Justice Without Borders

Essays in Honour of Wolfgang Schomburg

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Contents

CHAPTER 7

Protecting Human Rights through Exclusionary Rules? Highlights on a Conflict in Criminal Proceedings from a Comparative Perspective

Sabine Gless

Abstract

Do exclusionary rules safeguard respect for human rights in criminal trials? In criminal proceedings individual rights are constantly at risk, starting with the establishment of facts in order to reach a decision on the defendant's guilt or innocence. Respect for human rights however must not cease when the bearer of those rights is suspected of having committed a criminal offence or is needed as a witness. Yet, the means to prevent violations of rights in criminal proceedings are limited. A promising instrument for avoiding certain human rights violations is the practice of excluding illegally obtained evidence from the criminal process. The rationale of so-called exclusionary rules is the expectation that law enforcement officers will refrain from employing methods of evidence-gathering that infringe human rights if they know that tainted evidence cannot be used at trial. The article assesses the impact of exclusionary rules in criminal proceedings by analysing the balancing of interests when deciding on the admissibility of evidence in European as well as in the Chinese and U.S. criminal justice systems.

1 Double Hypothesis

The protection of individual rights and, especially, human rights in criminal proceedings is a matter that is very close to *Wolfgang Schomburg*'s heart. On numerous occasions, he has explained that, no matter what charges are brought against an accused, a defendant's human rights may not be violated and access to a fair trial must be provided – in national, international and transnational

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proceedings.[1] He strongly believes that the respect for individual rights is a key factor for the credibility and integrity of a legal system.[2] But he also knows that the means to actually ensure effective protection of human rights in criminal proceedings are rather limited. To many scholars of penal proceedings, one of the most promising instruments for obviating human rights violations is the exclusion of illegally obtained evidence from the criminal process, in order to deter future violations of rules.[3] The assumption is that law enforcement officers will refrain from employing methods of evidence gathering that infringe upon individual rights if they know that any evidence gained in such a manner would be useless because it will not be admitted at trial. The question arises as to whether this reasoning is actually validated by the lawmaker's objectives, legal frameworks, doctrine and case law concerning exclusionary rules that we find on the national level? In a first approach to addressing this question, this article scrutinizes the double hypothesis that exclusionary rules are (a) meant and (b) made to protect individual rights in criminal proceedings against the backdrop of the fundamental conflict of interests in criminal proceedings: the wish for comprehensive fact-finding, on the one hand, and protection of individual rights of defendants and witnesses, on the other. An overview of lawmakers' aspirations in Switzerland, Germany, United States of America (USA), People's Republic of China (PRC) and Taiwan when adopting exclusionary rules illustrates the thrust of the laws. Highlighting the issue of excluding fruits of the poisonous tree provide a first basis to assess whether the relevant laws actually have a potential for protecting human rights in criminal proceedings.

1 Wolfgang Schomburg, Otto Lagodny, 'Verteidigung im international-arbeitsteiligen Strafverfahren' (2012) Neue Juristische Wochenschrift, 348.

2 Wolfgang Schomburg, 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights' (2009) 8 Northwestern Journal of International Human Rights, 1.

3 Hock Lai Ho, 'The Criminal Trial, the Rule of Law and the Exclusion of Unlawfully Obtained Evidence' (2014) Crim. L. & Phil. 4; Walter Pakter, 'Exclusionary Rules in France, Germany, and Italy' (1985) 9 Hastings Int'L & Comp. L. Rev. 1, 56; David Ormerod and Diane Birch, 'The Evolution of the Discretionary Exclusion of Evidence' (2004) Crim. L. Rev. Supp (50th Anniversary Edition), 141; Rosemary Pattenden, 'Admissibility in Criminal Proceedings of Third Party and Real Evidence Obtained by Methods Prohibited by UNCAT' (2006) International Journal of Evidence & Proof, 10(1), 13; Dimitrios Giannoulopoulos, 'The Exclusion of Improperly Obtained Evidence in Greece: Putting Constitutional Rights First' (2007) International Journal of Evidence & Proof, 11(3), 181; Paul Roberts, Jill Hunter, 'Criminal Evidence and Human Rights: Reimaging Common Law Procedural Traditions' (2013) Crim. L. Rev. 2, 176–179; see also arguments provided by Association for the Prevention of Torture <http://www.apt.ch/en/evidence-obtained-through-torture> accessed on 24 March 2017.

2 The Ubiquitous Conflict

In all criminal justice systems, the public has a strong interest in determining the truth, because in a common understanding it is only on the basis of "true facts" that a court can decide whether a suspect is guilty or innocent.[4] The interest in finding the truth has led to procedural rules that expose suspects and witnesses to coercive measures, which frequently interfere with individual rights. The classic conflict of criminal proceedings – between the state's interest in determining the facts relevant to the suspect's guilt and potential sentencing, and the suspect's (and possibly other individuals') interest in maintaining privacy and avoiding conviction leads to a conflict between comprehensive fact-finding and safeguarding individual rights, especially those of defendants, in all criminal justice systems.

The infliction of physical pain in order to obtain evidence is a drastic measure and, generally speaking, torture is an outdated concept in criminal justice. The right to be free from torture is a basic right and, in principle, accepted world-wide, based on the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[5] which itself establishes an obligation to exclude evidence acquired through torture.[6] Recent events, however, have revealed that the line may be crossed quickly, even in states solidly committed to the rule of law, for instance, in the fight against terrorism.[7]

4 See for the Swiss legal System: Sabine Gless, 'Art. 139–Art. 141 Beweismittel' in Marcel Alexander Niggli, Marianne Heer and Hans Wiprächtiger (eds.), *Basler Kommentar. Schweizerische Strafprozessordnung* (2nd edn, Helbing Lichtenhahn, Basel 2014), art. 139, note 1; for the German legal system: Carl-Friedrich Stuckenberg, 'Schuldprinzip und Wahrheitserforschung. Bemerkungen zum Verhältnis von materiellem Recht und Prozessrecht' (2016) Goltdammer's Archiv für Strafrecht, 689, 695 et seq.; for the Chinese legal system: FAN Chongyi (樊崇义), 'Views on the Objective Authenticity and Discussion about the Standard of Proof in Criminal Proceedings' (客观真实管见：兼论刑事诉讼证明标准) (2000) Chinese Legal Science (《中国法学》) Vol. 1, 114.

5 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85; <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> accessed on 24 March 2017.

6 Art. 15 CAT stipulates "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." For further information, see: Tobias Thienel, 'The Admissibility of Evidence Obtained by Torture under International Law' (2006) The European Journal of International Law Vol. 17 EJIL, 349, at 351–353.

