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Assessing Allegations: Judicial Evaluation of Testimonial Evidence in International Tribunals

Juliana Murray*

I. INTRODUCTION

Current scholarship focuses on the prohibition of torture1 and the inadmissibility of confessions or statements obtained through torture.2 The scholarship correctly concludes that involuntary confessions or statements should not be admissible in criminal proceedings. However, little attention has been given to the procedural law governing the standards that judges sitting on international tribunals do or should apply to determine whether a statement or confession was obtained improperly. For example, if a defendant claims that officials obtained his statement through coercive or improper means, what procedures do international tribunals require before deciding whether the statement is admissible into evidence? International and human rights treaties uniformly prohibit the admission of evidence obtained through a violation of human rights. These treaties are ambiguous, however, regarding the standards judges should use to evaluate the credibility of an allegation of impropriety in acquiring a statement or confession. In light of these ambiguities, it is informative and necessary to examine national practices of judicial evaluation of challenged testimonial evidence.

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At least in theory, all countries agree that "involuntary confessions must be excluded. Beyond that . . . the rationales and the rigor of exclusionary practices vary greatly." Some countries establish mandatory rules that govern judicial assessment of the admissibility of statements. The common law in England requires that a statement or confession be voluntarily given in order to be admissible in court; the common law's insistence on the exclusion of involuntarily confessions is based in part on the refusal to accept oppression or inducement. In the US, a party challenging the legality of a statement or confession may file a motion to suppress; the judge will then hold an evidentiary hearing to assess witness credibility and to determine whether the statement was given knowingly and voluntarily, as is legally required. When a defendant alleges that his confession was coerced, however, an automatic rule of exclusion applies and the statement does not come into the trial as evidence.

Other countries apply more discretionary standards. France applies a relaxed and much less stringent standard that results in the admissibility of most statements if the judge finds that the statement did not substantially violate the rules of criminal procedure. The German Code of Criminal Procedure tracks the general trend toward a more discretionary standard, although it does require the mandatory exclusion of statements elicited by certain forbidden means. Although these and other states vary in their evaluative standards of such statements, the practice of excluding involuntary or coerced statements qualifies as customary international law. There is broad and established state practice of this specific behavior of excluding certain types of statements. While some states may exclude these statements out of a moral obligation—the desire not to reward coercion or inhuman interrogation practices, for example—such exclusion has also developed into opinio juris. That is, even if a state feels no moral compulsion to exclude involuntary testimonial evidence, it will still do so out of a sense of legal obligation.

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4 A and others v Secretary of State for the Home Department (No 2) [2005] UKHL 71.
6 See, for example, Bram v US, 168 US 532, 543 (1897) (describing the voluntariness requirement for confessions under the Fifth Amendment to the US Constitution, which states that "[a] confession can never be received in evidence where the prisoner has been influenced by any threat or promise").
7 Bradley, 52 Case W Res L Rev at 388 (cited in note 3) ("While French authorities are expected to avoid the use of unfair, brutal or deceptive methods . . . French courts have traditionally been lax in controlling the use of psychological pressure.") (citations omitted).
8 Id at 389.
9 The Paquete Habana, 175 US 677, 708 (1900) (stating that evidence of state practice of the specific situation at issue satisfies the doctrine of establishing international custom).
In addition to constituting customary international law, the prohibition against admitting involuntary statements is also rooted in international treaties. Article 38(1) of the Statute of the International Court of Justice offers a quasi-hierarchy of the sources of international law; while it does not elevate treaties explicitly, it does give them priority in its list of sources.\footnote{Statute of the International Court of Justice Art 38(1), 59 Stat 1055, 1060 (1945).} Treaties are also widely recognized by scholars as a valid source of international law that may in some circumstances be superior to custom, when treaties can more clearly reflect the parties’ specific intentions.\footnote{Richard Baxter, \textit{Treaties and Custom}, 129 Rec des Cours 25, 101 (1970-1) (stating that treaties “will increasingly gain paramountcy over customary international law” because they can both strengthen established customary international law and simplify its application); Elihu Lauterpacht, ed, \textit{International Law: Collected Papers of Hersch Lauterpacht I} 86–7 (1970) (noting that treaties are given priority as a source of international law and that States’ rights and duties are determined, “in the first instance, by their agreement as expressed in treaties.”).} In this instance, treaties establish the international law that governs the procedural rules of the various international tribunals. Specifically, the treaties establish procedural rules for both the admissibility of statements and the prohibition against admitting statements obtained in a manner that violates norms of permissible international behavior.

The Universal Declaration of Human Rights of 1948 was the first UN instrument to explicitly prohibit cruel, inhuman or degrading punishment.\footnote{Universal Declaration of Human Rights, General Assembly Res No 217A (III), UN Doc A/810 71 (1948).} It followed on the heels of the establishment of the International Military Tribunal (IMT) at Nuremberg, the first international criminal tribunal, which opened in 1945 for the “just and prompt trial and punishment of major war criminals of the European Axis.”\footnote{Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal (Aug 8, 1945), Arts 1, 6, 59 Stat 1544, 1547, 82 UN Treaty Ser 279, 288 (1945).} Because the IMT arose out of necessity following the Second World War, the IMT Charter did not contain rules of evidence.\footnote{See M. Cherif Bassiouni, foreword, in Richard May and Mariëtte Wierda, \textit{International Criminal Evidence} xiv (Transnational 2002).} Since then, judges in international tribunals, “in their legislative rule-making role, as well as in the exercise of their judicial discretion . . . [have] relied on international and regional norms . . . embodied in international treaties” such as the European Convention on the Protection of Human Rights.\footnote{Id at xv.}

These international norms have also informed the laws of many countries, resulting in general principles of law regarding due process in domestic courts that reflect the due process of international courts and which inform the analysis of international law. While the rules of the international tribunals attempt to
harmonize national and international practices, the language of the courts’ respective treaties exposes ambiguities and describes potentially conflicting procedural and evidentiary rules.

This Comment analyzes the legal standards international tribunals apply when assessing the credibility of defendants’ claims that testimonial evidence against them was improperly obtained. Section II focuses on existing rules of evidence and procedure in international and regional tribunals, examining the standards for admissibility of evidence in the tribunals’ treaties and, where available, in their jurisprudence. Section III examines the national practices of several common and civil law countries that have established and tested rules that can help to inform international courts’ procedures. This examination of national practices is not intended to be exhaustive and only reflects the domestic law of select nations, but it nonetheless helps to inform the analysis. Section IV weighs the benefits and pitfalls of establishing a standard for the judicial assessment of challenged testimonial evidence in the international courts. Section V concludes that requiring judges in international tribunals to first assess the credibility of allegations of improper conduct, and then to exclude the statements only if he finds the allegations to be true, will ensure that voluntary and validly obtained statements are admitted into international criminal trials.

II. THE ADMISSIBILITY OF STATEMENTS

International law prohibits human rights violations as a means to obtain evidence against a defendant or to secure a statement or confession from a defendant. This prohibition exists in both customary international law and in treaties, several of which are especially pertinent to the impact of alleged human rights violations on the admissibility of evidence at trial. The European Court of Human Rights (ECtHR) and the ad hoc Tribunals in particular offer the most case law on these procedural issues in human rights cases. These treaties and the courts’ jurisprudence provide some insight into the underlying practices of the international courts and their relationship to the procedural rules of domestic courts, but they fail to present coherent and precise guidance to judges in evaluating the admissibility of testimonial evidence.

