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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development****Report of the Special Rapporteur on torture and
other cruel, inhuman or degrading treatment or
punishment, Juan E. Méndez****Summary*

The present report focuses on the scope and objective of the exclusionary rule in judicial proceedings and in relation to acts by executive actors.

The Special Rapporteur elaborates on the exclusionary rule and its fundamental role for upholding the prohibition of torture and other cruel, inhuman or degrading treatment or punishment by providing a disincentive to use such acts.

The report identifies State practice and elaborates on the rationale and scope of the exclusionary rule in relation to formal proceedings. The second part of the report focuses on the use of information obtained by torture or other ill-treatment by executive agencies, including the collecting, sharing and receiving of such information from other States, and its relation to the absolute prohibition of acts torture and other ill-treatment and the State's obligation to prevent and discourage such act. In this context the report also elaborates on the threshold for State responsibility for complicity in torture or other ill-treatment or an internationally wrongful act.

The Special Rapporteur finds that all actions of executive agencies shall be reviewed under the absolute prohibition of torture and that the standards contained in the exclusionary rule shall apply, by analogy, to the collecting, sharing and receiving of information by executive actors.

* Late submission

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1–2	3
II. Activities of the Special Rapporteur.....	3–16	3
A. Upcoming country visits and pending requests	3–5	3
B. Highlights of key presentations and consultations.....	6–16	3
III. The use of torture-tainted information and the exclusionary rule	17–62	4
A. In judicial proceedings	20–36	5
B. By executive agencies.....	37–62	10
IV. Conclusions and recommendations	63–83	16
A. Conclusions.....	63–81	16
B. Recommendations.....	82–83	19

I. Introduction

1. The present report is submitted to the Human Rights Council in accordance with Council resolution 16/23.
2. The Special Rapporteur's report of his country visit to Ghana is contained in document A/HRC/25/60/Add.1. A/HRC/25/60/Add.2 contains observations made by the Special Rapporteur on cases sent to Governments between 1 December 2012 and 30 November 2013 as reflected in the communication reports A/HRC/23/51, A/HRC/24/21 and A/HRC/25/74.

II. Activities of the Special Rapporteur

A. Upcoming country visits and pending requests

3. The Special Rapporteur plans to visit Mexico from 21 April to 2 May 2014 and Thailand from 4 to 18 August 2014. He also plans to visit Georgia and Guatemala in 2014 to 2015 and is engaged with the respective Governments to find mutually agreeable dates. He also notes with appreciation an outstanding invitation to visit Iraq. The Special Rapporteur, with support from his Anti-Torture Initiative project, plans to conduct follow-up visits to Tunisia and Morocco in 2014.
4. The Special Rapporteur has reiterated his request for an invitation by the Government of the United States of America to visit the detention centre at Guantanamo Bay, Cuba, on conditions that he can accept. His request to visit U.S. prisons on the mainland, renewed on 3 October 2013 and 3 March 2014, is still pending.
5. After the second postponement of his planned visit to Bahrain, the Special Rapporteur has reiterated his request that the Government suggest new dates. This request is still pending.

B. Highlights of key presentations and consultations

6. On 18 October 2013, the Special Rapporteur held a community dialogue with the families of California prisoners in solitary confinement in Los Angeles, United States and delivered a speech at the University of California at Berkeley entitled "The Intersection of Solitary Confinement and International Human Rights."
7. On 22 October 2013, the Special Rapporteur presented his interim report (A/68/295) to the General Assembly and participated in a side event on the "Review of the Standard Minimum Rules for the Treatment of Prisoners." He also met with representatives of the Permanent Mission of Brazil, Denmark and Ghana.
8. On 28 October 2013, the Special Rapporteur submitted a written statement and testified during a public hearing on the human rights situation at Guantánamo Bay Naval Base before the Inter-American Commission on Human Rights in Washington, D.C.
9. On 4 November 2013, the Special Rapporteur participated in an expert consultation on the use of torture-tainted information by executive agencies organised by the Association for the Prevention of Torture (APT) in Geneva, Switzerland.
10. On 5 November 2013, the Special Rapporteur met with the European Committee for the Prevention of Torture of the Council of Europe in Strasbourg, France.

11. From 8 to 14 November 2013, the Special Rapporteur conducted a country visit to Ghana (A/HRC/25/60/Add.1) at the invitation of the Government.
12. On 15 November 2013, the Special Rapporteur discussed the topic of reprisals during a meeting with members of the United Nations Committee against Torture and the Subcommittee on the Prevention on Torture in Geneva, Switzerland.
13. On 9 December 2013, the Special Rapporteur gave a keynote speech on the theme of “What Steps Can the International Community Take to Eradicate Torture?” at the Fifth Annual Baha Mousa Memorial Lecture in London, United Kingdom.
14. From 10 to 12 February 2014, the Special Rapporteur conducted a follow-up visit to the Republic of Tajikistan, at the invitation of the Government, to assess the level of implementation of his recommendations and identify remaining challenges regarding torture and other cruel, inhuman or degrading treatment or punishment.
15. On 25 February 2014, the Special Rapporteur submitted a written statement and attended the second Senate Judiciary Committee hearing on solitary confinement, held at the United States Congress in Washington, D.C.
16. On 28 February 2014, the Special Rapporteur welcomed the publication on “*Torture in Healthcare Settings: Reflection on the Special Rapporteur on Torture’s 2013 Thematic Report*” by the Center for Human Rights and Humanitarian Law, Anti-Torture Initiative, Washington College of Law, American University.

III. The use of torture-tainted information and the exclusionary rule

Introduction

17. The exclusionary rule is fundamental for upholding the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (other ill-treatment) by providing a disincentive to use such acts. It contains an absolute prohibition on the use of statements made as a result of torture or other ill-treatment in any proceedings.¹ However, in practice, this prohibition is not always upheld. Moreover, the wording of article 15 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention) may be its weakest aspect and the one most frequently flouted by States that practice torture. Some States interpret “any proceedings” narrowly, to mean judicial proceedings of a criminal nature against the person who has made the statement. More importantly, some insist that the exclusionary rule is triggered only when it is established that the statement was made under torture. However, the exclusionary rule is a norm of customary international law and is not limited to the Convention which is only one aspect of it. The exclusionary rule must be considered as one element under the overarching absolute prohibition against acts of torture and other ill-treatment and the obligation to prevent such acts.

