***Amicus Curiae* brief presented to the Inter-American Court of Human Rights by the**

Association for the Prevention of Torture (APT)

in the case of

Teodoro Cabrera García and Rodolfo Montiel Flores

against the United Mexican States

(Case No. 12,449)

10 September 2010

Contents

I. INTRODUCTION

1. These written comments are respectfully submitted to the Honourable Inter-American Court of Human Rights in the Case No. 12,449, *Teodoro Cabrera García and Rodolfo Montiel Flores*, against the United Mexican States (Mexico) by the Association for the Prevention of Torture (APT).

2. The APT is an independent non-governmental organisation based in Geneva, Switzerland. The APT was founded in 1977 by Swiss banker and lawyer Jean-Jacques Gautier, who dedicated his later life to laying the foundations for a worldwide system to prevent torture.

3. The APT envisions a world in which no one is subjected to torture or other cruel, inhuman or degrading treatment or punishment, as promised by the Universal Declaration of Human Rights. To prevent torture, the APT focuses on three integrated objectives: promoting effective monitoring and transparency in places of deprivation of liberty; contributing to the effective international and national legal and policy frameworks for the prevention of torture; and ensuring that international and national actors have the necessary determination and capacity to prevent torture. In its work and functioning, the APT endeavours to apply the principles of a human rights-based approach, in particular the universality and indivisibility of all human rights, empowerment, accountability, participation, non-discrimination, gender sensitivity and protection of vulnerable groups.

4. The APT has consultative status with the United Nations Economic and Social Council, the Organisation of American States, the Council of Europe, the African Commission on Human and Peoples' Rights, and the International Organisation of la Francophonie.

5. The APT promotes legal and procedural safeguards for the prevention of torture and other forms of ill-treatment.[1] One such safeguard is the principle of non-admissibility of evidence obtained by torture, otherwise known as the exclusionary rule. It is enshrined in Article 15 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and Article 10 of the Inter-American Convention to Prevent and Punish Torture (IACPPT).

6. The inadmissibility of evidence extracted by torture is one of the key safeguards against abuse in the criminal justice system.[2] In general, it is a well-established feature of most legal systems, both national and international.[3] The non-exclusionary rule helps maintain the integrity of the trial system, because without it the courts would be tacitly endorsing mistreatment of suspects. As such, systems which do not respect this rule risk encouraging or even legitimising torture and other forms of ill-treatment as an investigative method to collect evidence.

7. Conversely, the exclusionary rule is intended to operate as a deterrent to authorities who may be tempted to employ violent means to extract a statement on which they plan to rely in a subsequent prosecution of the victim. It is closely associated with the

[1] The expression "other forms of ill-treatment" is used in this submission as an abbreviation for cruel, inhuman or degrading treatment or punishment.
[2] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN doc.A/HRC/13/39/Add.5, at §93 (5 February 2010).
[3] See e.g. UNCAT Article 15, Constitution of the Federal Republic of Mexico (as revised in 2008), Article 20, par A, s IX.

widely-accepted fair trial right not to be compelled to testify against oneself or confess guilt.[4]

8. The APT opposes the admission in any proceedings of information which has been or may have been obtained as a result of a violation of the prohibition of torture and other forms of ill-treatment, except as evidence that such practice occurred.

9. As explained by the UN Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Special Rapporteur on Torture), "laxity and inertia on the part of the highest executive authorities and of the judiciary in many cases are responsible for the flourishing of torture." He indicates further that the judiciary should be aware that "it is within their competence to refuse evidence which is not freely given" and that "it is within their power to make torture unrewarding and therefore unattractive and they should use that power."[5]

10. In this light, the purpose of this *Amicus Curiae* brief is to provide analysis and comparative law jurisprudence on the duty of States to prevent torture and to ensure that evidence is not obtained through this unlawful and heinous practice. After some preliminary considerations on the status of ratification of the main human rights instruments in Mexico, it focuses on different aspects of the principle of non-admissibility of evidence obtained by torture, including its history and legal framework; its absolute and non-derogable nature; its purpose and relationship with fair trial rights; the burden of proof; and its application to other forms of ill-treatment. Finally, this legal brief provides some final comments on the evidentiary value of confessions, with a particular reference to the principle of procedural immediacy in Mexico.

II. PRELIMINARY CONSIDERATIONS

11. Mexico is a State Party to the main international human rights instruments: the International Covenant on Civil and Political Rights[6] (ICCPR) and its Optional Protocols;[7] the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [8] and its Optional Protocol;[9] the International Covenant on Economic, Social and Cultural Rights;[10] the International Convention on the Elimination of All Forms of Racial Discrimination;[11] the Convention on the Elimination of All Forms of Discrimination against Women[12] and its Optional Protocol;[13] the Convention on the Rights of the Child[14] and its two Optional Protocols;[15] the International Convention on the rights of Migrant Workers and Members of their Families;[16] the Convention on the

[4] See ICCPR Article 14(3)(g).
[5] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN doc. E/CN.4/1993/26, at § 590 (15 December 1992).
6 Acceded 23 March 1981 (Source: UN Treaty Collection – see: http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en).
[7] Acceded 15 March 2002 and 26 September 2007 (First and Second respectively).
[8] Ratified 23 January 1986.
[9] Ratified 11 April 2005.
[10] Acceded 23 March 1981.
[11] Ratified 20 February 1975.
[12] Ratified 23 March 1981.
[13] Ratified 15 March 2002.
[14] Ratified 21 September 1990.
[15] Ratified 15 March 2002 (both).
[16] Ratified 8 March 1999.

Rights of Persons with Disabilities[17] and the International Convention for the Protection of All Persons from Enforced Disappearance.[18]

12. In the framework of the Inter-American system for the protection of human rights, Mexico is a State Party to the American Convention on Human Rights[19] (ACHR) and its Protocols on Economic, Social and Cultural Rights[20] and the Death Penalty,[21] as well as the Inter-American Convention to Prevent and Punish Torture,[22] the Inter-American Convention on the Forced Disappearance of Persons,[23] the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention Belém do Pará)[24] and the Inter-American Convention on Disabilities.[25]

13. The most relevant obligations to the exclusionary rule are contained in the ICCPR (Articles 7 and 14), UNCAT (Articles 2, 15 and 16), ACHR (Articles 5 and 8) and IACPPT (Articles 6 and 10).

