Tainted by Torture

Examining the Use of Torture Evidence

A report by Fair Trials and REDRESS

May 2018

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We are delighted to have been invited by Fair Trials and REDRESS to assist on this project and to support their essential work countering the practice of torture.

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Disclaimer

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Executive summary

Over the last century, there has been an international movement towards the eradication of torture. Despite being recognised globally as heinous, inhuman and criminal, torture continues to be a daily reality in many parts of the world. In particular, torture continues to be used by police and others as a short-cut in criminal investigations, as a means of exerting control over detainees, to gather 'intelligence', to solicit leads and to obtain confessions.

International law prohibits reliance on 'torture evidence' because: (a) statements made as a result of torture are involuntary, inherently unreliable and violate the right to a fair trial; (b) to rely on such evidence undermines the rights of the torture victim; (c) it indirectly legitimises torture and in so doing taints the justice system; and (d) prohibiting reliance on the fruits of torture acts as a form of deterrence and prevention. The exclusionary rule plays a key role in the legal architecture underpinning the prohibition on torture. Sadly, reliance on 'torture evidence' in criminal cases continues to be routine in many places.

Despite the requirement under international law to exclude 'torture evidence', some countries simply fail to do so. More commonly, countries have an exclusionary rule, but one which is incomplete:

i) Some countries rely on general rules for the exclusion of illegally obtained evidence, which requires some form of judicial discretion or balancing act in deciding whether to admit the evidence.

ii) A number of countries only prohibit reliance on statements obtained from the torture of the defendant and not evidence obtained from the torture of a third party.

iii) Many legal systems focus on the prohibition on 'confessions' or 'statements', without any reference to physical or derivative evidence which has resulted from torture. International law is also unclear on derivative evidence or 'fruits of the poisoned tree'.

Many criminal justice systems rely on confessions as the main evidence on which convictions are founded. This exacerbates the risk of coercion, including torture. In response, some countries apply special protections, including a requirement for corroborating evidence and/or the need to demonstrate that procedural safeguards have been complied with. The need to move away from coercive policing practices and confession-based justice is gaining traction at an international level as a key protection against torture. A universal set of standards for non-coercive interviewing methods and procedural safeguards has, for example, been recommended.

Even where a country has a clear exclusionary rule in law, this does not always succeed in precluding reliance on 'torture evidence' in practice. It is crucial to have a fair and effective legal procedure for identifying and excluding 'torture evidence'. Many countries fall short here, for example, because they place an unreasonable burden on the defendant to prove that torture occurred or because they rely too heavily on types of evidence which are not practical to obtain. Many other factors affect whether exclusionary rules work, including whether there are trained professionals applying the rules; broader institutional incentives and cultures at play in the justice system; and practical barriers, such as failures to protect torture victims in detention.

In practice, where torture is identified in the course of proceedings to exclude evidence, there is rarely an obligation on competent officials to initiate a criminal action. In general, criminal investigations require a formal complaint to be made by the victim. The exclusionary rule is also just one of a wide range of remedies and reparations for victims mandated by international law.

To make the international prohibition on reliance of 'torture evidence' more effective, our recommendations are as follows:

1. Given its crucial role in the prohibition on torture, the exclusionary rule should be accorded a more prominent role in the work undertaken to combat torture. In particular, we would urge the UN Committee Against Torture to produce a general comment on the topic.

2. We recommend that domestic legal regimes be reviewed to ensure compliance with existing international standards on the exclusion of 'torture evidence'. This should, for example, form a part of country reviews by relevant treaty monitoring bodies. Where states fail to remedy shortfalls in protection, this should become a focus for advocacy, including by domestic civil society actors.

3. Clarity is needed on the extent to which the exclusionary rule covers derivative evidence and evidence obtained as a result of inhuman or degrading treatment or punishment. This should be the focus of further research and we urge the UN Committee Against Torture to address these issues in a general comment.

4. We urge those working to advance compliance with the exclusionary rule to consider what legal procedure is applied to identify and exclude 'torture evidence', taking account of applicable international standards on the right to a fair trial. Domestic legal regimes should, in particular, be reviewed to ensure compliance with international standards on the burden of proof for establishing whether evidence was obtained as a result of torture.

5. Concerns about reliance on 'torture evidence' will not be solved by changes to the law alone. We recommend approaches which address how the law is operating in practice. This should include the collection of statistical data on the application of exclusionary regimes as well as qualitative engagement with the stakeholders who are key to making the law work in practice.

6. Reducing reliance on confessions in criminal prosecutions has the potential to address a major driver of torture. We welcome the growing recognition that increasing respect for suspects' procedural rights in the period following arrest is important to torture prevention. We recommend an increased focus on rights-compliant police investigations.

7. We recommend that states review the process for ensuring accountability where torture is identified in the course of proceedings to exclude evidence: this should not rely on a complaint by the victim. Similarly, whilst the exclusionary rule should be recognised in part as a means of reparation, it is not a sufficient form of remedy or reparation.

Introduction

Imagine a young man is detained in a police cell. He has been there for several weeks, has had no access to a lawyer and his family doesn't know where he is. The police are repeatedly administering electric shocks to the most sensitive parts of his body; they are beating him on the soles of his feet; and they are threatening that they will rape his wife if he doesn't comply. He is being denied proper food and his cell is not ventilated, making it difficult for him to breathe. Basic dignities such as the ability to use toilet facilities, to wash and to interact with other detainees are curtailed. The young man is progressively worn down out of sheer mental and physical exhaustion. He can hardly think. He just wants the suffering to stop. He tells the police officers what he thinks they want to hear. He admits to crimes of which he has no knowledge. His statement is then written up and he is forced to sign it.

This is a typical example of torture, but it does not come close to covering the variety of contexts in which torture can occur, the persons who resort to it, the supposed purposes for using it or indeed the consequences of its use. Nevertheless, torture is often used by police, intelligence services, the military and others as a short-cut in criminal investigations, as a means of exerting control over detainees; to gather 'intelligence'; to solicit leads or other information; and to obtain confessions. In some countries this form of cruelty and intimidation is routine and state-sanctioned. In others, it is unseen and unsanctioned but nevertheless is still regularly resorted to behind closed doors.

This report focuses on the rule prohibiting the use of information gathered from torture practices in legal proceedings. National constitutions, criminal procedural codes, regional and international treaties and their interpretive texts have progressively addressed the question of 'torture evidence', as have domestic and international jurisprudence. The general position is that 'torture evidence' is incapable of being admitted in legal proceedings, except to prove that the torture happened. This is clear and well known. Sadly, however, in the words of the former UN Special Rapporteur on Torture, Juan Mendez: '*this is a norm that is mostly observed in the breach. In practice, judges and prosecutors ignore signs that a person has been mistreated and even ignore formal complaints to that effect*'.[1]

The aim of this report is to understand better the disconnect between what is, on its face, a clear international standard and the reality on the ground. Whilst much is known about the general prohibition on the use of 'torture evidence', the procedural aspects of the prohibition are not well defined and the practical implementation of the prohibition in countries around the world is opaque. This report draws on a comparative survey of the law and practice of 17 countries, namely Australia,[2] Brazil, China, England and Wales, France, Germany, Indonesia, Japan, Kenya, Mexico, Spain, South Africa, Thailand, Tunisia, Turkey, the United States of America[3] and Vietnam. We use this data to examine different ways of implementing the prohibition; and to identify challenges which arise in the course of applying the prohibition and any consequential gaps in the protections against the use of 'torture evidence'.

The lack of detail in international standards in this area and fundamental differences in domestic legal systems result in a myriad of approaches to implementing the prohibition. We do not seek to assess the strengths or weaknesses of the law in any particular country. That would go beyond the scope of this study. Instead we examine how different countries approach key components of the prohibition on the admissibility of 'torture evidence' including whether: (i) the prohibition is absolute; (ii) the prohibition extends to other forms of inhuman or degrading treatment or punishment; (iii) the prohibition covers evidence obtained from the torture of a third party; (iv) the prohibition covers derivative evidence/fruits of the poisonous tree; and (v) there are effective legal procedures in place to identify and exclude 'torture evidence'.

Recognising that the perfect legal framework does not automatically result in perfect compliance with international standards, we also consider broader

approaches to tackling overreliance on confessions, as well as some of the many related factors which may affect whether the prohibition is effective in practice. Finally, we seek to place the prohibition within the broader scheme of international law against torture, considering what criminal or disciplinary sanctions stem from revelations about 'torture evidence', and the broader remedies and reparations available for victims.

1 Juan E. Mendez, 'How International Law Can Eradicate Torture: A Response to Cynics', *Southwestern Journal of International Law*, 22, no. 2 (2016), pp. 247, 262.

2 In Australia, the research investigated both Australian Commonwealth law (applicable in federal courts) and the state law of Western Australia.

3 The report largely focuses on US federal law and a limited amount of state law that may be applicable in criminal proceedings. It does not address any laws or rules that may be applicable to US military commissions, administrative proceedings, grand jury and other preliminary proceedings in criminal cases, proceedings after a finding of guilt has been made or proceedings regarding extradition matters.

Chapter I: The prohibition on torture and the exclusionary rule

I.1 The prohibition on torture

Torture is the administration of severe pain or suffering, whether physical or mental, for a specific purpose, such as to elicit a confession, to exercise control, to instil fear, to punish, or for any other reason on the basis of discrimination of any kind. It is inflicted by a person exercising some kind of authority with the aim of breaking the will of an individual. Torture is an extreme form of abuse of power. Its consequences have been well documented and can be severe and long-lasting both for the individuals subjected to the treatment as well as for the wider community or society.[4]

In recognition of the heinousness of torture, it is absolutely prohibited under international law. All states are obliged to prohibit it without exception; the right to be free from torture cannot be suspended or limited and its violation can never be justified, even in emergency situations or in the context of terrorism. The prohibition on torture operates irrespective of the particular circumstances or attributes of persons; non-citizens, illegal migrants, terror suspects, convicted criminals, persons suspected of having vital information about planned crimes, protesters and opposition leaders all benefit, like any other person or group of persons, from the right not to be subjected to torture or other prohibited ill-treatment. The prohibition on torture has been recognised as a principle of customary international law and a peremptory norm (*jus cogens*).[5] Rules of *jus cogens* cannot be contradicted by treaty law or by other rules of international law.[6]

The fundamental human right not to be subjected to torture is reflected in numerous treaties and declaratory texts including the Universal Declaration of Human Rights,[7] the International Covenant on Civil and Political Rights,[8] the Convention on the Rights of the Child,[9] the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,[10] the European Convention on Human Rights,[11] the American Convention of Human Rights[12] and the African Charter on Human and Peoples' Rights.[13] Several treaties focus on torture specifically: the UN Convention Against Torture,[14] the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment[15] and the Inter-American Convention to Prevent and Punish Torture.[16] Torture also features in international humanitarian law treaties. It is outlawed in the 1907 Hague Regulations respecting the Laws and Customs of War on Land.[17] Common Article 3 of the four Geneva Conventions of 1949 and various other provisions in those conventions prohibit cruel treatment and torture, and outrages upon personal dignity, in particular humiliating and degrading treatment of civilians and persons *hors de combat*.[18] Torture is also outlawed by the two Additional Protocols to the Geneva Conventions.[19] It is one of the possible underlying offences for a war crime, a crime against humanity and genocide.[20]

I.2 The exclusionary rule – a key component of the absolute prohibition

A part of what it means for torture to be absolutely prohibited is that states are not able to endorse, adopt or recognise acts that breach the absolute prohibition on torture. This would include taking account of statements or other evidence procured through torture. If courts were to recognise statements procured by torture, this would be incompatible with the *jus cogens* nature of the prohibition and the *erga omnes*[21] obligations that flow from it.

It is a relatively straight-forward proposition that information obtained by torture should not be admissible, nor should it be used, relied upon or proffered in any legal proceeding. This rule stems from

the absolute prohibition on torture[22] and is reflected in Article 15 of the UN Convention Against Torture:

> '*Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made*'.

The prohibition on the use of such statements is based upon a number of inter-related rationales, including:

i) **To safeguard the fairness of a trial**.[23] Any statement made under torture is *ipso facto*[24] involuntary and inherently unreliable:

> '*Any confession made as a result of physical violence or other oppressive or inhuman treatment is not voluntary. The accused makes it, as we have seen, merely to avoid pain. He is not a free agent when he makes it*'.[25]

It also violates the presumption of innocence which requires the state to prove guilt, and protects a suspect's right to remain silent and not to be compelled to incriminate him or herself.[26] In consequence, human rights courts have regularly determined that reliance upon statements procured by torture in proceedings violates the right to a fair trial. In *Magee v UK*,[27] for example, the European Court of Human Rights held that the admission in evidence of statements made by a person detained under the Prevention of Terrorism Act 1984 at a police station in austere detention conditions which were 'intended to be psychologically coercive' and without access to a lawyer breached Article 6(1) (Right to a Fair Trial) of the European Convention.

ii) **To safeguard the torture victim's rights in the legal proceedings**. Somewhat connected to the first rationale, which focuses on the unreliability of the evidence as the reason to exclude it in particular proceedings, this rationale focuses on the torture victim's rights and is associated with the need to provide the victim with a remedy (in this case exclusion of the evidence) for the violation of his or her right not to be subjected to torture.[28] This is discussed in further detail in Chapter VII.

iii) **To use evidence procured by torture is an outrage to basic human values and makes the court complicit by indirectly legitimising the torture**. Thus, the admission of such evidence taints the justice process and is an offence to the rule of law. Such evidence must be excluded in order to protect the integrity of the justice system. As the European Court of Human Rights recognised in the Othman case:

> '*No legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. 'Torture evidence' damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. 'Torture evidence' is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself*'.[29]

iv) **As a form of deterrence and prevention serving the public policy objective of disincentivising officials from resorting to torture and prohibited ill-treatment in the conduct of investigations**.[30] As the former UN Special Rapporteur on Torture, Juan Mendez, has noted, '[a] *judicial practice that rewards torture by not depriving it of all legal effects in fact encourages the torturer*'.[31] Special Rapporteur Kooijmans wrote similarly much earlier, in 1992:

> '*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* […] *It is no exception that this chain of situations, which are all extremely conducive to the practice of torture, is in clear violation of the prevalent rules. 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.* […] *It is within their* [the judiciary's] *competence to order the release of detainees who have been held under conditions which are in flagrant violation of the rules; it is within their competence to refuse evidence which is not freely given; it is within their power to make torture unrewarding and therefore unattractive and they should use that power*'.[32]

One should not sanction the acts of torturers around the world by giving their unlawful conduct legitimacy through the courts. Furthermore, to deter is not only a moral imperative to forestall the use of torture, it is also a legal imperative stemming from the clear

preventative obligations on states in relation to the prohibition on torture and other cruel, inhuman and degrading treatment or punishment. The UN Human Rights Committee listed among the safeguards which may make the control against torture effective, '*provisions making confessions or other evidence obtained through torture or other treatment contrary to article 7 inadmissible in court*'.[33]

4 For example, Ellen Gerrity, Terence M. Keane and Farris Tuma (eds.), *The Mental Health Consequences of* Torture (Springer, 2001).

5 Questions relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*), Judgment, ICJ Reports 2012, 422, para 99; *Prosecutor v Furundzija* (Judgment) IT-95-17/1-T (10 December 1998), para 151.

6 *Jus cogens* is a Latin phrase which literally means 'compelling law' and, in a legal context, designates a fundamental, overriding principle of international law, from which no derogation is ever permitted.

7 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217(A)(III), Article 5.

8 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Articles 7 and 10(1).

9 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, Article 37(a).

10 UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, Article 10.

11 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, Article 3.

12 Organization of American States (OAS), *American Convention on Human Rights*, 22 November 1969, Article 5(2).

13 Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 5.

14 UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465.

15 Council of Europe, European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment,26 November 1987, ETS 126.

16 OAS, Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS Treaty Series, No. 67.

17 International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, Article 4.

18 International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (*First Geneva Convention*), 12 August 1949, 75 UNTS 31, Article 12(2); ICRC, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (*Second Geneva Convention*), 12 August 1949, 75 UNTS 85, Article 12(2); ICRC, *Geneva Convention Relative to the Treatment of Prisoners of War* (*Third Geneva Convention*), 12 August 1949, 75 UNTS 135, Articles 13, 17(4), 87(3), 89; ICRC, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (*Fourth Geneva Convention*), 75 UNTS 287, 12 August 1949, Articles 27, 32.

19 ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3, Article 75(2); ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, Article 4(2).

20 For example, UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, Articles. 7(1)(f), 8(2)(a)(ii), 8(2)(c)(i).

21 *Erga omnes* is a Latin phrase which literally means 'towards all' or 'towards everyone', for example *erga omnes* rights or obligations of states are owed to everyone in the international community.

22 This was affirmed by the UN Committee Against Torture which has indicated in *GK v Switzerland* 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*' – *GK v Switzerland*, CAT/C/30/D/219/2002, UN Committee Against Torture (CAT), 7 May 2003, para 6.10.

23 For example, *Joyce Nawila Chiti v Zambia*, Communication no. 1303/2004, UN Doc CCPR/C/105/D/1303/2004, 28 August 2012, para 12.6; *Söylemez v Turkey*, App no. 46661/99 (ECtHR, 21 September 2006), para 122; *Othman (Abu Qatada) v The United Kingdom*, App no. 8139/09 (ECtHR, 17 January 2012), para 264: '*experience has all too often shown that the victim of torture will say anything – true or not – as the shortest method of freeing himself from the torment of torture*'.

24 *Ipso facto* is a Latin phrase which literally means 'by the fact itself' or 'by the mere fact' i.e. something which is the inevitable result of an existing state of affairs, rather than dependent on other factors.

25 *The People v B* (1980), *Zambia Law Reports* 219, para 26, cited in Daniel D. Ntanda Nsereko, 'The Poisoned Tree: Responses to Involuntary Confessions in Criminal Proceedings in Botswana, Uganda, and Zambia', *African Journal of International and Comparative Law*, 5 (1993), pp. 609, 617.

26 *John Murray v United Kingdom*, App no. 18731/91 (ECtHR, 8 February 1996), paras 43-63.

27 *Magee v The United Kingdom*, App no. 28135/95 (ECtHR, 6 June 2000), paras 43-46.

28 Marc Thommen and Mojan Samadi, 'The Bigger the Crime, the Smaller the Chance of a Fair Trial? Evidence Exclusion in Serious Crime Cases Under Swiss, Dutch and European Human Rights Law', *European Journal of Crime, Criminal Law & Criminal Justice*, 24 (2016), pp. 65, 82.

29 *Othman (Abu Qatada) v The United Kingdom*, App no. 8139/09 (ECtHR, 17 January 2012), para 264. See also *Jalloh v Germany*, App no. 54810/00 (ECtHR, 11 July 2006), para 105.

30 *Gäfgen v Germany*, App no. 22978/05 (ECtHR, 1 June 2010), para 178: 'the admission of evidence obtained by conduct absolutely prohibited by Article 3 might be an incentive for law-enforcement officers to use such methods notwithstanding such absolute prohibition.' See also, UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7* (*Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment*), 10 March 1992, para 12.

31 Juan E. Mendez, 'How International Law Can Eradicate Torture: A Response to Cynics', *Southwestern Journal of International Law*, 22 (2016), pp. 247, 262.

32 P. Kooijmans, Report of the Special Rapporteur, Mr. P. Kooijmans, Pursuant to Commission on Human Rights Resolution 1992/32, UN Doc E/CN.4/1993/26, 15 December 1992, paras 589-591.

33 HRC, CCPR General Comment No. 7: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment), 30 May 1982, para 1.

Chapter II: The components of the exclusionary rule: international standards and local realities

The prohibition on reliance on 'torture evidence' has a crucial position in international human rights law and in the overall prohibition on torture. In this Chapter we dissect the prohibition – outlining its key components as enunciated in international and regional treaties, their interpretative texts and in the judgments of human rights courts and decisions of treaty monitoring bodies. We also draw on our comparative study of 17 countries to examine how different countries have sought to protect these components of the prohibition (if at all) with the aim of identifying some of the challenges which arise in the course of applying the rule and consequential gaps in the protections against reliance on 'torture evidence'.

II.1 The form of the prohibition on 'torture evidence'

II.1.1 Monist and dualist systems

The force of treaty obligations at the domestic level differs between the 17 countries we examined.

i) In some countries, such as France, international law does not need to be translated into domestic law to have legal effect; it has legal effect automatically as a result of ratifying the treaty.[34] The French Administrative Supreme Court (*Conseil d'Etat*) has specifically recognised that Article 15 of the UN Convention Against Torture has direct effect at the national level, allowing defendants to rely on this provision directly to exclude evidence.[35] Similarly, in Kenya, the Constitution provides that '*general rules of international law form part of the law of Kenya*'.[36] The Kenyan High Court has specifically confirmed that this includes customary international law and the prohibition on 'torture evidence'.[37]

ii) In other countries, the prohibition on reliance on 'torture evidence' under treaty provisions such as Article 15 of the UN Convention Against Torture does not have automatic legal effect at a domestic level. Sometimes, all that is required is a simple notification process to give domestic legal effect to a treaty provision. In Spain, for example, the publication of the UN Convention Against Torture in the Official Gazette had the effect of incorporating it into national law.[38] In other countries, provisions of international treaties only become binding under domestic law if they are introduced in domestic legislation.[39] The South African Constitution, for example, provides that an international agreement becomes '*law in the republic when it is enacted into law by national legislation*'.[40] This is also the case in Thailand[41] and the United Kingdom.[42]

Even if, as a matter of legal principle, Article 15 of the UN Convention Against Torture (or equivalent provisions of other treaties) has automatic legal effect domestically, including the provision in specific national legislation can bolster that protection. For example, this has the advantage of drawing the attention of lawmakers to areas in which treaty obligations may conflict with existing domestic laws, and incorporates these standards into more readily accessible domestic law. For this reason, we focus on the domestic legal regimes when examining how the countries studied have protected against reliance on 'torture evidence'.

