

EL-HASKI

Applicant

v.

BELGIUM

Respondent

<p style="text-align: center;">INTERVENTION SUBMISSION BY THE EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS AND THE REDRESS TRUST</p>
--

INTRODUCTION

1. The European Center for Constitutional and Human Rights (ECCHR) and The Redress Trust (REDRESS) make these submissions pursuant to leave granted by the President of the Chamber on 17 April 2009 in accordance with Rule 44 § 2 of the Rules of Court.
2. The chief focus of these submissions is the relationship between the prohibition of torture and the right to a fair trial and thus between Articles 3 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This relationship is encapsulated in the rule prohibiting the use of torture evidence (the exclusionary rule), which is itself an inherent part of the prohibition of torture.
3. The present intervention provides analysis and comparative law jurisprudence on:
 - a. The definition, nature, rationale and scope of the exclusionary rule;
 - b. The burden of proof in the practical application of the exclusionary rule; and
 - c. The impact of the use of evidence obtained by torture and/or other cruel, inhuman or degrading treatment or punishment on the fairness of judicial proceedings.

A. THE EXCLUSIONARY RULE AS INHERENT TO THE PROHIBITION OF TORTURE

a. The definition and nature of the exclusionary rule

4. The exclusionary rule prohibits the admission of evidence obtained by torture and/or other cruel, inhuman or degrading treatment or punishment (“other prohibited ill-treatment”). As is shown below, it has been explicitly established in a number of international treaties and other declaratory instruments.
5. For example, Article 12 of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides:

“[a]ny statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings”.¹
6. Article 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which entered into force on 26 June 1987, provides that:

“[e]ach 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”.
7. Article 10 of the Inter-American Convention to Prevent and Punish Torture, adopted by the Organisation of American States, which entered into force on 28 February 1987, provides that:

“[n]o statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means”.
8. The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, adopted by the African Commission on Human and Peoples' Rights in 2002 (known as The Robben Island Guidelines), also provide that states should:

¹ For background to the Declaration, see J.H. Burgers & 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 Publishers 1988), pp. 13-16.

“[e]nsure that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings except against persons accused of torture as evidence that the statement was made”.²

9. Also, the rules of procedure of the ad hoc international criminal tribunals include an exclusionary rule,³ as does the International Criminal Court (ICC). Article 69(7) of the ICC’s Statute⁴ provides:

“[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence; or
- (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings”.

10. In terms of the UN treaty bodies, the Human Rights Committee (HRC) locates the exclusionary rule in Article 7 of the International Covenant on Civil and Political Rights (ICCPR):

“[i]t is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment”.⁵

11. Similarly, the Committee against Torture (CAT) has consistently and repeatedly called upon states parties to UNCAT to take all necessary measures to ensure that evidence which has been obtained by torture or other prohibited ill-treatment is inadmissible.⁶ In *P.E. v. France* the CAT observed:

“...the generality of the provisions of Article 15 derive from the absolute nature of the prohibition of torture and imply, consequently, an obligation for each State party to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture”.⁷

12. The exclusionary rule forms an inherent part of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment as it has been developed in order to give effect to the prohibition. As the CAT has stated:

“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 of torture”[underline added].⁸

13. The normative quality and widespread acceptance of the exclusionary rule is also strongly evidenced by the fact that no state party to UNCAT has entered a reservation to Article 15.

14. Thus, when a provision of a human rights treaty, such as Art. 3 ECHR, sets out the general prohibition of torture and other cruel, inhuman or degrading treatment or punishment without explicitly making reference to the exclusionary rule, this rule implicitly forms part of that general prohibition.⁹

b. The rationale of the exclusionary rule

15. The rationale behind the exclusionary rule includes: (i) the public policy objective of removing any incentive to undertake torture anywhere in the world (i.e. the prevention of torture);¹⁰ (ii) the outrage caused by torture;¹¹ (iii) protecting the fundamental rights of the party against whose interest the evidence is sought to be used;¹² (iv) preserving the integrity of the judicial process;¹³ and (v) the unreliability of evidence obtained

² Adopted by the African Commission on Human and Peoples’ Rights at its 32nd session, Oct. 2002, Nr. 29.

³ Rule 95 of the Rules of Procedure and Evidence of both the ICTY (IT/32/Rev. 42 4 Nov. 2008) and the ICTR (14 Mar. 2008) provides that “[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings”.

⁴ Rome Statute of the International Criminal Court, A/CONF.183/9 as corrected, entered into force 1 Jul. 2002.

⁵ HRC, General Comment No. 20 on Article 7, 10 Mar. 1992, UN Doc. HRI/GEN/1/Rev.1 at 30, para 12.

⁶ See CAT, Conclusions and recommendations: *United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories* 10 Dec. 2004, UN Doc. CAT/C/CR/33/3, paras. 4(a)(i) and 5(d); CAT, Conclusions and recommendations: *Russian Federation*, 6 Feb. 2007, UN Doc. CAT/C/RUS/CO/4, para. 21; CAT, Concluding observations: *Mexico*, 26 Jun. 1993, UN Doc. A/48/44, paras. 208-229; CAT, Conclusions and recommendations: *Iceland*, 27 May 2003, UN Doc. CAT/C/CR/30/3, paras. 7 and 9(b); and CAT, Concluding observations: *Finland*, 9 Jul. 1996, UN Doc. A/51/44, paras. 120-137 at para. 137.

⁷ CAT, *P.E. v. France*, Communication No. 193/2001, UN doc. CAT/C/29/D/193/2001 (2002), para. 6.3.