18. Of particular concern are attempts to undermine the prohibition of torture or other ill-treatment that the tainted statement is not used in “proceedings” but for other purposes such as intelligence gathering or covert operations. Cooperation in sharing intelligence

¹ The rule does provide a limited exception: Where a person is prosecuted for torture, the statement may be admitted as proof the statement was made. However, commentators have observed that the wording does not demonstrate an exception at all, since in proceedings against a person accused of torture, the confession is not admitted to show it is true, but rather simply that it was made. See Burgers & Danelius, *The UN Convention Against Torture: A Handbook* (1988), p. 147-148)

between States has expanded significantly in the fight against terrorism,² and some police, security and intelligence agencies (executive agencies) have shown a willingness to receive and rely on information likely to be obtained through torture and other ill-treatment and to share that information with one another. The global trend of giving executive agencies increased powers of arrest, detention and interrogation have retracted the traditional safeguards against torture or other ill-treatment and lead to further abuse of individuals. The practice of information obtained by torture or other ill-treatment for use outside of court proceedings by executive agencies must be examined to ensure the prohibition against torture is upheld, a practice made even more dangerous because of the secrecy and lack of transparency that surrounds it. Regrettably, some States have diluted cardinal principles necessary for preventing and suppressing torture and other ill-treatment.

19. The present report will elaborate the scope and objective of the exclusionary rule in judicial proceedings and in relation to acts by executive actors.

A. In judicial proceedings

20. Both, the Human Rights Committee and the Committee against Torture have concluded that the exclusionary rule forms a part of, or derived from, the general and absolute prohibition of torture and other ill-treatment.³ In its article 12, the 1975 General Assembly Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, expressly states that “any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence [...] in any proceedings. Article 15 of the Convention provides 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.”⁴

21. The rationale behind the exclusionary rule is manifold and includes the public policy objective of removing any incentive to undertake torture anywhere in the world by discouraging law enforcement agencies from resorting to the use of torture, thus to prevent torture and other ill-treatment. Furthermore, confessions and other information extracted under torture or ill-treatment are not considered reliable enough as a source of evidence in any legal proceeding. Finally, their admission violates due process and fair trial rights.⁵

22. As the prohibition against torture and other ill-treatment is absolute and non-derogable under any circumstances it follows that the exclusionary rule must also not be derogable under any circumstances, including in respect of national security⁶. Further, since the prohibition of torture and other ill-treatment is part of customary international law, it

² Security Council Resolution 1373 (2001) and Resolution 1624 (2005) stressed that States must ensure that any measures taken to combat terrorism comply with all of their obligations under international human rights law.

³ Human Rights Committee, General comment No. 20 (1992), HRI/GEN/1/Rev.9 (Vol.I), para. 12; CAT/C/30/D/219/2002, para. 6.10

⁴ See also article 10 of the Inter-American Convention to Prevent and Punish Torture; GA res. A/RES/67/161 (2013), para. 16

⁵ Burgers and Danelius, *The United Nations Convention against Torture: A Handbook to the Convention against Torture* (1988), p. 148; Nowak and McArthur, *The United Nations Convention against Torture: A Commentary* (Oxford University Press, 2008) Ch. 15, para.2

⁶ See e.g. International Covenant on Civil and Political Rights (ICCPR), article 4, paragraph 2; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 2, paragraph 2; A/63/223, para. 34.

follows that the exclusionary rule, as a component of the prohibition, must also apply to States that are not party to the Convention against Torture.⁷ In the aftermath of the attacks of 11 September 2001, the Committee against Torture specified that the obligations in article 2, paragraph 2, of the Convention whereby “no exceptional circumstances whatsoever may be invoked as a justification of torture, the exclusionary rule contained in article 15 and article 16 prohibiting cruel, inhuman or degrading treatment or punishment are three provisions of the Convention that “must be observed in all circumstances.”⁸

1. The scope and implementation of the exclusionary rule in any proceedings

23. Some progress has been made. Confessions, once considered the ‘queen of evidence,’ now require corroboration in most countries. Extrajudicial confessions are not generally considered as full evidence or given weight as presumptive or even indicial (circumstantial) evidence. However, the practices in a number of countries show that forced confessions are still deemed admissible and that judges and prosecutors fail to promptly and impartially investigate allegations of torture or other ill-treatment.

24. In some States, due to a lack of capacity and expertise in investigating crimes, extracting confessions through ill-treatment or torture is still seen as the most efficient or only way to secure evidence and conviction. In this regard, the Special Rapporteur draws attention to the international standards intended to provide assistance to national law enforcement, including the UN Code of Conduct for Law Enforcement Officials and the UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment. To ensure compliance with international standards, all applicable procedures should be reviewed regularly. During country visits, the Special Rapporteur has observed that some States are unable to provide information on cases where evidence had been excluded because it was found to have been obtained under torture, or the national provisions did not accurately reflect the exclusionary rule, or the measures to be taken by courts if evidence appears to have been obtained through torture or other ill-treatment, or the mechanisms in place by which evidence may be declared inadmissible. Though some national legislations do follow the standards set by the exclusionary rule, some do not.

25. In jurisdictions where independent medical examinations must be authorized by investigators, prosecutors or penitentiary authorities, these authorities have ample opportunity to delay authorization so that any injuries deriving from torture have healed by the time an examination is conducted. Additionally, these medical and forensic reports are often of such poor quality that they provide little assistance to judges or prosecutors when deciding whether to exclude statements. Some judges are willing to admit confessions without attempting to corroborate the confession with other evidence, even if the person recants before the judge and claims to have been tortured. In addition, sometimes cases submitted to the courts are based solely on confessions by the accused, and lack any material evidence, or judges establish prerequisites such as visible or recognizable marks for ruling that evidence obtained under torture or other ill-treatment was invalid. The Committee against Torture stated that physical marks or scar should not be a prerequisite for ruling the evidence obtained under torture was invalid.⁹ In addition, in order to show

⁷ GA res. 67/161, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2013), para.16; GA res. 3452 (XXX), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975), article 12; Matt Pollard, “*Rotten Fruit: State Solicitation, Acceptance and the Use of Information obtained through Torture by Another State*”, (2005) 23 NQHR, Vol.23/3, 349, at 357

⁸ Committee against Torture, General comment No. 2 (CAT/C/GC/2), para. 6;

⁹ CAT/C/SR.1024, para. 29

that evidence has not been obtained by torture, a court must rely on evidence other than the testimony of the investigating officer.¹⁰

26. Although the exclusionary rule is not expressly listed among the rules that apply both to torture and to cruel, inhuman or degrading treatment,¹¹ the Committee against Torture, as the authoritative interpreter of the Convention, has made it clear that statements and confessions obtained under all forms of ill-treatment must be excluded.¹² This ambiguity has led some courts to decide that the exclusionary rule does not apply when the ill-treatment that has resulted in a confession does not reach the gravity required for torture. The Human Rights Committee has authoritatively interpreted Article 7 of the ICCPR and found that the exclusionary rule applies to both torture and other ill-treatment.¹³ Similarly, the Committee against Torture in its General comment No. 2 has held that “articles 3 to 15 of the Convention are likewise obligatory as applied to both, torture and other ill-treatment (para. 6).”¹⁴ Also, the 1975 UN General Assembly Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment explicitly includes statements made under cruel, inhuman or degrading treatment or punishment.¹⁵

