

UNCAT Exclusionary Rule Tool 8/2020

NON-ADMISSION OF EVIDENCE OBTAINED BY TORTURE AND ILL-TREATMENT: PROCEDURES AND PRACTICES

The effectiveness of a State's criminal justice system depends on the trust of the people it serves. The ways that the police and other law enforcement agencies investigate crime, interview suspects, witnesses and victims, and collect evidence are crucial to build and maintain that trust. Where torture and ill-treatment are used to achieve confessions or other information or evidence, that confidence can be broken. The rule of non-admission of evidence in any proceedings obtained by torture or ill-treatment (also known as the "exclusionary rule", and found in Article 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)) puts an important break on corrupt practices, removes one of the primary incentives for abuse, and safeguards due process rights and the fairness of court proceedings. Applying this rule helps dismantle unreliable confession-based policing and results in better and more reliable evidence gathering and investigations.

This tool sets out a variety of legislative, policy and practical measures and procedures adopted by States to prohibit and prevent evidence being obtained by torture and ill-treatment and subsequently used in domestic criminal processes. It is intended to assist officials – notably the police, prosecutors, medical practitioners, and judges – on how to avoid and exclude such evidence obtained by torture or ill-treatment. Experience shows that a proper process for preventing and excluding the use of evidence (including confessions) obtained as a result of torture or ill-treatment, helps minimise the risks and incentives that lead to the use of torture and ill-treatment in the first place.

Torture evidence: The tool will use the phrase 'torture evidence' as short-hand to refer to all forms of evidence extracted through the use of torture or other cruel, inhuman or degrading treatment or punishment, including confessions, other information and other forms of evidence. The tool also gives examples, based on State experiences, which cover the non-admission of evidence extracted through coercion, duress, intimidation, oppression or other illegal means.



The CTI '[UNCAT Implementation Tools](#)' are a series of practical tools designed to share good practices among States on the implementation of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). They offer thematic guidance and ideas for State practitioners and policymakers as they develop or revise context-specific strategies, mechanisms and procedures to prevent torture and other forms of ill-treatment or punishment, and provide remedies for victims.

Why exclude “torture evidence”?

There are many good public policy reasons for excluding evidence obtained by way of torture or ill-treatment, including:

Article 15, UNCAT

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

- To make court proceedings more **effective** by ensuring that they are based on reliable evidence. There is ample scientific research showing that any statement made or information provided under torture is inherently unreliable, as it is not given freely.
- To avoid **miscarriages of justice**, where someone is forced to confess to a crime that they did not commit.
- To safeguard the **fairness of a trial** by protecting a defendant’s right to remain silent and not to be compelled to provide information under duress.
- To enhance **police effectiveness**, by encouraging them to develop effective investigation skills and methods.
- To save **police as well as court time** and associated costs spent on responding to allegations of torture or misconduct.
- To safeguard a **torture victim’s rights** in the legal proceedings, and provide them with a remedy for the violation of their rights.
- To protect the **integrity of the justice system**, to instil **public confidence** in it, and strengthen **rule of law-based institutions**.
- To **deter, disincentivise and prevent torture and ill-treatment**, by removing one of the key reasons torture and ill-treatment are committed.

CONSTITUTIONAL PROVISIONS AND LEGISLATION

Many States prohibit unlawfully obtained evidence (including torture evidence) in their Constitutions or through legislation. This is sometimes done by specific reference to the prohibition of torture evidence (as stated in Article 15 UNCAT), or through a ban on unlawful evidence in broader terms. Codes of practice or guidance for the police, prosecutors, medical practitioners, and judges can also provide practical guidance on how to operationalise the rules (see below).

Equatorial Guinea: anti-torture legislation prohibits use of torture evidence

Section 8 of the Law No. 2/2006 on the Prevention and Sanctions of Torture outlaws the use of confession or information obtained by torture.

Japan: Constitution prohibits use of confessions obtained by torture

Japan’s 1947 Constitution (Article 38(2)) expressly prohibits the admission into evidence of confessions obtained by torture: “Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.”