A. International Legal Standards of Admissibility

Individual treaties govern each international tribunal, and these international courts operate according to their respective treaties and procedural rules. Examination of these texts exposes the varying standards for admissibility of evidence in international courts. Specifically relevant here, the legal documents establish different standards that judges should follow when assessing contested evidentiary statements or confessions to determine whether
those statements should be admitted. The following summarizes the varying standards in these treaties.

1. UN Convention against Torture

The UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (UNCAT) is the UN instrument directly prohibiting any act that inflicts severe pain and suffering—whether physical or mental—for the purpose of punishment, coercion or intimidation, or obtaining information or a confession.\(^{16}\) While it forbids torture under any circumstances and with no exceptions, the UNCAT does not necessarily demand the exclusion of testimonial evidence that a defendant alleges was improperly obtained. Rather, it places the burden of preventing torture and excluding any tortured statements on each individual state party. Article 15 of the UNCAT codifies this specific exclusionary rule, which deems inadmissible any evidence “which is established to have been made as a result of torture.”\(^{17}\) The treaty specifies neither who should establish whether the evidence in question was elicited through torture, nor how one should make that determination. Signatory states are obligated to report every four years to the Committee Against Torture (CAT), a body established to supervise claims of torture.\(^{18}\) While the UNCAT empowers the CAT to investigate claims of torture, “[t]he Committee is a non-judicial institution and, therefore, is not authorized to make decisions on individual complaints” of torture.\(^{19}\) The treaty thus establishes an ambiguous exclusionary rule for evidence obtained by torture and requires that each state party ensure that tortured evidence does not reach trial, but it fails to establish a supervisory arm with the authority to enforce these obligations.\(^{20}\)

The language of the UNCAT also fails to clearly allocate the burden of proof in a case involving an allegation of tortured testimonial evidence.\(^{21}\) The House of Lords faced this problem in *A and others*, a case in which the Court of Appeals placed the burden of proving improper behavior on the person against whom the evidence in question was used.\(^{22}\) The House of Lords unanimously

\(^{16}\) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT"), Art 1, 1465 UN Treaty Ser 85 (1984).
\(^{17}\) UNCAT at Art 15 (cited in note 16).
\(^{18}\) Id at Arts 17–24.
\(^{20}\) UNCAT, Art 16 (cited in note 16).
\(^{21}\) See Thienel, 17 Eur J Intl L at 354 (cited in note 2) ("[I]t seems doubtful whether any provision on the burden of proof could properly be derived from Article 15 UNCAT").
\(^{22}\) *A and others*, 2 AC at ¶ 56.
reversed the lower court’s decision, noting that it would be unfair to place the burden of proof on this private party, who has little ability to investigate and to collect the necessary evidentiary support. The court therefore held that the duty of investigation shifts to the court if the person alleging torture requests that the court review the manner in which the statement was obtained. Once the appellant has met his burden of stating a plausible reason for review, often by showing the evidence has come from a country “widely known or believed to practise torture,” the Special Immigration Appeals Commission (SIAC) will form a fair judgment based on the specific facts and circumstances of the case.23 “If SIAC is unable to conclude that there is not a real risk that the evidence has been obtained by torture, it should refuse to admit the evidence. Otherwise it should admit it.”24

The House of Lords’ approach in A and others clearly shifts the burden of proof where a moving party has little ability to meet that burden, and it clearly describes the inquiry the SIAC should undertake in determining—for the purposes of UNCAT Article 15—whether statements were made as a result of torture. This approach does not derive from the language of the UNCAT, however, but rather from that particular bench’s own interpretation and discretion. Other panels or courts interpreting the UNCAT may choose different standards of assessment, or may allocate the burden of proof to a different party, thus resulting in an inconsistent application of the treaty. The ambiguous language of the exclusionary rule opens the door for varying standards that may lead to indiscriminate exclusion or admission of testimonial evidence.

2. Rome Statute


23 Id at ¶ 56 (per Lord Bingham).
24 Id.
Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69. While this procedural rule authorizes the ICC Chamber to assess evidence, it does not establish guidelines or standards by which the judges should do so. The provisions of Article 69 of the Rome Statute likewise authorize the court to exercise broad discretion in deciding on the admissibility of evidence.

Article 69(7) does not provide for an absolute exclusionary rule, but instead prohibits the admission of evidence “obtained by means of a violation of this Statute or internationally recognized human rights . . . if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.” The treaty’s language presumably leaves the task of deciding what constitutes “substantial doubt” to the ICC Chamber handling the specific case. In making such a determination, the Chamber is constrained by the text of in Article 69(8), which states: “When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State’s national law.”

The Rome Statute and the supplementary rules of the ICC provide for judicial discretion in admitting or excluding evidence. First, the court must determine whether the collection of the statements constitutes a violation of either the Rome Statute or recognized human rights. Then, even if the court does find that a violation occurred, it still has the authority to admit the statements under the ambiguous language of Article 69(7). Some scholars criticize this discretionary standard of review, arguing that authorizing judges to admit illegally obtained evidence threatens uniformity and subverts the principles of human rights upon which the ICC was founded. Difficulties generally arise in cases involving allegations of international human rights violations that do not reach the level of torture. In these cases, critics argue, the judges’ discretion regarding the admissibility of evidence creates an assessment standard that incorporates the judges’ subjective perceptions. By permitting the members of the ICC Chamber to make admissibility determinations in this manner, the Rome Statute relies on the judges’ own evaluative abilities.

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30 Id at Art 69(8) (cited in note 25).
3. European Convention on Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) established the ECtHR, which hears cases brought by a state party or by an individual who believes that a state party has violated his rights under the ECHR. The ECHR is unique because it gives individuals an active role in the international arena, where traditionally only states are considered actors. Article 3 of the ECHR prohibits torture, stating simply: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Under Article 46, the Committee of Ministers “retains the primary responsibility for supervising the execution of European Court judgments.” The Committee has no quasi-judicial function, however, and its authority “is limited to the mere supervision and execution of judgments.” The ECHR offers no further language on the admissibility of statements or the standards by which to assess the statements’ reliability.

4. Statutes and rules of procedure and evidence of the ad hoc Tribunals.

The UN established the criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), or the ad hoc Tribunals, to prosecute crimes committed during the wars in the former Yugoslavia and in Rwanda. Although both tribunals aim to complete all appeals by 2010, an examination of the courts’ Rules of Procedure and Evidence (Tribunals’ Rules) can apply more broadly to other current and future ad hoc Tribunals. “The ad hoc Tribunals represent the first time that jurists from different legal, political and cultural systems have come together to participate in the adjudication of criminal cases.” The Tribunals’ Rules provide for broad judicial discretion in evidentiary matters, and the judges are not bound by national rules of evidence in determining

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33 As of October 28, 2009, there are 47 states parties to the ECHR; see Member States of the Council of Europe, online at http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG (visited October 28, 2009).
35 Id at Art 46, ¶ 2 (“The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”); see Philip Leach, The Effectiveness of the Committee of Ministers in Supervising Enforcement of Judgments of the European Court of Human Rights, 2006 Public L 443, 444 (“[I]t is the Committee of Ministers which retains the primary responsibility for supervising the execution of European Court Judgments.”).
Assessing Allegations

Under Rule 89 of the ICTY and ICTR, the Chamber may admit "any relevant evidence which it deems to have probative value."\( ^{38} \) It has the discretion to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.\( ^{40} \)

The Tribunals’ Rules favor a flexible approach to the issue of admissibility of evidence in order to achieve the goal of fair and expeditious trials. When addressing the admissibility of evidence, “questions of credibility or authenticity [are] determined according to the weight given to each of the materials by the judges at the appropriate time.”\( ^{41} \) Rule 95, which inspired the language of Article 69(7) of the Rome Statute, provides that “[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.”\( ^{42} \) In imposing few limits on the admissibility of evidence—largely a result of the specific function of the ad hoc Tribunals to prosecute war criminals—the Tribunals’ Rules permit judges to exercise broad discretion in admitting challenged testimonial evidence into trial.

