3 October 2014

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House Canberra ACT 2600

Dear Secretary

Submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the "Foreign Fighters Bill")

Thank you for this opportunity to make a submission to the PJCIS Inquiry into the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill* 2014.

I have not had sufficient time to prepare comprehensive submissions on the many aspects of the *Foreign Fighters Bill* that, in my view, should be addressed. Given the many intrusions on civil liberties that this Bill will permit once it becomes an act of Parliament, the time allocated for public comment is grossly inadequate.

In light of this, my submission is limited to one area of particular concern. It addresses the legislative amendment proposed in Schedule 1 (main counter-terrorism amendments) of the *Foreign Fighters Bill*, which seeks to amend the *Foreign Evidence Act 1994* (Cth). This legislative amendment is designed to enable "material received from foreign countries on an agency-to-agency basis (i.e. through police channels or intelligence channels) to be adduced in terrorism-related proceedings."[1] My submission argues that the exception to admissibility contained in section 27D(2) of the *Foreign Fighters Bill*, in its current form, is unsatisfactory and does not fully discharge Australia's obligations under international law. It does not adequately protect against the use of information tainted by torture and ill-treatment in terrorism-related proceedings. In fact, it leaves open the very real risk that evidence obtained as a result of torture will be deemed admissible. It is, for this reason, that I ask the PJCIS to give careful consideration to my recommendations.

My submission is largely informed by the conclusions and recommendations contained in the most recent report of the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, hereinafter referred to as the Special Rapporteur. The Special Rapporteur is a highly qualified and independent expert who is mandated by the United Nations to examine questions relevant to torture. This report, which is **annexed** to my submission, was submitted to the United Nations Human Rights Council on 10 April 2014. In my view, paragraphs [17] to [83] of the report warrant careful consideration by the PJCIS as this section includes a very comprehensive chapter on the

[1] Explanatory Memorandum to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, [242].

obligations owed by States with respect to the admission of evidence tainted by torture and ill-treatment in terrorism-related proceedings. For your convenience, I will also refer to the pertinent extracts of the report in my submission.

Overview of the *Foreign Evidence Act 1994* (Cth) and proposed reforms under the *Foreign Fighters Bill 2014*

Currently, the *Foreign Evidence Act 1994* (Cth) regulates the admission of foreign material in Australian judicial proceedings. In particular, Part 3 of the Act specifies the procedure that must be carried out when collecting overseas evidence and the rules relating to the admissibility of such evidence. I share the Independent National Security Legislation Monitor's (INSLM) concerns that are expressed in his Fourth Report relating to the serious operational constraints imposed on the Australian Federal Police in collecting evidence overseas for prosecution in terrorism-related proceedings. I also accept that the procedure detailed in Part 3 of the *Foreign Evidence Act 1994* (Cth) can, in some circumstances, be impractical. This is particularly so when dealing with countries in the midst of armed conflict, and with a government that is not recognized by the Australian government (as is the case in Syria). Therefore, in principle, I support Recommendation IV/1 [2] and Recommendation IV/2[3] contained in the Fourth Report of the INSLM. Similarly, I support, in principle, the reasons for amendment outlined in the Explanatory Memorandum.

I do, however, take issue with the proposed amendments to the *Foreign Evidence Act 1994* (Cth) as they exist in their current form. My particular concern relates to the "exception to admissibility" contained in section 27D(2) of Part 3A. This exception is designed to replicate the international prohibition against the use of information tainted by torture or ill-treatment. This exclusionary rule exists for several reasons. The rule is a preventive measure that forms part of the general and absolute prohibition of torture and other ill-treatment by removing the incentive to engage in such abhorrent acts. It also exists to protect the accused's procedural right to a fair trial because information tainted by torture is inherently unreliable.[4] While section 27D(2) purports to fully discharge Australia's obligations under international law, the proposed formulation does not go far enough. The deficiencies with section 27D(2) that I identify in my submission relate to: the scope of the exclusionary rule; the burden of proof; the use of evidence obtained as an indirect result of acts of torture or other cruel, inhuman or degrading treatment or punishment; and the admission of extrajudicial confessions that are not corroborated by other evidence, or that have been recanted.

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[2] Recommendation IV/1: Consideration should be given to amending the Surveillance Devices Act[96] to enable the Attorney-General to waive the requirement for the consent of an "appropriate consenting official" in the authorization and use of surveillance devices. The Attorney-General would need to be satisfied that it would be reasonably unlikely that the consent of an "appropriate consenting official" could be obtained as a matter of practicability. Appropriate amendments would need to be made to section 43 of the Surveillance Devices Act to enable the admission of the evidence into an Australian court proceeding where the court is satisfied that an Attorney-General's certificate was in place.

[3] Recommendation IV/2: Consideration should be given to examining the merits of amendments to the Evidence Act 1995 and the Foreign Evidence Act 1994 so as to permit the collection of information and its admission into evidence, from foreign countries, where political circumstances or states of conflict render impracticable the making of a request of the government of that country for assistance in gathering evidence.