7 See for instance: Brugger, 'May Government Ever Use Torture? Two Responses from German Law' (2000) 48 American J Comparative L 661; David Hope, 'Torture' (2004) 53 ICLQ 807;

Furthermore, different forms of "physical coercion" persist in many places as a means of obtaining evidence.[8] Although physically coerced evidence is controversial since its reliability is disputed, it may lead to derivative evidence that can be viewed as reliable.[9]

As constantly pointed out by *Wolfgang Schomburg*, who has sat on benches judging atrocities and core crimes, respect for fair trial rights must not cease when the bearer of those rights is suspected of having committed a criminal offence or is needed as a witness.[10] The protection of individual rights is an intrinsic feature of criminal procedure codes, which, for Western countries, has been dated by some scholars back to the Magna Charta.[11] In recent decades, human rights have become topical in criminal proceedings, with the emergence of a modern human rights movement.[12] This movement promises the safeguarding of individual rights. Best known, perhaps, is the European Convention of Human Rights[13] (ECHR), because it not only establishes rights but offers a remedy, i.e., access to the European Court of Human Rights (ECtHR).[14] Today, various human rights have an impact on criminal proceedings: the right to have one's human dignity respected, to be free from physical force and torture, the right against self-incrimination, and also the right to have the privacy of one's home and intimate sphere respected. It is these rights, in particular, that tend to inhibit the authorities' quest for the truth. The search for truth is a very strong ambition in criminal proceedings it manifests an ever-present

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Sanford Levinson, *Torture: a Collection* (OUP, Oxford 2004); Marcy Strauss, 'Torture', (2004) 48 New York Law School L. Rev. 201; Alan M. Dershowitz, 'The Torture Warrant: A Response to Professor Strauss' (2004) 48 New York Law School L. Rev. 275.

8 <https://www.amnesty.org/en/latest/research/2016/02/annual-report-201516/> accessed on 24 March 2017.

9 Sabine Gless in 'Art. 139–Art. 141 Beweismittel' in Marcel Alexander Niggli, Marianne Heer and Hans Wiprächtiger (eds.), *Basler Kommentar. Schweizerische Strafprozessordnung* (2nd edn, Helbing Lichtenhahn, Basel 2014), art. 141, notes 6 and 88–98.

10 Wolfgang Schomburg, 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights' (2009) 8 Northwestern Journal of International Human Rights, 1.

11 Richard M. Re, 'The Due Process Exclusionary Rule' (2014) 127 Harv. L. Rev. 1885, at 1908. The Magna Carta however said little about criminal procedure, see Vincent R. Johnson, 'The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015' (2015) 47 Sr. Mary's Law Journal, 1, at 5.

12 Göran Sluiter, 'International Criminal Proceedings and the Protection of Human Rights' (2003) 37 New Eng. L. Rev. 935, 936.

13 <http://www.ECHR.coe.int/Documents/Convention_ENG.pdf> accessed on 24 March 2017.

14 <http://www.ECHR.coe.int> accessed on 24 March 2017.

risk that the relevant human rights will be disregarded in national and international criminal justice systems.

3 Human Rights and Criminal Procedure

There are, however, limited means available to prevent human rights violations. The exclusion of illegally obtained evidence from the criminal process offers a real chance to protect human rights: If, for example, a police officer has the option of unlawfully coercing a suspect and thereby forcing a confession, it would be obvious that he will refrain from such coercion if he knows that any confession *or evidence found on the basis of this confession* will be declared inadmissible and excluded from the criminal proceedings against the suspect. The hope that exclusionary rules protect human rights is thus based on a double hypothesis: (a) that lawmakers intend to protect individual rights with exclusionary rules; and (b) that the legal framework, at least theoretically, provides protection for human rights in national criminal justice systems. As has been pointed out previously, the range of human rights discussed as relevant for criminal proceedings is wide. To focus the discussion, this article looks at evidence gained through torture. The right to be free from physical abuse in a criminal investigation has been firmly established as an individual right worldwide, including countries with quite different legal traditions, such as Switzerland, China, USA and Germany. In defining torture, there is a common legal basis, including the CAT as well as regional legal frameworks such as the ECHR.

The five jurisdictions selected for a brief overview encompass a wide geographical and cultural spread, with two continental European jurisdictions (Switzerland, Germany), the USA, the PRC and Taiwan. They also mark a huge legal spectrum of legal models with two inquisitorial systems (Germany and Switzerland), an adversarial system (USA), and "mixed" systems with legal implants from different models (PRC and Taiwan). Nevertheless, they only represent a cursory sampling of domestic laws governing the exclusion of evidence. Interestingly enough, however, despite the vast differences among the legal systems, as a common feature they all provide options for excluding evidence obtained in breach of certain rules, and all carry a statute that prohibits the infliction of pain in order to receive a statement from an individual.[15]

15 For further information on transcendental commonalities: Jenia Turner 'The Exclusionary Rule as a Symbol of the Rule of Law' (2014) 67 Southern Methodist University Law Review, 101 at 105–119.

3.1 *Are Exclusionary Rules Meant to Protect Human Rights?*

Given the common feature of elimination of information obtained in a certain way, one would expect that there is a common rationale behind exclusionary rules. But a brief look at the ideological background is not very promising.

3.1.1 Protecting Human Rights a Western-Leitmotif?

If states are parties to the CAT or a human rights convention like the ECHR, it might be assumed that they provide for exclusionary rules in order to prohibit physical abuse. Such an approach would fit the Western liberal concept of procedural rules safeguarding the position of individuals exposed to state power. In fact, since the adoption of the "*Déclaration des droits de l'homme et du citoyen*" during the French Revolution at the end of the 18th century, the concept of human rights has gradually generated a sense of identity in Europe, which affects all areas of state power, including penal law and criminal proceedings.[16] In North America, similar libertarian ideals heavily influenced the notion of basic human rights in the independence movement, which led to the adoption of the United States Constitution and its amendments forming the Bill of Rights, which to this day have a profound impact on safeguarding individual rights in criminal proceedings.[17] Based on philosophical views of the Enlightenment and the idealism of the early 19th century, the common Western concept of human rights has emphasized the applicability of such rights to every human being, regardless of the positive laws of the person's state of residence.[18]

East Asian countries, however, do not share this tradition of an *individual* human rights heritage, but have developed different ideas.[19] Based, inter alia,

16 The European Court of Justice (ECJ) has referred to human rights as the value system common to all EU member states, ECJ judgment of 13 December 1979, *Hauer v Land Rheinland-Pfalz*, C-44/79, § 15.

