal services and substantial access to justice rely, in many aspects, on multidisciplinary approaches. The field of forensic justice covers various and dynamic fields of scholarship. Due to new technological solutions, scientific developments, and methodological achievements, forensic science is in constant development. The outcome of a trial usually depends entirely on the conclusion set out in the forensic expert research that contributes to a successful trial – meaning the acquittal of innocent people and the conviction of criminals. Assuring this expertise to defendants who cannot afford it is a fundamental matter of equality of arms.

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[3] Human Rights Committee, General Comment 20, par 11 (Twenty first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\GEN\1\Rev.1 at 14 (1994).

[4] European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights' (2021) p. 94: "418. A medical expert report pertaining to a technical field that is not within the judges' knowledge is likely to have a preponderant influence on their assessment of the facts; it is an essential piece of evidence and the parties must be able to comment effectively on it (Mantovanelli v. France, 1997, § 36; Storck v. Germany, 2005, § 135). It is an important requirement that the expert should be independent from the parties to the case, both formally and in practice (Tabak v. Croatia, 2022, § 60)". < https://www.echr.coe.int/documents/guide_art_6_eng.pdf> accessed 18 April 2023.

[5] Interamerican Court of Human Rights. Case Espinoza Gonzáles vs. Peru. Sentence. 20 November 2014 (Preliminary Exceptions, Merits, Reparations and Costs). Par. 156.

However, medical and psychological reports of good quality, if not provided by the State, are not accessible to the majority of detainees. In cases of defendants who are victims of torture, such reports can make the total difference between a fair or an unfair trial.

2. Access to justice by defendants who are victims of torture

Torture is one of the most serious crimes known to humanity not only because it involves the intentional infliction of severe physical and mental pain, but also because it is committed by officials or with the acquiescence of officials, and it is often concealed effectively to prevent justice and accountability.

The global survey "Does Torture Prevention Work?"[6] concluded that ensuring due process during the first few hours of police custody is one of the most effective measures to deter torture. In 2017, the UN Rapporteur on Torture stated that "[i]t is during the first hours and days after arrest that the risk of torture and other forms of ill-treatment is the highest. The right to have access to a lawyer promptly after apprehension and at all stages of the investigation process constitutes an effective safeguard against such abuse"[7].

Indeed, it is the primary duty of a public defender or a defense lawyer to ensure that the rights of the defendant are fully respected at all times, and that only evidence which has been properly obtained should be admissible in court. In order to fulfil this function, the defense needs adequate resources.

In a broad perspective of access to justice, it is necessary to exclude all the evidence obtained through torture, as well as to ensure that the victims – if not released – will not be imprisoned in facilities where they are at risk of torture or subjected to ill-treatment. Furthermore, the damage caused by the act of torture must be redressed, and this includes full pecuniary reparation and rehabilitation of the victim.

As discussed above, a timely and adequate forensic assessment can make all the difference between being held or released, convicted or acquitted. That is the case when a lawyer is representing someone recently arrested that shows physical or psychological signs and symptoms of torture, among other measures.

Upon any sign of institutional violence, the detainee must undergo a medical or psychological examination, the report of which may determine the respective steps to his own defense.

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[6] Carver, Richard and Handley, Lisa, Does Torture Prevention Work? (Liverpool University Press, 2017).

[7] UN Human Rights Council. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Turkey. 2017. Par. 63. <file:///C:/Users/Andr%C3%A9/Downloads/A_HRC_37_50_Add-1-EN.pdf> accessed on 22 April 2023.

The Inter-American Court of Human Rights pronounces a consolidated understanding on the positive duty of States to investigate human rights violations, which is included within the scope of protection of the judicial guarantees provided for in arts. 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention on Human Rights (ACHR). They comprise the protection of access to justice and judicial guarantees, inserted in the sphere of safeguarding the right to the truth – of undisputed primacy not only in transitional periods, but equally important at the heart of consolidated democratic conjunctures.

