

# REDRESS

*Ending Torture. Seeking Justice for Survivors*

London, 26 June 2015

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Juez Cuarto Penal De Primera Instancia Del  
Distrito Judicial De Cancún Quintana Roo  
Causa Penal Número 98/2014

## *Amicus Curiae submission*

REDRESS is an international human rights nongovernmental organisation with a mandate to assist torture survivors to seek justice and other forms of reparation.<sup>1</sup> Over more than twenty years, it has accumulated a wide expertise on the various facets of the obligations on states flowing from the prohibition of torture under international law. REDRESS regularly takes up cases on behalf of individual torture survivors and has wide experience with interventions before national and international courts and tribunals.

REDRESS has been made aware of this case by the family of the accused. Our understanding is that the accused has alleged that the evidence in the case made against him is a product of the torture he and several prosecution witnesses were subjected to, which resulted in coerced written witness statements. The purpose of this submission is not to comment on the veracity of those torture allegations. Instead, REDRESS' purpose in providing this submission is to draw to the attention of this Court the legal framework binding on Mexico in relation to confession evidence procured through torture:

### **General framework**

1. The prohibition of torture is universally recognised and is enshrined in all the major international and regional human rights instruments. The prohibition is binding in Mexico by virtue of Mexico's adherence to the *International Covenant on Civil and Political Rights*, the *UN Convention Against Torture and other Cruel, Inhuman and Degrading Treatment and Punishment*; the *American Convention on Human Rights* and the *Inter-American Convention to Prevent and Punish Torture*. It is also binding in Mexico by virtue of Mexican domestic law. As has been recognised in Mexican jurisprudence:

« *Con fundamento en el artículo 22 de la Constitución Política de los Estados Unidos Mexicanos, la Ley Federal para Prevenir y Sancionar la Tortura y la Convención contra la Tortura y otros Tratos o Penas Crueles, Inhumanos o Degradantes, el Estado Mexicano tiene las siguientes obligaciones para prevenir la práctica de la tortura: establecer dentro de su ordenamiento jurídico interno la condena a la tortura como un delito, sea consumada o tentativa; sancionar tanto al que la comete como al que colabora o participa en ella; detener oportunamente al torturador a fin de*

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<sup>1</sup> For more information, see the website: [www.redress.org](http://www.redress.org).

*procesarlo internamente o extraditarlo, previa investigación preliminar; sancionar con las penas adecuadas este delito; indemnizar a las víctimas; prestar todo el auxilio posible a todo proceso penal relativo a los delitos de tortura, incluyendo el suministro de toda prueba que posean; y prohibir que toda declaración o confesión que ha sido obtenida bajo tortura sea considerada válida para los efectos de configurar prueba en procedimiento alguno, salvo contra el torturador. Además, la integridad personal es el bien jurídico cuya protección constituye el fin y objetivo principal para prohibir la tortura y otros tratos y penas crueles, inhumanas o degradantes, lo cual también se encuentra previsto en los artículos 5 de la Declaración Universal de los Derechos Humanos y 7 del Pacto Internacional de Derechos Civiles y Políticos. Esto es, el derecho a no ser objeto de tortura, penas crueles o tratos inhumanos o degradantes es un derecho cuyo respeto no admite excepciones, sino que es absoluto y, por ende, su vigencia no puede alterarse ni siquiera durante una emergencia que amenace la vida de la nación. »<sup>2</sup>*

2. The prohibition of torture is absolute and non-derogable. The *UN Convention Against Torture* provides, in Article 2(2), that, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Article 5 of the *Inter-American Convention to Prevent and Punish Torture* contains a similar provision: “The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture. Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.”
3. As a consequence of the fundamental importance of the prohibition of torture to the international community, it is widely accepted that the prohibition constitutes both a norm of *jus cogens* and an obligation owed by every State to the international community as a whole (*erga omnes*). *Jus cogens* goes to the overriding, unconditional and non-derogable nature of the obligation while *erga omnes* goes to the reach of the obligation, denoting the legal interest of all states in the protection of the correlative right and their standing to invoke its breach.
4. As a consequence of the *erga omnes* nature of the obligations arising under the prohibition, all States have a legal interest in the performance of the obligations arising from the prohibition. Moreover, as a consequence of the *jus cogens* status of the prohibition, no State may recognise as lawful a situation arising from breach of the prohibition of torture.