[4] Tobias Theinel, "The Admissibility of Evidence Obtained by Torture under International Law", (2006) *The European Journal of International Law Vol.* 17 (2),

In summary, my recommendations are as follows:

1. The exclusionary rule must extend to include ill-treatment such as cruel, inhuman or degrading treatment or punishment;
2. The exclusionary rule must 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 also deemed inadmissible;
3. The burden of proof should be such that the State (not the accused) must prove that there is no "real risk" that evidence to be adduced in terrorism-related proceedings was obtained as a result of torture;
4. Extrajudicial confessions that are not corroborated by other evidence, or that have been recanted, should never be admissible under section 27(2).

Recommendation 1: The scope of the exclusionary rule

The Foreign Fighters Bill's proposed amendment to Section 27D(2) of the *Foreign Evidence Act 1994* (Cth):

"*foreign material or foreign government material is not admissible if the court is satisfied that the material, or information contained in the material, was obtained* ***directly*** *as a result of* ***torture or duress*** *by a person…"*

My recommendation:

The wording of section 27D(2) should be amended so that the exclusionary rule also applies to the use of information obtained as a result of ill-treatment such as cruel, inhuman or degrading treatment or punishment.

The wording of Section 27D(2) seems to suggest that the exclusionary rule will only be triggered when the court is satisfied that the evidence was obtained **directly** as a result of **torture or duress.**[5] However, the exclusionary rule, under international law, is not limited to acts of torture. It also includes other ill-treatment such as cruel, inhuman or degrading treatment or punishment. In support of this statement, I refer to the annexed report of the Special Rapporteur where he notes:

> **[17] some [States] 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.
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> …
>
> [26] Although the exclusionary rule is not expressly listed among the rules that apply both to torture and to cruel, inhuman or degrading treatment,[6] **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.**[7] That 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 International Covenant on Civil and Political Rights and found that the exclusionary rule applies to both torture and other ill-treatment.**[8] Similarly, the **Committee against Torture** in its general comment

[5] Torture and duress being defined in the Foreign Fighters Bill at subsection 3(1) and section 27D(3) respectively). The Explanatory Memorandum to the *Foreign Fighters Bill* at [1016]-[1019] informs us that Section 27D(3) defines torture consistently with Article 1(1) of the Convention Against Torture.

[6] Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[7] Committee against Torture, general comment No. 2, para. 6.

[8] Human Rights Committee general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 41. See also the Guidelines on the Role of Prosecutors (A/CONF.144/28/Rev.1) and the

> No. 2 (para. 6), has **held** that **"articles 3 to 15 of the Convention are likewise obligatory as applied to both torture and other ill-treatment"**[9] and article 12 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment explicitly excludes statements made under cruel, inhuman or degrading treatment or punishment.
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> [Own emphasis added]

The amendment that I have recommended would also comport with the following conclusion and recommendation of the Special Rapporteur:

> **A. Conclusions**
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> **…**
>
> **[68] It is incumbent on States to go beyond the literal remit of article 15 of the Convention and provide procedures in domestic legislation for the exclusion of any and all evidence obtained in violation of safeguards designed to protect against torture and other ill-treatment.**[10]
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> **B. Recommendations**
>
> **[82] Regarding the use of information tainted by torture in any proceedings, all States should:**
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> **…**
>
> **(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 stage of any proceedings, irrespective of the classification of that treatment as torture or other cruel, inhuman or degrading treatment or punishment;**

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second annual report of the International Criminal Tribunal for the Former Yugoslavia, (A/50/365-S/1995/728), para. 26, footnote 9, on the amendment to rule 95 of the rules of procedure and evidence.

[9]See also Chris Ingelse. *The UN Committee against Torture. An Assessment*, (The Hague, Kluwer Law International, 2001), p. 365.

[10]See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 27.

Recommendation 2: The admissibility of real or other evidence obtained as an indirect result of acts of torture or other cruel, inhuman or degrading treatment or punishment

The Foreign Fighters Bill's proposed amendment to Section 27D(2) of the *Foreign Evidence Act 1994* (Cth):

*"foreign material or foreign government material is not admissible if the court is satisfied that the material, or information contained in the material, was obtained **directly** as a result of **torture or duress** by a person…"*

My recommendation:

The word "directly" must be removed from section 27D(2) to ensure that all evidence obtained as an indirect result of acts of torture or other cruel, inhuman or degrading treatment or punishment is excluded from any proceedings.

Under the proposed wording of section 27D(2), it appears as though only evidence that "was obtained **directly** as a result of **torture or duress** by a person" is inadmissible, however, this is not the case under international law and in other jurisdictions. According to the United Nations Special Rapporteur:

> **[28] 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.[11]** In some jurisdictions, this approach is 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.[12]
>
> **[29] 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 those absolute prohibitions. It indirectly legitimizes such conduct and objectively dilutes the absolute nature of the prohibition.[13]** The exclusionary rule is not limited to criminal proceedings but extends to military commissions, immigration boards and other administrative or civil proceedings.[14] Moreover, the use of the phrase "any proceedings" suggests that a broader range of processes is intended to be covered; essentially, any formal decision-making by State officials based on any type of information.[15]

[11] *Cabrera García and Montiel Flores v. México*, Inter-American Court of Human Rights, Series C, No. 220, judgement of 26 November 2010, para. 167 (including evidence obtained under duress).
[12] Human Rights Committee, general comment No. 32, para. 6; see also African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, section N, para. 6 (d) (i).
[13] Malcolm D. Evans, "'All the perfumes of Arabia': the House of Lords and 'foreign torture evidence'", *Leiden Journal of Law* vol. 19, No. 4 (December 2006).
[14] See e.g. *G.K. v. Switzerland*, Committee against Torture, communication No. 210/2002, para. 6.10.
[15] See "Rotten fruit: State solicitation, acceptance and the use of information obtained through torture by another State", p. 358.