In its decisions, the Interamerican Court reiterates that the duty to investigate is subject to the procedures adopted internally, which is not just a simple formality. According to the jurisprudence of the Inter-American Court[8], both the adequacy and investigative effectiveness presuppose that the procedure: i) be initiated and expire within a reasonable period of time; ii) be carried out from the articulation of all available legal means; iii) be executed with impartiality and with the collaboration of state agents to clarify the portrayed illicit acts; iv) include the collaboration of victims and their families; v) pursue the truth and the accountability of perpetrators.

Despite this clear guidance, in many cases it is not often implemented. In fact, torture can be difficult to prove. The signs of bodily injury, alone, may indicate that a prisoner got hurt when falling while trying to escape, or was injured resisting arrest, or was even attacked by third parties before the moment of arrest. The physical exam may detect the injuries, but indicate no substantial evidence of torture.

Such is the case in a large number of situations. The annual Report on torture (2021) produced by the Public Defender's Office in Rio de Janeiro (Brazil) shows that arrested individuals who claim to have suffered torture or mistreatment, do not receive any judicial protection nor are released from prison, despite the expert reports indicating the existence of injuries. The quick and superficial analysis of the experts fails to establish a link with the action of state agents and the injuries[9]. Given the lack of more in-depth forensic examinations, what most often remains is the "hearsay" of the accused against the "information" provided by police.

[8] CORTE IDH. Case Panel Blanca (Paniagua Morales and others) vs. Guatemala. Sentence May 8, 1998, § 3.6, 199, 200; Case Maritza Urrutia vs. Guatemala. Sentence November 27, 2003, § 126; Case Tibi Vs. Ecuador. Sentence September 7, 2004, § 159; Case Gutiérrez Soler vs. Colombia. Sentence September 12, 2005, § 95.

[9] Annual Report on torture and degrading treatment. Public Defender's Office of the State of Rio de Janeiro. 20121.<https://sistemas.rj.def.br/publico/sarova.ashx/Portal/sarova/imagem-dpge/public/arquivos/Relat%C3%B3rio_casos_tortura_e_maus_tratos_junho2019-agosto2020_-_v3_(1).pdf> accessed 25 March 2023.

According to the report, regarding the incidence of alleged police aggression in Rio de Janeiro, a set of judicial decisions were examined and the researchers found that, although the judges consider reports of aggression, in a sample of 28 cases, the majority accusations of police brutality were disqualified:

> Of the total of 22 cases of alleged brutality, the judges disqualified the statements of the accused, or understood that the tests carried out concluded that the accused did not have any injury compatible with the reported aggressions. Even injuries confirmed to have been inflicted after arrest, the injuries were not considered sufficient to invalidate the criminal act or discredit the reports of public agents. Therefore, any flaws in the investigation would not contaminate the criminal lawsuit.[10]

The report indicates the profile of the 1,250 people arrested, subjected to torture and ill-treatment. The majority of the alleged victims were men (96%), almost always black or brown (about 80%), more than half aged between 18 and 40, who did not finish high school (71%), physically and/or psychologically assaulted in the act of arrest, most often by military state police (85.6%). In the context of an inequal criminal justice system, the social-economic vulnerabilities and racial discrimination are other hindrances to a fair trial and the due process of law.

Tilting the scales of justice, the statements of the detainees and the existence of body injuries evidence are consistently disregarded, which represents a set of challenges to deliver an effective access to justice to victims of state torture who cannot afford a prompt legal and forensic services.

3. Exclusionary rule, Istanbul Protocol and Legal defense strategies

The prohibition of torture has been universally understood to mean that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (article 5[11]). The prohibition of torture is also complemented by the obligation to prevent torture, and both are internationally recognized in the United Nations Convention against Torture and its Optional Protocol[12].

