

**PROBLEMATIC EXCLUSIVENESS OF CONVENTION AGAINST TORTURE’S EXCLUSIONARY RULE:
GENERAL PRINCIPLES OF LAW AS A MORE COHERENT SOLUTION**

Working Draft: Please Do Not Cite or Circulate*

Mirakmal Niyazmatov
Notre Dame Law School
J.S.D. Candidate

I.	INTRODUCTION	1
II.	MANFRED NOWAK’S APPROACH AND ITS APPRAISAL	3
	A. <i>Purpose vs. Severity Argument</i>	5
	B. <i>Scope of UNCAT’s Exclusionary Rule</i>	8
	C. <i>Recent State Practice</i>	10
	D. <i>Review of Relevant Scholarship</i>	13
III.	GENERAL PRINCIPLES OF LAW AS A MORE COHERENT SOLUTION	14
	A. <i>Preliminary Remarks</i>	12
	B. <i>What Do “General Principles of Law” Mean</i> ...	14
	C. <i>How To Determine Existence of General Principles of Law?</i>	18
	D. <i>Why to Refer to General Principles of Law</i>	21
IV.	EXCLUSIONARY RULE IN DOMESTIC LAWS OF DIFFERENT LEGAL SYSTEMS	22
	A. <i>State Practice</i>	23
	i. Canada	23
	ii. The United States	24
	iii. Argentina	27
	iv. Mexico	28
	v. Germany	28
	vi. The United Kingdom	29
	vii. Russian Federation	31
	viii. South Africa	32
	ix. Japan	34
	x. China	35
V.	CONCLUSION	36

I. INTRODUCTION: STATEMENT OF THE PROBLEM

In the aftermath of 9/11 and the subsequent launch of the “war on terror,”¹ discussion of the issues related to torture gained new momentum. Lawyers and state officials started debating

* This is a working draft. I would be grateful for any comments. Please feel free to contact me at mniyazma@nd.edu. I look forward for your comments.

¹ The term became widely used after the former President G. W. Bush used it in his televised address to a joint session of Congress. See, CNN, *Transcript of President Bush’s Address*, September 21, 2001, available at http://articles.cnn.com/2001-09-20/us/gen.bush.transcript_1_joint-session-national-anthem-citizens?_s=PM:US (last

more extensively issues related to the definition of torture, its difference from cruel, inhuman or degrading treatment (hereinafter CIDT), and whether the use of torture and CIDT can be justified in certain situations.² Some States even elaborated innovative ways of outsourcing torture to avoid direct culpability by sending suspected terrorists for interrogation purposes to countries with solid reputations for systematic use of torture.³ In his 2005 report, the UN Special Rapporteur described “increased questioning or compromising of the absolute prohibition on torture and all forms of cruel, inhuman or degrading treatment” as a global phenomenon.⁴ Concerns raised by the UN Special Rapporteur resonate with the poll conducted in 2006 involving 27,000 people from 25 countries.⁵ Though most countries agreed that the absolute prohibition against torture should be maintained even in combating terrorism, one-third supported the use of some torture.⁶

One of the corollaries of the use of torture is the issue of the admissibility of evidence obtained by it. The use of torture for the purposes of obtaining evidence is certainly not a new phenomenon. It can be traced back to Roman-canon law.⁷ In early modern times, circumstantial evidence became insufficient in proving the commission of serious crimes.⁸ Two other types of evidence became recognized as supportive evidence: the testimony of two eyewitnesses and the confession of the alleged criminal.⁹ Because in some situations it was impossible to find two eyewitnesses to testify, interrogators used torture to extract confessions. Torture was later

visited March 10, 2011). The Obama administration has been using “Overseas Contingency Operation” instead of “War on Terror.” See, S. Wilson & A. Kamen, ‘Global War on Terror’ Is Given New Name, March 25, 2005, The Washington Post, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html> (last visited March 10, 2011).

² On definition of torture and its difference from CIDT, see M. Nowak, *What Practices Constitute Torture?: US and UN Standards*, 28 HUMAN RIGHTS QUARTERLY 809 (2006); On whether torture should be justified in specific circumstances and the critique of this position, see, Mirko Bagaric & Julie Clarke, *Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justified?*, 39 U.S.F.L. REV. 581 (2005); Anna O’Rourke et al., *Torture, Slippery Slopes, Intellectual Apologists, and Ticking Bombs: An Australian Response to Bagaric and Clarke*, 40 U.S.F.L. REV. 85 (2005).

³ Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law*, 37 CASE W. RES. J. INT’L L. 309 (2006); John Radsan, *A More Regular Process for Irregular Renditions*, 37 SETON HALL L. REV. 1 (2006).

⁴ Martin Scheinin, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, E/CN.4/2006/98, 28 December 2005, Commission on Human Rights, 62nd session, Item 17, p. 16.

⁵ BBC, Global Poll: 25 Nations Poll on Torture, October 2006, available at <http://news.bbc.co.uk/2/hi/6063386.stm> (last accessed January 24, 2011).

⁶ Two questions asked at the poll were: (a) “Which position is close to yours: Terrorists pose such an extreme threat that governments should now be allowed to use some degree of torture if it may gain information that saves innocent lives;” (b) “Which position is close to yours: Clear rules against torture should be maintained because any use of torture is immoral and will weaken international human rights standards against torture.” See, BBC, Global Poll: 25 Nations Poll on Torture, October 2006, available at <http://news.bbc.co.uk/2/hi/6063386.stm> (last accessed January 24, 2011). The highest support for the position to use torture in some circumstances came from Israel (43%), Iraq (42%), Indonesia (40%), Philippines (40%), Nigeria (39%), Kenya (38%), China (37%), Russia (37%) and USA (36%). The highest support for the position to maintain absolute prohibition of torture came from Italy (81%), Australia (75%), France (75%), Canada (74%), United Kingdom (72%) and Germany (71%).

⁷ JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIENT REGIME* 4 (The University of Chicago Press, 2006).

⁸ *Id.* See also, JOHN CONROY, *UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE* 28 (Alfred A. Knopf, 2000).

⁹ *Id.*

described as “the queen of proofs.”¹⁰ Consequently, it was introduced into the legal process and even provided for in criminal codes of European States.¹¹

Today, it is an internationally agreed position that the evidence obtained by torture should not be admissible in any judicial proceeding. This rule is commonly referred to as an exclusionary rule.¹² Article 15 of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984¹³ (hereinafter UNCAT) provides for the exclusionary rule. It reads

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.

At first sight, the message of Article 15 is straightforward: confessions obtained through torture are not admissible in judicial proceedings. However, strict reading of the wording of the article reveals that it prohibits only evidence obtained by torture and fails to address instances when lesser forms of ill-treatment, namely CIDT, are used for the same purpose. Manfred Nowak, former U.N. Special Rapporteur on Torture and an author of the commentary to UNCAT, argues that Article 15 prohibits both torture and CIDT evidence. This paper will first discuss Nowak’s interpretation of Article 15 and its possible weaknesses. Then, it will advance an alternative interpretation of Article 15. The paper will argue that in resolving Article 15’s failure to explicitly prohibit CIDT evidence, the general principles of law provide more coherent solution.

II. Manfred Nowak’s Approach and Its Appraisal

Manfred Nowak provides two reasons why Article 15’s exclusionary rule should be interpreted to include evidence obtained by CIDT. The first argument is based on the methods of treaty interpretation. For the purposes of clarity, we will quote the relevant part in full:

A systematic interpretation of Articles 15 and 16 in light of the *travaux préparatoires* as well as the purpose of both Articles leads to the conclusion that those [UNCAT] provisions which are directly related to criminal law only apply to torture, whereas the more preventive obligations of States apply to all forms of ill-treatment. Since Article 15, is, according to its main purpose, directly connected to criminal proceedings, one could argue that it applies exclusively to torture. On the other hand, Article 15 also has a clear preventive purpose, which would support a broader interpretation.¹⁴

¹⁰ NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 7 (Oxford University Press, 1999).

¹¹ EDWARD PETERS, *TORTURE* 74 (University of Pennsylvania Press, 1996).

¹² Black’s Law Dictionary defines “exclusionary rule” as “[a] rule that excludes or suppresses evidence obtained in violation of an accused person’s constitutional rights.” B. A. GARNER (ED.), *BLACK’S LAW DICTIONARY* 647 (9th ed., West Publishing, 2009).

¹³ UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 24 I.L.M. 535, G.A. Res. 39/46, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984). At the time of writing of this paper, it had been ratified by 144 States and signed by 74 States. An Optional Protocol to the Convention against Torture was adopted in December 18, 2002. It entered into force in June 22, 2006 a. The Optional Protocol aims to prevent torture and other cruel, inhuman and degrading treatment or punishment by establishing a system of regular visits to all places of detention. As of March 21, 2007, it has been ratified by 33 States and signed by 57.

¹⁴ M. NOWAK & E. MCARTHUR, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY* 534-535, 572 (Oxford University Press, 2008).

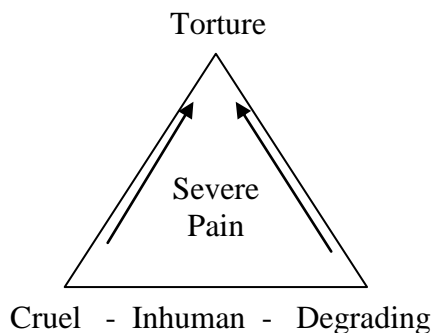
Nowak formulated his second argument in the following manner:

Even if Article 15 were applied to other forms of ill-treatment, the result would, however, not be that different [...]. [I]f interrogation methods aimed at obtaining a confession or other information cause severe pain or suffering, then they amount not only to cruel and inhuman treatment, but also to torture.¹⁵

Nowak's second argument can be illustrated by the following equation:

$$\text{CIDT} + \text{Purpose of Conduct} = \text{Torture}$$

An alternative approach to Nowak's argues that it is the severity of treatment that distinguish torture from CIDT. Nigel Rodley, referring to this approach as "pyramid approach," comments that it proposes that only pain reaching certain level of severity can be defined as torture.¹⁶ This approach can be illustrated by the following diagram:



Because Nowak considered his second argument to be more important than the first one (and arguably superseding the first argument),¹⁷ we will only address the second argument.

Nowak's second argument is based on his approach to the issue of what distinguishes torture from other forms of ill-treatment, namely CIDT. He argued that the "decisive criteria" that distinguishes torture from CIDT is the purpose of conduct rather than its severity.¹⁸ If we assume the correctness of this approach, then there is no need to worry about the inclusion of CIDT into Article 15's exclusionary rule, because whenever CIDT is used for a specific purpose, e.g. the extraction of information, it becomes torture and automatically prohibited by the exclusionary

¹⁵ *Id.*, pp. 535, 572.

¹⁶ Sir Nigel Rodley, Reflections on Committee Against Torture General Comment No. 2, 11 N.Y. City L. Rev. 356 (2007-2008).

¹⁷ *Id.*, p. 535 ("Even if Article 15 were applied to other forms of ill-treatment, the result would, however, not be that different [...].")

¹⁸ *Supra* note 14, p. 558; *See also, supra* note 2, M. Nowak, p. 809. On definition of torture and its difference from CIDT, *see also*, A. Cullen, *Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights*, 34 CAL. W. INT'L L. J. 29 (2003-2004); M. D. Evans, Getting to Grips With Torture, 51 Int'l & Comp. L.Q. 365 (2002); N. S. Rodley, The Definition(s) of Torture in International Law, 55 Current Legal Problems 467 (2002).

rule found in Article 15. This is the gist of Nowak's second argument. In what follows, we will assess the merits and weaknesses of Nowak's approach by looking at the negotiation history, relevant case law and recent scholarship.

a. Purpose vs. Severity Argument

The issue of what distinguishes torture from CIDT should start with discussing the definition of torture. UNCAT is the most authoritative source that defines torture.¹⁹ Its Article 1, in part, reads:

[t]he term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, 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. [...].

The definition mentions four key elements that together constitute torture. These elements are: [1] the requirement of severity; [2] the purpose of the conduct; [3] the identity of the offender; and [4] intent. Because this part discusses Nowak's approach on what distinguishes torture from CIDT, we will analyze only two most contentious elements of torture definition: elements of severity and purpose.

As it was mentioned earlier, Nowak's second argument argued that the "decisive criteria" that distinguishes torture from CIDT is the purpose of conduct rather than its severity.²⁰ In constructing his argument, Nowak draws support from the decisions of the European Commission of Human Rights (hereinafter European Commission) in the *Greek*²¹ and *1976 Northern Ireland* case.²² In *Greek* case, the European Commission dealt with the allegations of

¹⁹ In *Prosecutor v. Jean Paul Akayesu*, the International Criminal Tribunal for Rwanda (hereinafter ICTR) recognized that the definition provided in the Convention against Torture should apply to any rule of international law on torture. See *Prosecutor v. Jean Paul Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 Sept. 1998, para. 593. See also *Prosecutor v. Anto Furundzija*, Case IT-95-17/1-T, Judgment 10 December 1998, para. 160; *Prosecutor v. Delalic and Others*, Case IT-96-21-T, Judgment 16 November 1998, para. 45.

²⁰ *Supra* note 14, p. 558; See also, *supra* note 2, M. Nowak. The list of purposes provided in UNCAT's Article 1 can be summarized as follows: (a) obtaining information or confession from the victim or the third person; (b) punishing the victim or the third person; (c) intimidating or coercing the victim or the third person; (d) discriminating against the victim or the third person. This list is not exhaustive because Article 1 introduces these purposes with the use of "such purposes as" clause. This position is also confirmed by the fact that most delegations agreed during the drafting of the article that the list was indicative rather than exhaustive. See, *supra* note 14, M. NOWAK & E. MCARTHUR, p. 75.

