
The Admissibility of Evidence Obtained by Torture under International Law

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Abstract

The article presents a survey of the international legal issues raised by the use of evidence obtained by torture, which concern not only the procedural right to a fair trial, but also play a part in protection from the abhorrence of torture itself. In this discussion, the author passes comment on the recent English decisions in the case of A and Others. The question of the admissibility of such evidence is broken down into several different cases. All those cases come within the exclusionary rule of Article 15 of the UN Convention against Torture. The article further argues that the inadmissibility is also comprehensive under the right to a fair trial, having regard to the right against self-incrimination and to the unreliability of statements obtained by torture. It is also argued that this exclusionary rule is part of customary international law and that the very concept of jus cogens obliges all states to distance themselves from any violation of its substantive content and to therefore refuse to accept any evidence obtained by torture. The article therefore exposes the exclusionary rule as coextensive with the prohibition of torture and as a function of this prohibition.

1 Introduction

While much has recently been written on the issue of torture, motivated in part by events in the ‘war on terror’,¹ the discussion has inevitably centred on the prohibition of torture² and has expended very little attention on the related questions of procedural law. It is only recently that the question of whether and in what circumstances

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¹ See, e.g., Hope, ‘Torture’, 53 *ICLQ* (2004) 807; S. Levinson, *Torture: a Collection* (2004); Strauss, ‘Torture’, 48 *New York Law School L Rev* (2004) 201; Dershowitz, ‘The Torture Warrant: A Response to Professor Strauss’, 48 *New York Law School L Rev* (2004) 275.

² *Ibid.*

any evidence obtained by torture would be admissible in court proceedings has been raised, and even then, widely differing views have been expressed. Thus, while the British Special Immigration Appeals Commission (SIAC)³ and the English Court of Appeal were content to accept the admissibility of such evidence, so long as the United Kingdom was in no way to blame for the preceding act of torture,⁴ the House of Lords unanimously overruled the latter decision.⁵ Faced with these differences of opinion, this essay will briefly analyse the international legal issues relating to the admissibility in evidence of statements⁶ made under torture.⁷ These issues arise mainly from the right to a fair trial under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁸ and Article 14 of the International Covenant on Civil and Political Rights⁹ and from the specific exclusionary rule of Article 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁰

2 The Prohibition of Torture

Even though this paper will not focus on the prohibition as such, the rules on the admissibility of statements made under torture cannot be satisfactorily explained without brief references to the general rules against such mistreatment.

The prohibition of torture in international law derives from a number of instruments, notably Article 3 of the European Convention on Human Rights (ECHR), Article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the Universal Declaration of Human Rights,¹¹ and from international *ius*

³ *A and Others v. Secretary of State for the Home Department* [2003] UKSIAC 1/2002, available at www.bailii.org/uk/cases/SIAC/2003/1_2002.html, at paras 72–84.

⁴ *A and Others v. Secretary of State for the Home Department* (No. 2) [2004] EWCA Civ 1123, [2005] 1 WLR 414, also available at www.bailii.org/ew/cases/EWCA/Civ/2004/1123.html (hereinafter *A and Others* (CA)), especially at paras 253, 265 (*per Laws LJ*). See as to this decision also Warbrick, 'The European Response to Terrorism in an Age of Human Rights', 15 *EJIL* (2004) 989, at 1011–1012, 1017–1018.

⁵ *A and Others v. Secretary of State for the Home Department* (No. 2) [2005] UKHL 71, [2005] 3 WLR 1249, also available at www.parliament.the-stationery-office.co.uk/pa/ld200506/ldjudgmt/jd051208/aand.pdf (hereinafter *A and Others* (HL)), at paras 51–52 (*per Lord Bingham of Cornhill*); paras 70–79 (*per Lord Nicholls of Birkenhead*); paras 86–97 (*per Lord Hoffmann*); paras 110–114 (*per Lord Hope of Craighead*); paras 137–138 (*per Lord Rodger of Earlsferry*); paras 148–150 (*per Lord Carswell*); paras 164–165 (*per Lord Brown of Eaton-under-Heywood*).

⁶ The further question whether any exclusionary rule would also apply to further evidence found as a result of such statements will not be addressed, nor will the question whether the exclusion of a statement requires that the accused be told about this at the beginning of the next round of questioning, so as to enable him or her to refuse to repeat any confession.

⁷ It will be assumed throughout that the evidence concerned is to be submitted to a court of law. But see as to the executive *A and Others* (HL), *supra* note 5, paras 46–49 (*per Lord Bingham*); paras 67–74 (*per Lord Nicholls*); paras 92–94 (*per Lord Hoffmann*); para. 162 (*per Lord Brown*).

⁸ 213 UNTS 221 (1950), as amended (hereinafter ECHR).

⁹ 999 UNTS 171 (1966) (hereinafter ICCPR).

¹⁰ 1465 UNTS 85 (1984) (hereinafter UNCAT).

¹¹ GA Res. 217 (III), 10 Dec. 1948.

cogens.¹² It is generally understood to be without any exceptions whatsoever,¹³ but attempts have recently been made to reduce the prohibition, allowing torture in situations of grave emergency,¹⁴ for instance, in the notorious case of the ticking time bomb.¹⁵ Any such exception from the general prohibition of torture would, however, fail to have an effect on the prohibition insofar as it underlies the subject of the present essay. There is no such state of emergency in situations where the authorities use torture in order to obtain evidence for subsequent court proceedings. Besides, even if the authorities originally used torture in an emergency and therefore lawfully, any evidence thus gained need not be admissible in court later. Only the presence of a great danger could give rise to emergency powers and those emergency powers would lapse the moment the danger has subsided. The emergency would thus only affect the immediate question of the lawfulness of torture, but not its later consequences; no such later effect would be required by the emergency.¹⁶ It may therefore be said that, so far as the present subject is concerned, the prohibition of torture is indeed absolute, regardless of recent attempts to reduce the prohibition.

3 General Issues under Article 15 UNCAT

The case of *A and Others* has raised a few issues of general application relating to Article 15 of the Convention against Torture (UNCAT), which will be examined at the outset, before the application of the article to different scenarios is discussed. Article 15 UNCAT provides as follows:

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.

A Content of the Obligation

The first general question is whether Article 15 UNCAT directly forbids the production of improperly obtained evidence in any case or whether it is limited to a general

¹² *The Prosecutor v. Anto Furundžija*, 38 ILM (1999) 317, at 349 (para. 153), [2000] 1 AC 147, 198 (ICTY, Trial Chamber II); *Al-Adsani v. United Kingdom*, ECHR RJD 2001-XI, 79, at 101 (para. 61); *R v. Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet* (No. 3), 39 ILM (2000) 581, at 589 (HL, per Lord Browne-Wilkinson); *Siderman de Blake v. Republic of Argentina*, 965 F 2d 699, at 717 (9th Cir. 1992).

¹³ See, e.g., *Chahal v. United Kingdom*, ECHR RJD 1996-V, 1831, at 1855 (para. 79).

¹⁴ See, e.g., Dershowitz, *supra* note 1; A.M. Dershowitz, *Why Terrorism Works* (2002), at 131–164; Brugger, 'May Government Ever Use Torture? Two Responses from German Law', 48 *American J Comparative L* (2000) 661. See also Justice J'Kedmi in the Israeli Supreme Court's *Judgment concerning the Legality of the General Security Service's Interrogation Methods*, 38 ILM (1999) 1471, at 1490. See, however, the criticism by Strauss, *supra* note 1; Imseis, "Moderate" Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgment concerning the Legality of General Security Service Interrogation Methods', 19 *Berkeley J Int'l L* (2001) 328.

¹⁵ Dershowitz, *supra* note 1, at 275; Justice J'Kedmi, *supra* note 14.