III. THE DUTY TO PREVENT TORTURE

14. The prohibition of torture is universally recognised and enshrined in the main international and regional human rights instruments.[26] It is an absolute prohibition and admits no derogations under treaty law.[27] International and regional courts and monitoring mechanisms have also supported this non-derogability. [28]

15. Under customary international law, the prohibition of torture has *jus cogens* status. As a result, no State may recognise as lawful a situation occurring from a violation of the prohibition of torture. It also imposes obligations *erga omnes,* and as such, every State has a legal interest in the protection of such obligations which are owed to the international community as a whole. [29]

16. Under international law, States have a general duty to prevent human rights violations. In *Velasquez Rodriguez v Honduras*, the Inter-American Court of Human Rights recognised that as a consequence of the obligation to ensure the free and full exercise

[17] Ratified 17 December 2007.
[18] Ratified 18 March 2008 (not yet into force).
[19] Acceded 2 March 1981 (Source: Organization of American States – see: http://www.oas.org/juridico/english/tresigsu.html)
[20] Ratified 8 March 1996.
[21] Acceded 28 June 2007.
[22] Ratified 11 February 1987.
[23] Ratified 28 February 2002.
[24] Ratified 19 June 1998.
[25] Ratified 6 December 2000.
[26] Universal Declaration of Human Rights (Article 5); ICCPR (Article 7); American Convention on Human Rights (Article 5); African Charter on Human and People's Rights (Article 5); Arab Charter of Human Rights (Article 13); UNCAT; IACPPT; and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.
[27] The prohibition of torture enshrined in international and regional human rights instruments is excluded from derogation. See UNCAT (Article 2); ICCPR (Article 4(2)); UN Torture Declaration (Article 3); European Convention of Human Rights (Article 15); American Convention on Human Rights (Article 27(2)).
[28] See e.g. Human Rights Committee General Comment No. 29 (2001); Inter-Am.Ct.H.R.: *Castillo Petruzzi et al. v Peru* (1999): *Cantoral Benavides v Peru* (2000); *Maritza Urrutia v Guatemala* (2003); EctHR: *Tomasi v France* (1992); *Aksoy v Turkey* (1996); *Chahal v the United Kingdom* (1996).
[29] See e.g. *Prosecutor v Delalic and others*, ICTY Trial Chamber, Case No. IT-96-21-T, judgment of 16 November 1998, at § 454; *Prosecutor v Furundzija*, ICTY Trial Chamber, Case No. IT-95-17/1-T, judgment of 10 December 1998, at §§. 151 and 153-154; Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN doc. E/CN.4/1986/15, at §3 (19 February 1986); Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc.5 rev 1 corr., at §155 (22 October 2002).

of the rights recognized by the Convention, "States must *prevent*, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."[30]

17. The prohibition of torture brings about a duty on States to take appropriate and effective measures to prevent torture. This duty is derived from the absolute and non-derogable nature of the prohibition of torture and by the fact that the prohibition of torture is a *jus cogens* norm of international law which gives rise to obligations *erga ommes*.

18. In *Prosecutor v Furundzija*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) provided:

> "Firstly, given the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. As was authoritatively held by the European Court of Human Rights in Soering, international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment). It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition."[31]

19. Under treaty law, the UN Convention against Torture and the Inter-American Convention to Prevent and Punish Torture enshrine the duty to prevent torture.

20. Article 2 of the UNCAT provides that all States shall "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Article 16 of the UNCAT requires that "each State shall undertake to prevent (…) other acts of cruel, inhuman or degrading treatment or punishment."

21. At a regional level, States have a corresponding obligation under Article 6 of the IACPPT to "take effective measures to prevent and punish torture within [its] jurisdictions" Likewise, the same article also refers to cruel, inhuman or degrading treatment or punishment.

22. In its General Comment No. 2,[32] the Committee against Torture elaborated on this duty, characterising it as an obligation to "take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented."[33] Moreover, the Committee is of the opinion that "[i]f the measures adopted by the State party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted."[34]

---

[30] *Velasquez Rodriguez v Honduras*, Judgment of 29 July 1998, Inter-Am.Ct.H.R. (Ser.C) No.4 (1998) at §166 (emphasis added).
[31] ICTY Trial Chamber, Case No. IT-95-17/1-T (10 December 1998) § 148.
[32] Committee against Torture, General Comment No. 2, UN doc. CAT/C/GC/2 (24 January 2008), available at: http://www2.ohchr.org/english/bodies/cat/comments.htm.
[33] As above, § 4.
[34] As above.

23. In its General Comment No. 20, the Human Rights Committee notes that "it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman an degrading treatment in any territory under their jurisdiction."[35]

IV. THE PRINCIPLE OF NON-ADMISSIBILITY OF EVIDENCE EXTRACTED BY TORTURE

A. HISTORY/LEGAL FRAMEWORK

24. The history of the exclusionary rule reveals that this principle is inherent to the prohibition of torture and other forms of ill-treatment. Although it is a long-standing principle in many domestic legal systems,[36] this rule was enshrined for the first time in an international instrument in 1975. Article 12 of the General Assembly Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration against Torture) provides:

> "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."[37]

The Declaration against Torture was adopted by consensus, which demonstrates the universal acceptance provided to the exclusionary rule from the outset.

25. In 1982, the Human Rights Committee adopted General Comment No. 7 on Article 7 of the ICCPR, including a relevant section on safeguards:

> "1. … The Committee notes that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make it a crime. … Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure effective protection through some machinery of control. …. Among the safeguards which make control effective are … provisions making confessions or other evidence obtained through torture or other treatment contrary to article 7 inadmissible in Court. "
>
> 2. As appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood."[38]

26. The exclusionary rule was first enshrined in treaty law in Article 15 of the UN Convention against Torture, which entered into force 26 June 1987.[39] Currently, there

---

[35] Human Rights Committee, General Comment No. 20 concerning the prohibition of torture and cruel treatment or punishment, UN Doc. HRI/GEN/1/Rev.7, at § 8 (10 March 1992).

[36] See e.g. *A & Ors v Secretary of State for the Home Department* [2005] UKHL 71 at §52; or US Supreme Court cases on the 'fruit of the poisonous tree' doctrine, e.g.: *Nix v Williams*, 467 US 431 (1984); or *Mthembu v The State*, [2008] ZASCA 51 (South African Supreme Court); or *Tofilau/Marks/Hill/Clarke v the Queen* [2007] HCA 39 (Australian High Court). Cf Thaman, *Truth or Due Process: The Use of Illegally Gathered Evidence in the Criminal Trial*, Background paper for the 18th Congress of the International Academy of Comparative Law, at p 3. Thaman suggests that '[i]n Britain, the courts did not worry about the methods used to acquire evidence if it was otherwise relevant and material.' Paper available at: http://www.wcl.american.edu/events/2010congress/reports/General_Reports/V_B_The_Exclusionary_Rule.pdf

[37] Adopted by General Assembly Resolution 3452 of 9 December 1975, available at: http://www.un.org/documents/ga/res/30/ares30.htm.