²¹ The Greek Case, 1969 Y.B. EUR. CONV. ON H.R. (European Commission on Human Rights) (hereinafter *Greek Case*).

²² *Ireland v. United Kingdom*, 1976 Y.B. EUR. CONV. ON H.R. 512 (European Commission on Human Rights) (hereinafter *1976 Northern Ireland* case). The case was initiated by Ireland in 1971 by submitting an application to the European Commission alleging, among others, that the use of five interrogation techniques by British security forces constituted breach of Article 3 of the European Convention on Human Rights. Five interrogation techniques were wall standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink.

torture.²³ It held that torture is “inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.”²⁴ Though this statement does not clearly state that it is the purpose of conduct that distinguishes torture from CIDT, Nowak interprets it as qualifying purposive element to be “the critical distinguishing criterion in the definition of torture.”²⁵ The second case that Nowak refers to, the *1976 Northern Ireland* case, is also not clear on what distinguishes torture from CIDT. This case was decided a year later after the European Commission’s decision in the *Greek* case. The European Commission, applying the interpretation of torture adopted in the *Greek* case,²⁶ held that it was the specific purpose and severity of pain and suffering that distinguished torture from inhuman and degrading treatment.²⁷ From the above discussion, it is obvious that the European Commission in *Greek* and *1976 Northern Ireland* cases did not explicitly state what distinguished torture from inhuman and degrading treatment. It considered both severity and purposive elements to be of crucial importance in distinguishing torture from other forms of ill-treatment.

An alternative approach to Nowak’s argues that it is the severity requirement that distinguishes torture from CIDT. Article 1 of the UNCAT provides for the severity element (“any act by which severe pain or suffering is inflicted”). There is considerable amount of support that the drafters considered severity element in the definition of torture as the key element in distinguishing torture from CIDT. During the adoption of the U.N. Declaration against Torture in 1975, the UN members included the idea of aggravation in the definition of torture.²⁸ Article 1(2) of the Declaration reads: “Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.” It should also be noted that at the time of the adoption of the Declaration against Torture in 1975 and early discussions on the adoption of the UNCAT, some States were of opinion that the requirement of purpose was not a decisive element in the definition of torture, with France even expressing a view that the purposive element was irrelevant.²⁹ At the time of drafting of Article 1 of the UNCAT, there were numerous proposals with regard to the formulation of the severity requirement. The former Soviet Union delegation was against using the word “severe” at all.³⁰ The American delegation proposed that torture be defined as “include[ing] any act by which extremely severe pain or suffering [...] is deliberately and maliciously inflicted on a person.”³¹ The British delegation proposed an even more

²³ The European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950. Its Article 3 reads: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

²⁴ *Supra* note 21, *The Greek Case*, p. 186.

²⁵ *Supra* note 2, Nowak, p. 820 (“In the Greek Case, the Commission took the position that the severity of pain or suffering distinguishes inhuman treatment, including torture, from other treatment, whereas the purpose of such conduct is the critical distinguishing criterion between torture and inhuman treatment.”).

²⁶ *Id.*, p. 750. (“As in the Greek Case, the Commission considers in this case that any definition of the provisions of Article 3 of the Convention must start from the notion of “inhuman treatment” and it maintains that the basic elements of that notion are those given in the Greek Case.”)

²⁷ *Id.*, pp. 748, 750.

²⁸ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 9, 1975, G.A.Res. 3452 (XXX) (1975).

²⁹ J. HERMAN BURGERS AND HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 47 (Martinus Nijhoff Publishers, 1988).

³⁰ AHCENE BOULESBAA, *THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT* 16 (Martinus Nijhoff Publishers, 1999).

³¹ *Supra* note 29, BURGERS & HANS DANIELIUS, p. 41.

restrictive definition of torture than Americans. The British suggested that torture be defined as the “systematic and intentional infliction of extreme pain or suffering rather than intentional infliction of severe pain or suffering.”³² The Swiss delegation proposed not to distinguish torture from CIDT on the basis of severity of suffering.³³ Drafters finally agreed on the phrase “severe pain” and considered it to be sufficient to convey the idea that only acts of certain gravity may be qualified to constitute torture.³⁴

Interestingly, despite the above-discussed developments, the definition of torture adopted in the UNCAT neither mentions torture as an aggravated form of inhuman or degrading treatment, nor makes the intensity of pain a criterion distinguishing torture from CIDT. It includes the severity requirement, along with the requirement of purpose, among other requirements, but does not make it a decisive criterion in distinguishing torture from CIDT. Nevertheless, later case law demonstrates that adjudicators considered the severity requirement as a decisive criterion in distinguishing torture from CIDT. In *Aksoy v. Turkey*, the European Court stressed that the “distinction would appear to have been embodied in the Convention to allow the special stigma of ‘torture’ to attach only to deliberate inhuman treatment causing very serious and cruel suffering.” The *Selmouni* case³⁵ is generally seen as a case that marked a change in the European Court’s approach of determining torture. Relying on the “living instrument” doctrine of treaty interpretation, the European Court in that case held that “[c]ertain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in the future.”³⁶ The approach taken in the *Selmouni* case signals a change in how the severity requirement of torture definition should be perceived nowadays. However, it does not propose that the severity requirement should play a less important role in distinguishing CIDT from torture than the requirement of purpose.

In a number of cases, the ICTY also relied on the severity requirement in distinguishing torture from lesser forms of ill-treatment. In the *Delalic case*, the Trial Chamber held that “[m]istreatment that does not rise to the level of severity necessary to be characterized as torture may constitute another offence.”³⁷ It further added that inhuman treatment is treatment that “deliberately causes serious mental or physical suffering that falls short of the severe mental and physical suffering required for the offence of torture.”³⁸ The ICTY reiterated the same position in the *Kvočka case*. Referring to the ruling in *Delalic case*, the Trial Chamber held that “the severity of the pain or suffering is a distinguishing characteristic of torture that sets it apart from similar offences.”³⁹

Compared to the above cases where it was explicitly stated that it is the severity of treatment that distinguishing torture from CIDT, there were no cases where courts explicitly stated that it is the purpose of conduct that distinguishes torture from CIDT.

³² *Supra* note 29, BURGERS & DANIELIUS, pp. 41-45, 117. *See also, supra* note 30, BOULESBAA, 16.

³³ *Id.*, BOULESBAA, p. 16.

³⁴ *Id.*

³⁵ *Selmouni v. France*, Eur. Ct. H.R., Judgment, 28 July 1999.

³⁶ *Id.*, para 101.

³⁷ *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, Nov. 16, 1998, paras. 462-468.

³⁸ *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, Nov. 16, 1998, para. 542.

³⁹ *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, Nov. 2, 2001, para. 142.

b. Scope of UNCAT's Exclusionary Rule

During the drafting of UNCAT, there were several proposals to prohibit evidence obtained by CIDT. The predecessor of the U.N. Convention against Torture, the U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (hereinafter The U.N. Declaration against Torture)⁴⁰ in its Article 12 required the exclusion of evidence obtained not only by torture, but also by CIDT. It was reported that the Swiss draft's exclusionary rule included CIDT as well.⁴¹ The International Commission of Jurists was also in favor of reading Article 15 as to include CIDT.⁴² Despite these proposals, drafters could not reach any agreement about whether the exclusionary rule should apply to information obtained by CIDT either by direct inclusion of CIDT in Article 15 or reference to Article 15 in Article 16.⁴³ Another commentator even noted that there was no serious debate about the omission of CIDT from UNCAT's exclusionary rule.⁴⁴ Eventually CIDT was not included into the final draft to Article 15.

The issue of prohibiting CIDT was addressed by drafting a separate article. Drafters included the prohibition of CIDT in Article 16 of UNCAT that reads:

Each State Party shall undertake to prevent [...] other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

As can be noticed, in addition to prohibiting CIDT, Article 16 makes four other UNCAT articles applicable to CIDT. These are Articles 10,⁴⁵ 11,⁴⁶ 12⁴⁷ and 13.⁴⁸ Article 15 is not mentioned

⁴⁰ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 9, 1975, G.A.Res. 3452 (XXX) (1975).

⁴¹ *Supra* note 29, BURGERS & DANIELIUS, p. 69.

⁴² The International Commission of Jurist proposing its version of article 16, which is about the prohibition of cruel, inhuman or degrading treatment, submitted the following wording: "Each State Party shall take effective measures to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture [...]. In particular, the obligations contained in [article 15] shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment." *See, id.*, BURGERS & DANIELIUS, p. 71.

⁴³ *Supra* note 29, BURGERS & DANIELIUS, pp. 70-71, 95-96, 147-150.

⁴⁴ *Supra* note 29, BURGERS & DANIELIUS; *Supra* note 30, BOULESBAA, p. 16.

⁴⁵ Article 10 of the U.N. Convention against Torture reads: "(1) Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment; (2) Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons."

⁴⁶ Article 11 of U.N. Convention against Torture reads: "Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture"

⁴⁷ Article 12 of U.N. Convention against Torture reads: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

among the articles. Commentators on the drafting history of the UNCAT reported that though several delegations proposed to extend the scope of Article 16 to prohibit evidence obtained by CIDT, such a proposal was not adopted.⁴⁹

It is important to note that the clause in Article 16 that introduces Articles 10, 11, 12 and 13 to be applicable to CIDT starts with the phrase “[i]n particular.” There is disagreement with regard to what exactly “in particular” means. The first President of the U.N. Committee against Torture indicated that all provisions of UNCAT were applicable to CIDT.⁵⁰ Chris Ingelse disagreed with such an interpretation.⁵¹ He wrote that the first President of the U.N. Committee against Torture went “very far by stating without basis that all rules of the Convention *mutatis mutandis* are applicable to cruel, inhuman or degrading treatment or punishment.”⁵² Nowak proposed a different approach. He holds the view that the number of articles mentioned in Article 16 should not be understood to be inclusive or exclusive.⁵³ He commented that the application of all provisions of the UNCAT with regard to CIDT depends on the purpose of the article. If the article’s main purpose is prosecution, then it is applicable only to torture.⁵⁴ If the article has a purpose of preventing torturous acts, then it is applicable to CIDT as well.⁵⁵ As was mentioned earlier, it is not clear if Article 15 serves purely preventive or prosecutorial functions and consequently if it can be regarded as either inclusive or exclusive in Article 16.

Our analysis of the UNCAT’s negotiation history so far demonstrates at least two things. First, drafters did not intend to include CIDT in UNCAT’s exclusionary rule. Second, the very fact that drafters discussed at length whether to include CIDT or not in Article 15’s exclusionary rule indicates that they did not consider the purposive element of torture to constitute a decisive criterion in distinguishing torture from CIDT. If this was the case, why would drafter engage into lengthy discussions on whether to include CIDT in UNCAT’s exclusionary rule or not? If the majority of drafters held the view that it was the purpose of ill-treatment that distinguishes torture from CIDT, then there was no need to include CIDT in Article 15’s exclusionary rule that only prohibits the admissibility of evidence by torture.

To conclude, it appears that the negotiating history demonstrates that drafters wanted UNCAT’s exclusionary rule to apply only to evidence obtained by torture. The very fact that drafters

⁴⁸ Article 13 of U.N. Convention against Torture reads: “Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”

⁴⁹ *Supra* note 29, BURGERS & DANIELIUS, p. 147; *See also, supra* note 14, NOWAK, p. 507.

⁵⁰ *Supra* note 14, NOWAK, p. 570.

⁵¹ CHRIS INGELSE, *THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT* 248 (Kluwer Law International, 2001).

⁵² *Id.*

⁵³ *Supra* note 14, NOWAK, pp. 570-575. “Since an agreement [to include reference to Article 15 in Article 16] could not be reached, these references were deleted from the draft, and the words ‘in particular’ added in order to show that this reference is not exhaustive.”

⁵⁴ *Id.*, p. 571. He wrote: “[a]ll obligations of States parties to use domestic criminal law for the purpose of investigating any crime of torture and bringing the perpetrators to justice shall not be applied to other forms of ill-treatment, notwithstanding the fact that the use of criminal law, of course, also has a preventive effect.”

⁵⁵ *Id.* He wrote: “[t]he obligation to prevent torture by means of education and training, by systematically reviewing interrogation rules and practices, by ensuring a prompt and impartial *ex officio* investigation, and by ensuring an effective complaint mechanism [...] must be applied equally to torture and other forms of ill-treatment.”

debated whether CIDT should be included in Article 15's exclusionary rule also demonstrates that they did not consider the purposive element as a decisive criterion in distinguishing torture from CIDT.

c. Recent Practice

Recent practice of international organizations and governmental institutions also demonstrates that the purposive element in the torture definition is not a decisive criterion in differentiating it from CIDT. The United Nations Committee against Torture (Committee against Torture), a body responsible for monitoring implementation of the UNCAT, issued general comments on the application/implementation of UNCAT articles. It is unfortunate that so far it has only issued two general comments: one on Article 3 (principles of *non-refoulement*) in 1996⁵⁶ and Article 2 (obligation to prevent torture and absolute prohibition against it) in 2007.⁵⁷ Considering the importance of the prohibition of torture and CIDT and the need for interpretative guidance of UNCAT's articles, the number of general comments issues by the Committee against Torture since 1984 is extremely modest. Of these two general comments, none concretely addresses the scope of either Article 15 or 16. The only reference to the application of UNCAT provisions to CIDT can be found in the General Comment #2, where the Committee against Torture noted that it "considers that articles 3-15 are [...] obligatory as applied to both torture and ill-treatment."⁵⁸

General Comment #2 also provides that obligations to prevent torture and CIDT are interdependent, indivisible and interrelated, and that "[t]he obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture."⁵⁹ More importantly, it also provides that because the "[e]xperience demonstrates that 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," the prohibition of ill-treatment should be considered to be of non-derogable nature.⁶⁰ This comment deserves three main observations. First, it does not propose, or even hint, that it is the purpose or severity of treatment that distinguishes torture from CIDT and its implications on the application of the Convention against Torture provisions with regard to torture and CIDT. Second, though the comment provides that

⁵⁶ General Comment No. 1, Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications), A/53/44, November 21, 1997, available at <http://www2.ohchr.org/english/bodies/cat/comments.htm> (last visited on March 24, 2011).