[10] [T]he answer to the question "If there was physical aggression/torture, is there an apparent injury?" it was yes, that is, 46.3% of the total. Of this universe, in 16 there is mention of aggression in the sentence (9.1%), three of which involved acquittal and 13 condemnations. This means that in approximately 90.9% of the cases in which there is visible damage resulting from the reported aggression, the judge does not even mention the aggression in the sentence. *Ibidem*.

[11] Universal Declaration of Human Rights (1948, art. 5).

[12] United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by resolution A/RES/57/199 on 18 December 2002.

It is worth stressing that the prohibition against torture and other ill-treatment in international law is absolute. As the European Court of Human Rights has ruled repeatedly,

> [T]he Court reiterates that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation.[13]

Furthermore, information obtained by torture should not be admissible, nor should it be used, relied upon or proffered in any legal proceeding. This rule stems from the absolute prohibition on torture and is reflected in Article 15 of the UN Convention Against Torture: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made"[14].

Any statement made under torture is *ipso facto* involuntary and inherently unreliable as the use of evidence procured by torture is an outrage to basic human values and makes the judge complicit by indirectly legitimizing this practice.

In addition, the fruits of the poisonous tree doctrine prohibit reliance on evidence derived from illegal activity, also called 'derivative evidence', which is the view taken by the European Court of Human Rights:

> '[T]he absolute nature of the exclusionary rule is reflected in the prohibition on granting probative value not only to evidence obtained directly by coercion, but also to evidence derived from such action. Consequently, the Court considers that excluding evidence gathered or derived from information obtained by coercion adequately guarantees the exclusionary rule'. [15]

In order to put these important tools in practice, the immediate and in-person access to a public defender or defense lawyer must be provided by the State when a defendant cannot

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[13] Selmouni v. France, Reports 1999-V, Judgment of 28 July 1999, para. 95 < https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58287%22]}> . See others, Ireland v. the UK, Series A, vol. 25, Judgment of 18 January 1978, para. 163; Tomasi v. France, Series A no. 241-A, Judgment of 27 August 1992, para. 115; Chahal v. the UK, Reports 1996-V, Judgment of 15 November 1996, para. 79.

[14] <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading> accessed 25 Abril 2023.

[15] Cabrera-García and Montiel Flores v Mexico (Preliminary Objection, Merits, Reparations and Costs) Series C No. 220, 26 November 2010, para 167.

afford it. The defense lawyer must be able to request the court to strike evidence against their clients from the record. The delay in providing the assistance of a lawyer reduces the ability to identify and challenge 'torture evidence', because, for example, defendants cannot build the rapport needed to disclose the torture they have suffered; and defendants cannot gather evidence of torture by requesting medical examinations. A former UN Special Rapporteur on torture, Sir Nigel Rodley, pointed out that "when there is prima facie evidence that a defendant has confessed under torture and if his/ her allegations are consistent with other evidence, such as forensic evidence, the trial must be suspended by the judge"[16].

When a medical exam is necessary, the use of the "Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", better known as the Istanbul Protocol, is highly recommended. The Protocol contains the first set of internationally recognized standards for the examination, investigation, and elaboration of reports of allegations of torture and treatment and punishment cruel, inhuman or degrading. Although the Istanbul Protocol is not a binding international instrument, it is based on international principles and norms, and it is an instrument promoted and endorsed by the United Nations Organization.

The Protocol was developed to enable States to address one of the fundamental concerns in protecting individuals from torture – effective investigation and documentation, bringing "evidence of torture and ill-treatment to light so that perpetrators may be held accountable for their actions and the interests of justice may be served"[17]. According to the Protocol, States must ensure that reports of torture or ill-treatment are promptly, effectively, and impartially investigated, guaranteeing the independence of investigative bodies.

The main role of the Protocol is to serve as a concordance analysis between the account of the facts and the medical and psychological symptoms presented by the victim. The reliability of clinical evidence is often based on elements of internal and external consistency, i.e., corroboration between elements of the case and knowledge of torture and ill-treatment within a particular region or additional witness information.