[38] Human Rights Committee, General Comment No.7, at §§ 1-2 (1982).

are 147 States Parties to the UNCAT, and none has entered a reservation to this article, which demonstrates its universal acceptance.[40] Article 15 evolved somewhat from the 1975 Declaration formulation, omitting "or other cruel, inhuman or degrading treatment or punishment"[41] and allowing statements made under torture to be used against the torturer as evidence that the statement was made:[42]

> "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."

27. The UN 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 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.[43] Provisions that permit a judicial authority to assess evidence "in accordance with his innermost conviction" or allowing "the free weighing of evidence" have been found to be inadequate.[44]

28. At a regional level, the Inter-American Convention to Prevent and Punish Torture was adopted by the Organization of American States soon after the UNCAT, on 9 December 1985. Article 10 of this treaty provides:

> "No statement that is verified as having been obtained through torture shall be admissible as evidence in legal proceeding, except in a legal action taken against a person or persons accused of having elicited through acts or torture, and only as evidence that the accused obtained such statement by such means."

Arguably this formulation has the same effect as Article 15 of the UNCAT, although the use of the word "verified" in place of "established" and limitation to "legal proceeding" (sic) rather than "any proceedings" could be said to restrict its ambit slightly.

29. In 1994, the Human Rights Committee issued an updated General Comment on Article 7 (General Comment No. 20) containing a similar admonition to the earlier General Comment:

> "It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."[45]

---

[39] Adopted by General Assembly Resolution 39/46 of 10 December 1984.

[40] Please note Austria declared upon ratification (29 July 1987) that it "regards article 15 as the legal basis for the inadmissibility provided for therein of the use of statements which are established to have been made as a result of torture."

[41] This omission, in view of subsequent jurisprudence on the absolute prohibition of all forms of ill-treatment, is no longer particularly significant. As Nowak and MacArthur note in their authoritative text *The UN Convention Against Torture: A Commentary*, 1st Ed 2008 at p 507, the drafters could not reach consensus on how to include other forms of ill-treatment in this particular protection, but this is hardly a sound basis on which to conclude that evidence obtained through cruel, inhuman or degrading treatment is admissible under international law.

[42] For a more complete picture of the evolution of the article, see Nowak and MacArthur, above, at pp 505-507.

[43] See C. Ingelse, *the UN Committee against Torture: an Assessment* (The Hague: Kluwer Law International , 2001) at 379-380, citing numerous decisions of the Committee against Torture, e.g. UN doc. CAT/C/SR.61 at §§ 16, 28 and 53.

[44] As above, citing UN doc. CAT/C/SR.79, § 43 and UN doc. CAT/C/SR.249, §§ 26 and 34.

[45] Above note 35 at § 12.

30. In 1992, the Special Rapporteur on Torture referred to the admissibility of evidence obtained under torture as one of the elements which contributes to impunity and makes torture feasible. He indicated:

> "If each and every State took such measures and vigorously supervised their implementation by the various branches of State authority, no torturer could do his dirty work in the expectation that he could evade punishment. For it is impunity which makes torture attractive and feasible. Far too often the Special Rapporteur receives information… that courts admitted and accepted statements and confessions in spite of the fact that during trial the suspect claimed that these had been obtained under torture, …that, consequently, those who are responsible for the prohibited acts go unpunished and those who are the victims of these acts are left without an effective remedy and without appropriate redress."[46]

31. The Special Rapporteur on Torture has also referred to the exclusionary rule in subsequent reports.[47] Likewise, other UN mandate holders such as the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has also referred to this important principle.[48]

32. In 2007, the Human Rights Committee adopted its General Comment No. 32 on Article 14 of the ICCPR on the right to equality before courts and tribunals and to a fair trial, and observed further:

> "A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession. Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred (…)."[49]

33. Moreover, in their annual resolutions on torture, the UN General Assembly and the Human Rights Council have also adverted to the exclusionary rule. For example, in 2009 and 2010, respectively, the following wording was adopted by consensus:

> "The General Assembly…
>
> 13. Strongly urges States to ensure that no statement that is established to have been made as a result of torture is invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made…."[50]
>
> "The Human Rights Council,
>
> 7. Strongly urges States to ensure that no statement that is established to have been made as a result of torture is invoked as evidence in any proceedings,

[46] Above note 5 at § 589 (emphasis added).
[47] See e.g. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN doc. A/54/426 at §12 (1 October 1999).
[48] Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN doc. A/63/223, at § 31-33 (6 August 2003) and Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the Special Rapporteur torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced Disappearences, UN doc. A/HRC/13/42, at § 292 f (19 February 2010).
[49] Human Rights Committee, General Comment No. 32, UN doc. CCPR/C/GC/32, at § 41(2007).
[50] General Assembly Resolution, UN doc. A/RES/64/153, at § 13 (Adopted on 18 December 2009).

> except against a person accused of torture as evidence that the statement was made, (…), and recognizes that adequate corroboration of statements, including confessions, used as evidence in any proceedings constitutes one safeguard for the prevention of torture and other cruel, inhuman or degrading treatment or punishment…."[51]

34. Finally, the history of the exclusionary rule is also reflected in the rules of procedure and evidence adopted for the various international criminal courts, which enshrine this principle in line with their mandate to uphold international human rights protections for defendants. In 1994, the International Criminal Tribunal for the Former Yugoslavia (ICTY) adopted a rule on the admissibility of evidence obtained in violation of human rights law. The rule, which was later amended in 1995 and 1997 provides:

> "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."[52]

35. Likewise, the International Criminal Tribunal for Rwanda (ICTR) adopted an identical provision to that of the ICTY.[53]

36. The Rome Statute of the International Criminal Court (ICC), which was adopted in 1998 and entered into force on 1 July 2002, similarly provides:

> "In respect of an investigation under this Statute, a person…[s]hall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment…"[54]
>
> "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:
>
> (a) The violation casts substantial doubt on the reliability of the evidence; or
>
> (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."[55]

B. ABSOLUTE AND NON-DEROGABLE NATURE

37. The principle that States may not use information obtained by torture is part of the general prohibition of torture and other cruel, inhuman and degrading treatment or punishment.[56] Like the other obligations in relation to the general prohibition against torture, the exclusionary rule is absolute and non-derogable. This was confirmed by the Human Rights Committee in its General Comment No 32:

> "…as article 7 is non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of

[51] Human Rights Council Resolution, UN doc. A/HRC/RES/13/19, at § 7 (Adopted on 26 March 2010).
[52] International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev.44 (1994 – as amended 1995 and 1997), rule 95.
[53] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, ITR/3/Rev.1 (1995 – as amended 1998), rule 95.
[54] Rome Statute of the International Criminal Court, article 55(1)(b).
[55] Rome Statute of the International Criminal Court, article 69(7).
[56] Human Rights Committee, General Comment No. 20, UN Doc. HRI/GEN/1/Rev.7, at § 12 (10 March 1992); Committee Against Torture, Communication No. 193/2001, *P.E. v. France*, Views adopted on 21 November 2002, UN doc. CAT/C/29/D/193/2001, 19 December 2002 at § 6.3; Committee against Torture, Communication No 219/2002, *G.K. v. Switzerland*, Views adopted on 7 May 2003, UN doc. CAT/C/30/D/219/2002, § 6.10.