⁵⁷ General Comment No. 2, Implementation of Article 2 by States parties, Committee against Torture, CAT/C/GC/2, January 24, 2008, available at <http://www2.ohchr.org/english/bodies/cat/comments.htm> (last visited on March 24, 2011). For the insightful discussion of the importance of General Comment #2 for the prevention of torture, see, Preventing Torture: "Implementation of Article 2 by the States Parties of the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:" A Symposium, 11 N.Y. City L. Rev. 179 (2007-2008). The Committee against Torture is currently working on a general comment on Article 14. The draft is open for comments and available at http://www2.ohchr.org/english/bodies/cat/comments_article14.htm (last visited on August 10, 2011).

⁵⁸ General Comment No. 2, Implementation of Article 2 by States parties, Committee against Torture, CAT/C/GC/2, January 24, 2008, available at <http://www2.ohchr.org/english/bodies/cat/comments.htm> (last visited on March 24, 2011), para. 6.

⁵⁹ General Comment No. 2, Implementation of Article 2 by States parties, Committee against Torture, CAT/C/GC/2, January 24, 2008, available at <http://www2.ohchr.org/english/bodies/cat/comments.htm> (last visited on March 24, 2011), para. 3.

⁶⁰ General Comment No. 2, Implementation of Article 2 by States parties, Committee against Torture, CAT/C/GC/2, January 24, 2008, available at <http://www2.ohchr.org/english/bodies/cat/comments.htm> (last visited on March 24, 2011), para. 3.

“the measures required to prevent torture must be applied to prevent ill-treatment,” the main rationale behind this appears to be the measures of prevention that cannot be applied separately with regard to torture and CIDT.

Third, the comment conflicts with the Committee against Torture’s earlier decision in *Hajrizi Dzemajl et al. v. Yugoslavia*.⁶¹ In that case, the Committee against Torture held that the list of Articles referred to in Article 16 is exclusive. Deliberating over the question whether Article 14⁶² of UNCAT was included in Article 16, the U.N. Committee against Torture commented

Concerning the alleged violation of article 14 of the [UNCAT], the [Committee against Torture] notes that the scope of application of the said provision only refers to torture in the sense of article 1 of the [UNCAT] and does not cover other forms of ill-treatment. Moreover, article 16, paragraph 1, of the [UNCAT] while specifically referring to articles 10, 11, 12, and 13, does not mention article 14 of the Convention.⁶³

Paragraph 3 of the General Comment #2 appears to attempt to fix this problem because it provides

Article 16, identifying the means of prevention of ill-treatment, emphasizes “*in particular*” the measures outlined in articles 10 to 13, but does not limit effective prevention to these articles, as the Committee has explained, for example, with respect to compensation in article 14.⁶⁴

It should be noted that under Nowak’s proposal,⁶⁵ Article 14 should be read to fall under the scope of Article 16 because Article 14’s main purpose is not persecution as such. Because Article 14 deals with the right of the torture victims’ compensation, it is more about prevention than persecution *per se*. But contrary to Nowak’s approach, the Committee against Torture held that Article 14 does not fall under the scope of Article 16.

⁶¹ *Hajrizi Dzemajl et al. v. Yugoslavia* (hereinafter *Hajrizi Dzemajl case*), No. 161/2000, Committee Against Torture, 29th Session, November 11-22, 2002.

⁶² Article 14 of the UNCAT reads: (1) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation; (2) Nothing in this article shall affect any right of the victim or other person to compensation which may exist under national law.

⁶³ *Supra* note 61, *Hajrizi Dzemajl case*, para. 9.6.

⁶⁴ Here the General Comment #2 partly refers to the Committee against Torture’s decision in *Hajrizi Dzemajl case*. As it was pointed out above that though the Committee against Torture commented that Article 16 does not cover CIDT and that the reference to Articles 10, 11, 12 and 13 in Article 16 are exclusive, it gave the following comment with regard to the scope of Article 14 of UNCAT: “[A]rticle 14 of the [UNCAT] does not mean that the State party is not obliged to grant redress and fair and adequate compensation to the victim of an act in breach of Article 16 of the [UNCAT]. The positive obligations that flow from the first sentence of Article 16 of the [UNCAT] include an obligation to grant redress and compensate the victims of an act in breach of that provision.” *See*, *Hajrizi Dzemajl case*, para. 9.6.

⁶⁵ *Supra* note 14, p. 571. He wrote: “[a]ll obligations of States parties to use domestic criminal law for the purpose of investigating any crime of torture and bringing the perpetrators to justice shall not be applied to other forms of ill-treatment, notwithstanding the fact that the use of criminal law, of course, also has a preventive effect.”

The British House of Lords decision in *A and Others v. Secretary of State for the Home Department (2005)*⁶⁶ also provides some important insights into the way how provisions of UNCAT are being interpreted. The House of Lords considered, among others, the scope of application of UNCAT's Article 15. Discussing the scope of the exclusionary rule provided in Article 15, Lord Bingham implied that it only extends to the admissibility of evidence obtained by torture and not cruel, inhuman or degrading treatment.⁶⁷ Lord Hope's opinion was the most straightforward on this issue. According to him, UNCAT's exclusionary rule found in Article 15 "extends to statements obtained by the use of torture, not to those obtained by the use of cruel, inhuman or degrading treatment or punishment."⁶⁸ More specifically, he added that "[t]o trigger the exclusion, it must be shown that the statement in question has been obtained by torture."⁶⁹ Interestingly, although the Law Lords stated that UNCAT's exclusionary rule does not include evidence obtained by CIDT, they did not even question the soundness of UNCAT's exclusionary rule and thus the scenarios of interpreting it in a different way. This is despite the fact that the relevant English law on the exclusionary rule states that evidence obtained by the infliction of coercion is inadmissible.⁷⁰

Several memoranda issued by the U.S. Department of Justice also illustrate lack of agreement with regard to what legal obligations UNCAT's Article 15 and 16 entail. The 2002 Bybee Memo, for example, interpreted UNCAT's Article 16 in such a way as proposing that "states must endeavor to prevent CIDT," but "states need not criminalize, leaving [CIDT] without the stigma of criminal penalties."⁷¹ Interestingly, the 2004 Memo⁷² that replaced the 2002 Bybee Memo, although it addressed in detail the issue of specific intent and the threshold of severity for the definition of torture, did not talk about CIDT.

The Military Commission Act of 2006 (2006 MCA)⁷³ expressly authorized the admission of statements obtained by coercion, which includes CIDT, before the enactment of the Detainee Treatment Act of 2005.⁷⁴ It provided that "the totality of the circumstances renders the statements reliable and possessing sufficient probative value"⁷⁵ and their introduction serves the "best interest of justice."⁷⁶ As for the statements obtained after the enactment of the Detainee Treatment Act of 2005, Section 948r(d) of the 2006 MCA provides that statements obtained by coercion may be admitted only if (1) the totality of the circumstances renders the statement

⁶⁶ FULL CITATION

⁶⁷ Para. 53: "Ill-treatment falling short of torture may invite exclusion of evidence as adversely affecting the fairness of a proceeding under section 78 of the 1984 Act, where that section applies. But I do not think the authorities on the Torture Convention justify the assimilation of these two kinds of abusive conduct. Special rules have always been thought to apply to torture, and for the present at least must continue to do so."

⁶⁸ Para. 126, Lord Hope.

⁶⁹ Para. 138, Lord Hope.

⁷⁰ See the discussion of the British exclusionary rule with regard to CIDT evidence below in the "State Practice" section.

⁷¹ Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice, Office of the Legal Counsel, Re: Standards of Conduct for Interrogation under 18 USC. ## 2340-2340A, August 1, 2002.

⁷² Daniel Levin, Acting Assistant Attorney General, Memorandum for James B. Comey, Deputy Attorney General, Regarding Legal Standards Applicable Under 18 USC. ## 2340-2340A, 30 December 2004.

⁷³ FULL CITATION

⁷⁴ FULL CITATION

⁷⁵ Military Commission Act of 2006, Sec. 948r.(c)(1).

⁷⁶ Military Commission Act of 2006, Sec. 948r.(c)(2).

reliable and possessing sufficient probative value; (2) the interests of justice would best be served by admission of the statement into evidence; and (3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005. Though Section 948r(d) of the 2006 MCA prohibited the admissibility of evidence obtained by CIDT, it also means that the US position does not favor the purposive element as a decisive criterion in distinguishing torture from CIDT. Otherwise, the discussion of prohibiting CIDT evidence or not would have been immaterial.

It can be concluded that recent state practice demonstrates that States do not consider purposive element as a decisive criterion in differentiating torture from CIDT.

d. Review of Relevant Scholarship

Leading scholars on the topics related to the definition of torture and the inadmissibility of evidence obtained by it wrote very little on how international law should address the issue of the admissibility of evidence obtained by CIDT. Some scholars acknowledged the problem but failed to propose solutions. Malcolm Evans is one of them. His position about what distinguishes torture from CIDT coincides with Nowak's,⁷⁷ but he elaborated very little about the failure of Article 15 to include evidence obtained by CIDT and how to remedy this problem. Criticizing how the House of Lords in *A and Others case* resolved the issue of the admissibility of foreign torture evidence, Evans did not discuss how taking purpose as a decisive criterion in distinguishing torture from CIDT impacts interpretation of Article 15's exclusionary rule.⁷⁸ Rather, he mainly criticized the House of Lords' focus on the difference between torture and CIDT. He argued that for the purposes of the human rights law States are obliged to refrain from both torture and CIDT,⁷⁹ which is certainly a valid point. Yet, if Evans holds the position that it is the purpose of conduct that distinguishes torture from CIDT, then he should have elaborated on the implications of such a position on admissibility of CIDT evidence.⁸⁰

Other groups of scholars who wrote on the admissibility of torture evidence in international law appear to either ignore or avoid discussing the issue of the admissibility of CIDT evidence in international law. In 2009, Kai Ambos published an article on transnational use of torture evidence.⁸¹ The article discusses the rationale of the exclusionary rule and the law of international and national criminal tribunals, but does not address the issue of transnational use of evidence obtained by CIDT. Tobias Thienel wrote two articles on the issue of the admissibility of torture evidence: the first addressed the admissibility of torture evidence in

⁷⁷ M. D. Evans, *Getting to Grips with Torture*, 51 INT'L & COMP. L.Q. 382 (2002) ("The first question to be asked would be whether the form of ill-treatment or punishment is sufficiently serious to be deemed 'inhuman.' If that threshold is met, then the next question is whether the ill-treatment was purposive (in the sense of the Article 1 of the UN Convention). If it was, then it should be characterized as 'torture.' It should not be necessary for the 'suffering' to be of a greater severity as well. It is the very fact of its purposive use that is the 'aggravating factor.'")

⁷⁸ Malcolm D. Evans, *'All the Perfumes of Arabia': The House of Lords and 'Foreign Torture Evidence'*, 19 LEIDEN JOURNAL OF INTERNATIONAL LAW 1125, 1132-1133 (2006).

⁷⁹ *Id.*, p. 1130.

⁸⁰ Arguably, if it is the purpose of conduct that distinguishes torture from CIDT, then, as Nowak argued, there is no need to explicitly prohibit CIDT evidence because whenever CIDT is inflicted for a specific purpose it becomes torture and thus prohibited under Article 15. See, Part II ("Manfred Nowak's Approach and Its Appraisal").

⁸¹ Kai Ambos, *The Transnational Use of Torture Evidence*, ISRAEL LAW REVIEW, Vol. 42, no. 2 (2009).

international law⁸² and the second discussed the House of Lords' decision in *A and Others case*.⁸³ In neither of the articles did Thienel address Article 15's failure to extend its exclusionary rule to CIDT evidence. Similarly, Rosemary Pattenden also addressed the issue of the admissibility of evidence obtained by torture but said very little about the admissibility of CIDT evidence.⁸⁴

It can be concluded that scholarship on the issue of the admissibility of evidence obtained by torture rarely addressed the issue of the admissibility of evidence obtained by CIDT. Even when scholars addressed this issue, they did not rely or support Nowak's approach.

III. General Principles of Law as a More Coherent Solution

This section will look at what guidance general principles of law provide with regard to international law standards as applied to the exclusion of CIDT evidence. As was established in the previous sections, Article 15 of CAT prohibits evidence only obtained by torture and does not explicitly prohibit the admissibility of CIDT evidence. This section will demonstrate that general principles of law provide better guidance in the resolution of this problem. It will first argue that general principles of law are cardinal principles of international legal system. Then, it will be argued that prohibition of evidence obtained by any form of unlawful coercion is a general principle of law and that interpretation of Article 15 shall be interpreted and applied in light of this principle. Finally, to demonstrate wide acceptance of this principles in domestic legal systems, national laws of several countries from different parts of the world will be analyzed.

a. What Do General Principles of Law Mean?

