

# Admissibility of evidence before the Inter-American Court of Human Rights

ADMISSIBILIDADE DE PROVAS PERANTE À CORTE INTERAMERICANA DE DIREITOS HUMANOS

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## Abstract

The Inter-American Court of Human Rights performs a wide evidentiary analysis, which tends to be very flexible in its admission of evidence. This paper tries to decipher the extent, applicability, and content of the Court's admissibility rules, both the norms established by the Court itself, and those that the Court is obliged to follow. In order to do so, this article will analyze the relevant case law of the Court and provide some examples. Within this analysis, this article refers in depth to some unclear rulings that the Court has made in relation to the exclusion of evidence obtained via coercion, some of which seem to clash with the central role of truth in the Inter-American system.

## Keywords

Admissibility; evidence; exclusion; fruit of the poisonous tree; Inter-American Court of Human Rights; right to the truth.

## Resumo

A Corte Interamericana de Direitos Humanos realiza uma ampla análise probatória, que tende a ser muito flexível na admissão da prova. Este artigo trata de decifrar a extensão, a aplicação e o conteúdo das regras de admissibilidade da Corte, tanto daquelas estabelecidas pela própria Corte, como daquelas que a Corte é obrigada a seguir. Para tanto, o artigo analisará a jurisprudência relevante da Corte e dará alguns exemplos. Durante esta análise, o artigo referir-se-á a algumas afirmações feitas pela Corte relativas à exclusão de provas obtidas sob coação, algumas das quais parecem estar em contradição com o papel central da verdade no Sistema Interamericano.

## Palavras-chave

Admissibilidade; prova; exclusão; fruto da árvore envenenada; Corte Interamericana de Direitos Humanos; direito à verdade.

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## INTRODUCTION\*

The Inter-American Court of Human Rights (IACtHR) evaluates evidence in a very flexible and informal way. Probably the best example of the IACtHR's informality is its admissibility of evidence, as the Court establishes only a few rules, and tends to subject them to many exceptions. This flexibility is rooted in the basic principle regarding admissibility of evidence before international courts, which provides that these courts are free to use any kind of evidence they deem necessary (SANDIFER, 1975, p. 180; SHELTON, 1989, p. 395). The IACtHR is also flexible when determining who can offer evidence in its proceedings. It admits evidence offered by non-parties, such as witnesses,<sup>1</sup> *amici curiae*,<sup>2</sup> and even by other persons at the request of one of the parties.<sup>3</sup> In doing this, the Court will apply a norm – Article 58 of its Rules of Procedure – enabling it to obtain “on its own motion, any evidence it considers helpful and necessary.” This particular power also allows the Court to admit all kinds of evidence, even if they do not fulfill certain evidentiary requirements, such as being lodged on time. Nevertheless, the Court's flexibility has some limits, because there are some kinds of evidence that the Court is obliged to exclude. The first is the evidence lodged by the Inter-American Commission when this evidence has been produced in non-adversarial proceedings. The second are some kinds of coerced evidence.

This article will attempt to discover and analyse the admissibility rules of the IACtHR. When doing so, it will depart from the Court's mere statements, and will assess its practices. In order to do so, this article will analyze the relevant case law of the Court and provide some examples. As a way of conclusion, this article will show that it would be better for the Court to apply its admissibility rules consistently, even if their number is reduced.

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1 IACtHR, “Juvenile Reeducation Institute” v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 112, Sept. 2, 2004, para. 90. More understandably, the Court accepts documents or written opinions presented by expert witnesses, as it happened in IACtHR, *Boyce et al. v. Barbados*, Preliminary Objection, Merits, Reparations and Costs, Judgment, (ser. C) No. 169, Nov. 20, 2007, para. 41; and in IACtHR, *Vélez-Loor v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 218, Nov. 23, 2010, para. 78.

2 IACtHR, *Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 154, Sept. 26, 2006, para. 80.

3 IACtHR, *Baena et al. v. Panama*, Merits, Reparations and Costs, Judgment, (ser. C) No. 72, Feb. 2, 2001, para. 79.

This article will also define the extent of the rule of exclusion of coerced evidence, by confronting some unclear rulings of the Court with other principles of the IACtHR, such as the right to the truth.

## I FEW RULES FOR ADMITTING EVIDENCE

### I.1 PROCEDURAL MOMENT FOR PRESENTING EVIDENCE

The Court's Rules of Procedure require, basically, that the production or offering of evidence should be made in the first writ presenting pleadings or answering them.<sup>4</sup> The prescribed moment for issuing evidence is subject to exceptions of *force majeure*, serious impediment, and the emergence of supervening events.<sup>5</sup> In some cases the Court has strictly applied this rule. For instance, in *Miguel Castro-Castro Prison v. Peru* the Court explicitly rejected evidence presented by the Commission, stating that it was time-barred and did not fall into any of the exceptions provided for in the Rules of Procedure.<sup>6</sup> The Court rejected untimely evidence presented by the Commission, the representatives, and the State in *Suárez-Rosero v. Ecuador*, *White Van*, and *Bueno-Alves v. Argentina*.<sup>7</sup> In spite of what has been held in the foregoing cases, the requirement of timeliness of evidence is inconsistently applied, as this article will set forth in a subsequent section.

There is also a deadline for requesting the substitution of a witness or expert witness. This petition must be made when presenting the definitive list of declarants.<sup>8</sup> If the substitution of a witness is requested after presenting the definitive list of declarants, the party will have to claim exceptional circumstances justifying its request. The Court has allowed the parties to provide the relevant explanations for this substitution after the final list of

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<sup>4</sup> IACtHR, Rules of Procedure, Arts. 35(1)(e), 36(1)(e), 40(2)(b) & 41(1)(b).

<sup>5</sup> *Idem*, Art. 57(2).

<sup>6</sup> IACtHR, *Miguel Castro-Castro Prison v. Peru* (the), Merits, Reparations and Costs, Judgment, (ser. C) No. 160, Nov. 25, 2006, para. 195.

<sup>7</sup> IACtHR, *Suárez-Rosero v. Ecuador*, Merits, Judgment, (ser. C) No. 35, Nov. 12, 1997, paras. 19-20; IACtHR, *Paniagua-Morales et al. v. Guatemala (White Van)*, Merits, Judgment, (ser. C) No. 37, Mar. 8, 1998, para. 31 No. 2; and IACtHR, *Bueno-Alves v. Argentina*, Merits, Reparations and Costs, Judgment, (ser. C) No. 164, May 11, 2007, paras. 51 & 52. Among others, such as IACtHR, *Servellón-García et al. v. Honduras*, Merits, Reparations and Costs, Judgment, (ser. C) No. 152, Sept. 21, 2006, para. 45, and IACtHR, *Suárez-Peralta v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 261, May 21, 2013, para. 35.