27. Some States have deemed evidence obtained in a third State as a result of torture or ill-treatment admissible as long as this evidence had been extracted without the complicity of the authorities. However, the exclusionary rule applies no matter where in the world the torture was perpetrated and even if the State seeking to rely on the information had no previous involvement in or connection to the acts of torture.¹⁶

28. The exclusionary rule applies not only where the victim of the treatment contrary to the prohibition of torture or other ill-treatment is the actual defendant but also where third parties are concerned. Such a conclusion is plainly intended by the wording of article 15, which provides that “any statement [...] in any proceedings” shall come within the scope of exclusion, and not just one given by the accused in a domestic court. The Committee against Torture, the European Court and the Inter-American Court of Human Rights have firmly ruled against the use of torture-tainted evidence extracted from third parties, regardless of whether such evidence may be used in domestic proceedings or in proceedings in a third state.¹⁷

29. The exclusionary rule extends not only to confessions and other statements obtained under torture, but also to all other pieces of evidence subsequently obtained through legal means but which originated in an act of torture.¹⁸ In some jurisdictions, this approach is

¹⁰ Swart and Fowkes, “*The regulation of Detention in the Age of Terror – Lessons from the Apartheid Experience*,” 126 S. African L. J. 780 2009

¹¹ Article 16

¹² Committee against Torture, General comment No. 2 (CAT/C/GC/2), para. 6

¹³ Human Rights Committee General comment No. 32 (2007), para. 41; see also Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cuba, 27 August to 7 September 1990, A/CONF.144/28/Rev.1 (1990); International Criminal Tribunal for the Former Yugoslavia, Second Annual Report, amendment to Rule 95, A/50/365-S/1995/728.

¹⁴ See also C. Inglese, *The UN Committee against Torture: and assessment*, Kluwer Law International: The Hague (2001), p. 365

¹⁵ Article 12

¹⁶ CAT/C/CR/33/3, para. 4

¹⁷ See e.g. *Kiti v. Morocco*, CAT/C/46/D/419/2010 (CAT); *El Haski v. Belgium*; Application no. 649/08, ECHR (2012), para. 85;

¹⁸ *Cabrera Garcia and Montiel Flores v. México*, IACHR (2010), Series C No. 220, para. 167 (including evidence obtained under duress)

called the “fruit of the poisonous tree” doctrine. There is no doubt that this includes real evidence obtained as a result of ill-treatment but falling short of torture.¹⁹

30. The admission of evidence, including real evidence obtained through a violation of the absolute prohibition of torture and other ill-treatment in any proceedings constitutes an incentive for law-enforcement officers to use investigative methods that breach these absolute prohibitions. It indirectly legitimizes such conduct and objectively dilutes the absolute nature of the prohibition.²⁰ The exclusionary rule is not limited to criminal proceedings but extends to the context of military commissions, immigration boards and other administrative or civil proceedings.²¹ Moreover, the use of the phrase “any proceedings” suggests that a broader range of processes are intended to be covered; essentially, any formal decision-making by State officials based on any type of information.²²

2. Burden of proof

31. It is of great concern that, in practice, the burden of proof on the admissibility of material obtained by torture or other ill-treatment in courts, seems to lie with the defendant rather than with the State, creating a real risk that such evidence is admitted in court because the individual is unable to prove that it was obtained under torture. The Special Rapporteur finds that the central question is the interpretation of the word “established” in article 15 of the Convention. In this context, it is necessary to have due regard for the special difficulties in proving allegations of torture, which is often practiced in secret, by experienced interrogators who are skilled at ensuring that no visible signs are left on the victim. In addition, all too frequently those who are charged with ensuring that torture or other ill-treatment does not occur are complicit in its concealment.

32. In the judgment *A and Others v. Secretary of State for the Home Department* the majority of the House of Lords agreed that evidence should be excluded from judicial proceedings if it is established, by means of diligent inquiries into the sources and on a balance of probabilities that the evidence invoked was in fact obtained by torture. However, three Law Lords, in a minority opinion, strongly rejected the test applied for the burden of proof preferred by the majority arguing that it placed a burden on the appellants that they can seldom discharge. They concluded that “it is inconsistent with the most rudimentary notions of fairness to blindfold a man and then impose a standard which only the sighted could hope to meet.”²³ Effectively denying detainees the standard of fairness and undermining the effectiveness of the Convention.

33. Indeed, this test in effect places the burden of proof on the appellant to put forward evidence that would satisfy the court that it is more likely than not that it was obtained under torture or other ill-treatment. The Special Rapporteur has held 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, and the burden of proof should shift to the prosecution and the Courts. The Committee against Torture has also consistently ruled that the burden of proof rests with the State stating that “the general

¹⁹ Human Rights Committee, General comment No. 32, para. 6; see also African Union’s Principles and Guidelines on the right to a fair trial and legal assistance in Africa, para. N 6 d i

²⁰ Malcolm D. Evans, “*All the Perfumes of Arabia*”: *The House of Lords and “Foreign Torture Evidence”*, *Leiden Journal of Law* (2006), 19, p. 1137

²¹ See e.g. *G.K. v. Switzerland*, CAT/C/30/D/219/2002, (CAT), para. 6.10

²² M. Pollard, *op. cit.*, at. 358

²³ *A and others v. Secretary of State for the Home Department* (No. 2) [2005] UKHL 71; see also A/61/259 (2006), paras. 57ff.

nature of [article 15] derives from the absolute nature of the prohibition of torture and therefore implies an obligation for each State party to ascertain whether or not statements included in an extradition procedure under its jurisdiction were made under torture. It is therefore for the State to investigate with due diligence whether there is a real risk that confession or other evidence was not obtained by lawful means, including torture or other ill-treatment.²⁴ Similarly, in the case of *El Haski v. Belgium* the European Court held that it will be necessary and sufficient for the complainant, if the exclusionary rule is to be invoked, to show that there is a “real risk” that the impugned statement was obtained under torture or other ill-treatment.²⁵ Similarly, the African Commission on Human and Peoples Rights held that “once a victim raises doubt as to whether particular evidence has been procured by torture or other ill-treatment, the evidence in question should not be admissible, unless the State is able to show that there is no risk of torture or other ill-treatment.”²⁶

3. Secret evidence and closed material procedures

34. There is a risk that the standard of proof applied to proceedings in which closed material is used is still much lower than in civil and criminal cases and the evidence in question may be heard in closed session from which the individual concerned and the legal representation of its own choice are excluded.