II.1.2 Express or implied regimes

Of the 17 countries examined, 16 do have some form of exclusionary regime for evidence obtained by torture. These domestic legal regimes governing the exclusion of 'torture evidence' fall into two broad categories:

i) express exclusionary regimes: in which the law contains an express prohibition on the use of evidence obtained by torture; and

ii) implied exclusionary regimes: in which there is no express prohibition on the use of evidence obtained by torture, but there is a bar on the use of such evidence as a result of the application of other, more general, standards relating to the admissibility of evidence.

In the countries with express exclusionary regimes, the prohibition takes a variety of legal forms, for example:

i) Japan's constitution expressly prohibits confessions obtained by torture;[43]

ii) many countries have criminal procedure codes which contain rules on the admissibility of evidence obtained by torture, as in Germany[44] and Tunisia;[45]

iii) exclusionary rules are found in general legislation on the admissibility of evidence, as in Commonwealth Australia[46] or specific anti-torture legislation, as in Mexico;[47] and

iv) in some countries the prohibition derives from binding decisions of apex courts, as in the United Kingdom.[48]

Of the countries examined which have implied prohibitions, these generally derive from the combination of one law (which makes the use of torture illegal) and another law (which prohibits the use of illegally obtained evidence). For example, in Spain, the Constitution defines the right not to be tortured as a fundamental right.[49] Legislation then provides that '[e]*vidence directly or indirectly obtained in infringement of fundamental rights shall not have legal effect*'.[50] The exception to this type of implied regime in the countries examined is the United States of America where judges may rely on a range of rights to exclude evidence obtained by torture, none of which expressly mentions torture, such as: (i) the 5th Amendment right not to incriminate oneself;[51] (ii) the 5th and 14th Amendment guarantees of due process;[52] and (iii) the common law provision that confessions must be given voluntarily.[53]

II.1.3 Indonesia – no exclusionary regime

Indonesia is the one country examined which has no prohibition on the reliance on 'torture evidence' (even in relation to statements or confessions obtained directly from the defendant). Although torture is implicitly prohibited by Indonesian law,[54] evidence obtained by torture is neither expressly nor implicitly excluded. Indonesia has been widely criticised for its reliance on 'torture evidence' in criminal proceedings. For example, in 2009, the Special Rapporteur on Torture observed: '*in particular in urban areas, torture and ill-treatment is used routinely to extract confessions*' and recommended that '[c]*onfessions made by persons in custody without the presence of a lawyer and which are not confirmed before a judge shall not be admissible as evidence against the persons who made the confession*'.[55]

II.2 An absolute prohibition on 'torture evidence'

II.2.1 International standards

Given that the rule on the inadmissibility of 'torture evidence' stems from the absolute prohibition on torture, the rule allows for no balancing.[56] This is because it is not only a procedural violation to admit 'torture evidence' potentially affecting the fairness of the trial; it strikes at the heart of the absolute prohibition on torture, and to admit the evidence would undermine not only the purpose of deterrence, but also ignores the impact such admission would have on the justice system as a whole. Considerations such as the nature or seriousness of the crime for which an individual is accused (which might be relevant in cases involving lessor violations involving unlawfully obtained evidence) should have no bearing on whether 'torture evidence' can be admitted in proceedings against a defendant. Neither should consideration of the admissibility of 'torture evidence' be part of the common exercise of courts assessing whether admitting a particular piece of

evidence would violate the overall fairness of the trial.

The absolute nature of the rule on the inadmissibility of 'torture evidence' has been recognised internationally.[57] However, as will be described, not all domestic legal regimes have adequately implemented the prohibition.

II.2.2 National implementation

The balancing act?

Although there are clear express or implied legal prohibitions on evidence obtained by torture in 16 of the countries we examined, these prohibitions are not always absolute in nature despite the clear requirement for this as a matter of international law.

Both Commonwealth and Western Australia are clear examples of jurisdictions which apply a balancing act. The underlying approach in these jurisdictions to the determination of whether evidence is admissible is to accord the greatest possible discretion to the trial court. Although the courts may exclude evidence obtained by improper means where it is in the public interest to do so. However, when making this decision, they must balance the need to convict offenders against the undesirability of the court approving or encouraging the unlawful conduct of law enforcement officers.[58] This position, initially established through the common law, is now codified in legislation in Commonwealth Australia.

Section 138 of the Evidence Act 1995

(1) Evidence that was obtained:

a) improperly or in contravention of an Australian law; or

b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

[…]

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

a) the probative value of the evidence; and

b) the importance of the evidence in the proceeding; and

c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

d) the gravity of the impropriety or contravention…

In Western Australia, the legislation is less specific. It refers to '*the power of a court in a criminal proceeding to exclude evidence that has been obtained illegally or would, if admitted, operate unfairly against the accused*'.[59] This is applied in accordance with the discretionary rule discussed above. The one exception to this in Commonwealth Australia is confessions or 'admissions' to which the balancing act does not apply.[60] No equivalent to this provision applies in Western Australia; the exclusion of even a defendant's confession that has been obtained by torture would appear to require a balancing act to be carried out.

Thailand's Criminal Procedure Code provides: '[a]*ny material, documentary or oral evidence likely to prove the guilt or the innocence of the accused is admissible, provided it was not obtained through any inducement, promise, threat, deception or other unlawful means*'.[61] Torture is not explicitly listed but 'unlawful means' includes torture as it is prohibited under the Constitution.[62] As in Australia, this is not an absolute prohibition. The Thai Criminal Procedure Code continues:

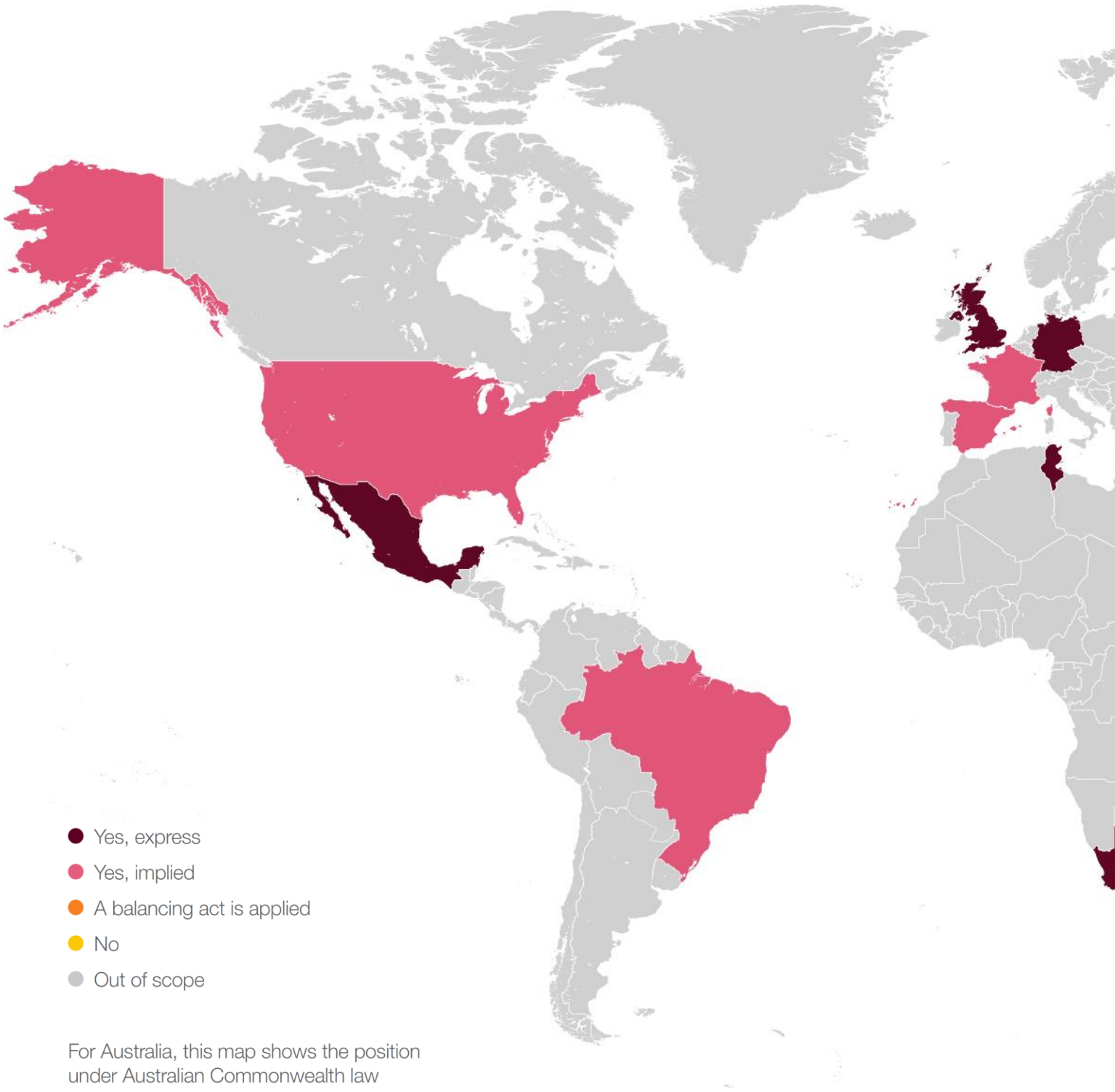
> '[U]*nless the admission of such evidence will provide benefits for the facilitation of justice that would outweigh any negative consequences on the criminal justice standard or due process*'.[63]

The Code requires the court to consider the following factors in deciding whether to admit evidence: (a) the evidential value, importance and credibility of the evidence; (b) the circumstances and gravity of the offence in the case; (c) the nature and damages resulting from the unlawful means; and (d) whether and to what extent the person, who committed the unlawful act from which the evidence derives, has been punished.[64] The Thai Supreme Court has never exercised its discretion to allow evidence obtained by torture, and it is unclear whether lower courts exercise this discretion due to the lack of published judgments.

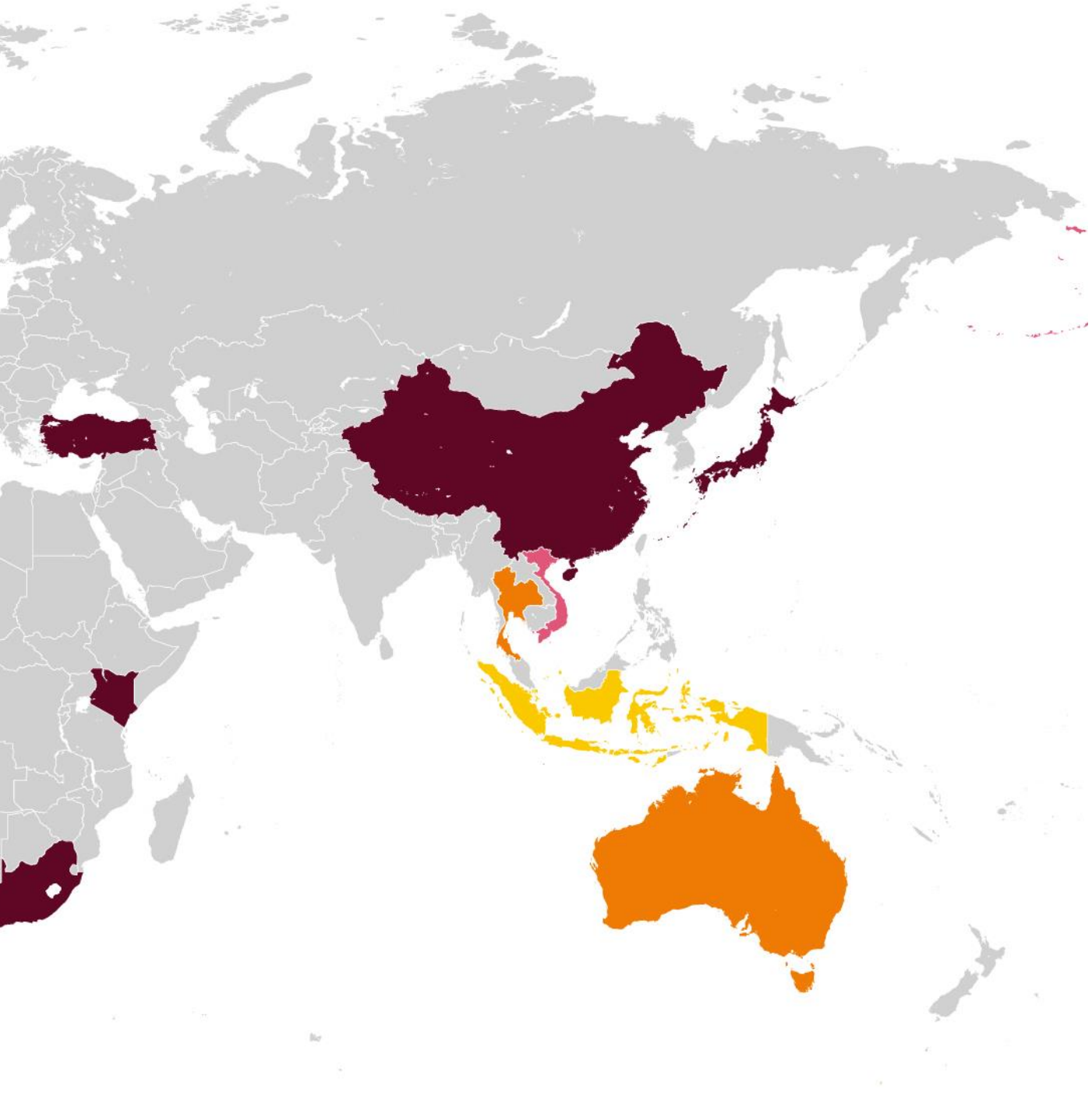
This balancing act, which Australian and Thai courts are required to perform, is clearly incompatible with international law. Given that the rule on the inadmissibility of 'torture evidence' stems from the absolute prohibition on torture, the rule allows for no balancing:

> '*Even in countries whose court procedures are based on a free evaluation of all evidence, it is hardly acceptable that a statement made under torture should be allowed to play any part in court proceedings*'.[65]

Is there an exclusionary regime for evidence obtained by torture?



For Australia, this map shows the position under Australian Commonwealth law



II.3 Does the ban on 'torture evidence' extend to other forms of cruel, inhuman or degrading treatment or punishment?

II.3.1 International standards

Article 15 of the UN Convention Against Torture focuses exclusively on statements procured through torture, as opposed to any other form of prohibited ill-treatment. Similarly, Article 10 of the Inter-American Convention to Prevent and Punish Torture focuses on the ban on 'torture evidence' exclusively. These formulations differ from the earlier UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment,[66] Article 12 of which provides for the exclusion of evidence obtained not only by torture, but also by cruel, inhuman and degrading treatment. This is also the approach taken in a number of other standard-setting texts,[67] by UN human rights experts[68] and by the official interpretive bodies of a host of other treaties.[69]

The bases for understanding the rule on the inadmissibility of 'torture evidence' to also cover statements procured by other forms of cruel, inhuman and degrading treatment or punishment fall into two main categories:

i) The inadmissibility rule arises out of the absolute prohibition on torture (and other ill-treatment). The UN Convention Against Torture and the Inter-American Convention to Prevent and Punish Torture are rather unique in separating out torture from other forms of prohibited ill-treatment; in most treaties and standard-setting texts, the prohibition on torture and other ill-treatment are dealt with jointly as part of a single article. There is thus a tendency in these other treaties and texts to understand the obligations which flow from the prohibition as applicable to all forms of prohibited ill-treatment and not only to torture.[70]

ii) States are obliged to prevent torture as well as all other forms of prohibited ill-treatment. This is recognised in Articles 2(1) and 16(1) of the UN Convention Against Torture. The rule on the inadmissibility of statements procured by torture (and other ill-treatment) derives at least in part from this obligation to prevent. In particular, the prohibition on torture requires states to take all possible measures to prevent it from occurring, to investigate allegations and, where sufficient evidence exists, to prosecute and punish those found guilty of the crime. It also requires states to give victims access to a remedy and reparations for the harm they suffered. Consequently, given states' obligations to prevent all forms of ill-treatment, the inadmissibility rule arguably applies to all forms of prohibited ill-treatment.[71]

In addition, there is debate about what distinguishes torture from other forms of ill-treatment. There is no definition of 'other ill-treatment' in the relevant treaty texts. Most would argue that severity of treatment and the existence of a specific purpose elevate an act of ill-treatment to torture. Nowak and McArthur understand the existence of a specific purpose to be the decisive factor.[72] Under this view, all acts of cruel, inhuman or degrading treatment which are carried out for the specific purpose of eliciting a confession or statement, would amount to torture and therefore be automatically covered by the exclusionary rule.

II.3.2 National implementation

Our examination of domestic law focused exclusively on 'torture evidence': we did not ask about evidence obtained from other inhuman or degrading treatment or punishment, but this would be a valuable area for further research. However, the following observations can be made based on our existing research:

i) As discussed above, the prohibition on 'torture evidence' often derives from the combination of the illegality of particular behaviours and the inability to rely on evidence obtained as a result of that behaviour. In such systems, a key question is whether inhuman or degrading treatment or punishment is considered illegal.

This may, for example, be the case where suspects are mistreated by investigating officers but where that mistreatment is not considered severe enough to constitute torture. However, it may not cover extensive periods of detention pre-trial in inhumane prisons which, in practical terms, will often result in confessions of guilt (as a way of ending the detention).

ii) As discussed below, in many countries specific rules apply in the context of confessions to protect against coercion. In some of these countries, these protections explicitly cover inhuman and degrading treatment. In the United Kingdom, confessions are inadmissible if they are '*obtained* […] *by oppression*' and the definition of 'oppression' includes '*torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)*'.[73]

II.4 Evidence obtained by torture of a third party

II.4.1 International standards

The exclusionary rule prohibits the use of *any* evidence obtained by torture in *any* proceedings. It is not confined to criminal proceedings, nor to cases directed against the victim of the torture: statements procured through torture cannot be used in proceedings against any person. This is because the exclusionary rule is not only intended to guarantee the right against self-incrimination; it also is intended to guarantee the fairness of the trial as a whole. As articulated by the Inter-American Court of Human Rights:

> '[S]*tatements obtained under duress are seldom truthful, because the person tries to say whatever is necessary to make the cruel treatment or torture stop. Accordingly, the Court considers that accepting or granting evidentiary value to statements or confessions obtained by coercion, which affect the person or a third party, constitutes, in turn, an infringement of a fair trial*'.[74]

The rule is not limited to the situation in which the tainted evidence is sought to be brought before the courts of the forum where the torture allegedly took place. It is irrelevant whether the state where the evidence is sought to be introduced had a role in the torture or not, it would still be inadmissible in the proceedings. The UN Committee Against Torture addressed this in *GK v Switzerland*, which concerned an extradition request from Switzerland to Spain the basis for which was alleged to be (at least indirectly) based on testimony extracted by torture of a third person by Spanish authorities. Whilst the Committee did not ultimately find a violation, it observed 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*'.[75] In its conclusions and recommendations concerning the United Kingdom's fourth periodic report, the UN Committee Against Torture indicated that '*article 15 of the Convention prohibits the use of evidence gained by torture wherever and by whomever obtained*'.[76] Therefore, it is irrelevant whether the forum state where the evidence is sought to be introduced had a role in the torture; it would still be inadmissible in the proceedings.

II.4.2 National implementation

i) Examples of clear exclusionary rules

Most of the countries examined prohibit reliance on third party 'torture evidence'. This largely derives from the same express or implied prohibitions on evidence obtained by torture of a defendant. For example, in countries like Spain, where illegally obtained evidence is prohibited, this typically applies to all forms of evidence obtained by torture, regardless of who was the victim of the torture.[77] In South Africa, the Constitutional rule on 'torture evidence' expressly refers to any '*evidence obtained in a manner that violates any right in the Bill of Rights*'.[78] The Constitutional Court confirmed that this applies to third party evidence in the case of *S v Mthembu*.[79]

CASE STUDY

MTHEMBU [80]

The accused, *Mthembu*, was a taxi operator sentenced to twenty-three years' imprisonment for stealing two vehicles and the armed robbery of a post office. His conviction and resulting sentence were based on evidence obtained from Mr Ramseroop, his accomplice, who had only volunteered the information after being subjected to torture. When dealing with the admissibility of this evidence the court remarked that, in its pre-constitutional era, all evidence regardless of how it was obtained was considered relevant but s35(5) of the Constitution required evidence that was improperly obtained from any person (not only from the accused) to be excluded. Even when the evidence is reliable and necessary to secure a conviction for serious charges, if torture has been used, it cannot be admissible.

> '*The absolute prohibition on the use of torture in both our law and in international law therefore demands that 'any evidence' which is obtained as a result of torture must be excluded 'in any proceedings'*.[81]

The Court further stated:

> '*To admit Ramseroop's testimony* [...] *would require us to shut our eyes to the manner in which the police obtained this information from him. More seriously, it is tantamount to involving the judicial process in 'moral defilement'. This 'would compromise the integrity of the judicial process (and) dishonour the administration of justice'. In the long term, the admission of torture-induced evidence can only have a corrosive effect on the criminal justice system*'.[82]

In the United Kingdom, whilst there is no express statutory prohibition on reliance on third party 'torture evidence', the House of Lords has confirmed that this is prohibited by common law:

> '*The principles of the common law, standing alone* […] *compel the exclusion of third party torture evidence as unreliable, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice*'.[83]

ii) The 'reliability' doctrine in the United States of America

In criminal cases in the United States of America, third party 'torture evidence' would be subject to standard evidentiary rules concerning hearsay, which generally prohibit the introduction of out-of-court statements.[84] However, the hearsay rules are complex and would not bar third party 'torture evidence' in all cases.

The United States Supreme Court has not determined whether the admission of coerced third party statements would violate a defendant's constitutional rights,[85] and judicial interpretation of US exclusionary rules regarding third party testimony are complex and vary across states.[86]

Defendants may be required to show that they have legal standing to challenge the evidence, which may require showing that admission of the evidence violates a right personal to the defendant, rather than the third party. The Supreme Court of California has, for example, held that:

> '[I]*f the defendant seeks to exclude a third party's testimony on the ground the testimony is somehow coerced or involuntary, any basis for excluding* [the third party's] *testimony must be found in a federal constitutional right personal to the defendant*'[87] (emphasis added).