<sup>8</sup> IACtHR, *Cabrera-García & Montiel-Flores v. Mexico*, Request of Public Hearing, Order of President of the Court, July 2, 2010, (In Spanish) para. 51.

witnesses and experts is presented, as long as the substitution request was lodged on time.<sup>9</sup> When doing so, the Court claimed to be acting accordingly to the informality governing human rights procedures.

## 1.2 RELEVANCE REQUIREMENT

### 1.2.1 REQUIREMENT ESTABLISHED BY THE COURT'S PRACTICE

Another admissibility requirement is that of relevance. By contrast to the requisite of presenting evidence within a certain deadline, the relevance requirement is not established in the Rules of Procedure, but was created by the Court's practice. In *Kawas-Fernández* the Court rejected some newspaper articles that were submitted by the representatives as supervening evidence, arguing that they were "unrelated to the factual framework of the instant case, as per the application filed by the Inter-American Commission."<sup>10</sup> *Bueno-Alves v. Argentina* provides an example of evidence that was rejected not only because of its untimely presentation, but also because of its lack of relevance.<sup>11</sup> In *Acevedo Buendía et al. v. Peru* the Commission asked the State to provide copies of the file of a case, but the latter objected that this evidence was unrelated to the issue under discussion.<sup>12</sup> The Court agreed with the State, considering it "unnecessary to require such documentation,"<sup>13</sup> and deciding that the case's body of evidence was enough for solving the dispute. In *Cantos v. Argentina* the Court took no consideration of evidence with "no direct bearing upon the analysis of the relevant facts in this case."<sup>14</sup> In *Ríos et al. v. Venezuela*, the State objected to the inclusion of evidence considered irrelevant for the object of the case; the Court decided to include it, but leaving out an irrelevant appendix.<sup>15</sup> Similarly, the IACtHR

9 The Court did so in the same *Cabrera case*. *Idem*, para. 49-53.

10 IACtHR, *Kawas-Fernández v. Honduras*, Merits, Reparations and Costs, Judgment, (ser. C) No. 196, Apr. 3, 2009, para. 43. Similarly in IACtHR, *Landaeta Mejías Brothers et al. v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 281, Aug. 27, 2014, paras. 36 & 37.

11 IACtHR, *Bueno-Alves v. Argentina*, Merits, Reparations and Costs, Judgment, (ser. C) No. 164, May 11, 2007, para. 50.

12 IACtHR, *Acevedo-Buendía et al. v. Peru* (Discharged and Retired Employees of the Office of the Comptroller), Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 198, July 1, 2009, para. 28.

13 *Idem*.

14 IACtHR, *Cantos v. Argentina*, Merits, Reparations and Costs, Judgment, (ser. C) No. 97, Nov. 28, 2002, para. 37.

15 IACtHR, *Ríos et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, (ser. C) No. 194, Jan. 28, 2009, para. 88. This case also provides some other examples of irrelevant evidence

has distinguished, within a declaration, the parts that are relevant to the case, such as in *The Rochela Massacre v. Colombia*, where the Court, after receiving the affidavit of a witness, decided to add to the body of evidence only the part that specifically referred to the facts of the massacre.<sup>16</sup> In *Bulacio v. Argentina* the Court rejected the declaration of an expert witness who sought to disprove certain facts that had already been accepted by the State.<sup>17</sup>

The Court is usually open to accept the presentation of evidence related to supervening facts,<sup>18</sup> as long as this evidence is clearly related to the object of the case (the problem is that, in some cases, the extent of the issue under discussion is not clear [PAÚL, 2015, p. 31]). If there were no *prima facie* relation between the supervening facts and those of the case, the parties would have to give arguments explaining this relation. This was suggested by the Court in *Bueno-Alves v. Argentina*.<sup>19</sup>

### 1.3 OTHER REQUIREMENTS

The IACtHR also sets other requirements for the presentation of evidence. Article 40(2) of the Court's Rules of Procedure provides that the representatives' brief containing pleadings, motions, and evidence shall include "the evidence offered, properly organized, with an indication of the alleged facts and arguments that it relates to." According to this Article, in *Torres et al. v. Argentina* the Court rejected the presentation of witness and expert witness evidence that did not fulfill this requirement; apparently, because the parties gave no clear account of the relation between this evidence and the facts of the case.<sup>20</sup>

The Rules of Procedure provide in Article 46(1) that the parties have to reiterate their offer of declarations of alleged victims, witnesses, or expert witnesses, in the "definitive

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that was not admitted. *See also* IACtHR, *Cantos v. Argentina*, Merits, Reparations and Costs, Judgment, (ser. C) No. 97, Nov. 28, 2002, para. 36.

16 IACtHR, *Rochela Massacre v. Colombia (The)*, Merits, Reparations and Costs, Judgment, (ser. C) No. 163, May 11, 2007, para. 61.

17 IACtHR, *Bulacio v. Argentina*, Merits, Reparations and Costs, Judgment, (ser. C) No. 100, Sept. 18, 2003, para. 59. The Court also rejects evidence already submitted by a party, as happened in IACtHR, *Constitutional Court (The) v. Peru*, Merits, Reparations and Costs, Judgment, (ser. C) No. 71, Jan. 31, 2001, para. 52.

18 *E.g.*, IACtHR, *Acevedo-Buendía et al. v. Peru (Discharged and Retired Employees of the Office of the Comptroller)*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 198, July 1, 2009, para. 29.

19 IACtHR, *Bueno-Alves v. Argentina*, Merits, Reparations and Costs, Judgment, (ser. C) No. 164, May 11, 2007, para. 47.

20 IACtHR, *Torres et al. v. Argentina*, Request of Public Hearing, Order of the President, April 29, 2011 (available only in Spanish), "considerando" para. 6.

list of declarants.” Hence, the Court has considered that when a party does not fulfill this requirement, this party has tacitly withdrawn its offer of evidence.<sup>21</sup>

Another requirement is related to the content of the declaration, because witnesses and experts are called to declare on a particular matter, so the Court has taken no account of the parts of their statements that exceed their previously defined purpose.<sup>22</sup> Nevertheless, it is not absolutely necessary for expert witnesses to limit their declarations strictly to the purpose for which they were required under the order of the President of the Court, because the IACtHR may still admit their declarations as being useful for adjudicating a case. This happened in *Almonacid-Arellano v. Chile*, where the Court explicitly acknowledged that the declaration of an expert witness presented by the State went beyond the matter for which he was summoned,<sup>23</sup> but nevertheless admitted this evidence. While doing so, it asserted to be taking “into account the observations made by the Commission,” which had objected to this presentation.<sup>24</sup>

The Court’s rules of procedure state that the party who wishes to submit the declaration of an expert witness must submit the *curriculum vitae* and contact information of the person they wish to bring before the Court.<sup>25</sup> However, parties have overcome this and other requirements by modifying their request and presenting the person they want to declare before the Court as an ordinary witness instead of as an expert witness, as it happened in the cases *García Lucero* and *Norín Catrimán*.<sup>26</sup>

Additional requirements are provided by the Court’s practice. The Court usually states that the presentation of witness and expert witness affidavits require prior authorization,

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21 *Idem*, “considerando” para. 7, and IACtHR, *Norín Catrimán y Otros (Lonkos, Dirigentes y Activistas del Pueblo Indígena Mapuche) v. Chile*, Request of Public Hearing, Order of the President, April 30, 2013, (available only in Spanish), “considerando” para. 5.