35. An increasing trend towards the use of secret hearings, “closed material procedures” and “secret evidence” can be observed. Further, there is a trend to extend the use of closed proceedings from military commissions and extradition proceedings to civil cases in which the Government considers that sensitive material should not be public because the disclosure would be damaging to national security and that the disclosure could potentially undermine the principle of confidentiality on which international intelligence-sharing arrangements are based. The definition of sensitive material is generally construed very broadly, meaning information which relates to, has come from or is held by the security and intelligence agencies.

36. The very secrecy of such evidence undermines the preventive element of the exclusionary rule. Wherever secret evidence is admitted there is an enhanced risk that evidence obtained by torture or other ill-treatment will be admitted, whether deliberately or inadvertently since such evidence cannot be challenged in open court.²⁷ In addition, much of the closed evidence used in cases which concern national security is heavily reliant on information from secret intelligence sources. Such evidence may contain second- or third-hand testimony or other material which would not normally be admissible in ordinary criminal or civil proceedings. Effective control of the implementation of the exclusionary

²⁴ *Kiti v. Morocco* (CAT), op. cit., at 8.8; A/61/259 (2006), para. 63 and 65; See also E/CN.4/2001/66/Add. 2, para. 169 (i) and para.102; E/CN.4/2001/66/Add.2; A/56/156 (2001) para. 39 (d); A/56/156, para. 39 (j); A/48/44/Add.1 (1993), para. 28; Human Rights Committee General comment No. 32 (2007), para. 41; E/CN.4/1999/61 Add. 1, para. 113 (e); *Cabrera García and Montiel Flores v. México* (IACHR), op. cit., para. 176

²⁵ *El Haski v. Belgium*, Application No. 649/08, ECHR (2012), para.. 88; see also *Othman (Abu Qatada) v. the UK*, Application no. 8139/09, ECHR (2012)

²⁶ *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*, Communication 334/06, ACHPR (2011); see also *Singarasa v. Sri Lanka*, CCPR/C/81/D/1033/2001 (2004), para. 7.4

²⁷ See e.g. *Mohamed et al. v. Jeppesen Dataplan, Inc.*, (no 08-15693), US Court of Appeals for the Ninth Circuit, 8 September 2010 (on 16 May 2011 the US Supreme Court declined to review the decision of the Ninth Circuit)

rule and assessment of the compatibility of the Government's conduct with the exclusionary rule in secret proceedings becomes difficult or even impossible²⁸

B. By executive agencies

1. State practice and the distinction between the use of tainted evidence in judicial proceedings and by executive agencies

37. Since the “war against terror” was launched more than a decade ago, executive agencies have been under extreme pressure to obtain information in order to protect their citizens. In this context, the executive use of information obtained by torture or other ill-treatment has been publicly condoned by some Governments. Other States assert that its executive agencies would share tainted evidence in “exceptional circumstances” in order to assure the effectiveness of their Executive agencies.

38. Such policies not only weaken the absolute prohibition of torture or other ill-treatment but also create a market for torture-tainted information. Inevitably, they raise the question of complicity in torture or other ill-treatment and require a reassessment of the overall responsibility of all States to prevent and discourage acts of torture and ill-treatment. States refuse to subject the work of their intelligence and security agencies to scrutiny or international oversight. Similarly, domestic courts follow this lead and reject motions to submit these executive practices to judicial review, even when the issue is the absolute prohibition of torture. This leads to the erroneous conclusion that executive collecting, sharing and receiving of torture-tainted information is not subject to international law.²⁹ There are numerous examples of the use of torture or other ill-treatment when there was no intention of using any information gained in subsequent legal proceedings in which it would a priori be subjected to scrutiny and exclusion, for instance administrative or preventive measures or sanctions against individuals of organizations.

39. There is a tendency to draw a clear distinction between the judicial and the executive use of tainted information by some domestic courts. The latter is often allowed, arguing inter alia that it does not impinge upon the liberty of individuals or that, when it does, – like in powers of arrest – it is usually of short duration. Alternatively, the argument refers to the “ticking-bomb scenario”, that executive agencies cannot be expected to close their eyes to information at the cost of endangering the lives of its citizens. In other words, courts tend to endorse the use of information acquired through torture or other ill-treatment by the executive agencies in all phases of operations except in judicial proceedings.³⁰ In fact, some courts have ruled that the executive agencies have no responsibility to examine the conditions under which of the information was obtained or to change its decisions accordingly or that it is not for the courts to discipline the executive agencies unless by way of a criminal prosecution and that its jurisdiction only exists to preserve the integrity of the trial process.

²⁸ CAT/C/GBR/Q/5/Add.1, (CAT), para. 30.5: The Government stated that it could not confirm or deny if evidence has been ruled inadmissible on the grounds that it was obtained through torture in proceedings where a closed material procedure has been used.

²⁹ See e.g. Gerald Staberock, *Intelligence and Counter-Terrorism: Towards a Human Rights and Accountability Framework?*, A. Salinas de Frias, K. Samuel and N. White, eds., Oxford University Press, (2012), 351, at 355; Association for the Prevention of Torture, *Beware the gift of poison fruit: sharing information with States that Torture*, (2014), p.6

³⁰ See e.g. *A and others v. SSHD (2005)*, *op. cit.*, at paras 69 and 149

2. The prohibition against torture and the obligation to prevent and discourage torture and other ill-treatment

40. The prohibition against torture and other cruel, inhuman or degrading treatment or punishment enjoys the enhanced status of a *jus cogens* or peremptory norm of general international law and requires States not merely to refrain from authorizing or conniving at torture or other ill-treatment but also to suppress, prevent and discourage such practices. States have not only the obligation to “respect”, but to “ensure respect” for the absolute prohibition against torture. In this context, the Human Rights Committee has authoritatively interpreted Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and found that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States shall take measures to prevent and punish acts of torture or other ill-treatment in any territory under their jurisdiction.³¹

41. Articles 2, paragraph 1 and 16, paragraph 1, of the Convention, as well as article 2 ICCPR oblige each State to take actions that will reinforce the prohibition against torture and other ill-treatment in its jurisdiction through legislative, administrative, judicial, or other actions that must, in the end, be effective in preventing it. States are obligated to adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture. The Committee against Torture has authoritatively held that the obligation to prevent torture and other ill-treatment under article 16, paragraph 1 of the Convention are indivisible, interdependent and interrelated. In addition, conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures to prevent torture must be applied to prevent ill-treatment.³²