⁸ CAT, *G.K. v. Switzerland*, Communication No. 219/2002, UN doc. CAT/C/30/D/219/2002 (7 May 2003), para. 6.10.

⁹ This has also been the understanding of this Court when finding a violation of Art. 6, read together with Art. 3 ECHR, when evidence obtained by torture and other cruel, inhuman or degrading treatment or punishment was used in judicial proceedings. See discussion in section C below.

¹⁰ M. Nowak & E. McArthur, *The United Nations Convention against Torture: A Commentary* (Oxford University Press, 2008) Ch. 15 para. 2; Burgers & Danelius, p.148.

¹¹ See, for example, Lord Hope in *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2005] UKHL 71 (hereinafter *A and Ors*), para. 112, in which he holds that: “[t]he use of such evidence [obtained by torture] is excluded not on grounds of its unreliability – if that was the only objection to it, it would go to its weight, not to its admissibility – but on grounds of its barbarism, its illegality and its inhumanity. The law will not lend its support to the use of torture for any purpose whatever.”

¹² *Ibid.*

¹³ Burgers and Danelius, p. 148. In the *Case of A. and Ors.*, Lord Bingham indicates at para. 39 that in addition to the unreliability of torture evidence and a desire to discourage torture by devaluing its product, the rationale for the exclusionary rule is also likely to reflect the wider principle expressed in art. 69(7) of the Rome Statute of the ICC which states that “[e]vidence obtained by means of a violation of this Statute or internationally

as a result of torture.¹⁴

16. In 1992, the then UN Special Rapporteur on Torture, Mr P. Kooijmans, stressed the link between the exclusionary rule and the prevention of torture, one of the rationales presented above. He observed that “[l]axity and inertia on the part of the highest executive authorities and of the judiciary in many cases are responsible for the flourishing of torture” and noted with dismay that “[f]ar 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”. He added that by excluding such evidence the courts could make torture “unrewarding and therefore unattractive”.¹⁵
17. As noted above, the HRC reinforced this fundamental connection between the exclusionary rule and the prevention of torture in its General Comment 20.¹⁶

c. The scope of the exclusionary rule

18. Article 15 UNCAT contains an explicit codification of the exclusionary rule. The exclusionary rule, as set out in Article 15, prohibits the admission as evidence in any proceedings of any statements which have been made as a result of torture and/or, as explained below, as a result of other cruel, inhuman or degrading treatment or punishment. These elements are analysed below.

i. *The exclusionary rule should apply equally to torture and other prohibited ill-treatment*

19. The reach of the exclusionary rule to cover evidence that has been obtained by other cruel, inhuman or degrading treatment or punishment (“other prohibited ill-treatment”) is subject to debate. Article 15 UNCAT and Article 10 of the Inter-American Convention to Prevent and Punish Torture refer only to evidence obtained by torture and Article 16 UNCAT does not explicitly refer to the obligation contained in Article 15 as one that shall equally apply to other prohibited ill-treatment. However, Article 16 is not an exhaustive list of the obligations that should apply to other forms of prohibited ill-treatment and, as pointed out by Nowak and McArthur, because Article 15 has a “clear preventive purpose”, it could be interpreted broadly given that “the *travaux préparatoires* as well as the purpose of both Articles leads to the conclusion that ... the more preventive obligations of States apply to all forms of ill-treatment”.¹⁷ Moreover, the view that the exclusionary rule applies also to other prohibited ill-treatment is supported by other international texts and jurisprudence of the UN treaty bodies as set out below.
20. Article 12 of the 1975 UN Declaration against Torture refers to “[a]ny statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment”.
21. The HRC also considers the exclusionary rule to apply to both torture and other prohibited ill-treatment. As noted, the HRC locates the exclusionary rule in Article 7 ICCPR, which prohibits torture and cruel, inhuman or degrading treatment or punishment.¹⁸ The CAT has also consistently indicated that statements obtained both by torture and other prohibited ill-treatment may not be used as evidence in any proceedings. In its General Comment No. 2 it stated: “[t]he Committee considers that articles 3-15 [of UNCAT] are likewise obligatory as applied to both torture and ill-treatment” [underline added].¹⁹
22. Thus, where a treaty prohibits in a joint article both torture and other prohibited ill-treatment, as in Article 3 ECHR,²⁰ the exclusionary rule inherent in that general prohibition should apply both to torture and to other prohibited ill-treatment.²¹

ii. *The exclusionary rule applies to any statement in any proceedings, wherever the torture has been committed*

23. The exclusionary rule requires that any statement, which has been obtained by torture and/or other prohibited ill-treatment is not admissible as evidence, except against a person accused of such treatment as evidence that the statement was made. Crucially, the prohibition extends both to confessions from the person against

recognized human rights shall not be admissible if: ... (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings”.

¹⁴ M. Nowak and E. McArthur, Ch. 15 para. 2 and Burgers and Danelius, p. 148.

¹⁵ UN Commission on Human Rights, Report of the Special Rapporteur, Mr. P. Kooijmans, UN doc. E/CN.4/1993/26 (15 Dec. 1992), paras. 589-591.

¹⁶ HRC, General Comment No. 20, para 12.

¹⁷ M. Nowak and E. McArthur, Ch. 15 para. 86.

¹⁸ See HRC, General Comment 20 on Article 7, para. 12.

¹⁹ CAT, General Comment No. 2 on Implementation of article 2 by States parties, U.N. Doc. CAT/C/GC/2 (24 Jan. 2008), para 6.