17 See for further information: Richard M. Re, 'The Due Process Exclusionary Rule' (2014) 127 Harv. L. Rev. 1885.

18 Kate Parlett, The Individual in the International Legal System: Continuity and Change in International Law (Cambridge University Press, Cambridge 2011); Jan Klabbers, Anne Peters and Geir Ulfstein, The Constitutionalization of International Law (OUP, Oxford 2012); Anne Peters 'Compensatory Constitutionalism. The Function and Potential of Fundamental International Norms and Structures' (2006) Leiden Journal of International Law 19, 579–610.

19 Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) The American Political Science Review, Vol. 76, 308; Julia Ching, 'Human Rights: A Valid Chinese Concept?' (This paper was presented by Dr. Ching on a panel convened by the Religious Consultation on Population, Reproductive

on Confucian traditions of thinking, the accustomed emphasis is predominantly on the collective (i.e. the family and state), while notions of autonomy and the rights of the individual are less present in the legal heritage.[20] In recent years, Chinese politicians have in fact denounced the Western concept of protecting human rights as an ideological tool for justifying intervention in the internal affairs of East Asian countries.[21] In the PRC, the traditional priority of collective interests was re-enforced by the influence of Marxist political thought, which likewise de-emphasized the importance of individual interests in comparison with those of the collective.[22] Even in an arguably non-Socialist country such as Singapore, politicians proclaim the importance of East Asian values, denouncing a strong emphasis on individual rights.[23] This difference between East and West in the understanding of human rights has long been observed and widely accepted by legal scholars.[24] At the same time, the debate about the universalization of human rights has never ceased and recognized standards for the protection of human rights – including in criminal proceedings – are needed at a global level.[25] As *Wolfgang Schomburg* has

Health and Ethics at the NGO Forum of the United Nation's World Summit on Social Development, Copenhagen March 1995*);* Ann Kent, *'Chinese Values and Human rights*' in Leena Avonius, Damien Kingsbury (eds.), *Human Rights in Asia* (Palgrave Macmillan, New York 2008), 83–84.

20 P. Christopher Earley, 'Social Loafing and Collectivism: A Comparison of the United States and the People's Republic of China' (1989) Administrative Science Quarterly, Vol. 34, No. 4, 569; Wei Wu, Tom Vander Beken, 'Police Torture in China and Its Causes: A Literature Review' (2010) Australian and New Zealand Journal of Criminology, Vol. 43, No. 3, 557.

21 For the implications on the understanding of human rights in criminal proceedings, see however, e.g., Na Jiang, 'The Presumption of Innocence and Illegally Obtained Evidence: Lessons from Wrongful Convictions in China?' (2013) 43 Hong Kong L. J., 745 et seq.

22 Information Office of the State or China's Cabinet, White Paper on Progress in China's Human Rights in 2012, Beijing May 2013 <http://news.xinhuanet.com/english/china/2013-05/14/c_132380706.htm> accessed on 24 March 2017.

23 See Fareed Zakaria, 'A Conversation with Lee Kuan Yew' Foreign Affairs March/April 1994. See also Molly Elgin, 'Asian Values: A New Model for Development?' (2010) Southeast Asia, 135, 138.

24 See, e.g., Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, OUP, Oxford 2008).

25 See Kate Parlett, The Individual in the International Legal System: Continuity and Change in International Law, (Cambridge University Press, Cambridge 2011); Jan Klabbers, Anne Peters and Geir Ulfstein, The Constitutionalization of International Law (OUP, Oxford 2012); Anne Peters 'Compensatory Constitutionalism. The Function and Potential of Fundamental International Norms and Structures' (2006) Leiden Journal of International Law 19, 579–610.

noted, in our globalized society, the importance of a common standard for a fair trial cannot be underestimated.[26]

Today, many Asian states, including the PRC, have joined major international human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR),[27] which grants important individual rights, and the CAT.[28] The Member States of ASEAN (the Association of Southeast Asian Nations) concluded a regional human rights instrument in 2012.[29] As a consequence of the growing prominence of human rights, the domestic laws of relevant jurisdictions – including Vietnam[30] and Taiwan[31] – have been amended to expressly guarantee such entitlements, including explicit exclusionary rules.[32] The PRC signed the ICCPR but has neither ratified the Covenant nor incorporated it into national law.[33] After long debate, Art. 33 para. 3 of the PRC Constitution was amended in 2004 to read that "the State respects and preserves

26 Wolfgang Schomburg, 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights' (2009) 8 Northwestern Journal of International Human Rights, 1, 28.

27 Ministry of Foreign Affairs of the PRC, <http://www.mfa.gov.cn/chn//pds/ziliao/wjs/2159/t9004.htm> accessed on 24 March 2017.

28 Human Rights in China, <http://www.hrichina.org/en/china-and-cat> accessed on 24 March 2017.

29 The ASEAN Human Rights Declaration was adopted by Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam on 18 November 2012; <http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration> accessed on 24 March 2017.

30 For Vietnam, see Thi Thuy Nguyen, Criminal Justice Reform in Viet Nam. Achievement and Lesson, ASEAN Law Association 10th General Assembly, 2009 p. 1; http://www.aseanlawassociation.org/10GAdocs/Vietnam5-2.pdf accessed on 24 March 2017.

31 Human rights law in Taiwan is primarily domestic law because the United Nations have decided to recognize the representatives of the Government of the PRC as "the only lawful representatives of China to the UN" (UN Resolution 2758 (XXVI) of 1971) and have thus excluded the ROC from official participation in UN organizations.

32 The Code of Criminal Procedure of the Kingdom of Cambodia, article 321 reads: "Unless it is provided otherwise by law, in criminal cases all evidence is admissible. …Declaration given under the physical or mental duress shall have no evidentiary value.", available at <http://www.wipo.int/wipolex/fr/details.jsp?id=10629> accessed on 24 March 2017. South Korea's criminal procedure act provides that "Confession of a defendant extracted by torture, violence, threat or after prolonged arrest or detention, or which is suspected to have been made involuntarily by means of fraud or other methods, shall not be admitted as evidence of guilt", 309, available at <http://www.wipo.int/wipolex/en/details.jsp?id=12936> accessed on 24 March 2017.

33 See the news in the journal: *The Economist*, <http://www.economist.com/news/china/21695095-how-chinese-versions-un-covenants-gloss-over-human-rights-suppressed-translation> accessed on 24 March 2017; also see news: *Extradition with China, Human Rights*

human rights".[34] In 2012, a similar reference for the "respect and protection of human rights" was inserted in Art. 2 of the PRC Criminal Procedure Code (PRC-CCP) as one of the purposes of the newly revised Code.[35] But these changes of the law on the books have not had much immediate impact on actual law enforcement in the PRC.[36] Nonetheless, they may be seen as a major shift towards official recognition of individual human rights[37] and perhaps a reversal of the earlier insistence on the sufficiency of "Eastern values".[38] Whether and how they translate in the criminal justice system has yet to be seen.