42. Although articles 2, paragraph 1 and 16, paragraph 1 of the Convention, as well as article 2 ICCPR contain a jurisdictional limitation, it is clear that the obligation to take measures to prevent acts of torture or other ill-treatment includes actions the State takes in its own jurisdiction to prevent torture or other ill-treatment in another jurisdiction. In *Soering v United Kingdom* the European Court for Human Rights found that the extraditing State would be responsible for the breach, even where such treatment is subsequently beyond its control.³³ The prohibition against acts of torture and other ill-treatment requires States to abstain from acting within their territory and spheres of control in a manner that exposes individuals outside of their territory and control to a real risk of such acts. The fact that torture or other ill-treatment would occur outside the territory of the State in question and the direct control of the State does not relieve the State from responsibility for its own actions vis-à-vis the incident.³⁴ States have an international legal obligation to safeguard the rights of all individuals under their jurisdiction, which implies that they have a duty to ensure that foreign agencies do not engage in activities that violate human rights, including the prohibition against torture or other ill-treatment, on their territory as well as to refrain from participating in any such activities.³⁵ The International Court of Justice, in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, recognised that the jurisdiction of States is primarily territorial, but concluded that the ICCPR extends to “acts done by a State in the exercise of its jurisdiction outside of its own territory.”³⁶ Moreover, the *jus cogens* nature of the prohibition against

³¹ Human Rights Committee General comment No. 20 (1992), op. cit., para. 8

³² Committee against Torture, General comment No.2 (CAT/C/GC/2), paras. 3 and 17

³³ *Soering v United Kingdom*, (1989) 11 EHRR 439, para 88

³⁴ E/CN.4/2002/137, para. 14; M. Pollard, op. cit., at 370

³⁵ A/HRC/14/46, Practice 35, para. 50

³⁶ Advisory opinion, I.C.J. Reports 2004, para. 111

torture implies that states are under an obligation to refuse to accept any results arising from its violation by another state.³⁷

43. International law intends to bar not only actual breaches but also potential breaches of the prohibition against torture as well as any cruel, inhuman or degrading treatment or punishment and obliges States to put in place all those measures that may pre-empt the perpetration of torture.³⁸

44. The obligation to take effective preventive measures transcends the items enumerated specifically in the Convention. Article 2, paragraph 1, provides authority to build upon subsequent articles, 3 to 15 of the Convention, referring to specific measures known to prevent acts of torture and other ill-treatment and to expand the scope of measures required for such prevention. Thus, States must take effective preventive measures -- including by good faith interpretation of the existing provisions-- to eradicate torture and ill-treatment.³⁹

45. In this sense, the customary non-refoulement provision as contained in article 3 of the Convention is one obligation under the overarching aim to prevent torture and other ill-treatment. It contains the States' obligation not to return a person if there are substantial grounds for believing that he or she would be in danger of being subjected to torture, even outside of a States own territory and control. In the case *Soering v United Kingdom* the European Court of Human Rights ruled that even though the European Convention on Human Rights and Fundamental Freedoms does not contain a specific non-refoulement provision prohibiting the extradition of a person to another State where he would be subject or be likely to be subjected to torture or other ill-treatment, such obligation was already inherent in the general terms of the prohibition against torture by referring to the recognition of its absolute nature and its fundamental value for democratic societies.

46. The interpretation and extension of the prohibition against torture under the non-refoulement provision, provides important guidance regarding rules applicable to executive actions that purposely and objectively promote torture by taking advantage of its results. The non-refoulement obligation is a specific manifestation of a more general principle that States must ensure that their actions do not lead to risks of torture anywhere in the world. There is a clear negative obligation not to contribute to a risk of torture.

47. As mentioned earlier in this report, the exclusionary rule provides for an absolute prohibition in international law on the use of evidence obtained by torture or ill-treatment in any proceedings. It is considered a preventive measure, reasonably required to give effect to the absolute prohibition of torture and ill-treatment and the obligation to prevent and discourage such acts, alongside other provisions of the Convention and customary law. On the basis of the purpose and object of the exclusionary rule and in the general prohibition of torture and other ill-treatment, the exclusionary rule must be interpreted to apply much more widely, to include the activities of executive actors.⁴⁰ Information obtained by torture or other ill-treatment, even when not intended to be used in formal proceedings, must always be treated in the same way that a court would treat evidence obtained by illegal means and thus, be disregarded.⁴¹ Articles 2 and 16 of the Convention require States to

³⁷ Ibid., para. 159, 163; *A v. SSHD (2005)*, op. cit., para. 34

³⁸ International Criminal Tribunal for the Former Yugoslavia, *Furundzija*, (1998), IT-95-17/T10, para. 148; A/59/324, para. 27

³⁹ Committee against Torture, General comment No.2, (CAT/C/GC/2), para. 25

⁴⁰ A/ HRC/16/52, paras. 53-57; A/67/396, paras. 48-49.

⁴¹ See e.g. OSCE, *Human Rights In Counter-Terrorism Investigations: A Practical Manual For Law Enforcement Officers* (2013), p. 28

ensure the rights under the prohibition of torture and other ill-treatment. A failure to do so by permitting or failing to take appropriate measures or to exercise due diligence to prevent, investigate or punish acts of torture gives rise to a violation. This also applies to the judiciary in its role as custodian of the legality of State action. The acceptance and use of information outside of formal proceedings that was likely obtained by torture or other ill-treatment or the sharing of information that could lead to such acts constitutes a violation of the underlying general prohibition against torture and other cruel, inhuman or degrading treatment or punishment.⁴²

3. State responsibility and complicity in acts of torture and other ill-treatment

48. A violation of the prohibition against acts of torture or other ill-treatment and the obligation to prevent can be committed by active participation and acts of complicity in such acts. Article 4, paragraph 1, of the Convention refers to the individual criminal liability of a person for complicity or participation in torture. The Committee against Torture considered complicity to include acts that amount to instigation, incitement, superior order and instruction, consent, acquiescence and concealment.⁴³ It is clear that acquiescence as contained in article 1 of the Convention on the part of state officials is sufficient for the conduct of those officials to be attributed to the state and to lead to state responsibility for torture. Although not written explicitly, article 4, paragraph 1, of the Convention reflects an obligation on states themselves not to be complicit in torture, through the actions of their organs or persons whose acts are attributable to them.⁴⁴

49. In addition, State responsibility also derives from existing customary rules as codified in the Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts (Draft Articles). They confirm that no State should provide aid or assistance to another State in the commission of an internationally wrongful act⁴⁵ and should not recognize as lawful a situation created by a “serious breach” of its obligations under peremptory norms of international law and to cooperate to bring the breach to an end.⁴⁶ Therefore, if a State were to be torturing detainees, other States have a duty to cooperate to bring such a serious breach of the prohibition against torture to an end, and are required not to give any aid or assistance to its continuation.⁴⁷