22 IACtHR, *González et al. (“Cotton Field”) v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 205, Nov. 16, 2009, para. 91; and IACtHR, *Artavia-Murillo et al. (in vitro fertilization) v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 257, Nov. 28, 2012, para. 59.

23 IACtHR, *Almonacid-Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 154, Sept. 26, 2006, para. 76.

24 *Idem*. The Court also “took into consideration” the allegations of some parties regarding the lack of relevance of some declarations in *Nogueira de Carvalho et al. v. Brazil*.

25 Arts. 31(1)(f), 36(1)(f), 40(2)(c) & 41(1)(c) Inter-American Court’s Rules.

26 IACtHR, *García Lucero y Otros v. Chile*, Request of Public Hearing, Order of the President, Feb. 14, 2013 (available only in Spanish), “considerando” paras. 10-11, and IACtHR, *Norín Catrimán y Otros (Lonkos, Dirigentes y Activistas del Pueblo Indígena Mapuche) v. Chile*, Request of Public Hearing, Order of the President, April 30, 2013 (available only in Spanish), “considerando” paras. 24-25.

so it has rejected this evidence when it is presented without this authorization,<sup>27</sup> or has declared to consider it to be “only” documentary evidence.<sup>28</sup> The Court has also given consideration to the fact that some affidavits have not been rendered before a notary public or some other public official,<sup>29</sup> or has rejected statements that did not follow the President’s order to be made before a notary public.<sup>30</sup> In *Bámaca-Velásquez* the Court rejected a witness’s declaration rendered by videotape, ruling: it “lacks autonomous value, and the testimony that it contains cannot be admitted as it has not complied with the requirements for validity, such as the appearance of the witness before Court, his identification, swearing in, monitoring by the State and the possibility of questioning by the judge.”<sup>31</sup> In addition, in *Bamaca-Velásquez* the Court rejected evidence whose source was not clearly identifiable, considering that it did not comply with the minimum formal requirements for admissibility.<sup>32</sup>

The most recent Rules of Procedure of the Court provide that a party may formulate some questions in writing to a witness or expert witness who will be issuing his or her statement via affidavit.<sup>33</sup> The Rules provide nothing as to what would happen if the declarant dismisses these questions. The reader may wonder whether a failure to answer them raises an issue of admissibility. This matter was referred to in *Artavia-Murillo et al. v. Costa Rica*.<sup>34</sup> In this case, the State alleged that some statements omitted these answers, which would

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27 IACtHR, *Bueno-Alves v. Argentina*, Merits, Reparations and Costs, Judgment, (ser. C) No. 164, May 11, 2007, para. 50.

28 IACtHR, *Abrill-Alosilla et al. v. Peru*, Request of Public Hearing, Order of the President of the Court, Sept. 8, 2010 (in Spanish) paras. 24 & 25. The relevance of such consideration is scarce, since the Court weighs evidence the way it deems better, regardless of the format in which evidence is presented. See PAÚL, 2015, p. 34-36.

29 *E.g.*, IACtHR, *Bueno-Alves v. Argentina*, Merits, Reparations and Costs, Judgment, (ser. C) No. 164, May 11, 2007, para. 50.

30 IACtHR, *González et al. (“Cotton Field”) v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 205, Nov. 16, 2009, para. 106.

31 IACtHR, *Bámaca-Velásquez v. Guatemala*, Merits, Judgment, (ser. C) No. 70, Nov. 25, 2000, para. 103.

32 *Idem*, para. 105. It is worth noting that in some courts the expertise or proficiency of an expert witness is an issue, which is dealt with at the admissibility stage, but this is not the case of the IACtHR, which assesses this circumstance when examining the merits of the case. IACtHR, *González et al. (“Cotton Field”) v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 205, Nov. 16, 2009, para. 91; and IACtHR, *Castillo-González v. Venezuela*, Merits, Judgment, (ser. C) No. 256, Nov. 27, 2012, paras. 32 & 33.

33 Art. 50(5) Inter-American Court’s Rules.

34 IACtHR, *Artavia-Murillo et al. (in vitro fertilization) v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 257, Nov. 28, 2012, para. 56.

affect the adversarial principle and its right to defence, among others.<sup>35</sup> The Court responded by ruling that a failure to answer the other party's questions did not make a statement inadmissible, but may have an impact on the weight that the Court grants to a particular declaration when analyzing the merits of a case.<sup>36</sup>

This decision is worthy of criticism. Failing to answer questions that have been issued on time and accepted by the Court is a breach of the duty to cooperate. Such breach should be penalized. Otherwise, the Court may be encouraging witnesses' dismissal of difficult questions, which ends up defeating the object of granting parties the chance of asking questions to those declaring via affidavit. In addition, since the Court's case decisions do not currently describe the content of declarations, there is no way of assessing whether the Court took into consideration the dismissal of questions when weighing declarations. Penalties attached to a refusal to cooperate should be clearly visible, unless there are strong reasons justifying such refusal to cooperate.

Also in *Artavia*, the Court decided that the untimely presentation of Spanish translations of statements issued in English did not render this evidence inadmissible.<sup>37</sup> For stating this, the Court paid regard to the fact that the parties made no objection to the presentation of some documents in English in the phase before the Commission.<sup>38</sup> By contrast, in *Cruz Sanchez et al v. Peru*, the Court rejected the statement of an expert witness that was not translated into Spanish.<sup>39</sup>

#### 1.4 INCONSISTENCY IN THE APPLICATION OF THE AFORESAID ADMISSIBILITY RULES

The very few admissibility rules of the IACtHR reveal this tribunal's flexibility. Nevertheless, an even clearer illustration of the Court's informality is its inconsistency when applying them. At times the Court makes exceptions to a certain rule in one section of a judgment, while endorsing a strict application of the rule in some other section of the same judgment. In fact, some of the cases that this article used previously as examples for the application of an admissibility rule also contain exceptions to the particular rules that were illustrated with them.

In the matter of untimely evidence, the IACtHR will often accept evidence presented after the relevant deadlines, even if there is no proof or allegation of exceptional circumstances

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<sup>35</sup> *Idem*.

<sup>36</sup> *Idem*.

<sup>37</sup> *Idem*, para. 57.

<sup>38</sup> *Idem*.