It further held:

> '*It is settled that the accused has no standing to object to a violation of another's Fifth Amendment privilege against self-incrimination. Similarly, a defendant has no standing to complain of violations of another's Fourth Amendment rights*'.[88]

A number of US federal and state courts bar the admission of third party evidence obtained by coercion if the evidence is not 'reliable'.[89] The Supreme Court of Wisconsin, for example, has ruled that coerced third party testimony is inadmissible if the defendant can show that police misconduct was 'egregious' and that the resulting testimony is therefore unreliable.[90]

Because of the hearsay rules, issues regarding third party evidence may arise, in particular, when witnesses give testimony in court. Whatever the circumstances surrounding previous out of court statements, a separate question may also arise whether the live testimony is also unreliable.[91] In this context, the Supreme Court of California has required the defendant to show that the fresh statement is unreliable, for example by showing it is tainted by earlier or on-going coercion:

> '*Testimony of third parties that is offered at trial should not be subject to exclusion unless the defendant demonstrates that improper coercion has impaired the reliability of the testimony. We believe, as federal courts have stated in the cases discussed above, that a*

> *witness's trial testimony is not necessarily unreliable simply because the witness was subject to improper pressures in making an earlier, out-of-court statement*'.[92]

In at least one case, in-court testimony has been considered tainted by continued coercion and therefore inadmissible and a violation of due process.[93] However, courts may also find that sufficient time has elapsed between the torture and the trial testimony that the trial testimony is not tainted by the prior torture.[94]

The reliability approach to third party 'torture evidence' was also used in the case of *Mohammed v Obama*[95] before the US District Court in the District of Columbia, which discussed the approach in some detail. The evidence in question was a statement inculpating Mohammed made by another Guantanamo Bay detainee (Binyam Mohammed) during an interrogation in Guantanamo. The statement by Binyam Mohammed followed his severe torture in secret detention centres prior to the detainee's extraordinary rendition, all at the behest of the United States. Binyam Mohammed's statement in Guantanamo was relied on by the state to justify Mohammed's detention there. Although this was a *habeas corpus*[96] petition rather than a criminal trial, the Court drew upon the '*existing case law in the criminal area as a useful, albeit not perfect, analogy*'.[97] It concluded:

> '*The earlier abuse had* […] *'dominated the mind' of Binyam Mohamed to such a degree that his later statements to interrogators are unreliable.* […] *In reaching this conclusion, the Court does not doubt the abilities or experience of Special Agent* [Redacted], *nor his account of his humane treatment of the witness* [in Guantanamo Bay]. *Rather, based on the factors discussed above, the Court finds that Binyam Mohamed's will was overborne by his lengthy prior torture, and therefore his confessions to Special Agent* [Redacted] *do not represent reliable evidence to detain Petitioner*'.[98]

The 'reliability' approach is not necessarily used across all jurisdictions in the United States. One federal court, for example, has concluded that considerations similar to those applicable to coerced confessions should also apply to coerced third party statements:

> '[A]*lthough there is no absolute parallel between the exclusionary rule relative to confessions and that relative to impeaching statements of witnesses, there is a point at which the same considerations apply to both. That point has been reached here because there is a substantial claim by the defendant that the impeaching statement offered by the government was obtained by police threats and other blatant forms of physical and mental duress. Where such a claim is made, and supported by sworn testimony, the court has a duty to conduct its own inquiry and to exclude the statement if found to have been unconstitutionally coerced*'.[99]

II.5 Excluding derivative evidence: the fruits of the poisonous tree

At times, confessions or statements procured through torture will lead investigators to other pieces of evidence – such as a body, a weapon or a crime scene. Arguably, the investigators would not have happened upon this evidence but for the torture. Should the evidence therefore be excluded in addition to the statement?

The fruits of the poisonous tree doctrine prohibits reliance on evidence derived from illegal activity, also known as 'derivative evidence'. According to this principle, if the prosecution were able to rely on this derivative evidence, it would defeat some of the key objectives of the prohibition on 'torture evidence'. For example, there would continue to be an incentive for police to torture suspects or, indeed, other individuals as it could continue, albeit indirectly, to generate evidence which could then be used to convict a suspect. As the US Supreme Court explained in *Nardone v United States*:

> '*To forbid the direct use of methods thus characterized, but to put no curb on their full indirect use, would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty*'.[100]

II.5.1 International standards

The position in international law on derivative evidence is not altogether clear. Article 15 of the UN Convention Against Torture does not tackle the issue. Respect for the right to a fair trial and the prohibition against torture arguably would require the exclusion, not only of statements elicited by torture,

but also of other forms of evidence obtained as a result of torture (insofar as it can be shown that the evidence would not have been discovered but for the violation). This is the view taken by the Inter-American Court, which indicated:

> '[T]*he absolute nature of the exclusionary rule is reflected in the prohibition on granting probative value not only to evidence obtained directly by coercion, but also to evidence derived from such action. Consequently, the Court considers that excluding evidence gathered or derived from information obtained by coercion adequately guarantees the exclusionary rule*'.[101]

It is also the understanding of the UN Human Rights Committee, when it explains that '*no statements or confessions or, in principle, other evidence obtained in violation of this provision* [prohibition on torture and ill-treatment] *may be invoked as evidence in any proceedings covered by article 14* [fair trial]', including during a state of emergency.[102] In the context of international criminal law, the Extraordinary Courts in the Chambers of Cambodia interpreted Article 15 to find that there was as yet no international standard concerning the treatment of evidence derived from 'tainted' evidence. Having interpreted the preparatory work of the CAT and the customary law of free admissibility of evidence in Cambodia to not support a broadening of the scope of Article 15, the Court concluded that derivative evidence could be admitted '*so long as the proposed use does not circumvent the prohibition against invoking the contents of torture-tainted confessions to establish their truth*'.[103]

The European Court of Human Rights has consistently refrained from deciding whether evidence in national jurisdictions is admissible, focusing instead on the separate question of the overall fairness of the trial:

> '*It is* […] *not the role of the court to determine, as matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair*'.[104]

The European Court of Human Rights has taken a nuanced approach to cases concerning derivative evidence; it has found that derivative evidence located as a result of torture must be excluded because it would necessarily violate the accused's fair trial rights,[105] but derivative evidence located as a result of other prohibited ill-treatment may only possibly violate the accused's fair trial rights.[106] In the Gäfgen case (see below) the Court concluded that the right to a fair trial was not violated as a result of admitting evidence derived from inhuman treatment because there was a break in the causal link between the ill-treatment and the conviction. By contrast, in the case of Jalloh, the European Court of Human Rights concluded that there was a violation of the right to a fair trial where the evidence was directly obtained as a result of the ill-treatment.[107] Jalloh had been held down by police whilst a doctor inserted a tube through his nose and administered a salt solution and syrup to force him to regurgitate drugs that he had swallowed.

CASE STUDY

GÄFGEN V GERMANY

Gäfgen had been convicted in Germany of the murder of a child. The question for the European Court of Human Rights was whether the admission of evidence during the trial constituted a violation of the right to a fair trial (Article 6). The evidence in question included the child's corpse, its subsequent autopsy results and other evidence found in the vicinity of the corpse. The location of the corpse had been disclosed by Gäfgen following threats to torture him. The Court held that the threats violated the right not to be subjected to torture or to inhuman or degrading treatment or punishment, but that they constituted inhuman treatment rather than torture. It concluded that the derivative evidence obtained as a result of that ill-treatment did not render the trial unfair.

The reasoning of the majority was based on its understanding that '*contrary to Article 3, Article 6 does not enshrine an absolute right*' and, furthermore, it could not be shown that the ill-treatment had a bearing on the outcome of the proceedings. Thus, the causal link between the threat of torture and the conviction had been broken.[108] This contrasted with the Grand Chamber's conclusion in the earlier Jalloh case in which the evidence used in the criminal proceedings against the applicant was obtained as a direct result of ill-treatment (forced regurgitation).[109]

Dissenting judges in the case criticised the distinction made by the majority in their approach to evidence procured by torture as opposed to other prohibited ill-treatment:

> '*From the moment of arrest to the handing down of sentence, criminal proceedings form an organic and inter-connected whole. An event that occurs at one stage may influence and, at times, determine what transpires at another. When that event involves breaching, at the investigation stage, a suspect's absolute right not to be subjected to inhuman or degrading treatment, the demands of justice require, in our view, that the adverse effects that flow from such a breach be eradicated entirely from the proceedings*'.[110]

II.5.2 National implementation

In the *Gäfgen* case, the European Court of Human Rights notes some of the generally accepted caveats in domestic legal regimes to excluding evidence on the basis of the fruit of the poisonous tree doctrine. In particular it notes the necessary 'causal link' between the illegal activity and obtaining the evidence, and whether evidence '*would have inevitably been discovered*'.[111] This is borne out by our comparative research.

In Spain, which had applied the exclusionary rule categorically since the 1980s, the Constitutional Court introduced exceptions to the doctrine in 1998 to mitigate its reach.[112] These exceptions included the 'nexus of illegality' (the causal link or illegal taint of the activity and the evidence), the inevitability of the evidence being discovered and the independent source exception. In the United States four exceptions to the exclusion of derivative evidence are generally recognised: (a) it was discovered from a source independent of the illegal activity; (b) the discovery was inevitable; (c) when the connection between the prohibited conduct and evidence is, in certain circumstances remote or has been interrupted by intervening circumstances; and (d) if the primary evidence was illegally obtained, but admissible under the good faith exception, its derivatives (or 'fruit') may also be admissible.[113]

Other countries also apply an exclusionary rule to derivative evidence obtained by torture, but apply different considerations when assessing the admissibility of such evidence:

i) In Commonwealth Australia, for example, judges take into consideration a range of factors including: (a) the gravity of the impropriety or contravention; (b) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and (c) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.[114]

ii) In Japan, the Supreme Court has also made clear that, when assessing illegally obtained evidence, the factors that would be taken into consideration are whether: '*(i) the process by which it was obtained or seized was seriously illegal* […] *and (ii) it appeared unreasonable from the perspective of preventing illegal investigation in the future to admit such an article as evidence*'.[115]

iii) In China: '[p]*hysical evidence or documentary evidence that is not collected according to statutory procedures and is therefore likely to materially damage judicial justice shall be subject to correction or reasonable explanations, and shall be excluded if correction or reasonable explanations are not made*'.[116] What would suffice as a 'correction' or 'reasonable explanation' for torture is not clear.

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34 Known as a 'monist' legal system.

35 *French Republic v Haramboure*, Cour de Cassation, Conseil d'Etat, 7 novembre 2001, n°228817.

36 The Constitution of Kenya, 27 August 2010, Chapter 1, Section 2(5).

37 *Kituo cha Sheria & 7 Ors v Attorney General*, High Court at Nairobi, Constitutional and Human Rights Division, Petition 19 of 2013.

38 Boletín Oficial del Estado núm. 268, de 9 de noviembre de 1987, páginas 33430 a 33436.

39 Such countries are often referred to as 'dualist'.

40 Constitution of the Republic of South Africa, 10 December 1996, Section 231(4).

41 S. Juaseekoon, *Recent Developments of Legal System in Thailand*, ASEAN Law Association, 10th General Assembly (2009), p.2.

42 *A & Others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, para 112.

43 Constitution of Japan, 3 November 1946, Article 38(2).

44 Criminal Procedure Code of Germany (Strafprozeßordnung (StPO)), Section 136a.

45 Code of Criminal Procedure of Tunisia, Decree-law No. 2011-106, Article 155.

46 Evidence Act 1995, Sections 84 and 138.

47 Ley General para Prevenir, Investigar y Sancionar la Tortura y Otros Tratos Crueles, Inhumanos o Degradantes, 2017, Article 50.

48 *A and Others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71. Note, however, that there is a legislative exclusionary regime for confessions (Police and Criminal Evidence Act 1984, Section 76).

49 Constitution of Spain, 6 December 1978, Article 15: '*Everyone* […] *under no circumstances may be subject to torture or to inhuman or degrading punishment or treatment*'.

50 Spanish Judiciary Act, Article 11.1 (Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial).

51 *Chavez v Martinez* (01-1444) 538 U.S. 760 (2003) 270 F.3d 852.

52 *Atuar v United States*, 156 Fed. App'x 555, 559 no.5 (4th Cir. 2005): '*As a general principle, due process prohibits the United States from using involuntary statements in a criminal proceeding that were obtained through torture or other mistreatment*'.

53 See generally Kaye et al., *McCormick on Evidence*, 7th edn. (2013); Gleeson et al., *Federal Criminal Practice: A Second Circuit Handbook*, 16th edn. (2016); 18 U.S.C. § 3501(a): Admissibility of confessions.

54 Article 117(1) of Law No. 8 of 1981 on the Law of Criminal Procedure states that '*the testimony of a suspect or witness given to an investigator shall be given without undue pressure from anyone in whatsoever nature*'. Article 422 of the Indonesian Criminal Code further stipulates that any state government official who '*makes use of any means of coercion*' to obtain either a confession or information is punishable by up to four years of imprisonment.

55 UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: addendum: mission to Indonesia, 10 March 2008, A/HRC/7/3/Add.7. See also UN Committee Against Torture (CAT), Consideration of Reports Submitted By States Parties Under Article 19 of the Convention, 2 July 2008, CAT/C/IDN/CO/2.

56 JH Burgers and H Danelius, The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, Or Degrading Treatment Or Punishment (Martinus Nijhoff, 1988), p.148.

57 The UN Committee Against Torture (CAT) has noted 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) must be observed in all circumstances*' (from CAT, *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, para 6). See also UN HRC, *General Comment no. 32: Article 14, Right to equality before courts and tribunals and to fair trial*, *23 August 2007*, para 6: '*The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non derogable rights.* […] *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 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*'.

58 *Bunning v Cross* [1978] HCA 22, 141 CLR 54.

59 Evidence Act 1906 (WA), Section 112.

60 In this case legislation provides that the admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person, or a threat of conduct of that kind (Commonwealth Evidence Act 1995, Section 84).

61 Thai Criminal Procedure Code, B.E. 2477. (1934), Article 226.

62 Constitution of the Kingdom of Thailand, B.E. 2560 (2017), Article 28(3).

63 Thai Criminal Procedure Code, Article 226(1).

64 Ibid, Article 226(2).

65 Burgers and Danelius, The United Nations Convention Against Torture, p.148.

66 UN General Assembly, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 December 1975, A/RES/3452(XXX), Article 12.

67 UN General Assembly, *International Covenant on Civil and Political Rights*, Article 7; OAU, *African Charter*, Article 5; OAS, *American Convention on Human Rights*, Article 5; Council of Europe, *European Convention on Human Rights*, Article 3. See also, *African Commission on Human and Peoples' Rights, Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines)* (2002), Guideline 29; Inter-American Commission on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Res. 1/08, 3-14 March 2008, Principle V.

68 For example, UN General Assembly, *Report on torture and other cruel, inhuman or degrading treatment or punishment*, submitted by Sir Nigel Rodley, Special Rapporteur, 1 October 1999, A/54/426, para 12(e).

69 HRC, *CCPR General Comment No. 20*, para 12; HCR, *General Comment No. 32*, para 60; CAT, *General Comment No. 2*, para 6. The ECtHR took this position in a succession of cases, including *Söylemez v Turkey*, para 23; *Jalloh v Germany*, para 99; *Haci Özen v Turkey*, App no. 46286/99, 12 April 2007, paras 101-105; *Levinta v Moldova*, App no. 17332/03, 16 December 2008, paras 97-100; *Gäfgen v Germany*, para 166; *Stanimirovic v Serbia*, App no. 26088/06, 18 October 2011, paras 51-52.

70 For example, CAT, *General Comment No. 2*, where the Committee noted that it '*considers that articles 3-15 are* […] *obligatory as applied to both torture and ill-treatment*'.

71 M. Nowak and E. McArthur, The United Nations Convention Against Torture: A Commentary (Oxford University Press, 2008), pp. 534-535, 572.

72 Ibid.

73 Police and Criminal Evidence Act 1984, Section 76.

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

75 *GK v Switzerland*, CAT/C/30/D/219/2002, para 6.10.

76 UN Committee Against Torture (CAT), *UN Committee Against Torture: Conclusions and Recommendations, United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories*, 10 December 2004, CAT/C/CR/33/3, para 4(a)(i). Furthermore, it expressed concern that '*the State party's law has been interpreted to exclude the use of evidence extracted by torture only where the State party's officials were complicit*'. The CAT issued these conclusions and recommendations following the decision of the English Court of Appeal in *A and Others*, where it was held that evidence obtained through torture by a foreign state would be admissible in an English court (*A and Others v Secretary of State for the Home Department* (No. 2) [2004] EWCA Civ 1123, 11 August 2004, paras 253-254 (per Laws LJ)). That ruling was subsequently overruled by the House of Lords.

77 Federal Constitution of Brazil, Article 5, Section LVI; Spanish Judiciary Act, Article 11.1 (Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial); Federal Constitution of Mexico, Article 20 A IX.

78 Constitution of the Republic of South Africa, Chapter 2 – Bill of Rights (1996), Section 35(5).

79 *S v Mthembu* (379/07) [2008] ZASCA 51, para 27.

80 Ibid.

81 Ibid, para 32.

82 Ibid, para 36.

83 *A & Others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71.

84 Federal Rules of Evidence, Article VIII. See also W Lafave et al., *Criminal Procedure* (2015, 4th edn), para 9.1(a): '*Questions of standing seldom arise as to confessions because established evidentiary rules normally permit a confession to be admitted as substantive evidence only against the maker.*'

85 *Samuel v Frank*, 525 F.3d 566, 569 (7th Cir. 2008).

86 Katherine Sheridan, 'Excluding Coerced Witness Testimony to Protect a Criminal Defendant's Right to Due Process of Law and Adequately Deter Police Misconduct', *Fordham Urban Law Journal*, 38 (2011), p.1242.

87 *People v Badgett* (1995) 10 Cal.4th 330, 41 Cal.Rptr.2d 635; 895 P.2d 877.

88 Ibid.

89 Ibid.

90 *State v Samuel*, 252 Wis.2d 26 (Wis. 2002).

91 *Douglas v Woodford*, 316 F.3d 1079 (2003).

92 *People v Badgett*, 895 P.2d 877, 886–87 (Cal. 1995).

93 *Bradford v Johnson*, 354 F. Supp. 1331 - Dist. Court, ED Michigan 1972 Para. 1336.

94 *Douglas v Woodford*, 316 F.3d 1079 (9th Cir. 2003); *Williams v Woodford*, 384 F.3d 567 (9th Cir. 2004); *People v Williams*, 233 P.3d 1000 (Cal. 2010).

95 689 F.Supp.2d 38 (2009).

96 *Habeas corpus* is a Latin phrase which literally means 'that you have the body' and, in a legal context, is a means through which a person can challenge unlawful detention or imprisonment.

97 *Mohammed v Obama*, 689 F.Supp.2d 38, 61 (D.D.C. 2009).

98 *Mohammed v Obama*, 689 F.Supp.2d 38, 66 (D.D.C. 2009).

99 *LaFrance v Bohlinger*, 499 F.2d 29, 35 (1st Cir. 1974).

100 *Nardone v United States*, 308 U.S. 338, 340 (1939).

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

102 HRC, *General Comment No. 32*, para 6. See similarly, UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, 6 August 2008, A/63/223, para 45(d), which refers to '*the information obtained at such hearings, or derived solely as a result of leads disclosed*'.

103 *Nuon Chea and Others*, Case No. 002/19-09-2007IECCCrrC.

104 *Gäfgen v Germany* (2010) 52 EHRR 1, para 163.

105 *Jalloh v Germany*, App no. 54810/00, 11 July 2006, para 105.

106 *Gäfgen v Germany*.

107 *Jalloh v Germany*.

108 *Gäfgen v Germany*, paras 178, 180, 187.

109 *Jalloh v Germany*.

110 Ibid (Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power), para 5.

111 *Gäfgen v Germany*, para 73.

112 Stephen C. Thaman, *Exclusionary Rules in Comparative Law* (Springer, 2012), p.232.

113 For examples, *Utah v Strieff* 136 S.Ct. 2056 (2016); *United States v Leon*, 468 U.S. 897, 918-922 (1984).

114 Evidence Act 1995, Section 138.

115 *Illegally Obtained Evidence case*, Supreme Court Judgment, 7 September 1978 (Case Number 1976 (A) 865).

116 Criminal Procedure Law, Article 54.

Chapter III: A fair process to identify and exclude 'torture evidence'

In practice, if the prohibition on 'torture evidence' is to be effective, a fair and effective procedure must be put in place to establish whether evidence was obtained by torture. As discussed below, some aspects of this have been explicitly addressed by international human rights monitoring bodies and courts (particularly relating to the question of the burden of proof). However, in general, this is an area where international human rights standards pertaining to the exclusionary rule are not clear.