¹⁶ See Art. 15(1) ECHR, Art. 15(2) ECHR rules out any derogation from Art. 3, so that the requirements for exceptions from that prohibition would probably have to be stricter still, if they were viewed as permissible at all.

obligation of the state to adjust its legal order to the aim stated in the article. This question is closely related, in states where international treaties may form part of domestic law,¹⁷ to the question of whether the UNCAT is 'self-executing'¹⁸ or 'directly applicable'.¹⁹

It was addressed in *A and Others*, where Lord Justice Neuberger in the Court of Appeal derived from the opening words of the provision that

Article [15] envisages that each contracting state will ensure that evidence obtained by torture cannot be relied on in its national courts. [It] therefore carries with it the notion that, if the current national law does not have such an exclusionary rule, something more will have to be done by the national government to ensure that it does.²⁰

The opening words of Article 15 UNCAT do not force this conclusion. A reference to the 'state party' in an international treaty does not necessarily differentiate between the government and other organs of the state;²¹ it therefore does not suggest that the other organs are not likewise bound. Under general international law, the state is responsible for the conduct of all of its organs, regardless of any classification under domestic law,²² so that the state is regarded as only one entity.²³

Also, the use of the verb 'to ensure' need not mean that the state must only take measures in legislation or similar general action, i.e. 'at one remove' from the actual decisions on the admissibility of evidence. This impression could arise if Article 15 UNCAT provided that each state party shall ensure that evidence is not ruled admissible. But given that the article refers – in its description of the aim to be ensured – to the *invocation* of evidence, the use of the verb 'to ensure' is only necessary to express the duty to rule such evidence inadmissible and to *thus* 'ensure' that improper evidence is not 'invoked'. Furthermore, the subject-matter of the provision clearly concerns the judiciary, rather than primarily the legislator or the government,²⁴ which suggests that it is also directed towards the judiciary.

¹⁷ I.e. in states such as the US (see Art. VI, cl. 2 of the US Constitution) and Germany (see Art. 59(2) of the federal constitution), but not in the UK: see *MacLaine Watson v. Department of Trade and Industry*, 81 Int'l LR (1990) 671 (HL), reported in the AC as *J H Rayner (Mincing Lane) Ltd v. Department of Trade and Industry* [1990] 2 AC 418.

¹⁸ See *Foster v. Neilson* 2 Pet 253, at 314 (US Sup Ct, 1829); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F 2d 929, at 937 (11th Cir, 1987).

¹⁹ A conclusion that Art. 15 is directed only to the national legislator would mean that it is not self-executing. Strictly speaking, the other conclusion would still entail the further question whether the provision is sufficiently clear to be self-executing, but this seems a foregone conclusion.

²⁰ *A and Others* (CA), *supra* note 4, at para. 435 (*per* Neuberger LJ); see also *ibid.*, at para. 447; for what appears to be a contrary view, see also the judgment of Pill LJ in the same case, at para. 104. The English court could not apply Art. 15 UNCAT, as such, but the meaning of the provision was relevant to the assessment of domestic law in the light of international law: *A and Others* (HL), *supra* note 5, at para. 27, *per* Lord Bingham; see also *supra* note 17).

²¹ Cf. also Arts 1 ECHR, 2 ICCPR.

²² *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* [1999] ICJ Rep 62, at 87–88.

²³ See ILC, Commentary to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, 59, 85, noting the 'principle of the unity of the state'.

²⁴ German Federal Constitutional Court (BVerfG) (3rd Chamber of the 2nd Senate), 47 Neue Juristische Wochenschrift (1994) 2883; Hanseatic Regional Court of Appeal (OLG), Hamburg, 58 Neue Juristische Wochenschrift (2005) 2326, at 2327–2328.

However, as one observer noted, the Committee against Torture (CAT) 'manage[d] to cloud the issue of whether article 15 lends itself to having a direct effect',²⁵ a number of members indicating that it did and others preferring the opposite view.²⁶ Nevertheless, the fact that the CAT has considered individual complaints under Article 15 UNCAT strongly suggests that the article can be violated in individual cases.

State practice on this point is also far from uniform: when ratifying the Convention, Austria deposited a declaration stating that 'Austria regards article 15 of the Convention as the legal basis for the inadmissibility provided therein of the use of statements which are established to have been made as a result of torture.'²⁷ However, Germany appeared to hold the opposite view²⁸ and the United States expressly declared that Articles 1 through 16 UNCAT were not self-executing,²⁹ although this sweeping statement may not mean all that it appears to do, given its legislative background³⁰ and the situation under US constitutional law.³¹ State practice therefore does not give much assistance either way. The conclusion must therefore remain as determined by the wording of Article 15 UNCAT, i.e. that the provision is violated in every instance of a successful invocation of evidence coming within its scope of application. Indeed, as the German Federal Constitutional Court held in 1994, 'there are no indications that [Article 15 UNCAT] was only intended to give rise to an obligation of the contracting states to enact statutory provisions on the inadmissibility of evidence and that no directly applicable law was therefore created'.³²

B The Burden of Proof

The next question of general application is who must prove an incident of torture before Article 15 UNCAT demands the exclusion of any resulting evidence as inadmissible. Under the terms of Article 15 UNCAT, it must be 'established' that the relevant statements were made as a result of torture. This led the majority of the Court of Appeal in *A and Others* to state that the onus is on the person against whom such

²⁵ C. Ingelse, *The UN Committee against Torture. An Assessment* (2001), at 379.

²⁶ See UN Docs. CAT/C/SR.46, at paras 66 and 105; CAT/C/SR.59, at para. 10; CAT/C/SR.79, at para. 43 and UN Doc. CAT/C/SR.75, at para. 60.

²⁷ Multilateral Treaties deposited with the Secretary-General, Status as at 31 Dec. 2002, UN Doc. ST/LEG/SER.E/21, at 261.

²⁸ The Federal Republic of Germany declared that 'in [its] opinion . . . , article 3 as well as the other provisions of the Convention exclusively establish state obligations that are met by the Federal Republic of Germany in conformity with the provisions of its domestic law. . . .': Multilateral Treaties, *supra* note 27, at 262.

²⁹ *Ibid.*, at 264.

³⁰ The declaration was intended only to underline that '[a]ny prosecution (or civil action) in the United States for torture will necessarily be pursuant to . . . Federal or state law' (Letter from Assistant Secretary Mullins, Department of State, quoted in Cohen, 'Implementing the U.N. Torture Convention in U.S. Extradition Cases', 26 *Denver J Int'l L and Policy* (1998) 517, at 519, note 10).

³¹ US courts accept the exclusion of the self-executing effect of a treaty by the federal treaty-making organs even if the treaty itself would suggest otherwise: see *Flores v. Southern Peru Copper Corporation*, 343 F 3d 140, 163–165, note 35 (2nd Cir, 2003) (on the ICCPR).

³² BVerfG, *supra* note 24 (translation by the author). The OLG Hamburg, *supra* note 24, adopted this assessment almost verbatim. Neither court even considered the German declaration.

evidence is used.³³ The House of Lords, however, was unanimous in holding that it would be unfair to put the burden of proof on this person, because he or she has very few means of investigation.³⁴ The House therefore concluded that the person against whom the suspect evidence is brought need only ask the SIAC to review the provenance of such a statement, pointing out perhaps that the evidence had been provided by a state known to practice torture; this would cause the duty of investigating the background of suspect pieces of evidence to pass to the SIAC itself.³⁵

It is certainly true that a general burden of proof on the person alleging torture under Article 15 UNCAT would violate the procedural implications of the right against self-incrimination.³⁶ But it seems doubtful whether any provision on the burden of proof could properly be derived from Article 15 UNCAT, and the House of Lords seems to have arrived at its above-mentioned conclusion based not on Article 15 UNCAT, but on the basis of domestic law. This is eminently sensible, because the mere requirement that a statement is established to have been made as a result of torture does not mean that the proof of this incident of torture must be brought forward *by any particular person*. Also, any provision of Article 15 UNCAT on the burden of proof would be impossible to implement in the inquisitorial system of criminal trials. An onus on the accused is alien to this system, in which the court itself must ascertain the facts and in which no burden of proof therefore exists, be it on the accused or on the prosecution.³⁷ Article 15 UNCAT therefore does not prescribe in detail who should bear the burden of proof.