[Own emphasis added]

My recommendation will also comport with the following recommendation of the Special Rapporteur:

> **Recommendations**
>
> **[82] - Regarding the use of information tainted by torture in any proceedings, all States should:**
>
> **…**
>
> **(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.**

Recommendation 3: The burden of proof should be such that the State (not the accused) must prove that there is no "real risk" that evidence was obtained as a result of torture

The Foreign Fighters Bill's proposed amendment to Section 27D(2) of the *Foreign Evidence Act 1994* (Cth):

*"foreign material or foreign government material is not admissible **if the court is satisfied** that the material, or information contained in the material, was obtained **directly** as a result of **torture or duress** …"*

Recommendation:

In accordance with the recommendation of the Special Rapporteur, section 27(D)(2) should be clarified to make explicit that the burden of proof is shifted to the State as soon as the accused advances a plausible reason as to why evidence may have been procured by torture or other cruel, inhuman or degrading treatment or punishment.

Furthermore, the court must enquire 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, then the evidence must not admitted.

The wording of section 27D(2) that requires the court to be **"satisfied"** the material seeking to be adduced before the court was obtained **"directly as a result of torture or duress"** appears to place a high burden of proof on the admissibility of such material on the accused rather than with the State. This is a burden that the accused would, in almost all cases, never be able to satisfactorily discharge. This is a fact that has also been acknowledged by the Special Rapporteur, the Committee against Torture (the authoritative body charged with the interpretation of the United Nations Convention Against Torture) and judicial bodies in other jurisdictions.

Paragraph [1015] of the Explanatory Memorandum states that section 27D(2) fulfils the following requirement under Article 15 of the Convention Against Torture:

> Each State Party shall ensure that any statement which is **established** to have been made as a result of torture shall not be invoked as evidence in any proceedings.

According to the Special Rapporteur, when interpreting the word 'established' in Article 15 of the CAT, States must have due regard for the difficulties associated with proving allegations of torture:

> **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 practised 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 their judgment on the case of *A and others v. Secretary of State for the Home Department*, a 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",[16] thereby 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 to satisfy the court that it is more likely than not 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 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 a confession or other evidence was not obtained by lawful means, including torture or other ill-treatment.**[17] Similarly, in the case of *El Haski v. Belgium*, the European Court of Human Rights held that it would be necessary and sufficient for the complainant, if the exclusionary rule were to be invoked, to show that there was a "real risk" that the impugned statement was obtained under torture or other ill-treatment.[18] 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

[16] *A and others v. Secretary of State for the Home Department*, United Kingdom, House of Lords 71, judgement of 8 December 2005, para. 59 and see also A/61/259, paras. 57–65.
[17] *Ktiti v. Morocco*, para. 8.8 and A/61/259, paras. 63 and 65. See also E/CN.4/2001/66/Add. 2, paras. 102 and 169 (i); A/56/156 para. 39 (d) and (j); A/48/44/Add.1, para. 28; Human Rights Committee general comment No. 32, para. 41; E/CN.4/1999/61 Add. 1, para. 113 (e); *Cabrera García and Montiel Flores v. México*, para. 176.
[18] *El Haski v. Belgium*, para. 88; see also *Othman (Abu Qatada) v. the United Kingdom*, application no. 8139/09, European Court of Human Rights, judgement of 17 January 2012.

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".[19]

[Own emphasis added]

The proposed amendment will take into account the following recommendations of the Special Rapporteur:

Recommendations

[82] - Regarding the use of information tainted by torture in any proceedings, all States should:

…

f) Clarify the procedural rules on admissibility, including the burden of proof applied by courts, by ensuring that the burden of proof is shifted to the State when the appellant advances a plausible reason as to why evidence may have been procured by torture or other cruel, inhuman or degrading treatment or punishment; and that the court enquires 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, that the evidence is not 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;

[19] *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt,* communication No. 334/06, African Commission on Human and Peoples' Rights, March 2011. See also *Singarasa v. Sri Lanka*, communication No. 1033/2001, para. 7.4.

Recommendation 4: Extrajudicial confessions

Recommendation:
An exclusionary rule should be inserted into section 27D that provides that extrajudicial confessions that are not corroborated by other evidence, or that have been recanted, should never be admissible in judicial proceedings.

Article 27D does not provide any safeguards against the admission of extrajudicial confessions that are not corroborated by other evidence or that have been recanted. This means that they will be deemed admissible and a judge will likely direct the jury on the weight to be accorded to such a confession. The Special Rapporteur has noted:

> **[23] 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 Code of Conduct for Law Enforcement Officials and the 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 his country visits, the Special Rapporteur has observed that some States are unable to provide information on cases where evidence has been excluded because it was either found to have been obtained under torture, or the national provisions did not accurately reflect the exclusionary rule by, for example, not defining the measures to be taken by courts if evidence appears to have been obtained through torture or other ill-treatment, or by not putting the mechanisms in place by which evidence may be declared inadmissible. The legislation of some countries does meet the standards set by the exclusionary rule, but that is not true of all countries.**

I submit that section 27D should also be amended in accordance with the following conclusion of the Special Rapporteur:

> **Conclusions**
>
> 1. Judicial Branch.
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> **…**
>
> **[65]** The quality of medical and forensic reports needs to be improved and courts should enhance the admissibility of independent and impartial medical evidence in any proceedings, in order to investigate allegations of torture or other ill-treatment effectively. **In addition, courts should never admit extrajudicial confessions that are not corroborated by other evidence, or that have been recanted.**

Yours sincerely,

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The views and opinions expressed in this submission are those of the author and do not reflect the official policy or position of any of the organizations she is affiliated with.