### **The Exclusionary Rule**

5. The exclusionary rule prohibits the invoking of any statement made as a result of torture as evidence in any proceedings, except against a person accused of such

<sup>2</sup> Amparo directo 9/2008. 12 de agosto de 2009. Mayoría de cuatro votos. Disidente: Sergio A. Valls Hernández. Ponente: José Ramón Cossío Díaz. Secretario: Miguel Enrique Sánchez Frías, available at: [http://200.38.163.178/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e100000000000&Apendice=10000000000000&Expresion=TORTURA.%2520OBLIGACIONES%2520DEL%2520ESTADO%2520MEXICANO%2520PARA%2520PREVENIR%2520SU%2520PR%2520C3%2581CTICA.%2520&Dominio=Rubro,Texto&TA\\_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=1&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,50,7&ID=165900&Hit=1&IDs=165900&tipoTesis=&Semenario=0&tabla=](http://200.38.163.178/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e100000000000&Apendice=10000000000000&Expresion=TORTURA.%2520OBLIGACIONES%2520DEL%2520ESTADO%2520MEXICANO%2520PARA%2520PREVENIR%2520SU%2520PR%2520C3%2581CTICA.%2520&Dominio=Rubro,Texto&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=1&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,50,7&ID=165900&Hit=1&IDs=165900&tipoTesis=&Semenario=0&tabla=) .

treatment as evidence that the statement was made. The purpose of torture being often to extract information, the exclusionary rule is integral to the prohibition of torture and fundamental to efforts to prevent and eradicate torture. The rationale behind the general prohibition of the admission of evidence obtained by torture includes the following elements (i) the unreliability of evidence obtained as a result of torture; (ii) the outrage to civilised values caused and represented by torture; (iii) the public policy objective of removing any incentive to undertake torture anywhere in the world; (iv) the need to ensure protection of the fundamental rights of the party against whose interest the evidence is tendered (and in particular those rights relating to due process and fairness); and (v) the need to preserve the integrity of the judicial process.

6. The Inter-American Court has recognised the absolute nature of the exclusionary rule. It has found that: “the rule of excluding from judicial proceedings all evidence obtained under torture or through cruel or inhumane treatment (hereinafter “exclusionary rule”) has been recognized by several international treaties and international bodies for the protection of human rights, which consider that the rule of exclusion is intrinsic to the prohibition of such acts. Therefore, the Court considers that this rule is absolute and irrevocable.”<sup>3</sup>
7. It is reflected in international law binding on Mexico by virtue of Article 15 of the *UN Convention Against Torture* and Article 10 of the *Inter-American Convention to Prevent and Punish Torture*. Article 15 of the *UN Convention Against Torture* provides: “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.” Similarly, Article 10 of the *Inter-American Convention to Prevent and Punish Torture* provides: “No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means.”
8. Mexican domestic law equally enshrines this rule. In particular, Article 20(a)(IX) of the *Mexican Constitution* treats as void any evidence obtained in violation of fundamental human rights through the commission of a violation of human rights. Equally, article 20(b)(II) of the Constitution underscores that confessions obtained without the presence of a defender are excluded. It is also reflected in Article 8 of the *Ley Federal Para Prevenir y Sancionar La Tortura*.<sup>4</sup> Equally, the prohibition on coerced confessions of any kind is reflected in Articles 233 and 250 of the *Código de Procedimientos Penales para el Estado Libre y Soberano de Quintana Roo*,<sup>5</sup> as well as Articles 263 and 367 of the new *Código Nacional De Procedimientos Penales*.<sup>6</sup> These principles are also reflected in Mexican jurisprudence. For instance, it has been recognised that “*Exigir la nulidad de la prueba ilícita es una garantía que le asiste al inculpado durante todo el proceso y cuya protección puede hacer valer frente a los*

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<sup>3</sup> *Case of Cabrera García and Montiel Flores v. Mexico (Preliminary Objection, Merits, Reparations and Costs)*, Series C, No. 220, 26 November 2010, para. 165.