Spain: Constitution and legislation

The 1978 Constitution defines the right not to be tortured as a fundamental right, and legislation then provides that “evidence directly or indirectly obtained in infringement of fundamental rights shall not have legal effect” (Spanish Judiciary Act, 1985, Article 11.1). The Spanish Supreme Court has stated that “evidence obtained in violation of fundamental rights must not be assessed by the Court” (Judgment 3943/1990 of 24 May 1990).



Tunisia: Code of Criminal Procedure nullifies torture evidence

The express legal prohibition on the use of evidence obtained by torture was added to Article 155 of the Code of Criminal Procedure in 2011. It states that “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.”

➔ For additional examples of Article 15-related laws, see [APT-CTI Guide on anti-torture legislation](#), Chapter 3.

THE ROLE OF POLICE INTERVIEWERS AND INVESTIGATORS



Many States have adopted policies and procedures (safeguards) for the police and other law enforcement officials on how to interview suspects, witnesses and victims, and to ensure that information provided by them is done so voluntarily and without coercion. In some States, confessions can only be used in court proceedings if these safeguards are shown to have been complied with. In other jurisdictions, lessons have been learned that improving early evidence gathering and forensic collection, prior to bringing in suspects in for questioning, reduces the incentives to induce, by unlawful means, confessions. In many countries, confession evidence needs to be corroborated.

In a growing number of countries, rapport-building methods of questioning suspects, victims and witnesses have been found to produce more accurate and reliable information, and to be more effective at detecting, investigating and solving crime. Such techniques have also minimised spurious allegations of misconduct against the police or other authorities. It is important when trying to dismantle confession-oriented investigation cultures that efforts are made to not only train police in new techniques, but also that promotions systems do not prioritise case resolution statistics, and that other negative incentives are removed. The need to invest in forensic science, alongside other crime detection techniques and training, is equally relevant.

“ [-] States must ensure that no statement that is established to have been made as a result of torture is invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made, [and] urges States to extend that prohibition to statements made as a result of cruel, inhuman or degrading treatment or punishment...”

UN General Assembly Resolution A/Res/72/163, 19 December 2017, para. 6.

Legal and procedural safeguards that accompany and encourage effective interviewing include:

- ✔ Notification of a suspect's rights
- ✔ Prompt access to a lawyer
- ✔ Independent medical examination
- ✔ Communication with a family member or third party
- ✔ Audio and video recording of interviews
- ✔ Time limits on interviewing, breaks where needed, and judicial oversight of detention promptly after arrest
- ✔ Keeping records of detention (including the duration)

➡ Effective safeguards are explained in more detail in CTI's [UNCAT Implementation Tool 2/2017 on "Safeguards in the first hours of police detention"](#).



Fiji: duty lawyers explain rights to arrested persons

Through Fiji's "first hour procedure" pilot project, being rolled out in the capital Suva, police officers defer interviews with suspects until a lawyer from the Legal Aid Commission has been notified within the first hour of their arrest or detention. Lawyers are rostered on an on-call basis and, upon arrival to the police station, they are trained to inform suspects of their rights, allowing them to make an informed decision as to whether to retain or waive their right to counsel.



Indonesia: investigative interviewing underpinned by legislative enactments

In accordance with Law 8/1981 of the Criminal Code Procedure, Regulation 58/2010 and Chief of Indonesian National Police's regulation 14/2012 on investigation management, Indonesia's police have adopted rapport-building investigation techniques and the roll-out and training on the techniques continue. Indonesia's POAC approach (which stands for **P**lanning, **O**rganizing, **A**ctuating, **C**ontrolling/evaluating) is Indonesia's version of rapport-building interrogation, takes into account the health, status and condition of the person to be interviewed, and mandates information being provided on their right to a lawyer.