<sup>39</sup> IACtHR, *Cruz-Sánchez et al. v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 292, April 17, 2015, (Currently available only in Spanish) para. 118.



justifying this untimely presentation. The usual way in which the Court circumvents these deadlines is through its power to obtain evidence “on its own motion.”<sup>40</sup> The Court will often accept evidence presented after the deadline simply because it is “relevant and necessary to determine the facts of the case,” as it happened in *Acevedo-Buendía et al. v. Peru*.<sup>41</sup> There are many other examples of the practice of accepting untimely evidence.<sup>42</sup> Ironically, these exceptions have been applied in cases where the Court states: “by their very nature, judicial deadlines must be met except for exceptional causes.”<sup>43</sup>

The acceptance of evidence issued after the appropriate procedural stage is now so common, that the Court has set a legal formula for accepting it. For instance, in *Gelman v. Uruguay* the IACtHR states: “the Court admits, exceptionally, documents sent by the parties in different procedural opportunities, finding them relevant and useful for the determination of the facts and their possible judicial consequences, [...]”<sup>44</sup> The Court may even accept time-barred evidence during the public hearing. For instance, in *Cabrera* the Court accepted some documents without assessing whether there were supervening circumstances justifying their belated presentation. The Court utilized its powers to accept evidence *motu proprio*.<sup>45</sup> At other times, the Court will accept evidence issued even after the expiration of deadline extensions, as it happened in *The Sawhoyamaya Indigenous Community v. Paraguay*.<sup>46</sup>

40 Art. 58 Inter-American Court’s Rules.

41 IACtHR, *Acevedo-Buendía et al. v. Peru* (Discharged and Retired Employees of the Office of the Comptroller), Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 198, July 1, 2009, paras. 37 & 38.

42 IACtHR, *Ivcher-Bronstein v. Peru*, Merits, Reparations & Costs, Judgment, (ser. C) No. 74, Feb. 6, 2001, para. 71; IACtHR, *Olmedo-Bustos et al. v. Chile* (The Last Temptation of Christ), Merits, Reparations and Costs, Judgment, (ser. C) No. 73, Feb. 5, 2001, para. 30; IACtHR, *Bámaca-Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, Nov. 25, 2000, para. 112; IACtHR, *Vélez-Loor v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 218, Nov. 23, 2010, para. 78; and IACtHR, *Boyce et al. v. Barbados*, Preliminary Objection, Merits, Reparations and Costs, Judgment, (ser. C) No. 169, Nov. 20, 2007, para. 42.

43 IACtHR, *Neira-Alegría et al. v. Peru*, Merits, Judgment, (ser. C) No. 20, Jan. 19, 1995, paras. 29-32 in relation with para. 37 (italics in the original).

44 IACtHR, *Gelman v. Uruguay*, Merits and Reparations, Judgment, (ser. C) No. 221, Feb. 24, 2011, para. 37.

45 IACtHR, *Cabrera-García & Montiel-Flores v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 220, Nov. 26, 2010, para. 33.

46 IACtHR, *Sawhoyamaya Indigenous Community v. Paraguay* (the), Merits, Reparations and Costs, Judgment, (ser. C) No. 146, Mar. 29, 2006, paras. 20 & 21.

There are also exceptions to the rule of relevance of evidence. In *Escher v. Brazil* the Commission alleged that an affidavit bore no relation whatsoever with the issue that was discussed in the case, but the Court decided to incorporate it into the body of evidence, and assess it only as far as related to the purpose for which it was requested.<sup>47</sup> The Court has also considered that the irrelevance of a particular piece of evidence would be a matter of weight, not of admissibility. For instance, in *Boyce et al. v. Barbados*, the Court admitted allegedly irrelevant evidence stating that it would assess it according to the rules of sound judicial discretion.<sup>48</sup> Likewise, in *Abrill-Alosilla et al. v. Peru* the Court decided to admit the declaration of an expert witness that was objected by the representative of the victims.<sup>49</sup> It is easy to understand this when declarations have both relevant and irrelevant parts, because the Court would prefer to receive a declaration in order to have access to its relevant sections. This happened in *Reverón-Trujillo v. Venezuela*, where the Court admitted the victim's declaration, but declared that it would disregard the part that was unrelated to the object of the case.<sup>50</sup> This way of proceeding spares the Court from declaring inadmissible some evidence that could be useful.

The Court also makes exceptions to other rules established in its case law, such as the requirement of rendering affidavits before a public notary or some other official, as long as “legal certainty and procedural balance between the parties are not impaired.”<sup>51</sup> In some cases this occurs because of extraordinary reasons, such as when the parties claimed that Venezuelan notaries public were refusing to authorize documents, presumably due to political pressures.<sup>52</sup> However, in most cases there are no particular grounds for making these exceptions. The Court has also accepted declarations of witnesses and expert witnesses

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<sup>47</sup> IACtHR, *Escher et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, (ser. C) No. 200, July 6, 2009, paras. 75 & 69.

<sup>48</sup> IACtHR, *Boyce et al. v. Barbados*, Preliminary Objection, Merits, Reparations and Costs, Judgment, (ser. C) No. 169, Nov. 20, 2007, para. 44.

<sup>49</sup> IACtHR, *Abrill-Alosilla et al. v. Peru*, Merits, Reparations and Costs, Judgment, (ser. C) No. 223, Mar. 4, 2011, paras. 46 & 47.

<sup>50</sup> IACtHR, *Reverón-Trujillo v. Venezuela*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, (ser. C) No. 197, June 30, 2009, paras. 44 & 45.

<sup>51</sup> IACtHR, *Baldeón-García v. Peru*, Merits, Reparations and Costs, Judgment, (ser. C) No. 147, April 6, 2006, para. 66.

<sup>52</sup> *E.g.*, IACtHR, *Ríos et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, (ser. C) No. 194, Jan. 28, 2009, paras. 82-86. Similarly in IACtHR, *Apitz-Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment, (ser. C) No. 182, Aug. 5, 2008, paras. 13 & 14; and IACtHR, *Castillo-González v. Venezuela*, Merits, Judgment, (ser. C) No. 256, Nov. 27, 2012, paras. 30 & 31).

exceeding their purpose, as long as they are useful. To do this, the Court invokes its power to admit evidence *ex officio*.<sup>53</sup>

It could be adequate for the Court to simplify its procedures, establishing just a few rules or eliminating Court-created admissibility requirements, but applying these rules consistently. Such simplification would spare the Court from having to analyze the admissibility of evidence in each of its judgments. It would also relieve the parties from making claims in this regard, and would give less space for criticizing unpredictability in the Court's behaviour.