[16] Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/3. Addendum. Visit to Brazil. 30 March 2001. E/CN.4/2001/66/Add.2. para 102. https://digitallibrary.un.org/record/437371#record-files-collapse-header> accessed 03 April 2023.

[17] Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. United Nations publication, issued by the Office of the United Nations High Commissioner for Human Rights (OHCHR). 2022. < file:///C:/Users/Andr%C3%A9/Downloads/Istanbul-Protocol_Rev2_EN.pdf> accessed 06 April 2023.

It is worth stressing that the search for this *consistency* burdens the State to produce an impartial forensic report indicating to what extent the allegations of torture are reliable or not, which may be one of the most critical elements for the legal defense.

The Protocol is relevant for the establishment of criminal defense measures in favor of the victim/defendant; the responsibility of the public agent; the civil liability of the State; and the changes in public policies or even the use of class action lawsuits.

4. The Red Room Case

In the morning of August 20, 2018, armed Brazilian soldiers descended upon the streets of Complexo da Penha, a set of favelas in Rio de Janeiro. Equipped with armored vehicles, the military arrested more than fifty people. Several young men came out of the woods with their hands raised, with the hope that the army would not shoot them.

Instead, the military physically and verbally assaulted them for hours on the street. Seven men reported that they were moved into the trunk of a military vehicle where they were electroshocked, sprayed with pepper spray, and transported with dead bodies on top of them. They – civilians – were then brought to a military base where the abuse and torture continued for seventeen hours. There the men's hands remained bound as they were placed in stressful positions, fed rotten food and deprived of sleep. Some of the men were transferred into a small room they called a "red room" due to the paint and what looked like dried blood on the floor. Inside, they were violently interrogated by hooded, ununiformed men, who beat them with wooden planks, whipped them with electric wires, and threatened sexual violence and suffocation. It was not until the next day, that the military transferred the men to the civilian police station and, finally, to the court (custody hearing[18]).

In the court, the men were assisted by state public defenders[19] who were informed of the torture suffered and the misconduct of the Army's agents. Before the hearing, the detainees underwent medical examinations conducted by doctors from the staff of the Civil Police board of forensics. The medical reports, in a very superficial and summarized way, described some of the physical injuries, but it did not mention if there was any consistency

[18] Custody Hearing: In Brazil, the police must present an arrested person before a judge during the first hours of detention. It happens before any charge and offer to criminal judges an opportunity to spot any signs of torture, ill-treatment or abuse. In case of *flagrante delicto*, the judge must decide on releasing or keeping the person arrested (preventive detention).

[19] The Public Defender's Office is an autonomous institution, under the terms of art. 134 of the Constitution of the Federative Republic of Brazil, having a nationwide reach through branches in all states of the federation and being is responsible for the judicial guidance and the defense, in all levels, of the needy. The Public Defender's Offices have functional and administrative autonomy, as well as the prerogative to present its budget proposal.

between physical findings and the concrete allegations of torture, nor did it recommend further investigation.

Based on the allegations of torture, the forensic report and the circumstantial evidence presented by the public defender, the judge stated that, "[w]ith regard to the request for release from prison due to the occurrence of aggression by police officers army that carried out the arrests of those in custody, I emphasize that the conduct of the military is totally reprehensible and absurd, and should be investigated and punished, if there is evidence of abuse of power"[20].

However, the judge decided to keep the defendants arrested: "this court understands that the occurrence of illegality subsequent to the *flagrante delicto* does not alter the prison order"[21]. This argument of the judge is quite representative of the common understanding of the Brazilian courts on the relation between torture acts, evidence, causation, and exclusionary rule and, based on this interpretation, the exclusionary rule is almost never applied, as well as the right to redress against the agent or the State.