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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 in upholding the prohibition of torture and other cruel, inhuman or degrading treatment or punishment by providing a disincentive to carry out such acts.

The present report identifies State practices in this regard 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 of torture and other ill-treatment and the obligation of the State to prevent and discourage such acts. 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 should be reviewed under the absolute prohibition of torture and that the standards contained in the exclusionary rule should apply, by analogy, to the collecting, sharing and receiving of information by executive actors.

* Late submission.

Contents

I. Introduction

1. The present report is submitted to the Human Rights Council in accordance with Council resolution 16/23.

2. The report of the Special Rapporteur on his visit to Ghana is contained in document A/HRC/25/60/Add.1. Document 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 communications reports of special procedures mandate holders (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 the period 2014–2015 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 the Anti-Torture Initiative at the Center for Human Rights and Humanitarian Law at American University Washington College of Law, plans to conduct follow-up visits to Tunisia and Morocco in 2014.

4. The Special Rapporteur has reiterated his request for an invitation from 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 prisons in the United States, 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 to the Government to suggest new dates. That request is still pending.

B. Highlights of key presentations and consultations

6. On 18 October 2013, the Special Rapporteur held a dialogue with the families of 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 entitled “Review of the Standard Minimum Rules for the Treatment of Prisoners”. He also met with representatives of the Permanent Missions 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 Guantanamo 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 by executive agencies of information tainted by torture, organized by the Association for the Prevention of Torture in Geneva, Switzerland.

10. On 5 November 2013, the Special Rapporteur met with the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in Strasbourg, France.

11. From 8 to 14 November 2013, the Special Rapporteur conducted a visit to Ghana 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 Committee against Torture and the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Geneva.

13. On 9 December 2013, the Special Rapporteur gave a keynote speech on the theme: "What steps can the international community take to eradicate torture?" at the fifth annual Baha Mousa memorial lecture in London.

14. From 10 to 12 February 2014, the Special Rapporteur conducted a follow-up visit to 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 to the Subcommittee on the Constitution, Civil Rights and Human Rights of the Senate Judiciary Committee and attended the second hearing on solitary confinement of the Subcommittee, held in Washington, D.C.

16. On 28 February 2014, the Special Rapporteur welcomed the publication entitled "Torture in health-care settings: reflection on the Special Rapporteur on Torture's 2013 thematic report" published by the Center for Human Rights and Humanitarian Law.

III. Use of information tainted by torture and the exclusionary rule

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 carry out 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 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.

[1] The rule does provide a limited exception: where a person is prosecuted for torture, a statement may be admitted as proof that that statement was made. However, commentators have observed that the wording does not in fact demonstrate an exception, since in proceedings against a person accused of torture, a confession is not admitted to show that it is true, but simply that it was made. See J. Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture. A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, Netherlands, Martinus Nijhoff Publishers,1988), pp. 147–148.

18. Of particular concern are attempts to undermine the prohibition of torture or other ill-treatment by using tainted statements outside of "proceedings", narrowly defined, for other purposes, such as intelligence gathering or covert operations. Cooperation in sharing intelligence between States has expanded significantly in the fight against terrorism[2] and some police, security and intelligence agencies (collectively, 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 led to further abuse of individuals. The practice by executive agencies of using information obtained by torture or other ill-treatment outside court proceedings must be examined to ensure that 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 the cardinal principles necessary for preventing and suppressing torture and other ill-treatment.

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

A. Use of information tainted by torture and the exclusionary rule 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 is derived from, the general and absolute prohibition of torture and other ill-treatment.[3] In article 12 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (resolution 3452 (XXX)), the General Assembly expressly stated 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. 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 the rights of due process and a fair trial.[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 be non-

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

[3] See Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 12, and CAT/C/30/D/219/2002, para. 6.10

[4] See also article 10 of the Inter-American Convention to Prevent and Punish Torture and General Assembly resolution 67/161, para. 16.

[5] See *A Handbook to the Convention against Torture*, p. 148; Nowak and McArthur, *The United Nations Convention against Torture: a Commentary* (Oxford, United Kingdom, Oxford University Press, 2008), art.15, para.2.

derogable under any circumstances, including in respect of national security.[6] Further, since the prohibition of torture and other ill-treatment is part of customary international law, it follows that the exclusionary rule, as a component of that 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 the prohibition of cruel, inhuman or degrading treatment or punishment in article 16 are three provisions of the Convention that "'must be observed in all circumstances'".[8]

1. 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 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 investigate promptly and impartially 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 Code of Conduct for Law Enforcement Officials and the 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 his country visits, the Special Rapporteur has observed that some States are unable to provide information on cases where evidence has been excluded because it was either found to have been obtained under torture, or the national provisions did not accurately reflect the exclusionary rule by, for example, not defining the measures to be taken by courts if evidence appears to have been obtained through torture or other ill-treatment, or by not putting the mechanisms in place by which evidence may be declared inadmissible. The legislation of some countries does meet the standards set by the exclusionary rule, but that is not true of all countries.