Saint Vincent and the Grenadines: e-recording of interviews reduces allegations and court time

The Interviewing of Suspects for Serious Crimes Act of 2012 (replacing non-mandatory administrative guidelines contained in the Judges' Rules, common in Commonwealth Caribbean States) requires the mandatory recording of police interviews, prompt access to a lawyer and notification of the suspect or accused's relatives of his/her arrest or detention. These safeguards have significantly reduced requests by defence lawyers to have recourse to *voir dire* proceedings (an internal court process used in common law countries where the admissibility of evidence is contested), as there is a record of the interview conduct, thus also reducing the time and expense of the trial process, and lowering the risk that evidence will be collected by torture or other abuse (and/or the risk of false allegations of torture) by removing one of the key incentives.

THE ROLE OF PROSECUTORS



Prosecutors have an important role in preventing the use of torture evidence being gathered by police investigators, as well as in deciding which evidence is to be submitted in legal proceedings. Not only are they frequently among the first authorities (aside from the police) to have access to interviewed persons and/or transcripts of their interviews, in many jurisdictions they are also responsible for compiling the evidence and assessing whether the case should proceed to trial, which involves an assessment of whether the evidence has been lawfully and fairly collected. In a number of Latin American countries, prosecutors or a specific police force known as “judicial police” (*policía judicial*), which are usually hierarchically subordinated to / report to the judicial branch (e.g. judiciary or Prosecutor’s office), conduct the interviews, rather than the regular police service, as is the case in *common law* countries.

The separation of the police from an independent prosecution service in a number of States (particularly common law countries) has an important effect of reducing the pressure on police to solve their investigations through relying on extracting confessions as primary evidence. In such systems, confession evidence is seen as only one part of the case material that the prosecution must weigh when considering whether to proceed to trial.

Well positioned to minimise the incentives and risks of torture-obtained evidence, prosecutors (and in some Latin American systems, the judicial police) have the opportunity to:

- Inform, as well as ask the suspect and/or their lawyer whether they have been informed of their rights and that procedural safeguards have been observed;
- ask the suspect and/or their lawyer about the treatment they have received from the police (without any police officers being present);
- make their own assessment as to whether the suspect has been treated fairly and the evidence collected legally;
- refer or provide information on rehabilitation services and support for suspected victims of torture;
- report complaints or other indications of ill-treatment to the appropriate investigating authority, and bring any concerns to the attention of the judge at the appropriate time.

Effective training on the relevant domestic laws and international standards, and on the professional skills necessary to implement relevant legal provisions can assist prosecutors to play this proactive role.

Because the State has responsibility for the treatment of individuals in its custody, once an individual has made a credible complaint about torture or other ill-treatment, the State/prosecution bears the burden of proof in establishing that evidence was not obtained by torture. Prosecutors and judges (see next) share a responsibility in this regard, also in respect of referring the allegation of torture or ill-treatment for investigation.

➡ Good State practices in handling complaints and investigations of torture can be found in CTI’s [UNCAT Implementation Tool No. 7/2019, Procedures and mechanisms to handle complaints of and investigations into torture or other ill-treatment](#).

“ Prosecutors shall, ...examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained; [and] refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect’s human rights and particularly methods which constitute torture or cruel treatment...”

[International Association of Prosecutors’ Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors \(1999\)](#) (Article 4.3)



France: prosecutor can initiate the exclusion of torture evidence

Under the French Code of Criminal Procedure (Art. 173), a prosecutor (or the investigating judge) can initiate the procedure to exclude evidence if they suspect that evidence was obtained by torture. A challenge to the validity of a piece of evidence is referred to the Investigation Chamber of the Court of Appeal (*Chambre de l'instruction*).



United Nations: Guidelines on the role of prosecutors

The [United Nations Guidelines on the Role of Prosecutors \(the Havana Guidelines, 1990\)](#) assist States in ensuring basic values and human rights protections underpin their prosecution services and that criminal proceedings are effective, impartial and fair. The Guidelines capture the legal obligation that when prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, such as torture or ill-treatment, they shall refuse to use such evidence and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

United States of America: confessions only admissible if combined with corroborating evidence



The position in the United States is varied and complex, but all jurisdictions require some form of evidence in addition to the confession itself. The federal courts, and some US states, 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” (*Opper v United States* (1954) 348 U.S. 84, 93).