5. International Covenant on Civil and Political Rights

Article 7 of the International Covenant on Civil and Political Rights (ICCPR), adopted by the UN General Assembly in 1966 and entered into force in 1976, reproduces the provision of the Universal Declaration of Human Rights that prohibits torture and other cruel or degrading treatment.\( ^{43} \) Article 14 of the ICCPR describes the rights to which every criminal defendant is entitled, including the right against self-incrimination.\( ^{44} \) The ICCPR does not enforce or supervise human rights, but instead leaves it to each signatory state to protect its citizens’ human rights. The Human Rights Committee is an independent body that monitors the implementation of the ICCPR. States parties are obligated to submit reports to the Committee describing how rights are being implemented.

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\( ^{38} \) ICTR Rules of Procedure and Evidence ("ICTR Rules") 89(A); ICTY Rules of Procedure and Evidence ("ICTY Rules") 89(A).

\( ^{39} \) ICTR Rule 89(C); ICTY Rule 89(C).

\( ^{40} \) ICTR Rule 95; ICTY Rule 89(D).

\( ^{41} \) Tochilovsky, Jurisprudence at 403 (cited in note 37) (citing Prosecutor v Blaškić, Judgment, Case No ICTY-95-14-T, T Ch I, 3 March 2000, ¶ 34).

\( ^{42} \) ICTR Rule 95; ICTY Rule 95.

\( ^{43} \) International Covenant on Civil and Political Rights ("ICCPR") (1966), Art 7, UN Doc A/6316 (entered into force Mar 23, 1976).

\( ^{44} \) Id at Art 14(3)(g).
The Committee then examines these reports and makes recommendations in the form of "concluding obligations" to the states parties.45

B. International Case Law Involving Statements

Some of the cases that reach international tribunals raise questions regarding the courts' procedural and evidentiary rules. When a defendant alleges that testimonial evidence was collected in a manner constituting a violation of his human rights, the rules of evidence will determine whether that evidence should be automatically excluded from or admitted to trial, or whether the judges should instead evaluate the manner in which the evidence was obtained to determine its admissibility. The determination depends to some extent on the role and purpose of the specific tribunal. For example, does the court elevate the relevance and objective truth of testimonial evidence above the manner in which the evidence is obtained? Should there be judicial discretion or a rigid regime of admissibility?

The treaties and customary international law controlling these international tribunals do not condone violations of human rights and will not reward such violations. However, some tribunals grant broader judicial discretion to the admissibility of evidence and allow judges to assess the credibility of claims of impropriety before deciding whether the evidence should be admitted or excluded from trial. The ICC Chamber, for example, has the discretion under the permissive Rome Statute to admit evidence obtained through a violation of human rights if the violation does not affect the reliability of the evidence or damage the integrity of the proceedings.46 The case law of these international and regional tribunals, especially the ECtHR and the ad hoc Tribunals, illustrates the varying standards.

1. International Court of Justice

The ICJ settles legal disputes submitted to it by states parties, and the specific question of the appropriate standard by which to evaluate the admissibility of testimonial evidence has not yet reached the court. One recent case may be instructive by analogy, however. In Avena and other Mexican Nationals, the ICJ handled Mexico's suit against the US for violation of the Vienna Convention on Consular Relations (VCCR).47 In its counter-memorial, the US stressed the importance of admitting the voluntary statements that the defendants made to officials:

45 Office of the UN High Commissioner for Human Rights, About the Human Rights Committee, online at http://www2.ohchr.org/english/bodies/hrc/ (visited October 29, 2009).
Frequently, the most reliable and probative evidence at a criminal trial will be the defendant's voluntary statement. To deny the prosecution the ability to introduce a confession that is not coerced, that is supported by sufficient detail to permit confidence in its truthfulness, that is taken in a manner that guarantees its voluntariness, and that meets other United States constitutional standards, would deprive the fact-finder of important evidence of guilt... An exclusionary rule also exacts a uniquely high price in the United States justice system because, unlike in most States, the government cannot appeal an acquittal, even if based on a legal mistake by the fact finder.48

Nonetheless, the ICJ found that the US violated its obligations to notify under Article 36 of the VCCR and thus deemed that the statements defendants made prior to the notification of their consular rights were inadmissible at the trial proceedings. The ICJ considered the US position in favor of admitting the statements because they were not obtained involuntarily or in violation of recognized human rights, but the VCCR ultimately determined the court's judgment in Avena. It is unclear how the court would have ruled if admissibility of the statements were the sole issue in the case.

2. International Criminal Court

The ICC is an independent permanent tribunal established to prosecute individuals for the most serious crimes of international concern—genocide, crimes against humanity and war crimes.49 Because the ICC hears only serious crimes against humanity, the case law is not comparable to that of any other courts, international or domestic. Given the limited category of cases that appear before the ICC, and their unique nature, there is no case law from the ICC raising the issue of admissibility of allegedly coerced statements. If the issue should arise, Article 69(7) of the Rome Statute codifies the exclusionary rule to govern evidence and the ICC Chamber retains discretion over the admissibility of challenged evidence. No relevant cases have reached the ICC at this time, however.

3. European Court of Human Rights

The ECtHR does not apply an absolute exclusionary rule to the admissibility of testimonial evidence, even when the defendant alleges that the

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49 See, International Criminal Court (“ICC”), About the Court, online at http://www.icc-cpi.int/Menus/ICC/About+the+Court/ (describing the history and functioning of the ICC) (visited Nov 21, 2009).
statements at issue were obtained improperly. Because of "its policy of not directly interfering with national law, [the ECtHR] has never held that improperly obtained evidence must be excluded." The Court explains its rationale for the absence of an exclusionary rule in *Miailhe v France*, concluding that it is appropriate to leave those evidentiary questions to national courts, which are competent to determine the admissibility of evidence, instead of making those decisions on its own authority. Although the ECtHR ultimately defers to the decisions of national tribunals regarding the admissibility of evidence, it does reserve the right to ensure that the proceedings as a whole are fair. Because the ECtHR may evaluate the methods used to obtain testimonial evidence pursuant to the ECHR Article 6(1) right to a fair trial, it may apply a discretionary exclusionary rule by holding that the admission of statements coerced by torture or improper means would violate ECHR Article 6(1). In this vein, the court has ruled on the sufficiency of the member states’ efforts to secure individuals’ human rights and freedoms, confronting cases involving allegations of torture or ill-treatment in obtaining evidence. It is useful to first look at cases involving allegations of ill-treatment in order to better understand ECHR Article 3, and then to turn to cases raising procedural questions regarding the admissibility of evidence that is alleged to have been coerced by such ill-treatment.