> emergency, except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred."[57]

38. The same view was also adopted by the Committee against Torture in its General Comment No. 2:

> The Committee reminds all States parties to the Convention of the non-derogable nature of the obligations undertaken by them in ratifying the Convention. In the aftermath of the attacks of 11 September 2001, the Committee specified that the obligations in articles 2 (whereby "no exceptional circumstances whatsoever…may be invoked as a justification of torture"), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) are three such provisions that "must be observed in all circumstances"[58]

39. The Committee against Torture has stated that "the broad scope of the prohibition in Article 15, proscribing the invocation of any statement which is established to have been made as a result of torture as evidence in "any proceedings", is a *function* of the absolute nature of the prohibition."[59]

40. Normally, a decision to admit evidence is based on an evaluative process – the interests of justice and other public policy considerations are weighed against the fairness to the individual on trial. Given the absolute prohibition of torture and other ill-treatment though, such a balancing process is inappropriate when it comes to evidence obtained through these means. This applies even to the so-called "fruit of the poisonous tree" – i.e. otherwise legitimate evidence which could not have been found if it were not for the ill-treatment. This principle has long been recognised in the USA as necessary to discourage illegal investigative methods.[60] The European Court of Human Rights also affirmed its application in Europe in the case of *Jalloh v Germany,* going so far as to say evidence obtained through ill-treatment must never be relied on as proof of the victim's guilt, regardless of its probative value.[61]

C. PURPOSE AND RELATIONSHIP WITH FAIR TRIAL RIGHTS

41. The purpose behind the general prohibition of admissibility of evidence obtained by torture is twofold.[62] First, 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. Second, 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

---

[57] Above note 49, at § 6.
[58] Above note 32, at § 6.
[59] See *GK v Switzerland*, note 56, at § 6.10 (emphasis added).
[60] See e.g. *Weeks v United States*, 232 US 383 (1914.)
[61] *Jalloh v Germany*, Application 54810/00, judgment of 11 July 2006 – see esp. § 105.
[62] Burgers and Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff, 1988) at p. 148. See also C. Inglese, *the UN Committee against Torture: An Assessment* (The Hague: Kluwer Law International, 2001) at p. 365.

hearing".[63] The Special Rapporteur on Torture[64] and the UN Committee against Torture[65] have also expressly applied these rationales in their work.

42. The exclusionary rule is inextricably linked to the protection against self-incrimination and the presumption of innocence included in general human rights treaties, such as the International Covenant on Civil and Political Rights.[66] A trial in which evidence obtained through torture or other forms of ill-treatment is used to convict the defendant can never be considered a fair trail according to international law standards.

43. Apart from damaging the integrity of the justice system, the use of information extracted by torture in proceedings also constitutes a serious violation of the right to a fair trial. The rights of the accused to the presumption of innocence, to examine witnesses against him or her and not to be compelled to testify against himself or herself or to confess guilt are vital aspects of the right to a fair trial as provided for in Article 14(2), 14(3)(e) and 14(3)(g) of the ICCPR,[67] as well as Articles 8(2), 8(2)(f), 8(2)(g) and 8(3) of the ACHR.

44. In its General Comment No. 32, the Human Rights Committee noted:

> "… [a]rticle 14, paragraph 3(g) guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt."[68]

45. The European Court of Human Rights has recognised the connection between coerced confessions and the right to a fair trial under Article 6 of the European Convention on Human Rights. For example in *Söylemez v Turkey*, the Court found unanimously that the applicant's rights under Article 6 had been violated because the statement obtained from him under duress while in police custody had been one of the items of evidence that had formed the basis for his conviction.[69]

46. *Murray* v *UK*[70] was the first case in which the European Court explicitly recognised that the privilege against self-incrimination should be considered integral to the fair trial rights in Article 6 of the European Convention. The judgment made reference to Article 14(3)(g) of the ICCPR[71] and concluded that "[a]lthough not specifically mentioned in Article 6 (art. 6) of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally

[63] See also Human Rights Committee, General Comment No. 13 on the administration of justice, § 14 (1984).
[64] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN doc.A/HRC/13/39/Add.5 (5 February 2010).
[65] See, e.g., Committee against Torture, Summary record of the public part of the 289th meeting, UN doc. CAT/C/SR.289, at § 34 (26 August 1997), sub-heading "D. Subjects of Concern".
[66] 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 (Article 87); Fourth Geneva Convention (Article 32).
[67] Nowak, *CCPR Commentary*, 2nd Revised Ed 2008, at pp 341 and 344.
[68] Above note 49, at § 41.
[69] *Söylemez v Turkey*, Application 46661/99 – definitive judgment of 21 December 2006, at §§ 118-125. Judgment available (in French only) at: www.echr.coe.int. See also *Sanuders v UK* ; *Teixeira de Castro v Portugal*; *Mamatkulov and Askarov v Turkey*; *Haratyunyan v Armenia*.
[70] *Murray v UK*, Application 41/1994, judgment of 25 January 1996.
[71] Report No. 117/09 on case 12,228, decision of November 19, 2009, at § 42.

recognised international standards which lie at the heart of the notion of a fair procedure under Article 6."[72]

47. In *Jalloh v Germany,*[73] the European Court discussed the effect of the use of evidence obtained in contravention of Article 3 of the European Convention on Human Rights (the prohibition on torture and other ill-treatment) and Article 6 (the right to a fair trial).[74] Concluding that the national courts did not even have discretion to exclude the evidence in question (due to specific authorisation by domestic law), the European Court found Germany had violated Article 6 of the Convention by using it to convict Mr Jalloh.[75]

48. In *Harutyunyan v Armenia,*[76] the Court again found a violation of the right to a fair trial, on the basis that witness statements obtained under duress were used in criminal proceedings against the applicant.[77] The applicant's defence counsel had tried several times to have the evidence in question excluded at all levels of appeal in Armenia, to no avail.[78]

49. Finally in *Gäfgen v Germany,*[79] the Court held that the principle of exclusion of evidence obtained by torture or other ill-treatment applies even when the evidence is compelling and the crime grave. Mr Gäfgen was convicted of kidnapping an 11 year old boy, blackmailing his parents, then killing him. Believing the child was still alive, the German police officer in charge of the case decided to authorise the extraordinary measure of threatening Mr Gäfgen with "subjection to extreme physical pain at the hands of a person specially trained for such purposes if he did not disclose the child's location."[80] He was also subjected to further threats and some physical pressure (shaking and shoving).