THE ROLE OF MEDICAL PRACTITIONERS

Medical practitioners have professional and ethical responsibilities to document and prevent torture and ill-treatment, and are also involved in the rehabilitation of victims of torture and ill-treatment. Following the detailed guidance in the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) helps ensure that forensic medical examinations produce the key evidence required to substantiate allegations of torture and ill-treatment, such as for the purposes of prosecution or seeking redress/reparations.

A challenge sometimes arises because such medical practitioners are often employed by the State (sometimes as medical officers employed by the police, prisons or military), but, even where this is the case, their primary duty is to the ‘patient’ and they have the same ethical obligations as other health professionals, namely the duty to provide compassionate care and confidentiality, and obtain informed consent from their patients. These duties are set out in Chapter II, section C of the [Istanbul Protocol](#): [Health professionals] “[...]cannot be obliged by contractual or other considerations to compromise their professional independence. They must make an unbiased assessment of the patient’s health interests and act accordingly.”



Ecuador: Right to medical certificate in prosecution/judicial police investigative procedures

Chapter V on ‘detention procedures’ of the Manual of the Prosecution Service and Judicial Police Investigative Procedure in Ecuador stipulates that any person arrested by order of the competent authority or in *flagrante delicto* (that is, in the act of committing a crime) shall, once he/she has been taken to and registered at the corresponding police station or unit, be transferred to a forensic medicine unit or a health centre, where a medical certificate shall be obtained and attached to the police report.



Kyrgyz Republic: practical guidance issued for medical practitioners

In December 2014, the Kyrgyz Ministry of Health approved ‘Practical Guidance on Effective Medical Documentation of Violence, Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment’ (updated in December 2015). In the event that a patient complains of violence, torture or ill-treatment, the guidance requires doctors to undertake a special medical examination (in accordance with the Istanbul Protocol), and file a copy of the report to the police within 24 hours.



Mexico: Istanbul Protocol domestication

To assist with standardisation of documentation of cases of torture, the Attorney General’s Office issued agreement number A/057/2003, published in the Federal Official Gazette of Mexico, providing for the compulsory application by forensic doctors and medical examiners of the so-called “Medical/ Psychological Specialist Opinion for cases of possible torture and/or ill-treatment”. This is a standardised forensic medical document designed to assist expert investigations into *prima facie* cases of torture.

➔ See for further examples of good practices, [CTI’s UNCAT Implementation Tool: Providing rehabilitation to victims of torture and other ill-treatment, 5/2018](#)



Philippines: right to medical examination in anti-torture legislation

The Philippines’ Anti-Torture Act of 2009 provides for the right of persons arrested, detained or under custodial investigation to have a physical and/or psychological evaluation contained in a medical report, which shall be considered a public document following applicable protocol.

“ If, in the course of examining a prisoner upon admission or providing medical care to the prisoner thereafter, health-care professionals become aware of any signs of torture or other cruel, inhuman or degrading treatment or punishment, they shall document and report such cases to the competent medical, administrative or judicial authority...”

[United Nations Standard Minimum Rules for the Treatment of Prisoners, ‘the Mandela Rules’ \(2015\), Rule 34](#)

“ National medical associations should support the adoption of “ethical rules and legislative provisions ... aimed at affirming the ethical obligation on physicians to report or denounce acts of torture or cruel, inhuman or degrading treatment of which they are aware ...”

World Medical Association, [resolution on the responsibility of physicians in the documentation and denunciation of acts of torture or cruel, inhuman or degrading treatment](#), adopted 2003, amended 2007, operative para. 9

THE ROLE OF JUDGES



Judges have a particular role to identify if an accused before them may have been subjected to ill-treatment while in police or other custody, as well as to exclude evidence obtained by torture or ill-treatment from criminal proceedings.