25. In jurisdictions where independent medical examinations must be authorized by investigators, prosecutors or penitentiary authorities, those authorities have ample opportunity to delay authorization, so that any injuries deriving from torture have healed by the time such an examination is conducted. Additionally, such 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, cases submitted to the courts are sometimes based solely on confessions by the accused and lack any material evidence, or else judges establish prerequisites, such as visible or recognizable marks, for ruling that evidence obtained under torture or other ill-treatment is invalid. The Committee

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

[7] See General Assembly resolutions 67/161, para.16, and. 3452 (XXX), art. 12, and Matt Pollard, "Rotten fruit: State solicitation, acceptance and the use of information obtained through torture by another State", *Netherlands Quarterly of Human Rights*, vol.23, No. 3 (2005).

[8] Committee against Torture, general comment No. 2 (2007) on the implementation of article 2 by States parties, para. 6.

against Torture has stated that physical marks or scars should not be a prerequisite for ruling that evidence obtained under torture is invalid (CAT/C/SR.1024, para. 29). In addition, in order to show that evidence has not been obtained by torture, a court must rely on evidence other than the testimony of the investigating officer.[9]

26. Although the exclusionary rule is not expressly listed among the rules that apply both to torture and to cruel, inhuman or degrading treatment,[10] 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.[11] That 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 International Covenant on Civil and Political Rights and found that the exclusionary rule applies to both torture and other ill-treatment.[12] Similarly, the Committee against Torture in its general comment No. 2 (para. 6), has held that "articles 3 to 15 of the Convention are likewise obligatory as applied to both torture and other ill-treatment"[13] and article 12 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment explicitly excludes statements made under cruel, inhuman or degrading treatment or punishment.

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 (CAT/C/CR/33/3, para. 4).

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 of Human Rights and the Inter-American Court of Human Rights have firmly ruled against the use of evidence tainted by torture that has been extracted from third parties, regardless of whether such evidence may be used in domestic proceedings or in proceedings in a third State.[14]

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.[15] In some jurisdictions, this approach is

[9] Mia Swart and James Fowkes, "The regulation of detention in the age of terror – lessons from the apartheid experience", *South African Law Journal*, vol. 126, No. 4 (2009).

[10] Article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[11] Committee against Torture, general comment No. 2, para. 6.

[12] Human Rights Committee general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 41. See also the Guidelines on the Role of Prosecutors (A/CONF.144/28/Rev.1) and the second annual report of the International Criminal Tribunal for the Former Yugoslavia, (A/50/365-S/1995/728), para. 26, footnote 9, on the amendment to rule 95 of the rules of procedure and evidence.

[13] See also Chris Ingelse. *The UN Committee against Torture. An Assessment*, (The Hague, Kluwer Law International, 2001), p. 365.

[14] See e.g. *Ktiti v. Morocco*, Committee against Torture, communication No. 419/2010 and *El Haski v. Belgium,* application no. 649/08, European Court of Human Rights, judgment, 25 September 2012, para. 85.

[15] *Cabrera García and Montiel Flores v. México*, Inter-American Court of Human Rights, Series C, No. 220, judgement of 26 November 2010, 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.[16]

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 those absolute prohibitions. It indirectly legitimizes such conduct and objectively dilutes the absolute nature of the prohibition.[17] The exclusionary rule is not limited to criminal proceedings but extends to military commissions, immigration boards and other administrative or civil proceedings.[18] Moreover, the use of the phrase "any proceedings" suggests that a broader range of processes is intended to be covered; essentially, any formal decision-making by State officials based on any type of information.[19]

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 practised 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 their judgment on the case of *A and others v. Secretary of State for the Home Department*, a 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",[20] thereby 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 to satisfy the court that it is more likely than not 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 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

[16] Human Rights Committee, general comment No. 32, para. 6; see also African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, section N, para. 6 (d) (i).

[17] Malcolm D. Evans, "'All the perfumes of Arabia': the House of Lords and 'foreign torture evidence'", *Leiden Journal of Law* vol. 19, No. 4 (December 2006).

[18] See e.g. *G.K. v. Switzerland*, Committee against Torture, communication No. 210/2002, para. 6.10.

[19] See "Rotten fruit: State solicitation, acceptance and the use of information obtained through torture by another State", p. 358.

[20] *A and others v. Secretary of State for the Home Department*, United Kingdom, House of Lords 71, judgement of 8 December 2005, para. 59 and see also A/61/259, paras. 57–65.

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 a confession or other evidence was not obtained by lawful means, including torture or other ill-treatment.[21] Similarly, in the case of *El Haski v. Belgium*, the European Court of Human Rights held that it would be necessary and sufficient for the complainant, if the exclusionary rule were to be invoked, to show that there was a "real risk" that the impugned statement was obtained under torture or other ill-treatment.[22] 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".[23]

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 that the evidence in question may be heard in closed session, from which the individual concerned and the legal representation of his or her choice are excluded.