This is also not contradicted by the practice of the CAT, which the Court of Appeal misunderstood as saying that Article 15 UNCAT imposed a burden of proof on the person raising the claim of torture.³⁸ In *P.E. v. France*, the CAT found no violation of Article 15 UNCAT, because the author of the communication had not discharged her burden of ‘demonstrat[ing] that her allegations were well-founded’.³⁹ This burden is

³³ *A and Others* (CA), *supra* note 4, at para. 136 (per Pill LJ); para. 271 (per Laws LJ).

³⁴ *A and Others* (HL), *supra* note 5, at paras 55, 59 (per Lord Bingham); para. 80 (per Lord Nicholls); para. 98 (per Lord Hoffmann); para. 116 (per Lord Hope); para. 154 (per Lord Carswell). See also *ibid.*, at paras 138–145 (per Lord Rodger) and para. 172 (per Lord Brown). This was mainly because, under the special system of the SIAC, some pieces of evidence would be kept secret from these persons and disclosed only to ‘special advocates’ appointed by SIAC.

³⁵ *Ibid.*, at para. 56 (per Lord Bingham); para. 98 (per Lord Hoffmann); para. 116 (per Lord Hope); para. 155 (per Lord Carswell). Lord Nicholls agreed with Lord Bingham (at para. 80). It seems doubtful, however, whether the term ‘burden of proof’ can be used, as some of the Lords did, when the duty falls to the court, because the concept of a burden of proof implies that a failure to discharge the burden would result in a judgment against whoever has so failed: see *R v. Lambert* [2001] UKHL 37, [2002] 2 AC 545, at para. 37 (HL, per Lord Steyn).

³⁶ See *Nallaratnam v. Sri Lanka*, Communication No. 1033/2001, Views of the Human Rights Committee adopted on 21 July 2004, UN Doc. A/59/40, II, 246, at 256–257 (para. 7.4).

³⁷ As, for instance, in continental Europe; see for remarks on German law J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (1987), at 180; K. Peters, *Strafprozeß* (1987), at 305. See also *supra* note 35.

³⁸ *A and Others* (CA), *supra* note 4, at para. 136 (per Pill LJ); para. 271 (per Laws LJ); para. 509 (per Neuberger LJ).

³⁹ *P.E. v. France*, Communication No. 193/2001, Views of the CAT adopted on 19 Dec. 2002, UN Doc. A/58/44, 135, at 151 (para. 6.6).

not a function of Article 15 UNCAT, but of the procedural law of the CAT,⁴⁰ under which the author of a communication must always demonstrate the truth of his or her allegations (*actori incumbit probatio*).⁴¹ This point of international procedural law does not therefore mean that Article 15 UNCAT imposes any regulation on the burden of proof on states parties.

Nevertheless, the conclusion of the House of Lords described above would appear to be the one required by international law. This is because the question of the burden of proof is indirectly affected by the interpretation given to Article 15 UNCAT by the CAT, according to which the article 'implies . . . an obligation for each state party to ascertain whether or not statements admitted as evidence in any proceedings for which it has jurisdiction . . . have been made as a result of torture'.⁴² A state would clearly not comply with this positive duty if it were to impose the burden of proof for the requirements of Article 15 UNCAT on a private person. On the other hand, this positive obligation cannot mean that omitting a completely pointless examination even in entirely unproblematic cases would be in violation of international law. Therefore, the state's duty to investigate is only triggered by the presence of clues as to the possible provenance of the statements concerned from incidents of torture. This means that, even if the ordinary rules in a legal order impose the burden of proof on this question on a private person, the private person need only present the required clues in order to satisfy that burden. It is then incumbent on the competent state organ in any case to examine all suspect evidence with a view to its admissibility under Article 15 UNCAT.

Article 15 UNCAT may therefore be concluded not to impose any burden of proof, but to reduce any burden of proof on persons other than the state to an evidentiary burden only of triggering the positive obligation of the state.⁴³ This is what the House of Lords decided would happen under English law; the decision of the House therefore appears to be quite correct.⁴⁴

⁴⁰ See Art. 22(1) UNCAT. See also the Report of the Human Rights Committee to the General Assembly, UN Doc. A/59/40, I, 93, at 97.

⁴¹ See Art. 1(c) of the Revised Draft Resolution on the 'Principles of Evidence in International Litigation', prepared by Amerasinghe for the *Institut de Droit International*: 70-I *Annuaire de l'Institut de Droit International* (2002/2003) 392, at 393.

⁴² *G.K. v. Switzerland*, Communication No. 219/2002, Views of the CAT adopted on 12 May 2003, UN Doc. A/58/44, 177, at 185 (para. 6.10), citing *P.E. v. France*, *supra* note 39, at 150 (para. 6.3). Part of the reason for this obligation is, of course, that the state will be in a much better position to conduct this assessment than any private party: see *A and Others* (CA), *supra* note 4, at paras 513–516 (*per* Neuberger LJ).

⁴³ This may be compared to a similar issue under the ECHR: where it has been shown that an applicant has suffered injuries while in custody, the government must, by virtue of its positive obligation to protect prisoners from harm, demonstrate that these injuries did not result from mistreatment; see e.g. *Ribitsch v. Austria*, ECHR (1995) Series A, No. 336, at 25–26 (para. 34).

⁴⁴ The House was divided on another issue, namely whether evidence would be excluded when there was only a risk that it had been procured by torture: see *A and Others* (HL), *supra* note 5, at para. 118, *per* Lord Hope), the majority holding that it would not. This relates to what has to be proved and will not be discussed here.

4 The Different Situations of the Use of Evidence Obtained by Torture

Evidence obtained by torture may be used in a variety of situations: such evidence may be used against the tortured person or in court proceedings against a third person and, furthermore, the evidence may have been obtained by the state in the courts of which it is presented, or by another state. The different scenarios arising from these distinctions will be examined in turn.

A Use of Tainted Evidence in the Courts of the Torturer State against the Tortured Person

The ‘classic’ situation is that in which evidence obtained by torture is brought forward by the torturer state against the tortured person.⁴⁵ The information thus obtained is frequently a confession to a criminal offence that is later used by the prosecution in a criminal trial. There is no shortage of authority for the proposition that such evidence may not be brought, i.e. that it is inadmissible.⁴⁶ The reasons for this rule in international law will now be briefly examined.

1 Article 15 UNCAT

There can be no doubt that the wording of Article 15 UNCAT covers the situation where perpetrator and victim of torture are also, respectively, the forum state and the party against whom the tainted evidence is brought.⁴⁷ Indeed, the presentation of tainted evidence in these circumstances is certainly the classic case and therefore the one abuse of state power that Article 15 UNCAT was primarily intended to outlaw.

2 Article 6 ECHR

As regards the right to a fair trial under Article 6(1) ECHR, the most obviously relevant right is the right against self-incrimination (*nemo tenetur se ipsum accusare*). This right is not mentioned in Article 6, but appears in Article 14(3)(g) ICCPR and has accordingly been held to be implied in Article 6 ECHR, as part of ‘generally recognised international standards’.⁴⁸ The rule is based on the unreliability of evidence obtained by coercion and on the desire to help prevent torture by making sure that the torturers do not gain from their acts, i.e. that the evidence thus obtained does not have the

⁴⁵ See *Bram v. United States* 168 US 532, 543–561 (US Sup Ct, 1897).