<sup>4</sup> *Ley publicada en el Diario Oficial de la Federación el 27 de diciembre de 1991, Última reforma publicada DOF 10-01-1994.*

<sup>5</sup> *Última Reforma Publicada en el Periódico Oficial el 12 de Septiembre de 2006.*

<sup>6</sup> *Nuevo Código publicado en el Diario Oficial de la Federación el 5 de marzo de 2014, Última reforma publicada DOF 29-12-2014.*

tribunales alegando como fundamento,”<sup>7</sup> and “..., las pruebas obtenidas, directa o indirectamente violando derechos fundamentales, no surtirán efecto alguno. Esta afirmación afecta tanto a las pruebas obtenidas por los poderes públicos, como a aquellas obtenidas, por su cuenta y riesgo, por un particular. Asimismo, la ineficacia de la prueba no sólo afecta a las pruebas obtenidas directamente en el acto constitutivo de la violación de un derecho fundamental, sino también a las adquiridas a partir o a resultas de aquéllas, aunque en su consecución se hayan cumplido todos los requisitos constitucionales. Tanto unas como otras han sido conseguidas gracias a la violación de un derecho fundamental - las primeras de forma directa y las segundas de modo indirecto-, por lo que, en pura lógica, de acuerdo con la regla de exclusión, no pueden ser utilizadas en un proceso judicial.”<sup>8</sup>

## The Burden of Proof

9. The burden of proving that a particular statement was procured under torture does not simply rest on the claimant. Indeed, international jurisprudence makes clear that the exclusionary rule imposes a positive obligation on States to verify whether statements said to have been made under torture have indeed been made under such conditions. As the UN Special Rapporteur summarises, “A defendant must only advance a plausible reason as to why the evidence may have been procured by torture or other ill-treatment. Thereafter the burden of proof must shift to the State and the courts must inquire as to whether there is a real risk that the evidence has been obtained by unlawful means. If there is a real risk, the evidence must not be admitted.”<sup>9</sup>
10. In *PE v France* the United Nations Committee Against Torture, the official United Nations body of experts assigned to the interpretation of the *UN Convention Against Torture*, observed that the exclusionary rule implies “an obligation for each State party to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture.”<sup>10</sup> As the UN Special Rapporteur has noted, “It is therefore for the State to investigate with due diligence whether there is a real risk that a confession or other evidence was not obtained by lawful means, including torture or other ill-treatment.”<sup>11</sup>
11. The Inter-American Court of Human Rights has taken this same approach in a leading case against Mexico. It has held that “Indeed, one of the arguments used by the trial judges in order not to exclude the evidence from the proceedings was based on the fact that “it is not sufficient for someone to allege that he has been physically or mentally abused for that person to be released, since in principle he must prove that such violence existed and that it was used as a means to extract a confession, which, at most, would invalidate the confession [...]” Similarly, the expert witness Coronado indicated that “if it is alleged that a confession was obtained under torture, and it is

<sup>7</sup> Tesis de jurisprudencia 139/2011. Aprobada por la Primera Sala de este Alto Tribunal, en sesión privada de cuatro de noviembre de dos mil once, available online at :

[http://200.38.163.178/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e10000000000&Apendice=1000000000000&Expresion=160509&Dominio=Rubro,Texto,Localizacion&TA\\_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=1&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,50,7&ID=160509&Hit=1&IDs=160509&tipoTesis=&Semenario=0&tabla](http://200.38.163.178/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e10000000000&Apendice=1000000000000&Expresion=160509&Dominio=Rubro,Texto,Localizacion&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=1&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,50,7&ID=160509&Hit=1&IDs=160509&tipoTesis=&Semenario=0&tabla)

<sup>8</sup> Tesis 1a. CLXII/2011, Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXXIV, agosto de 2011, p.226, Reg. 161221, available online at: <http://200.38.163.178/sjfsist/Paginas/DetalleGeneralV2.aspx?id=161221&Clase=DetalleTesisBL>.

<sup>9</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez , A/HRC/25/60, 10 April 2014, para. 67.

<sup>10</sup> CAT/C/29/D/193/2001, 19 December 2002, para. 6.3.

