

**IN THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW**

UNITED STATES OF AMERICA )  
)  
*Appellant,* ) U.S.C.M.C.R. Case No. 23-005  
)  
)  
) Arraigned at Guantánamo Bay, Cuba on  
) November 9, 2001  
)  
)  
) Before a Military Commission  
) convened by Vice Admiral (ret.) Bruce  
v. ) E. Donaldson, USN  
)  
)  
) Presiding Military Judge  
) Lt Col Terrance J. Reece, USMC  
)  
)  
*ABD AL RAHIM HUSSAYN* )  
*MUHAMMAD AL-NASHIRI* ) **DATE: September 25, 2023**  
*Appellee.* )  
)

**TO THE HONORABLE, THE JUDGES OF  
THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW  
SITTING EN BANC**

**BRIEF ON BEHALF OF AMICUS CURIAE BAR HUMAN RIGHTS COMMITTEE OF  
ENGLAND AND WALES**

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## TABLE OF CONTENTS

	Page	
<b>TABLE OF AUTHORITIES</b> .....	4	
<b>INTRODUCTION</b> .....	7	
<b>SUMMARY OF SUBMISSIONS</b> .....	9	
<b>PART I: THE PROHIBITION OF TORTURE</b>		
International and regional human rights law.....	10	
The absolute and non-derogable nature of the prohibition of torture.....	13	
<b>PART II: THE ADMISSIBILITY OF EVIDENCE ACQUIRED THROUGH THE USE OF TORTURE</b>		
International and human rights instruments .....	15	
International courts.....	19	
<b>PART III: THE SCOPE OF THE EXCLUSIONARY RULE</b> .....		20
<b>PART IV OBLIGATION OF LAW ENFORCEMENT AGENTS TO COMPLY WITH DUE PROCESS PRINCIPLES IN CONDUCTING INTERROGATIONS</b> .....		25
Requirements for the investigation of torture.....	27	
Rights of persons with disabilities.....	28	
<b>CONCLUSION</b> .....	29	

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Cabrera García and Montiel Flores v. México</i> , Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220 (Nov. 26, 2010).....	22
<i>Harutyunyan v. Armenia</i> App. No. 36549/03 (June 28, 2007).....	21
Communication No. 7/2012 <i>Marlon James Noble v. Australia</i> CRPD/C/16/D/7/2012 (Oct 10, 2016) .....	27
<i>Prosecutor v Mucić and others</i> , Case No. IT-96- 21, Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence (Int’l Crim. Trib. For the Former Yugoslavia Sept. 2, 1997).....	19
<i>Prosecutor v. Furundzija</i> , Case No. IT-95-17/1, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).....	11,12
<i>R v. Bow Street Metropolitan Stipendiary Magistrate, Ex. p. Pinochet Ugarte (No. 3)</i> [2000] 1 AC 147.....	12
<i>Siderman de Blake v Argentina</i> 965 F. 2d 699 (22 May 1992).....	12

## GENERAL COMMENTS

Committee Against Torture General Comment No. 2, <i>Implementation of Article 2 by States Parties</i> , CAT/C/GC/2 (Jan. 24, 2008).....	19, 16, 24
U.N. Human Rights Committee General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) A/44/40 (Mar. 10, 1992)...	11, 15, 24
U.N. Human Rights Committee General Comment No. 32, <i>Article 14: Right to equality before courts and tribunals and to a fair trial</i> , CCPR/C/GC/32 (Aug. 14, 2007).....	15, 20, 25

## TREATIES

International Covenant on Civil and Political Rights, <i>adopted</i> Dec. 16, U.N.T.S. 999 (p. 171); U.N.G.A. Res. 2200A (XXI) 1966 (entered into force Mar. 23 1976)...	7, 9, 10, 12, 15, 19, 25, 26
United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.T.S. 1465, p. 85; U.N.G.A. Res. 39/46, Dec, 10, 1984.....	9, 13, 14, 19, 24, 26, 29

United Nations Convention on Rights of Persons with Disabilities, Articles 1 and 13, U.N.T.S. 2515 p. 3, Res. 61/106 (Dec. 12, 2006).....	27
---	----