In *Assenov v Bulgaria*, the Court held that ECHR Article 3 requires that national authorities conduct an investigation into allegations of ill-treatment if the defendant’s allegations "raise a reasonable suspicion" that he has been seriously ill-treated. The court noted that ECHR Article 3 states that the alleged "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of that minimum is relative: it depends on all the circumstances of the case." The court proceeded to assess the medical evidence offered and, in its discretion, found that the injuries were sufficiently serious to qualify as ill-treatment under the ECHR. However, it

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50 Herrmann, 31 Hastings Int'l & Comp L Rev at 447 (emphasis added) (cited in note 19).
52 Id.
54 Id at ¶ 94.
55 Id at ¶ 95.
found that the evidence offered to support the allegation that the police caused the injuries was insufficient.\textsuperscript{56}

In \textit{Andreyevskiy v Russia}, the Court noted that "allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court [ ] generally applie[s] the standard of proof ‘beyond a reasonable doubt.’"\textsuperscript{57} The applicant in \textit{Andreyevskiy} alleged that the police beat him "with a view to extracting a confession to the murder" and that he confessed only when the police threatened to rape his mother and girlfriend.\textsuperscript{58} The day after this mistreatment purportedly occurred, the applicant wrote a statement confessing to the murder, and he noted that he made the confession without any moral or physical pressure. Months later, he recanted that statement and submitted that the confession was obtained from him by force. During the trial in Russia, the district court found him guilty and "dismissed as unfounded the applicant's allegations of ill-treatment" on the basis of his contradictory statements regarding the circumstances.\textsuperscript{59} In evaluating the applicant's appeal, the ECtHR examined the allegation in the same manner the Court adopted in \textit{Assenov}. The court assessed the alleged ill-treatment and the sufficiency of the national authorities’ investigation into the allegation and held that the manner in which the police obtained applicant's confession did not violate Article 3 ECHR.\textsuperscript{60} The court therefore admitted the statement into evidence.\textsuperscript{61}

\textit{b) Procedural questions regarding the admissibility of evidence}

The ECtHR has indicated that the use of evidence obtained as a result of acts of violence or ill-treatment that reaches the minimum level of severity required by ECHR Article 3 can constitute a violation of the ECHR Article 6(1) right to a fair trial.\textsuperscript{62} Specifically, the court has stated that the use of evidence "obtained as a result of torture" renders the proceedings unfair even if "the

\textsuperscript{56} Id at ¶ 100–01 (finding a violation of ECHR Art 3 on the separate claim of inadequate investigation, "in view of the lack of a thorough and effective investigation into the applicant's [] claim that he had been beaten by police officers.").

\textsuperscript{57} \textit{Andreyevskiy v Russia}, App No 1750/03, ECHR 1750/03, ¶ 59 (2009).

\textsuperscript{58} Id at ¶ 7.

\textsuperscript{59} Id at ¶ 24.

\textsuperscript{60} Id at ¶ 54–57.

\textsuperscript{61} Id at ¶ 58.

\textsuperscript{62} \textit{Levtina v Moldova}, App No 17332/03, ECHR 17332/03, ¶ 99 (2009) (finding violations of ECHR Arts 3 and 6 where applicants were ill-treated for the purpose of extracting confessions and where the authorities were aware of the ill-treatment, but did not act to stop it. The court states that the use of evidence gathered in a manner that violates ECHR Art 3 “always raises serious issues as to the fairness of the proceedings.”)

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admission of the evidence was decisive in securing the applicant's conviction."\textsuperscript{63} In \textit{Jalloh v Germany}, the police action of administering an emetic in order to provoke regurgitation of a bag of cocaine attained the minimum level of severity, under the court's assessment of the circumstances.\textsuperscript{64} Although \textit{Jalloh} involved physical and not testimonial evidence, the court's stated rationale for determining admissibility is useful. The court cited a US case, \textit{Rochin v California}, as persuasive authority for its exclusion of otherwise relevant evidence that was obtained by improper means, noting that "[c]oerced confessions offend the community's sense of fair play and decency."\textsuperscript{65} Thus while the court agreed that admitting confessions coerced \textit{by torture} would constitute an unfair proceeding in violation of ECHR Article 6(1), it specifically left open the question of how to handle allegations of acts amounting to less than torture.\textsuperscript{66}

4. Ad Hoc Tribunals

Similar rules govern the procedures of the ICTR and the ICTY. In these ad hoc Tribunals, "[d]ecisions relating to the admissibility of evidence . . . largely fall within the discretion of the Trial Chamber."\textsuperscript{67} The Chamber has the discretion to evaluate inconsistencies in, or concerns about, the evidence. It may also consider whether a witness is reliable and whether the evidence offered is credible.\textsuperscript{68} Like the ECtHR, the ad hoc Tribunals do not have an absolute exclusionary rule that requires the exclusion of all unlawfully obtained evidence. The "manner and surrounding circumstances in which evidence is obtained, as well as its reliability and defect on the integrity of the proceedings, will determine its admissibility."\textsuperscript{69} The Chamber has the authority to exclude evidence pursuant to Rule 95, although a commentator noted in 2003 that "[i]t does not seem that the Chambers of the ad hoc Tribunals have ever applied the provisions of Rule 95."\textsuperscript{70}

\textsuperscript{63} Id at ¶ 100; note that the court here indicates that the use of evidence obtained \textit{by torture} automatically violates Art 6, but that this holding still requires that the court first determine whether there was in fact ill-treatment and, if so, its severity.

\textsuperscript{64} \textit{Jalloh v Germany}, App No 54810/00, ECHR 54810/00, ¶ 76 (2006).

\textsuperscript{65} \textit{Rochin v California}, 342 US 165, 173 (1952) (finding a due process violation where police obtained evidence of illegal drugs by pumping defendant's stomach against his will, the court analogizes this extraction of physical evidence to the extraction of a verbal confession by physical abuse).

\textsuperscript{66} \textit{Jalloh}, App No 54810/00 at ¶ 107 ("In the present case, the general question whether the use of evidence obtained by an act qualified an inhuman and degrading treatment automatically renders a trial unfair can be left open") (cited in note 64).

\textsuperscript{67} Tochilovsky, \textit{Jurisprudence} at 404 (cited in note 37).

\textsuperscript{68} \textit{Prosecutor v Aleksovski}, Case No ICTY-95-14/1-A, App Ch, ¶ 63 (Mar 24, 2000).

\textsuperscript{69} Tochilovsky, \textit{Jurisprudence} at 407 (cited in note 37).

In its decision adopting evidentiary guidelines, the Chamber in *Prosecutor v Martić* referred to the exclusionary rule outlined in Rule 95. Specifically, the Chamber held: “If there are prima facie indicia that there was such oppressive conduct [in obtaining the testimonial evidence at issue], the burden is on the party seeking to have the evidence admitted to prove that the statement was voluntary and not obtained by oppressive conduct.” The defendant did not challenge the manner in which any of his statements was obtained during trial proceedings, however, so the prosecution did not have to produce evidence to prove that the statements offered were properly obtained.