<sup>11</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez , A/HRC/25/60, 10 April 2014, para. 33.

not proven during the trial that there was a torturer, the confession will stand.” As stated previously, this Court reiterates that the burden of proof for such facts rests with the State (*supra* para. 136), and therefore it cannot be argued that the petitioner did not fully prove his complaint in order to rule it out.”<sup>12</sup>

12. This placement of the burden on the State is consistent with the wider recognition that it is not appropriate to require the person who is alleging the torture to prove the torture when the evidence to prove that treatment lies with the authorities. Numerous courts have thus recognised that the burden is on the State to disprove torture when an individual who alleges torture entered into the custody of State officials in good health and sustained injuries which produced sequelae consistent with torture while in the custody of the authorities.
13. For example, in the case of *Evloev v. Kazakhstan*, in facts similar to the case of Mr. Héctor Manuel Casique Fernández, the UN Committee Against Torture noted that:

“ ... the complainant has alleged a violation ... on the grounds that the State party failed in its duty to prevent and punish acts of torture. ... In this respect, the Committee notes the complainant’s detailed description of the treatment he was subjected to while in police custody and of the content of forensic medical report No. 3393 of 10 December 2008 documenting the physical injuries inflicted on him to force him to confess his guilt in a multiple murder, robbery and other crimes. The Committee considers that the treatment as described by the complainant can be characterized as severe pain and suffering inflicted deliberately by officials with a view to obtaining a forced confession. The State party, while not contesting the conclusions of the medical report, denies any involvement by officials. It is uncontested that the complainant was placed in pretrial investigation at the premises of the Ministry of Internal Affairs in Astana at the time his injuries were incurred. Under these circumstances, the State party should be presumed liable for the harm caused to the complainant unless it provides a compelling alternative explanation. In the present case, the State party provided no such explanation and thus the Committee must conclude that the investigating officers are responsible for the complainant’s injuries. Based on the detailed account which the complainant has given of ill-treatment and torture, and the corroboration of his allegations in the medical forensic documentation, the Committee concludes that the facts as reported constitute torture within the meaning of article 1 of the Convention and that the State party failed in its duty to prevent and punish acts of torture, in violation of article 2, paragraph 1, of the Convention.”<sup>13</sup>

### **Consequences of the exclusionary rule**

14. The first and immediate consequence of the exclusionary rule is that any evidence procured by torture is inadmissible in legal proceedings.
15. However the jurisprudence suggests additional consequences. Derivative evidence, that is, evidence found as a result of a statement made under torture, may also be

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<sup>12</sup> *Case of Cabrera García and Montiel Flores v. Mexico (Preliminary Objection, Merits, Reparations and Costs)*, Series C, No. 220, 26 November 2010, para. 176.

<sup>13</sup> CAT/C/51/D/441/2010, 17 December 2013, para. 9.2. See also, *Rasim Bairamov v. Kazakhstan*, CAT/C/52/D/497/2012, 12 June 2014, paras. 8.2 – 8.4; *Vasily Yuzepchuk v. Belarus*, CCPR/C/112/D/1906/2009, 17 November 2014, para. 8.2.

excluded, because its exclusion would be consistent with the purpose behind the prohibition of torture of removing the incentive for States to engage in torture. For example, the Supreme Court of Appeal of South Africa endorsed such reading in the case of *Mthembu v The State* in which it ruled out evidence obtained as a result of torture, including the “fruits of the poisonous tree.” The Supreme Court of Appeal held in particular that any use of evidence obtained through torture automatically renders proceedings unfair, a finding that must apply in equal measure to other forms of ill-treatment. It reasoned that:

“Ramseerop [the accomplice] made his statement to the police immediately after the metal box was discovered at his home following his torture. That his subsequent testimony was given apparently voluntarily does not detract from the fact that the information contained in that statement pertaining to the Hilux and metal box was extracted through torture...It is also apparent from his testimony that, even four years after his torture, its fearsome and traumatic effects were still with him. In my view, therefore, there is an inextricable link between his torture and the nature of the evidence that was tendered in court. The torture has stained the evidence irredeemably... In the long term, the admission of torture-induced evidence can only have a corrosive effect on the criminal justice system. The public interest, in my view, demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial.”<sup>14</sup>