⁴⁶ See, e.g., *Saunders v. United Kingdom*, ECHR RJD 1996-VI, 2044, at 2064 (para. 68); *Serves v. France*, ECHR RJD 1997-VI, 2159, at 2173–2174 (para. 46); and, from domestic law, *R v. Mushtaq* [2005] UKHL 25, [2005] 1 WLR 1513 (HL); *Bram*, *supra* note 45; s. 136a of the German Code of Criminal Procedure.

⁴⁷ Under Art. 31 of the Vienna Convention on the Law of Treaties (VCLT, 1155 UNTS 331 (1969)), ‘[i]f the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter’: *Competence of the General Assembly for the Admission of a State to the United Nations* [1950] ICJ Rep 4, at 8). Therefore, the question will not be further pursued. But see *infra* note 49.

⁴⁸ *Saunders*, *supra* note 46; *Serves*, *supra* note 46; see also *Funke v. France*, ECHR (1993) Series A, No. 256-A, at 21–22 (paras 41–44).

intended effect.⁴⁹ It is thus also related to the general principle according to which no-one shall be allowed to profit from his own unlawful actions.⁵⁰ It may therefore be concluded that evidence obtained by torture is inadmissible also under Article 6(1) ECHR at least where it is adduced in the courts of the torturer state against the victim of torture.⁵¹

B Use of Tainted Evidence in the Courts of the Torturer State against a Person Other than the Victim of Torture

Torture has also frequently been used to exert from a person a witness statement for use in proceedings against another person, for instance, in order to obtain statements implicating another person in a crime.

1 Article 15 UNCAT

As before, the terms of Article 15 UNCAT are wide enough to encompass this case. The phrase 'any statement'⁵² may also cover a statement of a person other than the one against whom the evidence is brought and the phrase 'any proceedings'⁵³ also extends to proceedings against a person other than the victim of torture. Even more clearly, the exclusion from the scope of Article 15 UNCAT of proceedings against a person accused of torture, i.e. the one person who certainly has not been a victim of torture, in the closing part of the article shows that the rule of inadmissibility would otherwise extend also to such a case.⁵⁴ Accordingly, there is nothing in the article to limit its protective effect to the person who was mistreated.

This is confirmed by the historical background and the *travaux préparatoires* of Article 15 UNCAT. Article 12 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was the principal basis for drafting the Convention,⁵⁵ specifically

⁴⁹ *Ibid.* ('rationale lies . . . in protecting the "person charged" against improper compulsion . . . and thereby contributing to the avoidance of miscarriages of justice'); see also *Mushtaq*, *supra* note 46, at para. 45 (*per* Lord Rodger). This is also the object and purpose of Art. 15 UNCAT, *supra* note 10; see J.H. Burgers and H. Danelius, *The United Nations Convention against Torture. A Handbook on the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (1988), at 148.

⁵⁰ *Cf. Rochin v. California* 342 US 165, 173 (US Sup Ct, 1952); see for an application of the principle *Jurisdiction of the Courts of Danzig* [1927] PCIJ Series B, No. 15, at 27.

⁵¹ See the cases cited in this section and *A and Others* (CA), *supra* note 4, at para. 265 (*per* Laws LJ); para. 445 (*per* Neuberger LJ).

⁵² The French, Russian, and Spanish versions of Art. 15 UNCAT, *supra* note 10, are to the same effect: 'toute déclaration'; 'любое заявление'; 'ninguna declaración'.

⁵³ The Russian and the Spanish versions are similarly broad ('в ходе любого судебного разбирательства'; 'en ningún procedimiento'), whereas the French wording is less explicit: 'dans une procédure'.

⁵⁴ See *A and Others* (HL), *supra* note 5, at para. 35 (*per* Lord Bingham): '[t]he additional qualification makes plain the blanket nature of this exclusionary rule'.

⁵⁵ Art. 13 of the initial Swedish draft (UN Doc. E/CN.4/1285) had been identical with Art. 12 of the UN Declaration, but was then revised to facilitate the trial of persons accused of torture (see the proposals of Austria and the US, UN Doc. E/CN.4/1314, 18). So revised, the Swedish draft was taken by the Working Group as the basic working document for its discussions: UN Doc. E/CN.4/1367, at 3. See also *infra* note 57.

provided that '[a]ny statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned *or against any other person* in any proceedings'.⁵⁶ The change from this to the present wording of Article 15 UNCAT was not intended to make any changes to the substance of the article, the drafters being anxious not to lessen the authority of the Declaration by promulgating any materially different rules.⁵⁷ It is therefore clear that Article 15 UNCAT also bans the use of evidence obtained by torture against a person who has not him- or herself been mistreated.⁵⁸

2 Article 6(1) ECHR

The right against self-incrimination is not applicable in this context, as the statements in question do not incriminate the person making the statement. However, even in the absence of any specific right implied in Article 6 ECHR, the fairness of the trial as a whole still falls to be assessed, considering all possible factors.⁵⁹ In this regard, part of the basis of the exclusionary rule,⁶⁰ i.e. the unreliability of evidence obtained by torture, remains⁶¹ and may be said to be even greater, since a person may be much more inclined to incriminate someone else under torture than him- or herself. The unreliability is even exacerbated by the fact that the person against whom statements made by another person under torture are used will rarely, if ever, be able to give evidence concerning the exact circumstances of the interrogation and the reliability of the statements.⁶² This seriously diminishes the possibilities of the person concerned to mount an effective defence,⁶³ i.e. a right inherent in all the specific aspects of the general right to a fair trial⁶⁴ contained in Article 6(3) ECHR.⁶⁵ There are, in particular, similarities to the use of anonymous statements, which are also difficult to verify as to their truth and to the methods used to obtain them.⁶⁶ The conclusion that the use of statements made under torture also offends Article 6 ECHR in the

⁵⁶ GA Res. 3452 (XXX), 9 Dec. 1975 (emphasis added).

⁵⁷ UN Doc. E/CN.4/1367, at 15; *cf.* also the mandate of ECOSOC, which was entrusted by the General Assembly with the task of drawing up the Convention 'in the light of the principles embodied in the Declaration': GA Res. 32/62, 8 Dec. 1977.

⁵⁸ *A and Others* (HL), *supra* note 5, at para. 35 (*per* Lord Bingham); *A and Others* (CA), *supra* note 4, at para. 104 (*per* Pill LJ); BVerfG (3rd Chamber of the 2nd Senate), 22 Europäische Grundrechtszeitschrift (1996) 324, at 328; Administrative Court (VG) Cologne, Case No. 3 K 8110.02 A, at paras 29–31 (quoting from an unpublished decision of the OLG Düsseldorf); Higher Administrative Court (OVG) North Rhine-Westphalia, Case No. 8 A 3852.03A, Entscheidungen zum Ausländerrecht 043 No. 63, at para. 239; the latter two cases are available at www.justiz-nrw.de.

⁵⁹ See *A and Others* (HL), *supra* note 5, at para. 26 (*per* Lord Bingham).

⁶⁰ See sect. 4 A 2 of this article.

⁶¹ *A and Others* (CA), *supra* note 4, at para. 463 (*per* Neuberger LJ).

⁶² *Ibid.*, at para. 464.

⁶³ OVG of North Rhine-Westphalia, *supra* note 58, at paras 233–239.

⁶⁴ See, e.g., *Doorson v. Netherlands*, ECHR RJD 1996-II, 446, at 469 (para. 66).