In most jurisdictions the detainee is brought before a detention judge at an early stage after their arrest (for example, as part of a hearing to authorise the initial holding or an extension of holding of the arrested person, or as part of the investigation itself), and the detainee or his/her lawyer may make a complaint about torture or ill-treatment. Even if a specific complaint is not made, experience or training may enable the judge to be alert to and to make inquiries into any indications of ill-treatment, such as visible injuries or the detainee's general appearance and demeanour. The law should enable the judge to respond immediately when there is any suggestion of ill-treatment. This may include requiring the judge to record the allegations or visible injuries in writing, ordering an immediate medical examination of the suspect, or ordering an investigation.

Many countries allow challenges to the admissibility of evidence in “pre-trial hearings”, in advance of the trial. 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 pretrial detention.

In other countries the judge will consider the admissibility of any confession at the beginning of the trial, in a process sometimes known as a “trial of the issue” or a “*voir dire*”. This has a number of advantages: (a) it adds to the efficiency of the trial, as witnesses (and sometimes a jury) are not kept waiting; (b) by getting the preliminary issue out of the way the judge can then plan the trial; (c) this may be the first time the defendant has a lawyer, and so they can consider the evidence against them carefully; and (d) for countries with 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.

Because of these advantages, some countries require applications to be made at the start of the case. However, in practice, it is not always possible for the defendant to raise these issues so early in the proceedings, and a number of the countries have sought to address this by creating some flexibility.

African Commission on Human and Peoples' Rights: evidence obtained by coercion or force interferes with fair trial rights



The [Principles and Guidelines on the Right to a Fair Trial and Legal assistance in Africa](#), adopted in 2003 by the African Commission on Human and Peoples' Rights in Luanda, state that “any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing” (Section N(6)(d)(1)).

Kenya: court conducts “trial within a trial” on the admissibility of torture evidence



The Kenyan Constitution does not allow evidence that contravenes any right or freedom in the Bill of Rights to be used in a trial; otherwise it would render the trial unfair and would be detrimental to the administration of justice. Practically, the prosecution has to inform the court of their intention to produce a confession as evidence, and if the accused objects to this, then the court will conduct a “trial within a trial” with the primary purpose to establish

the circumstances under which the statement was taken, and to determine whether the evidence can be admitted. This procedure ensures that an accused person can testify about the admissibility of the evidence without the risk of self-incrimination from cross-examination on matters which could influence a finding of guilt.

People's Republic of China: evidence can be challenged throughout the process, including during the trial



The Chinese Criminal Procedure Law (amended in 2012) requires the exclusion of torture evidence at every stage of a criminal case, including investigation, prosecution, pre-trial and trial, expressly stating that evidence obtained through torture cannot be relied on in “prosecution opinions, prosecution decisions or judgments” (Article 54). Under the 2017 Exclusionary Rules (Article 29), evidence can be challenged during the trial but the individual making the challenge must give an explanation as to why they did not challenge it at an earlier opportunity.

Vietnam: a separate investigation examines the torture evidence



The Criminal Procedure Code of Vietnam (2015), Article 174, provides for a separate investigative process to decide whether torture evidence should be excluded. In such a case, the court or prosecutor has to suspend the trial and order a re-examination of the evidence allegedly obtained by torture.

EXAMPLES OF EXCLUSION PROCEEDINGS AND PROCESSES

States have developed, in accordance with their laws and judicial practices, various processes to exclude evidence obtained by torture or ill-treatment. Some States adopt a two-stage process: an initial stage of triggering an exclusion procedure, either requiring a credible complaint of torture or ill-treatment, or initiated by the judge; and second, a stage of establishing whether the material at issue was obtained by torture or ill-treatment. In common law countries using the jury system, this process will take place before the trial starts, and in the absence of the jury.

Where a confession has been excluded from proceedings on the basis of the prohibition on the reliance on torture evidence, it does not necessarily mean that a defendant will be acquitted if there is other reliable evidence. It is rather an assessment as to whether the specific evidence or evidence arrived at as a result of that earlier evidence (derivate evidence, see below) should not be admitted during the hearing.