50. The police officers involved were subsequently prosecuted for their actions and convicted of "coercion committed by an official in the course of his duties" (and in the case of the superior officer, incitement to this offence).[81]

51. The European Court was therefore called upon to "examine the consequences for a trial's fairness of the admission of real evidence obtained as a result of an act qualified as inhuman treatment in breach of Article 3, but falling short of torture."[82] The Court noted that despite the law enforcement interests and life-saving motive of the police, Article 3 of the European Convention is absolute and non-derogable, and therefore cannot have other considerations weighed against its breach, as such a balancing process would "sacrifice [the values of Article 3] and discredit the administration of justice."[83]

52. In the end, the court concluded that Germany had not breached Article 6, because in reality the coerced confession had not formed the basis for Mr Gäfgen's conviction (rather, the basis was a second, voluntary and valid confession before a judge and

[72] As above, § 45.
[73] *Jalloh v Germany*, above note 61.
[74] As above, at §§ 94-123.
[75] As above, at §§ 121-123.
[76] *Harutyunyan v Armenia*, Application 36549/03, judgment of 28 September 2007.
[77] As above, at §§ 58-66.
[78] As above.
[79] *Gäfgen v Germany* Application 22978/05, judgment of 1 June 2010.
[80] As above, at § 15.
[81] As above, at § 49.
[82] As above, at § 173.
[83] As above, at § 176.

corroborating evidence which could have been found without the police coercion).[84] Nevertheless, the case sets a strong precedent for the exclusion of coerced confessions in criminal trials, even when there is a compelling public interest in the conviction of the person concerned.

53. The Inter-American Commission on Human Rights has been called on several times to rule on cases in which confessions obtained by torture have been used to convict either the victims or third parties. One example is the case of *Cruz and Sanchez v Mexico,* in which the Commission ruled that being tortured and forced to sign blank sheets of paper (later to be used as confessions) constituted a *prima facie* breach of Article 10 of the IACPPT.[85]

54. In the case of *Manriquez v Mexico*,[86] the Inter-American Commission concluded that Mexico had breached not only Article 10 if the IACPPT, but also the right to the presumption of innocence under Article 8(2) of the American Convention.[87] The Inter-American Commission provided:

> "Historical experience has clearly shown that giving evidentiary effect to extrajudicial statements, or statements made during the investigative stage of proceedings, is an incentive to use torture when the police prefer to save on investigative effort, extracting a confession from the accused."[88]

55. The Inter-American Commission also found breaches of the above articles in the cases of *Lovato v El Salvador*[89] and *Del Campo Dodd v Mexico*.[90] In the latter case, following its reasoning in *Manriquez,* the Commission concluded that Mr Del Campo Dodd was forced to testify against himself in a torture-induced confession, which it called "the most egregious form of coercion." [91]

56. In *Cantoral Benavides v Peru*, the Inter-American Court of Human Rights also found a violation of Article 8 of the ACHR, after having determined that the applicant had been subjected to physical and psychological torture for the purpose of "wear[ing] down his psychological resistance and forc[ing] him to incriminate himself or to confess to certain illegal activities."[92]

D. THE BURDEN OF PROOF: STATES HAVE A POSITIVE OBLIGATION TO ENSURE THAT EVIDENCE WAS NOT OBTAINED BY TORTURE

International jurisprudence

57. The Committee against Torture regularly makes recommendations to States Parties to adopt legislation implementing Article 15 of the UNCAT and reminds them of their general obligation to take measures to ensure torture evidence is never adduced in their courts of law.[93] Countries as diverse as the Russian Federation, the USA, Togo,

---

[84] However, please note there was a strong dissenting opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Blanku and Power, effectively supporting the 'fruit of the poisonous tree' principle to find that the trial was, in fact, unfair.
[85] See Report No. 80/03 on Petition No 12,228, Admissibility decision of 22 October 2003.
[86] Report No. 2/99 on Case 11,509, decision of 23 February 1999.
[87] As above, at § 85.
[88] As above, at § 78.
[89] Report No. 5/94 on Case 10,574, decision of 1 February 1994.
[90] Report No. 117/09 on Case 12,228, decision of November 19, 2009.
[91] As above, at §§ 51-57.
[92] *Cantoral Benavides v Peru*, IACHR (Serie C) No. 69, judgment of 18 August 2000.
[93] See Nowak, above note 41, at p 507.

Iceland, China, New Zealand and Morocco have been criticised for their lack of compliance with this article of the Convention.[94]

58. In *PE v. France*, [95] France argued before the Committee against Torture that nothing in UNCAT imposed upon it an obligation to ascertain the circumstances in which information provided by another State (in this case Spain) was obtained before using the information in its domestic extradition processes. This implied, in part, that the person alleging information was obtained by torture must prove the allegation. The Committee rejected these submissions, 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." Once the complainant alleged that statements used against him were obtained as the result of torture, "the State party had the obligation to ascertain the veracity of such allegations."[96]

59. The Human Rights Committee has also produced relevant jurisprudence with regard to the burden of proof. In its General Comment No. 32, it opined that "domestic law must ensure that statements and confessions obtained in violation of Article 7 of the Covenant are excluded from evidence… and the burden is on the State to prove that the statements made by the accused have been given of their own free will."[97]

60. The Human Rights Committee confirmed its stance on this issue in its Views on the individual communication of *Kurbanova v Tajikistan:*

> "The Committee has noted the author's fairly detailed description of beatings and other ill-treatment that her son was subjected to. She has furthermore identified by name some of the individuals alleged to have been responsible for her son's ill-treatment. In reply, the State party has confined itself to stating that these allegations were neither raised during the investigation nor in court. The Committee recalls, with regard to the burden of proof, that this cannot rest alone with the author of a communication, especially considering that the author and the State party do not always have equal access to evidence and that frequently the State party alone has access to relevant information. Further, the mere fact that no allegation of torture was made in the domestic appeal proceedings cannot as such be held against the alleged victim if it is proposed, as in the present case, that such an allegation was in fact made during the actual trial but was neither recorded nor acted upon. In the light of the details given by the author on the alleged ill-treatment, the unavailability of a trial transcript and the absence of any further explanations from the State party, due weight must be given to the author's allegations. Noting in particular that the State party has failed to investigate the author's allegations, which were brought to the State party's authorities' attention, the Committee considers that the facts as submitted disclose a violation of article 7 of the Covenant."[98]

61. The Human Rights Committee went on to confirm and expand upon this jurisprudence in subsequent Individual Communications. In *Singarasa v Sri Lanka*, it explained that the burden of proof should never fall on the individual:

> "However, the Committee also notes that the burden of proving whether the confession was voluntary was on the accused. This is undisputed by the State party since it is so provided in Section 16 of the PTA. Even if, as argued by the State party, the threshold of proof is "placed very low" and "a mere possibility of involuntariness" would suffice to sway

[94] As above, pp 508-509.
[95] *PE v France*, Communication 193/2001, Views of 21 November 2002.
[96] As above, at § 6.3.
[97] See note 49, at § 41.
[98] *Kurbanova v Tajikistan,* Communication 1096/2002, Views of 12 November 2003, § 7.4.