⁶⁵ C. Grabenwarter, *Europäische Menschenrechtskonvention* (2005), at 325.

⁶⁶ See *Doorson*, *supra* note 64, at 472 (para. 76); even where there are counterbalancing factors, no judgment should ever be based on such statements.

case now under consideration⁶⁷ is then further supported by the principle under which the state should not be allowed to profit from its own unlawful acts.

If any doubt persisted on this point, Article 15 UNCAT would be capable of dispelling it.⁶⁸ Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) counts 'any relevant rules of international law. . . ' among the context of the treaty provision to be interpreted⁶⁹ and the European Court of Human Rights (ECtHR) has, especially recently, placed great emphasis on the relevance of the international law surrounding the ECHR.⁷⁰ Thus, it has considered other international law when recognizing the binding force of its interim measures⁷¹ and when delineating the reach of Article 1 ECHR,⁷² and it has had special regard to other instruments on the protection of human rights.⁷³ There is, accordingly, nothing to prevent Article 15 UNCAT from strongly influencing the interpretation of Article 6 ECHR. It follows that, because Article 15 UNCAT applies to the production of evidence against one person of statements coerced from someone else,⁷⁴ the same conclusion on Article 6(1) ECHR is further reinforced.

C *The Use of Tainted Evidence in the Courts of a State not Involved in the Act of Torture*

Based on some of the above considerations, the real problem may be thought to arise in the case where the forum state is in no way responsible for the previous act of torture. Indeed, this distinction prompted the majority of the Court of Appeal in *A and Others* to hold that evidence obtained through torture by a foreign state would be admissible in an English court.⁷⁵ This finding was subsequently overruled by the House of Lords, which unanimously held that evidence obtained by torture was always inadmissible, regardless of where and by whom it was so procured.⁷⁶

In so doing, the majority of the House appears to have based its conclusions mostly on the English common law, but the following comments will relate only to

⁶⁷ *A and Others* (CA), *supra* note 4, at para. 473 (*per* Neuberger LJ); *R (Ramda) v. Secretary of State for the Home Department* [2002] EWHC Admin 1278, available at www.bailii.org/ew/cases/EWHC/Admin/2002/1278.html, at paras 16, 22 (QBD, Div Ct); OVG of North Rhine-Westphalia, *supra* note 58, at paras 233–239; VG Cologne, *supra* note 58, at para. 28.

⁶⁸ See *A and Others* (HL), *supra* note 5, at paras 29, 52 (*per* Lord Bingham). But see also the comments by Laws LJ in *A and Others* (CA), *supra* note 4, at para. 268, according to whom Art. 6 ECHR 'does not carry on its back an acceptance that other international obligations should drive our administration of Article 6'.

⁶⁹ Applied in a far-reaching manner in *Oil Platforms* [2003] ICJ Rep 161, at 182.

⁷⁰ See Tams, 'Interim Orders by the European Court of Human Rights—Comments on *Mamatkulov and Abdurasulovic v. Turkey*', 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003) 681, at 688–689.

⁷¹ *Mamatkulov and Askarov v. Turkey*, Judgment of the ECHR Grand Chamber of 4 Feb. 2005, available at www.echr.coe.int, at paras 111–117.

⁷² *Banković and Others v. Belgium and Others*, ECHR RJD 2001-XII, 333, at 341–344, 351–352 (paras 14–27, 57, 59–61).

⁷³ See, e.g., *Pini and Others v. Romania*, ECHR RJD 2004-V, 297, at 332 (para. 138).

⁷⁴ See sect. 4 B 1 of this article.

⁷⁵ *A and Others* (CA), *supra* note 4, at paras 124–138 (*per* Pill LJ); paras. 265, 273 (*per* Laws LJ).

⁷⁶ See *supra* note 5.

the international legal issues involved.⁷⁷ The conclusions of the Court of Appeal and of the House will therefore be examined first on the basis of Article 15 UNCAT, and then with regard to Article 6(1) ECHR. Customary international law will also be addressed.

1 Article 15 UNCAT

The terms of the article ('any statement', 'any proceedings')⁷⁸ are wide enough to encompass also the case where a state other than the forum state has committed the act of torture. This is confirmed by the Court of Appeal in *A and Others*,⁷⁹ which unfortunately held that such a conclusion was not possible under domestic law,⁸⁰ and by the House of Lords, which overruled the earlier judgment.⁸¹

Further support for this conclusion comes from the international bodies concerned with the implementation of the UNCAT⁸² and in particular from their reactions to the decision of the Court of Appeal in *A and Others*, which all stressed the blanket nature of the exclusionary rule.⁸³ The identity of the torturer state and the forum state are accordingly of no relevance to Article 15 UNCAT.⁸⁴ It is therefore to be welcomed that the House of Lords came to the same conclusion.

2 General Considerations under the ECHR

The case of *A and Others* also raises several points under Article 3 ECHR, which will be discussed in turn.

(a) Duty to Protect under Article 3 ECHR

It has been said that the use of evidence that another state has obtained by torture has the effect of making the acts of torture worthwhile and even of encouraging torture.⁸⁵ This raises the question of whether the use of evidence obtained by torture in these circumstances might even be in violation of Article 3 ECHR. To be sure, the obvious violation of the prohibition of torture is committed by another state, but Article 3 ECHR also includes a number of – positive as well as negative – duties to protect persons from being tortured.⁸⁶ On that basis, it might be argued that there is a duty

⁷⁷ These were addressed at length by Lord Bingham at paras. 23–45 of his speech.

⁷⁸ See *supra* notes 52, 53, for some of the other authentic versions.

⁷⁹ *A and Others* (CA), *supra* note 4, at para. 104 (*per* Pill LJ); para. 271 (*per* Laws LJ); see also *ibid.*, at para. 448 (*per* Neuberger LJ): 'where [the UNCAT] intends the reference to torture to be limited to torture carried out within a particular state's jurisdiction, it says so'.

⁸⁰ International treaties are not part of English domestic law. See *supra* notes 17, 20.

⁸¹ *A and Others* (HL), *supra* note 5, at para. 35 (*per* Lord Bingham); paras. 112–113 (*per* Lord Hope).

⁸² *P.E. v. France*, *supra* note 39, at 150 (para. 6.3); *G.K. v. Switzerland*, *supra* note 42.

⁸³ Conclusions and Recommendations of the CAT on the UK's fourth periodic report, UN Doc. CAT/C/CR/33/3, at paras 4(a)(i), 5(d) (this document was before the HL: see Lord Bingham's speech at paras 43–44); Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/59/324, at 7.

⁸⁴ See also Warbrick, *supra* note 4, at 1012. Art. 15 does not, however, apply to torture by private persons (see Art. 1 UNCAT).

⁸⁵ *A and Others* (HL), *supra* note 5, at para. 34 *in fine* (*per* Lord Bingham); *A and Others* (CA), *supra* note 4, at para. 460 (*per* Neuberger LJ). Others have compared similar cases to the criminal offence of handling stolen goods: F.-C. Schroeder, *Strafprozeßrecht* (2001), at 85.