The *flagrante delicto* arrest was maintained – as a pretrial or preventive detention – substantially grounded on the testimony of the police about the dynamics of the facts. The courts consider that there was no causational relation between acts of tortures and the crime allegedly committed by the defendant, leaving the burden of proof on the defendant.

The court also ordered that the military public prosecutor's office be summoned to investigate the conduct of the army's officials (who closed the case some years later, considering the allegations of torture to be unverifiable). If the acts of torture happened after the arrest, then it would not have a causal relationship with the evidence of the crime imputed to the defendant. Thus, there would be no reason to apply the exclusion rule as it was not fully proven by the public defender that the torture had been a means of obtaining criminal evidence against the defendants. But, on the other hand, the evidence to keep them imprisoned was, essentially, the testimony of the army police.

After the custody hearing, they were indicted by a state prosecutor for drug trafficking (before the state criminal court) and a military prosecutor also indicted them for the attempted murder of a soldier (before the military federal court). It is important to clarify that, as a remnant of the authoritarian legislation of the Military Dictatorship period in Brazil (1964-1985), and contrary to international law, civilians can be prosecuted and trialed in the Military

[20] State of Rio de Janeiro *vs*. Luis da Conceicao and others, Proc. 0198272-05.2018.8.19.0001. Decision issued on 23rd August 2018 (Custody Hearing).
[21] *Ibidem*.

Court, even during peacetime. Moreover, only military prosecutors can investigate allegations of torture by the military, even against civilians.

This is an exemplary case of how allegations of torture are disregarded in criminal proceedings due to a number of factors: poor quality of the forensic medical examination; failure to investigate the other evidence of torture; and lack of witnesses who agree to testify despite the fear of reprisals. In the end, if there is no forensic report or other hard evidence exists to prove torture, it is often the word of a victim against the word of the police.

In an unprecedented move, the state court granted the request of the Public Defender's Office of Rio de Janeiro to order additional medical examinations to address the men's allegations of torture. Rio's forensic institute, part of the civil police, in collaboration with the International Bar Association Human Rights Institute and the Open Society Justice Initiative, conducted evaluations of the men, with the guidance of international medical experts and complying with the Istanbul Protocol.

These examinations confirmed that the men's allegations of torture at the hands of the military were "highly consistent" with their injuries and psychological state. The forensic institute submitted the reports to the court, marking the first time that a court in Brazil had received medical-legal reports in line with international standards.

Relying on these new reports, the court applied the exclusionary rule and acquitted all seven men in their drug trafficking case. Following the international standards, the judge questioned the credibility of the military's statements and the state's evidence in the case. The judge noted that when the military entered the favela, it "enjoyed a presumption of legitimacy of [its] actions," however, the judge held that this presumption is "not an absolute truth." Recalling the evidence provided in the new reports, the judge argued that this corroboration of the men's allegations of torture cast "doubt" on any testimony given by the military in this case, asking, how the court can trust the military in the face of such evidence. Due to the lack of what the judge deemed credible evidence to tie the men to the allegations, the judge ruled that all charges were unfounded.

Contrary to international human rights standards, the men are still serving preventive detention ordered by the military courts, even though their acquittal in state criminal suit marks a significant achievement for accountability and the rule of law in Brazil.

5. Access to justice as access to a fair trial.

The aforementioned Red Room case is a kind of playbook of the sad reality of torture conducted by state agents in Brazil (and many other countries). The victims remain arrested, unredressed, and neither the perpetrators nor the State ever face any type of responsibility.

Regarding the access to justice approach, a meaningful and comprehensive legal aid system is the most decisive tool, implementing international standards and best practices for legal assistance to persons in vulnerable conditions and for torture prevention.

As previously mentioned, it must be ensured that all people deprived of their liberty receive access to legal advice and representation as early as possible. Legal aid providers must be able to carry out their work effectively, freely and independently in order to perform all of their professional functions without intimidation, hindrance, harassment or improper interference. They must be protected from threats of any kind, including administrative, economic, criminal or other sanctions when acting in accordance with recognized professional duties[22]. Where depositions have been taken by the authorities without a lawyer or an official public defender present, there is a serious risk that such depositions have been obtained through torture or other forms of ill-treatment.