50. According to article 4, paragraph 1, of the Convention, interpreted in line with international criminal law jurisprudence, “complicity” contains three elements: knowledge that torture is taking place; a direct contribution by way of assistance; and that it has a substantial effect on the perpetration of the crime. Thus, individual responsibility for complicity in torture arises also in situations where State agents do not themselves directly inflict torture or other ill-treatment but direct or allow others to do so, or acquiesce in it. In addition, orders from superiors or other public authorities cannot be invoked as a justification or excuse.⁴⁸

⁴² M. Pollard, op. cit., at 360

⁴³ CAT/C/SR.105

⁴⁴ A/HRC/13/42, para. 39-40; see also Sarah Fulton, *Cooperating with the enemy of mankind: Can States simply turn a blind eye to torture?*, IJHR, 16:5, 773, at 782

⁴⁵ Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session, in 2001, taken note of by the General Assembly in its resolution 56/83, Draft Articles 16-18

⁴⁶ Ibid., Draft Articles 40-41 on the Responsibility of States for Internationally Wrongful Acts

⁴⁷ A/67/396, para. 48; A/HRC/13/42, para. 42

⁴⁸ See e.g. Human Rights Committee, General Comment No. 20 (1992), op. cit., para. 3

51. Similarly, Draft Article 16 on the Responsibility of States for Internationally Wrongful Acts requires either the knowledge that the assistance is facilitating the wrongful act, or an intention to do so. Some domestic courts have applied a high threshold for State complicity by ruling that knowingly receiving and relying on information obtained by torture did not constitute complicity under international customary or treaty law if there was no direct encouragement of acts of torture.

52. However, responsibility of a State for complicity in torture or other ill-treatment by collecting, sharing or receiving tainted information shall be governed by a different standard, especially because for torture and other ill-treatment there is a clear universal and absolute prohibition of peremptory nature as well as an affirmative obligation to prevent. State responsibility is objective, and it results from a policy or practice of acquiescing in torture in this manner. In addition, the special rules defined by Draft Articles 40 and 41 on the Responsibility of States for Internationally Wrongful Acts referring to a “serious breach” of an “obligation arising under a peremptory norm of general international law” support the argument for a different, lower standard of intent for State complicity in torture.

53. 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 the information was obtained by torture or other ill-treatment, or ought to have been aware of the risk and did not take reasonable steps to prevent it.⁴⁹ Moreover, the Special Rapporteur finds that the assistance provided by States does not have to have a substantial effect on the perpetration of the crime of torture itself.

Systematic torture

54. Collecting, sharing or receiving information from a country that is known or ought to be known to torture in a widespread or systematic way, is turning a blind eye to what goes on and is tantamount to complicity in torture as it tacitly acknowledges the illegal situation and fails to prevent and discourage the use of torture. Systematic or widespread violations encompass torture as both a State policy and as a practice by public authorities over which a Government has no effective control. Thus, if a State is known to systematically torture detainees or specific categories of detainees, no State may actively collect, share or recognize information it receives from the agency as “lawfully obtained”, nor may it “passively” accept such information. In addition, collecting, sharing or receiving information from a State known or ought to be known to use torture on a wide or systematic way would also trigger State responsibility under Draft Article 41 on the Responsibility of States for Internationally Wrongful Acts. International Law Commission commentaries specify that the non-recognition obligation contained in Draft Article 41, paragraph 2 also prohibits acts which would imply such recognition.

55. Therefore, the Special Rapporteur finds the receiving States are responsible because their policy and practice serve to maintain the situation of illegality, which constitutes a serious breach of the peremptory norm prohibiting torture and other ill-treatment and is irreconcilable with the obligation *erga omnes* of States to cooperate in the eradication of torture.⁵⁰ Even if ultimately not used, and therefore not under scrutiny, the receipt of

⁴⁹ A/HRC/10/3, para. 55; A/67/396, para. 48; A/HRC/13/42, para. 39-40; see also See M. Pollard, op. cit., at 356

⁵⁰ S. Fulton, op. cit., at 777; A/HRC/10/3, para. 55

information tainted by torture or other ill-treatment involving countries with a poor human rights record condones torture or ill-treatment, makes it less likely that a State concerned speaks out against such practices and leads to State responsibility for complicity in torture and in the commission of internationally wrongful acts.

In other cases

56. In cases where there is no record of “systematic” torture, State responsibility is triggered if the State that collects, shares or receives the information knew or ought to have known that there was a real risk that it could lead to or was acquired through impermissible means in another State. Due diligence in making such a determination should be demanded from States that rely on information not gathered by its own agents. By accepting the information without investigating or questioning the manner in which it was extracted, the receiving State inevitably implies the “recognition of lawfulness” of such practices, even if the information is obtained only for operational purposes, and aids and assists the torturing State in maintaining impunity for the acts of torture.⁵¹ Even by receiving torture-tainted information once the receiving State does in fact encourage information from agencies that pursue investigations in violation of the framework of international human rights law. It creates a demand for torture-tainted information and elevates its operational use to a policy. In order to avoid complicity, executive agencies must assess the situation and rule out the existence of such a risk before interacting with foreign States. After-the-fact, acceptance and use of information likely obtained by torture or other ill-treatment constitute implicit recognition of the situation created by the torture or ill-treatment as lawful since it treats the information no differently than legally-obtained information.⁵²

Assurances

57. The invocation of “assurances” as a means to eliminate possible risk of torture or other ill-treatment are of great concern. In the context of the non-refoulement provision, the Special Rapporteur, the Committee against Torture and the Human Rights Committee have found that assurances from foreign services do not relieve the sending State from its responsibilities to prevent torture. Similarly, assurances by providers of information that torture or other ill-treatment was not involved in producing it are not sufficient to permit cooperation where a real risk is identified.⁵³ Promises of humane treatment given by governments that practice torture or ill-treatment are not reliable and do not provide an effective safeguard against the real risk of acts of torture or other ill-treatment on return. States that engage in torture or ill-treatment routinely deny and conceal its use and it is therefore difficult if not impossible for executive agencies to verify whether assurances are truthful. In addition, assurances are not legally binding or enforceable; and States concerned are unlikely to follow-up on assurances provided since verifying and acknowledging that the abuse has occurred means an admission for both countries that they are responsible for violations of the prohibition of torture.

58. While such findings have been made in the particular context of international transfers of detainees, the reasoning applies with equal force to collecting, sharing and receiving information by executive agencies and to the States’ obligation to prevent and discourage torture and other ill-treatment.

⁵¹ A/HRC/10/3, para. 55; M. Pollard, *op cit.*, at 376

⁵² *Ibid.*, at 377

⁵³ A/59/324, para. 31; A/60/316, para. 51; Commissioner for Human Rights of the Council of Europe, Comm DH (2004) 13, para.19

4. National Guidelines

59. In an attempt to regulate executive sharing and receiving information and in order to avoid allegations of complicity in acts of torture or other ill-treatment, States have adopted internal guidelines addressed to Executive agencies.