### 1.5 TWO MANDATORY EXCLUSIONARY RULES

The Court's flexibility for admitting evidence has exceptions. There are two cases where the Court is bound to exclude evidence. The first is established in the IACtHR's Rules of Procedure. Article 57 provides that "[i]tems of evidence tendered before the Commission will be incorporated into the case file as long as they have been received in adversarial proceedings, unless the Court considers it indispensable to duplicate them." Hence, evidence produced by the Commission in non-adversarial proceedings should be excluded from the body of evidence of a given case. Nevertheless, the Court appears to have a presumption that the evidence presented by the Commission was obtained in adversarial proceedings.

Despite the fact that this exclusionary rule is established merely in the Court's Rules of Procedure, the Court's freedom to modify it is limited, because this requirement flows from the principle *audi alteram partem*, which is a basic principle of justice. Furthermore, the Court should consider inadmissible all evidence produced without following this principle, unless there were rare circumstances justifying an exception, such as the death of a proposed witness who was able to leave a written statement. Nevertheless, even in a case like this, the opposing party should be granted the possibility to object or comment on this evidence.

The second mandatory rule refers to the need to exclude evidence obtained through coercion. This rule and the Court's interpretation of it generate serious interpretation issues, so it is necessary to analyze it in a separate heading.

## 2 EVIDENCE OBTAINED THROUGH COERCION

### 2.1 PRELIMINARY ISSUES

#### 2.1.1 GENERAL DESCRIPTION OF THE MATTER

Article 8(3) of the American Convention on Human Rights (ACHR) provides the basis

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<sup>53</sup> IACtHR, González et al. ("Cotton Field") v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 205, Nov. 16, 2009, para. 89.

for the rule of exclusion of evidence obtained through coercion, when establishing that “[a] confession of guilt by the accused shall be valid only if it is made without coercion of any kind.”<sup>54</sup> The ACHR’s exclusion of confessions obtained through coercion was drafted as an obligation binding States, not the IACtHR. Nevertheless, this provision deprives this kind of evidence from its *validity*, so the IACtHR should exclude any coerced confession that may have been produced during domestic criminal proceedings.

The IACtHR has upheld the rule excluding coerced confessions in relation to domestic courts. In some of them, the IACtHR did not develop this rule in depth,<sup>55</sup> but it certainly did so in *Cabrera-García & Montiel-Flores v. Mexico*.<sup>56</sup> This ruling was later reaffirmed in *García-Cruz & Sánchez-Silvestre v. Mexico*,<sup>57</sup> and in *Maldonado Vargas et al. v. Chile*<sup>58</sup>. In these cases, the IACtHR made some broad statements regarding the exclusion of evidence obtained under duress, which brings forth some interpretation challenges. The need to determine the real extent of the rule was established in *Cabrera and Montiel*. This is also necessary because the IACtHR’s counterpart – the European Court of Human Rights (ECtHR) – has no absolute approach to the exclusion of evidence (TORRES CHEDRAUI, 2011, p. 207-217; KENNES, 2010, p. 383, 392-393; THAMAN, 2010, p. 357-358).

#### 2.1.2 THE TRUTH AS A PARAMOUNT VALUE OF THE INTER-AMERICAN SYSTEM

The IACtHR considers that the end of domestic proceedings is to search the truth, and that those appearing before courts have a right to expect proceedings to be, at least, capable of leading to the truth.<sup>59</sup> This peculiarity of the system must be the lens through which the extent of the exclusion of evidence before the Inter-American system must be judged. The

54 American Convention on Human Rights (1969).

55 IACtHR, *Gutiérrez-Soler v. Colombia*, Merits, Reparations and Costs, Judgment, (ser. C) No. 132, Sept. 12, 2005, para. 52, and IACtHR, *Cantoral-Benavides v. Peru*, Merits, Judgment, (ser. C) No. 69 (Aug. 18, 2000) paras. 132-133.

56 IACtHR, *Cabrera-García & Montiel-Flores v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 220, Nov. 26, 2010, paras. 165-167.

57 IACtHR, *García-Cruz & Sánchez-Silvestre v. Mexico*, Merits, Reparations and Costs, Judgment, (ser. C) No. 273, Nov. 26, 2013, paras. 58-61.

58 IACtHR, *Maldonado Vargas et al. v. Chile*, Merits, Reparations and Costs, Judgment, (ser. C) No. 300, Sept. 2, 2015, para. 118.

59 *See*: IACtHR, *García-Prieto et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 168, Nov. 20, 2007, para. 101; IACtHR, *Ximenes-Lopes v. Brazil*, Merits, Reparations and Costs, Judgment, (ser. C) No. 149, July 4, 2006, para. 198 (and 112(11)); IACtHR, *Mendoza et al. v. Argentina*, Preliminary Objections, Merits and Reparations, Judgment, (ser. C) No. 260, May 14, 2013, para. 217-218.

relevance of the reaching of the truth before the IACtHR has two different manifestations. The first is the development of what the IACtHR has called “the right to the truth.” This would be a right of the victims, their relatives and society at large, which stems as a consequence of forced disappearances or violations of a similar seriousness (INTER-AMERICAN, 2014; BURGORGUE-LARSEN; ÚBEDA DE TORRES, 2011, p. 700; IBÁÑEZ RIVAS, 2014, p. 633). We shall call this expression the *right to the truth in the narrow sense*. The IACtHR states that this right has some concrete consequences, such as the prohibition of enacting amnesty laws and of using statutes of limitations (INTER-AMERICAN, 2014). The IACtHR places such a degree of importance on the achievement of the truth that it has even rejected the application of the *non bis in idem* principle or the prohibition of applying *ex post facto* laws when they may hamper the “right to the truth.”<sup>60</sup> It has also extracted, as a consequence of the right to the truth, a duty to investigate and punish (BASCH, 2007; BURGORGUE-LARSEN; ÚBEDA DE TORRES, 2011, p. 707-708).

There is also a second manifestation of the relevance of the truth before the Inter-American system. This manifestation expresses itself in cases that do not refer to forced disappearances or similar violations. In light of the extension limits of this article, we will not refer to this matter in detail. Nevertheless, it must be noted that the IACtHR has ruled, in cases that do not refer to crimes against humanity, that the relatives of the victims have a right to know the truth. When doing so, it utilizes similar expressions to the ones it uses when referring to the *right to the truth in the narrow sense*.<sup>61</sup> The IACtHR does not grant this second manifestation the same effects it grants to the right to the truth, such as the prohibition of applying the statute of limitations (in spite of this doctrine’s sharing many features with the right to the truth). This is why we will call it a *right to the truth in the broad sense*.

The doctrine of the *right to the truth in the narrow sense*, together with the relevance to the finding of the truth according to the *right to the truth in the broad sense*, show that the finding of the truth is a fundamental value in the Inter-American system. Hence, it is paramount

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<sup>60</sup> *E.g.*, IACtHR, Almonacid-Arellano et al. v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 154, Sept. 26, 2006, para. 154, and IACtHR, Maldonado Vargas et al. v. Chile, Merits, Reparations and Costs, Judgment, (ser. C) No. 300, Sept. 2, 2015, para. 156.