It can often be difficult for a defendant in custody to make such an allegation, as they may fear reprisals, may not know the law, may not have knowledge of the circumstances in which statements were obtained, or the identity of those who provided the statements. Judges can mitigate these difficulties by ensuring that:

- Defendants are able to obtain medical or other evidence that could help to corroborate a complaint of torture or ill-treatment.
- All investigations are undertaken in accordance with the Istanbul Protocol.
- All evidence of torture and/or ill-treatment is handed over to the defence to be able to establish a plausible complaint.

Burden and standard of proof

The UN Committee against Torture has consistently stated that the burden of proof rests on the State (prosecutor) to establish that statements were made voluntarily and were not made under torture or ill-treatment. As to the standard of proof to exclude the alleged torture or ill-treatment, practice varies across countries from those applying the standard of “real risk” that the evidence was obtained by torture or ill-treatment, to those systems applying the civil standard of “balance of probabilities”. The Special Rapporteur on Torture argued in 2014 that the applicant is “only required to demonstrate that his or her allegations are well founded, thus that there are plausible reasons to believe that there is a real risk of torture or ill-treatment”, after which the burden of proof shifts to the Prosecutor or the Court to “inquire as to whether there is a real risk that the evidence has been obtained by unlawful means. If there is a real risk, the evidence must not be admitted”.¹ Clear guidelines clarifying what evidence the prosecution needs to produce to prove that there was no torture or ill-treatment (for example, tape recordings and/or medical reports) would assist all relevant actors.



Australia: showing a ‘reasonable possibility’ of torture

In the Australian Federal courts, once a ‘reasonable possibility’ has been raised that an admission was “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” (Evidence Act 1995, Section 84(1)), there are then two considerations, (i) whether the conduct of detectives was violent, oppressive, inhuman or degrading or constituted a threat of that kind; and (ii) whether the Court is satisfied that the admission was not influenced by such conduct. If the prosecution cannot prove, on the balance of probabilities, that the admission was obtained without violence or threat, then that admission is inadmissible and the judge has no discretion to admit the evidence. Section 138 (3) (f) provides further that the Court has to look at “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.”



England & Wales: State must prove ‘beyond a reasonable doubt’ that oppression was not used

In England and Wales, section 76 of the Police and Criminal Evidence Act 1984 provides that where there are representations to the court that a confession was or may have been obtained by “oppression or in consequence of anything said or done (...) to render the confession unreliable”, notwithstanding that the confession may be true, the confession is to be excluded. The burden of proof rests on the prosecution to prove “beyond a reasonable doubt” (i.e. the criminal standard) that it was not obtained in such a way. Oppression includes “torture, inhuman or degrading treatment and the use or threat of violence (whether or not amounting to torture)”, as well as other inappropriate interviewing practices. In practice this means that if a confession is challenged by the defence or by the court (of its own volition), the court must not allow the confession to be given in evidence unless the prosecution can prove that it was not obtained by “oppression”. This is usually done by calling the interviewing officer to give evidence that procedures were followed, there was no ill-treatment, and to produce the tape recording of the interview.

¹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 10 April 2014, [A/HRC/25/60](#), on the scope and objective of the exclusionary rule in judicial proceedings and in relation to acts by executive actors, paras. 33, 67.



South Africa: showing reasonable grounds to suspect the use of torture

The 1996 Constitution requires the exclusion of any “evidence obtained in a manner that violates any right in the Bill of Rights”. Article 12(1) of the Bill of Rights states that “everyone has the right to freedom and security of the person, which includes the right ... not to be tortured in any way; and ...not to be treated or punished in a cruel, inhuman or degrading way”. In practice, the accused or the defence need to firstly raise the possibility that the evidence being introduced against them has been obtained by torture. The Court then assesses whether there are reasonable grounds to suspect the use of torture and, if it suspects torture has been used, this must be investigated to determine whether or not the evidence can be admitted. This procedure ensures the accused can testify about the admissibility of the impugned evidence without exposing themselves to cross-examination as to their guilt or innocence.