> the court in favour of the accused, it remains that the burden was on the author. The Committee notes in this respect that the willingness of the courts at all stages to dismiss the complaints of torture and ill-treatment on the basis of the inconclusiveness of the medical certificate (especially one obtained over a year after the interrogation and ensuing confession) suggests that this threshold was not complied with. Further, insofar as the courts were prepared to infer that the author's allegations lacked credibility by virtue of his failing to complain of ill-treatment before its Magistrate, the Committee finds that inference to be manifestly unsustainable in the light of his expected return to police detention. Nor did this treatment of the complaint by its courts satisfactorily discharge the State party's obligation to investigate effectively complaints of violations of article 7. The Committee concludes that by placing the burden of proof that his confession was made under duress on the author, the State party violated article 14, paragraphs 2, and 3(g), read together with article 2, paragraph 3, and 7 of the Covenant."[99]

62. Similarly, the Subcommittee on Prevention of Torture stated relevantly in its report on its 2008 visit to Mexico:

> "Regarding the judicial evaluation of evidence, the State party bears the burden of proving that its agents and institutions have not committed acts of torture. Victims should not be expected to prove that torture has occurred, particularly as they may have been subjected to conditions that make it impossible to prove: in most cases, victims of torture are held in closed places without access to legal assistance. Moreover…it is not always easy to prove that acts of torture have been committed."[100]

63. The Special Rapporteur on Torture has also stated that the burden of proof of absence of coercion should be on the state where it seeks to use information against a detainee.[101] The Special Rapporteur noted that in Mexico, the 1991 Federal Act for the Prevention and Punishment of Torture was intended to shift the burden on to the authorities, but had failed to do so.[102] Likewise, in its Standing General Recommendations he explains, "where allegations of torture and or other forms of ill-treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill-treatment."[103]

64. The Special Rapporteur on Torture took up this issue again in 2006 in his annual report to the General Assembly.[104] He noted with concern the "heavy burden of proof placed on an individual to establish that [secret] evidence was obtained under torture."[105] On the interpretation of the word "established" by States, he emphasised that it is "of the utmost importance in this respect that there exists a procedure which affords protection

---

[99] *Singarasa v Sri Lanka*, Communication 1033/2001, Views of 21 July 2004, § 7.4. See also *Kelly v Jamaica*, Communication 253/1987 at § 5.5; *Berry v Jamaica*, Communication 330/1998 at § 11.7; *Shukurova v Tajikistan*, Communication 1044/2002 at §s. 8.2-8.3 and *Deolall v Guyana*, Communication 912/2000 at §s. 5.1-5.2.

[100] Subcommittee on Prevention of Torture, Report on visit to Mexico, UN doc. CAT/OP/MEX/1, at § 39 (31 May 2010).

[101] See e.g. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report on visit to Mexico, UN doc. E/CN.4/1998/38/Add.2, at §§ 36-38 (14 January 1998). See also Report on Visit to Turkey, UN doc. E/CN.4/1999/61/Add.1, at § 113(e) (27 January 1999) or more recently the Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention, UN doc. A/HRC/13/39/Add.5 (5 February 2010).

[102] As above, at § 38.

[103] Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN doc. A/56/156, at § 39(j), (3 July 2001).

[104] Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN doc. A/61/259 (14 August 2006).

[105] As above, at p 2 (Summary).

to the individual against whom the evidence is invoked without imposing a burden of proof on either party that they would not be able to discharge."[106]

65. Finally, the Special Rapporteur on Torture has recently explained that:

> "It is not enough for suspects to indicate that their confession was obtained under torture; they have to establish the ill-treatment. Since torture almost always takes place behind close doors, lacks any witnesses except its perpetrators, and any independent forensic expertise to document traces of abuse is beyond the survivor's reach, this requirement is the most difficult to satisfy and appears almost taunting. In order for the safeguard against the admissibility of evidence obtained under torture to have any realistic prospect of unfolding, a shift of the burden of proof regarding allegations has to take place."[107]

National jurisprudence

66. A great many variations on the exclusionary rule have been developed by national courts.[108] However, the seminal national cases relating to the exclusionary rule in recent years are *Mounir el Motassadeq* [109] in Germany and *A & Others v Secretary of State for the Home Department* in the UK.[110]

67. El Motassadeq was charged by the German authorities and convicted in the Hanseatic Higher Regional Court (Hamburg) in 2003 for complicity in the World Trade Center attacks in New York in 2001. His conviction was, however, quashed by the Federal Court of Justice because it was based largely on testimony from a person or persons detained by the United States who may have been tortured. What is more, this evidence was the subject of a secrecy order by the Executive.[111] During the retrial, the Hamburg court requested access to the relevant witnesses or full records of their interrogations. In response, the US provided only summary records of interrogation and declined to reveal the witnesses' whereabouts. The Hamburg court eventually admitted the summary records into evidence, holding that it could not be *established* that the relevant testimony had been given as a result of torture, as required by Article 15 of the UNCAT.[112] El Motassadeq's Appeals to higher courts were ultimately unsuccessful.[113]

68. The German courts' decisions in relation to the exclusionary rule are disappointing for the leeway they give governments to overlook allegations of torture in admitting evidence. Placing too much emphasis on the word "established" (or "verified" in Article 10 of the IACPPT) preserves flexibility for States wishing to adduce evidence of dubious provenance, but constitutes an abject failure to respect the protective intent of Article 15 of the UNCAT and its equivalents. This view is also supported by the Special Rapporteur on Torture, who held that "the Hamburg Court should have applied Article

---

[106] As above, § 47.
[107] Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention, UN doc. A/HRC/13/39/Add.5, at § 98. (5 February 2010).
[108] See e.g. Decision of High Court Prague (2 To 123/2001), *Chief Military Prosecutor v. Issacharov* (Decision of Israeli Supreme Court of April 5, 2006 – not yet published) or STC 114/1984 (Spanish Constitutional Court Decision of 29 November1984).
[109] For full citations of judgments, see Timo Kost, *Mounier el Motassadeq: A Missed Chance for Weltinnenpolitik?* German Law Journal, Vol. 8 No. 4, p 443, available at: http://www.germanlawjournal.com/pdfs/Vol08No04/PDF_Vol_08_No_04_443-454_Developments_Kost.pdf
[110] [2005] UKHL 71, 8 December 2005.
[111] As above, § 444.
[112] See Nowak, above note 41, at p 524.
[113] See Kost, above note 109, at pp 445-447.