<sup>61</sup> *See*, for instance, IACtHR, Albán-Cornejo et al. v. Ecuador, Merits, Reparations and Costs, Judgment, (ser. C) No. 171, Nov. 22, 2007, para. 52; IACtHR, García-Prieto et al. v. El Salvador, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 168, Nov. 20, 2007, para. 102; IACtHR, González et al. (“Cotton Field”) v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 205, Nov. 16, 2009, para. 388; IACtHR, Suárez-Peralta v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 261, May 21, 2013, para. 93.

to consider it when determining the extent of the exclusion of evidence, and the effects that such exclusion may have in the different proceedings.

### 2.1.3 THE COURT'S RULINGS AND THE QUESTIONS THEY POSE

In *Cabrera-García & Montiel-Flores v. Mexico* the IACtHR ruled that the verification of “any type of duress capable of breaking the spontaneous expression of will of a person, [...] necessarily implies the obligation to exclude the respective evidence from the judicial proceeding.”<sup>62</sup> In this quote, as well as in some other paragraphs, the IACtHR used the expression “evidence,” not “confession,” despite the ACHR’s use of the word confession, and that international documents usually exclude “statements,” not evidence in general. Thus, the question arises as to whether the IACtHR intended to extend the ACHR’s exclusionary rule to cover evidence in general, as long as it was obtained under coercion.<sup>63</sup> It is also interesting to note that the IACtHR requires the accused person to give his or her “spontaneous expression,” which is a highly demanding concept.<sup>64</sup>

The IACtHR gives no definition of coercion, so we may use an ordinary legal definition, according to which coercion would mean “[c]ompulsion of a free agent by physical, moral, or economic force or threat of physical force” (GARNER, 2014, p. 315). Duress has, in broad terms, a similar meaning (GARNER, 2014, p. 614). In its more classical example, coercion would include torture inflicted in order to make somebody confess a crime. However, the IACtHR refers to “any type” or duress that may break somebody’s “spontaneous expression of will,”<sup>65</sup> and similarly, the IACtHR refers to “coercion of any kind.”<sup>66</sup> Hence, it becomes necessary to include also other acts that go beyond the paradigmatic case of the use of coercion. Thus, this concept could include, for example, the forcible extraction of hair or blood in order to make some chemical analyses, the administration of laxatives or emetics without a detainee’s consent, an illegal detention, or forcing somebody to open the door of his home.

Another challenge is given by the IACtHR’s tacit upholding of the doctrine of the fruit of the poisonous tree (DFPT), which is the exclusion of secondary evidence that “owes

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<sup>62</sup> IACtHR, *Cabrera-García & Montiel-Flores v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 220, Nov. 26, 2010, para. 166.

<sup>63</sup> *Idem*, paras. 165 & 166.

<sup>64</sup> IACtHR, *Cabrera-García & Montiel-Flores v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 220, Nov. 26, 2010, para. 166.

<sup>65</sup> IACtHR, *Cabrera-García & Montiel-Flores v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 220, Nov. 26, 2010, para. 166.

<sup>66</sup> Art. 8(3) ACHR.

its discovery to evidence initially obtained in violation of a constitutional, statutory, or court-made rule” (PITLER, 1968, p. 579). The IACtHR upheld this doctrine when it stated in *Cabrera-García* that “the absolute character of the exclusionary rule is reflected on the prohibition of granting probative value not only to the evidence obtained directly under duress, but also to evidence deriving from said act.”<sup>67</sup>

## 2.2 THE EXCLUSIONARY RULE BEFORE THE IACtHR

### 2.2.1 PRELIMINARY ISSUES

It is not crystal-clear whether, when establishing the rule of Article 8(3), the framers of the ACHR had in mind concerns of truth, policy, both or some other. Nevertheless, the concern for truth is a sufficient rationale for considering invalid a confession obtained under serious coercion because, depending on the harshness of the acts of duress, an innocent person may make up his or her guilt, just as a way of putting an end to the acts of coercion. Since this first rationale tries to reach the truth in a particular case, it is called the *truth rationale*. In addition to the foregoing, excluding coerced confessions would also serve a policy concern, by showing public officials that there is no use in applying coercion for obtaining confessions, because the resulting evidence would be invalid anyway. This second rationale is called the *public policy rationale*, and is very common in relation to the exclusion of evidence, as is the case in the U.S.<sup>68</sup>

The ACHR provides no explicit rationale for the rule of Article 8(3). In spite of this, the IACtHR stated that the exclusion of evidence aims at both deterring abuses (so as “to discourage the use of any type of duress”)<sup>69</sup> and at excluding declarations rendered unreliable by the use of coercion (because they may include false facts asserted solely to put an end to coercion).<sup>70</sup> The IACtHR did not dwell on the rationale of integrity of proceedings or on some other rationale.

By making explicit the rationales underlying its exclusion of evidence, the IACtHR allows the reader to analyze whether they provide enough support for: (a) applying the exclusionary rule to *all evidence* obtained through acts of coercion, regardless of its nature;

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<sup>67</sup> IACtHR, *Cabrera-García & Montiel-Flores v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 220, Nov. 26, 2010, para. 167.

<sup>68</sup> See U.S., Supreme Court, *Davis v. U.S.*, 564 U.S. \_\_\_, 6, judgment, June 16, 2011.

<sup>69</sup> IACtHR, *Cabrera-García & Montiel-Flores v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 220, Nov. 26, 2010, para. 166.

<sup>70</sup> IACtHR, *Cabrera-García & Montiel-Flores v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 220, Nov. 26, 2010, para. 167.

and (b) extending the deprivation of its probative value to all evidence *deriving from* such an act (the DFPT). The former is important, especially in cases where illegal or illegitimate coercion has effects on things, going beyond the mere expression of the coerced person's will, such as when the coerced person is obliged to open the door of his or her residence, or when he or she is obliged to stop his or her car and allow its inspection.

### 2.2.2 BREADTH OF THE DUTY TO EXCLUDE

#### a) *Extension to statements*

The ACHR's Article 8(3) excludes only *confessions*, not other kinds of evidence. This norm is clear. In spite of the foregoing, the IACtHR utilizes an "expansive interpretation" of the ACHR (MAULL, 1994, p. 101-104; LIXINSKI, 2010, p. 585-604; BURGORGUE-LARSEN, 2014, p. 105-161; TIGOUDJA, 2002, p. 69-110), so possibly the IACtHR would consider that there are more important elements than the actual text of the ACHR for determining the extension of the duty to exclude. These would be, for instance, to consider whether the duty to exclude confessions could be extended via analogy to other kinds of evidence and whether that extension could be supported by other international documents.

