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Operationalization of the Presumption of Innocence

From Interrogation to Investigative Interviewing

The United Nations special Rapporteur on Torture, Professor Juan E. Méndez, has called upon experts to support the drafting of his thematic report to the United Nations General Assembly in October 2016. We have been advised that the report will address the need for the development of a universally applicable protocol for interrogations, investigations and custody practices that are grounded in fundamental principles of international human rights law, and particularly the legal prohibition of torture.

I believe the Rapporteur has chosen a topic that has the potential to reduce torture and other ill treatment significantly.

Having read the first draft of the report and participated in the expert consultation in Washington, I feel inspired to write down a few thoughts.¹ My first point would be in line with the one I emphasized at the final stage of our consultation:

The most important safeguard

The first draft of the Rapporteur's report highlights various safeguards that isolated, and particularly so in combination, will serve as preventive measures against torture and other ill treatment in interrogative settings. The safeguards, including the right to legal assistance, the right to remain silent, access to medical care, electronic recording, detailed custody records, to name a few, are so important that we cannot ignore any of them. However, these (and other) safeguards are none the less complementary measures. The most important safeguard against interrogative torture is indeed the interview methodology employed by the police.

The myth (and the argument for universally applicable standards)

The question of torture can be approached from a variety of perspectives. Torture by state agents can be used to induce fear, as informal punishment, or to intimidate. Torture can also be used as an instrument to induce false confessions (Rejali 2007). As vividly explained by our colleagues during the consultation in Washington; torture is unfortunately also used as a corruptive instrument; to achieve political ends, as social control, nurturing a culture of fear. In line with the call from the special Rapporteur, aiming for

¹ Once again I would take the opportunity to thank the Special rapporteur and his team for inviting me. It is a great honor, and a tremendous inspiration to be consulted and privilege to work along colleagues from different parts of the world.

global and sustainable guidelines to prevent harsh interrogations, I believe that it nevertheless is important to address the problem through the myth that torture and other coercive interrogation tactics represents an efficient way of inducing information and solving crime (Bybee 2002, Inbau et al 2001). From this perspective I regret to acknowledge that the questions we must tackle are universal, relevant to all member states.

By including manipulative, confession-oriented interrogation techniques into the torture-preventive framework, one could argue that we are expanding the problem and hence, diverting the much needed focus, away from the more grave breaches of human rights. But I will argue that if the special Rapporteur chooses to tackle the all-important “crime fighting” argument for torture by highlighting the underlying problem feeding the myth of its effectiveness, I strongly believe that the special Rapporteur and the United Nations are in a unique position to institute a sustainable framework, benefitting all states pursuing a more effective and professional police force, including those in which torture no longer constitutes a serious threat.

I believe my argument is in line with Steven Kleinmans insightful appeal during our consultation, namely that all forms of coercion, whether it amounts to physical pain, severe pain, psychological pain or undue pressure, nevertheless constitutes a fundamental breach of the ‘operationalization of the pursuit of truth’; a breach of how police and military information-gathering must be carried out if it is to be performed in a professional manner. Like certain kinds of weapons are banned from law enforcement and warfare, coercion should be banned from professional information-gathering. The end will never justify the means; not from a moral, strategic or practical perspective. The inherited legal acceptance to apply more pressure than the asymmetric interpersonal encounter already warrants by its very nature is based on the myth of its effectiveness and hence, invalidating the argument of necessity.

On the more positive side; we know through scientific research, including systematic gathering of field experience, that there are more effective methodology available, and that the knowledge is equally relevant for police, security and military personnel in their quest of timely, accurate and reliable information (Meissner et al. 2013, The constitution project 2012, Alison et al 2013, Kassin et al 2009, Pearse (2006), Loftus 1974, CIA 1963 – to name a few).

True; we had read some of each other’s work before the Rapporteur wisely encouraged and facilitated our meeting in Washington, but I find it important to testify to the fact that experienced police officers from the Nordic region of Europa have reached the same conclusions as equally experienced soldiers from the US. Different fields, different parts of the world, same conclusion. The fact that science points in the same direction, and that the spirit of Human rights principles long have advised us that there is a better and smarter way, is remarkable.²

² There are, broadly speaking, three variables that many of us did not understand when we inherited (and adopted) the idea of coercion from our older colleagues; Interpersonal communication theories, explaining why ethical and empathic communication facilitates the flow of reliable information (Hargie 1998), the fact that memory are stimulated in these conditions (O’Mara 2015, Loftus & Palmer 1974), and the fact that coercion – in any shape or form – tends to make people say anything to obey the one in power, and particularly so when the coerced or manipulated are vulnerable and/or find themselves in vulnerable positions (Kassin et al 2009).