60. The Special Rapporteur welcomes recent initiatives by some States to establish and publish guidelines for intelligence services and commitments made not to participate in, solicit, encourage or condone the use of torture or other ill-treatment for any purpose, to the extent that they accord with States' international legal obligations.⁵⁴ However, some aspects of published guidelines fall short of standards required by the prohibition of torture and other ill-treatment. If a real risk of torture or ill-treatment is detected, a State must not proceed to work with a foreign agency. Any discretion afforded in the guidelines to executive actors to proceed to work despite a real risk of torture or ill-treatment is incompatible with the State's obligation under the prohibition of torture. In addition, no distinction between torture and other ill-treatment should be made. Likewise, the excuse of exceptional circumstances contained in some national guidelines is inconsistent with the prohibition of torture and other ill-treatment.⁵⁵

5. Effective oversight

61. While normative guidelines must be developed, and clarified where they exist, additional safeguards may be taken into consideration to encourage compliance with international law when using information that may be obtained by torture or other ill-treatment.

62. There is currently a lack of comprehensive or effective independent oversight of the activities of the security and intelligence services. The structure of oversight mechanisms to guarantee non-use of information tainted by torture or other ill-treatment is of crucial importance, particularly in relation to cooperation between agencies. Any action by intelligence services should be governed by law, which in turn should be in conformity with international law and standards.

IV. Conclusions and recommendations

A. Conclusions

Judicial branch

63. The exclusionary rule is fundamental for upholding the prohibition of torture and other ill-treatment by providing a disincentive to use such acts. The rule forms a part of the general and absolute prohibition of torture and other ill-treatment. As such, the exclusionary rule is not derogable under any circumstances and does also apply to States that are not party to the Convention.

64. Inadmissibility of unlawfully obtained confessions and other tainted evidence is not only one of the essential means of preventing torture and other ill-treatment but is also crucial to fair trial guarantees. The ineffectiveness of efforts to put an end to the

⁵⁴ See UK Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees, July 2010; Ministerial Direction to Canadian Security Intelligence Service (CSIS): Information sharing with foreign entities, published in 2011.

⁵⁵ See e.g. CAT/C/CR/33/3, para. 4

practice of torture or other ill-treatment is often the result of the fact that State authorities continue to admit tainted evidence during trials.

65. The quality of medical and forensic reports needs to be improved and courts shall enhance the admissibility of independent and impartial medical evidence in any proceedings in order to effectively investigate allegations of torture or other ill-treatment. In addition, courts should never admit extra-judicial confessions that are not corroborated by other evidence or that have been recanted.

66. The exclusionary rule covers the exclusion of statements obtained through torture or other ill-treatment of the defendant himself or of a third party as well as evidence obtained in a third state, even if the State seeking to rely on the information had no previous involvement in or connection to the acts of torture or other ill-treatment. Similarly, documentary or other evidence obtained as a result of acts of torture or other ill-treatment must be excluded, irrespective of whether such evidence was corroborated or not the only decisive evidence in the case.

67. The Special Rapporteur holds that the defendant must only advance a plausible reason why the evidence may have been procured by torture or other ill-treatment. Thereafter the burden of proof must shift to the State and the courts must 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.

68. It is incumbent on States to go beyond the literal remit of article 15 of the Convention, and provide in domestic legislation procedures for the exclusion of any and all evidence obtained in violation of safeguards designed to protect against torture and other ill-treatment.⁵⁶

69. Secret proceedings or “closed material procedures” inhibit the implementation of the exclusionary rule. States should implement effective legal representation and control of the implementation of the exclusionary rule in all proceedings involving secret evidence, closed material procedures or the invocation of the “state secrets doctrine” in order to enable the defendants effectively to challenge evidence, including evidence from the security services. There should be no state secret excuses for human rights violations.

70. The Special Rapporteur observes that in practice, the transition from an executive operation to a quasi-judicial or judicial one is often seamless, and that operational intelligence is often relied on in legal proceedings that follow.⁵⁷ By utilizing tainted information originally obtained for intelligence and policing purposes the courts tacitly endorse and condone the torture or ill-treatment itself, contradicting the very essence of the exclusionary rule.

Executive branch

71. While being aware of the threats posed by terrorism and the duty of States to protect their people against such threats, the Special Rapporteur reiterates that the absolute nature of the prohibition of torture and other ill-treatment means that no exceptional circumstances whatsoever may be invoked as a justification for torture or other ill-treatment.

⁵⁶ Principle 27, UN Body of Principles for the Protection of All Persons under Any Form of Detention of Imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, A/43/49 (1988).

⁵⁷ See also: ICJ, *Assessing Damage, Urging Action*; Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights (Geneva, 2009), p.85.

72. To allow exceptions by the executive branch for purposes other than legal proceedings or to find other uses for their outcomes is plainly against the spirit of the Convention, the International Covenant on Civil and Political Rights and other treaties and standards, against the obligation to prevent torture and other ill-treatment and against the absolute prohibition of torture and other ill-treatment.

73. The Special Rapporteur is of the opinion that the aim to prevent and discourage torture and other ill-treatment, by rendering their product useless in legal proceedings is one strong policy objective of the exclusionary rule. If executive agencies are free to use information obtained by torture or other ill-treatment for other purposes, this constitutes an incentive to torture or ill-treatment in clear contradiction to the object and purpose of the absolute prohibition of such acts, including during interrogation. There is a clear affirmative obligation to prevent torture and ill-treatment that includes actions the State takes in its own jurisdiction to prevent torture or other ill-treatment in another jurisdiction. Thus, an interpretation focused on the objective of the norm demands that the collecting, sharing and receiving of tainted information be banned, because otherwise the purpose of preventing and discouraging torture and other ill-treatment is negated. It is not sufficient to ensure that the judicial process is free from the taint of torture; torture must not be encouraged, condoned, or acquiesced in all manifestations of public power, executive and judicial.

74. Therefore, the standards of the exclusionary rule should be interpreted in good faith and applied by way of analogy to the collecting, sharing and receiving of torture-tainted information, including information obtained by other ill-treatment, even if not used in “proceedings” narrowly defined.

75. Governments cannot condemn the evil of torture and other ill-treatment at the international level while condoning it at the national level. It is hypocritical of States to condemn torture committed by others while accepting its products. Any use of torture-tainted information, even if the torture has been committed by agents of another State, is an act of acquiescence in torture that compromises the user State’s responsibility and leads to individual and State complicity in acts of torture. Complicity in torture is a direct breach of international human rights obligations under the Convention, the International Covenant on Civil and Political Rights, other human right and international humanitarian law treaties as well as under customary international law and according to the general principles of State Responsibility for internationally wrongful acts.