In light of this, in order to determine if the IACtHR wished to extend its ruling beyond confessions, the interpreter must note that the Court also referred to statements.<sup>71</sup> Besides, other human rights treaties exclude not only coerced confessions, but also coerced statements. Similarly, both the truth and policy rationales would be equally applicable to forced confessions and statements. Therefore, and without assessing the appropriateness of this interpretation, it should be understood that in *Cabrera-García* the IACtHR wished to extend the rule of Article 8(3) to statements.

Another matter that must be answered is what would happen if statements obtained via coercion incriminate third parties and not the person who is making them. The ACHR provides nothing in this regard, at least directly. In *Cabrera* the IACtHR refers only slightly to this matter, by ruling that its acceptance would affect the right to a fair trial.<sup>72</sup> The problem of forced declarations against third parties could be faced by applying the rule of *sana critica* (PAÚL, 2015, p. 34-36), since a coerced statement has no major weight. It could also be addressed by applying other rights of the ACHR, such as the *due guarantees* of a fair trial, since they protect the right of the defense counsel to examine witnesses.<sup>73</sup>

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71 IACtHR, *Cabrera-García & Montiel-Flores v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 220, Nov. 26, 2010, para. 167.

72 *Idem*.

73 Art. 8(7) ACHR.



Nevertheless, the IACtHR may include this kind of exclusion within the rule of Article 8(3), because the same rationales for excluding confessions would be applicable. Something similar could be said about cases where private individuals coerce somebody to give a particular statement.

*b) No extension beyond confessions and statements*

In relation to the ACHR's statement regarding the exclusion of *evidence* – with no further qualification –, the question is whether the rule of exclusion should be extended to all kinds of evidence obtained under coercion, not only to confessions and statements. An example where duress is used for obtaining real evidence would be if police officers illicitly coerce a suspect to open the door of his or her house, where they find conclusive evidence.<sup>74</sup> In this example, there is an illegal use of coercion. However, if the duress used in forcing the door leads to conclusive real evidence against the suspect there will be no danger of falsely convicting him or her. Hence, there will be no concern for truth in this case, so the exclusion of evidence can only be a way of discouraging illegal acts of the police that involve coercion. It would be an indirect way of punishing public officials' wrongdoing.

In the aforementioned example, the exclusion of evidence only benefits the victims of an act of coercion when they are themselves guilty of a wrongdoing. In other words, if two people were affected by a forceful entrance into their respective homes, one of them innocent and the other culpable, the police would find incriminating evidence only in the dwelling place of the guilty person. Hence, if the emphasis for punishing an illegal use of coercion were placed on the exclusion of evidence, the innocent victim would be granted no redress, or would receive less redress than the guilty person. In addition, if the authority uses exclusion of evidence as the main punishment for illegal acts of coercion, it should note that this “punishment” does not allow gradation in light of the different degrees of coercion.

Be that as it may, neither the truth rationale nor that of policy is applicable if the State punishes illegal acts of coercion by other means (as long as they are proportional to the seriousness of the act of coercion). We already stated that the truth rationale would not be applicable if real evidence is found. Similarly, the policy rationale would also be irrelevant, as could be noted with the following example: if police officers who illegally coerce somebody are punished with the appropriate criminal sanctions – proportionally to their wrongdoing – and are expelled from the institution, it will probably be mostly irrelevant to them whether the evidence they obtained was considered invalid.

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<sup>74</sup> The concept “real evidence” has been defined as “items that allegedly played some role in or were generated by the events in dispute” (SKLANSKY, 2012, p. 704).

The foregoing arguments give grounds to affirm that the IACtHR's conclusion regarding the exclusion of *evidence* would actually refer to *statements*, leaving States free to decide whether to exclude other kinds of evidence illegally obtained. Likewise, the IACtHR would only be required to exclude confessions and statements (even though the IACtHR is free to establish more restrictive admissibility norms in its rules of procedure). This conclusion would also be more compatible with the right to produce evidence and the general rule that all relevant evidence should be admissible.

In addition to the foregoing, it is important to note that, when determining the breadth of the duty to exclude, the reader must also consider the relevance that the IACtHR gives to the reaching of the truth in criminal proceedings, as it was stated above. Excluding evidence that was brought about due to a State officer's wrongdoing could have the effect of absolving the criminal, leaving his or her conduct unpunished. This result would be contrary to the "right to the truth", which would amount to a failure of the national judiciary in fulfilling the IACtHR's doctrine of the duty to punish. This may be exemplified with the case of a police agent that illegitimately coerces a member of the military who committed a crime against humanity. In this case there are two illegal conducts, that of the police and that of the member of the military. The State should deter both.

*c) Confirmation by the Court's reference to international law*

The wording of *Cabrera & Montiel* somewhat reinforces the fact that the duty to exclude would not extend beyond forced confessions and statements. The IACtHR provides that the rule of exclusion of *evidence* obtained under torture or inhuman treatment "has been acknowledged by several international treaties and international bodies for the protection of human rights, insofar as they have considered that the rule of exclusion is inherent to the prohibition of such acts."<sup>75</sup> In ruling this, the IACtHR quotes two treaties, which only refer to confessions or statements.<sup>76</sup> It also refers to the non-binding conclusions of some international bodies. Among them, only the United Nations Human Rights Committee extended this rule to other kinds of evidence, and it did so in very specific terms. Indeed, this body asserted: "no statements or confessions or, *in principle*, other evidence obtained in violation of [the norm protecting from torture and cruel, inhuman or degrading treatment or punishment] may be invoked as evidence in any proceedings covered by

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<sup>75</sup> IACtHR, *Cabrera-García & Montiel-Flores v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 220, Nov. 26, 2010, para. 165 (footnotes omitted).

<sup>76</sup> The U.N. Convention against Torture (1984) and the Inter-American Convention to Prevent and Punish Torture (1985). Furthermore, these documents only exclude evidence obtained via torture, not via cruel, inhuman or degrading treatment (see Arts. 15 and 10, respectively).

article 14, including during a state of emergency.”<sup>77</sup> In other words, the Human Rights Committee does not rule out admitting other evidence obtained in violation of Article 7, since it uses the expression “in principle.” Moreover, the Committee’s decisions refer to evidence obtained via torture or cruel, inhuman, or degrading treatment or punishment, not to evidence obtained merely under coercion. The latter also occurs with the other instruments cited by the IACtHR, which require the use of torture, not just *coercion*, for excluding statements.

Thus, there is no generally binding international rule compelling the exclusion of *all evidence* obtained via torture or cruel, inhuman or degrading treatment or, *a fortiori*, under mere coercion. Hence, if the IACtHR claimed that the rule of exclusion of *evidence* was a rule recognized in international law, it must be understood that the expression “evidence” referred to confessions (and most probably to statements). If the IACtHR’s conclusions were to be interpreted as meaning *evidence in general*, the IACtHR would have been inaccurate in describing the reality of international law.