35. There is an increasing trend towards the use of secret hearings, "closed material procedures" and "secret evidence". Furthermore, 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 made public, because the disclosure would be damaging to national security and 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.[24] 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 rule and assessment of the compatibility of the conduct of the Government with the exclusionary rule in secret proceedings becomes difficult or even impossible.[25]

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[21] *Ktiti v. Morocco*, para. 8.8 and A/61/259, paras. 63 and 65. See also E/CN.4/2001/66/Add. 2, paras. 102 and 169 (i); A/56/156 para. 39 (d) and (j); A/48/44/Add.1, para. 28; Human Rights Committee general comment No. 32, para. 41; E/CN.4/1999/61 Add. 1, para. 113 (e); *Cabrera García and Montiel Flores v. México*, para. 176.

[22] *El Haski v. Belgium*, para. 88; see also *Othman (Abu Qatada) v. the United Kingdom*, application no. 8139/09, European Court of Human Rights, judgement of 17 January 2012.

[23] *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt,* communication No. 334/06, African Commission on Human and Peoples' Rights, March 2011. See also *Singarasa v. Sri Lanka*, communication No. 1033/2001, para. 7.4.

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

[25] See CAT/C/GBR/Q/5/Add.1, para. 30.5.

B. Use by executive agencies of information tainted by torture and the exclusionary rule

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 the citizens of their countries. In this context, the use of information by the executive agencies that has been obtained by torture or other ill-treatment has been publicly condoned by some Governments. Other States assert that their executive agencies would share tainted evidence in "exceptional circumstances" in order to ensure their effectiveness.

38. Such policies not only weaken the absolute prohibition of torture or other ill-treatment, but also create a market for information tainted by torture. 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. All 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 the collection, sharing and receiving by the executive agencies of information tainted by torture is not subject to international law.[26] There are numerous examples of the use of torture or other ill-treatment when there was no intention of using any of the information gained from that ill-treatment in subsequent legal proceedings, in which it would a priori be subjected to scrutiny and exclusion, for instance in administrative or preventive measures or sanctions against individuals or 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, the argument being, inter alia, that it does not impinge upon the liberty of individuals or that, when it does, as relating to powers of arrest, it is usually of short duration. Alternatively, that argument may refer to the "ticking-bomb scenario", i.e., that the executive agencies cannot be expected to close their eyes to information at the cost of endangering the lives of the citizens of their own countries. 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.[27] In fact, some courts have ruled that the executive agencies have no responsibility to examine the conditions under which information was obtained, or to change their decisions accordingly. They have also ruled that it is not for the courts to discipline the executive agencies, unless by way of a criminal prosecution, and that their jurisdiction only exists to preserve the integrity of the trial process.

2. 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

[26] See e.g. Gerald Staberock, "Intelligence and counter-terrorism: towards a human rights and accountability framework?" in *Counter-Terrorism: International Law and Practice*, eds. Ana Maria Salinas de Frias, Katja Samuel and Nigel White, (Oxford, United Kingdom, Oxford University Press, 2012) and Association for the Prevention of Torture, "Beware the gift of poison fruit: sharing information with States that torture" (Geneva, 2014), p.6.

[27] See e.g. *A and others v. Secretary of State for the Home Department*, paras 69 and 149.

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 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 should inform the Committee of the measures they take to prevent and punish acts of torture or other ill-treatment in any territory under their jurisdiction.[28]

41. Articles 2, paragraph 1, and 16, paragraph 1, of the Convention and article 2 of the International Covenant on Civil and Political Rights, oblige States parties to take measures that will reinforce the prohibition against torture and other ill-treatment in their jurisdictions through legislative, administrative, judicial or other actions that must, in the end, be effective in preventing such treatment. 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 obligations 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.[29]

42. Although articles 2, paragraph 1, and 16, paragraph 1, of the Convention and article 2 of the Covenant contain a jurisdictional limitation, it is clear that the obligation to take measures to prevent acts of torture or other ill-treatment includes actions that the State takes in its own jurisdiction to prevent torture or other ill-treatment in another jurisdiction. In *Soering v. the United Kingdom*, the European Court of Human Rights found that the extraditing State would be responsible for the breach, even where such treatment is subsequently beyond its control.[30] 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 their territory and control to a real risk of such acts. The fact that torture or other ill-treatment occurs outside the territory or the direct control of the State in question does not relieve that State from responsibility for its own actions vis-à-vis the incident.[31] 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 on their territory (including as regards the prohibition against torture or other ill-treatment) and to refrain from participating in any such activities (A/HRC/14/46, para. 50). The International Court of Justice, in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, recognized that the jurisdiction of States is primarily territorial, but concluded that the International Covenant on Civil and Political Rights extends to "acts done by a State in the exercise of its jurisdiction outside of its own territory."[32] Moreover, the *jus cogens* nature of the prohibition against torture implies that States are under an obligation to refuse to accept any results arising from its violation by another State.[33]

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[28] Human Rights Committee general comment No. 20, (1992), para. 8.

[29] Committee against Torture, general comment No.2, paras. 3 and 17.

[30] *Soering v. the United Kingdom,* application No. 14038/88, European Court of Human Rights, judgement of 7 July 1989, para 88.

[31] See E/CN.4/2002/137, para. 14 and "Rotten fruit: State solicitation, acceptance and the use of information obtained through torture by another State", p.370.

[32] Advisory opinion, I.C.J. Reports 2004, para. 111.