²⁰ Article 3 ECHR states that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

²¹ This has been the understanding of this Court when it has found that evidence obtained by other ill-treatment in breach of Article 3 rendered the proceedings as a whole unfair. See, for example ECtHR, *Göçmen v. Turkey*, App. No. 72000/01, (17 Oct. 2006) paras. 57, 74 and 75.

whom the evidence is sought to be used as well as witness statements from third parties.²²

24. In 1999, the then UN Special Rapporteur on Torture commented on the scope of the exclusionary rule:

“[a]ny statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings” [underline added].²³

25. The central issue facing the House of Lords in *A and Others*, was whether the Special Immigration Appeals Commission (SIAC) could receive 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 the British authorities.²⁴ The House of Lords ultimately decided that the exclusionary rule extends to cases where evidence is obtained in a state which is not the forum state “since the stain attaching to such evidence will defile an English court whatever the nationality of the torturer”.²⁵ Importantly, the House of Lords held that in order to be excluded, there is no need for the connivance of the UK authorities in foreign torture.²⁶

26. The CAT’s jurisprudence in individual communications is similar. In *P.E. v France*, it noted:

“... the generality of the provisions of article 15 derive from the absolute nature of the prohibition of torture and imply, consequently, an obligation for each State party to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture”.²⁷

B. THE BURDEN AND STANDARD OF PROOF

27. According to the CAT, the forum state is under “an obligation ... to ascertain whether or not statements admitted as evidence in any proceedings for which it has jurisdiction... have been made as a result of torture”.²⁸ Part B will discuss (i) what triggers the state’s duty to investigate the allegation that the evidence was obtained by torture; (ii) what the state’s duty to investigate entails; and (iii) the circumstances in which the evidence in question will be excluded from proceedings.

28. The leading English case on the burden and standard of proof is *A and Others* cited above. There is scarce discussion of the burden and standard of proof in the international jurisprudence that deals with the exclusionary rule. However, as shown below, it is relatively well settled that an allegation must be initially raised that evidence was obtained by torture and that it is then for the forum state to investigate these allegations.²⁹ Where it is established that the evidence was obtained by torture, it must be excluded.

29. Most of the case-law also indicates that the burden of proof cannot rest with either the individual or the state alone. In particular, as regards the individual, it is recognised that s/he will not have access to the information necessary to establish that the evidence was in fact obtained by torture. The HRC has stated:

“... the burden of proof (on the use of torture) cannot rest alone on the author of a communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information; it is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities”.³⁰

30. In *A and Others*, Lord Hope for the majority commented:

“.. a conventional approach to the burden of proof is inappropriate in this context. It would be wholly unrealistic to expect the detainee to prove anything, as he is denied access to so much of the information that is to be used against him. He cannot be expected to identify from where the evidence comes, let alone the persons who have provided it”.³¹

31. Similarly, Nowak and McArthur emphasise the difficulties of requiring the individual to provide “full evidence that his or her confession...was extracted by torture, a burden of proof which in almost no case could be met” and note that “it might be equally difficult for the prosecutor or any other government authority to provide full evidence that a given confession or witness statement was definitely not extracted by

²² See, for example, CAT, *P.E. v. France*. This also seems to be the understanding of this Court, for example in *Jalloh v. Germany*, App. No. 54810/00, (11 Jul. 2006), para. 105.

²³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Sir Nigel Rodley, UN Doc. A/54/426, 1 Oct. 1999, para. 12(e).

²⁴ *A and Ors.*, para. 1 (per Lord Bingham).

²⁵ *A and Ors.*, para. 91 (per Lord Hoffman). Lord Hope for the majority stated, “[w]ithout hesitation I would hold that, subject to the single exception referred to in article 15, the admission of any statements obtained by this means against third parties is absolutely precluded in any proceedings as evidence. I would apply this rule irrespective of where, or by whom, the torture was administered” [underline added], para. 113.

²⁶ *A and Ors.*, para. 163-165 (per Lord Brown).

²⁷ CAT, *P.E. v. France*, para. 6.3. See also, CAT, *G.K. v. Switzerland*, para. 6.10.

²⁸ CAT, *G.K. v. Switzerland*, para. 6.10.

²⁹ See *A and Ors.*, para. 116 (per Lord Hope); CAT, *P.E. v. France*, para. 6.3; and HRC, *Mr. Saimijon and Mrs. Malokhat Bazarov v. Uzbekistan*, U.N. Doc. CCPR/C/87/D/959/2000 (8 Aug. 2006) para. 8.3.

³⁰ HRC, *Saimijon and Bazarov v. Uzbekistan*, para. 8.3.

³¹ *A and Ors.*, para. 116 (per Lord Hope). See also, Lord Carswell for the majority, para. 155.

torture”.³² They conclude that, “[a]ny interpretation which takes into account both the wording and the purpose of Article 15 must, therefore, aim at striking a *fair balance between the legitimate interests of the State and of the individual against whom the evidence is invoked*” [emphasis in original].³³

i. What triggers the state’s duty to investigate the allegations that evidence was obtained by torture?