⁸⁶ For a discussion of the various forms of a 'duty to protect' under Art. 3 ECHR, see *Limbuella v. Secretary of State for the Home Department* [2004] EWCA Civ 540, [2004] QB 1440, at paras 59–65 (CA, *per* Laws LJ).

not to encourage foreign states to commit acts of torture, which would be a negative duty to protect. Such a duty would be somewhat similar to the obligation not to extradite or expel a person if there is a real risk of that person being tortured in the receiving state,⁸⁷ in that both constructions of Article 3 ECHR would require the state not to adopt a certain course of action in order to protect persons from torture in a foreign state.⁸⁸ However, the similarities end on closer examination: firstly, the mere encouragement of torture inherent in a court decision making it worthwhile will rarely, if ever, provide sufficient evidence of a 'real risk'⁸⁹ of torture, arising for any person *from that court decision*. Secondly and more decisively, such a negative obligation also seems impossible to reconcile with the limited reach of the ECHR under its Article 1, which requires that the person holding the right be 'under the jurisdiction' of the state party to the ECHR. This requirement is readily fulfilled in the *Soering* line of cases, because the person concerned is initially in the territory of the state party and is there subjected to the act of extradition or expulsion.⁹⁰ By contrast, the persons benefiting from the negative obligation discussed here are at no material time in the forum state and the forum state only has some slight influence on whether they will be tortured or not. Such a limited influence relating only to the ambit of one Convention right is not sufficient for Article 1 ECHR,⁹¹ so that the obligation not to make torture worthwhile cannot result from a duty to protect under Article 3 ECHR.

(b) Analogy to the Recognition of Foreign Judgments: *Pellegrini v. Italy*

Another possible argument may be drawn from the rules of the ECHR on the recognition of foreign judgments. The ECtHR has held in *Pellegrini v. Italy* that Italy could not recognize a judgment of a court of the Holy See,⁹² because that judgment did not accord with the requirements that Article 6 ECHR places on states parties.⁹³ This may be taken to mean that states parties cannot give effect or recognition to the acts of foreign states if those acts are in violation of Convention standards.⁹⁴ Such an

⁸⁷ This obligation was most famously stated in *Soering v. United Kingdom*, ECHR (1989) Series A, No. 161, at 32–36 (paras 81–91).

⁸⁸ *Soering* established a negative obligation: see *N v. Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 WLR 1124, at para. 93 (HL, *per* Lord Brown); P. Szczekalla, *Die sogenannten grundrechtlichen Schutzpflichten im deutschen und europäischen Recht* (2002), at 752–753.

⁸⁹ *Soering*, *supra* note 87, at 35 (para. 88).

⁹⁰ *Banković*, *supra* note 72, at 354 (para. 68); *R (B) v. Secretary of State for Foreign & Commonwealth Affairs* [2004] EWCA Civ 1344, [2005] 2 WLR 618, at para. 53 (CA); see also *Kindler v. Canada*, Communication No. 470/1991, Views of the Human Rights Committee adopted on 30 July 1993, 14 *Human Rights LJ* (1993) 307, at 309 (para. 6.2).

⁹¹ *Banković*, *supra* note 72, at 356–357 (para. 75).

⁹² The ECtHR wrongly spoke of a court of the Vatican, which is a separate legal entity: cf. *Government of the United States of America v. Barnette and Another* [2004] UKHL 37, [2004] 1 WLR 2241, at para. 19 (HL, *per* Lord Carswell).

⁹³ *Pellegrini v. Italy*, ECHR RJD 2001-VIII, 369, at 379–381 (paras 40–48).

⁹⁴ Curiously, the obligation of non-recognition in *Pellegrini* was not limited to cases of flagrant breaches of ECHR standards by the foreign court: see *Drozd and Janousek v. France and Spain*, ECHR (1992) Series A, No. 240, at 34 (para. 110) (stating *inter alia* that there is no duty to impose Convention standards on third states), and *Barnette*, *supra* note 92, at paras 24, 27–28. This is, however, irrelevant for present purposes, as any act of torture is a flagrant breach of ECHR standards.

interpretation would isolate states parties of the ECHR from any violations of its standards; *Soering* would then serve this purpose before the violation and *Pellegrini* would do the same after the event. Therefore, when applied to the present question, this interpretation of *Pellegrini* could mean that the courts of a state party cannot declare admissible witness statements that have been obtained by means of torture; any other decision would thus be in violation of the *Pellegrini* dimension of Article 3 ECHR.

It should be noted in this respect that the recognition of a foreign judgment is nearly equivalent to a judgment by the recognizing court itself, being subject to execution in the same manner as a domestic judgment. This special significance suggests that the issue of the acceptance of evidence obtained by another state is not in fact comparable to the facts of *Pellegrini*. A ruling on the admissibility of evidence does not lend the court's power to the foreign act of investigation, and, in other words, does not transform the foreign power into the domestic legal system. The proposed analogy to the rule stated in *Pellegrini* is therefore not appropriate.

3 Article 6(1) ECHR

The presentation of evidence obtained by the acts of torture of a foreign state again raises different problems under Article 6(1) ECHR, depending on whether the evidence is used against the victim of torture or against a third person. In the former case, the solution appears clear: the rule against self-incrimination consists of two separate parts, the prohibition of any pressure to incriminate oneself and the rule on the inadmissibility of such evidence.⁹⁵ If a foreign state has exerted the pressure, a state party to the ECHR therefore remains bound to rule the resulting statements inadmissible.⁹⁶

If, on the other hand, the evidence is used against someone other than the victim of torture, the considerations as to the reliability of evidence and the rights of the defence set out above remain relevant.⁹⁷ Besides, the admission against any person of evidence obtained illegally by a foreign state may be compared to the admission of evidence thus obtained by a private person without the instigation of the forum state.⁹⁸ In such a case, the ECtHR has held in *Schenk v. Switzerland* that the admission as evidence of a telephone call illegally recorded by a private person did not render a trial unfair, as the rights of the defence relating to that piece of evidence were preserved and the judgment was not based exclusively on the recording.⁹⁹ Nevertheless, the illegality of that part of the investigation was a factor in the determination of the fairness of the proceedings and the additional factor of the unreliability of statements

⁹⁵ In *Saunders*, *supra* note 46, Art. 6 ECHR was not applicable to the duty of self-incrimination (which arose outside civil or criminal proceedings), so the ECtHR was exclusively concerned with the use of the statement made by the applicant (*ibid.*, at para. 67).

⁹⁶ See also *The Prosecutor v. Zejnil Delalić et al.*, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence (ICTY, Trial Chamber), available at www.un.org/icty/celebici/trialc2/decision-e/70902732.htm, at paras 43–55, examining Austrian interrogations.

⁹⁷ See sect. 4 B 2 of this article. The principle based on the illegality of the forum state's prior conduct does not apply, but the remoteness of the interrogation and the resulting unreliability of the information gained is even greater.

⁹⁸ See *A and Others* (HL), *supra* note 5, at para. 89 (*per* Lord Hoffmann).

⁹⁹ *Schenk v. Switzerland*, ECHR (1988) Series A, No. 140, at 29–30 (paras 46–48).

made under torture, with the resulting disadvantages for the defence,¹⁰⁰ suggests a different outcome if the evidence was obtained by a (private or foreign) breach not of Article 8 ECHR, but of Article 3.¹⁰¹ In particular, the balancing exercise inherent in determining whether a trial was fair,¹⁰² according to which flagrant breaches of the law make it impossible for a court bound by the rule of law to entertain the results,¹⁰³ means that the violation of the absolute prohibition of torture will always outweigh any interest in using the evidence concerned.¹⁰⁴ The admission of evidence obtained by torture is therefore contrary to Article 6(1) ECHR, regardless of where and by whom the act of torture was committed.¹⁰⁵ Thus, the holding of the House of Lords is again proved right.

4 Customary International Law

Apart from treaty law, the rule on the inadmissibility of evidence obtained by torture may also exist as part of customary international law.¹⁰⁶ In this respect, it may be observed that general international law may lead to the inadmissibility of evidence obtained by torture in two separate ways. Firstly, the special status of the prohibition of torture as a rule of international *jus cogens*¹⁰⁷ may oblige states to refuse to accept any results arising from its violation by another state. Secondly, state practice and *opinio juris* as the necessary ingredients of customary law¹⁰⁸ may have given rise to an independent rule on the admissibility of such evidence.