3.1.2 Rationale for Exclusionary Rules

Against this backdrop, the question arises whether lawmakers in the jurisdictions treated here aspire for exclusionary rules to protect human rights. Even a perfunctory glance reveals great differences.

3.1.2.1 *Europe*

The two European jurisdictions under consideration, Switzerland and Germany, at least envisage a clear role for exclusionary rules in safeguarding individual rights: Switzerland sees its ban on torture evidence as part of the global fight against the physical abuse of individuals by state agents, as prohibited by CAT[39] and Art. 3 ECHR.[40] Germany also adopted the relevant provisions, banning physical coercion after World War II as a reaction to the abuses – including

and Parliament's Role, available at <http://thecic.org/2016/10/03/extradition-with-china-human-rights-and-parliaments-role/> accessed on 24 March 2017.

34 Art. 33 (3) Chinese Constitution, see the website: National People's Congress of PRC, <http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372964.htm> accessed on 24 March 2017.

35 Art. 2 Chinese Criminal Procedure Code, see the website: National People's Congress of PRC, <http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384067.htm> accessed on 24 March 2017.

36 Margaret K. Lewis, 'Controlling Abuse to Maintain Control: The Exclusionary Rule in China' (2011) 43 New York University Journal of International Law and Politics 629, at 650–652.

37 Congyan Cai, 'New Great Powers and International Law in the 21st Century' (2013) European Journal of International Law, Vol. 24, 794.

38 Sophia Woodman, 'Human Rights as "Foreign Affairs": China's Reporting under Human Rights Treaties' (2005) Hong Kong Law Journal, Vol. 35, 181–182.

39 For Switzerland: Sabine Gless in Marcel Alexander Niggli/Marianne Heer/Hans Wiprächtiger (eds.), *Basler Kommentar Schweizerische Strafprozessordnung* (2nd edn, Helbing Lichtenhahn, Basel 2014), art. 141, no. 15.

40 Sabine Gless in Marcel Alexander Niggli/Marianne Heer/Hans Wiprächtiger (eds.), *Basler Kommentar Schweizerische Strafprozessordnung* (2nd edn, Helbing Lichtenhahn, Basel 2014), art. 141, no. 22.

torture – prevalent in interrogations during the national-socialist era.[41] When the newly founded Federal Republic of Germany joined the ECHR it emphasised its commitment to human rights.[42] Since then, the prohibition of torture and degrading punishment stipulated by Art. 3 ECHR has been directly applied by German courts, which rely on the case law of the ECtHR, referring to international human rights law when necessary,[43] and in doing so have shaped value-based rules for not using certain evidence.[44]

But the references to human rights tell only half the truth: In both states, the exclusion of evidence also aims at safeguarding the reliability of fact-finding and at ensuring justice.[45] When put to a tough test, for instance, Germany's seemingly clear commitment to deterring police abuse during interrogations may waver, as in the cases of *Gäfgen*[46] and *Jalloh.*[47] In both cases, Germany had to answer charges of violating the defendants' rights not to be submitted to torture or degrading treatment or punishment.

3.1.2.2 *United States*

The meaning and purpose of exclusionary rules in the United States are more difficult to assess than the legal policy framing provisions in continental European jurisdictions, as they are found on the basis of common law, constitutional amendments and more recent case law. Only rarely is an exclusionary rule adopted through an act of parliament, with its legislative policy preferences explicitly revealed. Broadly speaking, however, it is clear that under common law the purpose of exclusionary rules is not the protection of human rights, but

41 See Kuk Cho, '"Procedural Weakness" of German Criminal Justice and Its Unique Exclusionary Rules Based on the Right of Personality' (2001) 15 Temp. Int'L & Comp. L.J. 1, at 15.

42 See the notification of 15 December 1953 (Bundesgesetzblatt 1954 II 14). Germany has also ratified the European Convention against Torture and Inhumane and Degrading Treatment of 1987 (Bundesgesetzblatt 1989 II 946).

43 Judgement of the German Bundesgerichtshof of February 21, 2001, 3 StR 372/00.

44 Thomas Weigend, 'Germany' in Craig M. Bradley (ed.), *Criminal Procedure: A Worldwide Study* (2nd edn, Carolina Academic Press, Durham 2007), 243, 251–254.

45 See for Germany: Sabine Gless, '§ 136 Vernehmung des Beschuldigten' in Volker Erb, Robert Esser et al (eds.), *Die Strafprozessordnung und das Gerichtsverfassungsgesetz: Grosskommentar Löwe-Rosenberg*, (26nd edn, De Gruyter Recht, Berlin 2014), § 136a, no. 1 and for Switzerland: Sabine Gless in Marcel Alexander Niggli, Marianne Heer and Hans Wiprächtiger (eds.), *Basler Kommentar Schweizerische Strafprozessordnung* (2nd edn, Helbing Lichtenhahn, Basel 2014), art. 141, no. 6.

46 See ECtHR, *Gäfgen v Germany*, Judgment of June 30, 2008, case no. 22978/05; Judgment (Grand Chamber) of June 1, 2010, §§ 165–166. For a comment, see Thomas Weigend, 'EGMR Nr. 22978/05 G. ./. Deutschland v. 01.06.2010, Folterverbot im Strafverfahren', Strafverteidiger 6/2011, 325.

47 See ECtHR (Grand Chamber), *Jalloh v Germany,* no. 54810/00, Judgment of 11 July 2006.

the safeguarding of reliability.[48] Evidence is to be excluded if its prejudicial effect would outweigh its probative value.[49] Under common law, not only torture has been deemed illegal, but confessions made under torture are inadmissible because they are not voluntary and bear a risk of being unreliable.[50] At the same time, torture infringes on individual rights. The common law rationale is reflected to a certain degree by current United States case law. It, for instance, provides that confessions made under torture must be excluded because of the Fifth Amendment's demand that no person "be compelled in any criminal case to be a witness against himself".[51] If one looks more closely at the development of case law, however, the emphasis appears to be shifting: In the more recent past, not a lack of reliability but the disapproval of certain offensive police practices during interrogation often has been the dominant reason for excluding coerced confessions.[52] Scholars have claimed that it is time for a shift of the focal point from a Fifth Amendment justification for exclusionary rules to a due process rationale, which in itself would put the protection of individual rights at the center.[53] With regard to evidence elicited through torture, such an approach is connected to the United States' obligations following from the CAT and its Torture Act, which bans torture under federal law.[54]

3.1.2.3 *China*

Neither the Criminal Procedure Code of the PRC (PRC-CPC, 中华人民共和国刑事诉讼法), dating back to 1979, nor other statutes or regulations elaborate upon the background of the exclusionary rules adopted in 2012. But the history leading to the adoption of exclusionary rules clearly show that the Chinese law is concerned with reliability of evidence, and not with protecting human

48 *R v Leathem* (1861) 8 Cox CC 498, Crompton J at 501, overruling an objection to production of a letter which had been discovered in consequence of an inadmissible statement made by the accused: "It matters not how you get it; if you steal it even, it would be admissible."