The underlying problem³

My ambitious and optimistic position rests on several pillars in which I will describe in more detail below. But first we must come to an understanding and reflect upon the fact that both torture and manipulative confession orientated interrogation techniques are means to the same end, administered by the police to confirm their belief of guilt. Although manipulative, confession orientated techniques are less brutal than torture, the mindset of interrogating detectives is none the less the same: they are trying to solve their (sometimes complex) tasks with a methodology, designed to confirm their presumption of guilt.

Police engage in such thinking because they believe it is the right thing to do. Not only because our inherited and dominant thinking style blurs us to believe that searching for confirmative information is the smartest way of solving problems (Kahneman 2011, Fahsing & Ask 2015), but also because the systems in which the agents are operating within salute confessions.

The human tendency (cognitive predisposition) to seek confirmation - and criminal justice systems encouraging their agent to do so - is a perilous mixture, feeding the underlying cause of wrongful convictions (Leo 2008) and planting the seeds of torture (Rejali 2007 p. 54).

From interrogation to Investigative Interviewing – a change of mindset

Investigative Interviewing, as defined by Home Office in the UK in 1992, developed and refined by pioneering scholars in close cooperation with British police, has influence police training outside the UK and extended to various regions of the world (Williamson, Milne & Savage 2009). The vast majority of police forces however, still haven't committed themselves to the fundamental principles underpinning the concept of Investigative Interviewing (Walsh et al 2015).

Training programs, encouraging detectives to solve their (sometimes) complex problems by searching for confirmations (confessions) are not only ignoring knowledge derived from research on human reasoning and decision-making in which good thinking is promoted as a thorough search for an alternative, without favoring the one already on mind (Canter and Alison 1999); they are in contravention of the mindset required to operationalize the values and principles imbedded in the presumption of innocence.

I will soon describe a methodology designed to stimulate “good thinking” and the operationalization of the presumption of innocence. First, however, I do believe it is important to emphasize that the difference between *Interrogations* (questioning designed to get the suspect to confess) and *Investigative Interviewing* (questioning designed to gather accurate and reliable information) is fundamental and distinct and cannot, as I understand the terms and concepts, be mixed up.

The mindset of an Investigative Interviewer, in her preparations, interpersonal communication and questioning of suspects cannot be altered along the way. To start off with “Investigative Interviewing” and then move on to interrogation at the end - or in between - has been a common, manipulative technique in confession orientated interrogations for decades (Leo 2008).

³ I realize that my (at best) small contribution does not solve the worst situations in various parts of the world in which torture is used as a weapon to intimidate the poor or silence the intellectual as means to stay in power. Nor is my text addressing hopeless situations in which torture plays its role in corrupt systems. For that I apologize and rest assure that other experts, including the Rapporteur himself, have deep understanding of the mechanisms in play when torture are employed for reasons *outside* the confession-orientated, interrogative regime to gather information and solve crimes.

The European Committee for the Prevention of Torture (CPT 2002) captures the essence brilliantly in their standard for suspect interviews (art. 34):

CPT Standard (2002):

First and foremost, *the precise aim of such questioning* must be made crystal clear: that aim should be to obtain accurate and reliable information in order to discover the truth about matters under investigation, not to obtain a confession from someone already presumed, in the eyes of the interviewing officers, to be guilty.

Fifteen years of research on investigative interviewing has passed since CPT formulated its normative standard. Moreover, 15 years of experience from the field - implementing, training and operating investigative interviewing in practice - has also produced valuable knowledge, not available to the authors of the pioneering CPT standard (Fahsing & Rachlew 2009). Hence, and in sum, I believe the Special rapporteur is in a unique position to formulate a new standard in his address to the United Nations General Assembly in October 2016.

In the suggestion below, I have tried to capture the spirit of CPT's formulation of Investigative Interviewing. I have included the latest development of strategic use of evidence (Rachlew & Fahsing 2015), and hence, addressed the main concern with the earlier texts on investigative interviewing, namely that whilst it alerted officers to the dangers associated with confirmation bias and false confessions, it provided little positive guidance or assistance in formulating strategies to improve information retrieval from suspects (Alison 1998). Finally, and with as few words as possible, I have included the very essence of the PEACE-module, providing the reader with guiding interviewing techniques, applicable for all interviews, including victims and witnesses:

The UN special Rapporteur standard (2016?):

The aim of *investigative interviews* with suspects (as well as victims and witnesses) is to collect accurate and reliable information to disclose all relevant facts about events; it is not about obtaining information that reinforces the assumptions already held by officers. Far more effective are officers with a different mindset; operating the *presumption of innocence* by generating and actively testing alternative hypotheses through systematic preparation, empathic rapport building, the use of open-ended questions, active listening, and strategic probing and disclosure of potential evidence.