32. Under international law, states have a duty to investigate *ex officio* where there are “reasonable grounds” for believing a person has been subject to a human rights violation, even in the absence of a formal complaint.³⁴ However, with torture evidence, as noted, above, the case law suggests that the individual seeking to exclude the evidence must, at a minimum, raise an allegation that the evidence was obtained by torture in order to trigger the state’s duty to investigate the circumstances in which the evidence was obtained. The jurisprudence is inconsistent however, as to the extent to which an individual must sustain his or her allegations. The CAT seems to suggest that the individual’s allegations of torture must be “well-founded” whereas, Nowak and McArthur suggest that an individual need merely submit “some evidence” of ill-treatment.³⁵ Domestic jurisprudence³⁶ seems to reach a similar result to the CAT, with courts variously requiring the individual to raise “sufficient allegations” (USA), “persuasive” allegations (Canada), and “plausible” allegations (the Netherlands). The UK however, seems merely to require the individual to “raise the issue”.³⁷

i) International jurisprudence

33. In *Halimi-Nedzibi v. Austria*, the CAT stated that it “cannot conclude that the allegations of ill-treatment have been sustained” and thus failed to find a violation of Article 15.³⁸ Similarly, in *Encarnación Blanco Abad v. Spain*, it found the author’s claim inadmissible commenting that “the author’s claim of a violation of article 15 lacked the requisite corroboration”.³⁹ In the more recent case of *P.E. v. France* the CAT held that “it is for the author to demonstrate that her allegations are well founded” [underline added] and found that “on the basis of the facts before it, it cannot conclude that it has been established that the statements at issue were obtained as a result of torture”.⁴⁰ The Committee reached similar conclusions in *G.K. v. Switzerland*.⁴¹

34. Interpreting this line of cases. Nowak and McArthur comment: “...the Committee against Torture ... held that the applicant is only required to demonstrate that his or her allegations or torture are well-founded. This means that the *burden of proof* to ascertain whether or not statements invoked as evidence in any proceedings, including extradition proceedings, have been made as a result of torture, *shifts to the State*” [emphasis in original].⁴² However, Nowak and McArthur’s own view seems to suggest a lower threshold at which a state’s duty to investigate allegations that evidence was obtained by torture will be triggered. For example, commenting on the *Halimi-Nedzibi* case, they note: “[t]he applicant is certainly correct in arguing that the burden of proof to establish torture cannot rest with the victim. It must be sufficient for the victim to submit *some evidence* of ill-treatment, such as the testimonies of his co-defendants in court” [emphasis added].⁴³

ii) Domestic jurisprudence: The English case of A and Others

35. As noted above, in *A and Others*, Lord Hope for the majority agreed that “a conventional approach to the burden of proof is inappropriate in this context”.⁴⁴ He found that

“[a]ll he [the detainee] can reasonably be expected to do is to raise the issue by asking that the point be considered by SIAC. There is, of course, so much material in the public domain alleging the use of torture around the world that it will be easy for the detainee to satisfy that simple test. All he needs to do is point to the fact that the information which is to be used against him may have come from one of the many countries around the world that are alleged to practise torture,

³² Nowak and McArthur, Ch. 15 para. 81.

³³ Nowak and McArthur, Ch. 15 para. 81.

³⁴ See e.g., Art 12 UNCAT: “[e]ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction” [underline added].

³⁵ See discussion and references at paras. 34.

³⁶ See discussion and references at paras. 38-40 below.

³⁷ See discussion and references at paras. 35-37 below.

³⁸ CAT, *Halimi-Nedzibi v. Austria*, Communication No. 8/1991, U.N. Doc. A/49/44 at 40 (1993) para. 13.4.

³⁹ CAT, *Encarnación Blanco Abad v. Spain*, Communication No. 59/1996, U.N. Doc. CAT/C/20/D/59/1996 (14 May 1998) para. 5.3.

⁴⁰ CAT, *P.E. v. France*, para. 6.6.

⁴¹ CAT, *G.K. v. Switzerland*, para. 6.11.

⁴² Nowak and McArthur, Ch. 15 para. 82. See also, para. 48 where they comment on the *P.E. v. France* case: “[t]he applicant must demonstrate that his or her allegations that the extradition request is based on statements extracted by torture are well-founded. The extraditing state has the obligation under Article 15 to ascertain the veracity of such allegations. It falls upon the requesting state to establish finally whether or not any statements, which constituted at least in part the basis for the extradition request, were made as a result of torture”.

⁴³ Nowak and McArthur, Ch. 15 para. 38.

⁴⁴ *A and Ors.*, para. 116 (per Lord Hope).

bearing in mind that even those who say that they do not use torture apply different standards from those that we find acceptable. Once the issue has been raised in this general way the onus will pass to SIAC” [underline added].⁴⁵

36. However, Lord Bingham (the minority on this point) also seemed to suggest that the tribunal had an obligation to investigate *ex officio* when he stated: “[w]here such a plausible reason is given, or where SIAC with its knowledge and expertise in this field knows or suspects that evidence may have come from such a country, it is for SIAC to initiate or direct such inquiry as is necessary” [underline added].⁴⁶

37. Tobias Thienel commenting on the UK case of *A and Others* stated:

“... the conclusion of the House of Lords ... would appear to be the one required by international law. This is because the question of the burden of proof is indirectly affected by the interpretation given to Article 15 UNCAT by the CAT, according to which the article ‘implies an obligation for each state party to ascertain whether or not statements admitted as evidence in any proceedings for which it has jurisdiction . . . have been made as a result of torture’. A state would clearly not comply with this positive duty if it were to impose the burden of proof for the requirements of Article 15 UNCAT on a private person. On the other hand, this positive obligation cannot mean that omitting a completely pointless examination even in entirely unproblematic cases would be in violation of international law. Therefore, the state’s duty to investigate is only triggered by the presence of clues as to the possible provenance of the statements concerned from incidents of torture. This means that, even if the ordinary rules in a legal order impose the burden of proof on this question on a private person, the private person need only present the required clues in order to satisfy that burden. It is then incumbent on the competent state organ in any case to examine all suspect evidence with a view to its admissibility under Article 15 UNCAT.