III.1 Triggering the procedure

The first stage in the procedure for excluding 'torture evidence' is to raise the issue of whether evidence has been obtained as a result of torture. But who is able to do this?

i) In all of the countries we examined, defendants had the right to trigger the procedure for the exclusion of evidence obtained by torture. It is logical that a defendant would frequently wish to take the initiative to do this if it results in the exclusion of evidence on which the prosecution seeks to rely.

ii) However, arguably, it should also be incumbent on the prosecution and the judiciary to raise this issue of their own accord where they have reason to suspect torture: after all, they are agents of the state and the state is responsible for the exclusion of 'torture evidence'. This also aligns with the state's independent obligation to investigate allegations of torture which is not contingent on the victim filing a complaint.[117] Also, a defendant who has been tortured may not always be in a position to raise this with the competent authorities, particularly when they remain in detention and/or are vulnerable to reprisals. In France and Spain, for example, an investigating judge or prosecutor can initiate the procedure to exclude evidence if they suspect that evidence was obtained by torture.[118]

At what point in the criminal case should this issue be raised?

i) Many countries allow challenges to the admissibility of evidence in advance of the trial, such as China,[119] Mexico[120] and Spain.[121] Enabling early challenges to 'torture evidence' can be important, particularly when a confession obtained by torture is the only evidence linking an accused person to a crime, and this is the basis upon which an accused person is in pre-trial detention. However, such early challenges require a defendant to know that the prosecution intends to rely on 'torture evidence' (which a defendant may not know if that evidence was obtained from a third party). Often the trigger will be the attempt by a prosecutor to introduce confession evidence at the start of the trial or just in advance of it.

ii) Many countries require the admissibility of evidence to be challenged at the trial stage, but before the trial has actually begun. Making a decision on whether to exclude evidence at this stage (as opposed to later in the process or during the sentencing phase) has a number of advantages: (a) the defence should have had an opportunity to consider the prosecution's case – in many countries this may also be the first time a defendant (particularly an indigent one) has had the active engagement of a lawyer; (b) courts prefer to get these preliminary issues out of the way so that a decision can be made on whether to proceed to trial (for example, if a confession is excluded there may not be sufficient evidence to prosecute) and, if so, to plan the trial; and (c) for countries that use jury trials this means that, if the defendant is successful in excluding evidence, the jury never becomes aware of the excluded evidence, ensuring they are not prejudiced by it.

iii) Because of these advantages, some countries are prescriptive about requiring applications to be

made at the start of the case. However, in practice, this can be unreasonable if the state is allowed to adduce evidence part-way through proceedings or if the defendant has not reported the torture to their lawyer (defendants who have been tortured or held in incommunicado detention may have had limited access to a lawyer and may still be suffering trauma as a result of what has happened to them). A number of the countries examined have sought to address this by creating some flexibility. For example, in US federal and state courts there is a growing recognition that it may be impossible for the defendant to challenge evidence at the beginning of a trial. In federal cases, the defendant can bring a motion to suppress evidence mid-trial if good cause can be shown.[122] Similarly, in China evidence can be challenged during the trial but the individual making the challenge must give an explanation of why they did not challenge it earlier.[123]

In terms of the burden of proof, international jurisprudence draws a distinction between the burden of proof that must be met to trigger a procedure and the burden of proof which must then be applied to 'establish' whether evidence was procured by torture and should therefore be excluded. These are considered further below.

III.2 The forum and process

Given the importance of the decision to exclude evidence and its potential impact on the outcome of a criminal case, the process for making that decision must meet standards relating to the right to a fair trial under international law, including:

i) The determination must be made by an 'independent and impartial tribunal': a body that is free to decide the matter independently and impartially, on the basis of the facts and in accordance with the law, without any interference.[124]

ii) The right for an oral hearing which the parties (including, notably, the defendant)[125] and members of the public, including the media, can attend.[126]

iii) The right to the assistance of a lawyer, paid for by the state where necessary: without the effective assistance of a lawyer (engaged in advance of the trial),[127] there is minimal likelihood in practice that a defendant would be able successfully to challenge the admissibility of 'torture evidence'.[128]

iv) The right to meet and have confidential communication with a lawyer well in advance of the trial commencing: without this a defendant is unlikely to be able to highlight torture and to obtain advice on how to challenge resulting evidence.[129]

v) The right to timely disclosure of material evidence (both evidence supporting the prosecution and exculpatory evidence): without this a defendant will not know what evidence is being relied on, including possible 'torture evidence'.[130]

vi) The right to call and question witnesses: in this context, for example, to cross-examine third parties about the context in which they gave evidence against the defendant or to question police officers to whom confessions were given regarding the context in which that occurred.[131]

vii) The right to translation and interpretation for defendants who need it.[132]

Assuming that evidence (which was alleged to have been obtained by torture) is admitted and the person is convicted, the violation of any one of these due process rights during the process of deciding whether to exclude 'torture evidence' would not necessarily result in an overall violation of the right to a fair trial. This is because, in general, the test which is applied is whether the violation affects the 'overall fairness' of the trial. Given the importance of the prohibition on admitting 'torture evidence', it is likely that denial of rights that comes to light in the process for testing the admissibility of evidence alleged to have been obtained by torture would undermine the overall fairness of the trial. For example, in the context of denial of early access to a lawyer, the European Court of Human Rights has held that the rights of the

defence will '*in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction*'.[133]

A detailed examination of whether these key fair trial standards are being met in the 17 countries examined is beyond the scope of this report. Meaningful comparisons between the procedures that exist in different countries to identify and exclude 'torture evidence' are also complicated by considerable national variations in criminal procedure.

Frequently, once triggered, the procedure takes the form of a mini trial that ultimately results in a decision taken by the judge presiding over the trial about whether or not to admit the evidence. This procedure takes different forms. In Kenya[134] and South Africa,[135] after a defendant brings a *prima facie*[136] claim that evidence was obtained by torture, a trial-within-a-trial occurs to determine the issue before the evidence can be admitted. This procedure ensures that an accused person can testify on the issue concerning the admissibility of the evidence without the risk of self-incrimination from cross-examination on matters which could influence a finding of guilt. In Mexico, once a defendant has alleged torture, a hearing must be held to analyse the allegation of torture and to assess whether any evidence should be excluded.[137]

In Thailand, which does not use jury trials, the motion to dismiss evidence is raised during the trial itself. The court is not required to follow a particular procedure and can exercise its discretion by either: (i) making a determination during the trial as to whether the evidence is admissible; or (ii) allowing the evidence to be heard and determining within the judgment whether such evidence is admissible.[138] For practical reasons, the courts of first instance often allow the hearing of evidence whose credibility has been called into question and then later make a determination about whether the evidence should be admitted in order to avoid a full re-trial of the facts should an appellate court order the evidence in question to be heard.[139]

CASE STUDY

CASE OF THE KOH TAO MURDERS (2014)[140]

This highly publicised and criticised case in which two British nationals were murdered on Koh Tao Island raised controversial questions about due process and the admission of 'torture evidence'. Following their arrest on 1 October 2014, the two defendants (who were both immigrants from Myanmar) were taken to a 'safehouse' for interrogation and were not charged until 3 October 2014. The defence claimed, *inter alia*, that the confessions of the two defendants were obtained by torture.[141] On 24 December 2015, the Samui Provincial Court sentenced both defendants to death for pre-meditated murder. On the claim of torture, the court reasoned in its verdict that these allegations were unlikely as the officers '*have not previously known the two defendants and have no previous history of personal grudge or disputes with the two defendants*'.[142] This would seem entirely to have missed the typical reason why torture is carried out by state officials: to obtain confessions or evidence from defendants.

In some of the countries examined, a motion to exclude evidence on the basis that it resulted from torture initiates a separate investigative process. In Vietnam, for example, the court or prosecutor must suspend the trial and order a re-examination of the evidence allegedly obtained by torture.[143] In Turkey, too, the criminal trial must be put on hold pending an investigation into whether evidence was obtained by torture.[144] Although these investigative processes provide an opportunity for an independent examination of the allegations, they can also pose challenges. Imagine, for example, that a defendant is in pre-trial detention and is facing criminal charges for an offence where, upon conviction, they would be released as the prison sentence imposed is equal to the time spent in pre-trial detention ('time-served'). In that context, the delays created by the investigation may deter them from triggering the procedure to exclude 'torture evidence'.

III.3 The burden of proof

Article 15 of the UN Convention Against Torture applies to evidence which is 'established' to have been obtained as a result of torture, but who has to prove that the evidence was obtained by torture and to what standard? This is crucial because, if the burden rests entirely with the defendant and the level of proof is too high, the prohibition will effectively lose all meaning. This question has been the subject of a number of important decisions by regional courts and treaty monitoring bodies. According to

international standards, there should be two distinct stages: (a) the initial stage of triggering the procedure; and then (b) the stage of establishing whether the evidence was obtained by torture.

The UN Human Rights Committee has stated that the defendant must first make a *prima facie* case by advancing a plausible reason or producing a credible complaint or evidence of ill-treatment in order to trigger the procedure. The burden should then shift to the prosecution to prove that a confession was voluntary.[145] Similarly, the UN Committee Against Torture has determined that, once a defendant has demonstrated their claim that torture occurred is 'well-founded', the burden of proof should shift to the state to prove that the evidence was not obtained by torture if it is to be admitted.[146]

CASE STUDY

SINGARASA V SRI LANKA (2004)[147]

At 5am one morning in July 1993, Singarasa was arrested in his village in Sri Lanka along with 150 other Tamil men. They were not informed of the reasons for their arrest but were taken to an Army Camp and accused of supporting the Liberation Tigers of Tamil Eelam. During his detention Singarasa's hands were tied together, he was kept hanging from a mango tree and was allegedly assaulted by members of the security forces. Over the period until September 1993, he alleged that he was subjected to torture which included being pushed into a water tank and held under water, and then blindfolded and laid face down and assaulted. He also alleged that he was held in incommunicado detention; had no access to a lawyer; and was not given any opportunity to obtain medical assistance.

On 30 September 1993, Singarasa allegedly made a statement to the police. The statement was challenged during a 'voir dire' hearing,[148] but the court concluded that the confession was admissible: domestic legislation required any statement to be admissible if the defendant had not established that the statement was not made voluntarily. Singarasa was convicted of a number of terrorist offences and sentenced to 50 years' imprisonment.

The UN Human Rights Committee found a violation of Article 14 (Fair Trial) of the International Covenant on Civil and Political Rights read in conjunction with Article 7 (Torture) as the complainant had been *'forced to sign a confession and subsequently had to assume the burden of proof that it was extracted under duress and was not voluntary'*.[149]

The requirement for the state to bear the burden of proof in establishing that evidence was not obtained by torture recognises the fact that the state has responsibility for the treatment of individuals in its custody. The state should be able to demonstrate that appropriate safeguards against mistreatment have been complied with. A defendant, on the other hand, would not normally be in a position to establish how they were treated. Furthermore, the defendant will not always be the victim of the torture: a defendant may be seeking to exclude statements made by third parties. The defendant may have no knowledge of the circumstances in which a particular statement was procured, and it may be onerous to demonstrate why the statement should be subject to challenge, other than by way of generalised evidence about the likelihood of torture in a particular context. In such cases, which have typically arisen in the security context, it would be unreasonable to require an applicant to do more than raise a 'plausible reason'[150] why evidence may have been procured by torture. After this the burden of establishing whether there is a 'real risk' that the evidence has been obtained by torture should transfer to the party seeking to rely on the evidence.[151]

Former UN Special Rapporteur on Torture, Manfred Nowak, recognised this conundrum in his 2006 report. After reviewing two cases from Germany and the United Kingdom which had grappled with the burden and standard of proof in security-related cases where the applicants were ill-placed to discharge the initial burden, he explained:

> *'The central question here is the interpretation of the word 'established'. It is of utmost importance in this respect that there exists a procedure which affords protection 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. However, with an increasing trend towards the use of 'secret evidence' in judicial proceedings, possibly obtained by torture inflicted by foreign officials, together with a too-heavy burden being placed on the individual, there exists the potential of undermining the preventive element of Article 15'*.[152]

Rapporteur Nowak concluded that a complainant '*must first advance a plausible reason why evidence may have been procured by torture*' after which it would be '*for the court to inquire as to whether there is a real risk that the evidence has been obtained by torture and, if there is, the evidence should not be admitted*'.[153] The Special Rapporteur on human rights and counter terrorism has stated:

> *'If there are doubts about the voluntariness of statements by the accused or witnesses, for example, when no information about the circumstances is*

> *provided or if the person is arbitrarily or secretly detained, a statement should be excluded irrespective of direct evidence or knowledge of physical abuse. The use of evidence obtained otherwise in breach of human rights or domestic law generally renders the trial as unfair*'.[154]

In the case of *El Haski v Belgium* (which concerned the admissibility in a Belgian court of evidence allegedly obtained as a result of third parties in Morocco) the European Court of Human Rights took this type of approach:

> '*Where the judicial system of the third State in question does not offer meaningful guarantees of an independent, impartial and serious examination of allegations of torture or inhuman and degrading treatment, it will be necessary and sufficient for the complainant, if the exclusionary rule is to be invoked on the basis of Article 6 § 1 of the Convention, to show that there is a 'real risk' that the impugned statement was thus obtained. It would be unfair to impose any higher burden of proof on him. The domestic court may not then admit the impugned evidence without having first examined the defendant's arguments concerning it and without being satisfied that, notwithstanding those arguments, no such risk obtains. This is inherent in a court's responsibility to ensure that those appearing before it are guaranteed a fair hearing, and in particular to verify that the fairness of the proceedings is not undermined by the conditions in which the evidence on which it relies has been obtained*'.[155]

The Inter-American Court has also ruled that, as the burden of proof is on the state, the accused need not fully prove the allegation that the evidence was obtained as a result of torture or other ill-treatment.[156]

A number of the countries examined follow this model, requiring only a low burden to be met in order to bring the issue before the court. This is expressed in a variety of ways: '*prima facie* assertion', 'reasonable grounds', 'a suspicion has been raised' or a 'credible claim' that evidence has been obtained by torture. For example:

i) In Australian Federal courts, in relation to confessions only, '[t]*here must be some evidence that indicates through legitimate reasoning that there is a reasonable possibility an admission or its making were influenced by prosecuted conduct*'.[157] This 'legitimate reasoning' could be the lack of recorded defendant interviews, or the mental health status of the defendant.[158]

ii) In Spain, according to recent case law, the relevant party must provide at least preliminary evidence which generates sufficient doubts as to whether the evidence was obtained illegally.[159]

A number of the countries examined then shift the substantive burden to the state to prove that the evidence was not obtained as a result of torture, for example:

i) In the United States, once torture is alleged, the state body that is seeking to introduce the evidence into the proceedings bears the burden of showing that the evidence was not obtained by torture. The burden of proof is generally a preponderance of evidence test[160] though some states require that the state meets a stricter standard (i.e. 'clear and convincing' or 'beyond a reasonable doubt').[161]

ii) In China, the prosecution bears the burden of proving that evidence on which it seeks to rely has been obtained legally: if the prosecution does not provide evidence to confirm the legality of the defendant's pre-trial confession, then it may not constitute the basis for a conviction.[162] The court must exclude the evidence if it cannot eliminate the possibility that it was obtained illegally.

However, not all of the countries examined have a process for shifting the burden of proof to the state. Several countries maintain the full burden on the defendant to prove that evidence was obtained by torture. For example, in France it is for the party alleging the irregularity and requesting the annulment of evidence to demonstrate that a given piece of evidence: (i) violates the law or a substantial formality; and (ii) hurts the interests of the party concerned.[163]

In England and Wales, in the context of criminal trials, the admissibility of confession evidence is governed by legislation. Section 76 of the Police and Criminal Evidence Act 1984 provides that where a criminal defendant provides some evidence that their confession was obtained by 'oppression', the burden of proof shifts to the prosecution to prove to the criminal standard that it was not obtained in such a way, if they wish to prove the admission against that

defendant. The statute provides that oppression includes '*torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)*'. While a finding of 'oppression' '*almost inevitably*'[164] entails some impropriety on the part of the interrogator, such as an inappropriate display of hostility by the police during an interview,[165] not all acts of impropriety will constitute 'oppression' – rather, it is a question of degree.[166] If a confession is challenged by the defence or by the court (of its own volition) in the course of a 'voir dire',[167] the court must not allow the confession to be given in evidence unless the prosecution proves that it is admissible.[168] The defendant is not obliged to give evidence or call witnesses in support of their case.[169]

However, outside of the context of criminal trials, the common law would appear to require a different approach. In *A and Others v Secretary of State for the Home Department (No 2)*,[170] where the majority of judges held:

> '*The* [exclusionary] *rule does not require it to be shown that the statement was not made under torture. It does not say that the statement must be excluded if there is a suspicion of torture and the suspicion has not been rebutted. Nor does it say that it must be excluded if there is a real risk that it was obtained by torture* […] *Is it established, by means of such diligent inquiries into the sources that it is practicable to carry out and on a balance of probabilities, that the information relied on by the Secretary of State was obtained under torture? If that is the position, Article 15 requires that the information must be left out of account*'.[171]

This controversial approach was clearly influenced by the security context as illustrated by the court stating that '[t]*oo often we have seen how the lives of innocent victims and their families are torn apart by terrorist outrages*'.[172] A number of the judges disagreed with the majority, highlighting:

> '*This is a test which, in the real world, can never be satisfied. The foreign torturer does not boast of his trade. The security services* [...] *do not wish to imperil their relations with regimes where torture is practised. The special advocates have no means or resources to investigate. The detainee is in the dark. It is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet. The result will be that, despite the universal abhorrence expressed for torture and its fruits, evidence procured by torture will be laid before SIAC because its source will not have been 'established'*'.[173]

Germany is a civil law country, and because of the way its legal system operates, the 'burden of proof' does not apply in the same way as it does common law systems like, for example, England and Wales. It is the duty of the prosecutor to put together a file of legally obtained evidence and, in so doing, the prosecutor would be required to conduct an official investigation where evidence may have been obtained by torture. The outcome of this investigation would determine whether the evidence should be included in the case file and, therefore, presented to the court. In practice, the defence lawyer may need to bring forward indications regarding the use of torture to urge the prosecutor, and subsequently the court, to conduct such an investigation.

Under German law, the decision to admit evidence is seen as a procedural issue rather than one which goes to the question of the guilt or innocence of the accused. The benefit of the doubt rests with the defendant in questions relating to the determination of guilt but this does not apply to procedural issues. As a result, if there is doubt as to whether evidence was obtained as a result of torture, that evidence will not be excluded.

This situation occurred in the *El Motassadeq* case (see next page for more detail), where evidence that was alleged to have been obtained by torture of third parties was considered admissible at trial because it could not be proven to the court that it had been obtained by torture.[174] In the *El Haski* case, the European Court of Human Rights established that where evidence comes from third party states that cannot guarantee adequate investigation into allegations of torture, only a 'real risk' that torture occurred is required in order for evidence to be excluded,[175] a standard of proof much lower than that which is employed by the German courts.

The *El Haski* judgment came several years after the *El Motassadeq* case, but it highlights that the approach taken by the German courts was severely flawed given the broader principled arguments for exclusion of any evidence which may have been obtained as a result of torture. Furthermore, it is not possible to divorce procedural questions relating to the admissibility of key evidence with ultimate decision on guilt. As significant evidence in the *El Motassadeq* case, the admission of the evidence alleged to have been obtained by torture clearly had a major impact on the outcome of the trial, and therefore the fairness of the conviction.

COUNTER-TERRORISM AND 'TORTURE EVIDENCE'

Whilst international human rights law and jurisprudence has steadily moved towards an absolute prohibition on torture and its resulting evidence, the same cannot always be said for political and cultural attitudes. Over recent decades, the political rhetoric around torture in the context of national security has represented a significant challenge to human rights law, including the prohibition on torture. Programmes like 24 and Homeland, where 'good guy' Western intelligence agents torture 'bad guy' terrorists in order to obtain crucial information, effectively made torture in the context of terrorism part of Western pop culture. Far from being confined to the screen, torture really was being carried out by Western state officials, which scandals such as the treatment of prisoners in Abu Ghraib demonstrated all too well.[176] The USA went so far as to attempt legal justification for the use of torture against so-called 'enemy combatants' in the now infamous torture memos.[177]

The global threat of terrorism has resulted in a significant increase in the sharing of intelligence information between states, some of which will have been procured through torture. This tainted evidence has been used in a wide variety of contexts, including as the basis for immigration decisions, applying administrative orders on terror suspects and in some extradition hearings and criminal prosecutions. Even where a country's exclusionary regime applies to 'torture evidence' obtained in another country, it can be difficult to apply this in practice. Invariably, it will be extremely difficult for an individual to raise even a *prima facie* case that the evidence was obtained as a result of torture. The clandestine nature of interrogations adds an extra dimension of complexity because the applicant will normally have no knowledge of the actual circumstances in which a particular statement was procured. Also, it will be implausible for a defendant to be in a position to demonstrate why a particular statement should be subject to challenge, other than by way of generalised evidence about the likelihood of torture in a particular country or context. Given the national security confidentiality that tends to surround such proceedings, it is important to note that the applicant will often not have access to the statements or be in a position to know their providence.

MOUNIR EL MOTASSADEQ[178]

In 2005, a Moroccan student residing in Germany, Mounir El Motassadeq, was convicted by the Hamburg Supreme Court of belonging to a terrorist group and assisting in the September 2001 terrorist attacks on the World Trade Centre. El Motassadeq was convicted on the basis of statements from three individuals who were held in US custody in an undisclosed location after US authorities gave summaries of the interrogations of these individuals to German authorities. The defence challenged the admissibility of these statements on the grounds that they may have been obtained by torture.

Although the Court ruled that evidence obtained by torture carried out by officials of third party states was not admissible under German domestic law,[179] the Court effectively shifted the burden of proof to the defence by ruling that, because it could not be proven that the evidence had been obtained under torture, the evidence was admissible. For more detail on the Court's reasoning, see paragraph 72 above. The Court was widely criticised for this decision by international NGOs, such as Amnesty International, and the UN Committee Against Torture's fifth periodic report on Germany in 2011 stated that Germany should refrain from 'automatic reliance' on the information from intelligence services of other countries.[180] Despite this criticism and multiple appeals, El Motassadeq is currently serving a 15 year prison sentence.

A AND OTHERS V SECRETARY OF STATE FOR THE HOME DEPARTMENT (NO 2)[181]

In 2001 the United Kingdom created a legal regime (outside of the criminal law) for non-nationals suspected of terrorism but who could not be deported or extradited.[182] This allowed, among other things, the indefinite detention of suspected terrorists who had been certified by the Home Secretary as posing a threat to national security.[183] The Home Secretary's decision to certify a person had to be based on a reasonable belief as to the threat posed and a reasonable suspicion that the person is a terrorist. This belief or suspicion could be based on a wide range of evidence, including intelligence received from foreign states. In one of a series of legal challenges to this regime, the UK courts had to decide whether it was permissible for the Special Immigration Appeals Commission to take account of evidence which has or may have been procured by torture inflicted, in order to obtain evidence, by officials of a foreign state without the complicity of British authorities. The Commission dealt with appeals against the Home Secretary's immigration decisions in national security cases and it had the power to cancel certificates, including where there were not reasonable grounds for the Home Secretary's belief or suspicion.