## 2.3 NO DUTY TO APPLY THE DFPT

### 2.3.1 BRIEF ACCOUNT OF THE ORIGIN OF THE DFPT

As previously stated, the IACtHR’s ruling in *Cabrera & Montiel* seems to make an implicit reference to the DFPT, since it ruled that “the absolute character of the exclusionary rule is reflected on the prohibition of granting probative value not only to the evidence obtained directly under duress, but also to evidence deriving from said act.”<sup>78</sup> In addition to this, in the early years of adjudication of the IACtHR a scholar considered that a strong argument could be made that “if a coerced confession is invalid, any additional evidence flowing from that confession should also be invalid” (MAULL, 1994, p. 111). Therefore, it is necessary to determine whether the DFPT is applicable to the Inter-American system.

The DFPT was created by the U.S. Supreme Court as a safeguard of the Fourth Amendment in the 1920 case *Silverthorne Lumber Co., Inc., et al. v. U.S.*<sup>79</sup> The doctrine “requires the exclusion of evidence (fruit) derived from evidence obtained in the underlying illegal search (the poisonous tree)” (BRINEGAR, 1981, p. 221). In the U.S., this rule has several exceptions. In cases of “involuntary confessions,” that is, confessions obtained via torture

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<sup>77</sup> Human Rights Committee, General Comment No. 32, *Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, CCPR/C/GC/32, Aug. 23, 2007, para. 6 (emphasis added).

<sup>78</sup> IACtHR, *Cabrera-García & Montiel-Flores v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 220, Nov. 26, 2010, para. 167.

<sup>79</sup> U.S, Supreme Court, *Silverthorne Lumber Co., Inc., et al. v. U.S.*, 251 U.S. 385, judgment, Jan. 26, 1920.

or cruel, inhuman or degrading treatment, or coercion that falls short from the aforementioned cases of duress, the U.S. Supreme Court would consider that physical evidence deriving from statements made under torture or cruel, inhuman or degrading treatment should be excluded from ordinary criminal courts. This may also be the case regarding real evidence derived from treatments that fall short from cruel, inhuman or degrading treatment (THAMAN, 2010, p. 359-360).

2.3.2 NO DUTY TO APPLY THE DOCTRINE IN LIGHT OF THE RATIONALES UNDERLYING EXCLUSION  
This article will analyze only the application of the DFPT to the evidence that derives (fruit) from the evidence that should be excluded in the Inter-American system, which is, as it was previously stated, coerced confessions and statements (poisonous tree). In this regard, a person who is coerced to declare may give clues leading to objective evidence. An example of this situation may be the following: the police coerces a kidnapper in order to find out the whereabouts of a person who was kidnapped. In his declaration, the kidnapper confesses that he killed his victim, and reveals the place where he concealed the body. This statement leads to the finding of other items of evidence, such as the victim's body and the kidnapper's DNA in the place where the murder took place.

In a case such as the aforementioned, the rationale of seeking the truth is not applicable, since there will be clear evidence showing the involvement of a person in a particular crime. Even if a judge grants no weight to the confession, the evidence found as a consequence of the accused person's confession may show his or her guilt. Hence, in such a case, there is no fear of being misled by the declaration; it will not be a hindrance to the finding of the truth. By contrast, the application of the DFPT may endanger reaching the truth in this case, because the tribunal of fact would be depriving itself from important evidence.

Of course, regardless of the truthfulness of the declaration, there is also a policy need of discouraging the use of duress when obtaining confessions. Furthermore, the main rationale justifying the DFPT is deterring the use of coercion to obtain evidence. Nevertheless, if public officials who exercise coercion were punished in proportion to the gravity of their wrongdoing, there would be a system that could have similar deterring effects to those of the DFPT. Thus, in a case like that described in the example, if the officers were proportionally sanctioned, neither the truth rationale nor the policy rationale would justify using the DFPT.

If the IACtHR were to follow the DFPT, and exclude real evidence that is indirectly derived from coercion, it may be hampering the search for the truth and the punishment of criminals. The IACtHR would be going against what can be considered the main aim or guiding principle of evidentiary proceedings, which is reaching the truth, and not the indirect punishment of public officials. Hence, at the Inter-American level, it is not advisable to utilize the DFPT for discouraging illegal conducts committed by the police or by security forces. It is not the role of the IACtHR to forgo its end of reaching the truth in

order to encourage a domestic policy. This does not, however, prevent the IACtHR from taking advantage of its unique system or remedies for requiring States to establish an appropriate system for punishing security forces that incurred in acts of undue coercion. In a related vein, the question may be posed as to whether States would be compelled by the IACtHR to apply the DFPT domestically. The answer to this question should be in the negative (even though States may apply it voluntarily), because the IACtHR, in addition to ordering States to search for the truth, requires them to be effective in their investigation of crimes.<sup>80</sup>

## CONCLUSION

The IACtHR has two kinds of admissibility rules. The first are the regulations established by the Court itself, either in its Rules or in its practice. The second are the rules imposed on the Court, such as the prescriptions enshrined in the ACHR or the demands of the right to due process and the *audi alteram partem* principle. The Court is very flexible when applying the first kind of rules; so much so, that they seem to be mere guidelines. If the Court follows objective and unambiguous admissibility rules, the parties will be able to understand better the state of a trial and plan their actions. Defining such rules would also prevent the Court from making distinctions that may seem discretionary. Some may argue that the establishment of clear rules of admissibility may diminish the chances of achieving a just result, because it may prevent the Court from assessing some evidence. However, if rules are established in advance, and room is made for really necessary exceptions – such as the presentation of supervening evidence –, they should have no detrimental effect on parties who are diligent.

The Court has not faced yet many cases dealing mandatory admissibility rules, but they raise interesting issues, some of which were described in this article. An example of them is the obligation to exclude statements following some kinds of coercion. The basis for this exclusion lies in the ACHR, which provides that coerced confessions are invalid. When it does so, it refers only to evidence produced before domestic courts. However, the ACHR's rule affects the *validity* of such evidence, so the IACtHR should also declare it inadmissible in its own proceedings. In the understanding that the IACtHR would be bound by this rule, this article assessed its extent. This task was necessary in light of some unclear rulings made by the IACtHR in *Cabrera-García & Montiel-Flores v. Mexico*. On the one hand, this article pondered whether the exclusion of evidence would extend to statements

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<sup>80</sup> IACtHR, *García-Prieto et al. v. El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, (ser. C) No. 168, Nov. 20, 2007, para. 115.

in general and to other means of evidence, and concluded that the exclusion should extend only to coerced confessions and other kinds of statements. However, the IACtHR is not prevented from establishing more stringent exclusionary rules in its rules of procedure. This article then referred to the DFPT and the role that it may have in the IACtHR's admission of evidence. As a result, taking particularly into account the IACtHR's doctrine of the right to the truth, it concluded that this doctrine should have no place before the IACtHR. It also concluded that States should not be obliged to adopt it.

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