15 … Whether the use of torture for the purpose of extracting information can be established or not is irrelevant in cases of enforced disappearances."[114]

69. The UK House of Lords' judgment in *A & Others v Secretary of State for the Home Department* sets a more promising precedent. The case concerned terrorism suspects who had been made subject to control orders by the Executive on the basis of intelligence from the United States. Despite the lack of an exclusionary rule in UK legislation,[115] the Lords ruled unanimously that, if it were more likely than not that evidence had been obtained as a result of torture, it should be excluded – regardless of where in the world the torture was committed or who the perpetrator happened to be.[116] This overturned the lower courts' judgment that the UK Government would have to have been involved (directly or indirectly) in the torture for the evidence to be inadmissible.[117]

70. The UK Government stated for the record during the Committee against Torture's consideration of its 4th periodic report, that it did not intend to rely upon "evidence where there is a knowledge or belief that torture has taken place."[118] However, it also affirmed that "evidence obtained as a result of any acts of torture *by British officials, or with which British authorities were complicit*, would not be admissible in criminal or civil proceedings in the United Kingdom,"[119] and it was this qualification (or refinement) of the general rule on which it relied in *A and Others*.

E. THE APPLICATION OF THE PRINCIPLE OF NON-ADMISSIBILTY OF EVIDENCE OBTAINED BY TORTURE TO OTHER FORMS OF ILL-TREATMENT

71. 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 or punishment[120]

72. Several arguments support its application in cases where evidence has or may have been obtained by other forms of ill-treatment.

73. First, as a preventive measure. Although Article 16 of the UNCAT, which prohibits cruel, inhuman and degrading treatment or punishment, does not make specific reference to Article 15, it can be argued that this is more of a quirk resulting from the drafting process rather than a deliberate omission.[121] In fact, Article 16 is clearly intended to extend States Parties' obligations in relation to the prevention of other forms of ill-treatment, and (as discussed above) prevention is a major one of the principal aims of Article 15. In order to reconcile this fact and reach a proper construction of Article 15, it is therefore necessary to exclude evidence obtained through any sort of treatment prohibited at international law.

---

[114] Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN doc. A/61/259, at § 56 (14 August 2006).
[115] See Duberstein, *Excluding Torture: A Comparison of the British and American Approaches to Evidence Obtained by Third Party Torture*, North Carolina Journal of International Law & Commercial Regulation, Vol. XXXII, 2006, p 159 at pp 162 & 187.
[116] Above note 109, at §§ 51 & 113 (judgments of Lords Bingham and Hope).
[117] As above.
[118] See UN doc. CAT/C/CR/33/3, at § 3(g), (10 December 2004).
[119] As above (emphasis added).
[120] Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, "Interim Report to the General Assembly" UN Doc. A/59/324, at §§ 13-16 (1 September 2004); and the 1975 General Assembly Declaration against Torture, supra, Article 12.
[121] See Nowak, above note 41, pp534-536.

74. Second, as the obligation laid out in article 15 of the UNCAT derives from the absolute prohibition of torture, and as the prohibition of cruel, inhuman or degrading treatment or punishment is equally absolute in nature, it follows that any evidence obtained by other forms of ill-treatment must also be declared inadmissible in any proceedings.

75. Finally, a literal interpretation of Article 15 of the UNCAT restricting its ambit to torture alone could risk undermining the treaties' preventive object and purpose. The same would apply to Article 10 of the IACPPT.

76. The application of the principle of non-admissibility of evidence obtained by torture to other forms of ill-treatment is supported by the Committee against Torture. In its General Comment No.2, the Committee against Torture provided that "Articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment" and that "Articles 3 to 15 of the Convention constitute specific preventive measures that the States parties deemed essential to prevent torture *and* ill-treatment."[122] The same approach has been supported by the Committee during the review of State Party reports .[123]

77. As indicated in the previous section, the Human Rights Committee also does not make a distinction between statements or confessions obtained through torture or other prohibited treatment.[124]

V. THE EVIDENTIARY VALUE OF CONFESSIONS

78. Confessions in many contexts are regarded as the "crown of evidence."[125] It is commonly known that one of the most frequent purposes of torture is the extraction of confessions. Furthermore, the fact that suspects can be convicted on the basis of a confession alone creates an environment conducive to torture.[126]

79. The Special Rapporteur on Torture has elaborated on several proposals to rectify the reliance on confessions to convict a person:

> "As a first but important step, criminal procedure codes should be amended and only accept confessions which are made in the presence of a competent and truly independent lawyer and further confirmed before the judge. Furthermore, confessions alone should never be sufficient for a conviction, but should always require further supportive evidence."[127]

80. The European Committee for the Prevention of Torture has provided further, "in the context of the prevention of torture and other forms of ill-treatment, it is of fundamental importance to develop methods of crime investigation capable of reducing reliance on confessions, and other evidence and information obtained via interrogations, for the purpose of securing convictions."[128]

---

[122] Above note 32, at §§ 6 and 25 (emphasis added).
[123] Committee against Torture, Concluding observations on FYROM, UN doc. A/63/44, § 44; on Japan, UN doc. A/62/44, § 41; on Kazakhstan, UN doc. A/64/44, § 41; on Uzbekistan, UN doc. A/63/44, § 37; on Australia, UN doc. A/63/44, § 39; on Indonesia, UN doc. A/63/44, § 42; on the Russian Federation, UN doc. A/62/44, § 36; on Tajikistan, UN doc. A/62/44, § 38; on Ukraine, UN doc. A/62/44, § 45; on The Philippines, UN doc. A/64/44, § 52.
[124] Above note 49.
[125] Above note 107.
[126] As above, at §60.
[127] As above, at § 101.
[128] The European Committee for the Prevention of Torture Standards, CPT/Inf/E (2002) 1 - Rev. 2009

81. Recently, the Subcommittee on the Prevention of Torture has stated that it "considers that an evidence-led and not confession-led approach to criminal investigation to be one of the fundamental safeguards, as it would render having recourse to extracting confessions by means of ill-treatment meaningless and thus reduce considerably the risk of ill-treatment of persons in police custody."[129]

82. In the case of Mexico, the subscription of judges at all levels to the doctrine of "procedural immediacy", as interpreted in the current case - that spontaneous confessions under pressure are more reliable than exculpatory statements made after pause for reflection - may drive confessions in police custody to be given more weight in criminal proceedings.