The Commission and Court of Appeal concluded that the fact evidence had, or might have been, procured by torture inflicted by foreign officials (without the complicity of the British authorities) did not render it legally inadmissible; this was simply relevant to the weight to be given to the evidence.[184] Ultimately the UK's highest court, the House of Lords, rejected this and decided that such evidence could not be admitted:

> '*The principles of the common law, standing alone,* […] *compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice. But the principles of the common law do not stand alone. Effect must be given to the European Convention, which itself takes account of the all but universal consensus embodied in the Torture Convention*'.[185]

III.4 Evidence

In most of the countries examined, there are no restrictions on the type of evidence that courts can take into account when assessing whether evidence was obtained by torture. The most commonly cited types of evidence were medical reports, expert reports or testimony, video and photographic evidence, and witness statements. In cases where criminal charges have been brought against the perpetrators of torture, the outcome of the case could also be admitted as evidence.

In a few of the countries considered, the desire to comply with international best practice relating to the documentation of torture could, in practice, make it harder for courts to exclude 'torture evidence'. For instance, in Mexico, judicial practice treats the Istanbul Protocol[186] as the ideal test for proof of torture, including for the exclusion of evidence.[187] The Protocol largely focuses on medical documentation in terms of the physical and psychological signs and symptoms of torture. However, as torture is a legal definition, it is usual for medical experts to explain that signs and symptoms are 'consistent with' torture; it is rare for them to assert positively that a particular individual has or has not been subjected to torture. This also takes into account that, in torture cases, there will not always be verifiable marks of injury. If a medical examination is inconclusive, many judges hold that torture has not occurred.[188] Where there are different expert opinions as to the signs and symptoms an individual may exhibit, the burden of proof may in practice shift to the defendant.

117 UN General Assembly, *Convention against Torture*, Article 12.

118 French Code of Criminal Procedure (2006), Article 173; Spanish Civil Procedure Act (2000), Article 287.

119 In China, the defendant or his counsel could file a written motion with the court '*between the time that the bill of prosecution has been delivered and the time the trial commences*'. 2010 Exclusionary Rules, Article 4; SPC Interpretation, Article 99; 2017 Exclusionary Rules, Article 23.

120 According to Article 264 of the Mexican Criminal Procedure Law, the defendant can make a motion for the exclusion of unlawful evidence at any stage of the proceedings which will then trigger a hearing on the motion.

121 In Spain, although there is no right set out in legislation to challenge the lawfulness of evidence during the investigation phase, the jurisprudence makes it clear that an application to exclude evidence obtained in a manifestly illegal way can be made to the investigating judge (see, José María Paz Rubio, La prueba en el proceso penal, Cuaderno de Derecho Judicial, Consejero General del Poder Judicial, Madrid, 1992; Agustín Jorge Barreiro, La prueba ilícita en el proceso penal, en Recopilación de Ponencias y Comunicaciones, Planes provinciales y territoriales de formación, vol. II, Consejero General del Poder Judicial, Madrid, 1993; Circular 1/1999 de la Fiscalía General del Estado).

122 The Federal Rule of Criminal Procedure used to provide that '*a party waives any* […] *defence, objection, or request not raised by the deadline the court sets* […] *or by any extension the court provides*' (Rule 12(e)). It has now been replaced with Rule 12(c)(3): '*if a party does not meet the deadline for making a motion* […] *the motion is untimely. But a court may consider the defence, objection, or request if the party shows good cause*'.

123 2017 Exclusionary Rules, Article 29.

124 Bangalore Principles of Judicial Conduct (2002), Principle 1; *Reverón Trujillo v Venezuela*, Inter-American Court June 30 (2009) (Preliminary Objection, Merits, Reparations, and Costs) para. 146.

125 International Covenant on Civil and Political Rights, Article 14(3)(d); *Guerra de la Espriella v Colombia*, CCPR/C/98/D/1623/2007, UN Human Rights Committee (HRC), 11 May 2010, para 9.3; *Hermi v Italy*, App no. 18114/02 (ECtHR, 18 October 2006), paras 58-59.

126 International Covenant on Civil and Political Rights, Article 14(1); American Convention, Article 8(5); European Convention on Human Rights, Article 6(1); African Charter, Article 7(1).

127 HRC, General Comment no. 32, para 10.

128 Cf. European Convention on Human Rights, Article 6(3)(c); UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, 28 March 2013), A/RES/67/187.

129 Cf. *Modarca v Moldova*, App no. 14437/05 (ECtHR, 10 May 2007), paras 84-99.

130 *Jasper v the United Kingdom*, App no. 27052/95 (ECtHR, 16 February 2000), para 51; *Foucher v France*, App no. 22209/93 (ECtHR, 18 March 1997), para 34.

131 Cf. International Covenant on Civil and Political Rights, Article 14(3)(e); American Convention, Article 8(2)(f); European Convention on Human Rights, Article 6(3)(d).

132 Cf. International Covenant on Civil and Political Rights, Article 14(3)(f); American Convention, Article 8(2)(a); European Convention on Human Rights, Article 6(3)(e).

133 *Salduz v Turkey*, App no. 36391/02 (ECtHR, 27 November 2008), para 55.

134 Evidence Act (as amended by Act No.5 of 2003 and Act No. 7 of 2007), Section 25; High Court of Kenya, *Republic Prosecutor v Elly Waga Omondi*, Case No.24 of 2012, Ruling in Trial within Trial, 11 May 2015.

135 Robert D. Nanima, 'The Legal Status of Evidence obtained through Human Rights Violations in Uganda', *African Human Rights Law Journal*, 19 (2016), pp. 1-34.

136 *Prima facie* is a Latin phrase which literally means 'at first sight', 'on first appearance' or 'on the face of it' and, in a legal context, means sufficient to establish a fact or raise a presumption, unless disproved or rebutted at trial.

137 Ley General para Prevenir, Investigar y Sancionar la Tortura y Otros Tratos Crueles, Inhumanos o Degradantes (2017), Article 51.

138 Singhanart, 'Admissibility of Evidence Obtained from Unlawful Means', Judicial Training Institute, Office of the Judiciary (2012) p.8.

139 Ibid.

140 Criminal Case Entry No. 2040/2557 Samui Provincial Court (2014).

141 T. Charuvastra, 'Koh Tao Murders: Court says DNA trumps other flaws in case', *Khao Sod English*, 25 December 2015.

142 Ibid.

143 Criminal Procedure Code of Vietnam (2015), Article 174.

144 *Sami Ozbil* (App no. 2012/543), the Constitutional Court, 15 October 2014; *Muslum Turfan* (App no. 2013/5216), the Constitutional Court, 18 November 2015.

145 *Deolall v Guyana*, CCPR/C/82/D/912/2000, 5 November2004; *Singarasa v Sri Lanka*, CCPR/C/81/D/1033/2001, 23 August 2004.

146 *GK v Switzerland*, para 6.10.

147 *Singarasa v Sri Lanka*.

148 This is effectively a 'trial within a trial' which is conducted in the absence of the jury to determine the admissibility of disputed evidence including, for example, confession evidence.

149 For example, *Singarasa v Sri Lanka*, para 7.4.

150 UN General Assembly, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 14 August 2006, A/61/259, para 47.

151 Ibid, para 65.

152 Ibid, para 47.

153 Ibid, para 65, referring to and disagreeing with the tests set out in *A and Others v Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, *Prosecutor v El-Motassadeq* (OLG Hamburg, 4. Strafsenat, Urteil, 2 StE 4/02–5), 19 Aug. 2005 and the Decision of the German Supreme Court of 4 March 2004, 3 StR 218/03. In the case of *A and Others*, the majority (four Law Lords out of seven) interpreted the term 'established' in Article 15 of the UN Convention Against Torture as requiring evidence to be excluded where it was 'more likely than not' that torture had been used to obtain it; in *El-Motassadeq*, certain testimonies were used despite the fact that serious doubts remained as to how they had been obtained.

154 UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, para 45(d).

155 *El Haski v Belgium*, App no. 649/08, (ECtHR, 25 September 2012), paras 88, 89. See also paras 92-99.

156 *Cabrera-García and Montiel Flores v Mexico*, Inter-American Court (2010), paras 176-177.

157 Habib v Nationwide News Pty Ltd [2010] NSWCA 34, para 234.

158 *R v Zhang* [2000] NSWSC 1099.

159 Judgment of the Spanish Supreme Court No. 477/2013 (3 May 2013).

160 *McCormick on Evidence* (2016), supra note 50 at para 163.

161 Ibid.

162 2010 Exclusionary Rules, Article 11.

163 French Code of Criminal Procedure, Article 802.

164 D. Ormerod and D. Perry (eds.), *Blackstone's Criminal Practice 2018* (Oxford University Press, 2017), para F18.12.

165 James Richardson, *Archbold: Criminal Pleading, Evidence and Practice 2018*, 64th edn. (Sweet & Maxwell, 2017), chapter 15; *R v Paris* [1997] Cr.App.R. 99, where the Court of Appeal found that police shouting in a hostile and intimidating manner during an interview with the accused to be 'oppressive' under s.76(2)(a).

166 Ormerod and Perry, *Blackstone's Criminal Practice 2018*, para F18.13.

167 Police and Criminal Evidence Act 1984, Section 76(3).

168 Ibid, Section 76(2).

169 *R v Davis* [1990] Crim. L.R. 860.

170 *A and Others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71.

171 Ibid, para 121, per Lord Hope.

172 Ibid, para 121, per Lord Hope.

173 Ibid, para 59, per Lord Bingham.

174 For example, the Hanseatic Higher Regional Court re the case of *Mr. El Motassadeq* (Beschluss, 2 BJs 85/01 - 2 StE 4/02 - 5 - IV - 1/04 –), 14 June 2005; Diemer, *Karlsruhe Commentary on the Criminal Procedure Code*, 7th edn. (2013), section 136a, recital 38.

175 *El Haski v Belgium*.

176 Seymour M. Hersh, 'Torture at Abu Ghraib', *The New Yorker*, 10 May 2004.

177 Memorandum from John Yoo, Deputy Assistant Att'y Gen.to William J. Haynes II, Gen. Counsel, Dep't of Def., 1 (March 14, 2003).

178 For example, the decision of 14 June 2005 of the Hanseatic Higher Regional Court (Beschluss IV - 1/04 des Hanseatischen Oberlandesgericht Hamburg, Neue Juristische Wochenschrift 2005 Heft 32) and the judgement of 19 August 2005, sentencing Mr. El Motassadeq to seven years' imprisonment for membership of a terrorist organization (OLG Hamburg, 4. Strafsenat, Urteil, 2 StE 4/02-5).

179 Strafprozeßordnung (StPO), Section 136a(3).

180 UN Committee against Torture, *Concluding observations on the fifth periodic report of Germany*, 12 December 2011, CAT/C/DEU/CO/5, 12 December 2011, p.11.

181 *A and Others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71.

182 Anti-Terrorism, Crime and Security Act 2001, Part IV (now repealed).

183 Ibid.

184 *A and Others v Secretary of State for the Home Department (No 2)* [2005] 1 WLR 414.

185 Ibid, para 52.

186 UN Office of the High Commissioner for Human Rights (OHCHR), Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Istanbul Protocol'), 2004, HR/P/PT/8/Rev.1.

187 La Suprema Corte ha establecido este estándar en el amparo directo en revisión 4428/2014, de 17 de Febrero de 2016: '*la autoridad judicial competente deberá ordenar de inmediato la realización de los exámenes pertinentes para el adecuado esclarecimiento de lo sucedido, dependiendo del tipo de maltrato alegado, aplicándose para ello lo previsto en el protocolo de Estambul, en la inteligencia que de no hacerlo, se vulnerarán las reglas esenciales del procedimiento*' (párr. 158).

188 Tesis XXVI.50 (V Region) 7 P (10a), October 2013.

Chapter IV: Making the exclusionary rule effective in practice

Even if countries have laws which align perfectly with international standards, this does not of course mean that, in practice, those standards are complied with. In this chapter, we look beyond the legal framework and explore some of the factors which affect whether exclusionary rules operate effectively in practice.

IV.1. Data on the use of 'torture evidence'

IV.1.1 Official statistics

As well as understanding the laws in the countries we examined, we wanted to assess the extent to which they were being used in practice. We therefore asked researchers: what data is available on how frequently procedures to exclude evidence obtained by torture are used? One notable and disappointing conclusion was that this data is not available in any of the 17 countries examined.[189]

Given the importance of the prohibition on torture and the exclusionary rule, this is disappointing because data on the application of the exclusionary rule could, among other things, serve to:

i) identify whether the rule is being used in practice and whether there are any discrepancies in how it is being applied in different parts of a country – to inform, for example, the targeting of training programmes; and

ii) assess the extent to which evidence obtained as a result of torture has been identified which could, for example, inform broader investigations into the systemic use of torture by particular police forces or other agents of the state and thereby to promote accountability.

The importance of this data has been recognised by the UN Committee Against Torture which on occasion asks for data to be provided by states on the practical application of the exclusionary rule. For example, in 2015 in its list of issues prior to submitting its 2017 State Party report, the Committee requested that Japan provide:

> ¶U]*pdated information on steps taken to ensure, in practice, that confessions obtained under torture and ill-treatment are inadmissible in courts, in all cases* […]. *Please provide data on the number of confessions that were not admitted into evidence based* […] *on the grounds that they were made under compulsion, torture or threat*'.[190]

At the time of publishing this report, Japan had not submitted its state party report due on 31 May 2017.

IV.1.2 Expert observations

In the absence of official data, we also examined whether NGOs and treaty-monitoring bodies were reporting instances of 'torture evidence' being admitted in criminal cases. It was notable how little research had been undertaken in this area. However, in a number of the countries examined, routine reliance on 'torture evidence' has been reported.

i) In Indonesia, for example, the UN Committee Against Torture reported in 2008:

> '*The Committee is deeply concerned about the numerous, ongoing credible and consistent allegations, corroborated by the Special Rapporteur on torture in his report (A/HRC/7/3/Add.7) and other sources, of routine and widespread use of torture and ill-treatment of suspects in police custody, especially to extract confessions or information to be used in criminal proceedings*'.[191]

Improvements to the legal regime on the exclusion of evidence were recommended to address this problem.

ii) In Tunisia, several NGOs have noted the routine reliance still placed by the courts on evidence obtained by torture:

> '[T]*o-date, no conviction has been quashed, dismissed or revised on the grounds that it has been delivered based on forced confessions under torture. There are probably dozens, if not hundreds of prisoners serving out their sentence delivered before the revolution based on forced confessions*'.[192]

iii) Vietnam has not recognised the competence of the UN Committee Against Torture to carry out confidential inquiries, and in 2015 refused to allow the Committee to undertake an inquiry.[193] However, a number of NGOs have reported on the routine use of torture in places of detention and the failure of the legal regime to exclude reliance on 'torture evidence'.[194]

In two of the countries examined (Mexico and Kenya), new anti-torture legislation with clear exclusionary regimes has been enacted, at least in part, in response to concerns about the torture of suspects. With respect to Mexico, for example, the UN Committee Against Torture reported in 2012: '[w]*hile taking note of constitutional guarantees relating to the inadmissibility of evidence obtained in a manner that violates fundamental rights, the Committee regrets that some courts continue to accept confessions that have apparently been obtained under duress or through torture*'.[195] It is too early to tell what impact Mexico's anti-torture legislation will have. However, it is disappointing that official data is not being collected to measure this and we are not aware of any data collection by civil society.

There are also reports that, in practice, confessions resulting from torture are being used routinely in countries with express and absolute exclusionary regimes which, on paper at least, comply with international standards. For example, a 2015 report by Amnesty International found that, despite a range of new regulations and procedural rules implemented in China, security officials in some areas '*still relied overwhelmingly on extracting confessions through torture to 'break' cases*'.[196]

IV.2 Justice sector professionals

High-tech medical equipment is of little use if no one has been told that the hospital has acquired it or if there are no trained doctors and nurses to operate it. The same applies with legal protections like the exclusionary rule. New legislation can be a relatively cheap and easy way for countries to respond to demands for action to address human rights abuses, whether from local voters, civil society or international bodies. However, all too often, this legislation fails because justice professionals aren't aware of it; are otherwise unwilling or unable to apply the law; or, indeed, because there are insufficient defence lawyers to argue for the legislation to be applied in individual cases.

In Tunisia, legislation was introduced in 2011 to prevent reliance on confessions obtained by torture,[197] but since the new provision was introduced, no judge has explicitly made use of the provision to exclude evidence obtained by torture. In his country visit to Tunisia, the former UN Special Rapporteur on torture, Juan Mendez, noted that '*in practice, confessions obtained under torture are not expressly excluded as evidence in court*'.[198] He also expressed concern at the lack of instruction to the courts with regard to implementing the exclusionary rule as well as ordering an immediate, impartial and effective investigation where evidence may have been obtained by torture.[199]

If legislation is not resulting in changes to practice, it is important to try to understand the barriers to effective implementation. However, this can be challenging and requires in-depth qualitative engagement with often hard-to-reach state actors such as judges, prosecutors and lawyers.[200] This is beyond the scope of the current report and we are unaware of any qualitative research being undertaken, such as through qualitative interviews of lawyers, prosecutors and judges. However, the following factors are likely to be relevant in this context.

IV.2.1. Training

One key question is whether judges, prosecutors, police and lawyers have received training on the relevant domestic laws and international standards. The need for appropriate training is frequently recommended by human rights monitoring bodies. In 2008, for example, having commented on the routine use of torture to extract confessions in Indonesia, the Special Rapporteur on Torture

recommended, *inter alia*, that '*the government should adopt an anti torture action plan which implements awareness raising programmes and training for all stakeholders*'.[201] In 2011, the UN Committee Against Torture requested from Indonesia '*detailed information in regards to the human rights instruction and training provided for: (i) law enforcement* […]*; and (ii) judges and prosecutor*'.[202] Similarly, in 2012 the Committee recommended that Mexico '[c]*ontinue to implement training programmes on the new criminal justice system for persons involved in the administration of justice*'.[203]

IV.2.2 Institutional disincentives

However, knowledge of the legal regime on its own may not be sufficient to change practice. As discussed above, even in countries with absolute and express exclusionary regimes, judges are usually left with some discretion about whether to exclude evidence, for example in their assessment of whether it has been 'established' to the appropriate standard that evidence was obtained as a result of torture. In Tunisia, where there is an express law prohibiting confessions obtained by torture, Article 152 of the Criminal Code of Procedure nevertheless states that validity and admissibility of confessions, '*like for any other piece of evidence, is left to the free discretion of the presiding judge*'.[204] Whilst judicial discretion is needed to facilitate case-specific determinations, it also provides the space within which practices or attitudes that frustrate the underlying aims of the law can flourish. For example, in its research into how Brazilian judges respond to allegations of torture which arise in custody hearings, the NGO Conectas Human Rights, reported:

> '[Q]*uestions about torture and mistreatment seem to depend on which judge is presiding over the custody hearing – which suggests a very wide margin of discretion, as if the combat and prevention of torture depends far more on the judge's personal conviction than on a protocol for the institutional conduct of judges*'.[205]

A wide range of factors could affect how a judge approaches the application of the exclusionary rule. For example, the weight of work might simply make it impossible to process cases if too many investigations into allegations of torture are started.[206] In the context of particular cases, the risk of an adverse public, political or diplomatic response to a prosecution collapsing as a result of evidence being excluded can place considerable pressure on judges.[207] In some countries, judges have been assaulted or killed for challenging grave human rights abuses and, more commonly, their prospects of promotion may be undermined. For example, the Due Process of the Law Foundation has reported:

> '[I]*t is very important to maintain a strong position in this web of relations in a profession in which merit and performance are not always the main criteria for achieving seniority. A judge or prosecutor who is not 'well positioned' and makes a decision that runs counter to expectations runs the risk of bureaucratic 'punishment' imposed through informal rules and practices that he or she would be hard pressed to challenge*'.[208]

Of course it is not only judges that exercise discretion in this area. As discussed earlier in this report, it will typically be the defendant (or their lawyer) who triggers the process for challenging the admission of evidence in criminal cases. A defence lawyer may not be willing to challenge the admissibility of evidence that results from torture where, for example, they: don't believe the court will exclude the evidence anyway; are concerned about their personal safety or that of their client; fear that it will be detrimental to their future work (for example, police officers would cease to refer cases to them);[209] or do not believe they are being paid enough to justify the extra work involved.[210]

The approach to the admissibility of 'torture evidence' is also tied, more broadly, to how the criminal justice system operates. As discussed above, in some countries confessions are the main evidence presented to the courts in criminal cases, for example, because the police do not have the will or capacity to properly investigate the cases. Perhaps inevitably the behaviour of actors in the justice system develops in response to this. For example, a judge refusing to accept confession evidence in such a system would threaten the overall capacity of the system to convict suspects. It is in part for this reason that Juan Mendez, the former UN Special Rapporteur on Torture, proposed a universal investigative interviewing protocol as a mechanism for preventing torture.[211]

IV.2.3 Access to a lawyer

Access to a lawyer, paid for by the state where a suspect cannot afford it, is an internationally-recognised human right. Despite this, '[r]*egrettably, many countries still lack the necessary resources and capacity to provide legal aid for suspects, those charged with a criminal offence, prisoners, victims and witnesses*'.[212] In practice, without legal assistance it is unlikely that most defendants would be able to apply to a court to have evidence against them excluded from consideration. Even where indigent defendants are provided with legal aid lawyers, it is common for the assistance that is provided to be limited, especially before the start of the trial.[213] This reduces the ability of a lawyer to identify and challenge 'torture evidence', for example, because they cannot build the rapport needed for the client to disclose the torture they have suffered; and cannot gather evidence of torture by, for example, requesting medical examinations.

IV.3 Practical barriers

IV.3.1 Protecting suspects

Imagine that you are a defendant in detention at the start of your trial. You have been tortured by investigators when you were arrested. Would you have the confidence to report the fact that you had been tortured whilst you still remain in custody? Or would you be too scared of the reprisals you might suffer? The absence of a culture of protection in many countries is a major challenge which impedes victims from reporting torture. In Tunisia, for example, the UN Committee Against Torture expressed concern '*about reports of reprisals committed by the police against the families and counsel of victims with the aim of preventing them from submitting complaints of torture*'.[214] Whilst countries are increasingly adopting victim and witness protection legislation, only a handful of the countries surveyed have robust procedures in place. That being said, there is a tendency to recognise the need to strengthen protection mechanisms in order to improve justice delivery.