**DECLARATIONS AND RESOLUTIONS**

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment U.N.G.A. Res. 3452, <i>adopted</i> Dec. 9, 1975..9. 13. 14. 20, 26	
Human Rights Council, <i>Torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers</i> , A/HRC/Res/13/19 (April 15, 2010) .....	16

**RULES**

Article 69(7) of the Rome Statute July, 17 1998.....	18
Rule 95 of the Rules of Procedure and Evidence of the I.C.T.Y.....	18
Rule 95 of the Special Court for Sierra Leone.....	19
Rule 162 of the Special Tribunal for Lebanon Rules of Procedure and Evidence.....	19
Rule 138 of the Kosovo Specialist Chambers Rules of Procedure and Evidence.....	19
Rule 21(3) of the Extraordinary Chambers in the Courts of Cambodia Internal Rules.....	19

**STANDARDS**

Body of Principles for the Protection of All Person under Any form of Detention or Imprisonment U.N.G.A. Res. 43/173 (Dec. 9, 1988).....	24
Code of Conduct for Law Enforcement Officials, U.N.G.A. Res 34/169 (Dec. 17, 1979).....	25
U.N. Standard Minimum Rules for the Treatment of Prisoners (“Mandela Rules”) U.N.G.A. Res. 70/175, Dec. 17, 2015.....	9, 25, 26
U.N. Officer of the High Commissioner for Human Rights, <i>Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i> xx (Professional Training Series No. 8 Rev., 2022) (“Istanbul Protocol”)...11, 24, 26	
Guidelines on the Role of Prosecutors, <i>adopted</i> Sept. 7, 1990, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders A/CONF.144/28/Rev.1.....	16

## REPORTS

BHRC, Trial Observation Report <i>USA v. Abd Al-Rahim Al-Nashiri</i> , June 2023.....	7
P. Kooijmans, <i>Report of the Special Rapporteur on Torture</i> , E/CN.4/1986/15. Feb. 19, 1986...12	
P. Kooijmans, <i>Report of the Special Rapporteur on Torture, pursuant to Commission on Human Rights resolution 1992/32</i> , 49 <sup>th</sup> Session of the Commission on Human Rights, E/CN.4/1993/26 (Dec. 15, 1992).....	18
Statement by the Special Rapporteur on Torture to the Third Committee of the General Assembly, E/CN.4/2002/76, Annex III, 14 (Nov. 8, 2001).....	13
Report of the Special Rapporteur on Torture, A/HRC/25/60 (April 10, 2014).....	21
Fionnuala Ní Aoláin, <i>Technical Visit to the United States and Guantánamo Detention Facility by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism</i> , Jun. 14, 2023.....	7, 28, 29

## **INTRODUCTION**

1. This brief is filed pursuant to CMCR Order of Acting Chief Judge Pollard dated August 25, 2023 that any amicus must be filed no later than the due date for the appellee's answer brief.
2. The Bar Human Rights Committee ("BHRC") is the international human rights arm of the Bar of England and Wales. It is an independent body working to protect the rights of advocates, judges and human rights defenders around the world. BHRC is concerned with defending the rule of law and internationally recognised legal standards relating to human rights and the right to a fair trial. The remit of the BHRC extends to all countries of the world, apart from its own jurisdiction of England and Wales. This reflects the Committee's need to maintain its role as an independent but legally qualified observer, critic and advisor, with internationally accepted rule of law principles at the heart of its remit.
3. It is understood that in considering the issue of personal jurisdiction in this case the Military Commission was invited by the US Government to admit into evidence statements taken from the Appellee by investigators of the Federal Bureau of Intelligence in January 2007. It is understood that while the US Government insists that those statements were not obtained by torture or coercion, it is accepted that the Defendant had been subject to torture and inhuman and degrading treatment in the four preceding years that he was detained incommunicado by the Central Intelligence Agency ("C.I.A"). The Appellee sought suppression of the statements taken in January 2007 and the Military Commission agreed that those statements should be suppressed by ruling on August 18, 2023. The Government appeals to the Court of Military Commission Review against that decision.

