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THE EXCLUSIONARY RULE:
International law prohibits the use of evidence obtained through torture
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All States are bound by an exclusionary rule

The principle that States may not use any information obtained by torture (the “exclusionary rule”) is expressly stated in Article 12 of the 1975 General Assembly Declaration against Torture:

Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings.

It is also expressly stated in Article 15 of the UN Convention against Torture (UNCAT):

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.

The exclusionary rule is an integral part of the general prohibition of torture and other forms of cruel, inhuman and degrading treatment or punishment.¹ As a consequence:

- The exclusionary rule is specifically included in the treaty obligations of all States parties to general human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), even if not expressly mentioned.²
- The exclusionary rule also binds states that are not party to the UNCAT, ICCPR or any other human rights or humanitarian treaty, since the general prohibition of torture and other ill-treatment is itself a rule of customary international law.³

¹ Human Rights Committee, General Comment No. 20, UN Doc. HRI/GEN/1/Rev.7, 10 March 1992, para.12; and Committee against Torture, *P.E. v. France*, No.193/2001, 19 December 2002, para.6.3; *G.K. v. Switzerland*, No.219/2002, para.6.10; and *Ktiti v. Morocco*, No.419/2010, 5 July 2011, para.8.8.

² Universal Declaration of Human Rights, Article 5; International Covenant on Civil and Political Rights, Article 7; European Convention on Human Rights, Article 3; American Convention on Human Rights, Article 5; African Charter of Human and Peoples` Rights, Article 5; 1949 Geneva Conventions, common article 3; Third Geneva Convention (on Prisoners of War), Article 87; Fourth Geneva Convention (on Civilians), Article 32.

³ N. Rodley, *The Treatment of Prisoners Under International Law* (2nd ed.) (Oxford: Oxford University Press, 1999), p.74; Burgers and Danelius, *The United Nations Convention against Torture: A Handbook on the Convention*

- Like the other obligations in the general prohibition against torture, the exclusionary rule is absolute and non-derogable.⁴

Reasons for the exclusionary rule

In their authoritative text, Burgers and Danelius note that the exclusionary rule is based on two considerations.⁵ First, statements made under torture are inherently unreliable; admission of such information in proceedings, where the proceedings involve consequences for individuals, may be contrary to principles of “fair hearing”.⁶ Second, since the use of information obtained from torture in proceedings is often the reason why torture is applied in the first place, prohibiting its use removes an incentive to torture. The Committee against Torture has also expressly applied these rationales in its work.⁷

The exclusionary rule applies to all proceedings of any kind

While Burgers and Danelius’ comments on the purposes of article 15 of UNCAT refer to “court” or “judicial” proceedings, nothing in the text of the Declaration or Convention restricts the meaning of “proceedings” to formal court proceedings. Indeed the use of the phrase “any proceedings” suggests that a broader range of processes were intended to be covered; essentially, any formal decision-making by state officials based on any type of information. It is submitted that the substance of both purposes identified by Burgers and Danelius would apply equally forcefully to any quasi-judicial, administrative, or informal proceedings, certainly where those proceedings involve a statutory decision by a senior government official with consequences for the liberty of individuals within the territory or jurisdiction of the state. For instance, the UN Committee against Torture has decided that the Exclusionary Rule applies to extradition proceedings.⁸

The rule applies to all information extracted by torture by any State, anywhere in the world

The exclusionary rule applies no matter where in the world the torture was perpetrated and regardless of the nationality of the perpetrators. Even where the state seeking to rely on the information had no previous involvement in or connection to the acts of torture or other ill-treatment, the exclusionary rule prohibits the state from using the information.⁹

The rule excludes all information obtained by any form of coercion, not just torture

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dordrecht: Martinus Nijhoff, 1988), p. 1; Human Rights Committee, General Comment No.24, HRI/GEN/1/Rev.7, para.8; UN General Assembly, 2010 Resolution on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/64/153, Preamble.

⁴ Committee against Torture, General Comment No. 2, CAT/C/GC/2, at para.6. See also Committee statement adopted after terrorist attacks in New York (A/57/44, paras.17-18).