49 *Lobban v R* [1995] 1 WLR 877 (Privy Council).

50 *A v Secretary of State for the Home Office* [2005] UKHL 71. See also Danny Friedman, 'Torture and the Common Law' (2006) E.H.R.L.R. Issue 2, 180–199.

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

52 Yale Kamisar, 'On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony' (1995) 93 Mich. L. Rev. 929, 939.

53 Richard M. Re, 'The Due Process Exclusionary Rule' (2014) 127 Harv. L. Rev. 1885, at 1912; Jenia Turner 'The Exclusionary Rule as a Symbol of the Rule of Law' (2014) 67 Southern Methodist University Law Review, 101.

54 See David Luban, *Torture, Power, and Law* (Cambridge University Press, Cambridge 2014), 122.

rights.[55] Looking beyond the reliability concern in criminal proceedings, some scholars have argued that the adoption of exclusionary rules aims at a broader policy issue as it intends to pacify public dissatisfaction with severe cases of miscarriage of justice, following news of certain cases of wrongful convictions spreading through social media.[56] They also argue that it represents a policy turning point, denoting the aspirations of the central government to extend its control in criminal justice matters over the provinces,[57] while at the same time showing – with a rather symbolic law – its integrity when it comes to criminal justice.[58]

Such claims are supported by the evolution of exclusionary rules: China has been confronted with frequent international and domestic criticism of illegally coerced confessions and torture in criminal proceedings.[59] In 2010, five institutions – the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice – jointly promulgated "Rules Concerning Questions About Exclusion of Illegal Evidence in Handling Criminal Cases" (2010 Exclusionary Rules) out of concerns about revelations concerning miscarriages of justice.[60] Furthermore, a revision of the PRC-CPC was passed in 2012 and includes several provisions that can be shown – at home and abroad – as protecting certain

55 Jiahong He and Ran He, 'Empirical Studies of Wrongful Convictions in Mainland China' (2012) University of Cincinnati L. Rev. Vol. 80, 1289; Jun Feng (冯军), 'The Functional Expectations and the Realization of the New Exclusionary Rules' (非法证据排除规则新规定的功能期待及其实现), (2011) Journal of Henan University, Social Sciences (《河南大学学报》社会科学版), Vol. 51, No. 3, 70–71.

56 See news: <http://news.sina.com.cn/s/2010-06-12/101420465898.shtml> accessed on 24 March 2017; <http://www.xiyuanwang.net/html/gnya_1271_1879.html> accessed on 24 March 2017; <http://www.people.com.cn/GB/news/25064/3300177.html> accessed on 24 March 2017.

57 Margaret K. Lewis, 'Controlling Abuse to Maintain Control: The Exclusionary Rule in China' (2011) 43 New York University Journal of International Law and Politics 629, at 632.

58 Margaret K. Lewis, 'Controlling Abuse to Maintain Control: The Exclusionary Rule in China' (2011) 43 New York University Journal of International Law and Politics 629, at 686.

59 See Jiahong He and Ran He, 'Wrongful convictions and tortured confessions: empirical studies in mainland China', in Mike McConville and Eva Pils (eds.), *Comparative Perspectives on Criminal Justice in China* (Edward Elgar, Cheltenham 2013), p. 73 et seq.

60 Joshua Rosenzweig, Flora Sapio, Jiang Jue, Teng Biao and Eva Pils, The 2012 Revision of the Chinese Criminal Procedure Law: (Mostly) Old Wine in New Bottles, pp. 12–13, CRJ Occasional Paper, available at: https://www.law.cuhk.edu.hk/en/research/crj/download/papers/2012-CRJ-OccasionalPaper-CPL.pdf accessed on 24 March 2017; Na Jiang, 'The Presumption of Innocence and Illegally Obtained Evidence: Lessons from Wrongful Convictions in China?' (2013) Hong Kong Law Journal, Vol. 43, 749.

individual rights of defendants. For instance, Art. 50 PRC-CPC now grants the privilege against self-incrimination,[61] while Art. 54 PRC-CPC excludes statements obtained by illegal means, particularly by torture. Since the turn of the century, the central government strives for more control of criminal justice in the provinces, most visible in the control of death penalty judgements.[62] But, even as the ban of coerced confessions was part of a 2009 National Human Rights Action Plan,[63] the intention was not to protect human rights but to prevent miscarriages by excluding unreliable evidence.[64]

3.1.2.4 *Taiwan*

Taiwan adopted exclusionary rules during an era of democratic consolidation, after a break with the preceding authoritarian rule, with a profound revision of its Criminal Procedure Code. The push for the exclusionary rule was based on a desire to emphasize the validity of human rights in criminal justice.[65] In 2009, Taiwan adopted the "Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights".[66] Art. 2 of this Act stipulates: "Human rights protection provisions in the two Covenants have domestic legal status".[67] The ICCPR is part of national law in Taiwan.[68]

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61 Na Jiang, 'The Presumption of Innocence and Illegally Obtained Evidence: Lessons from Wrongful Convictions in China?' (2013) Hong Kong Law Journal, Vol. 43, 759.

62 Susan Trevaskes, 'China's Death Penalty: The Supreme People's Court, the Suspended Death Sentence and the Politics of Penal Reform', 53 British Journal of Criminology 482–549 (2013).

63 Margaret K. Lewis, 'Controlling Abuse to Maintain Control: The Exclusionary Rule in China' (2011) 43 New York University Journal of International Law and Politics 629, at 659 and 664.

64 Jianghong He, 'Wrongful Convictions and the Exclusionary Rules in China', Frontiers of Law in China (2014) Vol. 9, No. 3, 505.

65 Supreme Court decision 104 taishangzih No. 3052 (最高法院104年度台上字第3052號判決).; LIAO Fu-Te (廖福特), 批准聯合國兩個人權公約及制訂施行法之評論 (Comments on Ratified Two United Nations Covenants on Human Rights and the Enforcement Act), (Nov. 2009), Vol. 174, The Taiwan Law Review, 223et seq.