The suggested text is a bit longer than the elegant CPT version, but those who have had the opportunity to study, teach and/or perform investigative interviews will hopefully appreciate that the suggested text captures the essence of the latest development within the field. For those who are new to investigative interviewing and hence, unfamiliar with the model, its underpinning values and techniques, may hopefully find the relatively short text informative enough to trigger further interest.

The turn-around operation in the UK, from confession oriented interrogations to Investigative Interviewing in the early 1990s is described in numerous academic books and articles. The turn-around operation came about in Norway, 10 years later. New Zealand followed in 2006. There are ongoing processes in Australia and Canada. The privilege of being "the next jumper" provides the opportunity to learn from the pioneers, adjust and prepare for challenges that necessarily follows a leap into uncharted waters.

As indicated above; one of these learning points relates to formulating strategies to improve information retrieval from suspects. In order to facilitate a successful turn-around operation, it is essential to keep in mind that when a `tool` is taken away from a practitioner, it needs to be replaced by an alternative `tool` - a better way of solving the task at hand.

Testing of alternative hypotheses - the operationalization of the presumption of innocence

I am by no means suggesting that we are left with an easy task by subordinating the problem of torture and coerced confessions. The Norwegian turn-around operation on the turning of the century, *from Interrogation to Investigative Interviewing* was later described as *the painful process of change* by one of Norway's most renowned police officers (Husby 2013).⁴ What I am suggesting, however, based on available knowledge from social science and relevant Human Rights law, is that if we treat torture and other confession orientated interrogations techniques as a breach of the presumption of innocence, the question – and hence the normative standard – may be formulated in a universally applicable protocol for investigative interviewing, grounded in fundamental principles of international human rights law. The question then, is how we can teach our detectives how to *operationalize the presumption of innocence*.

More research is needed, but in a recent text, published as a chapter in one of Scandinavia's most comprehensive books on evidence in criminal procedures, we describe a methodology for police investigations in general, and Investigative Interviewing in particular, based on abductive reasoning (Rachlew & Fahsing 2016).⁵ We argue that if the procedural steps are followed (see attachment 1) it will stimulate the necessary change of mindset, assisting detectives to generate and test alternative hypothesis, and hence operate the presumption of innocence and simultaneously strengthen the case against the guilty suspect.⁶ We believe abductive reasoning is sustainable for a variety of reasons, including the fact that the methodology has the potential to enhance the entire criminal procedure. As pointed out by the Swedish, legal scholar, Christian Diesen (2000): the alternative hypotheses that the police must test in their investigation are the same hypotheses (alternative scenarios/explanations) that the prosecution and eventually the court must consider (ensure that they are tested) before the evidential threshold “proven beyond reasonable doubt” can be reached.

A brief illustration – DNA evidence

In brief, if the police have found a stray of hair, including DNA from the missing girl in the suspects' car, the first thing they must do is to generate all possible scenarios, ensuring that all necessarily lines of inquiries are identified for the investigation in general. In this case there are five, possible scenarios. If the missing girl is dead, she may have been killed (homicide), ended her own life (suicide) or died in an accident or by natural causes (stroke, heart attack). If the missing girl is still alive, she may have been kidnapped or ran away. Of course, the families “missing report” may be false, but the number of alternative scenarios reminds the same (homicide, suicide, natural/accidental death, kidnap or `run-away`).

⁴ As one of the drivers for change, I felt the pain to, leaving permanent (inter)personal “scars”. Some officers stopped talking to me, but sure enough about me, behind my back.

⁵ The Norwegian text is an elaborated version of a similar, but less developed text about Investigative Interviewing in the Nordic region (Attachment 1, Fahsing & Rachlew 2009).

⁶ See attachment 1: Fahsing & Rachlew 2009, pp. 52 – 60

Now, having identified the possible scenarios, the investigative interviewer, assigned to interview the suspect (the owner of the car with the stray of hair) must – in her preparations for the interview – identify all plausible hypotheses (alternative explanations) as of why the stray of hair may have ended up in the trunk of the suspects' car. If the suspect has nothing to do with the reported disappearances of the girl, there must be an alternative explanation as to why her DNA is found in the suspects car, and the sooner the police find the excluding explanation, the better. In this case these alternative explanations (hypotheses to be tested) might be:

1. Someone may have borrowed the suspects' car
2. Someone may have stolen the suspects' car
3. The car used to belong to another person (who knew the girl?)
4. The police who found the stray of hair had just visited the girls home (contamination)
5. The suspect may (secretly) know the girl, and given her a lift
6. The suspect may have picked up a hitch hiker (the girl or the person who killed her?)
7. The suspect may have transported some items for a friend (the person who killed her?)⁷

As the interview starts (with a free narrative account, including details of any relationship between the suspect and the missing girl), the detective must interview the suspect with a mindset set to test the alternative hypotheses. Could the suspect be innocent? Is there a legitimate reason, explaining the potential evidence pointing towards the suspect? Before (and this is an essential point) the interviewer presents (disclose) the potential evidence (stray of hair in the suspects car), the interviews task is to establish accurate information, prone to provide relevant information to the questions (alternative hypotheses) outlined above. The questions should be as open as possible, preventing contamination (and subsequent allegations of it), enabling the *innocent suspect* to provide information freely. Broad and open-ended questions will also prevent the *guilty suspect* from understanding the evidential significance of them.

The best questions are those in which the suspect (innocent or guilty) introduces the essential information before the interviewer introduces the topic (in this case; the suspects' car and his handling of it). The essential strategic element is that the interviewer gathers information in which the suspect provides answers to the questions below, without knowledge of the fact that the police have found a stray of hair from the missing girl in his car.

Who is the owner of the car? When did the suspect buy it? Who drives it? Has anyone rented our borough the car? If so; when and whom? Has the car been stolen? How many set of keys are there? Who has them? Has the suspect had passengers in the car? Hitchhikers? Transported any goods for anyone lately? Etc.

The interviewer is, in fact, searching for alternative explanations. The procedure stimulates open-mindedness and hence, operationalizing the presumption of innocence. The strategy requires strategic thinking and flexibility; elements we know detectives and intelligence officer's find attractive, stimulating a sense of pride of their own (detective / intelligence) work (Fahsing & Rachlew 2006).

When the interviewer examines (tests) the alternative and plausible explanations without finding evidence (information) to support them, the initial hypotheses (the suspicion of guilt leading up to the

⁷ There are, of course, other, alternative hypotheses that needs to be tested (the DNA analysis of the stray of hair may be contaminated; DNA not belonging to the girl); the arresting officers may have planted the evidence (corruption), but these and other hypotheses needs to be addressed (if they are plausible) through other investigative methods.

arrest) is strengthened. The guilty suspect will find it difficult to provide a false but credible statement. The evidential value of the DNA is strengthened through strategic thinking without coercion.

Summary (and a few, additional points)

The reason why I have chosen the title: «Operationalization of the presumption of innocence» is because if we can teach our detectives to think differently, to provide them with knowledge and methodology that stimulates them to generate alternative hypotheses and actively test them, rather than pursuing information, confirming their belief of guilt, I truly believe we can prevent not only the underlying cause to wrongful convictions, but also the seeds of torture.

CAT, art. 11

I would advise the special Rapporteur to challenge the United Nations in his upcoming thematic report to encourage member state to check, and report back if, when and how state parties “systematically” reviewed its interrogation rules, instructions, methods and practice - as they obligated themselves to do when ratifying CAT. (art. 11).

A possible strategy would be to arrange a survey, conducted by the Special rapporteur, in which all members states were requested to fill out a well thought of questionnaire (research project) answering if, when, how etc.

Terminology in the report

A shift from Interrogation to Investigative Interviewing in the official language of the United Nations will stimulate the emerging and global turn around operation, from confession orientated Interrogation techniques, to Investigative Interviewing. A change of terminology will in it selves represent a much needed, authoritative attack on myth that confession oriented methodology represents an efficient way of inducing information and solving crime. By changing the terminology, the UN also commits itself to a scientific development of policing.

- *Interrogations* - questioning of suspects, designed to get the suspect to confess
- *Investigative Interviewing* – questioning of victims, witnesses and suspects, designed to gather accurate and reliable information

Hence, terminology such as “soft interrogations”, “coercive investigative interviews” – are contradictions in terms. By being consistent, terminologies like “non-coercive interviewing”, “appropriate interviewing” etc. becomes superficial. Investigative interviewing is, by definition, non-coercive. Questioning in which torture accrue should be referred to as interrogations – interrogative torture.

See for example page 15 in the report:

“..interviewing methods amounting to torture.....” Should be changed to: “...interrogation methods amounting to torture....”

Hence, I would encourage the Special rapporteur to change the title of the report:

INVESTIGATIVE INTERVIEWING AND CUSTODY PRACTICE

Or

INVESTIGATIONS, INTERVIEWING AND CUSTODY PRACTICES

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