⁵Burgers and Danelius, *supra*, p. 148. See also C. Ingelse, *the UN Committee against Torture: An Assessment* (The Hague: Kluwer Law International, 2001), p.365.

⁶ See also Human Rights Committee, General Comment 13, at paragraph 14.

⁷ For instance, see “Summary record of the public part of the 289th meeting: Mexico, Paraguay.” (26 August 1997), CAT/C/SR.289, at para.34, sub-heading “D. Subjects of Concern”.

⁸ *P.E. and G.K.*, *supra* fn.1.

⁹ *Ktiti*, *supra* fn.1; see also Committee against Torture, Concluding Observations on the Fourth Periodic Report of the United Kingdom, 25 November 2004, UN Doc. CAT/C/CR/33/3, para.4(a)(i).

States cannot apply the exclusionary rule only to information obtained through a narrowly defined concept of “torture”, distinguishing other forms of cruel, inhuman or degrading treatment: all information obtained through any form of ill-treatment is covered.¹⁰

In its recommendations, the Committee against Torture has frequently extended the exclusionary rule to cruel, inhuman, and degrading treatment or punishment.¹¹ The Human Rights Committee has also extended the rule to other forms of ill-treatment. In its General Comment on Art.7, the prohibition on torture and other ill-treatment, the Human Rights Committee states: “It is important for the discouragement of violations of Art.7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture *or other prohibited treatment*. [emphasis added]”¹²

The UN Body of Principles on Detention also recommend the exclusion of evidence which was obtained in violation of other principles of detention as well as torture, such as irregularities during arrest, the failure to inform the detainee of reasons for his arrest or his rights, failure to promptly bring the detainee before a judicial or other authority, the denial of legal assistance or contact with the outside world, failure to keep records of the interrogation, or other methods of interrogation which impair a detainee’s judgment or take advantage of the situation to compel statements.¹³

The State has a positive duty to ensure the evidence was not obtained by torture

In *P.E. v. France*, a case before the Committee against Torture,¹⁴ France argued that nothing in UNCAT imposed upon it an obligation to ascertain the circumstances in which information provided by another State was obtained before using the information in its domestic extradition processes. This implied, in part, that the person alleging that information was obtained by torture must prove the allegation. The Committee rejected the submissions of France, holding that States are obliged “to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture.” The Committee considered the issue further in the case of *G.K. v. Switzerland*, in which it ruled that the applicant is only required to demonstrate that the allegation of torture is well-founded. Once this threshold is met, the burden of proof shifts to the State to show whether or not the evidence was made as a result of torture.¹⁵

The Human Rights Committee has also ruled that, pursuant to the ICCPR, the author of a complaint must not have the burden of proving his confession was made under duress. Rather, the burden rests with the prosecution.¹⁶

¹⁰ Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, “Interim Report to the General Assembly”, 1 September 2004, UN Doc. A/59/324, paras.13-16; and 1975 General Assembly Declaration against Torture, *supra*, art.12. Whether one employs a definition of “torture” *per se* whereby any form of pain, suffering or other cruel, inhuman and degrading treatment applied for the purpose of obtaining information constitutes torture (as under customary international law), or the perhaps technically narrower UNCAT definition of “torture” (referring to “severe” pain or suffering), the substantive obligation remains the same: no State can use the information in any type of proceeding. See also the Committee against Torture report on its Confidential Art.20 inquiry in Turkey, A/48/44/Add.1, para.28; and Human Rights Committee, General Comment 20, 10 March 1992, at para.12.

¹¹ For examples, see C. Ingelse, *supra*, p.381. See also the CAT report on its Confidential Art.20 inquiry in Turkey, A/48/44/Add.1, §28.

¹² CCPR, General Comment 20, 10 March 1992, §12.

¹³ UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

¹⁴ *Supra* n. 2.

¹⁵ See *G.K. v. Switzerland*, No. 219/2002, at para.6.10.

¹⁶ Human Rights Committee, *Nallaratnam v. Sri Lanka*, No.1033/2001, 23 August 2004, at para.7.4.