66 公民與政治權利國際公約及經濟社會文化權利國際公約施行法. The text is available online at <http://law.moj.gov.tw/Law/LawSearchResult.aspx?p=A&k1=%E5%85%AC%E7%B4%84%E6%96%BD%E8%A1%8C%E6%B3%95&t=E1F1A1&TPage=1>, official English translation at <http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=I0020028>, accessed on 24 March 2017.

67 „兩公約所揭示保障人權之規定,具有國內法律之效力".

68 For more information, see below 7.

3.1.2.5 *Interim Conclusion*

As an interim result, we can conclude: Some, but not all criminal justice systems intend their exclusionary rules to (at least indirectly) protect human rights. Others only wish to exclude unreliable evidence. This result however does not answer the question whether the intention to protect human rights actually translates into the design of legal provisions, that are capable of protecting human rights when it comes to a test in practice.

3.2 *Are Exclusionary Rules Made to Protect Human Rights?*

With respect to individuals exposed to the criminal justice system, it is ultimately for the court to determine whether their individual rights prevail over the interest of comprehensive fact-finding. While the lawmaker sets the course with the legal framework, the details in legal regulations of exclusionary rules determine the chances of human rights being actually protected. A crucial detail for safeguarding individual rights in criminal proceedings is the approach to evidence derived from torture evidence, so-called derivative evidence.[69]

The decision of whether or not to use evidence directly gained through torture is clear-cut: The CAT obligates states to ensure that any statement established to have been made as a result of torture is not invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.[70] The exclusion of derivative evidence however is highly controversial. In certain cases, torture evidence may lead to "hard evidence", like DNA traces on a victim's body or incriminating documents. If officials can hope for such evidence, they may be tempted to use force in order to gain access to it. From a human rights protection angle, the exclusion of direct torture evidence appears thus to be a necessary but not sufficient condition to effectively protect human rights. Only the exclusion of derivative evidence ultimately promises to deter physical abuse, since there is nothing for the state agent to gain in using torture. Therefore, the assessment of a legal framework for excluding torture evidence must be based not only on its capacity to block coerced confessions from criminal proceedings, but especially on the option to sort out the fruits of the poisonous tree. The latter constitutes the litmus test for exclusionary rules actually functioning as safeguards for human rights.

69 Stephen C. Thaman, '"Fruits of the Poisonous Tree" in Comparative Law' (2010) 16 SW J Int'l L 333, at 370.

70 For further information, see: Tobias Thienel, 'The Admissibility of Evidence Obtained by Torture under International Law' (2006) The European Journal of International Law Vol. 17 EJIL 349, at 351–353.

3.2.1 Inquisitorial Systems

The two continental European jurisdictions have both adopted specific statutes which ban undue coercion (including torture), but differ in legislative technique: *Switzerland*, only recently, adopted a blanket provision, which establishes a general screen for all evidence obtained in violation of procedural rules, calling for the exclusion of some (but not all) illegally obtained evidence flanked by a ban for tainted derivative evidence. In contrast *Germany*'s procedural code only contains a few explicit rules and normally leaves the decision on "non-use" of evidence to the courts, which decide on a case-by-case basis, following the maxim that exclusion of relevant evidence must remain an exception.[71]

3.2.1.1 *Switzerland*

Swiss law on the exclusion of torture evidence is clear cut: "The use of coercion, violence, threats, promises, deception and methods that may compromise the ability of the person concerned to think or decide freely are prohibited when taking evidence,"[72] even if the person concerned consents to the use of such methods (Art. 140 of the Swiss Criminal Procedure Code, CH-CPC).[73] Any evidence "obtained in violation of Article 140 is not admissible under any circumstances" (Art. 141 para. 1, 1st sentence CH-CPC). Furthermore, the Swiss lawmaker adopted the fruit of the poisonous tree doctrine: If torture evidence "made it possible to obtain additional evidence, such evidence is not admissible if it would have been impossible to obtain had the previous evidence not been obtained" (Art. 141 para. 4 CH-CPC). According to the wording, the statute – rather paradoxically – does not explicitly exclude indirect evidence based on primary evidence obtained by torture. But the intention of the legislature is clear: to establish a *strict* exclusion of *any* evidence in these cases, also of all indirect evidence.[74] Thus, at first glance, Swiss law has an ideal legal design for the efficient protection of human rights with the elimination not only

71 Judgement (Beschluss) of the Bundesverfassungsgericht (1. Kammer des Zweiten Senats) of November 9, 2010, 2 BvR 2101/09.

72 See. Wolfgang Wohlers, in Andreas Donatsch, Christian Schwarzenegger and Wolfgang Wohlers (eds.) *Kommentar zur Schweizerischen Strafprozessordnung* (2nd edn. Schulthess, Zürich 2014), art. 3, no. 22.

73 SR 312.0 <https://www.admin.ch/opc/en/classified-compilation/20052319/index.html> accessed on 24 March 2017.

74 Whether the wording allows for a hypothetical clean path doctrine is subject of a controversial debate, see Sabine Gless in 'Art. 139–Art. 141 Beweismittel' in Marcel Alexander Niggli, Marianne Heer and Hans Wiprächtiger (eds.), *Basler Kommentar. Schweizerische Strafprozessordnung* (2nd edn, Helbing Lichtenhahn, Basel 2014), art. 141, no. 90.

of torture, but also of derivative evidence. However, in the few cases in which Swiss courts had to apply Art. 141 para. 4 CH-CPC (which involved evidence obtained by unauthorized searches and surveillance, no torture cases) the decision was in favor of the admissibility of evidence – based on a hypothetical clean path doctrine.[75]

3.2.1.2 *Germany*

Germany, by contrast, in general terms follows a case-by case-approach when it comes to deciding whether certain evidence can be used for fact-finding.[76] Different considerations play a role in the decision-making, including the reliability of the evidence and the safeguarding of overriding interests (e.g., a right to privacy[77]). Only in few cases, as when evidence has been obtained under undue coercion – which includes torture[78] – it may never be used,[79] even if the individual later consents to the use (§ 136a Sec. 3, 2nd sentence CCP).[80]

However, this apparently firm stance of the "non-use-rule" does not translate into procedural rules, since "an 'excluded' confession will still be in the file available to the judges at trial, even though they are supposed to ignore it".[81]

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75 See e.g. Decision of the Swiss Federal Court Bundesgericht Urteil of 12 July 2012 6B_805/2011 (= BGE 138 IV 169).

76 See for an appropriate use of terminology in inquisitorial systems, which do not formally exclude evidence: Thomas Weigend, 'Germany' in Craig M. Bradley (ed.), *Criminal Procedure: A Worldwide Study* (2nd edn, Carolina Academic Press, Durham 2007), p. 243 at 254.