Of those countries which do have protection regimes, these are not necessarily geared towards cases involving allegations made by detainees against officials of the state, which require special care in how they are instituted and overseen, and need to be sufficiently independent from the bodies said to be responsible for the torture. The majority of protection schemes are run by the police or prosecution services, and are available upon the initiative of the prosecution services to provide special services for witnesses in particular cases. Access to protection can be contingent on a prosecutor's decision to pursue a case. In addition, few protection mechanisms operate inside prisons and detention centres. This is the case with Indonesia's victim protection agency (*Lembaga Perlindungan Saksi dan Korban*, LPSK), which is not able to protect those held in custody.

Generally, detainees who are tortured to solicit confessions will not be able to benefit from protection schemes until they are released from detention. This can result in delays in the reporting of torture allegations which precludes the practical application of the exclusionary rule.

IV.3.2 Obtaining evidence of torture

Even if a detainee has the courage to report torture and has access to a lawyer who will argue for the exclusion of any resulting evidence, in order for this argument to succeed the detainee will need to provide some evidence that they have been tortured. This is not as simple as it may seem, and practical barriers to obtaining evidence can frustrate the effectiveness of an exclusionary regime. For instance, a detainee may not have the name, badge number or unit of the person who carried out the ill-treatment – sometimes interrogators use false names when carrying out interrogations. Where a detainee has been interrogated over several weeks or months, the details of who meted out what treatment may blur together, as will the dates, time of day and precise locations. Delay in access to a medical examination may result in any immediate physical signs of torture having faded. More robust forensic testing and psychological reporting may not be accessible to the

majority of detainees. Furthermore, many detention facilities prevent or severely restrict access to independent medical professionals; in-house medical professionals may feel less able to author reports with clear findings of torture, given employer loyalty or fear of repercussions. In Tunisia, the UN Committee Against Torture noted that this was an issue:

> '[P]*ersons deprived of liberty cannot choose their doctors. It is concerned about reports of detainees being examined in the presence of police officers or prison staff and of some examinations being carried out by doctors from the Ministry of Justice, although it notes that responsibility in this area is now being transferred to the Ministry of Health*'.[215]

To some extent, these practical challenges are addressed by regimes which require the prosecution to establish that evidence was not obtained by torture after a reasonable suspicion has been raised by the defendant (see section III.3 above). However, in practice, not all countries adopt this approach.

IV.3.3 Delays and pre-trial detention

A defendant's decision about whether to challenge the admissibility of evidence will also depend on the likely impact this will have on the outcome of their case. Even leaving aside the risk of reprisals, it will not always follow that this will be in the defendant's interests. For a defendant in detention (particularly if they are suffering torture or ill-treatment) a key factor will be the speed of release – how quickly can I get out of here? In a country in which suspects are held for lengthy periods of time pre-trial, the outcome of a criminal trial – even if it results in conviction – will often be release from prison because the sentence will already have been served. In this case, the decision about whether to challenge the admissibility of evidence may seem relatively academic (in those instances when challenges cannot be instituted in any earlier appearances before a judge to confirm the legality of detention). It may even prolong detention. For example, as discussed above, in Vietnam[216] and Turkey[217] a motion to exclude evidence, on the basis that it resulted from torture, initiates a separate investigative process during which the substantive trial is put on hold.

IV.3.4 Avoiding trials – guilty pleas

A further practical challenge to the operation of exclusionary regimes is the increasing global reliance on systems which incentivise suspects to waive their right to a fair trial in exchange for a shorter sentence or reduced charges.[218] By pleading guilty, a suspect will typically also waive their right to challenge the admissibility of evidence – in many legal systems the evidence becomes irrelevant as the state is no longer required to establish guilt. In effect, this means that the prohibition on reliance on 'torture evidence' is side-stepped, frustrating the underlying reasons for the exclusionary rule discussed above.

CASE STUDY

MAHDI HASHI[219]

In a 2015 case before the federal district court in New York, the validity of a plea deal entered into by Mahdi Hashi was considered. Hashi had previously been stripped of his British citizenship, apprehended in Djibouti and tortured there in incommunicado detention for three months. He was then rendered without legal process to the US where he was held in solitary confinement for three years facing charges of material support to a terrorist organisation, which carried a potential sentence of 30 years to life in prison. He finally accepted a plea deal to a charge of conspiracy to provide material support for terrorism.

There are a number of troubling aspects of this case that deserved deeper judicial scrutiny than was possible absent a trial. The procedural history raised serious questions, for example, about the allegations of US involvement in kidnap, torture and rendition, and the constitutionality of Hashi's extended incommunicado solitary confinement pre-trial.

Criminal trials and associated challenges to the admissibility of evidence provide a crucial forum through which torture and mistreatment is made public. The evidence of torture that is exposed can, as discussed below, also form the basis of collateral claims for compensation or prosecution or civil liability of abusers. Plea deals can be used to avoid this by 'cleansing' or 'laundering' cases that are too tainted by torture and other human rights abuses to take to trial.[220] This issue was considered by the UN Human Rights Committee in *Hicks v Australia*.[221]

CASE STUDY

HICKS V AUSTRALIA

Hicks, an Australian national, was apprehended by US officials in Afghanistan in 2001 and detained in Guantanamo Bay, Cuba. He claims he was subjected to torture and ill-treatment and was held without charge for years – repeated attempts to try him in Guantanamo Bay at the military commission were blocked as unconstitutional. Hicks was finally charged in 2007 and entered into a deal in which he pleaded guilty to providing material support for terrorism, in return for a seven year sentence and deportation to Australia, where he would serve the sentence imposed in Guantanamo Bay.

The UN Human Rights Committee held Australia responsible for its part in the negotiation of the plea deal, recognising that Hicks had no choice but to accept the terms of the deal offered to him. The Committee considered that, by giving effect to the remainder of the sentence imposed under the plea deal, Australia had violated Hicks' rights to liberty and security of the person.[222]

China is considering expanding its trial waiver systems to reduce reliance on torture and other unlawful methods of interrogation.[223] Nonetheless, without other systematic procedural safeguards for defendants, the confession-based justice system is effectively preserved by reliance on trial waivers, and means that increased respect for human rights in criminal proceedings has not necessarily resulted.[224] Japan is also planning to introduce the right to plea bargain in mid-2018. One of the rationales given for the change is the introduction of audio-visual recording of police interviews:

> '*The number of cases subject to audio-visual recordings to improve the transparency of investigations is limited to around 3 percent of total offenses. Still, investigators claimed the recordings would make it harder for them to obtain statements from suspects, which prompted them to seek the introduction of plea bargaining as an alternative method to collect evidence*'.[225]

This suggests that, where cameras are not installed, investigators are able to do other things to 'obtain statements from suspects'.

189 The one exception to this is Brazil where data has been gathered in recent years about the new custody hearings procedure (at which point they examine incidents of torture).

190 UN Committee against Torture, List of issues prior to submission of the third periodic report of Japan due in 2017, 15 June 2015, CAT/C/JPN/QPR/3.

191 UN Committee Against Torture (CAT), *Concluding observations of the Committee against Torture : Indonesia*, 1 July 2008, CAT/C/IDN/CO/2, para 14.

192 Action by Christians for the Abolition of Torture (ACAT) and Freedom without Borders (FWB), Alternative report on torture and cruel, inhuman or degrading treatment or punishment in Tunisia submitted to the Committee against Torture during the review of Tunisia's third periodic review, 57th session, 18 April – 13 May 2016 (2016), para 150.

193 Confidential inquiries under Article 20 of the Convention against Torture.

194 For example, Amnesty International, Prisons within Prisons: Torture and Ill-Treatment of Prisoners of Conscience in Vietnam, 7 July 2016; Human Rights Watch, Public Insecurity: Deaths in Custody and Police Brutality in Vietnam, 16 September 2014.

195 UN Committee Against Torture (CAT), Concluding observations on the combined fifth and sixth periodic reports of Mexico as adopted by the Committee at its forty-ninth session (29 October–23 November 2012), 11 December 2012, CAT/C/MEX/CO/5-6, para 15.

196 Amnesty International, 'No End in Sight: Torture and Forced Confessions in China', *Amnesty International Publications* (2015), p.35.

197 See Law No.2011-206 of 22 October 2011, amending article 155 Code of Criminal Procedure: '*accounts and confessions of the accused and statements of the witnesses will be deemed null and void, if it can be established that they were obtained under torture or duress*'.

198 UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 2 February 2012, A/HRC/19/61/Add.1, para 17.

199 Ibid.

200 For an example of this approach to research, taken in the context of decision-making on pre-trial detention, see Fair Trials, 'A Measure of Last Resort? The practice of pre-trial detention decision making in the EU', April 2016.

201 UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: addendum: mission to Indonesia, 10 March 2008, A/HRC/7/3/Add.7, para 76.

202 UN Committee Against Torture (CAT), *List of issues prior to the submission of the third periodic report of Indonesia*, 15 February 2011, CAT/C/IDN/3, Article 10, para 19.

203 UN CAT, Concluding observations on the combined fifth and sixth periodic reports of Mexico, para 15(d).

204 Code of Criminal Procedure (2011), Article 152.

205 Conectas Human Rights, Shielded Torture: how the institutions of the justice system perpetuate violence in custody hearings, February 2017, p.12.

206 Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, 'Extraneous factors in judicial decisions', *Proceedings of the National Academy of Science*, 108 no. 17 (2011).

207 Luis Pasara, 'Pre-trial detention and the exercise of judicial independence: A comparative analysis', Due Process of the Law Foundation (2013).

208 Ibid, pp. 9-10.

209 Cf. Fair Trials, 'Advancing Defence Rights in the EU', 31 March 2014, para 43.

210 Cf. Fair Trials, 'The Practice of Pre-trial Detention Decision-Making', 2017, para 43.

211 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 14 August 2006.

212 United Nations Office on Drugs and Crime, 'Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems', *United Nations* (2013), A. 5.

213 Cf. Fair Trials, 'The Practice of Pre-trial Detention Decision-Making'; Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing, 2013).

214 UN Committee against Torture (CAT), *Concluding observations on the third periodic report of Tunisia*, 10 June 2016, CAT/C/TUN/CO/3, para 21.

215 Ibid, para 13.

216 Criminal Procedure Code of Vietnam (2015), Article 174.

217 Sami Ozbil; Muslum Turfan.

218 Fair Trials, The Disappearing Trial: Towards a rights-based approach to trial waiver systems (2017).

219 *United States of America v Ali Yasin Ahmed, Madhi Hashi, Mohamed Yusuf,* No. 12 Cr. 661, 2012 WL 6721134 (E.D.N.Y. Nov. 15, 2012); 18 U.S.C. § 2339B (2012).

220 Ibid.

221 UN Human Rights Commission, Communication No. 2005/2010: Views adopted by the Committee at its 115th session, 19 February 2016, CCPR/C/115/D/2005/2010.

222 Ibid, para 4.10.

223 Mengjie, 'China Considers Plea Bargaining in Criminal Cases', *Xinhua*, 29 August 2016.

224 E. M. Lynch, 'May Be a Plea, but is it a Bargain? An Initial Study of the Use of the Simplified Procedure in China', *Human Rights in China*, 1 April 2009.

225 'Japan plans to introduce the right to plea bargain in June', *Japan Times*, 24 January 2018.

Chapter V: Tackling confessions-based criminal justice

V.1 Confessions and torture

The existence of a specific purpose is commonly considered a decisive factor in the determination of whether ill-treatment constitutes torture.[226] Frequently, the specific purpose is to elicit a confession from a suspect. The ability to found a conviction on a confession provides an incentive for investigating authorities to coerce suspects into confessing to a crime, including through the use of torture.

According to Juan Mendez, former UN Special Rapporteur on Torture: '[c]*oerced confessions are regrettably admitted into evidence in many jurisdictions, in particular where law enforcement relies on confessions as the principal means of solving cases and courts fail to put an end to these practices*'.[227] Japan, for example, has been criticised in the media for its heavy reliance on confessions and for how defendants are treated in order to obtain admissions of guilt – with resulting miscarriages of justice. In 2007, the Economist reported: '*Japan is unique among democratic countries in that confessions are obtained from 95% of all people arrested, and that its courts convict 99.9% of all the suspects brought before them*'.[228]

In 2016, Quartz reported:

> '*Confessions have long been perceived as the best form of evidence in Japan, and are often coerced by psychological intimidation, shaming, and methods as ruthless as sleep deprivation. Until now, Japan has not had the same tools used in other countries such as wiretapping and plea bargaining – in their absence, Japanese law enforcement has had to rely on confessions, according to a former detective interviewed by the BBC*'.[229]

Given the close association between confessions and torture and cruel, inhuman or degrading treatment or punishment, special rules to restrict the ability to found a conviction on a confession can also operate as an indirect protection against 'torture evidence'. Special rules in relation to confessions are relatively common in domestic legal systems. They relate not only to protection against torture but also to the protection of the presumption of innocence, and the associated rights not to be compelled to testify against oneself and to remain silent.

V.2 Protections

V.2.1 Corroborating evidence

In the words of Juan Mendez, former Special Rapporteur on Torture: '*the ability to convict suspects solely on the basis of confessions without further corroborating evidence encourages the use of physical or psychological mistreatment or coercion*'.[230] Whilst none of the countries studied prohibit courts from taking account of confessions made by a suspect when determining their guilt, a number of them do provide that a confession, on its own, cannot be the sole evidence for a conviction. This is the case in Vietnam,[231] Mainland China,[232] Turkey,[233] and Indonesia[234] (where the testimony of the defendant is considered by law to be the least influential evidence).[235] Despite the criticism it has received for its reliance on confessions (highlighted above), Japan's Constitution also provides that '[n]*o person shall be convicted or punished in cases where the only proof against him is his own confession*'.[236] In Brazil, too, confessions cannot be the sole evidence of guilt.[237] Despite this, there have been cases in which judges in Brazil have accepted tenuous evidence in support of confessions.[238]

The position in the United States is varied and complex, but all jurisdictions require some form of evidence in addition to the confession itself.[239] A number of jurisdictions require evidence in addition

to the confession in order to establish that the crime actually occurred.[240] This, known as the *corpus delicti* rule, is designed to safeguard against convictions for crimes that have not occurred; rather than to protect against torture. Other US states, and the federal courts, apply the corroboration rule which requires the prosecution to bolster a confession with some other evidence to establish the trustworthiness of the confession. The US Supreme Court has described this rule as '*requir*[ing] *the Government to introduce substantial evidence which would tend to establish the trustworthiness of the statement*'.[241]

V.2.2 Heightened judicial scrutiny

In a number of the countries studied, the law requires heightened scrutiny of confession evidence by the courts. In France, for example, a '*confession like any other evidence is left to* [the] *judge's discretion*' and can be the sole evidence of guilt if the judge is satisfied.[242] Despite this, the admissibility of the confession must be discussed in open trial[243] and the judge has to decide according to his or her '*innermost conviction*'.[244] Similarly, in South Africa a confession can be the sole evidence for a conviction but due diligence is required by the court and reliance on the confession must be '*consciously considered and ruled upon*'.[245]

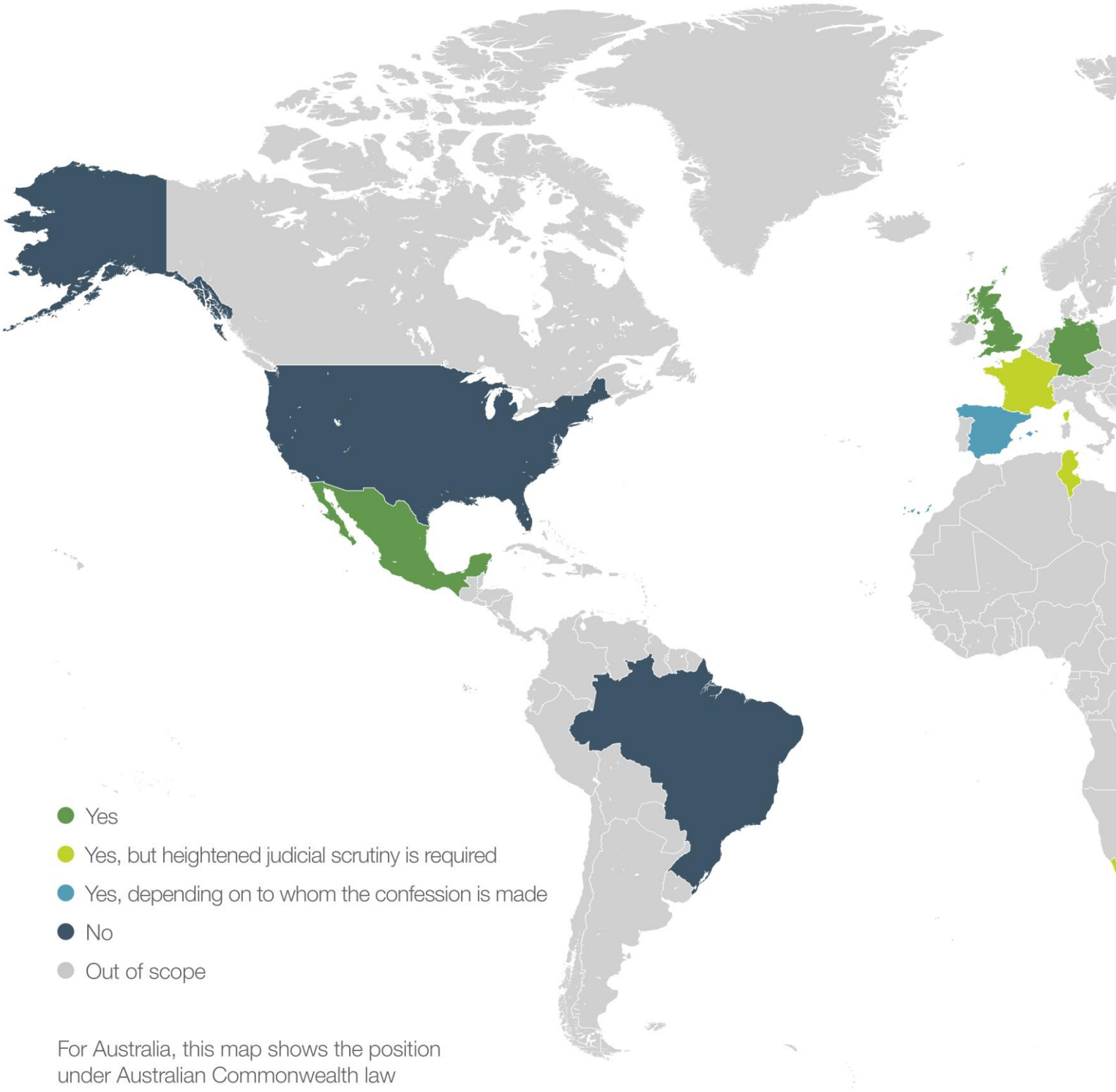
V.2.3 Types of confession

Some countries distinguish between confessions given at different stages in proceedings or to different actors within the justice system. In Kenya, confessions are treated as the gold standard in evidence, but only when given to a judge, magistrate or third party of the suspect's choice (not to the investigating officer).[246] In Spain, confessions made before a judge can be relied on as the sole evidence of guilt, provided certain conditions are met,[247] but confessions made before a police officer (if not then repeated during the trial) may not be the sole evidence of guilt.[248] A confession given in the pre-trial phase must be supported by other evidence.[249]

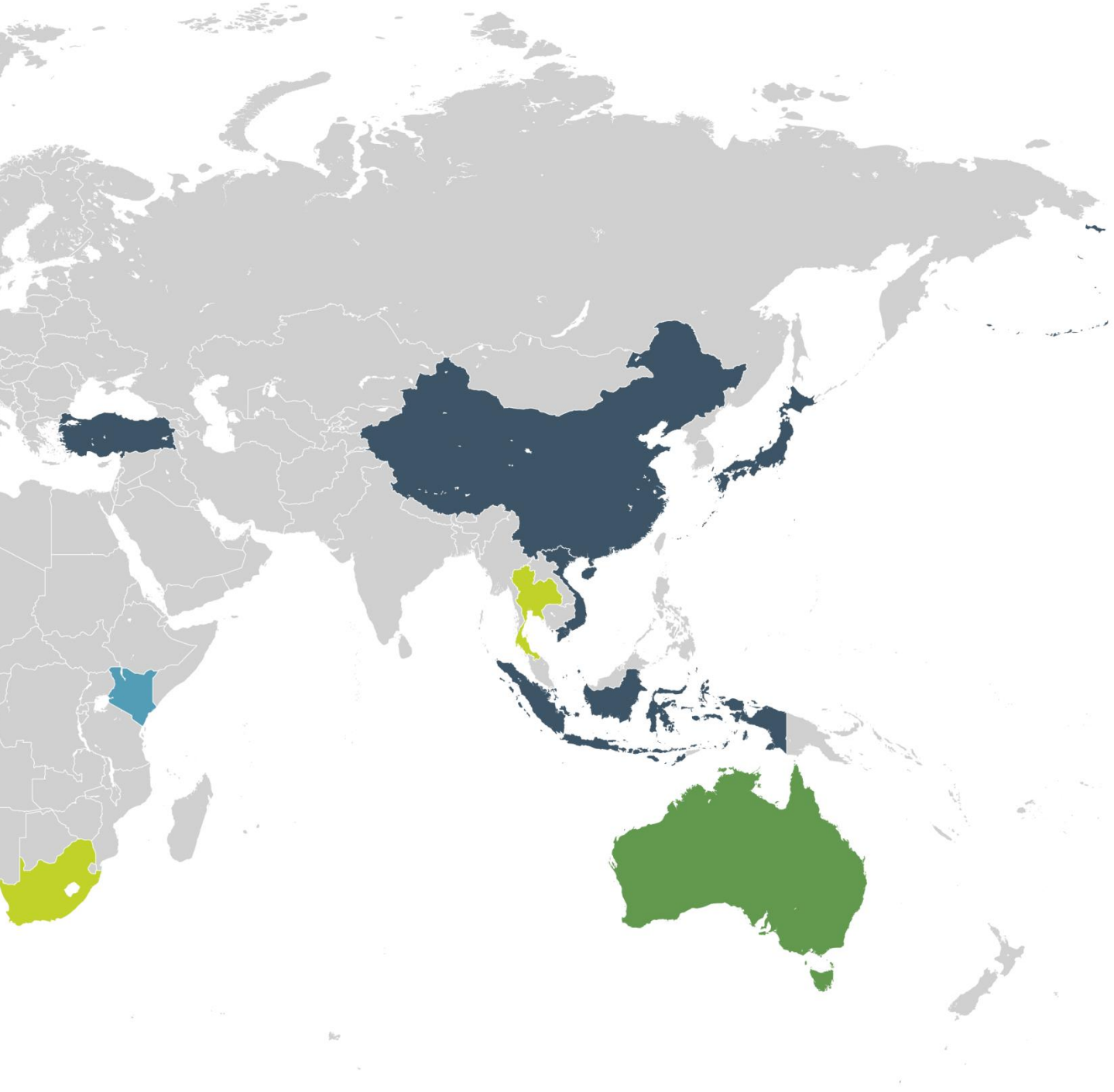
In some jurisdictions, confessions given in court are regarded as the 'gold-standard' because it is thought that they are not subject to the kind of coercion or pressure a defendant may be subjected to when giving a confession in, for example, a police station. However, this does not take into account potential continued coercion placed on the defendant that can come from a range of factors, such as: a defendant who will be delivered back into the custody of his torturers; the psychological impact torture may have on a defendant's state of mind; and threats of more severe charges or prosecution for additional offences if they do not repeat their confession. As the South African Constitutional Court recognised in the *Mthembu* case (discussed above in section II.4.2) when considering the repetition in court of a coerced statement by Mthembu's accomplice originally given after torture in police custody:

> '*That his subsequent testimony was given apparently voluntarily does not detract from the fact that the information contained in that statement* […] *was extracted through torture. It would have been apparent to him when he testified that* […] *any departure from his statement would have had serious consequences for him. It is also apparent from his testimony that, even four years after his torture, its fearsome and traumatic effects were still with him*'.[250]

Can a conviction be based solely on confession evidence?