An ordinary starting point for international lawyers when thinking about the sources of international law is Article 38 of the Statute of the International Court of Justice (hereinafter ICJ).⁸⁵ Article 38(1)(c) provides that the ICJ should apply "the general principles of law recognized by civilized nations" to resolve disputes.⁸⁶ The rationale of including general principles of law into Article 38(1)(c) was that drafters were concerned that international treaty and customary law will not be sufficient to resolve legal disputes between States. Indeed, there were fewer decided cases in international law than in municipal law and there was no unified

⁸² Tobias Thienel, *The Admissibility of Evidence Obtained by Torture Under International Law*, 17 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, Vol. no. 2, 349-367 (2006).

⁸³ Tobias Thienel, *Foreign Acts of Torture and the Admissibility of Evidence: The Judgment of the House of Lords in A and Others v. Secretary of State for the Home Department (No. 2)*, 4 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 401 (2006).

⁸⁴ Rosemary Pattenden, *Admissibility in Criminal Proceedings of Third Party and Real Evidence Obtained by Methods Prohibited by UNCAT*, THE INTERNATIONAL JOURNAL OF EVIDENCE AND PROOF 8 (2006).

⁸⁵ Statute of the International Court of Justice, June 26, 1945. It is widely recognized as the most authoritative statement that enumerates sources of international law. See, I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (7th ed., Oxford University Press, 2008), p. 5; L. OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 22 (R. Y. Jennings et al. eds., Longmans 9th ed., 1992).

⁸⁶ Article 38 reads: The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

method of lawmaking to provide rules to govern new situations as they arise.⁸⁷ These factors led some scholars describe general principles of law to constitute “self-curative methods” of international law to address the gaps.⁸⁸ Writing about the importance of having general principles of law as a separate source of international law, F. Jalet wrote that general principles of law play special role in filling the gaps and remedying deficiencies of international law.⁸⁹

It should be noted that Article 38 in the ICJ Statute was taken from the Statute of its predecessor, the Permanent Court of International Justice (hereinafter PCIJ). Article 38 of the PCIJ Statute was drafted by the Advisory Committee of Jurists (hereinafter Committee) composed of ten members: eight Westerners, a Brazilian and a Japanese.⁹⁰ Discussions at the Committee reveal majority of its members wanted to include into Article 38 a source of law that does not rely on the will of State, like international treaties and customs. Whereas the majority led by Belgian Chairman Baron Descamps suggested that PCIJ should apply “principles of objective justice,”⁹¹ the minority led by the American Eluhi Root opposed this view arguing that international law is what States decide it should be.⁹² Along with the British Lord Phillimore and the Italian Ricci Busatti, E. Root understood general principles of law in terms of rules accepted in the domestic law of all civilized states.⁹³ It appears that the majority wanted PCIJ to apply natural law and the minority opposed this view based on their positive approach to international law. Eventually, the term “general principles of law” served as a compromise among the Committee members. It was preferred to “objective justice” because general principles of law relative concreteness in a sense that they constituted only those principles which were found in domestic legislation.⁹⁴

Definition provided by the scholars after the adoption of the ICJ Statute appears to resonate initial split among scholars during the adoption of the PCIJ Statute. Some continued to emphasize nature law origins of general principles of law. Vedross believed that the effect of including general principles of law in Article 38 was to incorporate natural law into international law.⁹⁵ Identifying general principles of law with natural law, H. Lauterpacht wrote that general principles of law are “a modern version of the law of nature.”⁹⁶

⁸⁷ F. Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations – A Study*, 10 UCLA L. REV. 1055-1063 (1961-1962); see also, M. SHAW, *INTERNATIONAL LAW* 92-93 (Cambridge University Press, 2003).

⁸⁸ P. Weil, “*The Court Cannot Conclude Definitely...*” *Non Liqueat Revisited*, 36 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 110 (1998).

⁸⁹ *Supra* note 87, Jalet, 1056 (“Without the ability to resort to general principles, decisions in many cases could not be made. This is true of all law, but has special significance in international law which is more susceptible to the need for such principles to fill gaps and to remedy its deficiencies [...]”). For similar views, see M. Janis - “Sometimes neither treaties nor custom provide a rule to decide a case involving international law. Then the judge ... may look outside the theoretically consensual sources to non-consensual sources.” See also, S. NASSER, *SOURCES AND NORMS OF INTERNATIONAL LAW: A STUDY ON SOFT LAW, MOBILITY AND NORM CHANGE, VOLUME 7* (Galda+Wilch Verlag, 2008), pp. 64-67.

⁹⁰ A. CASSESE & J. H. H. WEILER (EDS.), *CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING* 53 (Walter de Gruyter & Co., 1988).

⁹¹ “We should apply the fundamental law of justice and injustice, deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations.” See *id.*

⁹² *Id.*

⁹³ *Id.*; see also, I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 16 (7th ed., Oxford University Press, 2008).

⁹⁴ *Supra* note 90, A. Cassese & J. H. H. Weiler (eds.), p. 54.

⁹⁵ M. DIXON, *TEXTBOOK ON INTERNATIONAL LAW* (4th ed., Blackstone Press Limited, 2000), p. 39.

⁹⁶ H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 115 (Stevens & Sons, London, 1950).

B. Cheng wrote that general principles of law do not consist of specific rules but are general propositions that express the essential qualities of juridical truth itself.⁹⁷ He also described general principles of law as “cardinal principles of the legal system, in the light of which international [...] law is to be interpreted and applied.”⁹⁸ O. Schachter described general principles of law as “an appeal to reason and moral ideas.”⁹⁹ As some ideas associated with general principles of law, he listed, among others, principles intrinsic to the idea of law, reasonableness, fairness, natural justice and good faith.¹⁰⁰ M. E. O’Connell defined general principles of law as the “principles inherent in law and often essential to the application of justice.”¹⁰¹ For G. Christenson, general principles of law are “foundational ordering norms in a global, interdependent community.”¹⁰² For R. Kolb, the general principles of law are norm-sources that “[do] not essentially deal with the fixed meaning of rules to be applied, but with the adaptation of the rules to some constitutional necessities, to new developments and needs, to conformity with basic value-ideas [...]”¹⁰³ Describing the functions of general principles of law as “value-catalysers,” R. Kolb also wrote that by referring to the general principles of law “the legal system assures itself not to be completely cut, on the level of the application of the law, from the fundamental ethical values, but also from the more contingent social values and needs held at a certain moment in a particular society.”¹⁰⁴

An alternative view, aligning with the positivist position taken by E. Root and Lord Phillimore during the drafting period, is that general principles of law are rules found in major legal systems. For Schlesinger, general principles are “a core of legal ideas which are common to all civilized legal systems.”¹⁰⁵ Judge Ammoun defined general principles of law as constituting “nothing other than the norms common to the different legislations of the world [...]”¹⁰⁶ S. Nasser wrote that general principles of law refer to those norms that are found in and recognized by the various domestic legal systems.¹⁰⁷ The definition of general principles of law adopted in the Rome Statute of the International Criminal Court¹⁰⁸ (hereinafter the Rome Statute) also uses

⁹⁷ B. CHENG, *GENERAL PRINCIPLES OF LAW: AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 24 (Grotius Publications, 1987).

⁹⁸ *Id.*

⁹⁹ O. Schachter, *International Law in Theory and Practice: General Course in Public International Law*, RECUEIL DES COURS, 1982-V, p. 74.

¹⁰⁰ *Id.*

¹⁰¹ M. E. O’CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT* 143 (Oxford University Press, 2008).

¹⁰² G. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT’L L. 585, 587 (1988).

¹⁰³ R. Kolb, *Principles as Sources of International Law (With Special Reference to Good Faith)*, Netherlands International Law Review, Vol. LIII (2006), p. 9.

¹⁰⁴ *Id.*, p. 29.

¹⁰⁵ R. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT’L L. 734, 73 (1957).

¹⁰⁶ North Sea Continental Shelf Cases, [1969] I.C.J. Rep. 3 at 132-140 (Separate Opinion by Judge Fouad Ammoun).

¹⁰⁷ S. NASSER, *SOURCES AND NORMS OF INTERNATIONAL LAW: A STUDY ON SOFT LAW (MOBILITY AND NORM CHANGE)* 65 (Galda+Wilch Verlag, 1st ed., 2008).

¹⁰⁸ FULL CITATION

similar definition. The Rome Statute defines general principles of law as the principles “derived by the Court from national laws of legal systems of the world.”¹⁰⁹

The second view appears to have received stronger support and approval in subsequent case law and scholarly writings. Judge Tanaka attempted to provide an explanation why there are two major views on what general principles of law constitute. After noting that some natural law elements are inherent in Article 38(1)(c), he also wrote that the article was “the product of a compromise between two schools, naturalist and positivist, and therefore the fact that the natural law idea became incorporated therein is not difficult to discover.”¹¹⁰ M. E. O’Connell unites both positions by summarizing that general principles of law have two categories: the first category is composed of natural law and is inherent in legal systems; the second category is composed of positive law of national systems.¹¹¹

We think that it is impossible to take either position with regard to general principles of law, i.e. either as being composed of natural law or rules common to major legal systems. The fact that later scholarship tended to define general principles of law as constituting rules common to major legal systems reflects the development of international law. When the idea of general principles of law was proposed, it was impossible at that moment to propose that those were the rules inherent in different legal systems and thus scholars relied on natural law in defining general principles of law. Subsequent growing reliance on the definition of general principles of law as rules common to major legal systems arguably happened because of growing influence of positivism over international law and criticism of natural law as lacking concreteness. Obviously, at the time of the adoption of both PCIJ and ICJ Statutes, international legal order was more positivist than it is now. Thus, by defining general principles of law as the rules inherent in different legal systems, scholars gave more concreteness and transparency to how the existence of GPL should be determined. O. Elias and C. Lim wrote that general principles of law are rules of not just good sense (because of the relativity of the notion), but of common good sense that is based on general acceptance.¹¹²

It can be concluded that although general principles of law might have had natural law origins, today they are widely considered to be norms common to different domestic legal systems. In what follows, we will address the issue of how we can derive a general principle of law from domestic legal systems.

b. How to Determine Existence of General Principles of Law?¹¹³

Identifying the existence of a general principle of law by studying national laws of legal systems of the world is a challenging task. There seems to be general agreement among scholars that this process is comprised of three main steps: identification of a legal rule, comparison between

¹⁰⁹ Article 21, Rome Statute.

¹¹⁰ Judge Tanaka’s dissenting opinion in South West Africa Case

¹¹¹ M. E. O’CONNELL ET AL., *THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS* 57 (6th ed., Foundation Press, 2010).

¹¹² O. Elias, p. 31-35.

¹¹³ Elsewhere, the question was formulated as “How ‘general’ must the occurrence of principles of law in domestic legal systems be in order to constitute ‘general principles of law recognized by civilized nations’?” See, J. H. Currie et al., *International Law: Doctrine, Practice, and Theory*, Irwin Law, 2007, p. 149.

national systems (with the purpose of determining if the legal rule is generally accepted), and transposability of the legal rule into international sphere.¹¹⁴

Evidently, we cannot think of the existence of a general principle of law when a principle is only found in a few national legislations, however important and well-developed those systems might be. At the same time, it is unrealistic to insist that a principle be found in every national legal system before it becomes a general principle of law. To address these questions, international law scholars have developed various methods of determining general principles of law. In general, there are two approaches: “comparativist” and “categorist.”¹¹⁵ The comparativist approach is based on Lord Phillimore’s position according to which general principles of law are those accepted by all States *in foro domestico*.¹¹⁶ M. Akehurst wrote that general principles of law can be “verified by a scientific study of the law of different States”¹¹⁷ and considered it a reliable way of proving their existence.¹¹⁸ Similarly, for J. Hathaway general principles of law are “derived from domestic standards present in the legal cultures of a significant majority of states.”¹¹⁹ Differentiating how general principles of law develop from the way how customary law does, Hathaway wrote that general principles of law “[are] established not on the basis of uniform state practice as under custom, but by virtue of the consistency of domestic laws across a significant range of countries.”¹²⁰ The ICTY adopted a similar approach in analyzing “world’s legal systems” to derive a general principle of law in its numerous decisions.¹²¹ In *Prosecutor v. Kurpeskic et al.*, the ICTY held that in order to fill gaps in international treaty and customary law, an adjudicator “may draw upon general principles of criminal law as they derive from the convergence of the principal penal systems of the world.”¹²² The Rome Statute, if seen as one of the most recent codifications of the sources of law that judges at the ICC shall employ, adopts the approach that general principles of law are derived “from national laws of legal systems of the world.”¹²³

Scholars¹²⁴ usually refer to the *Case Concerning Right of Passage Over Indian Territory*¹²⁵ as an example of this approach. In this case, Portugal studied the national laws of sixty-four states with

¹¹⁴ F. O. RAIMONDO, *GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS*, Martinus Nijhoff Publishers, 2008, pp. 45-53; *see also*, A. Pellet, *Applicable Law*, in *The Rome Statute of The International Criminal Court: A Commentary*, Volume II (A. Cassese et al. (eds), Oxford University Press, 2002), p. 1073;

¹¹⁵ C. Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and ‘General Principles of Law,’* 5 *DUKE J. COMP. & INT’L L.* 35, 65-75 (1994). *See also*, J. H. CURRIE ET AL., *INTERNATIONAL LAW: DOCTRINE, PRACTICE, AND THEORY* 149-150 (Irwin Law, 2007).