This risk is highly increased in the case of *incommunicado* detention and an unofficial or secret place of detention, as well as being held for a long period in confinement. Other circumstances of risk include effective custody when medical reports have not been maintained; when detainees have not been fully informed of their rights at the start of their detention; when detainees have not been subject to immediate and regular medical examinations; when statements taken have not been properly recorded; when detainees have been subject to any physical restraint without reasonable cause; when independent visits to the place of detention have been blocked, delayed or interfered with[23].

Furthermore, when a detainee reports torture and is promptly assisted by a public defender or a lawyer who will argue for the exclusion of any resulting evidence, the detainee will have to provide evidence of the torture and the causation, which can be very tricky and, sometimes, not feasible by individual means.

Despite all the evidence of the Red Room case, it was all disregarded by the court during the custody hearing, denying the application of the exclusionary rule, as usual.

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[22] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: Principle 12. Independence and protection of legal aid providers, Par 36. <https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf> accessed 28 April 2023.

[23] Foley, Conor. Protecting Brazilians from torture: A manual for judges, prosecutors, public defenders and lawyers. Ministry of Justice (Brazil). International Bar Association. 2nd edition. Brasília, 2013.

For these reasons, whenever applicable, examinations must be carried out by independent medical professionals paid by the State – especially when the victim cannot afford it – according to the Istanbul Protocol guidelines. The forensic professional must be entitled to some guarantees and a certain degree of institutional independence to prevent them from fear of repercussions or even employer loyalty.

Faced with a report indicating the consistency of the allegations of torture with evidence found in medical examinations and other circumstances, the pretrial court should have enormous caution before fully taking into account the statements of the police or other state agents. When examining the validity or legality of the arrest, the court should avoid any kind of misplaced use of tort law concepts, whereby the plaintiff (victim) has the onus to prove and establish that the damage was caused by the wrongdoing of the defendant (State). The international standards for cases of torture recommend an opposite approach on causation and the burden of the proof, regarding the extreme condition of vulnerability of victims and the position of the State. If a person is taken into a custody hearing bearing signs of injury and reporting to have suffered torture, it is incumbent upon the State to provide plausible explanation.

A review of the judicial approach to the exclusionary rule must cover derivative evidence. The justice system cannot disregard evidence of torture, even if circumstantial, committed by the agents responsible for the arrest, thereby presuming the veracity of the police testimony and validating preventive detention. The fact that torture happened after arrest in *flagrante delicto* does not necessarily mean that unlawful acts have no connection to evidence of alleged crime.

To foster the judicial review, legal aid providers must be able to submit appeals or file requests promptly and at all stages of the criminal justice process, including the higher courts. Far beyond a mere formal legal prerogative, it must be effective and feasible, regardless of an individual's means.

6. Conclusion.

Access to justice is a core fundamental right and a central concept in the broader field of justice. However, it is a right that faces a number of challenges such as the provision of a multidisciplinary approach, gathering legal assistance with other fields of knowledge and science.

To ensure an effective access to justice in cases of alleged torture, it is at least necessary that:

1) the detainee has immediate access to the justice system, with legal representation, forensic examination and has been presented before a judge;

2) the State provides independent lawyers and forensic experts in different fields when a state agent accused of torture;

3) the exclusionary rule covers derivative evidence and evidence obtained as a result of inhuman or degrading treatment or punishment;

4) the fruits of the poisonous tree doctrine prohibits reliance on evidence derived from illegal activity, especially in the context of torture;

5) access to justice be comprehensive, multidisciplinary, provided by legal and non-legal providers and fully supplied by the state, regardless of individual lack of means;

6) acts of torture be redressed, including full pecuniary reparation and rehabilitation of the victim.

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