For Australia, this map shows the position under Australian Commonwealth law



V.2.4 Procedural safeguards during the investigation

In recognition of the dangers that confessions given by a suspect may have been coerced, some countries require the court to be satisfied that certain procedural safeguards have been met before admitting confession evidence. In England and Wales for example, if there is a suggestion that a confession may have been obtained as a result of oppression, the prosecution must prove that the confession evidence was not obtained in this way by showing that procedural safeguards against oppression were complied with. This includes, for example, giving the accused appropriate cautions, providing an appropriate adult where required and compliance with Codes of Practice in relation to the detention of the accused.[251]

In the countries studied, there are numerous and varied examples of confessions being inadmissible as evidence where there has been a violation of particular procedural safeguards that protect against oppression:

i) In Western Australia, a suspect's confession to the police or the CCC in the context of a serious offence is not admissible unless it has been recorded.[252]

ii) Brazil's Supreme Court has concluded that a confession is not admissible where suspects are not informed of their rights, including the right to remain silent.[253]

iii) In Germany, violations of procedural rights accorded to suspects can lead to a confession being deemed to be inadmissible, such as a violation of the obligation to notify a suspect of their right to remain silent.[254]

iv) In Turkey, the Constitutional Court requires a lawyer to be present during the police interrogation in order for the confession to be used.[255]

v) In Mexico, a confession is only valid if provided in the presence of a lawyer.[256]

vi) In some United States jurisdictions, confessions which are made following procedural violations (designed in part to protect against torture and oppression), including the right to be brought promptly before a judge[257] and the failure to provide information on the right to remain silent and the right to a lawyer,[258] may not be admissible.

V.3 Emerging international standards: a universal protocol for interviews

The UN Committee Against Torture has recommended changes to eliminate incentives to obtain confessions[259] and the UN Human Rights Committee and the European Committee for the Prevention of Torture have called for states to reduce reliance on confession evidence by developing other investigative techniques.[260] In his 2016 interim report to the General Assembly, Juan Mendez, the former UN Special Rapporteur on Torture, further developed the link between torture and confessions, advocating for the development of a new universal protocol for non-coercive interviews:

> '*The protocol must address the need to change the culture of tolerance and impunity for coerced confessions in such cases. National legislation must accept confessions only when made in the presence of competent and independent counsel (and support persons when appropriate) and confirmed before an independent judge (see A/HRC/13/39/Add.5 and A/HRC/4/33/Add.3). Courts should never admit extrajudicial confessions that are uncorroborated by other evidence or that have been recanted (see A/HRC/25/60)*'.[261]

This is an important initiative that, if adopted and implemented, may remove a key incentive for torture. Several aspects of what is envisioned for the protocol help to enforce the exclusionary rule and are set out immediately below:

i) prohibit any form of coercion during the questioning of suspects (not only torture and other cruel, inhuman or degrading treatment);

ii) promote alternative information-gathering models focused on eliciting the truth (as opposed to a focus on eliciting confessions);

iii) abolish and criminalise secret detention: '[a]*ny evidence obtained from detainees in unofficial places of detention and not confirmed by them during subsequent interviews at official locations ought to be inadmissible in court*';[262]

iv) introduce legislation which prevents confessions from being the sole basis upon which a guilty verdict may be secured and exclude from proceedings confessions made to police and other non-judicial officers, or taken without the presence of the detainee's lawyer,[263] for example, the Special Rapporteur encourages that:

> '*If doubts arise about the voluntariness of a person's statements, as when no information about the circumstances of the statement is available or when pursuant to arbitrary, secret or incommunicado detention, the statement should be excluded regardless of direct evidence or knowledge of abuse*';[264]

v) exclude confession evidence stemming from interrogations that was not voice or video recorded, and prohibit the use of hooding or blindfolding in interrogations;[265]

vi) ensure that all accused persons are informed of the right against self-incrimination;[266] and

vii) introduce a clear procedure to test a confession for signs of torture.

There is a growing recognition that some of the most important torture prevention mechanisms are the safeguards that should be applied in the first hours and days after a person is taken into custody. This was a key conclusion of a major independent study commissioned by the Association for the Prevention of Torture and undertaken by Oxford Brookes University to assess the impact of torture prevention measures undertaken over a thirty-year period:

> '*The study found that, when detention safeguards are applied in practice, this has the highest correlation with the reduction of torture* […] *Among all measures, abstaining from unofficial detention and the implementation of safeguards in the first hours and days after arrest are the most important means for preventing torture* […] *The study also highlights the positive impact of reducing reliance on confession evidence in criminal proceedings: 'When police investigators make use of alternative forms of evidence, and the judicial process insists they do, the motive for, and risk of, torture decline*".[267]

There is also emerging evidence of a slowly developing state practice in several of the recommended areas, including the elimination of confessions as a sole source to secure a conviction (discussed above); the recording of interviews;[268] and the right to information on rights, including the right to silence.[269] At a regional level, too, there are developments linking the admissibility of confessions with the protection of procedural safeguards for suspects. For example:

i) In Europe, domestic criminal procedure laws have been changing to exclude reliance on evidence obtained in the absence of a lawyer, pursuant to the decision of the European Court of Human Rights in *Salduz v Turkey*.[270] In *Salduz*, the European Court of Human Rights established the general rule that access to a lawyer should be afforded to a suspect from the first interrogation by police. Failure to abide by this requirement would render as unfair any trial in which incriminating statements made in the absence of a lawyer are used for a conviction.

ii) The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa state that any confession or admission made during incommunicado detention should be considered as having been obtained by coercion and, accordingly, must be excluded from evidence.[271]

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226 Nowak and McArthur, *The United Nations Convention Against Torture*, pp. 534-535, 572.

227 UN ONHCR, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Juan Ernesto Mendez, 5 August 2016, A/71/298, para 99.

228 'Confess and be done with it: Almost everyone accused of a crime in Japan signs a confession, guilty or not', *Economist*, 8 February 2007.

229 Hanna Kozlowska, 'Japan's notoriously ruthless criminal justice system is getting a face lift', *Quartz*, 26 May 2016.

230 UN ONHCR, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Juan Ernesto Mendez, para 11.

231 Criminal Procedure Code (2015), Article 98.

232 Criminal Procedure Law (2012), Article 53: '*a defendant cannot be found guilty and sentenced to criminal punishments if there is no evidence other than his/her own statement*'.

233 *Gunes v Turkey*, App no. 28490/95 (ECtHR, 19 June 2003).

234 Kitab Undang-undang Hukum Acara Pidana (KUHAP) (1981), Article 189(4).

235 Ibid, Article 184.

236 Constitution of Japan (1947), Article 38(2).

237 Code of Criminal Procedure (2011), Article 199.

238 Appeal # 0004290.80.2010.8.26.0431 of the Court of Appeals of the State of Sao Paulo.

239 McCormick on Evidence (2016), para 145.

240 David A. Moran, 'In Defence of the Corpus Delicti Rule', *Ohio State Law Journal*, 64, no. 3 (2003), p. 817.

241 *Opper v United States* (1954) 348 U.S.84, 93.

242 Code of Criminal Procedure (2006), Article 428.

243 French Supreme Court, Criminal Chamber, 21 October 1965, No. 65-90.318.

244 Code of Criminal Procedure (2006), Article 427.

245 *Hlayisiani Chauke v The State* (70/12) [2012] ZASCA 143.

246 Evidence Act No 46 of 1963, Revised Edition 2014 (2012).

247 Judgment of the Spanish Supreme Court, 307/2008 of 5 June 2008.

248 Judgment of the Spanish Supreme Court, 174/2015 of 14 May 2015.

249 Judgment of the Spanish Supreme Court, 655/2011 of 28 June 2011.

250 *S v Mthembu* (379/07) [2008] ZASCA 51, para 34.

251 *R v Fulling* [1987], 2 All E.R. 65; Police and Criminal Evidence Act 1984, Section 76.

252 Unless the prosecution proves that there was a reasonable excuse for there not being such a recording, or there are '*exceptional circumstances which, in the interests of justice, justify the admission of the evidence*' – Criminal Investigation Act 2006 (WA), s.118.

253 Habeas Corpus, #78708, Federal Supreme Court. 9 March 1999.

254 Strafprozeßordnung, (StPO), Section 136.

255 *Muslum Turfan*, 18 November 2015.

256 'La confesión rendida sin la asistencia del defensor carecerá de todo valor probatorio', Artículo 20 B II, Constitución Política de los estados unidos mexicanos.

257 US Code, Title 18 (Crimes and Criminal Procedure) (2012), para 3501(c).

258 *Miranda v Arizona* [1966], 384 U.S. 436.

259 Cf. UN Committee Against Torture, *Concluding Observations: Russian Federation*, 6 June 2002, CAT/C/CR/28/4, para 6(b).

260 UN Human Rights Committee, *Concluding Observations: Japan*, 18 December 2008, CCPR/C/JPN/CO/5, para 19; CPT Standards, 12th General Report CPT/Inf (2002), 15, para 35.

261 UN ONHCR, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Juan Ernesto Mendez, para 99.

262 Ibid, para 63. This recommendation had been made years earlier by the then Special Rapporteur, Sir Nigel Rodley (see UN General Assembly, *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, 3 July 2001, A/56/156, para 39(d). See also, UN Commission on Human Rights, *Report of the Special Rapporteur on the Question of Torture, Theo Van Boven, submitted pursuant to Commission Resolution 2002/38*, 17 December 2002, E/CN.4/2003/68, para 26(e))

263 Ibid, paras 69-75; 99, 100. The recommendation also is made, in *Report of the Special Rapporteur on the Question of Torture, Theo Van Boven, submitted pursuant to Commission Resolution 2002/38*, para 26(e): '*No statement of confession made by a person deprived of liberty, other than one made in presence of a judge or a lawyer, should have a probative value in court, except as evidence against those who are accused of having obtained the confession by unlawful means*'.

264 Ibid, para 99.

265 Ibid, paras 84-87. The recommendation also is made in Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, 3 July 2001, para 39(f).

266 Ibid, paras 65, 76-78.

267 Association for the Prevention of Torture, "Yes, Torture Prevention Works': Insights from a global research study on 30 years of torture prevention' (2016), pp. 6-7.

268 For example, Directive 2012/13/EU of the European Parliament and of the Council, 22 May 2012, on the right to information in criminal proceedings.

269 For example, A. Birtles, 'The European Committee for the Prevention of Torture and the electronic recording of police interviews with suspects', *Human Rights Law Review* (2001), 1, no. 1; J. Chalmers, 'Recording of police interviews', in J. Chalmers et al. (eds.), *Post-Corroboration Safeguards Review Report of the Academic Expert Group* (The Scottish Government, 2014), pp. 118-123; D. Donovan and J. Rhodes, 'Comes a Time: The Case for Recording Interrogations', *Montana Law Review*, 61, no. 1, p. 223; C. Ingrain, J. Pasternak and R. Lorrain, 'Pour une généralisation de l'enregistrement audiovisuel des gardes à vue et des interrogatories en matière correctionnelle', *La Semaine Juridique*, 7 September 2015; T. P. Sullivan, 'Electronic Recording of Custodial Interrogations: Everybody Wins', *Journal of Criminal Law and Criminology* (2005), 95, no. 3, pp. 1127-1144; A. E. Taslitz, 'High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations', *Northwestern Journal of Law & Social Policy* (2012), 7, pp. 400-454.

270 *Salduz v Turkey*.

271 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), Section N(6)(d)(i).

Chapter VI: Prosecutions and disciplinary sanctions stemming from revelations about 'torture evidence'

The core focus of our research was on the measures taken by states to exclude 'torture evidence' in criminal proceedings, but we also wanted to understand what states did once cases of torture had been brought to their attention. In particular, did this lead to criminal proceedings against the torturers?

Torture is recognised as a crime giving rise to individual criminal responsibility.[272] If the police engage in criminal behaviour in order to obtain evidence then they should be held criminally liable for such conduct.[273] A policeman who tortures a defendant or coerces a confession may face charges including torture, assault, coercion, threatening behaviour or abuse of public office. An official who breaches procedural rules may face disciplinary sanctions.

VI.1 The criminalisation of torture

The UN Convention Against Torture requires states to criminalise torture – specifically, to set it out as a distinct criminal offence.[274] This is to underline society's abhorrence for the crime. Also, without a separate offence of torture, it is difficult to ensure compliance with the obligation to investigate and prosecute instances of torture. Furthermore, the special procedural rules which apply to torture prosecutions under international law, such as the inapplicability of amnesties, will be more difficult to apply. Despite this, not all states have criminalised torture. For instance, in Thailand, torture is not a specific offence in the criminal code, though the prohibition is reflected in the 2017 Constitution.[275]

Where the exclusionary rules relate to evidence obtained as a result of illegal actions, the absence of a specific crime of torture makes it harder for states to apply special (absolute) exclusionary regimes to 'torture evidence'. In Western Australia, for example, there is no legislation explicitly criminalising torture. Instead, the prohibition against the use of torture is found in the general provisions of the Western Australia Criminal Code in offences such as assault and other related offences against the person.[276]

VI.2 The obligation to investigate

When there is information that suggests that torture may have taken place, there is an obligation for the competent authorities to investigate with a view to establishing whether the offence indeed took place and, where sufficient evidence exists, to prosecute and punish the persons responsible. This obligation derives from the absolute prohibition on torture set out in the UN Convention Against Torture and a host of other human rights treaties,[277] and is incorporated into numerous national constitutions.

When a person alleges that torture has been used in order to obtain a confession, this allegation should, in and of itself, result in the competent authorities initiating a criminal investigation into the torture allegation. There should be no need for the person to report the matter to the police as a fresh crime. This is because the obligation to investigate torture allegations is not contingent on the victim lodging a formal complaint; the competent authorities are required to proceed with an investigation regardless of how they learnt of the allegation.[278] In the *Demir and others* case, for example, the Turkish Constitutional court held:

> '[E]*ven if there was no formal complaint of torture, if there are signs that demonstrate that the person was subject to ill-treatment or torture, there has to be an investigation. In this context an investigation has to take place promptly and independently*'.[279]

Often, the revelation of torture will arise at the pre-trial or trial stage when counsel for a defendant seeks to have evidence excluded. It may also be revealed during an initial detention hearing before a judge or

magistrate which may be the first opportunity for the detainee to allege torture.[280] A defendant will tend to raise the torture allegation because they want the practice to stop; they want to be transferred to a new location; they require medical treatment of some kind; or because they do not want the involuntary confession to be used against them.

Typically, a defendant is not thinking about or actively pursuing a criminal investigation against the person(s) responsible for the torture. Nevertheless, this does not mean that a criminal investigation should not be opened. The obligation under international law to investigate torture is not contingent on the lodging of a criminal complaint.

However, it is rare for an investigating magistrate, judge or prosecutor to cause a criminal investigation to be initiated unless the victim specifically requests it, even in those instances in which they have the mandate to do so. Of the countries surveyed, only in a small number of instances is there a special obligation on a competent official (including a judge, investigating magistrate or other) to take specific steps to initiate a criminal action when they learn about a possible case of torture. These tend to be civil law countries, namely Spain,[281] Vietnam[282] and Turkey.[283]

In Brazil, a judge can request a physical examination to detect possible abuse committed during the arrest, and can also open a criminal or administrative investigation in relation to the officers alleged to be responsible.[284] Challenges have been noted in the practical application of these powers.[285] The Brazilian Ministry of Justice has itself reported that there are difficulties in identifying, qualifying and determining the required course of action following an allegation of illegal use of force by the police.[286] Part of the difficulty is timing. In the majority of cases, the examination is conducted after the custody hearing takes place (and only in cases where the torture report is considered valid and an investigation has been initiated) which may reduce the quality of the evidence and limit the prospects for a torture prosecution.[287] In the report of its 2011 visit to Brazil, the UN Subcommittee on the Prevention of Torture strongly recommended that, when torture is suspected, judges immediately notify the prosecution so that an investigation can be initiated.[288]

In a case concerning Mexico, the Inter-American Court of Human Rights found that Mexico violated the prohibition on torture when the local courts, who were apprised of torture allegations, failed to cause a criminal investigation to be opened. The Court held:

> '[T]*he fact that no independent investigation against the alleged perpetrators was conducted by the ordinary courts prevented any attempt to dispel or clarify the allegations of torture. Based on the foregoing, it is clear to this Court that the State failed in its duty to investigate ex officio the human rights violations committed against Messrs. Cabrera and Montiel. In the instant case, it was essential that the different domestic courts order new procedures to investigate the link between the signs found on the victims' bodies and the acts allegedly suffered as torture*'.[289]

However, even absent an explicit power to compel an investigation, regardless of the legal system, a judge should nonetheless be in a position to ask a defendant about treatment in detention and alert the competent investigating authorities to the existence of a potential crime. For instance, in China, the court has no power to open a criminal investigation against the alleged torturer, but in theory could report the torturer to the People's Procuratorates who would then be required to carry out an investigation.[290]

Arguably, a judge has a responsibility not to ignore an allegation of torture and should report the alleged crime to the police. However, in the absence of strict regulations, how a judge decides to respond to an allegation of torture received in open court may in some countries depend on the personal disposition of that judge, or on cursory impressions formed at the time of the hearing.[291] In the UN Special Rapporteur on Torture's report following his visit to Indonesia, he noted as a problem 'reports about non-action of judges, prosecutors and other members of the judiciary vis-à-vis allegations of torture,'[292] and recommended that:

> '*Judges and prosecutors should routinely ask persons arriving from police custody how they have been treated, and if they suspect that they have been subjected to ill-treatment, order an independent medical examination in accordance with the Istanbul Protocol, even in the absence of a formal complaint from the defendant*'.[293]

Matters may be further complicated when the alleged torturers operate overseas, for instance when military personnel or members of the police are serving

abroad. There may be legal jurisdiction for a court to prosecute officials from the forum state who perpetrate torture abroad, but special procedures may be applicable which might act to reduce the likelihood of a case against such officials from proceeding. For instance, torture committed by an Australian public official or a person acting in official capacity overseas can be prosecuted, but this requires thorough consent from the Australian Attorney-General.[294] However, it may well be practical challenges that prove the most difficult – a victim of torture perpetrated by a foreign official may have difficulty lodging a complaint in the home country of that official.

VI.3 Inspection and disciplinary bodies

Many public departments which exert control over detainees have administrative complaints bodies or inspectorates which can investigate and sanction any unlawful conduct. Sometimes these bodies operate in conjunction with the penal process, and investigations are intended to lead to prosecutions when there is sufficient evidence. In other instances, these bodies operate in addition to any penal process and take on an internal, disciplinary character. Typically, if sufficiently independent and resourced, such bodies can contribute to the accountability processes and act as important safeguards against misconduct.

The UN Committee Against Torture has recommended that certain states establish complaints bodies or inspectorates in order to better tackle impunity in torture cases. It did so in respect of Spain, in relation to which it expressed concern about the impunity and absence of effective and thorough investigations. The Committee urged Spain '*to create an independent mechanism that conducts prompt, impartial and thorough investigations as regards allegations of torture and ill treatment carried out by law enforcement officials*'.[295]

Inspection and disciplinary bodies are most prevalent for the police:

i) In France, the division of the Inspectorate General of the National Police (*Inspection générale de la police nationale*) is responsible for carrying out administrative and judicial investigations against the staff of the French National Police. It has the power to investigate police officers who fail to respect the Ethics Code of the French National Police.[296]

ii) Similarly, the Indonesian Police Agency has its own internal inspection mechanism which can result in disciplinary sanctions.[297] An internal trial is compulsory where police officers are alleged to have violated ethical standards.

iii) In South Africa, the Independent Police Investigative Directorate (IPID) can investigate alleged criminal acts perpetrated by the South African and Municipal Police Services. Inspection and disciplinary processes are also often in place for the military and there are mechanisms which cater specifically to allegations concerning correctional facilities, such as the South African Judicial Inspectorate of Correctional Services which is an independent office controlled by the Inspecting Judge and which acts as an independent monitoring body to investigate deaths and a range of abuses in correctional centres.[298] Their roles are to investigate the treatment of detainees and conditions of detention, including deaths in detention and allegations of torture or inhuman or degrading punishment or punishment in correctional centres.

iv) In England and Wales, most complaints about the police are dealt with by professional standards departments within the relevant police force. However, these departments must refer certain cases to the Independent Office for Police Conduct which investigates the most serious incidents and complaints. This includes indications of misconduct by police officers and staff (for example, that a criminal offence has been committed or a serious injury has been caused) or where a person has suffered a serious injury which may have been connected to contact with the police.