(a) Consequences from the *jus cogens* Status of the Prohibition of Torture?

The nature of the prohibition of torture as *jus cogens* may be said to imply that, in the case of a violation of the prohibition by one state, other states must distance themselves from the breach of *jus cogens*, in particular by refusing to give any effect or recognition to the foreign conduct in question. Certainly, the VCLT, which contains the most famous

¹⁰⁰ See sect. 4 B 2 of this article and *supra* note 97.

¹⁰¹ See also *Khan v. United Kingdom*, ECHR RJD 2000-V, 279, at 294 (para. 37): where the evidence in question is reliable, the need for supporting evidence is weaker. Cf. also *supra* note 66.

¹⁰² *Brown v. Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97, 115 (PC, *per* Lord Bingham).

¹⁰³ Similar considerations as to the preservation of the rule of law also weighed heavily with the HL in its judgment on the common law: see in particular *A and Others* (HL), *supra* note 5, at paras 18–22, 52 (*per* Lord Bingham); para. 167 (*per* Lord Brown).

¹⁰⁴ See, e.g., *Entscheidungen des Schweizerischen Bundesgerichts* 109 Ia 244, at 247, also available (in French) at www.bundesgericht.ch (Swiss Federal Tribunal (TF), 1983) (quoted in that case as one of the domestic decisions in *Schenk*, *supra* note 99, at 23–24, para. 30).

¹⁰⁵ See also *A and Others* (HL), *supra* note 5, at para. 52 (*per* Lord Bingham); *A and Others* (CA), *supra* note 4, at paras 439–474 (*per* Neuberger LJ).

¹⁰⁶ In *A and Others*, such a rule would have been relevant because customary international law is *ipso facto* part of the common law. See *Trendtex Trading Corporation v. Central Bank of Nigeria* (1977), 64 Int'l LR (1983) 111, at 128 (CA, *per* Lord Denning MR), at 150–153 (*per* Shaw LJ). Nevertheless, the appellants' submission in this respect was not heard in the CA (see *A and Others* (CA), *supra* note 4, at paras 80–82, *per* Pill LJ), and in the HL, only Lord Bingham alluded to the point (see *A and Others* (HL), *supra* note 5, at paras 34, 36–38—Lord Hoffmann agreed at para. 99 with all of Lord Bingham's speech).

¹⁰⁷ See *supra* note 12.

¹⁰⁸ Art. 38(1)(b) of the Statute of the International Court of Justice, UNCIO XV, 355; *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, at 44.

recognition of *jus cogens*, envisages this kind of rule only as invalidating any conflicting prior or subsequent treaty¹⁰⁹ and does not extend the concept any further, but this need not be taken as ruling out any further effects.¹¹⁰ The VCLT only deals with treaty law, so its drafters could hardly have been expected to address any other implications of their recognition of *jus cogens*, and it appears plausible that a rule which is powerful enough to limit the treaty-making power of states should also have a broader effect.¹¹¹

The leading pronouncement on these further rules following from the *jus cogens*-rank of the prohibition of torture is without doubt the judgment of the ICTY in *Furundžija*.¹¹² The Tribunal there regarded as effects of international *jus cogens* that national acts condoning torture would be unlawful and that there was universal criminal jurisdiction to try suspected torturers.¹¹³ Thus, it may be argued that even condoning torture is a violation of international law¹¹⁴ and that no state may therefore use evidence obtained by torture because it would otherwise seek gain from the violation of *jus cogens* and thus lend its implicit support to this violation of the core interests of the international community.¹¹⁵ This also sits easily with the universal jurisdiction over the crime of torture (whether or not it exists as a direct consequence of *jus cogens*),¹¹⁶ because it is inconceivable that a state could at the same time regard conduct as a serious crime and knowingly make use of it as a source of evidence.¹¹⁷ The latter conduct would fly in the face of the desire of international law to comprehensively outlaw any acts of torture, including at the level of criminal law.¹¹⁸

¹⁰⁹ Arts 53, 64, 71 VCLT.

¹¹⁰ But see Zimmermann, 'Sovereign Immunity and Violations of International Jus Cogens—Some Critical Remarks', 16 *Michigan J Int'l L* (1994/95) 433, at 438.

¹¹¹ Tams, 'Schwierigkeiten mit dem Jus Cogens', 40 *Archiv des Völkerrechts* (2002) 331, at 343; de Wet, 'The Prohibition of Torture as a Norm of International Jus Cogens and its Implications for National and Customary Law', 15 *EJIL* (2004) 97, at 99.

¹¹² *Furundžija*, *supra* note 12, at 349–350 (paras 153–156).

¹¹³ *Ibid.*, at paras 155–156.

¹¹⁴ See also Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', 16 *EJIL* (2005) 59, at 71–72, and Art. 41 of the ILC Draft Articles, *supra* note 23, at 286.

¹¹⁵ This may not be the case for the use of tainted evidence by the executive, as there is no state practice to suggest such consequences (see Tams, *supra* note 111, at 344, for the proposition that the consequences of Art. 41 of the ILC Draft Articles do not arise automatically, given the uncertainties in state practice).

¹¹⁶ This consequence is stated also in *Pinochet* (No. 3), *supra* note 12 (per Lord Browne-Wilkinson); *ibid.* (ILM), at 649 (per Lord Millett); see also *Attorney-General of the State of Israel v. Adolf Eichmann* (1962), 36 Int'l LR (1968) 5, at 298–300 (Sup Ct of Israel); *Demjanjuk v. Petrovsky* 776 F 2d 571, at 582–583 (6th Cir, 1985). But see for a different view *Arrest Warrant of 11 April 2000*, Separate Opinion of President Guillaume [2002] ICJ Rep 35; the President quoted *R v. Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet* (No. 1), 37 ILM (1998) 1302, at 1312 (per Lord Slynn), but Lord Slynn's observations refer only to immunity, not to universal jurisdiction. Still, recent changes in the practice of claiming universal jurisdiction tend to support the President's point (see Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', 1 *J Int'l Criminal Justice* (2003) 589, at 589–590).

¹¹⁷ *A and Others* (HL), *supra* note 5, at para. 35 (per Lord Bingham). See also *supra*, text at note 104.

¹¹⁸ A similar contradiction was observed in *Jones v. Ministry of the Interior of the Kingdom of Saudi-Arabia* [2004] EWCA Civ 1394, [2005] 2 WLR 808, at para. 126 (CA, per Lord Phillips MR), where it was held, against *obiter dicta* from the HL in *Pinochet* (No. 3), that a state whose servants had to pay damages for torture would not, given the criminality of torture under international law, be under an obligation to indemnify them.

The nature of the prohibition of torture as *jus cogens* therefore means that also the use of evidence obtained by torture is unlawful, wherever the act of torture may have taken place.¹¹⁹

(b) Customary Law Directly on the Use of Evidence Obtained by Torture

Although this result tends to negate the need for a rule of ordinary customary international law on the inadmissibility of statements made under torture, state practice and *opinio juris* may nevertheless have established such a rule.¹²⁰ Again, there are two routes by which such a rule of customary law may have come into existence, provided by the different sources and contexts of the relevant state practice: Article 15 UNCAT and its background and progeny on the one hand and the right to a fair trial on the other. However, considering that the question is a limited one, relating only to the existence or otherwise of a rule of evidence and not relating to any specific context, the two routes should be seen as mutually reinforcing rather than separate. It is therefore to be noted that, as of 31 December 2002, the UNCAT had acquired 132 states parties and had been signed by another nine states¹²¹ and that many states have exclusionary rules on coerced statements.¹²² The requisite *opinio juris* is then provided by resolutions of the UN General Assembly,¹²³ i.e. the UN Declaration of 1975,¹²⁴ the mandate of the drafters of the UNCAT, which suggests an emphasis on codification,¹²⁵ and the repetition of the terms of Article 15 UNCAT in General Assembly Resolution 59/182 of 20 December 2004. The customary validity of the rule of Article 15 UNCAT was also never actively disputed.¹²⁶ Considering also the similarly widespread practice relating to the right to a fair trial, it may therefore be said that the obligation of Article 15 UNCAT has achieved customary status.¹²⁷

¹¹⁹ See also *A and Others* (HL), *supra* note 5, at para. 34 (*per* Lord Bingham). This must not be confused with the divisive issue of whether the prohibition of torture as *jus cogens* takes away state immunity for such acts, which requires a different construction of *jus cogens*, extending the rule to the enforcement of its primary obligation. See Tams, *supra* note 111, at 342; de Wet, *supra* note 111, at 105–111; Zimmermann, *supra* note 110.