The Special Rapporteur on Torture has also stated that the burden of proof of absence of coercion should rest with the prosecuting authority where it seeks to use information against a detainee.¹⁷

The logic of such findings is sound. It is an insurmountable obstacle to any victim of torture to collect the necessary supporting evidence, such as legal files, registers of police custody and visits, to prove the merits of their case. Such evidence is held by the State party and often unavailable to the victim.¹⁸

Key State actors, such as judges, must act to ensure compliance with the rule. Even without an allegation of torture, it is incumbent on each judge to make sure the evidence admitted to the court has not been obtained by unlawful means. Judges should be prepared to ask the prosecution to prove such evidence was not obtained by torture, or that the confession was not obtained by other measures of coercion.¹⁹ Prosecutors therefore also have an important role in the exclusion of evidence obtained by ill-treatment. Art.16 of the UN Guidelines on the Role of Prosecutors states:

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.²⁰

Though it is clear that evidence should be excluded where torture has left a visible or recognizable mark on a victim, the Committee against Torture has repeatedly stated that "such marks should not be a prerequisite for ruling the evidence obtained under torture was invalid."²¹

Where torture or ill-treatment is alleged or suspected, the UNCAT describes the duty of States parties to investigate the truth. In *Ktiti v. Morocco*, the Committee found that as the State party had not investigated the allegation, and had relied on information allegedly obtained through torture, it had violated Art.15 of the Convention.²²

Where there is such an investigation, and prior to any hearing to assess whether such evidence should be admitted, the victim should be provided with access to legal assistance and independent doctors, to allow him or her to collect the evidence necessary to substantiate the claim.

The prohibition should be expressly stated in domestic legislation

The Committee against Torture has indicated on a number of occasions that laws governing processes subject to article 15 should expressly provide for the exclusion of evidence

¹⁷ Special Rapporteur on Torture, Report on Visit to Turkey, E/CN.4/1999/61/Add.1, at paragraph 113(e). SRT, Visit to Brazil, E/CN.4/2001/66/Add.2, 30 March 2001, at para.169(i).

¹⁸ See Committee against Torture, *Bouabdallah LTAIEF v. Tunisia*, No. 189/2001, 20 November 2003, at para.9.17.

¹⁹ C. Foley, *Combating torture: A manual for judges and prosecutors* (Human Rights Centre, University of Essex, 2003), p.50.

²⁰ Article 16, *UN Guidelines on the Role of Prosecutors*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

²¹ Mr. Bruni, CAT Member (Rapporteur), Summary Record of the 1024th meeting of the Committee against Torture, Initial report of Djibouti, CAT/C/SR.1024, 10 November 2011, at para.29.

²² *Ktiti, supra.*, para.8.8.

obtained by torture: where exclusion is simply a rule developed through case law this may not provide a secure enough guarantee to satisfy the requirements of article 15.²³ Provisions that permit a judicial authority to assess evidence “in accordance with his innermost conviction” or allowing “the free weighing of evidence” have also been found to be inadequate.²⁴

Supplementary measures to effectively exclude information obtained by torture

In order to effectively meet the obligation to exclude evidence obtained by torture, the Committee against Torture has stressed that, in addition to a clear exclusionary rule in domestic law, supplementary measures may also be taken. States could introduce measures to:

- Prevent the use of confessions as the sole evidence necessary for a guilty verdict. Such procedures invite force and coercion to extract such a confession.
- Exclude all confessions made in the absence of a lawyer, to persons below a certain rank, or to non-judicial officers.²⁵
- Guarantee the right against self-incrimination in law, and ensure the accused is informed of this right.
- Ensure the burden of proving evidence was obtained by torture or not rests with the State. This burden should be clearly stated in law.
- Agree a clear procedure to test a confession for signs of torture. The State might discharge the burden by maintaining detailed detention records, providing an independent medical exam at the beginning and end of custody, and by recording all interrogations. These records should be critically examined by a judge.



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²³ See Ingelse, *supra.*, pp.379-380, citing numerous decisions of the Committee against Torture, e.g. CAT/C/SR.61 at paragraphs 16, 28 and 53.

²⁴ *Ibid.*, citing CAT/C/SR.79, at para.43 and CAT/C/SR.249 at paras.26 and 34.

²⁵ Redress, *Bringing the International Prohibition of Torture Home* (2006), p.63.