Article 15 UNCAT may therefore be concluded not to impose any burden of proof, but to reduce any burden of proof on persons other than the state to an evidentiary burden only of triggering the positive obligation of the state” [underline added].⁴⁷

iii) *Comparative jurisprudence: Domestic cases from the US, Canada, France and The Netherlands*

38. In *Re Guantánamo Detainee Cases*,⁴⁸ petitions were filed in eleven cases on behalf of detainees held as “enemy combatants” at the United States (US) Naval Base at Guantanamo Bay, Cuba. The US District Court for Columbia held that the petitioning detainees had made “sufficient allegations” that the Combatant Status Review Tribunals (CSRT) had improperly relied on evidence allegedly obtained by torture or other mistreatment. The Court stated:

“[i]ndeed, at this stage of the litigation it is premature to make any final determination as to whether any information acquired during interrogations of any petitioner in these cases and relied upon by the CSRT was in fact the result of torture or other mistreatment. What this Court needs to resolve at this juncture, however, is whether the petitioners have made sufficient allegations to allow their claims to survive the respondents’ motion to dismiss. On that count, the Court concludes that the petitioners have done so” [underline added].⁴⁹

39. In *India v Singh*,⁵⁰ the Supreme Court of British Columbia, Canada, held that “[t]he burden of proving that the confessional statements were obtained as a result of the commission of an offence under this torture section rests upon the Fugitive who makes that allegation” and that the “allegation must be proved upon a balance of probabilities”.⁵¹ On this basis, Oliver J found that one of the statements had been obtained by torture and should be excluded.⁵² As regards the other four cases, he held that where there are “serious and persuasive allegations of torture” but these are “met with affidavits of the police officials allegedly present denying that torture”, though “strong suspicions remain”, there “is not enough evidence to convince me on a balance of probabilities that these four individuals were tortured”.⁵³

40. In a 1996 decision,⁵⁴ the Hoge Raad (Supreme Court of the Netherlands) accepted the lower court’s finding that it was not “plausible” that the witness statement obtained by Portuguese police had been obtained by torture and rejected this ground of appeal. However, the Court also indicated that if it *had* been plausible that the statements *had* been obtained by torture, these would have had to be excluded from the evidence considered by the lower court.

⁴⁵ *A and Ors.*, para. 116 (per Lord Hope). To similar effect, Lord Bingham for the minority stated: “[t]he appellant must ordinarily, by himself or his special advocate, advance some plausible reason why evidence may have been procured by torture. This will often be done by showing that evidence has, or is likely to have, come from one of those countries widely known or believed to practise torture....” [underline added] (*ibid.*, para.56).

⁴⁶ *A and Ors.*, para. 56 (per Lord Bingham).

⁴⁷ T. Thienel, *The Admissibility of Evidence Obtained by Torture under International Law*, EJIL (2006), Vol. 17 No. 2, 349–367, at 355.

⁴⁸ *Re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) (31 Jan. 2005).

⁴⁹ *Ibid.*, p. 474.

⁵⁰ British Columbia Supreme Court, *India v. Singh (IN THE MATTER OF The Extradition Act AND IN THE MATTER OF India, and Mahesh Inder Singh a.k.a. Maheshi)*, [1996] B.C.J. No. 2792, (oral judgment Oliver J: filed 8 May 1996).

⁵¹ *Ibid.*, para. 21. For further discussion on this issue, see paras. 19 – 32.

⁵² *Ibid.*, para. 32: “[d]ue to the *persuasive* nature of the allegations made by Nirmal Singh, and in the absence of any denial on the part of the alleged torturers, I am satisfied upon a balance of probabilities that he was tortured and that his confessional statement was the result” [emphasis added].

⁵³ *Ibid.*, para. 28. See also, para. 38.

⁵⁴ Supreme Court of the Netherlands (Hoge Raad), Judgment No. 103.094, (1 October 1996) (NJ 1997 90).

ii. What does the duty to investigate entail?

41. As noted above, once the party seeking to exclude the evidence raises an allegation that it was obtained by torture, the forum state is obliged to verify the circumstances in which the evidence was obtained.
42. In its Concluding Observations on the Russian Federation in 2007, the CAT expressed concern that Russian law gave “no instruction to the courts to rule that the evidence is inadmissible, or to order an immediate, impartial and effective investigation” [underline added].⁵⁵ In relation to statements made by the defendant specifically, CAT jurisprudence further suggests that judges are required to ask individuals “explicitly about the treatment received since their arrest” and “to check whether their statements to the prosecutor were made freely and without any form of coercion”.⁵⁶ The case-law of this Court suggests furthermore that “[t]he severity of the sentence that may be imposed upon the conclusion of the criminal proceedings would increase the level of due diligence that is required from the domestic authorities”.⁵⁷

iii. When is a state required to exclude evidence?