77 The German Basic Law requires a certain protection of a core area of privacy, see § 100a Abs. 4 S. 2, § 100c Abs. 5, Abs. 7 German CPP.

78 § 136a CCP does not employ the term "torture" (*Folter*) among the forbidden means of interrogation. But any case of physical torture is necessarily included in the broader term "physical abuse".

79 Fort he debate on the inadmissibility of coerced statements and its consequences see Sabine Gless, '§ 136 Vernehmung des Beschuldigten' in Volker Erb, Robert Esser et al (eds.), *Die Strafprozessordnung und das Gerichtsverfassungsgesetz: Grosskommentar Löwe-Rosenberg* (26nd edn, De Gruyter Recht, Berlin 2014), § 136a, note 71; Claus Roxin 'Anmerkung zu BGH Beschluss v. 5.8.2008 – 3 StR 45/08 (LG Lüneburg)' (2009) Strafverteidiger, 113; Wolfgang Wohlers 'BGH, Urteil vom 22.12.2011 – 2 StR 509/10' (2012) Juristische Rundschau, 391; Herbert Diemer, in Rolf Hannich et al (eds.), *Karlsruher Kommentar StPO* (hereinafter KK StPO, 7th edn, Verlag C.H. Beck, München 2013), § 136a, note 37; Claus Roxin and Bernd Schünemann, *Strafverfahrensrecht* (28th edn, Verlag C.H. Beck, München 2014), 173.

80 This rule does, of course, not preclude the declarant from making the same statement again in court. Such a statement would be admissible if the suspect has been informed that his prior statement is inadmissible.

81 Thomas Weigend, 'Germany' in Craig M. Bradley (ed.), *Criminal Procedure: A Worldwide Study* (2nd edn, Carolina Academic Press, Durham 2007), p. 243 at 254.

Moreover, German courts do not normally apply the fruits of the poisonous tree doctrine.[82] For example, if a suspect makes a coerced statement in which he refers to other persons who allegedly committed the offense together with him, the exclusion of the statement by § 136a Sec. 3 CCP will not block further police investigation into the identity of these persons, and their statements may be used as evidence against the defendant.[83] The German legal framework is thus not ideal for protecting human rights. Although torture evidence is banned from fact-finding, threatening a defendant with the infliction of pain may still lead to useful clues. The lack of adequate procedural safeguards comes as a surprise, since § 136a Sec. 3 CCP was adopted in reaction to the abuses taking place in interrogations during the national-socialist era (see above 3.1.2.1).

3.2.2 The Adversarial System of the United States

Exclusionary rules owe their prominence in global debate to their importance in the United States' legal system. Contrary to what one would expect, however, the Federal Rules on Evidence contain no explicit rule on excluding torture evidence. Such evidence will all the same be excluded under common law rules as well as constitutional rights (see above 3.1.2.2). The Fifth Amendment's Privilege against Self-Incrimination and the Fourteenth Amendment's Due Process Clause compel the exclusion of torture confessions, since no person should be compelled to be a witness against himself in a criminal case,[84] and no one shall be deprived of life, liberty, or property without due process of law.[85]

But even if under a voluntariness analysis, torture confessions cannot be introduced at trial, the question remains as to whether its fruits can be used, since their exclusion does not follow automatically from the ban of primary evidence.[86] In a nutshell, the Supreme Court has generally extended the Fourth Amendment exclusionary rule to "fruits" of the original violation, with the

82 Claus Roxin and Bernd Schünemann, *Strafverfahrensrecht* (28th edn, Verlag C.H. Beck, München 2014), 187.

83 See Judgement of the German Bundesgerichtshof of August 24, 1983, 3 StR 136/83 = BGHSt 32, 68, at 70.

84 James J. Tomkovicz, *Constitutional Exclusion* (Oxford University Press 2011) 64; Mark A. Godsey, 'Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination' (2005) 93 Cal. L. Rev. 465, 479–480.

85 *Weeks v United States* 232 U.S. 383 (1914); Thomas S. Schrock and Robert C. Welsh, 'Up from Calandra: The Exclusionary Rule as a Constitutional Requirement' (1974) 59 Minn. L. Rev. 251, 343, 362–364.

86 Richard M. Re, 'The Due Process Exclusionary Rule' (2014) 127 Harv. L. Rev. 1885 at 1895–1898.

reasoning that such exclusion is necessary to deter police misconduct.[87] But the case law has also placed limits on how far the fruit of the poisonous tree doctrine extends. In cases in which the link between the original violation and the derivative evidence is too attenuated (e.g. if an event has broken the chain of causation between the original illegality and the derivative evidence), the derivative evidence may be admitted.[88] Furthermore, if the police would inevitably have discovered the evidence even without the violation of rights the exclusionary rule does not apply.[89] The admission of tainted derivative evidence dilutes the deterrence effect.[90]

Interestingly, the Supreme Court points to the importance of comprehensive fact-finding as a justification for these restrictions on the fruit of the poisonous tree doctrine. The Court also reasons that excluding evidence which could have been discovered independently by lawful means would not deter future police abuse.[91] As far as can be ascertained, in recent case law on exclusionary rules, the courts have not addressed possible human rights protection aspects. In fact, courts rather searches for ways to prevent the loss of evidence at a lesser cost through alternative reactions, which may involve disciplining officers.[92] A promising strategy against such curtailment could be to shift the focal point from a Fourth Amendment justification for exclusionary rules to a due process rationale, more focused on protecting individual rights as such.[93]

3.2.3 Mixed Systems

Both Chinese jurisdictions have certain elements derived from the inquisitorial models. But they also include adversarial aspects as well as their own specific features embedded in the systems. Exclusionary rules have been present in the Taiwanese law for a while, but have been adopted in mainland China only recently.

87 *Herring v United States*, 555 U.S. 135, 141 (2009); *Hudson v Michigan*, 547 U.S. 586, 591 (2006).

88 *Brown v Illinois*, 422 U.S. 590 (1975); *Murray v United States*, 487 U.S. 533 (1988); McCormick on Evidence § 159, at 875 (2013).

89 *Nix v Williams*, 467 U.S. 431 (1984).

90 See Richard M. Re, 'The Due Process Exclusionary Rule' (2014) 127 Harv. L. Rev. 1885 at 1895.

91 *Nix v Williams*, 467 U.S. 431, 444–445 (1984).

92 *Hudson*, 547 U.S. at 591, 599.