The ICTY Chamber hearing *Prosecutor v Delalić et al* defined the exclusionary rule embodied in Rule 95 as “a residual exclusionary provision.” The defendant’s motion challenged the admissibility of his confession, which he alleged the police induced from him illegally. The Chamber evaluated evidence of the circumstances of his confession and determined that no such violation had occurred and that the confession was therefore admissible. In assessing the evidence, the Chamber applied the Austrian national rules of evidence. While Rule 89(A) provides that the trial chamber “shall not be bound by national rules of evidence,” the Chamber noted that, “where the interest of justice demands and the matter before [the court] can be better determined by the application of the national rules of evidence, the Trial Chamber may apply such rules.” Weeks after the Chamber denied this motion, the defense argued for the exclusion of another defendant’s statements, alleging a violation of Rule 95, but it again failed to persuade the Chamber. The Chamber ruled in favor of the prosecution and admitted the statements over objection after evaluating the evidence presented and, in its discretion, determining that the admission of the testimonial evidence would not damage the integrity of the proceedings.

In its judgment in *Prosecutor v Furundžija*, the ICTY observed:

In international human rights law, which deals with State responsibility rather than individual criminal responsibility, torture is prohibited as a criminal offence to be punished under national law; in addition, all States parties to the relevant treaties have been granted, and are obliged to exercise, jurisdiction to investigate, prosecute and punish offenders.

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71 *Prosecutor v Martić*, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, Case No ICTY-95-11-T, T Ch I (Jan 19, 2006).
72 Id at ¶9.
73 *Prosecutor v Delalić et al*, Decision on Zdravko Mucić’s Motion for the Exclusion of Evidence, Case No ICTY-96-21-T, T Ch II, ¶ 44 (Sept 2, 1997).
74 Id at ¶ 49.
75 *Prosecutor v Delalić et al*, Decision on the Motions for the Exclusion of Evidence by the Accused, Zejnil Delalić, Case No ICTY-96-21-T, T Ch II, ¶ 45 (Sept 25 1997).
This firm condemnation of torture appeared in the Chamber’s assessment of the merits of the case and did not relate to testimonial evidence. However, one might expect that the ad hoc Tribunals would likewise denounce torture and ill-treatment procedurally and would exercise their exclusionary authority under Rule 95 whenever allegations of such impropriety arise with respect to evidence. Instead, the case law of the ad hoc Tribunals supports the conclusion that the Rules impose no mandatory exclusion of evidence on the judges in their determinations of admissibility.

III. NATIONAL PRACTICES

As discussed above, the ECtHR ultimately defers to the national courts’ decisions regarding the admissibility of evidence, and the ad hoc Tribunals sometimes choose to apply national rules of evidence. For example, the ad hoc Tribunals necessarily adopted rules of procedure and evidence that derived from common law and civil law experiences. These international criminal tribunals are expected “to be informed and inspired by progressive national practices and international research. In turn, the courts have the capacity to provide human rights based models for domestic legal proceedings.” Study of national practices is highly relevant in international legal scholarship:

Increasingly, comparative criminal law and procedure furnishes international law through general principles of law, which are identified from national laws with norms of the general part and the procedural part of domestic criminal law, and which apply to the direct enforcement system. Thus, the substantive and procedural norms, which are applicable to proceedings before international legal institutions . . . derive from such general principles of law.

Understanding several nations’ approaches to the exclusion of statements can help to inform an analysis of the procedure in international tribunals. This discussion is not intended to be exhaustive, but rather to emphasize certain differences in the approaches of various courts to the admissibility of challenged testimonial evidence. Particularly, it notes the difference between the discretionary standard of the ICC and the French, English and German courts, and the rule of automatic exclusion applied in the US judicial system. All these

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courts aim to discover the truth and simultaneously strive to protect individuals’ human rights, yet these interests are sometimes in tension.

A. United States

The constitutional right against self-incrimination limits the power of custodial interrogation and protects against the admission of inculpatory statements in criminal proceedings. At common law, defendants’ statements were admitted into evidence if the court found that the statements were reliable. When the court deemed the statement to be reliable, it also presumed that the statement was voluntary.\(^8\) Courts later moved from the reliability test to a test of the voluntariness of the statement or confession in question.\(^8\) Then the US Supreme Court handed down its landmark decision, holding in *Miranda v Arizona* that a defendant has certain constitutional rights of which he should be informed before custodial interrogation can proceed and before any statements made in those circumstances may be admitted into evidence.\(^8\) *Miranda* therefore established an absolute exclusionary rule, or a default rule requiring the exclusion of statements made under certain conditions, without the need to establish whether they were voluntarily given. However, voluntariness still remains the threshold requirement for testimonial evidence in most cases.

1. Voluntariness Requirement

In 1968, Congress enacted 18 USC § 3501 to govern the admissibility of confessions. The statute provides in part that “a confession . . . shall be admissible in evidence if it is voluntarily given. Before such evidence is received in evidence, the trial judge shall . . . determine any issue as to voluntariness.”\(^8\) This requirement protects the due process demanded by the Fourteenth Amendment to the US Constitution and prevents violations of the Fifth Amendment’s right against self-incrimination.\(^8\) Judicial determination of the voluntariness of a statement controls the statement’s admissibility, regardless of its veracity. Therefore, while an involuntary confession is inadmissible partially because such a confession is likely to be unreliable, it is also inadmissible, even if it is true, because of the “strongly felt attitude of our society that important

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\(^8\) Ziang Sung Wan v United States, 266 US 1, 14 (1924) (“A confession is voluntary in law if, and only if, it was, in fact, voluntarily made.”).

\(^8\) Miranda, 384 US 436 (cited in note 5).

\(^8\) Title II of the Omnibus Crime Control and Safe Street Acts, Pub L No 90-351, 82 State 210 (1968) codified at 18 USC § 3501(a).

\(^8\) See Bram, 168 US at 542 (cited in note 6).
human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.\textsuperscript{35} The reasoning behind this principle is analogous to the human rights protections codified in international law treaties.

If the defendant challenges the voluntariness of a confession or statement by alleging that it was coerced or obtained through improper means, US courts will hold a suppression hearing so the judge may consider all the evidence supporting or denying the validity of the confession.\textsuperscript{36} The judge then makes a determination on the admissibility of the statement in question, based in part on her credibility assessment of the parties.\textsuperscript{37} In determining voluntariness, the judge is to take into consideration all circumstances regarding the manner in which the confession was obtained.\textsuperscript{38} This procedure prevents the admission of coerced or improperly obtained statements and safeguards the rights of criminal suspects. The judge in US criminal proceedings therefore determines the admissibility of challenged testimonial evidence on the basis of an evidentiary suppression hearing if the defendant challenges the statement before trial. If the defendant raises the challenge during trial, the court again makes the determination, pursuant to Rule 104(a) of the Federal Rules of Evidence, which govern the introduction of evidence in proceedings in US federal courts. Rule 104 states that questions of admissibility “shall be determined by the court,” outside the hearing of the jury.\textsuperscript{39}

2. Miranda Warnings and Judicial Determination of Admissibility

The rights established in \textit{Miranda} require that suspects receive and voluntarily waive certain rights before their statements or confessions will be deemed admissible. Specifically, the warnings inform defendants of their right to remain silent and to consult an attorney, and warn that any statements they make can and will be used against them in court. If a suspect confesses without

\textsuperscript{36} Federal Rules of Criminal Procedure (“FRCP”) 12(b)(3)(C) (permitting a defendant to make a pretrial motion to suppress evidence); FRCP 26.2.
\textsuperscript{37} FRCP 26.2, Advisory Committee Note on 1983 Amendment (requiring the production of witness statements at suppression hearings “enhances the ability of the court to assess the witnesses’ credibility and thus assists the court in making accurate factual determinations at suppression hearings.”)
\textsuperscript{38} 18 USC § 3501(b).
\textsuperscript{39} Federal Rules of Evidence 104(a); note also that the jury system in the US does not affect this analysis, because all questions of admissibility occur at the initial stages of litigation whether the case proceeds to a jury or is decided by the judge herself. A judge’s determination of admissibility is highly relevant even in bench trials, because the judge is presumed and expected to make her rulings based only on the legally admissible evidence and cannot take any excluded evidence into consideration in deciding a case.
receiving these *Miranda* warnings and without knowingly and voluntarily waiving them, his unwarned statements will be automatically excluded from the criminal proceeding. In cases involving questions of unwarned statements that potentially occur in a custodial situation where *Miranda* warnings are required, judicial assessment of credibility and demeanor is crucial, because the trial judge often has to weigh conflicting accounts of what transpired. The US system therefore entrusts the judge with the task of evaluating the credibility of a defendant’s claim that the statements violated the voluntariness requirement.