Treaty law

43. Article 15 UNCAT provides that evidence must be excluded from proceedings where it “is established to have been made as a result of torture” [underline added]. Similar language is used in Article 12 of the Declaration on the Protection of All Persons from Being Subjected to Torture⁵⁸ and in Article 10 of the Inter-American Convention to Prevent and Punish Torture.⁵⁹

International jurisprudence

44. In two cases on Article 15 UNCAT, the CAT makes clear that the state must investigate once allegations are raised that evidence was obtained by torture; and that, where evidence is established to have been obtained by torture it should be excluded.⁶⁰
45. As noted above, the HRC uses similar language to Article 15 UNCAT, stating: “[i]t is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment” [underline added].⁶¹ However, in later jurisprudence, it seems to adopt a stricter test. In *Nallaratnam Singarasa v. Sri Lanka*, in which the author claimed a violation of his rights under article 14(3)(g) for having been “forced to sign a confession and subsequently had to assume the burden of proof that it was extracted under duress and was no voluntary”, the HRC found that “it is implicit in this principle [of art. 14(3)(g)] that *the prosecution* prove that the confession was made without duress” [underline added, italics in original].⁶²

Domestic jurisprudence

The English case of A and Others

46. The House of Lords in *A and Others* considered the meaning of “established” and this issue split the Law Lords 4:3. The majority interpreted Article 15 as requiring evidence to be excluded where it is ‘more likely than not’ that torture was used to obtain the evidence. Lord Hope for the majority stated:

“... crucially, the exclusionary rule extends to any statement that “is established” to have been made under torture. The 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. ... The rule that article 15 lays down looks at what has happened in the past. It applies to a statement that is established *to have been* made under torture. In my opinion the test that it lays down is the test that should be applied by SIAC. It too must direct its inquiry to what has happened in the past. Is it established, by

⁵⁵ CAT, Conclusions and recommendations: Russian Federation, para. 21. See also, Activities of the Committee against Torture pursuant to article 20 UNCAT: Turkey, U.N. Doc. A/48/44/Add. 1 (15 Nov. 93) para. 28.

⁵⁶ CAT, Report on Mexico Produced By The Committee Under Article 20 UNCAT, And Reply From The Government Of Mexico, U.N. Doc. CAT/C/75, (26 May 2003) para. 220(d). See also, CAT, Inquiry under Article 20: Peru, U.N. Doc. A/56/44, paras.144-193 (16 May 2001), paras. 26 and 29.

⁵⁷ ECtHR, *Panovits v. Cyprus*, App. No. 4268/04 (11 Dec. 2008), para. 81.

⁵⁸ Art. 12 provides: “[a]ny statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings” [underline added].

⁵⁹ Art. 10 provides: “[n]o statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means” [underline added].

⁶⁰ CAT, *P.E. v. France*, para. 6.3 and *G.K. v. Switzerland*, para. 6.10.

⁶¹ HRC, General Comment No. 20, para. 12.

⁶² HRC, *Nallaratnam Singarasa v. Sri Lanka*, Communication No. 1033/2001, U.N. Doc. CCPR/C/81/D/1033/2001 (23 Aug. 2004), para. 7.4. See also, HRC, *Darmon Sultanova v. Uzbekistan*, Communication No. 915/2000, U.N. Doc. CCPR/C/86/D/915/2000 (19 Apr. 2006), para. 7.3 and HRC., *Saimijon and Bazarov v. Uzbekistan*, para. 8.3.

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?” [underline added, italics in original].⁶³

47. The minority indicated that evidence should be excluded where there is a “real risk” that it was obtained by torture:

“[w]here such a plausible reason is given, or where SIAC with its knowledge and expertise in this field knows or suspects that evidence may have come from such a country, it is for SIAC to initiate or direct such inquiry as is necessary to enable it to form a fair judgment whether the evidence has, or whether there is a real risk that it may have been, obtained by torture or not. All will depend on the facts and circumstances of a particular case” [underline added].⁶⁴

48. The difference between the two approaches in the House of Lords becomes more apparent in cases where some doubt remains as to whether torture was used to obtain the evidence in question. According to the majority’s test, in such a case, the evidence can be admitted: “[i]f, having regard to the evidence of a particular state’s general practices and its own inquiries, SIAC were to conclude that there is no more than a *possibility* that the statement was obtained by torture, then in my judgment this would not have been established and the statement would be admissible” [emphasis in original].⁶⁵ Whereas, for the minority, the evidence must be excluded in such cases: “[i]f SIAC is unable to conclude that there is not a real risk that the evidence has been obtained by torture, it should refuse to admit the evidence”.⁶⁶

The El-Motassadeq Case in Germany

49. In June 2005, the Hanseatic Higher Regional Court in Hamburg in the case of Mr. *Mounir El-Motassadeq*,⁶⁷ “made use of the full summaries of the testimonies given by three Al-Qaeda suspects before US authorities despite the fact that serious doubts remained whether these testimonies had been extracted by torture”.⁶⁸ The Court,

“based this decision on the reasoning that Article 15 CAT only excluded statements as evidence which were established to have been made as a result of torture but that in the present case it was impossible for the Court to establish that the testimonies were in fact extracted by torture. Although the press articles and NGO reports heard in court supplied indications that alleged Al-Qaeda members had been tortured, the Court was unable to verify them, as no primary sources had been named. Since the summaries of the interrogations also contained exculpatory elements, this was taken as an indication that no torture had been used” [underline added].⁶⁹

50. Lord Hope, for the majority in the English case of *A and Others* referred explicitly to *El-Motassadeq*:

“124. ...[t]he court was careful to distinguish between the generalised allegations of torture which were to be found in the press articles and other materials - sufficient, it might well be said, to raise a suspicion of torture - and the position of these three witnesses in particular. What it was looking for was evidence which established that the statements of these three witnesses in particular had been obtained under torture. The test which it was asked to apply was that laid down by the article. The evidence for assuming that torture had been used was said to be weak, and the contents of the statements tended to show that torture had not been used. The court did not go so far as to say that it was unable to conclude that there was not a real risk that the evidence had been obtained by torture. It was left in a state of doubt on this point. If it had applied the test which Lord Bingham suggests, the result would have been different because it had been denied access to information about the precise circumstances.