¹²⁰ Which would also confirm the above interpretation of *jus cogens*: see *supra* note 115.

¹²¹ Multilateral Treaties, *supra* note 27, at 260–261. International treaties may serve as evidence of state practice: *Continental Shelf (Libyan Arab Jamahiriya v. Malta)* [1985] ICJ Rep 13, at 29–30.

¹²² See the examples in *A and Others* (HL), *supra* note 5, at paras 36–38 (*per* Lord Bingham).

¹²³ See *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, at 99–100.

¹²⁴ See *supra* note 56. The term ‘declaration’ suggests an intention to codify international law: Hailbronner and Klein, ‘Art. 10’, in B. Simma *et al.* (eds), *The Charter of the United Nations. A Commentary* (2002), i, marginal note 41.

¹²⁵ See *supra* note 57.

¹²⁶ Unlike the principle of the ‘common heritage of mankind’ laid down in the UN Convention on the Law of the Sea (1833 UNTS 3 (1982)), for which a similar customary law argument was made: see G. Dahm, J. Delbrück, and R. Wolfrum, *Völkerrecht* (2002), i/2, at 431–435.

¹²⁷ See also the decisions of the BVerfG, the VG Cologne, the OLG Düsseldorf (at paras. 29–30 of the VG’s judgment) and of the OVG, North Rhine-Westphalia (at para. 239), all cited *supra*, in note 58. These decisions also fall to be considered as state practice and *opinio juris*. The judgments of the HL and of the OLG Hamburg probably count only as state practice, not being based on customary international law.

D *The Use of Tainted Evidence in the Courts of a State Implicated in the Act of Torture*

Besides the situations where the acts of torture have been committed either by the forum state or entirely and without any connivance by the forum state by another state, it is possible that the state in which the information is later used in court was complicit in the act of torture. For example, the United States are said to pursue a programme of sending suspected terrorists to countries where torture is relatively commonplace, presumably in the knowledge that torture may be used also in those cases and perhaps even with the intention of thus receiving information that would not otherwise be forthcoming; this practice is apparently known as ‘extraordinary rendition’.¹²⁸ Whatever the truth of these allegations,¹²⁹ the legal situation at least under Article 15 UNCAT seems clear, i.e. the results of any such enterprise would be inadmissible as evidence in any court of law. If the wording is wide enough to cover both the cases where the forum state has itself tortured and the case where it has not been a party to the breach of the prohibition of torture,¹³⁰ it must certainly also extend to this case, which lies between the other two propositions.

As far as Article 6(1) ECHR (or, in the case of the United States, Article 14(1)(2) ICCPR), is concerned, the only new question arising from this state of affairs appears to be that of the illegality of the alleged US conduct, which also affects the admissibility of any evidence thus obtained.¹³¹ Again, the answer appears to be clear. The rendition of a person to a foreign state where there is a real risk of torture violates Article 3 ECHR¹³² and Article 7 ICCPR.¹³³ Problems may only arise in this regard if the person in question was never on the territory of the state party in question and therefore arguably not ‘under the jurisdiction’ of that state in the sense of Articles 1 ECHR, 2 ICCPR.¹³⁴ However, if a state removes a person to another state, it must, at some point, have complete physical control over that person; ‘jurisdiction’ in the sense of Articles 1 ECHR, 2 ICCPR therefore exists.¹³⁵ It may therefore be concluded that the

¹²⁸ See e.g. de Wet, *supra* note 111, at 99, note 7, and the report in the *New Yorker* magazine of 8 Feb. 2005 (Mayer, ‘Outsourcing Torture, The Secret History of America’s “Extraordinary Rendition” Program’). Remarkably, Lord Hoffmann said in his speech in *A and Others*, at para. 82: ‘[I]n our own century, many people in the United States . . . have felt their country dishonoured by its use of torture outside the jurisdiction and its practice of extra-legal “rendition” of suspects to countries where they would be tortured’. See also *ibid.*, at para. 107 *in fine* (per Lord Hope); para. 161 (per Lord Brown).

¹²⁹ President Bush denied them in an interview with *The Times* of 27 Jan. 2005 and Secretary Rice did the same on various occasions in Nov. 2005. It is also reported that Lord Hoffmann’s remarks, as quoted in the previous footnote, ‘left the Bush administration fuming’: *The Economist*, 16 Dec. 2005, at 40.

¹³⁰ See sects 4 A 1 and 4 C 1 of this article.

¹³¹ See sect. 4 A 2 of this article.

¹³² See sect. 4 C 2 (a) of this article.

¹³³ See, e.g., *Kindler*, *supra* note 90, at 313 (para. 13.2).

¹³⁴ It may also be doubted whether the person was, in those circumstances, ‘repelled’ in the sense of Art. 3 UNCAT. See Kirgis, ‘Alleged CIA Kidnapping of Muslim Cleric in Italy’, *ASIL Insight*, 7 July 2005, available at www.asil.org/insights.htm.

¹³⁵ *Öcalan v. Turkey*, Judgment of the ECHR Grand Chamber of 12 May 2005, available at www.echr.coe.int, at para. 91.

(apparent) US practice of 'extraordinary rendition' is or would be in violation of Article 7 ICCPR.¹³⁶ It follows that the situation where the forum state is thus implicated in the act of torture is not materially different from the case in which it has itself committed the unlawful act.¹³⁷

5 Conclusion

It has been observed that the inadmissibility of statements made under torture, as based on international law, does not depend on any further considerations, be they related to the identity of the torturer state or to the persons concerned. This conclusion is in line with the general attitude international law takes towards the practice of torture and therefore underlines that the exclusionary rule 'is a function of the absolute nature of the prohibition of torture'.¹³⁸ It may therefore be said that international law provides a comprehensive set of rules to combat torture¹³⁹ and that the inadmissibility of evidence found to have been obtained by coercion is an important tool designed to eradicate torture once and for all.¹⁴⁰ The House of Lords deserves praise for making this very clear and for finally overruling the unfortunate precedent set by the Court of Appeal.

¹³⁶ The doubts raised by Kirgis, *supra* note 134, are therefore not entirely persuasive, given that Art. 3 UNCAT is based on the early *Soering*-type jurisprudence of the European Commission of Human Rights (see Burgers and Danelius, *supra* note 49, at 35, 125).

¹³⁷ See *A and Others (CA)*, *supra* note 4, at paras 250, 252, and 265 (*per* Laws LJ).

¹³⁸ *G.K. v. Switzerland*, *supra* note 42, citing *P.E. v. France*, *supra* note 39, at 150 (para. 6.3).

¹³⁹ *Furundžija*, *supra* note 12, at 347 (para. 146): '[n]o legal loopholes have been left'.

¹⁴⁰ Human Rights Committee, General Comment No. 20 (44), UN Doc. A/47/40, at 193, 195.