4. As such, this brief seeks to assist the Court with submissions concerning international law relating to the admissibility of evidence obtained as a result of torture and the scope of the prohibition.
5. We observe at the outset that almost the entirety of the international fair trial standards have been violated in this case: BHRC, Trial Observation Report *USA v. Abd Al-Rahim Al-Nashiri*, June 2023<sup>1</sup>; Fionnuala Ní Aoláin, *Technical Visit to the United States and Guantánamo Detention Facility by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Jun. 14, 2023.
6. We also note the maintained position of the United States during the most recent periodic review of the application of the International Covenant on Civil and Political Rights, *adopted* Dec. 16, U.N.T.S. 999 (p. 171); U.N.G.A. Res. 2200A (XXI) 1966 (entered into force Mar. 23 1976) (“I.C.C.P.R.”) that the I.C.C.P.R. does not apply with respect to individuals under its jurisdiction, but outside its territory. Concluding Observations on the Fourth Periodic Report of the United States of America, C.C.P.R./C./U.S.A./C.O./4, April, 23 2014. This is despite the contrary interpretation to Article 2 (1)<sup>2</sup> in the jurisprudence of the Human Rights Committee (“H.R.C.”), the jurisprudence of the International Court of Justice and State practice. As such, in line with international law and the signatory status

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<sup>1</sup> Available at [https://barhumanrights.org.uk/wp-content/uploads/2023/08/BHRC\\_TrialOb\\_Nashiri\\_Final.pdf](https://barhumanrights.org.uk/wp-content/uploads/2023/08/BHRC_TrialOb_Nashiri_Final.pdf)

<sup>2</sup> “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

of the United States, we consider that international standards are of relevance and interpretative assistance in this case.

## **SUMMARY OF SUBMISSIONS**

7. In summary it is respectfully submitted that:

- (i) The prohibition on torture is recognised and enshrined in primary international and regional human rights instruments. It is absolute and non-derogable. This prohibition has achieved *jus cogens* status under customary international law, and imposes obligations *erga omnes* on each State. As a result, no State may recognise as lawful a situation arising from a violation of the prohibition of torture, and all States have a legal interest in the performance of the obligations arising from the prohibition.
- (ii) The exclusionary rule encompasses the principle that evidence obtained as a result of torture is not admissible in a court of law. The exclusionary rule is an essential component of the prohibition of torture. International human rights instruments, and international and regional courts have developed rules enshrining this principle.
- (iii) The scope of the exclusionary rule may encompass both statements extracted directly through the use of torture, and subsequent statements given in lawful interrogation that confirm or replicate the statements made during torture according to the circumstances of each case.



- (iv) International human rights instruments and guidelines emphasise the importance of enabling procedural safeguards to those in detention who are subject to questioning by law enforcement personnel, especially in the context of evidence that detainees have been subjected to torture and may have disabilities as a result.

## **PART I: THE PROHIBITION OF TORTURE**

### **International and regional human rights law**

- 8. The prohibition of torture is universally recognised and enshrined in primary international human rights instruments:
  - (i) Article 7 I.C.C.P.R. states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”
  - (ii) The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment U.N.G.A. Res. 3452, *adopted* Dec. 9, 1975 (“Declaration against Torture”) contains a guideline of measures that should be taken by States to ensure the prohibition of torture.
  - (iii) Article 2 of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.T.S. 1465, p. 85; U.N.G.A. Res. 39/46, Dec, 10, 1984 (“U.N.C.A.T.”) requires states to take active and “effective” measures to “prevent acts of torture”.
  - (iv) Rule 1 of the U.N. Standard Minimum Rules for the Treatment of Prisoners U.N.G.A. Res. 70/175, Dec. 17, 2015 (“the Mandela Rules”) 2015 provides:

All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.