125. Article 15 of the Convention does not compel us to adopt the test which Lord Bingham suggests, and there are good reasons - as the case of *El Motassadeq* so clearly demonstrates - for thinking that the terms on which information is passed to the intelligence services would make it impossible for it to be met in practice. ... I do not believe that the test which I suggest is one that in the real world can never be satisfied. Nor do I believe that applying the test which the Convention itself lays down in the way I suggest would undermine the practical efficiency of the Convention” [underline added].⁷⁰

51. The German decision has however been subject to criticism by the UN Special Rapporteur on Torture,⁷¹ by academics,⁷² NGOs⁷³ and by the Lord Bingham for the minority in the *Case of A and Others*.⁷⁴

⁶³ *A and Ors.*, para. 121 (per Lord Hope). See also Lord Hope, para. 118., Lord Carswell, para. 158 and Lord Brown, para. 172.

⁶⁴ *A and Ors.*, para. 56 (per Lord Bingham).

⁶⁵ *A and Ors.*, para. 172 (per Lord Brown).

⁶⁶ *A and Ors.*, para. 56 (per Lord Bingham).

⁶⁷ Decision of Hanseatic Higher Regional Court in Hamburg 14 June 2005 and judgment of 19 August 2005.

⁶⁸ Nowak and McArthur, Ch. 15 para. 3.

⁶⁹ Nowak and McArthur, Ch. 15 para. 63.

⁷⁰ *A and Ors.*, paras. 124-125 (per Lord Hope).

⁷¹ UN General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. M. Nowak, UN doc. A/61/259 (14 Aug. 2006), para. 64: “[i]n the Special Rapporteur’s opinion, the Hamburg Court failed to shift the burden of proof to those Government authorities who actually invoked the contested evidence. In light of well-founded allegations about the torture and enforced disappearance of the witnesses in United States custody, it was the responsibility of the Prosecutor (or the Court) to prove beyond reasonable doubt that the testimonies were not extracted by torture, rather than to prove that they were actually obtained by torture.”

⁷² See Nowak and McArthur, Ch. 15, para. 83.

⁷³ For example, Amnesty International strongly criticised the court’s lack of sufficient diligence in investigating the allegations that evidence had been obtained by torture or other ill-treatment and the court’s decision to accept the evidence despite the reports by human rights organisations, journalists and released detainees “on numerous allegations of torture and other ill-treatment” (Amnesty International, ‘Germany: Hamburg court violates international law by admitting evidence potentially obtained through torture’, AI Index: EUR 23/001/2005 (Public) News Service No: 227 (18 Aug. 2005), para. 4).

C. THE IMPACT OF THE USE OF EVIDENCE OBTAINED BY TORTURE AND OTHER PROHIBITED ILL-TREATMENT ON THE FAIRNESS OF JUDICIAL PROCEEDINGS

52. The use of evidence obtained by torture or other prohibited ill-treatment in judicial proceedings violates not only the exclusionary rule, but also seriously impacts the fairness of the proceedings.

53. Although this Court has established in various jurisprudence that the rules on admissibility of evidence are primarily a matter of national law,⁷⁵ it has also recognised that the use of illegally obtained evidence may affect the fairness of the judicial proceedings, and in this respect, this Court has stated that:

“[t]he question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the “unlawfulness” in question and, where a violation of another Convention right is concerned, the nature of the violation found”.⁷⁶

54. This would indicate that such usages will have a greater impact on the fairness of proceedings when the method of obtaining the evidence constitutes a serious violation of Convention norms. It is submitted that when the use of the evidence in question is contrary to one of the most fundamental and absolute norms of the Convention such as the prohibition of torture, the fairness of the proceedings is acutely affected.

55. Use of evidence obtained in violation of Article 3 has invariably led this Court to find a violation of Article 6 because the admission of such evidence renders the trial as a whole unfair. This results from the special stigma of torture and other prohibited ill-treatment. In *Harutyunyan v. Armenia*, this Court held:

“...different considerations apply to evidence recovered by a measure found to violate Article 3. An issue may arise under Article 6 § 1 in respect of evidence obtained in violation of Article 3 of the Convention, even if the admission of such evidence was not decisive in securing the conviction. The use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. Incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimize indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to “afford brutality the cloak of law”...” [underline and emphasis added].⁷⁷

56. In addition, in assessing whether the use of evidence obtained by torture or other prohibited ill-treatment has rendered the whole trial unfair, this Court has found it irrelevant whether the national court has based its decision in a determinative manner on the evidence in question. As noted above, in *Harutyunyan v. Armenia*, this Court held that, “[a]n issue may arise under Article 6 § 1 in respect of evidence obtained in violation of Article 3 of the Convention, even if the admission of such evidence was not decisive in securing the conviction” [underline added].⁷⁸

57. While this Court seems to find that the use of evidence obtained by *torture* renders a trial automatically unfair, when the evidence has been obtained by treatment which constitutes a violation of Article 3 *but does not amount to torture*, this Court has indicated that its impact on the fairness of the proceedings will depend on the circumstances of the individual case. In *Jalloh v. Germany*, this Court noted:

“[i]t cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial” [underline added].⁷⁹

However, this Court ultimately left open the general question of whether the use of evidence obtained by other prohibited ill-treatment, as opposed to torture, automatically renders a trial unfair.⁸⁰

58. The strict link between the prohibition of torture and the right to a fair trial has also been established in the jurisprudence of other regional human rights courts and UN treaty bodies. The Inter-American Court and

⁷⁴ See *A and Ors.*, para. 60 where Lord Bingham stated: “...the German court, although noting that it was the United States, whose agents were accused of torture, which was denying information to the court, proceeded to examine the summaries and found it possible to infer from internal evidence that torture had not been used. This is not a precedent which I would wish to follow”.