3. Exclusionary Rule

The US exclusionary rule is designed to deter police misconduct, punishing the use of improper means to obtain incriminating statements by demanding the exclusion of those statements at trial. The US Supreme Court’s decision in *Mapp v Ohio* held that evidence obtained in violation of the Fourth Amendment must be excluded from state and federal criminal trials. *Mapp* signified a departure from common law tradition and, although Chief Justice Burger declared in 1971 that the exclusionary rule is “unique to American jurisprudence,” other countries have adopted the exclusionary rule to some degree. Critics of the rule argue that it allows the criminal to “go free because the constable has blundered” and therefore leads to the over-exclusion of relevant evidence. The same criticism may be levied against the automatic exclusionary rule that applies to allegedly coerced confessions. As with the admissibility of other testimonial evidence, the judge should determine the validity of the allegation before deciding whether to exclude the statement. Otherwise the possibility of excluding valid and voluntary confessions on the basis of a false allegation of impropriety will impede the truth finding function of trial. Note that the exclusionary rule, especially as applied to physical evidence, may be in danger in the US court systems. The Supreme Court has limited the exclusionary rule in two recent cases, and “critics of the

96 *People v Defore*, 242 NY 13, 21 (1926).
97 See *Hudson v Michigan*, 547 US 586, 599 (2006) (holding that evidence obtained in violation of the “knock and announce” rule is admissible); *Herring v United States*, 129 SCt 695, 704 (2009) (holding that evidence that was illegally obtained because of errors in police databases need not be automatically excluded).
exclusionary rule have high hopes that the Court will overrule *Mapp.*" 98 Yet for the present, and especially with regard to statements that a defendant claims to have been coerced, the exclusionary rule remains the law in US criminal trials.

**B. England**

At common law, English courts had virtually no exclusionary rule. Any evidence that satisfied the relevancy requirement was admissible at trial, "regardless of how it had been obtained." 99 Today the English courts apply a more discretionary standard in determining the admissibility of evidence, although judges have less discretion regarding statements and confessions that were obtained by improper means. 100

1. Common Law

At common law, English courts generally allowed the admission of any relevant evidence, but the courts imposed a strict voluntariness requirement on any statements or confessions offered into evidence. The King's Bench stated its rationale for this voluntariness requirement, and the inadmissibility of involuntary confessions, in *Regina v Waricksball*:

- A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected. 101

The common law held statements inadmissible if there was any indication that the statement was induced and thus involuntary. For example, the courts held that the following language constituted improper inducement that made the subsequent statements inadmissible: "There is no doubt thou wilt be found guilty: It will be better for you if you confess" 102 and "[i]t would be better for her to speak the truth." 103

English common law took evidence of coercion in collecting statements seriously and punished such improper behavior by

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100 Vanderpuye, 14 Tul J Intl & Comp L 127, 152 (2005) (cited in note 31) (citing the English case *Regina v Sang*, [1979] AC 402, ¶ 2 (HL) (UK), which held that, “[s]ave with regard to admissions and confessions . . . [a trial judge] has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means.”).


102 Sherrington's Case, (1838) 2 Lewin, Cr Cas 123, 123 (UK).

103 *Regina v Garner*, (1848) 1 Denison, Cr Cas 329, 331 (UK).
automatically excluding the confessions from the trial proceedings. Such exclusion was unique to testimonial evidence and marked a departure from the lax relevancy requirements that the court applied to other evidence. Modern English law presents similar rationales for its voluntariness requirement.

2. Police and Criminal Evidence Act and Interrogation Rules

The Police and Criminal Evidence Act (PACE) took effect in January 1996 and gave English courts broader discretion to assess the admissibility of evidence. Section 76 of PACE governs confessions, and allows for the admission of statements made by the accused with some exceptions. In particular, PACE § 76(2) provides: “If . . . it is represented to the court that the confession was or may have been obtained . . . by oppression of the person who made it,” the court shall exclude the confession from evidence unless the prosecution proves to the court that the confession was obtained properly.104 Section 76(8) defines oppression to include “torture, inhuman or degrading treatment, and the use or threat of violence.”105 Under PACE § 78(1), the court is responsible for ensuring the fairness of criminal proceedings and may exercise its discretion in excluding statements if it finds they were obtained in an improper manner.106 Often, it is the provision entitling the defendant to a fair trial that leads the court to exercise its exclusionary discretion. In deciding what constitutes a fair trial, or adequate due process, the courts have referred to Article 6 of the ECHR.107

England’s interrogation rules, in the PACE Codes of Practice (PACE Codes), are similar to the American requirement of Miranda warnings. These rules affect the admissibility of statements taken while the suspect is in police custody. They require that the police inform the suspects of their rights, specifically the right to remain silent, the fact that any statements may be used against the suspect as evidence, and the right to have legal advice from a personal attorney or from the Duty Solicitor.108 PACE Code requires that the

104 Police and Criminal Evidence Act 1984 (“PACE”) § 76(2) (UK ST 1984 c 60 Pt VIII s 76).
105 Id at § 76(8).
106 Id at § 78(1). Section 78(1) reads:

In any proceedings the court may refuse to allow evidence on which the prosecution proposes 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.

107 See Regina v A, [2001] UKHL 25, [2002] 1 AC ¶ 46 (UK) (citing the ECHR Article 6(1) right to a fair trial in deciding whether to admit evidence of alleged rape victim’s reputation).
108 PACE Code C: Code of Practice for the Detention, Treatment, and Questioning of Persons by the Police, ¶¶ 3.1, 6.
suspect be warned of his rights not only orally but also in writing, and the suspect must sign a form acknowledging receipt of the notices pursuant to PACE Code ¶ 3.2. Additionally, the Code requires that the warnings be given as soon as there are grounds to suspect the accused of an offense; in contrast, the US *Miranda* warnings attach only when a suspect is subjected to custodial interrogation. The English interrogation rules are therefore more stringent than the US interrogation protections under *Miranda*.

Thus courts adhering to PACE and its Codes of Practice have little discretion to inquire into the voluntariness of statements and to admit challenged confessions or statements, unless the prosecution overcomes the allegations of impropriety.