9. Article 1 of U.N.C.A.T. defines “torture” as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
10. Ill-treatment is not defined in the Convention, but the Committee Against Torture has observed that most States Parties identify or define certain conduct as ill-treatment in their criminal codes. In comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes. The Committee emphasizes that it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present. Committee Against Torture General Comment No. 2, CAT/C/GC/2, Jan. 24, 2008 para. 10.
11. The H.R.C. observes as regards Article 7 I.C.C.P.R. that the aim is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be

necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. Human Rights Committee General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) A/44/40 Mar. 10, 1992, ¶ 2. The Committee further observes that distinctions between the kinds of punishment or treatment depend on the nature, purpose and severity of the treatment applied. *Id.*, ¶ 2.

12. It has been observed that torture is one of the most heinous crimes known to humanity not only because it involves the intentional infliction of severe physical and mental pain, but because it is committed by officials or with the acquiescence of a State and often concealed effectively to prevent justice and accountability. As a result of torture, victims endure profound physical and mental pain and suffering, while the reality of the crime perpetrated against them is often dismissed in judicial and administrative proceedings and unpunished. Torture is a profound concern for the world community because it seeks to destroy not only the physical and emotional well-being of individuals but also, in some instances, the dignity and will of families and entire communities. U.N. Officer of the High Commissioner for Human Rights, *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* xx (Professional Training Series No. 8 Rev., 2022) (“Istanbul Protocol”).
13. The International Criminal Tribunal for the Former Yugoslavia (“I.C.T.Y.”) in *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgment, ¶ 147 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) authoritatively expressed the link between the universality of the prohibition of torture, and its place in international law:

There exists today universal revulsion against torture: as a USA Court put it in *Filartiga v. Peña-Irala*, 'the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind'. This revulsion, as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination.

14. It is widely accepted in international governance, and regional and domestic jurisprudence, that the prohibition of the use of torture has an enhanced status as a *jus cogens*, or pre-emptory norm, of international law. P. Kooijmans, *Report of the Special Rapporteur on Torture*, E/CN.4/1986/15. Feb. 19, 1986 ¶ 3; *Prosecutor v. Furundzija*, Case No. IT-95-17/1; *Al-Adsani v. U.K.* 34 Eur. Ct. H.R. 11 (2002); *Siderman de Blake v Argentina* 965 F. 2d 699 (22 May 1992), 717; *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex. p. Pinochet Ugarte (No. 3)* [2000] 1 AC 147, 197-199. The fundamental and overriding nature of the prohibition also imposes obligations *erga omnes*.

### **The absolute and non-derogable nature of the prohibition of torture**

15. The primary international instruments contain express mention of the absolute and non-derogable character of the prohibition against torture, for example Article 4(2) I.C.C.P.R. This has consistently been reinforced, and the absolute and non-derogable nature subsists in relation to the threat posed by global terrorism.

- (i) Article 2(2) C.A.T. specifically provides that:

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

- (v) Article 3 of the Declaration Against Torture states:

No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

- (ii) Responding to the terrorist attacks of September 2001, the United Nations Special Rapporteur on Torture stated:

However frustrating may be the search for those behind the abominable acts of terrorism and for evidence that would bring them to justice, I am convinced that any temptation to resort to torture or similar ill-treatment or to send suspects to countries where they would face such treatment must be firmly resisted.”

Statement by the Special Rapporteur on Torture to the Third Committee of the General Assembly, E/CN.4/2002/76, Annex III, 14 (Nov. 8, 2001).

16. The *jus cogens* and *erga omnes* nature of the prohibition of torture places a duty on States to take action to prevent breaches of the prohibition. It is submitted that the use of evidence obtained through torture is one such unlawful consequence.

## **PART II: THE ADMISSIBILITY OF EVIDENCE ACQUIRED THROUGH THE USE OF TORTURE**

### **International human rights instruments**

17. The exclusionary rule is enshrined in Article 12 of the Declaration Against Torture:

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 against the person concerned or against any other person in any proceedings.

18. Article 15 C.A.T. provides a narrower application to torture evidence:

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.

19. The U.N. Human Rights Committee has also reiterated the link between the prohibition of torture and the exclusionary rule:

The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime.

States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction...

Human Rights Committee General Comment No. 20 ¶ 8.

And further:

It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.

*Id.* ¶ 12.