⁷⁵ In *Allan v. the United Kingdom*, this Court noted: “...it is not its [the Court's] function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not” (App. No. 48539/99, (5 Nov. 2002), para. 42). See also ECtHR, *P.G. & J.H. v. the United Kingdom*, App. No. 44787/98, (25 Sept. 2001), para. 76.

⁷⁶ ECtHR, *Allan v. the United Kingdom*, para. 42.

⁷⁷ ECtHR, *Harutyunyan v. Armenia*, App. No. 36549/03, (28 Jun. 2007) para. 63. See also *Jalloh v. Germany*, para. 105.

⁷⁸ *Harutyunyan v. Armenia*, para. 63. See also, *Göçmen v. Turkey*, para. 74; *Örs and others v. Turkey*, App. No. 46213/99, (20 Jun. 2006) para. 60.

⁷⁹ *Jalloh v. Germany*, para. 106. In the particular case, the Court found that the use of evidence obtained by treatment which it qualified as ill-treatment prohibited by Article 3 rendered the trial as a whole unfair (paras. 82, 108 and 122-123).

⁸⁰ *Jalloh v. Germany*, para. 107.

Commission on Human Rights have found that the use of evidence obtained by torture violates the right to a fair trial under Article 8 of the American Convention on Human Rights.⁸¹ For example, in *Manríquez v. Mexico*, the Inter-American Commission found that,

“...the confession obtained through torture was in effect the only evidence relied upon in the judgment of the court of first instance to convict Manuel Manríquez as direct perpetrator of the homicide of which he was accused. The Commission also concludes that the right to the presumption of innocence set forth at Article 8(2) of the [American] Convention was violated, as Manuel Manríquez was forced to give testimony against himself under torture, to declare his guilt, and for having accepted his confession obtained by coercion as valid”.⁸²

59. In *Singarasa v. Sri Lanka*, the HRC found a violation of Article 14 of the ICCPR, read in conjunction with Article 7 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”.⁸³

D. CONCLUDING REMARKS

60. It is submitted that there is merit to the minority view in *A and Others* that evidence must be excluded where there is a “real risk” that it was obtained by torture because, as highlighted by Nowak and McArthur, the majority view in this case in practice places too high a burden on the individual against whom the evidence is sought to be used; a burden which “may well be impossible to meet by most of the foreign terrorist suspects presently in detention”,⁸⁴ and “does not seem really to shift the burden of proof to the government authorities”.⁸⁵

61. Moreover, the fact that the evidence in question is sought to be used against someone accused of terrorism-related offences cannot result in the shifting of the burden of proof, *in practical terms*, to the defendant. As this Court has itself established, public interest concerns, such as those served by counter-terrorism policies, “cannot justify measures which extinguish the very essence of an applicant’s defence rights”.⁸⁶ In *Hulki Güneş v. Turkey*, this Court held:


“[t]he Court is fully aware of the undeniable difficulties of combating terrorism – in particular with regard to obtaining and producing evidence – and of the ravages caused to society by this problem, but considers that such factors cannot justify restricting to this extent the rights of the defence of any person charged with a criminal offence”.⁸⁷

62. As was the reasoning of the Spanish Supreme Court when reversing the conviction of *Hamed Abderrahaman Ahmed*,⁸⁸ because of the disrespect for the fundamental rights of the detainees and of due process guarantees, “any diligence or act carried out in that context [in Guantanamo Bay], must be declared completely invalid and as such inexistent” [underline in original].⁸⁹ This included not only the statements given by the defendant during the interrogations, but also the statements given in court by the Spanish police agents who had interrogated him.

63. Similarly, in its recent report, the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights expressed concern that “due to the international dimension of recent terrorism attacks, there have been cases where the prosecution sought to rely on statements of the accused or witnesses obtained abroad under conditions that cast doubt about their reliability”⁹⁰ and that the prevention of torture or other ill-treatment of detainees can only be effectively safeguarded “if the judiciary responds urgently and effectively when any allegations concerning such ill-treatment are brought to their attention”.⁹¹

All of which is respectfully submitted.

Marta Valiñas, Lucy Moxham and Carla Ferstman
THE REDRESS TRUST


Wolfgang Kaleck
THE EUROPEAN CENTER FOR
CONSTITUTIONAL AND HUMAN RIGHTS

⁸¹ Inter-American Court of Human Rights (IACtHR), *Cantoral Benavides v. Peru*, Series C No. 69, (18 Aug. 2000), paras. 132-133.

⁸² Inter-American Commission of Human Rights (IACHR), *Manuel Manríquez v. México*, Case 11.509, Report No. 2/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 663 (1998), (23 Feb. 1999), para. 85.

⁸³ HRC, *Singarasa v. Sri Lanka*, para. 7.4.

⁸⁴ Nowak and McArthur, Ch. 15 para. 74.

⁸⁵ Nowak and McArthur, Ch. 15 para. 84.

⁸⁶ *Jalloh v. Germany*, para 97.

⁸⁷ ECtHR, *Hulki Güneş v. Turkey*, App. no. 28490/95, (19 Jun. 2003), para. 96.

⁸⁸ Spanish Supreme Court (Criminal Division), Judgment No. 829/2006, (20 Jul. 2006).

⁸⁹ *Ibid.*, a p. 13 [unofficial translation].

⁹⁰ International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, Geneva, 2009, p. 150.

⁹¹ *Ibid.*, p. 149.