NON-ADMISSION OF DERIVATIVE EVIDENCE

Confessions or statements procured through torture or ill-treatment may lead investigators – directly or indirectly – to other evidence (such as, for example, the location of physical evidence, the crime scene, other witnesses). To guard against the risk that allowing ‘derivative’ evidence may incentivise the use of torture, ill-treatment or other forms of coercion against a suspect, a number of States as well as international and regional bodies and courts have excluded ‘derivative evidence’ from proceedings. Some States exclude the evidence in its entirety; others apply a balancing test, as to the probity of the evidence weighed against the gravity of the harm or impropriety inflicted on the individual.

“ [T]he absolute character of the exclusionary rule is reflected in the prohibition of granting probative value not only to the evidence obtained directly under duress, but also to evidence deriving from the said act.”

Inter-American Court of Human Rights, *Teodoro Cabrera García and Rodolfo Montiel Flores v. Mexico*, Case No. 12, 449 (26 November 2010), para. 167



Brazil: law prohibits evidence derived from ‘illicit evidence’

Article 157 of the Brazilian Code of Criminal Procedure (1941) provides that all illicit evidence and evidence derived from it must not be admitted in the legal process. Illicit evidence is understood to be evidence obtained by violation of the Constitution or other laws. The prohibition against torture and ill-treatment is included in the Brazilian Constitution of 1988 at Article 5(III) as well as a provision that “evidence obtained through unlawful means is unacceptable in any proceedings” (Article 5(LVI)).



Thailand: law prohibits all evidence derived from unlawful means

The Thai Criminal Procedure Code of 1937 states: “In a case where it appears to the Court that any evidence which arose lawfully was derived from unlawful means or by relying on information which arose or was obtained unlawfully, such evidence shall be inadmissible...”.

MUTUAL LEGAL ASSISTANCE



States regularly cooperate with each other to facilitate the collection and exchange of information for use in criminal investigations or prosecutions. States parties to UNCAC shall provide the “greatest measure of assistance” to other States in respect of torture offences, including supplying all evidence necessary for the proceedings; and they shall follow international treaties on mutual judicial assistance in this regard (Article 9, UNCAC).

Whether in relation to proceedings in respect of torture offences, or other ordinary criminal offences, if there is a “real risk” that evidence obtained from other States has been obtained by torture or ill-treatment, this evidence would need to be excluded per Article 15 UNCAC. Many States limit the risk of being potentially considered complicit in torture by establishing a clear basis for the sharing and receiving of information and ‘intelligence’ with other States, and have procedures in place to assess the risk that information that may have been obtained by torture, and to restrict their engagement if that risk cannot be ruled out.

“ There is State responsibility for complicity in torture when one State gives assistance to another State in the commission of torture or other ill-treatment, or acquiesces in such acts, in the knowledge (including imputed knowledge) of the real risk that torture or ill-treatment will take place or has taken place, and aids and assists the torturing State in maintaining impunity for the acts of torture or ill-treatment. A State would thus be responsible when it was aware of the risk that information was obtained by torture or other ill-treatment, or ought to have been aware of that risk and did not take reasonable steps to prevent it.”

Report of the UN Special Rapporteur on torture, Juan E. Méndez, 10 April 2014, A/HRC/25/60, para. 53.