16. The Inter-American Court of Human Rights has likewise held that “the absolute nature of the exclusionary rule is reflected in the prohibition on granting probative value not only to evidence obtained directly by coercion, but also to evidence derived from such action. Consequently, the Court considers that excluding evidence gathered or derived from information obtained by coercion adequately guarantees the exclusionary rule.”<sup>15</sup> The UN Special Rapporteur on Torture has also endorsed this approach, holding that “the exclusionary rule extends not only to confessions and other statements obtained under torture, but also to all other pieces of evidence subsequently obtained through legal means, but which originated in an act of torture.”<sup>16</sup>
17. In some instances, this may go so far as resulting in the quashing of legal proceedings, when the admission of the evidence would render the entire trial unfair. In considering whether the admissibility of evidence renders a trial as a whole ‘unfair’, the European Court of Human Rights has indicated that: “The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the “unlawfulness” in question and, where a violation of another Convention right is concerned, the nature of the violation found.”<sup>17</sup> It has further determined that the use of evidence obtained by torture renders the trial as a whole unfair.<sup>18</sup>

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<sup>14</sup> *Mthembu v The State* (379/2007)[2008] ZASCA 51 (10 April 2008), paras. 34, 36.

<sup>15</sup> *Case of Cabrera García and Montiel Flores v. Mexico (Preliminary Objection, Merits, Reparations and Costs)*, Series C, No. 220, 26 November 2010, para. 167.

<sup>16</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/25/60, 10 April 2014, para. 29.

<sup>17</sup> *Allan v. the United Kingdom*, Application no. 48539/99, §ECHR 2002-IX, paras.42 and 43.

<sup>18</sup> *Harutyunyan v. Armenia*, Application no. 36549/03, Judgment of 28 June 2007. It is noted at para. 63 that “The use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. Incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other

18. Mexican jurisprudence recognises that when evidence has a corrupting effect on a trial, it is appropriate to declare the invalidity of the process and, having no other evidence that are incriminating, order the release of the accused. In particular, the First Chamber of the Supreme Court has indicated:

*« A juicio de esta Primera Sala de la Suprema Corte de Justicia de la Nación, la vulneración de los derechos fundamentales del acusado en el proceso penal puede provocar, en determinados supuestos, la invalidez de todo el proceso, así como de sus resultados, lo cual imposibilitará al juez para pronunciarse sobre la responsabilidad penal de una persona. Esta Primera Sala considera que el efecto corruptor del proceso penal se actualiza cuando, en un caso concreto, concurren las siguientes circunstancias: a) que la autoridad policial o ministerial realice alguna conducta fuera de todo cauce constitucional y legal; b) que la conducta de la autoridad haya provocado condiciones sugestivas en la evidencia incriminatoria que conlleven la falta de fiabilidad de todo el material probatorio; y c) que la conducta de la autoridad impacte en los derechos del acusado, de tal forma que se afecte de forma total el derecho de defensa y lo deje en estado de indefensión. Así las cosas, cuando el juez advierta la actualización de estos supuestos, deberá decretar la invalidez del proceso y, al no haber otras pruebas que resulten incriminatorias, decretará la libertad del acusado. »<sup>19</sup>*

## Conclusions

19. As a result of the foregoing, the international legal position as applicable to Mexico may be summarised as follows:
- i) Torture is absolutely prohibited in all circumstances.
  - ii) There is an obligation to duly investigate any and all allegations of torture.
  - iii) Evidence procured by torture may not be used in legal proceedings except in proceedings against the alleged perpetrator of the torture, to prove that torture occurred.
  - iv) Courts should be mindful of the impact of the attempt to introduce torture evidence on the fairness of the legal proceedings as a whole. There are numerous instances in which courts faced with torture evidence have not only prevented that evidence from being used in any legal proceedings, but have also gone further and a) rejected derivative evidence which was obtained as a result of the torture and/or b) stayed legal proceedings as an abuse of process, given the impact on the rule of law in the countries concerned.

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conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to “afford brutality the cloak of law.”

<sup>19</sup> Amparo directo en revisión 517/2011. 23 de enero de 2013. Mayoría de tres votos; available at:

[http://200.38.163.178/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e10000000000&Apendice=1000000000000&Expresion=2003563&Dominio=Rubro,Texto&TA\\_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=1&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6.1.2.50.7&ID=2003563&Hit=1&IDs=2003563&tipoTesis=&Semanao=0&tabla.](http://200.38.163.178/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e10000000000&Apendice=1000000000000&Expresion=2003563&Dominio=Rubro,Texto&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=1&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6.1.2.50.7&ID=2003563&Hit=1&IDs=2003563&tipoTesis=&Semanao=0&tabla.)