¹¹⁶ *Supra* note 93, I. BROWNIE, 16; G.J.J. VAN HOOFF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 141 (Kulwer Academic Publishers, 1983).

¹¹⁷ *Id.*

¹¹⁸ M. Akehurst, *Equity and General Principles of Law*, 25 *INT’L & COMP. L.Q.* 818 (1976).

¹¹⁹ J. C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 17 (Cambridge University Press, 2005).

¹²⁰ *Id.*, p. 26.

¹²¹ *See*, *Prosecutor v. Erdemovic*, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, App. Ch., 7 October 1997, para. 40, 55-72. *See also*, *Prosecutor v. Kurpeskic et al.*, Judgment, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, para. 677; *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998, paras. 177-181.

¹²² *Prosecutor v. Kurpeskic et al.*, Judgment, Case No. IT-95-16-T, T. Ch. II, 14 January 2000, para. 677

¹²³ Article 21 (1)(c), the Rome Statute.

¹²⁴ *See, e.g., supra* note 144, RAIMONDO, pp. 28-29.

¹²⁵ *Right of Passage Over Indian Territory (Portugal v. India)*, [1960] I.C.J. Rep. 6 at 11-12

the purpose of deriving a general principle of law relating to the right of passage in enclave territory.¹²⁶ The advantage of approaching the legal issue through the means of the comparative law method, in the words of Johan Lammers, “has the merit of scientific verifiability and constitutes a proper defense against complaints of subjectivism in the determination of general principles of law.”¹²⁷ This way, the comparativist approach would also address one of the critiques raised by Soviet scholars of international law that in an attempt to determine the content of “general principles of law,” Western scholars rarely make a comparative study of all the systems of municipal law, limiting themselves to several Western systems and ignoring the law of Asian, African and Socialist states.¹²⁸

Despite its merits, the comparative approach has one major disadvantage. Undertaking comparative research is an extremely time-consuming and arguably unrealistic task for several reasons. First, the required material on a specific legislation might not be available either because of logistical problems of finding necessary legal provision or because of language barriers. Second, not all judges might have comparative law experience. This might result in the reluctance to carry out full-scale comparative analyses of different legal systems and/or spending more time than they are expected to spend in search of specific legal provisions. Apparently, this problem was also noted by the drafters of the Rome Statute and thus its Article 21 requires only inquiring into “national laws of legal systems of the world” and not to national laws in general.¹²⁹ Because of these practical difficulties associated with the comparative approach, scholars started favoring what is referred to as the “systems approach.”¹³⁰ The systems approach involves analyzing only a representative sample of the world’s legal systems.¹³¹ Supporting this approach, A. Pellet wrote that “all modern domestic laws can be gathered into a few families or systems of law which, insofar as general principles are concerned, are coherent enough to be considered as ‘legal systems’.”¹³² Thus, instead of analyzing all or the prevailing majority of legal systems around the world, the systems approach allows deriving a general principle of law by inquiring into the legal systems of representative countries. In the words of A. Pellet, this approach requires ensuring that “the norms in question are effectively found in the ‘principal legal systems of the world.’”¹³³

The systems approach has its own methodological challenges: What is a representative sample of the world’s legal systems? Which states are to be considered representative of each legal system? There is no specific guidance in international law to address these questions. But scholars expressed the view that demonstrating existence of a specific rule in one legal system can generally indicate that similar rule exists in other domestic laws that fall under the same legal system. In this regard, M. Akehurst wrote that legal systems “are grouped in families; the law in most English-speaking countries is very similar [...]. Once one has proved that a principle exists in English law, there is a high probability that it will be found to exist also in New Zealand and

¹²⁶ Right of Passage Over Indian Territory (Portugal v. India), [1960] I.C.J. Rep. 6 at 11-12.

¹²⁷ *Supra* note 86, J. G. Lammers, p. 62.

¹²⁸ See, e.g., O. J. Lissitzyn, *Book Review and Notes*, 53 AMERICAN JOURNAL OF INTERNATIONAL LAW 202 (1959).

¹²⁹ *Supra* note 114, A. Pellet, p. 1073.

¹³⁰ *Supra* note 115, C. Ford, 69; *supra* note 115, J. H. Currie et al., 149.

¹³¹ *Id.*

¹³² A. Pellet, *Article 38*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 770 (A. Zimmermann et al. (eds.), Oxford University Press, 2006).

¹³³ *Supra* note 114, A. Pellet, p. 1073

Australia.¹³⁴ It appears that this is exactly what happens in the practice of the ICJ. As Virally noted, the fact that ICJ judges are elected in such a way as to represent principal legal systems of the world, coincidence of opinion among the judges can be sufficient for establishing the rule of general principle of law.¹³⁵

The second approach, i.e. the categorist approach, involves identifying what is “inherent in the very idea/nature of law”¹³⁶ or “inherently good and necessary ingredients of any functioning legal system.”¹³⁷ In this case, the inquiry is not whether a specific legal principle can be found in the majority or a representative sample of the world’s legal systems, but whether it is inherent in the very nature of law. This means that the categorist approach allows the possibility of deriving a general principle of law even from a single legal system without any reference to municipal legal systems. Mary Ellen O’Connell, although agrees that general principles of law can be derived by analyzing national laws, wrote that inquiring into the “nature of law, justice and fair process”¹³⁸ is more commonly used method by the ICJ. To support her position, she mentioned ICJ’s ruling in the *Barcelona Traction* case where the court reiterated its obligation to apply the law reasonably.¹³⁹ This position also resonates with ICJ’s finding in the *Corfu Channel* case where the ICJ held that the obligation of not allowing knowingly the territory to be used for acts violating the rights of other States is a general and well-recognized principle.¹⁴⁰ Judge Tanaka’s dissenting opinion in the *South West Africa* case also aligns with this position. After noting that “social and individual necessity constitutes one of the guiding factors for the development of law by the way of interpretation,” he noted that “although the Court does not possess the power to decide a case *ex acquo et bono* without the parties’ agreement [...], the result of the interpretation mentioned above can satisfy the requirement of justice and good sense.”¹⁴¹

E. Root opposed using the categorist approach because he thought that governments would mistrust a court which relied on a subjective concept of principles of justice.¹⁴² Because determination of general principles of law involves the study of the laws of different States with different legal systems, “a tribunal which applies general principles of law is less likely to be accused of bias, or of acting subjectively and arbitrarily, than a tribunal that applies equity unsupported by general principles of law.”¹⁴³

We think that both approaches of determination have their own merits. It appears that the comparative approach’s main advantage over the categorist approach is its better-developed

¹³⁴ *Supra* note 118, M. Akehurst, p. 818.

¹³⁵ M. Virally, *The Source of International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 146 (M. Sorenson (ed.), London, 1968); (“[ICJ] proceeds in a more pragmatic fashion, and is satisfied with a coincidence of opinion amongst its own judges. Such a method affords sufficient safeguards, the judges having been elected so as to ensure ‘the representation of the main forms of civilization and the principal legal systems of the world.’”)

¹³⁶ *Supra* note 115, C. Ford, pp. 73-74.

¹³⁷ *Supra* note 115, J. H. Currie, p. 150

¹³⁸ *Supra* note 111, M. E. O’CONNELL, p. 143.

¹³⁹ *Id.*

¹⁴⁰ The ICJ held that the Albanian authorities had an obligation to notify the approaching British warships of the existence of a minefield in Albanian territory. This obligation was held to be based on “general and well-recognized principles, namely [...] every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.” See, *Corfu Channel Case*, Judgement of April 9, 1949, I.C.J. Reports 1949, p. 22.

¹⁴¹ Judge Tanaka, Dissenting opinion, *South West Africa*, Second Phase, Judgment, I.C.J. Reports 1966, p. 278.

¹⁴² *Supra* note 93, I. BROWNLIE, p. 16.

¹⁴³ *Supra* note 118, M. Akehurst, p. 814.

methodology. Whereas the comparative approach requires analyzing the majority of the world's legal systems (or at least a representative number), the categorist approach leaves the determination of the relevant rule at the discretion of the decision-maker and provides few guidelines as to how a decision-maker should derive a general principle of law. The comparative approach allows for a meaningful and straightforward method of analyzing domestic legal systems and deriving general principles of law from them. This way we can distinguish a widespread presence of a particular principle in domestic legal systems and from that derive one general principle of law. Despite these advantages of the comparative approach, it should be noted that not every single rule of fundamental importance for the functioning of any legal system can be derived through the comparative approach.

[add...]

c. Why to Refer to General Principles of Law?

There are several reasons why in interpreting international treaty provisions an interpreter should refer to general principles of law. First reason derives from customary rules¹⁴⁴ of treaty interpretation found in the Vienna Convention on the Law of Treaties (hereinafter Vienna Convention).¹⁴⁵ Its Article 31(1) is entitled "General Rule of Interpretation" and provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose. Article 31(1)(c) provides that any relevant rules of international law applicable in the relations between the parties shall also be taken in to account together with the context. This partly means that general principles of law, which are among the sources of international law provided in Article 38 of the ICJ Statute, shall also be taken into account.

Second reason, assuming exclusionary rule of Article 15 of the Convention against Torture should be treated as a gap or *lacunae*, general principles of law express themselves in their gap-filling function.

[ADD...]

Third reason, which we propose to be of a bigger importance, is the general principles of law's role playing in international legal system. Among eight functions highlighted by R. Kolb, two reflect our positions – the role of general principles of law as value-catalysers and corrective function.¹⁴⁶ Similarly, Lammers, in addition to "the interpretation function," general principles of law play "the corrective function" because they may "set aside or modify provisions of

¹⁴⁴ *Libya v. Chad*, ICJ Reports (1994), para. 41. ("The Court would recall that, in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of their object and purpose. Interpretation must be based above all upon the text of the treaty."); Rudolf Bernhardt, *Evolutionary Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 *German Yearbook of International Law* 13 (1999); Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, A/CN.4/L.682, 13 April 2006, para. 427.

¹⁴⁵ FULL CITATION

¹⁴⁶ *Supra* note 103, R. Kolb, pp. 27-36.

conventional or customary law.”¹⁴⁷ He also mentioned about “the formative/persuasive function” of the general principles of law is that it “may exert influence on the formation of conventional and customary international law [by inspiring] the framers of treaties or the initiators of a certain practice of States.”¹⁴⁸ For O. Elias distinguished general principles of law’s substantive superiority under which he meant their superiority to ordinary positive laws.¹⁴⁹ Raimondo wrote that general principles of law might also serve important roles in (a) interpreting legal rules and (b) reinforcing legal reasoning.¹⁵⁰ Allen Pellet agrees with Raimondo. He wrote that “judges [...] resort to general principles in order either to interpret a customary or treaty rule or to strengthen an argument based on a rule from another origin.”¹⁵¹

IV. EXCLUSIONARY RULE IN DOMESTIC LAWS OF DIFFERENT LEGAL SYSTEMS

This section will look at state practice to identify how the exclusionary rule with regard to evidence obtained by cruel, inhuman and degrading treatment works in different countries. Because our study is of a comparative character and with the aim of identifying general state practice, we need to establish the scope of national legal systems to be looked at in as representative way as possible.

There is no doubt that the common and civil law traditions are the largest legal systems. They have had tremendous impact in shaping national legal systems of many countries around the world, especially of those in Asia, Africa and Latin America. Thus, any inquiry into national laws with the aim of deriving a specific general principle of law should necessarily include an analysis of national laws that represents these two legal traditions. In addition to that, we tried to focus on countries from different parts of the world. For the purposes of our analysis, we have chosen the following countries: Canada, the United States of America, Mexico, Argentina, Germany, United Kingdom, France, Russia, Japan, China, and South Africa.

In analyzing different national legal systems pertaining to the admissibility of evidence obtained by coercion, we are not looking for strict consistency for the purposes of establishing the existence of a general principle of law against the admissibility of coerced confessions. That is because small differences in the content of legal rules pertaining to different national legal systems do not impede the ascertainment of a general principle of law.¹⁵² What we will be looking at is the existence of a common legal principle underlying the legal rule under consideration.¹⁵³ More specifically, our inquiry will primarily focus on whether national laws prohibit the admissibility of evidence obtained by CIDT.

A. State Practice

a. Canada

¹⁴⁷ J. G. Lammers, *General Principles of Law Recognized by Civilized Nations*, in *ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER* 64-65 (F. Kalshoven et al., (eds.), Sitjhoff & Noordhoff Publishers, 1980).

¹⁴⁸ *Id.*

¹⁴⁹ O. Elias, p. 6.

¹⁵⁰ *Supra* note 114, F. O. RAIMONDO, pp. 7, 34-35.

¹⁵¹ *Supra* note 132, A. Pellet, p. 781.

¹⁵² *Supra* note 114, RAIMONDO, p. 49.

¹⁵³ *Supra* note 118, M. Akehurst, p. 814.