Sharing information with other States

Policies for sharing information can include provisions to:

- Prevent information sharing with other States where there is a credible risk that such sharing will contribute to or facilitate the violation of the prohibition on torture (and establish due diligence and risk assessment procedures to determine whether such a credible threat exists)
- Require the attachment of limitations (‘caveats’) when sharing information to ensure such information is not used in violation of domestic or international law and establish procedures to monitor adherence to and address breaches of such limitations (‘caveats’)
- Assess the reliability of the information when it is shared (and keep this assessment under review, for example, if errors are discovered or concerns emerge regarding its reliability)

Receiving information from other States

Policies for requesting and/or receiving information can include provisions to:

- Prevent the use of information where there is a credible risk that the other State obtained it in violation of the prohibition on torture
- Analyse the provenance, accuracy and verifiability of information shared by another State
- Respect any limitations ('caveats') placed on shared information by the other State, to ensure such information is not used in violation of domestic or international law and notify the other state of any breach of these limitations ('caveats')
- Internal mechanisms, by which police and intelligence agencies' staff can disclose any concerns about intelligence sharing, provide a further layer of protection against the risks involved



Canada: by law, intelligence sharing arrangements must be disclosed to oversight body

Under section 17 of the Canadian Security Intelligence Service Act (1985), the intelligence agencies in Canada are required by law to provide the relevant oversight body (the Security Intelligence Review Committee) with access to written intelligence sharing arrangements.



Germany: primary legislation regulates intelligence cooperation through intelligence sharing

The Act for Foreign-Foreign Signals Intelligence Gathering of the Federal Intelligence Service (Gesetzes zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes) authorises the gathering and processing of communications of foreign nationals abroad, and sets out the general parameters for intelligence cooperation with foreign agencies, including via intelligence sharing.



UN Human Rights Committee: judicial oversight is recommended

The UN Human Rights Committee has recognised the importance of prior independent authorisation in the context of intelligence sharing, indicating that "robust oversight systems over surveillance, interception and intelligence-sharing of personal communications activities" should include "providing for judicial involvement in the authorisation of such measures in all cases" (Seventh Periodic Report of the United Kingdom, Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland, UN Doc. CCPR/C/GBR/CO/7, 17 Aug. 2015, at para. 24).

PROCEDURES AND PRACTICES TO EXCLUDE TORTURE EVIDENCE: THINGS TO CONSIDER



Review of existing laws, procedures and instructions

1

Does the Constitution or national laws prohibit the admission of torture evidence in court proceedings? Are these in line with Article 15 of UNCAT, or best international guidance?

2

What legal and procedural safeguards are in place to disincentivise and/or take action against officials where evidence has been gathered unlawfully, including by use of torture or ill-treatment? Are there any additional safeguards that could be introduced?

3

Are clear instructions and guidance for handling of evidence and procedures for excluding such evidence in place and readily known, applicable to (i) interviewers and investigators, (ii) the prosecution service, (iii) medical practitioners and (iv) judges?

4

Does (and if so how) the national medical/forensic science institution already place ethical obligations on medical practitioners to report acts of torture or ill-treatment? Do these obligations apply to State/police medical officers? How are they enforced?

5

In court proceedings, who has the burden of proving that testimonies were (or were not) obtained by torture, and what is the relevant standard of proof to show that such evidence was obtained lawfully?

6

Is there a provision allowing for the exclusion of derivative evidence?

Implementing new procedures and encouraging new practices

1

What Codes of Practice or guidance could be introduced to assist police, prosecutors, medical practitioners and judges to operationalise the rule against admission of torture evidence in practice?

2

What measures could be introduced to encourage police interviewers and investigators to develop/use rapport-building interviewing techniques? What are the training needs?

3

Do prosecutors understand relevant domestic/international legal standards and do they need to further develop relevant professional skills? Do medical practitioners understand their ethical obligations with regard to victims of torture and ill-treatment?

4

Is training on factual investigation and record documentation of torture and ill-treatment provided for judges, prosecutors and lawyers in line with the Istanbul Protocol? Is there further training which could be offered to further sensitise relevant officials and other actors to the signs of torture or ill-treatment?

5

Would the introduction of further procedural rules or legislation assist judges in determining the admissibility of torture evidence, and the types of evidence at issue, in ways which maintain/enhance the fairness of the trial?

6

How can procedures and practices for sharing and receiving of information and intelligence with other States be made fully compliant with Article 15 UNCAT?



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Ending torture, seeking justice for survivors

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