[33] Ibid., paras. 159 and 163 and *A and others v. Secretary of State for the Home Department*, para. 34.

43. International law intends to bar not only actual breaches but also potential breaches of the prohibition against torture and 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.[34]

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 (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.[35]

45. In this sense, the customary non-refoulement provision, as contained in article 3 of the Convention, is one obligation under the overarching aim of preventing torture and other ill-treatment. It contains the obligation of States 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 the territory and control of a State. In the case of *Soering v. the United Kingdom*, the European Court of Human Rights ruled that even though the European Convention for the Protection of 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 the 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 a risk 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.[36] 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.[37] Articles 2 and 16 of the Convention require States to prevent torture and ill-treatment by taking appropriate preventive measures. A failure to do so, by permitting acts of torture, 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

[34] International Criminal Tribunal for the Former Yugoslavia, case No. IT-95-17/T10, judgement of 10 December 1998, para.148 and A/59/324, para. 27.
[35] Committee against Torture, general comment No.2, para. 25.
[36] See A/ HRC/16/52, paras. 53-57 and A/67/396, paras. 48-49.
[37] See e.g. Organization for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights, "Human rights in counter-terrorism investigations: a practical manual for law enforcement officers" (Warsaw, 2013), p. 28.

and use of information outside formal proceedings, which is likely to have been 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.[38]

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 both 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.[39] 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.[40]

49. In addition, State responsibility also derives from existing customary rules, as codified in the draft articles on the responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session. They confirm that no State should provide aid or assistance to another State in the commission of an internationally wrongful act (draft articles 16–18), should not recognize as lawful a situation created by a "serious breach" of its obligations under peremptory norms of international law and should cooperate to bring the breach to an end (draft articles 40 and 41). Therefore, if a State were to be torturing detainees, other States would have a duty to cooperate to bring such a serious breach of the prohibition against torture to an end and would be required not to give any aid or assistance to its continuation (A/67/396, para. 48, and A/HRC/13/42, para. 42).

50. According to article 4, paragraph 1, of the Convention, interpreted in line with international criminal law jurisprudence, "complicity" contains three elements: (a) knowledge that torture is taking place, (b) a direct contribution by way of assistance and (c) 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.[41]

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 that there is 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 does not constitute complicity under international customary or treaty law if there was no direct encouragement of acts of torture.

52. However, the responsibility of a State for complicity in torture or other ill-treatment by collecting, sharing or receiving tainted information must be governed by a different

[38] "Rotten fruit: State solicitation, acceptance and the use of information obtained through torture by another State", p. 360.

[39] See Committee against Torture, general comment No. 2, para. 17.

[40] See A/HRC/13/42, paras. 39 and 40, and Sarah Fulton, "Cooperating with the enemy of mankind: can States simply turn a blind eye to torture?", *The International Journal of Human Rights*, vol. 16, No. 5 (June 2012).

[41] See e.g. Human Rights Committee, general comment No. 20, para. 3.

standard, especially because for torture and other ill-treatment there is a clear, universal and absolute prohibition of a peremptory nature and an affirmative obligation to prevent. The responsibility of a State is objective and 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 information was obtained by torture or other ill-treatment, or ought to have been aware of that risk and did not take reasonable steps to prevent it.[42] 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 for it to be regarded as responsible.

Systematic torture

54. Collecting, sharing or receiving information from a country that is known, or ought to be known, to use 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 include torture, both as 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 torture detainees, or specific categories of detainees, systematically, no other State may actively collect, share or recognize any information it receives from an agency of that State as "lawfully obtained", nor may it "passively" accept such information. In addition, collecting, sharing or receiving information from a State that is known, or ought to be known, to use torture in a widespread or systematic way would also trigger State responsibility under draft article 41 on the responsibility of States for internationally wrongful acts. Commentaries of the International Law Commission specify that the non-recognition obligation contained in draft article 41, paragraph 2, also prohibits acts which would imply such recognition.

55. The Special Rapporteur therefore finds that the receiving States are responsible because their policies and practices 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.[43] Even if ultimately not used, and therefore not under scrutiny, the receipt of 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 will speak 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 information knew, or ought to have

[42] A/HRC/10/3, para. 55, A/67/396, para. 48, and A/HRC/13/42, paras. 39 and 40. See also "Rotten fruit: State solicitation, acceptance and the use of information obtained through torture by another State", p. 356.

[43] See "Cooperating with the enemy of mankind: can States simply turn a blind eye to torture?" p. 777 and A/HRC/10/3, para. 55.

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 their own agents. By accepting 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 that information was obtained only for operational purposes, and aids and assists the torturing State in maintaining impunity for the acts of torture.[44] Even by once receiving information tainted by torture, the receiving State does in fact encourage the receipt of information from agencies that pursue investigations in violation of the framework of international human rights law. It creates a demand for information tainted by torture 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 that is likely to have been 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.[45]

Assurances

57. The invocation of "assurances" as a means of eliminating the possible risk of torture or other ill-treatment is 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 other States do not relieve the sending State from its responsibility 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.[46] 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. 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 their assurances are truthful. In addition, assurances are not legally binding or enforceable and the States concerned are unlikely to follow up on the assurances provided, since verifying and acknowledging that the abuse has occurred means an admission by 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 the collection, sharing and receiving of information by executive agencies and to the obligation of States to prevent and discourage torture and other ill-treatment.