PACE shifts the burden to the prosecution to prove, beyond a reasonable doubt, that officials did not impose inhumane treatment or torture on the accused in obtaining his statements. The House of Lords addressed this procedural rule in *Regina v Mushtaq*. In *Mushtaq*, the trial judge ruled pursuant to PACE § 76(2) that the confession had not been obtained by oppression, but unnecessarily instructed the jury to consider the possibility of coercion in weighing the evidence. The House of Lords held that such instruction did not violate the right to a fair trial guaranteed by ECHR Article 6(1). The court also certified a point of general importance, holding that the admissibility of a confession was a matter solely for the judge, as it is under the US Federal Rules of Evidence. Therefore, if the defendant raises an objection to the admission of a statement, claiming that it should be excluded because obtained by oppression, the prosecution must disprove the allegation beyond a reasonable doubt. The judge will then decide the ultimate issue of admissibility.

The defendant in *Regina v Fulling* raised such a challenge to the admissibility of her statement, which she alleged the police obtained through oppression in violation of PACE § 76(2)(a). The judge stated: “I am satisfied that oppression cannot be made out on the evidence I have heard in the context required by the statutory provision.” The judge proceeded to clarify that the decision rested entirely on the validity of the prosecution’s evidence: “[M]y ruling is based exclusively upon the basis that, even if I wholly believed the defendant, I do not regard oppression as having been made out. In those circumstances, her confession—if that is the proper term for it—the interview in which she confessed, I rule to be admissible.” Here, the judge exercised his discretionary

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112 Id at 429.
113 Id at 430.
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powers in evaluating the validity of the prosecution's evidence offered against the allegation of oppression.

The House of Lords offers a comprehensive summary of the history of the English exclusionary rule in *A and others*, where ten individuals detained under the Anti-terrorism, Crime and Security Act of 2001 appealed the dismissal of their earlier appeal. In allowing the appeals and remitting each individual case, the House of Lords reiterated the common law rule that evidence obtained by torture must be excluded from trial. The court stated that "the [Special Immigration Appeals Commission] should adopt the test of admissibility laid down in Article 15 of the Torture Convention" and that, if the commission is doubtful as to the veracity of the defendant's claims of torture, the commission "should admit [the statement], bearing their doubt in mind in evaluating it." The court therefore noted that the admission of statements claimed to have been improperly obtained is not necessarily precluded by law; instead, the prosecution must overcome the burden of proving that the evidence in question was not coerced. The court also recognized judges' ability to take all circumstances of the testimonial evidence into account, including the means by which it was obtained, when making their credibility determinations.

C. France

Evidentiary requirements in the civil law France are more relaxed than those in the US or England, largely because violations of French rules of interrogation "are not generally backed up with an exclusionary sanction." The police are not required to inform a detainee of his right to remain silent, although the defendant must be warned before judicial interrogation at trial. Even then, a defendant's choice to exercise his right to silence "can give rise to an unfavourable inference against the accused." Defendants have a right to legal counsel, but the lawyer may not be present during interrogation and may not consult with the defendant for more than thirty minutes. The Code de Procédure Pénale states that "violations of the provisions of Articles 63 and 64, governing investigatory detention, might lead to exclusion if it were shown that

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114 *A and others*, 2 AC ¶ 71.
115 Id at ¶ 222.
‘the search for the truth was fundamentally tainted,’” but confessions or statements taken in violation of the interrogation rules are not necessarily excluded from trial.\textsuperscript{120}

There are three levels of offense in France: \textit{délits flagrants}, or felonies, punishable by five years’ or more imprisonment; \textit{délits}, or misdemeanors, punishable by two months to five years’ imprisonment; and \textit{contraventions}, punishable by no more than two months’ imprisonment.\textsuperscript{121} The felonies must be investigated by an investigating judge, a completely independent party whose role is to search for the material truth.\textsuperscript{122} If the investigating judge finds adequate evidence for a possible prosecution, he will refer the case to a court or tribunal.\textsuperscript{123} In the trial phrase, there are practically no rules of evidence—as long as the evidence offered is open to challenge, it will be accepted.\textsuperscript{124} Decisions regarding the admissibility of evidence are left entirely to the discretion of the judge, who determines both the admissibility and the weight of the evidence presented. “This principle is often referred to as the ‘free assessment of evidence,’ and is seen as a corollary of the search for material truth.”\textsuperscript{125}

French courts are generally more lax in controlling the use of psychological pressure during interrogations, and the police and courts alike are not as likely to pay attention to civil liberties as the courts of other countries.\textsuperscript{126} Cases of mandatory exclusion are therefore rare, and judges generally exclude statements only if they were taken in violation of a substantial provision of the Code and if the court finds that the violation harmed the interested party.\textsuperscript{127}

\begin{itemize}
\item \textsuperscript{119} Richard S. Frase, introduction, in \textit{The French Code of Criminal Procedure} 16 n 105 (FB Rothman rev ed 1988).
\item \textsuperscript{120} See Code de Procédure Pénale, Art 63 (2007).
\item \textsuperscript{121} See Bradley, 14 Mich J Intl L at 203 (cited in note 95); Nagorcka et al, 29 Melb U L Rev at 456 (cited in note 118).
\item \textsuperscript{122} Nagorcka et al, 29 Melb U L Rev at 456 (cited in note 118).
\item \textsuperscript{124} Id at 677–82.
\item \textsuperscript{125} Nagocka et al, 29 Melb U L Rev at 461 (cited in note 118); John Hatchard, Barbara Huber and Richard Vogler, eds, \textit{Comparative Criminal Procedure} 29 (British Inst of Intl and Comp L 1996) (noting that “courts are concerned more with the ‘weight’ or ‘value’ of evidence than its admissibility.”).
\item \textsuperscript{126} Bradley, 52 Case W Res L Rev at 388 (cited in note 3).
\item \textsuperscript{127} Id.
\end{itemize}
D. Germany

The German Code of Criminal Procedure provides for rights analogous to the US *Miranda* rights. Prior to questioning in court, the police must inform the accused of his right to remain silent and his right to counsel; failure to give these warnings will result in the exclusion of any unwarned statement or confession. While these warning rights attach even before the suspect is taken into custody, the accused has no absolute right under German law to have his attorney present during police questioning. In the Decision of February 27, 1992, the Fifth Senate of the Federal Court of Appeals in Germany cited *Miranda* in its opinion, declaring that a confession made during an interrogation not proceeded by statutory warnings is not admissible in court.

Section 136a of the German Code of Criminal Procedure describes the circumstances that render a statement inadmissible and lays down the "most explicit German exclusionary rule." Section 136a of the Code, the German counterpart to the US exclusionary rule and the English mandatory exclusion of confessions in PACE § 76(2), prohibits statements procured "by ill-treatment, by fatigue, by physical interference, by dispensing machines, by torture, by deception or by hypnosis." A mandatory, unconditional exclusionary rule applies to any statements or confessions obtained involuntarily, regardless of their probative value. The German rules are less stringent than the US exclusionary rules, except in cases involving statements obtained by police deception, which the German Code automatically excludes.