The modern Canadian exclusionary rule is based on statutory and common law. A general provision pertinent to the exclusionary rule can be found in the Canadian Charter of Rights and Freedoms of 1982 (hereinafter Canadian Charter). Its Section 24(2) reads

Where [...] a court concludes the evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Section 24(2) provides for a two-part test for the exclusion of evidence: first, a Court must establish whether the defendant's rights or freedoms under the Canadian Charter have been violated; second, if one of the Canadian Charter rights or freedoms were violated, a Court must exclude the evidence only if the admission would bring the "administration of justice into disrepute."¹⁵⁴

With regard to the first test, i.e. the inquiry into whether the defendant's rights or freedoms under the Canadian Charter were violated, the most relevant provisions are Sections 7,¹⁵⁵ 9,¹⁵⁶ 11,¹⁵⁷ 12¹⁵⁸ and 13.¹⁵⁹ Among these, it is Section 12 that bears direct relation to the exclusion of coerced confessions. Section 12 provides that no one shall be subjected to cruel and unusual treatment or punishment. With regard to what constitutes "cruel and unusual," Justice Laskin interpreted that the determination of this clause should be guided by "evolving standards of decency."¹⁶⁰ The *McCann case*¹⁶¹ provided a more concrete test. It established that the treatment that (a) serves no positive purpose, (b) is unnecessary because of the existence of alternatives, and (c) is not in accord with standards of public decency is "cruel and unusual" within the meaning of Section 12.¹⁶² It is obvious that CIDT would violate Section 12 of the Canadian Charter and thus fail the first test.

The second test is whether violation of Section 12 would bring the "administration of justice into disrepute." Because Canadian common law's requirement for confessions is the voluntariness

¹⁵⁴ For the interpretation of this term, see W. S. Tarnopolsky, *Just Desserts or Cruel and Unusual Treatment or Punishment? Where Do We Look for Guidance?* 10 OTTOWA LAW REVIEW 1 (1978); Rothman v. Queen, "There first must be a clear connection between the obtaining of the statement and the conduct; furthermore that conduct must be so shocking as to justify the judicial branch of the criminal justice system in feeling that, short of disassociating itself from such conduct through rejection of the statement, its reputation and, as a result, that of the whole criminal justice system, would be brought into disrepute. [...] What should be repressed vigorously is conduct on their part that shocks the community." P. 697; Collins v. The Queen,; R v. Grant, paras. 60-62.

¹⁵⁵ Section 7 reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

¹⁵⁶ Section 9 reads: "Everyone has the right to be secure against unreasonable search or seizure"

¹⁵⁷ Section 11 reads: "Any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence."

¹⁵⁸ Section 12 reads: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

¹⁵⁹ Section 13 reads: "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence."

¹⁶⁰ R v. Shand, p. 108;

¹⁶¹ McCann v. The Queen, 1975.

¹⁶² McCann v. The Queen, 1975.

test,¹⁶³ the use of CIDT for the purposes of obtaining information would certainly bring “administration of justice into disrepute.” In *Ibrahim v. The King*, the Court held that a confession must be a voluntary statement that had not been obtained either by fear of prejudice or hope of advantage exercised or held out by a person in authority.¹⁶⁴ The rule was applied in numerous later cases.¹⁶⁵ It is important to note that the Ibrahim rule, in clarifying the scope of voluntariness requirement, once again affirmed the prohibition of any treatment that would result in the “fear of prejudice or hope of advantage.”¹⁶⁶ This qualification would certainly include cruel and inhuman treatment and any other treatment that might not rise to the level of cruel and inhuman treatment, but result in the “fear of prejudice or hope of advantage.” In *R. v. Hebert*, the Court further developed the Ibrahim rule and held that “the absence of violence, threats and promises by the authorities does not necessarily mean that the resulting statement is voluntary, if the necessary mental element of deciding between alternatives is absent.”¹⁶⁷ The emphasis in *R. v. Hebert* to the mental element gave rise to the “operating mind” doctrine that was developed later in *Horvath v. The Queen*¹⁶⁸ and *R. v. Whittle*.¹⁶⁹ In these cases, the test for the admissibility of confession was whether the statements were freely and voluntarily made even if no hope of advantage or fear of prejudice could be found.¹⁷⁰

b. The United States of America

D. Osborn described the United States to be the “birthplace” of the exclusionary rule.¹⁷¹ The American legal system is characterized by a mandatory exclusionary rule. There is no express constitutional or statutory provision that provides for the exclusionary rule in the American criminal proceedings. Because of that, U.S. courts used provisions of the U.S. Constitution that cover the issue of prohibiting the admissibility of evidence obtained by ill-treatment. Those provisions are the Fifth and Fourteenth Amendments.

The Fifth Amendment to the U.S. Constitution (hereinafter Fifth Amendment) reads: “No person [...] shall be compelled in any criminal case to be a witness against himself.”¹⁷² This provision is

¹⁶³ C.M. Bradley, *Interrogation and Silence: A Comparative Study*, 27 WIS. INT’L L. J. 280 (2009).

¹⁶⁴ *Ibrahim v. The King*, [1914] A.C. 599 (P.C.), at p. 609

¹⁶⁵ *Prosko v. The King* (1922), 63 S.C.R. 226, and subsequently applied it in cases like *Boudreau v. The King*, [1949] S.C.R. 262, *Fitton, supra*, *R. v. Wray*, [1971] S.C.R. 272, and *Rothman v. The Queen*, [1981] 1 S.C.R. 640, *R. v. Hebert*, [1990] 2 S.C.R. 151.

¹⁶⁶ “It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.” P. 5 - http://www.privacy-council.org.uk/files/pdf/JC_Judgments_pre_1999_no_1.pdf

¹⁶⁷ *R. v. Hebert*, <http://scc.lexum.umontreal.ca/en/1990/1990scr2-151/1990scr2-151.html>

¹⁶⁸ *Horvath v. The Queen*, <http://scc.lexum.umontreal.ca/en/1979/1979scr2-376/1979scr2-376.html>

¹⁶⁹ *R. v. Whittle*, <http://scc.lexum.umontreal.ca/en/1994/1994scr2-914/1994scr2-914.html>

¹⁷⁰ *Horvath v. The Queen*; *R. v. Whittle*.

¹⁷¹ D. Osborn, *Suppressing the Truth: Judicial Exclusion of Illegally Obtained Evidence in US, Canada, UK and Australia*, MURDOCH UNIVERSITY ELECTRONIC JOURNAL OF LAW, Volume 7, Number 4 (December 2000), available at <http://www.murdoch.edu.au/elaw/issues/v7n4/osborn74.html> (last visited March 20, 2011). For the critique of US exclusionary rule and how it can benefit from British and Canadian rules, see L. Glasser, *The American Exclusionary Rule Debate: Looking to England and Canada for Guidance*, 35 GEO. WASH. INT’L L. REV. 163 (2003).

¹⁷² Its full text reads: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

widely known as the Self-Incrimination Clause.¹⁷³ For the Fifth Amendment to apply, testimony must be compelled. In *Colorado v. Connecticut*, Justice Frankfurter defined voluntary confession to be “the product of an essentially free and unrestrained choice by its maker.”¹⁷⁴ Some scholars expressed views that the test of voluntariness is irrational because the custodial interrogation environment is inherently coercive.¹⁷⁵ In *Miranda v. Arizona*,¹⁷⁶ the Court admitted that “an individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described in the [standard police interrogation manuals] cannot be otherwise than under compulsion to speak.”¹⁷⁷ The Court further clarified that for statements obtained under these circumstances to be admissible, “adequate protective devices [shall be] employed to dispel the compulsion inherent in custodial surroundings.”¹⁷⁸ The protective devices that the Court deemed necessary to neutralize the compulsion inherent in the interrogation environment became known as “Miranda warnings.”¹⁷⁹

The Fourteenth Amendment is also one of the main guarantees against coerced confessions in the American criminal proceedings. In its relevant part, it reads: “[...] nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

In *Brown v. Mississippi*,¹⁸⁰ the Supreme Court relied on two rationales: coerced confessions are inherently involuntary and the abhorrence of coercing a suspect to confess. With regard to the voluntariness test, the Supreme Court relied on the dissenting opinion expressed in the state court decision. It quoted in full the dissenting opinion by Judge Griffith who thought that the judgment should have been reversed because coerced confessions made the statements involuntary. It reads:

There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary; and the failure of the court then to exclude the confessions is sufficient to reverse the judgment.¹⁸¹

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

¹⁷³ S. M. SALKY, *THE PRIVILEGE OF SILENCE: FIFTH AMENDMENT PROTECTIONS AGAINST SELF-INCRIMINATION* iv (ABA Publishing, 2009); A. GARCIA, *THE FIFTH AMENDMENT: A COMPREHENSIVE APPROACH* iv (Greenwood Press, 2002).

¹⁷⁴ *Colorado v. Connecticut*, 367 U.S. 568, 602 (1961).

¹⁷⁵ Referring to the majority position that continuous interrogation of a suspect for thirty six hours was coercive in itself and thus rendered confession inadmissible, Justice Jackson noted that custody and interrogation are inherently coercive and thus one hour interrogation is equally coercive as thirty six hour interrogation. P. Brooks wrote in this connection that “even the most indisputably ‘voluntary’ confession may arise from a state of dependency, shame, and the need for punishment, a condition that casts some doubt on the law’s language of autonomy and free choice.” See, *Ashcraft v. Tennessee*, 322 U.S. 143, 161 (1944); P. BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* 74 (2000).

¹⁷⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁷⁷ *Id.*, p. 461.

¹⁷⁸ *Id.*, pp. 457-458.

¹⁷⁹ “He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.”

¹⁸⁰ *Brown v. Mississippi*, 297 U.S. 278 (1936).

¹⁸¹ *Brown v. State*, 173 Miss. 465, 471 (1935)

With regard to the abhorrence of the act, the Court in *Brown v. Mississippi*¹⁸² referred to *Fisher v. State*,¹⁸³ where it was held that coercing someone into confessing and then using such confession against them “has been the curse of all countries” and that the Constitution prohibits such practices.¹⁸⁴ Similarly, in *Rochin v. California*, Justice Frankfurter held that involuntary confessions “are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true” because they “offend the community’s sense of fair play and decency.”¹⁸⁵

Courts relied on different rationales when they excluded coerced confessions. There appears to be no general agreement about which rationales are more important than others. The main rationales used by the courts are voluntariness, reliability, deterrence and administration of justice. In *Wolf v. Colorado*¹⁸⁶ and *Ashcraft v. Tennessee*, courts held that deterrence of police misconduct was the main rationale underlying the exclusionary rule.¹⁸⁷ In *Rogers v. Richmond*, it was held that convictions based on involuntary confessions must be excluded not because they were unreliable, but because of the methods used.¹⁸⁸ The Court explained that “[t]he attention of the trial judge should have been focused [on] whether the [police behavior] was such as to overbear petitioner’s will to resist and bring about confessions not freely self determined – a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.”¹⁸⁹ In *Mapp v. Ohio*, the Court’s rationale for the exclusionary rule was that constitutional guarantees could be respected only if the incentive to disregard them was removed.¹⁹⁰ The Court in *Spano v. New York* also excluded coerced confessions primarily because of the abhorrence of the act itself. The Court held that “[t]he abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness [...] and it turns on the deep-rooted feeling that the police must obey the law while enforcing the law.”¹⁹¹

c. Argentina

Argentina’s new criminal code of 1992 was described to be “exceptionally protective of the accused’s rights”¹⁹² during interrogation, and it was intended to serve as a model for other Latin American countries.¹⁹³ Article 18 of the Constitution provides that nobody may be compelled to testify against himself. Article 184 of the Criminal Procedure Code also provides that “if the police violate any of the rules regarding interrogations the statements are nullified.” The same article further provides that the police are not authorized to receive statements from the accused except for the purposes of learning the accused’s identity. Article 296 of Criminal Procedure

¹⁸² *Supra* note 180, *Brown v. Mississippi*, p. 287.

¹⁸³ *Fisher v. State*, 145 Miss. 116, 134 (1926).

¹⁸⁴ *Supra* note 180, *Brown v. Mississippi*, p. 287.

¹⁸⁵ *Rochin v. California*...

¹⁸⁶ *Wolf v. Colorado*, 338 U.S. 25 (1949).

¹⁸⁷ J. F. Finnelly, *Inevitable Discovery, The Exclusionary Rule, and Military Due Process*, 131 MIL. L. REV. 114 (1991).

¹⁸⁸ *Rogers v. Richmond*, 365 U.S. 534 (1961).

¹⁸⁹ *Id.*, pp. 543-544.

¹⁹⁰ *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

¹⁹¹ *Spano v. New York*, 360 U.S. 315, 320-321 (1959).

¹⁹² J. Maull, *The Exclusion of Coerced Confessions and the Regulation of Custodial Interrogation Under the American Convention on Human Rights*, 32 AM. CRIM. L. REV., 95 (1994-1995).

¹⁹³ *Id.*

Code is more relevant for our study. It provides: “Coercion or threats will not be employed against the accused nor any means to compel or induce him to give evidence.”

Scholars wrote that the rationale for excluding wrongfully obtained evidence was mostly grounded on ethical grounds rather than pursuing the policy objective of deterring police misconduct.¹⁹⁴ Indeed, in suppressing illegally obtained evidence, the Argentinean Supreme Court relied on such values as morality, security and privacy. In the *Charles Hermanos* case, referring to the evidence obtained as a result of an illegal search, the Supreme Court held that “the law, in the name of morality, security and privacy [...] compels inadmissibility of such evidence against the defendants.”¹⁹⁵ Thus, the police deterrence rationale of exclusionary rule, though occasionally referred to, does not appear to be the dominant rationale behind Argentina’s constitutional jurisprudence.

