

Tainted by Torture: Examining the Use of Torture Evidence

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Sara Lopez. PhD. Senior Legal Advisor*

In 80 pages, the report *Tainted by Torture: Examining the Use of Torture Evidence*, jointly written by Redress and Fair Trials, analyses legislation, jurisprudence and data on the admission of evidence obtained under torture. It identifies not only the different models of regulation in applying Article 15 of the Convention against Torture,¹ but particularly focuses on the limitations, both interpretative and practical, found in this provision.

The authors draw on a comparative survey of the law and practice of 17 countries, namely, Australia, Brazil, China, England and Wales, France, Germany, Indonesia, Japan, Kenya, Mexico, Spain, South Africa, Thailand, Tunisia, Turkey, the United States of America and Vietnam. As they explain, this data was used to examine different ways of implementing the prohibition on using evidence obtained under torture, to identify challenges in the course of applying it and any gaps in

the protection against its use. The great contribution of this report, compared with previous reviews, is precisely its effort to identify the real translation of the prohibition into different state models, providing evidence on existing formats and how they function in practice. Taking on this complex and ambitious task is not only courageous but is also important as it provides an evidence-based proposal to limit the judicial legitimization of torture. The proposals and conclusions of the report are a remarkable starting point for undertaking this work.

The report is divided into several chapters, dealing with different aspects of the admissibility of evidence obtained under torture in the named countries, including whether: (i) the prohibition is absolute; (ii) it extends to other forms of inhuman or degrading treatment or punishment; (iii) it covers evidence obtained from the torture of a third party; (iv) it covers derivative evidence/‘fruits of the poisonous tree’; and (v) there are effective legal procedures in place to identify and exclude ‘torture evidence’.

Chapter I, “The prohibition on torture and the exclusionary rule”, examines the international regulation on the prohibition of torture, with a particular focus on the rights and principles to do with the violation of the exclusionary rule with respect to the use of confessions obtained under torture.

Chapter II, “The components of the exclusionary rule”, analyses the different models, monistic or dualistic, express or implied regimes, which can be adopted with respect to the prohibition on ‘torture evidence’ in different countries. Of particular interest is the study of the balancing act between the system in the Commonwealth and Western Australia. The chapter also addresses challenges arising from the fact that the prohibition of

*) SiR[a] Center.

Correspondence to: acdc@nodo50.org

¹ Article 15 of the Convention states that, “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”.

torture is not extended to other forms of cruel, inhuman and degrading treatment. The analysis of the differing national implementation of the evidence obtained by torture of a third party is particularly relevant. Similarly, the varying application of excluding derivative evidence ('the fruits of the poisonous tree' or evidence obtained illegally) is also reviewed in detail and with considerable cross-national evidence.

Chapter III, "Triggering the procedure", reviews in detail the different models of regulation and procedural practices in combating the use of evidence obtained under torture. It examines the different moments in which the illegality of the evidence may be challenged; it defines the standards relating to the right to a fair trial under international law; it verifies the different systems of burden of proof, again with numerous comparative evidence; and considers the different types of evidence that courts can take into account when assessing whether evidence was obtained by torture. The breadth of the legal, jurisprudential and practical review of the chapter provides a clear overview of the advantages and weaknesses of the different models analysed.

One of the most relevant chapters is Chapter IV, "Making the exclusionary rule effective in practice". The absence of official data compels the authors to review whether NGOs and treaty-monitoring bodies are reporting instances of 'torture evidence' admitted in criminal cases. The chapter reviews the major problems for professionals in the justice sector, including the lack of training for judges on the relevant domestic laws and international standards; and, institutional disincentives among judges, such as the weight of work, or the risk of an adverse public, political or diplomatic response to a prosecution. The disincentives

that operate among defence lawyers are also discussed, including the fact that they do not believe the court will exclude the evidence anyway, are concerned about their personal safety or that of their client, and fear that it will be detrimental to their future work. Similarly, the chapter thoroughly reviews practical barriers, which include the difficulties in ensuring the protection of complainants; the limitations in obtaining evidence of the existence of torture; the obstacles posed by delays in cases where the complainant is in pretrial detention; and the very frequent guilty pleas, which involve the withdrawal of the complaint in exchange for favourable treatment in application of the complainant's punishment. The clarity with which these complex practical dilemmas are identified in the report successfully lays bare the challenges that need to be addressed in this area.

Chapter V, "Tackling confessions-based criminal justice", in turn, proposes a clear approach to judicial models based on a single source of evidence that can easily be obtained under torture. Thus, different proposals for corroborating evidence are reviewed, as are the diverse systems of confession given at different stages in the proceedings or to different actors within the justice system. Reviewed too is the varied systems of procedural safeguards during the investigation in different countries. The chapter concludes with the need to reinforce the initiative of Juan Mendez, the former UN Special Rapporteur on Torture, to elaborate a universal protocol for interrogations.

Chapter VI, "Prosecutions and disciplinary sanctions stemming from revelations about torture evidence", briefly addresses the Convention's requirement that countries define torture as a specific offence in their Criminal Codes. It also reviews the major difficulties posed by the

duty to investigate in various countries; and examines some systems of administrative complaint bodies or inspectorates which have the power to investigate and sanction any unlawful conduct.

Chapter VII, “Remedies and reparation for victims”, sets out the need for specific forms of reparation for forced confessions and reviews, in turn, the elements of the duty of reparation to victims (restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition) in the various systems under study, in order to identify the insufficiency of measures in this regard and to define future lines of work.

The final chapter, “Conclusions and recommendations”, reviews the proposals made at the beginning of the report, providing suggested resolutions on each of the aspects addressed. The signatory organisations, Redress and Fair Trials, argue that the exclusionary rule should be accorded a more prominent role in the work undertaken to combat torture; it should define a clear focus for advocacy efforts, including by domestic civil society actors. They argue for clarity on the extent to which the exclusionary rule overlaps with derivative evidence and evidence obtained as a result of inhuman or degrading treatment or punishment. The elaboration of approaches which address how the law is operating in practice is proposed, and an increased focus on rights-compliant police investigations is recommended. Not least, the report calls for the adoption of reparation measures for victims in accordance with the requirements of General Comment No. 3 of the Committee against Torture. All in all, it is a thorough and geographically broad analysis which is at the same time a reasonable and understandable rallying cry in the name of justice for torture survivors.