Other challenges related to the operation of such complaints bodies are the degree to which they are transparent and the typically more limited extent to which they apply to the security and intelligence services.[299]

272 UN General Assembly, *Convention against Torture*, Articles 4 and 5.

273 Ibid.

274 Ibid, Article 4.

275 2017 Thai Constitution, Article 28(3). Draft anti-torture and anti-disappearance legislation was prepared by the Thai Government and put forward for adoption. However, in February 2017, the National Legislative Assembly refused to adopt it.

276 Criminal Code Compilation Act (1913) (WA).

277 See above footnotes 6-13.

278 UN General Assembly, *Convention against Torture*, Article 12.

279 *Demir* and others (App no. 2013/293), the Constitutional Court, Judgment of 17 July 2014, para 116 [unofficial translation].

280 In Brazil, Conselho Nacional de Justiça (CNJ) statistics reveal that from 2015 to 2016 there were more than 6,200 reports regarding torture and ill-treatment of prisoners arising during custody hearings, which were formalised and presented to the judicial authorities for investigation (CNJ, 'CNJ firma acordo com entidade internacional para prevenir tortura no país').

281 Spanish Criminal Procedure Act 2015, Article 269.

282 Criminal Procedure Code (2015), Article 163 (previously Article 110.1 of the 2003 Criminal Procedure Code). The Vietnamese Government has listed several examples of torture cases which have progressed to trial under this basis, such as the conviction of Nguyen Hoang Quan and Trieu Tuan Hung after allegations were made that they tortured seven murder suspects in Soc Trang Province. Apparently, when the allegation of torture was made, the case was postponed and the Defendants were ultimately prosecuted under Article 298 of the 1999 Criminal Code. See Vietnam's national report on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 13 September 2017, CAT/C/VNM/1, para 231 68 and Annex 11 (case 7).

283 Muslum Turfan.

284 Conectas, *Shielded Torture*, p.5.

285 Ibid, p.5.

286 Ministry of Justice of the Federative Republic of Brazil, 'Audiências de Custódia e Prevenção à Tortura: Análise das Práticas Institucionais e Recomendações de Aprimoramento' (unofficial translation: 'Custody Hearings and Torture Prevention: Analysis of Institutional Practices and Improvements Recommendations'), 35.

287 Ibid, 49.

288 UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Brazil, 5 July 2012.

289 *Cabrera-García and Montiel Flores v Mexico* (Preliminary Objection, Merits, Reparations and Costs) Series C No. 220, 26 November 2010, para 131.

290 Criminal Procedure Law of the People's Republic of China (2012), Article 55.

291 Conectas, *Shielded Torture*. See similarly, Ministry of Justice of the Federative Republic of Brazil, 'Audiências de Custódia e Prevenção à Tortura', 34-35.

292 UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: addendum: mission to Indonesia, 10 March 2008, A/HRC/7/3/Add.7, para 59(B).

293 Ibid, para 80.

294 Division 274.3, Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act (2010) (Commonwealth).

295 UN Committee against Torture (CAT), *Concluding observations on the sixth periodic report of Spain*, 29 May 2015, CAT/C/ESP/CO/6, pp. 3, 6.

296 Decree no. 2013 784, Articles 3 and 4, 28 August 2013, with respect to the tasks and organisation of the Inspectorate General of National Police.

297 For further information on police internal mechanisms and disciplinary sanctions in Indonesia see Amnesty International, *Unfinished Business: Police Accountability in Indonesia*, 24 June 2009.

298 Republic of South Africa Combined Second Periodic Report Under the African Charter on Human and Peoples` Rights and Initial Report Under the Protocol to the African Charter on the Rights of Women in Africa (August 2015), para 57.

299 See the website of the Independent Office for Police Conduct, at www.policeconduct.gov.uk.

Chapter VII: Remedies and reparation for victims

VII.1 Specific forms of reparation for forced confessions

One rationale for exclusion of 'torture evidence' is to protect the torture victim's rights. It operates, in part, as a remedy for the victim – preventing further damage resulting from the torture due to the state's inability to rely on the evidence. As discussed, the scope of the exclusionary rule under international law is unclear in some respects and many states have not implemented it effectively. Despite this, exclusion of the evidence remains one of the most common responses of states to 'torture evidence'.

It is rare for the fact of torture to result in the staying of proceedings or quashing of the charges, unless the evidence procured directly from that torture was the only evidence to sustain a conviction.[300] As the Spanish Supreme Court has noted, if the evidence does not '*pass the legality test, it becomes* […] *unlawful evidence* […] *with an irretrievable nullity. It will drag down all other evidence directly deriving from*' such unlawful evidence.[301] However, this will not necessarily trigger a re-trial if the torture is not deemed to have had an overall impact on the reliability of the conviction.[302]

In some legal regimes, criminal cases may be discontinued by the courts where there is a grave violation of human rights, on the basis that it would be an 'abuse of process' to continue the case. In the United Kingdom, the House of Lords has concluded that the courts have discretion to stay proceedings as an abuse if they would '*amount to an affront to the public conscience*' and where '*it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place*'.[303] This has been described as follows:

> '[T]*hat the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused*'. [304]

Although this power is applied only rarely and in a limited range of contexts,[305] the underlying rationale would appear to apply to torture which, as discussed earlier, would 'taint' the court's process.

VII.2 Remedies and reparation for the underlying acts of torture

The right of victims of torture and other human rights violations to reparation is a '*well established and basic human right that today is enshrined in universal and regional human rights treaties and instruments*'.[306]

In addition to its criminal elements, torture is recognised as a human rights violation engendering state responsibility as well as a tort giving rise to damages and other forms of reparation.[307] In civil law legal systems, damages for torture are often pursued in connection with criminal proceedings following a conviction of the perpetrator for torture. In common law systems, civil claims for torture are usually pursued separately as torts: (i) through the civil courts;[308] (ii) as part of constitutional fundamental rights petitions;[309] (iii) pursuant to special torture compensation legislation;[310] or (iv) as part of transitional justice frameworks (some of which will establish special reparation procedures).[311]

International law requires that individuals who are subjected to torture have access to a procedure at the national level for complaining about torture, which has the capacity to grant an effective remedy, including adequate and effective forms of reparation, which may include: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, each of which are described below. It is important for reparation to respond to the harms caused by the violation and, typically, multiple forms of reparation will be required.[312]

VII.2.1 Restitution

The purpose of restitution is to restore the victims to the situation they were in before any violation occurred. Yet the concept of restoring the victim to the situation which pre-dated the violation (often a situation of marginalisation) will not always align with other goals of guarantees of non-recurrence, which has led some to call for reparation with transformative potential.[313]

For human rights violations, restitution has been ordered to vacate arrest warrants,[314] expunge criminal records,[315] release individuals from prison,[316] or issue stays of execution in death penalty cases.[317] Whilst it is impossible to 'undo' torture, it is possible to undo the legal weight of a confession which was procured through torture. The exclusionary rule is a form of restitution in that it is intended to 'undo' the impact of the wrong. A Brazilian Appellate Court has underscored:

> '*It is invalid the extrajudicial confession obtained through torture duly proven. The defendant shall be acquitted when there is not enough judicial evidence for conviction, being the conviction evidence collected during the police investigation tainted by torture* […]. *The defendant's acquittal in a judicial proceeding tainted by torture is a matter of justice*'.[318]

VII.2.2 Rehabilitation

Rehabilitation is a key form of reparation for torture survivors. Article 14 of the UN Convention Against Torture specifically provides that a victim of torture must have '*the means for as full rehabilitation as possible*'.[319] The concept is understood to include medical and psychological care,[320] as well as legal and social services.[321] To be effective, rehabilitation should be tailored to the specific needs of a given victim.

Few of the countries surveyed set out clear pathways for rehabilitation of torture victims, whether through legislation or practical service delivery through national health services. Often, access to rehabilitation is through non-governmental organisations with the state only stepping in if it is ordered to do so through a criminal or administrative process However, there are exceptions to this.[322]

VII.2.3 Compensation

Whilst monetary compensation alone cannot be regarded as adequate redress for a victim of torture it is nevertheless an important component of reparation given the real and significant harms suffered by victims. Compensation is understood to cover any economically assessable damage stemming from the violation. Some countries have adopted specific laws to enable victims of torture to claim compensation through special administrative procedures or through the courts. The amount of recoverable compensation can vary significantly from one country to another and in many cases is inadequate when compared to the harm suffered.

CASE STUDY

IMAM YAPA KASENG[323]

In 2008 muslim cleric, Imam Yapa Kaseng, died as a result of the torture he suffered in military custody in southern Thailand. According to the post-mortem:

> '*The cause of death is being physically abused by military officers until the ribs broke and pneumothorax was sustained on his right chest during the time the deceased was held in custody by the military officers who were competent officials*'.[324]

Yapa Kaseng's wife and children filed a civil tort claim against the Ministry of Defence, the Royal Thai Army and the Royal Thai Police. The case reached settlement in 2011 with two of the three defendants agreeing to compensate Yapa Kaseng's family in the amount 5,211,000 Thai Baht (approximately USD 160,000).

How a compensation claim is pursued will also depend on the legal culture in the countries concerned. In civil law countries, it is most common for victims to engage in the criminal procedure as 'parties civiles' and for compensation claims to be pursued against individual perpetrators following a conviction through the adhesion procedure. In common law countries, compensation claims tend to be pursued through fundamental rights petitions before constitutional courts[325] or through the institution of a separate civil action.

VII.2.4 Satisfaction

Satisfaction includes key components of justice for victims such as verification of the facts, public acknowledgement of wrongdoing, apology and acceptance of responsibility, full disclosure of the truth, commemorative activities, as well as other

avenues for accountability including judicial and administrative sanctions against those responsible.[326]

Satisfaction has been frequently ordered in human rights jurisprudence to address injuries which involve breaches of trust, in which acknowledgement and commemoration may help to contribute to an effective remedy.[327] Criminal investigations have also been ordered as satisfaction. Cessation, as a form of satisfaction, has been emphasised as a remedy for continuing violations. For example, in cases of disappearance, full disclosure of the truth, and the need to locate and identify remains, is understood to be central.[328]

VII.2.5 Guarantees of non-repetition

The prevention of torture is a clear component of the overall prohibition on torture and an important part of the UN Convention Against Torture and the Optional Protocol to the Convention, as well as other treaties.

States are regularly being asked to take active steps to prevent torture and other prohibited ill-treatment, which usually requires them to take a range of legislative, educative and practical measures to outlaw the practice, including ending impunity. Guarantees of non repetition include: strengthening monitoring mechanisms and other procedural safeguards applicable to detainees and others who come into contact with authorities; strengthening policies and legislation; vetting public officials; and setting up commissions of inquiry to investigate wide-scale occurrences of torture.

Reducing the reliance on confession-based evidence and other, similar recommendations that have been made by the Special Rapporteur on Torture[329] are important ways in which states can reduce the incentive to coerce statements from detainees. This, in turn, will help to reduce the practice of torture.

300 *Arzate case*, Mexican Supreme Court of Justice, Amparo Review No. 703/2012.

301 Judgment of the Spanish Supreme Court No. 737/2009 (Criminal Division) of 6 July 2009, legal basis number four, para 29.

302 For example, Judgment of the Spanish Constitutional Court No. 7/2004 of 9 February 2004. The Spanish Constitutional Court considered that the declarations made before the investigating judge were flawed by the torture previously suffered by the accused. Consequently, the evidence was excluded. However, the accused were ultimately convicted on the basis of other evidence that was independent from the declarations obtained by torture. See similarly, Mexican Supreme Court of Justice, Direct Amparo Review, No. 6564/2015.

303 *R v Latif* [1996] 1 WLR 104, para 112-113.

304 *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, para 76C.

305 Including (a) Where a fair trial is impossible, for example because of delays or adverse media publicity (*R v Stone* [2001] Crim. L.R. 465); (b) where the UK authorities were involved in the unlawful abduction of a person from a third country to the United Kingdom (also known as 'rendition') in order to face trial, even where there was no question that the subsequent trial was fair (*R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42 (involving a person abducted from South Africa in gross breach of his rights and the law of South Africa) and *R v Mullen* [2000] QB 520 (involving the appeal against conviction for a serious terrorist offence following the suspect's illegal abduction from Zimbabwe)); (c) Where the state has procured the commission of a crime through entrapment (*R v Looseley*, Attorney General's Reference (No 3 of 2000) [2001] UKHL 53).

306 See generally, UN Human Rights Committee (HRC), General Comment no. 31, the Nature of the Legal Obligation on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13.

307 UN General Assembly, *Convention Against Torture*, Article 14; UN Committee Against Torture, *General Comment No. 3 (2012): Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States parties*, 13 December 2012, CAT/C/GC/3.

308 *Ndiki Mutua and Others v The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB).

309 *Wachira Weheire v The Attorney General* [2010] eKLR, 21 July 2010 (Kenya); *D.K. Basu v State of West Bengal*, AIR 1997 SC 610 (India); *Dr. Mehmood Nayyar Azam v State of Chattisgarh and Ors* (Civil Appeal No. 5703 of 2012) *[2012] 8 SCR 651, 3 Aug. 2012 (India).*

310 For example, Nepal: Compensation for Torture Act, 2053, 18 December 1996; USA: Torture Victim Protection Act 28 U.S.C. 1350 (1991).

311 For example, Philippines Compensation Act to Victims of Human Rights Violations, H. No. 5990, 25 Feb. 2013; Chilean Law No. 19.992 Establece pension de reparacion y otorga otros beneficios, 17 Dec. 2004, modified 10 Dec. 2009; Argentinean Law No. 24.043 of 1991.

312 For example, *Guridi v Spain*, where the UN Committee Against Torture recognised that in the particular case, reparation for torture needed to '*cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non repetition of the violations, always bearing in mind the circumstances of each case*' (UN Committee Against Torture, thirty-fourth session, CAT/C/34/D/212/2002, para 6.8).

313 An emphasis of the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (International Meeting on Women's and Girls' Right to a Remedy and Reparation, Nairobi, 19-21 March 2007).

314 Arrest Warrant of 11 April 2000 (*DRC v Belgium*) (Merits) [2002] ICJ Rep 3.

315 *Cantoral Benavides v Peru* (Reparations and Costs) Ser C no 88 (IACtHR, 3 December 2001), para 78.

316 *Loayza Tamayo v Peru* (Merits) Ser C no 33 (IACtHR, 17 September 1997), para 84.

317 *Fermín Ramírez v Guatemala* (Merits, Reparations, Costs) Ser C no 126 (IACtHR, 20 June 2005), para 130(c).

318 Appeal # 2.0000.00.406378-5/000 of the Court of Appeals of the State of Minas Gerais [2004].

319 Convention against Torture, Article 14.

320 *Plan de Sánchez Massacre v Guatemala* (Reparations) Ser C no 116 (IACtHR, 19 November 2004), para 106-8.

321 *Juvenile Reeducation Institute v Paraguay* (Preliminary Objections, Merits, Reparations and Costs) Ser C no 112 *(IACtHR, 2 September 2004), para 340(13).*

322 In Brazil, Article 11 of Resolution 213/2015 provides that if a person who is arrested declares that he was the victim of torture and ill-treatment or if the judicial authority understands that there is evidence of torture, the information obtained shall be recorded, and the appropriate steps to investigate the complaint and to preserve the physical and psychological safety of the victim shall be taken, and the victim shall be submitted to specialised medical and psychosocial care.

323 For background on the case, see Isara News, 'NACC found misconduct and criminal charges against Sub.Lt. in Imam Yapa case', 4 September 2015.

324 Cf. 'Thailand: The case of Imam Yapa Kaseng', Press Statement, Asian Human Rights Commission, 23 June 2010.

325 In *Njuguna Githiru v Attorney General*, Nairobi, HCCC, No. 204 of 2013, the Kenyan court declared that where torture is used to obtain evidence or in any other manner, the petitioner is entitled to damages and compensations for the violations and contraventions of his fundamental rights and freedoms, which in this case included general damages, exemplary damages, and moral damages on an aggravated scale pursuant to Article 23(3) of the Constitution of Kenya (2010).

326 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147, 16 December 2005.

327 *Mack-Chang v Guatemala* (Merits, Reparations and Costs) Ser C no 101 (IACtHR, 25 November 2003), paras 8, 9, 11, 12.

328 *Neira-Alegría v Peru* (Reparations and Costs) Ser C no 29 (IACtHR, 19 September 1996), para 69.

329 UN General Assembly, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Part II: Universal protocol for interviews, 5 August 2016, A/71/298.

Conclusions and recommendations

1. International human rights law prohibits reliance on evidence obtained as a result of torture. This rule plays a key part in the overall legal architecture which underpins the absolute prohibition on torture. Reliance on 'torture evidence' is prohibited because: (a) it is involuntary, inherently unreliable and violates the right to a fair trial; (b) to rely on such evidence undermines the rights of the torture victim; (c) it indirectly legitimises torture and in so doing taints the justice system; and (d) prohibiting reliance on the fruits of torture acts as a form of deterrence and prevention.

   Given its crucial role in the prohibition on torture, the exclusionary rule should be accorded a more prominent role in the work undertaken to combat torture. In particular, we would urge the UN Committee Against Torture to produce a general comment on the topic.

2. Despite this clear legal obligation, some countries do not prohibit reliance on 'torture evidence' at all. More commonly, countries have some form of exclusionary rule but this is incomplete and fails to meet the key components of the rule as defined by international law:

   i) Some countries do not have an absolute prohibition on reliance on 'torture evidence': frequently, countries require the courts to carry out a balancing act when deciding whether to admit unlawfully-obtained evidence, even in circumstances where that evidence is obtained as a result of torture.

   ii) A number of countries prohibit reliance on statements obtained from the torture of the defendant, i.e. a confession obtained as a result of torture. However, it is quite common for exclusionary regimes not to extend to evidence obtained from the torture of a third party, i.e. when a person (who is not the defendant) is tortured and, as a result, implicates the defendant.

   We recommend that domestic legal regimes be reviewed to ensure compliance with existing international standards on the exclusion of 'torture evidence'. This should, for example, form a part of country reviews by relevant treaty monitoring bodies. Where states fail to remedy shortfalls in protection this should become a focus for advocacy, including by domestic civil society actors.

3. There are two areas in particular on which international standards do not provide clear guidance as to the scope of the exclusionary rule. This is reflected in (and perhaps results from) varying approaches in domestic law:

   i) There is confusion about the application of the exclusionary rule to evidence indirectly derived from torture, i.e. physical evidence located due to a statement made as a result of torture. Although some countries do have blanket prohibitions on relying on such evidence, most apply a range of considerations to determine whether this kind of derivative evidence should be excluded.

   ii) There is also a lack of clarity about the extent to which the exclusionary rule applies to evidence obtained as a result of cruel, inhuman or degrading treatment or punishment.

   Clarity is needed on the extent to which the exclusionary rule covers derivative evidence and evidence obtained as a result of inhuman or degrading treatment or punishment (as opposed to 'torture'). This should be the focus of further research and we urge the UN Committee Against Torture to address these issues in a general comment.

4. In addition to having appropriate domestic laws requiring the exclusion of 'torture evidence', states must provide a fair and effective procedure to apply those laws in practice. Variations in countries' criminal procedures make it unworkable to develop a 'one size fits

all' approach for identifying and excluding 'torture evidence'. Nonetheless, certain minimum standards, identified from international standards on fair trial rights, do need to be met. Currently, many countries fail to meet such standards and, in particular, place an unreasonable burden on the alleged torture victim to 'establish' that evidence was obtained by torture.

We urge those working to advance compliance with the exclusionary rule to consider the legal procedure to be applied in relation to the identification and exclusion of 'torture evidence', taking account of applicable international standards on the right to a fair trial. In particular, domestic legal regimes should be reviewed to ensure compliance with international standards on the burden of proof for establishing whether evidence was obtained as a result of torture.

5. A lack of data on the use of exclusionary regimes precludes an assessment of how legal frameworks are operating in practice. However, it is clear that, in practice, preventing reliance on 'torture evidence' requires more than just good domestic laws. Other factors include: (a) access to trained professionals and an understanding of the broader institutional incentives at play in the justice system as a whole or in individual cases; and (b) practical barriers to the application of the exclusionary rule such as failures to protect torture victims, the inability to obtain evidence and the operation of incentives to plead guilty rather than challenging evidence in court.

   Concerns about reliance on 'torture evidence' will not be solved by changes to the law alone. We recommend approaches which address how the law is operating in practice. This should include the collection of statistical data on the application of exclusionary regimes as well as qualitative engagement with the stakeholders who are key to making the law work in practice.

6. In some countries, the main evidence on which convictions are founded is confessions. This creates a considerable risk of coercion, including torture. In response, some countries apply special legal protections in the context of confessions, including a requirement for corroborating evidence and/or the need to demonstrate that procedural safeguards have been complied with during police interviews. This approach is starting to gain traction at an international level as a protection against torture.

   Reducing reliance on confessions in criminal prosecutions has the potential to address a major driver of torture. We welcome the growing recognition that increasing respect for suspects' procedural rights in the period following arrest is important to torture prevention. We recommend an increased focus on rights-compliant police investigations.

7. The exclusion of 'torture evidence' should operate as part of the wider anti-torture architecture under international law. This includes accountability (through criminal or disciplinary sanctions). However, in practice, where torture is identified in the course of proceedings and the related evidence is excluded, there is rarely an obligation on competent officials to initiate a criminal action against the perpetrators. In general, criminal investigations require a formal complaint to be made by the victim. The exclusionary rule is also just one of a wide range of remedies and reparations for victims that are mandated by international law.

   We recommend that states review the process for ensuring accountability where torture is identified in the course of proceedings and the related evidence is excluded: this should not rely on a complaint by the victim. Similarly, whilst the exclusionary rule should be recognised, in part, as a means of reparation, it is not a sufficient form of remedy or reparation on its own.

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