20. U.N. Human Rights Committee General Comment 32, *Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32 (Aug. 14, 2007) at ¶ 41 has likewise authoritatively interpreted that the exclusionary rule in article 7 I.C.C.P.R. applies to both torture and other ill treatment.

21. The emphasis on preventing cruel, inhuman or degrading treatment is explained through its interrelated relationship with torture. As observed by the Committee against Torture, “in practice, the definitional threshold between ill-treatment and torture is often not clear ... [and] the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment.”

Committee Against Torture General Comment No. 2, *Implementation of Article 2 by States Parties*, CAT/C/GC/2 (Jan. 24, 2008), ¶ 3.

22. The role that the judiciary and legal profession play in enforcing the exclusionary rule and thus the prohibition of torture is further set out in the Guidelines on the Role of Prosecutors, *adopted* Sept. 7, 1990, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders A/CONF.144/28/Rev.1 ¶ 16:

When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods.

23. UN Human Rights Council Resolution 13/19 also addresses the ‘role and responsibility of judges, prosecutors and lawyers’ in relation to torture, and states that they ‘play a critical role in safeguarding’ the non-derogable right to freedom from torture. Human Rights Council, *Torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of judges, prosecutors and lawyers*, A/HRC/Res/13/19 (April 15, 2010).

The Human Rights Council:

Strongly urges States to ensure that no statement that is established to have been made as a result of torture is invoked as evidence in any proceedings,



except against a person accused of torture as evidence that the statement was made, and calls upon States to consider extending that prohibition to statements made as a result of other cruel, inhuman or degrading treatment or punishment, and recognizes that adequate corroboration of statements, including confessions, used as evidence in any proceedings constitutes one safeguard for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.

*Id.* ¶ 7.

24. The first UN Special Rapporteur on Torture Koojmans made clear the link between the prohibition on torture and the duty of national governments to implement the exclusionary rule:

Governments should be aware that they cannot go on condemning the evil of torture on the international level while condoning it on the national level. The judiciary in each and every country should bear in mind that they have sworn to apply the law and to do justice and that it is within their competence, even when the law is not in conformity with international standards, to bring the law nearer to these standards through the interpretation process. The judiciary should be aware that there is no place for impartiality if basic human rights are violated because, by virtue of their oath, they can only choose the side of the downtrodden. It is within their competence to order the release of detainees who have been held under conditions which are in flagrant violation of the rules; it is within their competence to refuse evidence which is not freely given; it is

within their power to make torture unrewarding and therefore unattractive and they should use that power.

P. Koojmans, *Report of the Special Rapporteur on Torture, pursuant to Commission on Human Rights resolution 1992/32, 49<sup>th</sup> Session of the Commission on Human Rights, E/CN.4/1993/26 ¶ 591* (Dec. 15, 1992).

### **International Courts**

25. International criminal courts have developed broad exclusionary rules that reflect the position of international human rights law.

(i) The International Criminal Court (“I.C.C.”) exclusionary rule is contained in Article 69(7) of the Rome Statute July, 17 1998, which provides as follows:

Evidence obtained by means of a violation of this Statute or internationally recognised human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

(ii) Rule 95 of the Rules of Procedure and Evidence of the I.C.T.Y. provides that:

[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.<sup>3</sup>

- (iii) In considering the exclusionary rule, the I.C.T.Y. Trial Chamber has observed that there was ‘no doubt’ that statements obtained from suspects which were not voluntary, or which seemed to be voluntary but were obtained by oppressive conduct, could not pass the test under Rule 95 and thus could not be admitted into evidence. *Prosecutor v Mucić and others*, Case No. IT-96- 21, Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence, ¶ 41 (Int’l Crim. Trib. For the Former Yugoslavia Sept. 2, 1997).

26. In consequence it is submitted that the exclusionary rule enshrined in international human rights law, has become a fundamental procedural norm in international criminal courts.