93 Richard M. Re, The Due Process Exclusionary Rule, 127 (2014) Harv. L. Rev. 1885, at 1912; Jenia Turner 'The Exclusionary Rule as a Symbol of the Rule of Law' (2014) 67 Southern Methodist University Law Review, 101.

3.2.3.1 *PRC*

In China, Art. 54 PRC-CPC at present provides for the exclusion of statements obtained by illegal means, particularly by torture. As has been pointed out above, the intention is not to protect human rights but rather to prevent miscarriages of justice by excluding unreliable evidence.[94] Therefore, it is only appropriate that the Chinese law does not acknowledge any fruit of the poisonous tree doctrine and allows derivative evidence obtained through torture or other illegal means in criminal proceedings to be admitted as valid evidence.[95] There are, however, rather broad legal options for excluding evidence: "If physical or documentary evidence is obtained in a manner that clearly violates the law and may have an impact on the fairness of an adjudication, redress or some reasonable explanation should be made, otherwise that physical or documentary evidence may not serve as a basis for conviction."[96]

The practical relevance of exclusionary rules depends on many aspects, ranging from the relationship between the Communist Party and the justice system to the way in which exclusionary rules are supported by other procedural rules. Today, the law gives a defendant the option to challenge incriminating evidence.[97] But the onus is on the defense to allege that a confession was obtained illegally and to offer supporting leads or evidence (though it is unclear how much evidence is needed to trigger a further investigation),[98] with the burden shifting if the court has doubts about the admissibility of evidence after an initial review.[99] Thus the threshold is high, with the government

94 Margaret K. Lewis, 'Controlling Abuse to Maintain Control: The Exclusionary Rule in China' (2011) 43 New York University Journal of International Law and Politics 629, with further information on the Zhao Zhenshang case at 630–631 and other cases at 668–670; Jiahong He and Ran He, 'Empirical Studies of Wrongful Convictions in Mainland China' (2012) University of Cincinnati L. Rev. Vol. 80, 1289.

95 Na Jiang, 'The Presumption of Innocence and Illegally Obtained Evidence: Lessons from Wrongful Convictions in China?' (2013) 43 Hong Kong L.J., 745, at 746.

96 Evidence Exclusion Rules, art. 14.

97 Evidence Exclusion Rules, art. 7. Jeremy Daum, 'Tortuous Progress: Early Cases under China's New Procedures for Excluding Evidence in Criminal Cases' (2011) NYU Journal of International Law and Politics, Vol. 43, 700; Yang Yuguan and Chen Zinan, 'On the Question of Exclusionary Rule in China' (2015) China Legal Science, Vol. 3, No. 1, 8–9.

98 Evidence Exclusion Rules, art. 6. Criminal Procedure Code, Art. 56 (2); Yang Yuguan and Chen Zinan, 'On the Question of Exclusionary Rule in China' (2015) China Legal Science, Vol. 3, No. 1, 9.

99 Evidence Exclusion Rules, art. 7. Na Jang, 'The adequacy of China's responses to wrongful convictions' (2013) International Journal of Law, Crime and Justice, Vol. 41, 395; Yang Yuguan and Chen Zinan, 'On the Question of Exclusionary Rule in China' (2015) China Legal Science, Vol. 3, No. 1, 11.

adhering to the view that the Chinese people are still connected to the long history of Chinese criminal justice that emphasizes substantive justice over procedural justice.[100]

3.2.3.2 *Taiwan*

According to art. 156 para. 1 of the Taiwanese Code of Criminal Procedure, information obtained by applying torture or inflicting other coercion on the defendant is to be mandatorily excluded and, accordingly, is inadmissible as evidence in criminal proceedings. The statute enshrines the case law that, for instance, excluded coerced confessions in order to safeguard the human dignity of the defendant and his status as a party to the trial proceedings.[101] Taiwan, however, does not apply a comprehensive fruit of the poisonous tree doctrine. Only in cases in which a secret surveillance investigation gravely violates procedural rules, all evidence, including derivative evidence is banned from presentation in court.[102] The representatives in parliament adopted this statute after they had fallen victim to a bugging scandal themselves.[103]

3.3 *Interim Conclusion*

In a nutshell, only the legal set-ups in Switzerland and the United States provide (theoretically) an ideal design to protect human rights, with their preparedness to exclude not only evidence elicited through torture but also derivative evidence. In practice, however, the situation is ambigious considering the ways in which such tainted evidence might enter via the backdoor, for example, based on a hypothetical clean path-doctrine, it is not even clear whether law enforcement officers would refrain from employing coercive methods of evidence-gathering that infringe human rights in severe and difficult cases, if they have reason to believe that tainted evidence could perhaps be of use after all.

4 Conclusion

The analysis of the rationale behind and the design of exclusionary rules shows that a common standard protecting individual rights in criminal proceedings world-wide, as *Wolfgang Schomburg* rightly calls for, is still wishful thinking.

100 See Sida Liu and Terence C. Halliday, 'Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law' (2009) 34 L. & Soc. Inquiry 911, 920.

101 Supreme Court decision 104 taishangzih No. 3052 (最高法院104年度台上字第3052號判決).

102 See art. 18-1 of the Communication Security and Surveillance Act.

103 Yang, 2014, at 3–4.

The rather superficial examination of exclusionary rules in five jurisdictions, however, has revealed that exclusionary rules have the theoretical potential of addressing the ubiquitous risk of human rights abuse in criminal proceedings in all countries. But in order to achieve their potential of being an instrument for protecting human rights in criminal proceedings, the legal framework must include the option of a ban on derivative evidence and the courts must make use of it. Up to now, exclusionary rules are often not put to work for a better protection of human rights, because the criminal justice system perceives their primary function as guarding against unreliable evidence, not as protecting human rights. Exclusionary rules are part of the criminal process's inherent struggle for a solution of the conflict arising from the need for comprehensive clarification of facts, in situations where individuals would choose not to disclose information. They have not been created as a genuine bulwark against state power in the liberal spirit.

The lesson that could be learned on the international level – where *Wolfgang Schomburg* adjudicated in an impressive way in many criminal proceedings – can best be articulated on the basis of one of his clear statements. When deciding upon cases, international tribunals today must set an example by ensuring justice is done where impunity used to be the rule, but also by making progress where rights of individuals are likely to be violated in the course of criminal proceedings.[104] Art. 69 para 7 of the Rome Statute merely stipulates, "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.", The International Criminal Court must now enhance its own legitimacy by excluding even tainted derivative evidence. Such respect for human rights in criminal procedure at the international level will pave the way for this trend to continue in national legal frameworks and all judicial systems.

104 Wolfgang Schomburg, 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights' (2009) 8 Northwestern Journal of International Human Rights, 1, at 28 et seq.