It should be noted that Article 8(3) of the American Convention on Human Rights provides that “[a] confession of guilt by the accused shall be valid only if it is made without coercion of any kind.”¹⁹⁶ Though the American Convention’s Article 5(2) prohibits torture and cruel, inhuman and degrading treatment, there is little guidance for determining what constitutes coercion as such.¹⁹⁷ No doubt, acts prohibited in Article 5(2), i.e. torture and cruel, inhuman and degrading treatment, are coercive acts and thus at a minimum any of them should trigger Article 8(3).

d. Mexico

The 1917 Mexican Constitution laid down the foundations of Mexican criminal procedure. Article 19 of the Mexican Constitution provides: “Any ill-treatment during arrest or confinement [...] are abuses which shall be punishable by law and repressed by the authorities.” Article 20(A)(II) of the Mexican Constitution prohibits torture and states that the accused does not have to make a statement. Even when the accused decides to make a statement or confession, to have evidentiary value, it should be done only before either the Public Prosecutor or a judge, and with the assistance of the defense counsel.¹⁹⁸

Article 5 of the Federal Law to Prevent and Punish Torture of 1986 states: “No declaration which has been obtained through torture can be invoked as evidence.” More relevant to our study is Article 287 of the Mexican Federal Code of Criminal Procedure (hereinafter Criminal Procedure

¹⁹⁴ A. D. Carrio & A. M. Garro, *Argentina*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 21 (C. M. Bradley (ed.), Carolina Academic Press, 2nd ed., 2007).

¹⁹⁵ Charles Hermanos, JA 2005-II, April 27, 2005, p. 88, cited in A. D. Carrio & A. M. Garro, *Argentina*, in C. Bradley... p. 20.

¹⁹⁶ For the analysis of exclusion of evidence under the American Convention on Human Rights, see J. Maull, *The Exclusion of Coerced Confessions and the Regulation of Custodial Interrogation under the American Convention on Human Rights*, 32 *AM. CRIM. L. REV.*, 97 (1994-1995).

¹⁹⁷ Jurisprudence of the Inter-American Court sheds more light to the meaning of coercion. In *Velasquez Rodriguez Case*, the Inter-American Court found that “prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being.” See, *Velasquez Rodriguez Case*, Judgment of July 28, 1988, Ser. C No. 4, Inter-Am. Ct. H.R. para. 156.

¹⁹⁸ Article 20(A)(II), the 1917 Mexican Constitution. See also Article 9 of the Federal Law to Prevent and Punish Torture of 1986.

Code). According to Article 287 of the Criminal Procedure Code, physical and psychological coercion by police or prosecutors to gain information is clearly illegal. Article 287(1) reads:

A confession rendered before the prosecutor and the judge must comply with the following requirements in order to be considered a confession: (I) The statement must be made [...] without any type of coercion either physical or psychological.

e. Germany

The German Constitution of 1949¹⁹⁹ has important provisions that create a firm foundation for the exclusionary rule. It was described as a “yardstick” for all decisions by the Federal Constitutional Court.²⁰⁰ Article 1(1) of the German Constitution reads: “The dignity of the person is sacrosanct. It is the duty of all State powers to respect and protect it.” In 1954, the German Supreme Court held that this constitutional provision is a “guiding principle” that applies “in an unrestricted manner also to a person suspected of having committed a crime.”²⁰¹

The German exclusionary rule is composed of a two-step analysis involving consideration of the principle of the rule of law and proportionality.²⁰² First, the court determines whether the evidence at issue was obtained in violation of the principle of the rule of law.²⁰³ If yes, then the evidence is excluded. C. Bradley notes that the principle of the rule of law is “the principle [that] serves to preserve the purity of the judicial process [and thus] evidence obtained by means of brutality or deceit must be excluded.”²⁰⁴ It appears that if there is any measure of illegal coercion used to obtain evidence, then that type of evidence should be excluded.

If the evidence is not excluded in the first step, the court then considers *Verhältnismässigkeit*. The concept of *Verhältnismässigkeit* refers to the principle of proportionality.²⁰⁵ Under this doctrine, the methods used in fighting crime must be proportional to the “seriousness of the offense and the strength of the suspicion” as well as to the constitutional interests at stake.²⁰⁶

The German Procedure Code²⁰⁷ deals with coerced confessions in a more detailed manner and has provisions specifically dealing with coerced confessions. Its Section 136a entitled “Prohibited Methods of Examination” is very detailed with regard to permitted methods of investigation. It prohibits inducing fatigue, administration of drugs, torment, deception or

¹⁹⁹ Also referred to as Basic Law of the Federal Republic of Germany.

²⁰⁰ A. M. VAN KALMTHOUT ET AL., PRE-TRIAL DETENTION IN THE EUROPEAN UNION: AN ANALYSIS OF MINIMUM STANDARDS IN PRE-TRIAL DETENTION AND THE GROUNDS FOR REGULAR REVIEW IN THE MEMBER STATES OF THE EU 391 (Wolf Legal Publishers, 2009).

²⁰¹ BGHSt 5, 332, at 333-335, case cited in S. C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH 91 (Carolina Academic Press, 2002).

²⁰² C. M. Bradley, *The Exclusionary Rule in Germany*, 96 HARVARD LAW REVIEW 1034 (1982-1983).

²⁰³ See Article 1 and 22 of the German Constitution. For different approaches to the concept of the rule of law in the United States and Germany, see G. L. Neuman, *The U.S. Constitutional Conception of the Rule of Law and the Rechtsstaatsprinzip of the Grundgesetz*, COLUMBIA LAW SCHOOL, PUBLIC LAW & LEGAL THEORY WORKING PAPER GROUP, Paper Number 5, p. 18 (Jun. 15, 1999), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=195368 (last visited September 1, 2011).

²⁰⁴ *Supra* note 182, C. M. Bradley, p. 1034.

²⁰⁵ *Id.*, p. 1041.

²⁰⁶ *Id.* For the scope of the principles of proportionality under German constitutional law, see *supra* note 203, G. L. Neuman, p. 18.

²⁰⁷ Digital version the Code can be seen at <http://legislationline.org/documents/section/criminal-codes> (last visited March 15, 2011).

hypnosis, and any other measures which impair the accused's memory or his ability to comprehend.²⁰⁸ Notably, the last paragraph of Section 136a specifically provides that "[s]tatements which were obtained in violation of these prohibitions shall not be used even if the accused agrees to said use." Thus coerced confessions would certainly not pass the first prong of the above-described two-step analysis.

In 1992, the German Supreme Court first held that it is only the accused alone who can make the decision if he will give a statement, and then held that police officials violated the suspect's procedural rights when they stated that they would continue the interrogation "until clarity reigned."²⁰⁹ In another case, the German Supreme Court held that the statements of the defendant can be used because there were no "[i]ndications that the defendant's free determination of his will had been influenced by the interrogating official through force or deception [...]. Especially any evidence of excessive fatigue of the accused is absent [...]."²¹⁰

f. The United Kingdom

In general, the English courts are not concerned with how evidence is obtained.²¹¹ In *R. v. Leatham*, the Court held that "[i]t matters not how you get it; if you steal it even, it would be admissible in evidence."²¹² In another case, the court held that "[i]t would be a dangerous obstacle to the administration of justice [...] to hold because evidence was obtained by illegal means it could not be used against a party charged with an offense."²¹³ This is the reason why the English position on illegally obtained evidence was described as the "antithesis" of the American position.²¹⁴ According to the English position, relevant and reliable evidence is admissible even though obtained illegally because the British courts have repudiated the idea of using exclusion as a deterrent against illegal police activity.²¹⁵ David Feldman commented that in the United Kingdom "the fact that evidence has been obtained by improper or unlawful means does not necessarily [...] make evidence of the discovery inadmissible or excluded at trial."²¹⁶ Cases involving real evidence are almost always decided against the accused. The likely explanation for this is that real evidence is seen to be extremely reliable and to exist independently of any

²⁰⁸ Section 136a reads in full: "(1) The accused's freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. Coercion may be used only as far as this is permitted by criminal procedure law. Threatening the accused with measures not permitted under its provisions or holding out the prospect of an advantage not envisaged by statute shall be prohibited; (2) Measures which impair the accused's memory or his ability to understand shall not be permitted; (3) The prohibition under subsections (1) and (2) shall apply irrespective of the accused's consent. Statements which were obtained in breach of this prohibition shall not be used, even if the accused agrees to their use."

²⁰⁹ BGHS 38, 372, at 373-73, case cited in S. C. THAMAN, *COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH* 80 (Carolina Academic Press, 2002).

²¹⁰ BGHS 42, 170, at 171, 173-174, case cited in S. C. THAMAN, *COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH* 81 (Carolina Academic Press, 2002).

²¹¹ *Supra* note 171, L. Glasser, p. 163.

²¹² *R. v. Leatham*, 8 Cox C.C. 498, 501 (Q.B. 1861).

²¹³ *Jones v. Owens*, 34 J.P. 759, 760 (Q.B. 1870).

²¹⁴ *Supra* note 171, D. Osborn.

²¹⁵ G. V. Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 90 (1986).

²¹⁶ D. Feldman, *England and Wales*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 163 (C. M. Bradley (ed.), Carolina Academic Press, 2nd ed., 2007)

police misconduct, making it difficult to demonstrate how its admission could possibly operate unfairly against the accused.

Though English law permits the admission of illegally obtained evidence as long as it is relevant and reliable, it has long considered confessions that were not free and voluntary as unreliable and thus inadmissible.²¹⁷ The 1981 Royal Commission on Criminal Procedure recommended that Parliament regulate the interrogation of suspects, including defining when the automatic exclusion of statements would be required.²¹⁸ This was achieved with the adoption of the Police and Criminal Evidence Act of 1984 (hereinafter PACE 1984).²¹⁹ PACE was described to be “the most important legislation”²²⁰ regulating criminal procedure. Section 78(a) of PACE formulates the exclusionary rule as follows:

In any proceedings the court may refuse to allow evidence on which the prosecution proposed to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

There is an additional and stricter rule applicable to confessions. Para. 76(2) of PACE 1984 provides for the mandatory exclusion of confessions if they were obtained “by oppression.” The same paragraph further clarifies that “oppression” includes torture, inhuman or degrading treatment, and the use or threat of violence.” In *Regina v. Fulling*, the English Court of Appeal held “the word oppression means something above and beyond that which is inherently oppressive in police custody and must import some impropriety, some oppression actively applied in an improper manner by the police.”²²¹ The Court further noted that “oppression” should be given its ordinary dictionary meaning, and relied on its definition in the *Oxford English Dictionary*.²²²

In *A and Others case*, Lord Bingham²²³ noted that PACE’s Section 72 prohibition of oppression for the purposes of obtaining confession expresses the common law rule established in *Ibrahim v The King*,²²⁴ *R v Harz and Power*,²²⁵ and *Lam Chi-ming v The Queen*.²²⁶ Lord Bingham noted that alternatively, evidence obtained by ill-treatment should also be excluded under PACE’s Section 78 because of its adverse effect on the fairness of the proceedings.²²⁷ Lord Hoffman appears to lean towards this rationale too. Writing about the reasons for excluding coerced

²¹⁷ C. SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION: LEGAL, HISTORICAL, EMPIRICAL, AND COMPARATIVE MATERIALS 551 (4th ed., LexisNexis, 2007).

²¹⁸ *Supra* note 215, G. V. Kessel, p. 38.

²¹⁹ The Police and Criminal Evidence Act 1984 (“PACE”) came into force on January 1, 1986.

²²⁰ E. Cape & J. Hodgson, *The Investigative Stage of the Criminal Process in England and Wales*, in SUSPECTS IN EUROPE: PROCEDURAL RIGHTS AT THE INVESTIGATIVE STAGE OF THE CRIMINAL PROCESS IN THE EUROPEAN UNION 59 (E. Cape et al. (eds), Intersentia Antwerpen-Oxford, 2007).

²²¹ *Regina v. Fulling* [1987], p. 426.

²²² The Court cited the third definition in the dictionary which reads: “Exercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc. [...]” See, *Regina v. Fulling* [1987], p. 432.

²²³ See, *A and Others*, Lord Bingham’s Opinion, para. 14

²²⁴ *Ibrahim v The King* [1914] AC 599, 609-610.

²²⁵ *R v Harz and Power*, [1967] AC 760, 817.

²²⁶ *Lam Chi-ming v The Queen* [1991] 2 AC 212, 220.

²²⁷ *A and Others*, Lord Bingham’s Opinion, para. 53.

evidence, he wrote that the main purpose was to “uphold the integrity of the administration of justice.”²²⁸

g. Russian Federation

The Constitution of the Russian Federation (hereinafter Russian Constitution) contains a number of articles guaranteeing civil liberties during interrogation: its Article 21 prohibits torture and inhuman and degrading treatment, Article 50 prohibits the use of illegally obtained evidence and Article 51 guarantees the right against self-incrimination. These rights are implemented by the Criminal Procedure Code. The Russian Federation enacted a new Criminal Procedure Code in December 2001.²²⁹

The Russian Constitution provides for the exclusionary rule. Its Article 50 reads: “In administering justice, it shall not be allowed to use evidence received by violating federal law.” It should be noted that the “federal law” to which Article 50 refers includes, among other documents, the Constitution itself, the Criminal Code and the Criminal Procedure Code. Thus evidence obtained in violation of any of the provisions of these laws must be excluded. The Russian Constitution and the 2001 Criminal Procedure Code prohibit torture and other forms of ill-treatment. Paragraph 1 of Article 21 of the RF Constitution provides that “[h]uman dignity shall be protected by the State” and that “[n]othing may serve as a basis for its derogation.” Paragraph 2 of the same article then prohibits torture, violence or other severe or humiliating treatment and punishment.