### **PART III SCOPE OF THE EXCLUSIONARY RULE**

27. The exclusionary rule protects the right to a fair trial enshrined in Article 14 I.C.C.P.R. and in particular Article 14(3)(g) (not to be compelled to testify against oneself or to confess guilt), but extends to all forms of proceedings. Apart from the suffering inflicted and the obligations upon States parties to prevent torture and punish the perpetrators of the torture (See Articles 2 and 4 C.A.T. and subsequent provisions therein) the principle reflects the

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<sup>3</sup> See also: Rule 95 of the Special Court for Sierra Leone Rules of Procedure and Evidence; Rule 162 of the Special Tribunal for Lebanon Rules of Procedure and Evidence; Rule 138 of the Kosovo Specialist Chambers Rules of Procedure and Evidence; Rule 21(3) of the Extraordinary Chambers in the Courts of Cambodia Internal Rules.

inherent unreliability of any statement extracted under conditions of torture, inhuman or degrading treatment.

28. Paragraph 41 of UN Human Rights Committee General Comment No. 32, explains that:

This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession. Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred, and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will.

29. Both Article 12 of the Declaration Against Torture and Article 15 UNCAT provide that any statement which is established to have been made as a result of torture must be excluded as evidence.

30. Whether a given statement has been made as a result of torture is a question of fact to be considered in each individual case. However, it is submitted that when construed in accordance with the object and purpose of the prohibition, it should be interpreted broadly and purposively as encompassing subsequent ("clean") statements made, if such statements

are derived from prior treatment and merely confirm or replicate the statements obtained during torture.

31. There is as yet no General Comment of the U.N. articulating an interpretation of Article 15. However, its reach has been considered by Special Rapporteurs and regional and state courts to be expansive and not literal.

32. Special Rapporteur Mendez observed that the scope of evidence obtained as the result of torture is given an expansive definition. The report states that:

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.”

Report of the Special Rapporteur on Torture, A/HRC/25/60 (April 10, 2014), ¶ 29.

33. Regional and state superior courts have ruled that statements obtained by the use of lawful interrogation, that replicate or confirm those directly obtained through the use of torture, may be viewed in turn as result of torture, and thus fall within the exclusionary rule.

(i) The European Court of Human Rights (“ECtHR”) in *Harutyunyan v. Armenia* App. No. 36549/03 (June 28, 2007) ¶ 65 applying the equivalent article of the European Convention on Human Rights held that:

[I]n the Court’s opinion, where there is compelling evidence that a person has been subjected to ill-treatment, including physical violence and threats, the fact that this person confessed – or

confirmed a coerced confession in his later statements – to an authority other than the one responsible for this ill-treatment should not automatically lead to the conclusion that such confession or later statements were not made as a consequence of the ill-treatment and the fear that a person may experience thereafter.

The ECtHR considered various factors, including the witnesses' belief that they would be subjected to further torture, and actual threats of further torture, concluding that:

[T]he credibility of the statements made by them during that period [of lawful interrogation] should have been seriously questioned, and these statements should certainly not have been relied upon to justify the credibility of those made under torture.

*Id.*

- (ii) This proposition has been followed in the Inter-American Court of Human Rights in *Cabrera García and Montiel Flores v. México*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220 (Nov. 26, 2010). The Court reiterated, having considered the dicta of the ECtHR above, at ¶ 173 that:

[A] subsequent confession may be the consequence of the mistreatment suffered by the person and, more specifically, because of the fear that remains after this type of experience.

The Court observed at ¶ 174 that:

[T]he situations of defencelessness and vulnerability felt by an individual when detained and subjected to cruel, inhuman and degrading treatment in order to wear down that individual's psychological resistance and force him to incriminate himself, can produce feelings of fear, anguish and inferiority capable of humiliating and overwhelming an individual and possibly breaking his physical and moral resistance.

As such, the Court ruled that statements made to the Public Prosecutor's Officer and thereafter the Judge of the local district a few days after physical mistreatment resulting in confession evidence should also be excluded.

34. It is clear that international law seeks to avoid statements obtained as a result of torture being used against an individual given the inherent unreliability of statements taken against these conditions. The context is determinative of whether a subsequent statement is considered to be obtained as a result of torture. Noting that there is no prior circumstance of a detainee being subjected to torture for as long as Mr Al-Nashiri and the other detainees currently held at the Guantanamo Bay detention facility, there are no directly comparative cases.