83. The doctrine of procedural immediacy relies in part for its legitimacy on a notion that subsequent "ratifications" of incriminating statements void any concerns about the way in which they were initially obtained, because the defendant has a chance to speak in front of the judge with all the protections that entails. However, it is unrealistic to expect that someone who has been tortured to confess to a crime will not also be threatened with further mistreatment should he/she speak about the torture before the prosecutor and/or judge.[130] Therefore, the presumption of voluntariness applied to such statements is misplaced.

84. More specifically, there is substantial evidence that the protections in Mexico's national legislation and Constitution have been undermined by the Supreme Court's insistence that, when there are two conflicting statements from a suspect, the earlier in time is to be preferred.[131] Unsurprisingly, this earlier statement is usually made in police custody, at the early stages of detention. It is well known that the first moments after apprehension or arrest are those where the risk of torture or other forms of ill-treatment is greatest.[132] In addition, the Supreme Court has narrowly interpreted the requirement that the statement be "established" or "verified" to have been made as a result of torture, placing a burden on the defendant which is very difficult to meet, and has allowed confessions alone to form bases for conviction.[133]

85. In this connection, the Inter-American Commission of Human Rights in *Manríquez v Mexico* has stated: "the principal of procedural immediacy as conceived by the Mexican State, instead of serving as a procedural guarantee for persons accused of crimes, is becoming its antithesis, a source of abuses of the accused."[134]

86. In cases involving 'confirmation' of confessions, such as the present case, national courts generally reject the Mexican approach. In an Article gathering relevant jurisprudence for a recent Congress of the International Academy of Comparative Law, Professor Stephen Thaman of St Louis University wrote:

> "Regarding fruits of involuntary confessions, the US [Supreme Court] has intimated in *Oregon v Elstad*, that a confession which otherwise comports with

[129] Subcommittee on prevention of torture and other cruel, inhuman or degrading treatment or punishment, Report of the visit to the Maldives, UN doc. CAT/OP/MDV/1 (26 February 2009).
[130] Support for this view may be found in e.g. the report of the Committee against Torture, inquiry visit to Mexico under article 20 of the UNCAT, UN doc. CAT/C/75, at §§199-200 (2003). See also J. Maull, *The Exclusion of Coerced Confessions and the Regulation of Custodial Interrogation under the American Convention on Human Rights*, American Criminal Law Review Vol 32, 87.
[131] See e.g. Human Rights Committee, Concluding Observations on Mexico, UN doc. CCPR/C/MEX/CO/5, at § 14.
[132] See e.g. European Committee for the Prevention of Torture, 6th General Report [CPT/Inf(96)21], at §15.
[133] See Maull, note 130, at 121.
[134] As above at § 82.

> Miranda would be subject to exclusion if it follows on the heels of a confession deemed to be involuntary under the due process analysis. In England and Wales, where an initial confession is found to be inadmissible due to "oppression," a subsequent non-coerced and otherwise legal confession may be suppressed as being fruit of the poisonous tree. The courts look to see whether the "blight persists" and/or the earlier confessions continues to exert a "malign influence" over the succeeding one. Courts will thus exclude the subsequent confession where the initial breach was flagrant or substantial, and depending on whether it was "continuing," or whether, for instance, the interrogators clearly let the suspect know that the initial confession could not be used, therefore giving her a clear chance to exercise free of will as to whether to talk to the police thereafter."[135]

87. It is indisputable that, in most instances, torture exerts an influence over the victim which lasts far longer than the initial physical pain. When the victims are still under the effective control of the alleged perpetrators (as they usually are when brought to court by the police), any claimed confirmation of a confession should *prime facie* be considered invalid.

VI. CONCLUSION

88. Evidence which has or may have been obtained by torture or other forms of ill-treatment must never be used in any criminal proceedings against the person concerned or any other person, except against a person accused of torture as evidence that such information was obtained. Prohibiting the admission of such evidence contributes to the prevention of torture and other forms of ill-treatment.

89. As a consequence of the absolute and non-derogable nature of the prohibition of torture, States have a duty to prevent torture by adopting appropriate and effective means. One such means includes the non-admissibility of evidence obtained by torture, as provided by Article 15 of the UNCAT and Article 10 of the IACPPT. Like other obligations in the general prohibition against torture, the exclusionary rule is absolute and non-derogable. It has a *jus cogens* status and imposes obligations *erga omnes*.

90. Since the adoption of the Declaration against Torture in 1975, the principle of non-admissibility of evidence obtained by torture has frequently been confirmed by the observations and findings of a number of UN bodies and mechanisms, such as the Committee against Torture, the Human Rights Committee, and the Special Rapporteur on Torture. At a regional level, it has also been included in the IACPPT and supported by the jurisprudence of the Inter-American and European System. The Rules of Procedure and Evidence of international criminal tribunals have also incorporated this rule. Moreover, this principle has been endorsed by the General Assembly and the Human Rights Council.

91. States have a positive duty to ensure that evidence is not obtained by torture, *inter alia* by ensuring that the burden of proof in torture cases does not rest on the alleged victim. There is ample international authority confirming that, whenever pertinent allegations are raised, the State must bear the burden of proving evidence has not been obtained through torture or other ill-treatment. Confirmations of confessions before a prosecutor or in court should not be given any credence, unless the victim genuinely no longer has anything to fear from the perpetrator(s).

92. For the purpose of determining the application of the exclusionary rule, no distinction should be made between torture and other forms of cruel, inhuman or degrading

[135] See Thaman, above note 36, at p 49.

treatment or punishment. Its scope of application must include all violations of the prohibition of torture and other forms of ill-treatment.

93. Finally, on the evidentiary value of confessions, confessions alone should never be sufficient to secure a conviction, but should always require further supportive evidence. States should develop methods of crime investigation capable of reducing reliance on confessions, and other evidence and information obtained via interrogations, as a means to prevent torture and other forms of ill-treatment. Where an initial confession is extracted by torture or other forms of ill-treatment, a subsequent non-coerced and otherwise legal confession should be considered inadmissible as being "fruit of the poisonous tree".

All of which is respectfully submitted

Geneva, Switzerland - 10 September 2010

Mark Thomson
Secretary General
Association for the Prevention of Torture (APT)