It is clear that Article 21 of the Russian Constitution explicitly prohibits torture. Though the same article does not mention CIDT as such, it prohibits “violence, or other severe or humiliating treatment or punishment.” This clause would certainly include CIDT. Articles 9 and 75 of the 2001 Criminal Procedure Code²³⁰ implement Articles 21 and 50 of the Russian Constitution by prohibiting torture and other forms of ill-treatment, as well as providing for the exclusionary rule. Article 9(2) of the 2001 Criminal Procedure Code reads

No one of the participants in criminal court proceedings shall be subjected to violence or torture or to other kinds of cruel or humiliating treatment, degrading his human dignity.

Article 75 of the 2001 Criminal Procedure Code provides for the exclusionary rule. The article first declares that inadmissible proof is “deprived of legal force and cannot serve as a basis for the accusation or be used for proving any one of the circumstances listed in Article 73²³¹ of the

²²⁸ A and Others, Lord Hoffman’s Opinion, para. 91.

²²⁹ It came into force on July 1, 2002. It replaced old Criminal Procedure Code of 1960 of Russian Soviet Federated Socialist Republic. The old Criminal Procedure Code continued in force following the dissolution of the USSR in 1991.

²³⁰ Criminal Procedure Code of the Russian Federation was enacted in December 2001 and came into force on July 1, 2002.

²³¹ Article 73. Circumstances Subject to Proving

1. Subject to proving in the proceedings on a criminal case shall be:
 - 1) the event of the crime (the time, place, mode and the other circumstances of committing the crime);
 - 2) the person's being guilty of committing the crime, the form of his guilt and the motives;
 - 3) the circumstances, characterizing the personality of the accused;
 - 4) the character and the size of the damage caused by the crime;
 - 5) the circumstances, excluding the criminality and the punishability of the action;

Criminal Procedure Code.” Its Paragraph 2 then provides for the scope of inadmissible proof. Under “Referred as inadmissible proof shall be,” it lists the following concrete circumstances that lead to the inadmissibility of evidence: (a) evidence given by the suspect and by the accused in the course of the pre-trial proceedings of the criminal case in the absence of the defense counsel, including the cases of the refusal from counsel for the defense, and not confirmed by the suspect and by the accused in the court; (b) evidence of the victim and of the witness, based on a surmise, a supposition or hearsay, as well as the testimony of the witness, who cannot indicate the source of his knowledge; and (c) other evidence, obtained in violation of the demands of the present Code.

Interestingly, the above circumstances do not mention the inadmissibility of torture and CIDT evidence.²³² The prohibition of torture and CIDT evidence can only be inferred from “other proof, obtained in violation of the demands of the present Code” clause²³³ which would certainly trigger the prohibition found in Article 9(2) of the Criminal Procedure Code that prohibits “violence or torture or to other kinds of cruel or humiliating treatment, degrading his human dignity.”

h. South Africa

Though the South African legal system is largely based upon Roman-Dutch law,²³⁴ its evidence law is based on the English law of evidence.²³⁵ Section 35 of the Constitution provides for the main due process guarantees and forms the cornerstone of the South African criminal justice system.²³⁶ It first provides for an extremely long list of procedural guarantees.²³⁷ Among the ones that have direct bearing on the exclusionary rule, Section 35 guarantees the right to remain silent and not to be compelled to make any confessions or admission that could be used in evidence against oneself. The final paragraph of Section 35 also provides that

6) the circumstances, mitigating and aggravating the punishment;

7) the circumstances which may entail relief from the criminal liability and from the punishment.

2. The circumstances conducive to perpetration of the crime shall also be subject to exposure.

²³² See paragraph 2(1)(1) of Article 75 of the 2001 Criminal Procedure Code.

²³³ See paragraph 2(3) of Article 75 of the 2001 Criminal Procedure Code

²³⁴ D. HUTCHINSON ET AL., *WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW* 1, 20-27 (8th Edition, Juta & Co. Ltd, 1991)

²³⁵ S. E. van der Merwe, *Sources of the South African Law of Evidence and the Impact of Constitutional Provisions*, in *PRINCIPLES OF EVIDENCE* 24-31 (P. J. Schwikkard et al., 2nd ed., JUTA Law, 2003); see also, P. J. Schwikkard & S. E. van der Merwe, *South Africa*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 475 (C. M. Bradley (ed.), Carolina Academic Press, 2nd ed., 2007).

²³⁶ *Id.*, p. 472.

²³⁷ Section 35 reads:

(1) Everyone who is arrested for allegedly committing an offence has the right – (a) to remain silent; (b) to be informed promptly - (i) of the right to remain silent; and (ii) of the consequences of not remaining silent; (c) not to be compelled to make any confession or admission that could be used in evidence against that person; (d) to be brought before a court as soon as reasonably possible, but not later than – (i) 48 hours after the arrest; or (ii) the end of the first day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day; (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right – (a) to be informed promptly of the reason for being detained; (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly; (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; (d) ...

Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

The clause of “would render the trial unfair” and “otherwise be detrimental to the administration of justice” in Section 35(5) were borrowed from the Canadian Charter of Rights and Freedoms,²³⁸ which requires the exclusion of evidence only if, having regard to all the circumstances, the admission of the evidence would “bring the administration of justice into disrepute.” South African courts relied on the Canadian jurisprudence for the interpretation of Section 35 as well.²³⁹

Section 35 provides a two-step analysis for excluding evidence. The evidence obtained in a manner that violates any right in the Bill of Rights must be excluded only where admission of it would render the trial unfair or would otherwise be detrimental to the administration of justice. Coerced evidence would not pass the first prong of the two-step analysis established by Section 35 (5), i.e. whether the evidence obtained in such a manner that violates any of the rights in the Bill of Rights. It would violate Section 12(1) of the Constitution, which guarantees that everyone has the right to freedom and security of person, which includes, among others, the right (a) to be free from all forms of violence from either public or private sources; (b) not to be tortured in any way, and (c) not to be treated or punished in a cruel, inhuman or degrading way.

Coerced evidence would also be prohibited under South African criminal procedure law. Provisions regulating the process of interrogation and admission of confessions are largely regulated by the Criminal Procedure Act 51 of 1977. Section 217 of the Criminal Procedure Act 51 of 1977 provides that a confession must be made freely and voluntarily whilst the maker is in his sound and sober senses and was not influenced in any way.²⁴⁰

Thus, for a statement to be admissible, the prosecution must show that it was (a) made freely and voluntarily by a person in his sound and sober senses and (b) without undue influence. For the purposes of Section 217, a person is considered to be in his sound and sober senses unless s/he is unable to know what s/he is saying.²⁴¹ David Zeffert proposed that an “undue influence” test is a better approach than the test of voluntariness because it has wider scope to include unduly lengthy interrogation, subjection to fatigue and the exploitation of weaknesses such as poor education or youthful immaturity.²⁴² Clarifying what practices constitute undue influence, he referred to case law that held that a practice is undue when a person’s freedom of will is impaired

²³⁸ The relevant part of Section 24(4) of the Canadian Charter of Rights and Freedoms provides: “Where [...] a court concludes that evidence was obtained in a manner that infringed or denied any rights guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstance, the admission of it in the proceedings would bring the administration of justice into disrepute.”

²³⁹ S. E. van der Merwe, *Unconstitutionally Obtained Evidence*, in *PRINCIPLES OF EVIDENCE* 171 (P. J. Schwikkard et al., 2nd ed., JUTA Law, 2003).

²⁴⁰ “Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence.”

²⁴¹ *R v. Blyth* 1940 AD 355.

²⁴² D. Zeffert, *Law of Evidence*, in *INTRODUCTION TO THE LAW OF SOUTH AFRICA* 501 (C. G. van der Merwe et al. (eds.), Kluwer Law International, 2004).

in any way.²⁴³ In *S v. Mpetsha*, the Court held that continued interrogation after an accused has asserted his right to remain silent will be viewed as undue influence.²⁴⁴

There is no doubt that the “undue influence” approach to the admissibility of evidence would prohibit any use of torture or cruel, inhuman and degrading treatment. In addition to the fact that unduly influenced statements can be unreliable, the South African courts also exclude such statements because they render trials unfair and their practice is abhorrent to civilized values.²⁴⁵ In *S v. Tandwa*, the court held that evidence obtained as a result of ill-treatment shall be excluded because of its “stain” on the administration of justice.²⁴⁶

i. Japan

The modern Japanese legal system has many attributes of a civil law system. It was significantly influenced by the French, German and American legal systems²⁴⁷ and thus its legal system was described as the “Japanization” of foreign law.²⁴⁸

Article 97 of the Japanese Constitution provides that the Constitution is the Supreme Law of the nation. The Constitution sets out three fundamental principles: first, sovereignty rests with the people; second, peaceful cooperation with foreign nations; and third, the respect for fundamental human rights.²⁴⁹ Article 31 of the Japanese Constitution guarantees due process of law and states that no person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except in accordance with the procedures established by law. H. Oda noted that this provision was modeled on the Fourteenth Amendment of the U.S. Constitution, which also deals primarily with procedural due process.²⁵⁰

The use of torture and cruel punishment by government officials is strictly prohibited. Article 36 of the Constitution reads: “The infliction of torture by any public officer and cruel punishments are absolutely prohibited.” Article 38 provides for the exclusionary rule. After providing for the right against self-incrimination, its paragraph 2 states that “[c]onfession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.” In *Abe v. Japan*, the plaintiff was told by the prosecutors that he would be freed if he confessed. He did so and was indicted. When the case was appealed and went to the Supreme Court, the latter held:

Where, as in this case, the suspect made a confession in reliance upon a statement of a public procurator to the effect that the case would be dropped if the suspect confessed, such a confession should be held to be inadmissible on the ground that there is doubt as to its voluntary nature.²⁵¹

²⁴³ *Supra* note 235, P.J. Schwikkard & SE van der Merwe, p. 494

²⁴⁴ *S. v. Mpetsha*, (2) 1983 (1) SA 576 (c).

²⁴⁵ *Supra* note 242, D. Zeffert, p. 501.

²⁴⁶ *S v Tandwa*, para. 120; *S v Pillay* 2004 (2) SACR 419 (SCA) paras. 9 and 11 of the judgment of Scott JA.

²⁴⁷ H. ODA, *JAPANESE LAW* 9, 430-436 (2nd ed., Oxford University Press, 1999); *See also*, K. L. PORT & G. P. MCALINN, *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 29 (2nd ed., Carolina Academic Press, 2003); Y. Kawashima, *The American Constitution and Japanese Minpo, 1945-1980*, 21 *International Lawyer* 1167 (1987).

²⁴⁸ K. L. Port & G. P. McAlinn, p. 35.

²⁴⁹ Article 11- ...

²⁵⁰ *Supra* note 247, H. ODA, p. 26.

²⁵¹ *Abe v. Japan*, 20 Keishu 537 (1966) cited in H. Tanaka (ed.) *The Japanese Legal System: Introductory Cases and Materials* (University of Tokyo Press, 1984), p. 821-822

Nevertheless, the wording of Article 38 remains vague, especially with regard to the term “compulsion.” With regard to the modern use of physical violence during interrogation, R. Hirano noted

The real problem is that confession cannot be obtained without somewhat severe questioning. At present it is probably safe to say that there is virtually no use of direct physical violence. It is also safe to say, however, that indirect techniques and psychological pressure are used to some extent at all times. Moreover, the line between proper and improper uses of such pressure is not truly clear.²⁵²

j. China

Article 43 of the Chinese Criminal Procedure Code provides that “it shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means.” Although such police conduct is clearly prohibited, Chinese law does not provide for the exclusion of evidence obtained illegally and does not provide for a procedure to determine whether unlawful means were used to obtain a confession.²⁵³ This problem was remedied with the adoption of a new set of rules regulating the admission of evidence in criminal trials. On June 25, 2010, Chinese law-enforcement institutions²⁵⁴ published “Rules Concerning Questions About Exclusion of Illegal Evidence in Handling Criminal Cases” (hereinafter Rules of Exclusion).²⁵⁵ Article 2 of the Rules of Exclusion prohibits the admissibility of illegal oral evidence. The definition of “illegal oral evidence” can be found in Article 1 that reads

The category of illegal oral evidence includes statements by criminal suspects or defendants obtained through illegal means such as coerced confession as well as witness testimony or victim statements obtained through illegal means such as use of violence or threats.

The prohibition of illegal oral evidence is wide enough to include evidence obtained by CIDT because Article 1 provides that any statement obtained through the use of coercion, violence or threats becomes illegal oral evidence. We believe that this article should be read in conjunction with Article 43 of the Chinese Criminal Procedure Code that prohibits collecting evidence by threat, enticement, deceit or other unlawful means. Thus, even though Article 1 does not specify what type of treatment should be regarded as constituting coercion, violence or threats, it would be fair to assume that cruel, inhuman or degrading treatment falls under one or all of the prohibited treatments provided in Article 1 of the Rules of Evidence or Article 43 of the Chinese Criminal Procedure Code.

V. CONCLUSION

[...]

²⁵² R. Hirano, *Diagnosis of the Current Code of Criminal Procedure*, in *JAPANESE LAW AND LEGAL THEORY* 137 (K. Fujikura (ed.), New York University Press, 1996).

²⁵³ C. Bradley, *Criminal Procedure: A Worldwide Study*, p. 101.

²⁵⁴ The Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Public Security, Ministry of State Security, and Ministry of Justice.

²⁵⁵ Full text of the Rule of Evidence is available at http://www.duihua.org/hrjournal/evidence/rules_criminal.htm (last visited on March 15, 2011).