The German courts created a judicial remedy for illegally obtained evidence that is similar to the common law courts’ approach. Similar to French procedure, German procedure recognizes the principle of free evaluation of evidence and elevates the probative value of the evidence above technical issues of admissibility. The judge determines the reliability of evidence and must be convinced personally of the truth of the facts, based on all the evidence presented. With few exceptions aside from the mandatory exclusion of

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128 German Code of Criminal Procedure § 136.
132 German Code of Criminal Procedure § 136a (cited in note 128); Thaman, *Comparative Criminal Procedure* at 90 (cited in note 129).
135 Hatchard, *Comparative Criminal Procedure* at 111 (cited in note 125).
statements violating § 136a, "the German exclusionary decision [] is left to the discretion of the trial judge."\textsuperscript{136}

IV. JUDICIAL ASSESSMENT OF CLAIMS OF TORTURE OR COERCION IN OBTAINING STATEMENTS

International tribunals, established to enforce international rules of law and to prosecute violations of established human rights, borrow from the laws and practices of the nations they monitor. The ad hoc Tribunals developed out of the need for fora in which to prosecute serious crimes committed during the wars in former Yugoslavia and Rwanda. The ICC prosecutes the most serious human rights violations and crimes against humanity. The ECtHR allows individuals to bring complaints against state parties and offers a neutral stage on which to litigate allegations implicating fundamental principles and national issues. The treaties governing these international tribunals resemble and often mirror the laws of member nations, laws that protect human rights fundamental to individuals, regardless of nationality. Judges presiding over international tribunals already look to national laws for guidance in making substantive decisions, as the ICTY Chamber did in \textit{Prosecutor v Delalić et al.}\textsuperscript{137} The rules governing the admissibility of testimonial evidence in national criminal cases can likewise inform international judges' decisions about procedure and can help to establish a more coherent general rule of evidence. This harmonization of international and domestic procedural rules of evidence—especially in the context of statements allegedly obtained through oppression or other inhuman treatment—gives rise to both advantages and concerns.

A. Benefits of Judicial Assessment of the Admissibility of Testimonial Evidence

There is a danger in an absolute exclusionary rule that omits reliable, probative statements from criminal cases without first determining whether they were in fact obtained through illegal coercion or torture. Failure to assess the credibility of such allegations can create incentives for criminal suspects to falsely claim that their confessions or statements were improperly obtained in order to exclude the evidence from trial and therefore to decrease the likelihood of conviction.

Unlike national courts, which developed concurrently with each respective nation's legal structure, international tribunals were established long after

\textsuperscript{136} Kuk Cho, "Procedural Weakness" of German Criminal Justice and Its Unique Exclusionary Rules Based on the Right of Personality, 15 Temp Int'l \\& Comp L J 1, 8 (2001).

\textsuperscript{137} See Section II.B.4.
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concrete laws and imprecise fundamental rights were settled. These international judicial institutions “have been shaped by political leaders and diplomats more than by jurists with expertise in international and comparative criminal law and procedure. Thus, several of these institutions reflect less than impartial and effective justice.”

As an examination of the international tribunals reveals, the courts’ rules of procedure and evidence suffer from ambiguities and gaps that leave important issues unsettled. Specifically, the international tribunals do not clarify the judge’s role in evaluating testimonial evidence and in determining the admissibility of challenged confessions or statements in serious international criminal prosecutions.

Endowing international judges with the task of assessing the credibility of allegations of impropriety before rewarding such claims with the exclusion of the evidence will increase the fairness and integrity of the court proceedings while imposing little additional burden on the judges. In national courts, judges are the gatekeepers of evidence—US judges determine issues of credibility, reliability and admissibility under FRE 104(a), while French and German judges freely evaluate all the evidence before them with an eye to discovering the material truth above all else. Similar to the judges on these national courts, judges of the international tribunals are capable of evaluating the circumstances of a particular case to determine whether the admission of contested evidence will have an adverse effect on the fairness of the proceedings. An impartial judge may exclude challenged statements if he finds that the statement was improperly obtained. If he finds that the evidence was obtained through no violation of fundamental laws, he shall admit the evidence and increase the reliability of the proceedings. This procedure will ensure that valid, relevant testimonial evidence is not arbitrarily excluded from trial. In addition, it will impose consistency among the various international tribunals and will find support in some national practices.

B. Problems with Judicial Assessment of the Admissibility of Testimonial Evidence

Attempting to transpose the discretionary exclusionary rule of domestic courts to international tribunals may also carry its own pitfalls, however. To administer a discretionary model in international tribunals that operate at different levels and with different jurisdictions would require a standardized criminal procedure that the treaties do not currently support. Additionally, such case-by-case evaluation and determination of the admissibility of contested

evidence may create instability and uncertainty that undermines the integrity of the specialized international tribunals.

The adoption of a discretionary evaluative model could also create confusion and variation in the burden of proof required to overcome a defendant's allegation that his confession or statement was obtained in violation of recognized human rights. In US suppression hearings, the prosecution bears the burden of proving that the statements were voluntarily given by a preponderance of the evidence. In France, the prosecution must present evidence that persuades the judge's *intime conviction*, or inner belief.\(^{139}\) The elevated standard of proof in English criminal trials requires that the prosecution provide evidence establishing voluntariness beyond a reasonable doubt. The burden likewise lies with the prosecution in cases in the ad hoc Tribunals, where the Chamber finds that "the nature of the issue demands for admissibility the most exacting standard consistent with the allegation. Thus, the Prosecution claiming voluntariness on the part of the Accused/suspect, or absence of oppressive conduct, is required to prove it convincingly and beyond reasonable doubt."\(^{140}\) To require such a high standard of proof in international cases to overcome every allegation of inhuman treatment in the collection of statements may create complications beyond the purview of the international tribunals and may overly complicate the pretrial stage of the proceedings.

V. CONCLUSION

Challenges to the voluntariness of statements and confessions offered as evidence often arise in criminal trials, and the judge shoulders the difficult task of assessing the credibility of each party's position to determine whether the evidence should be admitted. It is undisputed on both the national and international level that coerced confessions or statements obtained through oppression, inhuman conduct or torture should be excluded from trial. Courts exclude evidence when these allegations are found to be valid in the interest of deterring and penalizing improper interrogation practices and upholding defendants' fundamental right to a fair trial. The international tribunals have no lesser interest in promoting justice and in ensuring a fair trial, for both the defendant and the prosecution.

International norms of due process have made their way into the laws and constitutions of nations, and international tribunals have likewise borrowed the established rules of procedure and evidence of national judicial systems. International and domestic rules have merged in many ways, but the evidentiary

\(^{139}\) Hatchard, *Comparative Criminal Procedure* at 29 (cited in note 125).

\(^{140}\) Delalić *et al.*, Case No ICTY-96-21-T at ¶ 42 (cited in note 73).
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standards of admissibility for allegedly coerced statements have yet to be reconciled. Establishing a uniform standard of discretionary judicial assessment will enable the international tribunals to enforce their rulings in member states and will create a harmony of outcomes. These are especially valuable achievements in light of the increase in the mobility of criminals and transnational cooperation in the prosecution of crimes.

Requiring judges to evaluate the veracity of challenges to the voluntariness and hence admissibility of testimonial evidence will not threaten the uniformity of international criminal justice. Instead, it will promote fair proceedings that achieve the courts’ shared purpose of determining the truth without threatening defendants’ human rights. Scholars who criticize the potential for the discretionary exclusionary rule in international criminal proceedings focus on the potential for inconsistency if courts decide evidentiary issues on a case-by-case basis. However, these critics do not recognize the valuable role that judicial discretion and judicial assessment of credibility can play when permitted at an early stage of the process. Determining whether the collection of a testimonial did in fact violate the defendant’s human rights can prevent more complicated procedural and substantive issues later in adjudicative proceedings. It will also avoid the danger present in a system of automatic exclusion—that international tribunals would improperly credit unfounded allegations of torture.