35. However, international standards as to the context in which law enforcement interrogations should be conducted is also instructive in this regard.

**PART IV OBLIGATION OF LAW ENFORCEMENT AGENTS TO COMPLY WITH  
DUE PROCESS PRINCIPLES IN CONDUCTING INTERROGATIONS**

36. It is understood that the interrogations at Guantánamo Bay Detention Facility in January 2007 were conducted by law enforcement rather than CIA agents. International law specifies certain standards for conditions of detention and such interrogations to ensure that they conform with the right to a fair trial.

37. International guidance emphasizes the importance of standards to guarantee the effective protection of detained persons in detention and prevention of torture, inhuman and degrading treatment. These include being held in officially recognized places of detention with an accessible record of their detention, and likewise a record of the time and place of all interrogations, together with the names of all those present. Provision should also be made against incommunicado detention, prompt and regular access to be given to independent medical assistance and independent legal assistance and, under appropriate supervision when the investigation so requires, to family members. States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment: H.R.C. General Comment No. 20, ¶ 11; C.A.T. General Comment No. 2; Body of Principles for the Protection of All Person under Any form of Detention or Imprisonment U.N.G.A. Res. 43/173 (Dec. 9, 1988); Istanbul Protocol, ¶ 10(e).

38. Likewise, it is mandatory that a detainee undergo a thorough medical examination at the time detention commences in any facility. This should include identifying any ill-treatment, signs of psychological stress and undertaking all appropriate measures or treatment as well



as determining the fitness of prisoners to take part in any activities as appropriate: Mandela Rules, rule 30; and Bangkok Rules, rule 6.

39. As set out above, Article 14(3)(g) I.C.C.P.R. guarantees the right not to be compelled to testify against oneself or to confess guilt. U.N. General Comment No. 32, ¶ 41 confirms that this must be understood to encompass the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.

40. The Code of Conduct for Law Enforcement Officials, U.N.G.A. Res 34/169 (Dec. 17, 1979) requires that:

- a. By Article 5: No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment. (emphasis added)
- b. By Article 6: Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.

41. The right to counsel serves as a fundamental safeguard against torture and ill-treatment, arbitrary detention, and other breaches of fundamental freedoms and human rights, in particular the right to a fair trial and to ensure that statements are not obtained in

circumstances where the detainee is unfit for interrogation through physical or psychological ill-health and/or is unable to effectively participate in their right not to self-incriminate during any interrogation.

### **Requirements for the investigation of torture**

42. Where it is known by law enforcement personnel that a detainee has in fact been subjected to torture, inhuman or degrading treatment elsewhere, the above standards take on particular importance for the detainee's subsequent treatment against the further requirements to appropriately investigate the circumstances and consequences of torture.

43. A State Party must ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction, even if there has been no complaint. Article 12 C.A.T.; Article 9 Declaration Against Torture; Istanbul Protocol; Mandela Rules, rule 57 (3).

44. Both the U.N. General Assembly and U.N. H.R.C. have encouraged states to follow the guidance in the Istanbul Protocol, and it is a key document in determining breaches of both I.C.C.P.R. and C.A.T. The Protocol emphasizes the importance of properly trained medical experts who must maintain the highest ethical and established standards of medical practice in assessing injuries and their possible causes. *Supra* ¶ 199.

45. The Protocol cautions of the need for awareness of potential dangers and sensitivities for interviewers documenting circumstances of torture where the person is imprisoned (¶ 207) and that interviews, physical and psychological examinations and evaluations, including

recounting past experiences of torture and severe trauma can be profoundly retraumatizing for victims, both during the examination and afterwards. *Supra* ¶ 277. In particular, the interview can trigger new or worsening symptoms of post-traumatic stress, depression and anxiety. *Supra* ¶ 278.

46. The Protocol also highlights the importance of access to psychological counsellors or those trained in working with torture victims since retelling the facts of the torture may cause the person to relive the experience or suffer other trauma-related symptoms. *Supra* ¶ 215.