76. The collection, sharing and receiving of information with States where there is a real risk of torture or other ill-treatment suffice to demonstrate State responsibility through complicity. States have to assess the situation and the possible real risk of acts of torture or other ill-treatment and must refrain from “automatic reliance” on the information from intelligence services of other countries, which is incompatible with the object and purpose of the absolute prohibition of torture and other ill-treatment and the obligation to prevent and discourage torture and other ill-treatment.⁵⁸

77. This applies in particular to situations of systematic torture where the State cannot avoid knowledge or imputed knowledge of the real risk of such acts and other situations in case it cannot be established that there is no such risk. In cases of systematic torture, the receiving State must presume that the information is a product of torture and therefore refrain from collecting, sharing or receiving such tainted

⁵⁸ See e.g. CAT/C/DEU/CO/5, para. 31; CAT/C/DEU/QPR/6, para. 38

information. Non-compliance with those principles makes the State complicit in acts of torture or other ill-treatment and responsible for an internationally wrongful act.

78. Therefore, torture-tainted information, even when not intended to be used in court proceedings, must be treated in the same way that a court would treat evidence obtained by torture or other ill-treatment. The Special Rapporteur reiterates that every use of torture-tainted information is encouragement of torture or ill-treatment after the fact, and therefore establishes complicity in such acts and a failure to prevent the next round of torture or other ill-treatment.

79. States cannot resort to diplomatic assurances as a safeguard against torture or other ill-treatment where there is a real risk of such acts. Such assurances are incapable of mitigating the responsibility of the State that relies on the information so obtained.

80. Executive agencies should be governed by detailed guidelines to avoid complicity in such acts and reflect all international standards required by the prohibition of torture and other ill-treatment.

81. To ensure accountability in intelligence cooperation, truly independent intelligence review and oversight mechanisms should be established and enhanced. The Special Rapporteur commends the guidelines proposed by the Special Rapporteur on human rights while encountering terrorism in his 2010 report A/HRC/14/46⁵⁹ as a starting point for further development.

B. Recommendations

82. Regarding the use of torture-tainted information in any proceedings, all States shall:

(a) Reaffirm the absolute and non-derogable nature of the exclusionary rule;

(b) Review criminal investigation practices to promote professional standards and eliminate confessions as the primary or sole evidence necessary for a prosecution;

(c) Ensure that legislation concerning evidence presented in any proceedings is brought into line with the exclusionary rule in order to exclude explicitly and declare inadmissible any evidence or extrajudicial statement obtained under torture or other ill-treatment at any state of any proceedings, irrespective of the classification of treatment as torture or other cruel, inhuman or degrading treatment or punishment;

(d) Ensure that the exercise of discretion by national authorities in circumstances where torture or other cruel, inhuman or degrading treatment or punishment is alleged is prohibited;

(e) Ensure that the use of real or other evidence obtained as an indirect result of acts of torture or other cruel, inhuman or degrading treatment or punishment is prohibited and excluded from any proceedings;

⁵⁹ Principles 31-35

(f) Clarify the procedural rules on admissibility, including the burden of proof applied by courts; by ensuring that:

(i) the burden of proof shall be shifted to the State; when

(ii) the appellant advances a plausible reason why evidence may have been procured by torture or other cruel, inhuman or degrading treatment or punishment; and that

(iii) the court shall inquire as to whether there is a real risk that the evidence has been obtained by torture or other cruel, inhuman or degrading treatment or punishment, and if there is, the evidence must not be admitted;

(g) Ensure that in order to show that evidence has not been obtained by torture or other cruel, inhuman or degrading treatment or punishment, a court must rely on evidence other than the testimony of the investigating officer and further enhance the admissibility of independent and impartial medical evidence;

(h) Ensure that closed material procedures comply with the exclusionary rule and enable the individual effectively to challenge admissibility of evidence, including evidence from the security services;

(i) Elaborate a rule that protects legitimate state secrets adequately and at the same time does not prevent a thorough examination of whether torture or other cruel, inhuman or degrading treatment or punishment has taken place.

83. Regarding the use of torture-tainted information by executive actors, all States shall:

(a) Submit all actions by the executive branch of government, including collecting, sharing and receiving information to independent and impartial review under the States' obligations under the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment, including the obligation to prevent and discourage torture and other ill-treatment;

(b) Ensure that if States request foreign intelligence services to undertake activities on their behalf, all legal standards regarding the absolute prohibition of torture or other cruel, inhuman or degrading treatment or punishment shall apply;

(c) Reiterate that no exceptional circumstances may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment;

(d) Restrain from creating a market for the fruits of illegal and abhorrent interrogation practices by collecting, sharing or receiving information obtained by torture or other cruel, inhuman or degrading treatment or punishment;

(e) Interpret the standards outlined by the exclusionary rule in a goal-oriented approach and apply by way of analogy to the collecting, sharing and receiving of information obtained by torture or other cruel, inhuman or degrading treatment or punishment even if not used in "proceedings" narrowly defined;

(f) Take positive preventive measures to ensure that the relationships between executive agencies of different States do not encourage or lead to torture or other cruel, inhuman or degrading treatment or punishment; inter alia by:

(i) Establishing requirements in intelligence-sharing agreements that information obtained in violation of the prohibition of torture or other cruel, inhuman or degrading treatment or punishment be withheld;

(ii) Establishing requirements in intelligence-sharing agreements that only States that comply with the all obligations under the prohibition of torture or other cruel, inhuman or degrading treatment or punishment be part of intelligence-sharing agreements.

(g) Presume that, in cases of information originated in countries where torture is a systematic or widespread practice, the information collected or received is a product of torture other cruel, inhuman or degrading treatment or punishment;

(h) Restrain from collecting, sharing or receiving information even if there is no pattern of systematic torture, if it is known or should be known that there is a real risk of acts of torture or other cruel, inhuman or degrading treatment or punishment; and ensure that opposition to such treatment is clearly communicated to the providing State;

(i) Ensure that assurances from foreign services are not regarded as sufficient to avoid complicity or to permit cooperation where a real risk of torture or other cruel, inhuman or degrading treatment or punishment is identified;

(j) Stress that national guidelines must strictly abide by the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment and the resulting ban on any use of information obtained by torture or other cruel, inhuman or degrading treatment or punishment;

(k) Elaborate more comprehensive guidelines at the national level reflecting international law and standards contained in the absolute prohibitions against torture and other cruel, inhuman or degrading treatment or punishment; including:

(i) Refraining from differentiating between torture and other cruel, inhuman or degrading treatment or punishment in accordance with international law;

(ii) Refraining from providing an excuse in the event of exceptional circumstances for using or sharing information which leads to torture or other ill-treatment.

(l) Provide effective, impartial and independent oversight of the intelligence services.