4. National guidelines

59. In an attempt to regulate the sharing and receiving of information by executive agencies 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 their intelligence services and commitments they have made not to participate in, solicit, encourage or condone the use of torture or other ill-treatment for any

[44] See A/HRC/10/3, para. 55, and "Rotten fruit: State solicitation, acceptance and the use of information obtained through torture by another State", p. 376.

[45] Ibid., p.377.

[46] A/59/324, para. 31, A/60/316, para. 51, and report of the Commissioner for Human Rights of the Council of Europe, Comm DH(2004)13, para.19.

purpose, to the extent that they accord with their international legal obligations.[47] However, some aspects of published guidelines fall short of the 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 with an agency, despite a real risk of the information they receive being tainted by torture or ill-treatment, is incompatible with the obligation of the State as to 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.[48]

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 have been 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 that information tainted by torture or other ill-treatment will not be used is of crucial importance, particularly in relation to cooperation between agencies. Any action by the 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

1. 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 also applies to States which are not party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.**

64. **The 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 guarantees of a fair trial. The ineffectiveness of efforts to put an end to the 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 should enhance the admissibility of independent and impartial medical evidence in any proceedings, in order to investigate allegations of torture or other ill-treatment effectively. In addition, courts should never admit extrajudicial confessions that are not corroborated by other evidence, or that have been recanted.**

[47] See "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" H.M. Government, United Kingdom (July 2010) and "Information sharing with foreign entities", Ministerial Direction to the Canadian Security Intelligence Service (2011).

[48] See e.g. CAT/C/CR/33/3, para. 4.

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, and 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 has been corroborated or is not the only decisive evidence in the case.**

67. **The Special Rapporteur holds that the defendant must only advance a plausible reason as to 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 procedures in domestic legislation for the exclusion of any and all evidence obtained in violation of safeguards designed to protect against torture and other ill-treatment.**[49]

69. **Secret proceedings or "closed material procedures" inhibit the implementation of the exclusionary rule. States should ensure 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 defendants effectively to challenge evidence, including evidence from the security services. There should be no excuses about State secrets put forward by States for violations of human rights.**

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 the legal proceedings that follow.**[50] **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.**

2. 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.**

72. **To allow exceptions by the executive branch for purposes other than legal proceedings, or to find other uses for their outcomes, goes 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 of preventing and discouraging torture and other ill-treatment by rendering their products 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, that constitutes an incentive to torture or ill-treatment in clear**

[49] See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 27.

[50] See also International Commission of Jurists, "Assessing damage, urging action; report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights" (Geneva, 2009), p.85.

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 collection, 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 acquiesced in, encouraged or condoned in any manifestations of public power, whether executive or judicial.

74. **The standards of the exclusionary rule should therefore be interpreted in good faith and applied by way of analogy to the collection, sharing and receiving of information tainted by torture, including information obtained by other ill-treatment, even if not used in "proceedings" as 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 information tainted by torture, even if the torture has been committed by agents of another State, is an act of acquiescence in torture that compromises the responsibility of the State that uses those products 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 and other treaties concerning human rights and international humanitarian law, as well as under customary international law and according to the general principles of the responsibility of States for internationally wrongful acts.**

76. **The collection, sharing and receiving of information from 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 information from the 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.**[51]

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 where 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 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. **Information tainted by torture, even when not intended to be used in court proceedings, must therefore 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 such information is an 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**

[51] See e.g. CAT/C/DEU/CO/5, para. 31 and CAT/C/DEU/QPR/6, para. 38.

incapable of mitigating the responsibility of the State that relies on information so obtained.

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

81. **To ensure accountability in intelligence cooperation, truly independent intelligence review and oversight mechanisms should be established and enhanced. As a starting point for further development, the Special Rapporteur commends the guidelines proposed by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in his report in 2010 on a compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight practices (A/HRC/14/46, principles 31–35).**

B. Recommendations

82. **Regarding the use of information tainted by torture in any proceedings, all States should:**

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

(b) Review criminal investigation practices with a view to promoting professional standards and eliminating 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 stage of any proceedings, irrespective of the classification of that 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;

(f) Clarify the procedural rules on admissibility, including the burden of proof applied by courts, by ensuring that the burden of proof is shifted to the State when the appellant advances a plausible reason as to why evidence may have been procured by torture or other cruel, inhuman or degrading treatment or punishment; and that the court enquires 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, that the evidence is not 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 by executive actors of information tainted by torture, all States should:**

(a) Submit all actions by the executive branch of Government, including the collection, sharing and receiving of information, to independent and impartial review under the obligations of States to respect 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 light of the objective of the rule to prevent and discourage torture and other ill-treatment and apply it by way of analogy to the collection, sharing and receiving of information obtained by torture or other cruel, inhuman or degrading treatment or punishment, even if not used in "proceedings" as 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 all the obligations under the prohibition of torture or other cruel, inhuman or degrading treatment or punishment be part of such agreements;

(g) Presume that, in cases of information originating in countries where torture is a systematic or widespread practice, information collected or received is a product of torture or 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 other States that torture or other ill-treatment was not involved in producing information are not regarded as sufficient, in order to avoid complicity or 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 adhere to 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 is a product of torture or other ill-treatment, or may lead to such acts;

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