### **Rights of Persons with Disabilities**

47. Moreover, the U.N. Convention on the Rights of Persons with Disabilities sets out requirements of State Parties for those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. Such persons are entitled to effective access to justice in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. U.N. Convention on Rights of Persons with Disabilities, Articles 1 and 13, U.N.T.S. 2515 p. 3, Res. 61/106 (Dec. 12, 2006).

48. State party authorities must pay special attention to the particular needs and possible vulnerability of the person concerned because of his or her disability, when detained in custody: Communication No. 7/2012 *Marlon James Noble v. Australia* CRPD/C/16/D/7/2012 (Oct 10, 2016) ¶ 8.9.

49. It is therefore incumbent on State Parties not only to medically examine potential victims of torture appropriately to properly identify physical and psychological trauma, but to carefully consider the impact of that torture upon any future interrogation with the individual, so as to ensure both that their account is given freely and accurately, but to avoid re-traumatisation. It is clear that to do otherwise can amount to inhuman and degrading treatment.

## **CONCLUSION**

50. U.N. Special Rapporteur Fionnuala Ní Aoláin concluded from her visit to Guantánamo Bay detention facility that currently several of the procedures in place establish structural deprivation and non-fulfilment of rights necessary for a humane and dignified existence and constitute at a minimum cruel, inhuman, and degrading treatment across all detention practices at Guantánamo Bay. These include reference to inmates by their Interment Serial Number for over twenty years; instruments of restraints used for transportation variably applied without any reasonable assessment; disciplinary measures such as forced cell extractions and solitary confinement implemented disproportionately, which can trigger past traumatic experiences; and near constant surveillance through visual monitoring. In particular, for some detainees the experience of past suffering and present conditions exist on a psychological continuum, and the present exists as a culmination of the totality of lived psychological and physical harms. *Technical Visit to the United States and Guantánamo Detention Facility by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, ¶

18 (Jun. 14, 2023). Likewise, the very fact of being held for 21 years without trial exposes the detainees to a higher likelihood of conditions amounting to torture. *Id.* ¶ 46.

51. The Special Rapporteur was gravely concerned at the failure of the US Government to provide torture rehabilitation programs, such available healthcare falling short of the requisite holistic, independent, fully resourced, and designated treatment. She also found that specialist care and facilities are not adequate to meet the complex and urgent mental and physical health issues of detainees resulting from their physical and psychological manifestations of torture and rendition after 9/11, as well as the cumulative and intersectional harms arising from continued detention, deep psychological distress, deprivation of physical, social, and emotional support from family and community while living in a detention environment without trial for some and without charge for others for 21 years, hunger striking and force-feeding, self-harm and suicidal ideation, as well as accelerated aging: *Id.* ¶ 22; Article 14 C.A.T. right to redress, explained in General Comment No. 3 *Implementation of Article 14 by States Parties CAT/C/GC/3* (Dec. 13, 2012) and in particular ¶ 11 to 15 on rehabilitation.

52. Against this backdrop, which it can be presumed in large part similarly persisted in January 2007, international human rights law holds the prohibition of torture as a fundamental pre-emptory norm. From this absolute and non-derogable prohibition stems the obligation on States to take active measures to prevent and appropriately recompense torture.

53. The exclusionary rule regarding the non-admissibility of evidence obtained as a result of torture is an essential corollary of the prohibition of torture and the preventative duty on States.

54. The scope of the exclusionary rule must be considered with its object and purpose in mind.

As reflected in the judgments of the European Court of Human Rights and the Inter-American Court of Human Rights, it may encompass subsequent statements of confessions where they follow or replicate statements made as a direct result of torture. To find otherwise would seriously undermine the exclusionary principle which is central to the states' obligation to prevent and prohibit torture.

55. Moreover, States must ensure that where individuals are subjected to torture, their subsequent treatment reflects and adapts to their needs and vulnerabilities in any subsequent investigation processes, appropriately identifying physical and psychological harm which may inhibit their ability to effectively participate in interrogations and interfere with their fundamental right not to self-incriminate.

Respectfully submitted,



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BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES

25<sup>th</sup> September 2023

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