

# THE TRANSNATIONAL USE OF TORTURE EVIDENCE

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*The Article examines the “transnational” use of torture evidence, i.e., the use of evidence obtained by torture by third states or parties in national criminal trials. The analysis of the law of the international criminal tribunals shows that supranational torture evidence must be excluded since such evidence is unreliable and damages the integrity of the proceedings. The same applies to the admission of transnational torture evidence before national tribunals. The strict exclusionary rule of Article 15 Convention Against Torture (CAT) confirms this view. The rationale for this rule is found in the general unreliability of torture evidence, its offensiveness to civilized values and its degrading effect on the administration of justice. The burden of proof must, as a rule, rest with the state as the party that presents the controversial evidence. For practical and fundamental considerations of fairness, such evidence should not be admitted if there is a real, serious risk that it was obtained by torture.*

## INTRODUCTION

From an international criminal law perspective the question of torture has two aspects. The first is substantive: is the use of torture in all situations, even in the most extreme ones, where torture is applied to save the life of innocents (“preventive torture”), unlawful and must the torturer always be punished? I have tried to find a differentiated answer to this question elsewhere.<sup>1</sup> The second aspect is a procedural one: can evidence obtained by means of torture (“torture evidence”) be used in criminal trials? In states governed by the rule of law and fair trial, the answer is a simple and clear “no” if torture was applied by national authorities and the torture evidence is meant to be used

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<sup>1</sup> Kai Ambos, *May a State Torture Suspects to Save the Life of Innocents?*, 8 J. INT’L CRIM. JUST. 261 (2008). This is an extended version of my lecture at the (first) joint symposium on Human Dignity of the Faculties of Law of The Hebrew and Göttingen Universities in Jerusalem on Sept. 2-3, 2007.

in a subsequent criminal trial. In this situation, of “direct use of torture evidence,” national procedural norms provide explicit prohibitions.<sup>2</sup> These national prohibitions are based on human rights law, in particular Article 15 of the UN Convention Against Torture (CAT).<sup>3</sup>

A more complex question also analyzed in this Article is whether such prohibitions also apply to the *transnational use of torture evidence*, i.e. situations in which torture evidence obtained in one country and is used in another. One may distinguish between two situations: in the first situation, state A, which has a clear prohibition against the use of torture evidence, sends a suspect to state B, known for its torture practices, to obtain such evidence. In the second situation, state A, in a joint investigation with and inside state B, obtains torture evidence and uses this evidence in a domestic criminal trial in its own territory. The difference between these cases is obvious: in the first case, state B’s torture practice is intentionally and consciously used to circumvent state A’s national torture prohibitions. In the second case, the prohibiting state A obtains torture evidence accidentally, without having intentionally used state B’s torture practices. Transnational

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<sup>2</sup> See, e.g., § 136a(1) Strafprozessordnung [German Criminal Procedure Code] [hereinafter StPO]:

The suspect’s freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. Coercion may be used only as far as this is permitted by criminal procedure law. Threatening the suspect with measures not permitted under its provisions or holding out the prospect of an advantage not envisaged by statute shall be prohibited.

Paragraph (3) states: “The prohibition under subsections (1) and (2) shall apply irrespective of the suspect’s consent. Statements which were obtained in breach of this prohibition shall not be used, even if the suspect agrees to their use.” [Translation based on “IUSCOMP, The Comparative Law Society,” available at <http://www.iuscomp.org/gla/statutes/StPO.htm#136a> (last visited Feb. 19, 2008)]. See also Strafprozessordnung [Austrian Criminal Procedure Code], Bundesgesetzblatt I No. 102/2006, § 166: “To the disadvantage of an accused ... it is not allowed to use his testimony, as well as those of witnesses and co-defendants as evidence, as far as they: 1. are made under torture (Art. 7 ICCPR, [...], art. 3 ECHR, [...], and art. 1(1) as well as 15 UNCAT ...) ...” (Translated K.A.). See also Kodeks Postępowania Karnego [Polish Criminal Procedure Code], June 6, 1997, art. 171 § 5 according to which it is inadmissible “to influence the statement of the examined person through coercion or unlawful threat” and art. 170 § 1(1) *id.* according to which an evidentiary motion regarding such evidence shall be denied. In French procedure any investigative act can be appealed before the *Chambre d’Instruction* which may declare it void and exclude the obtained evidence (“requête en nullité,” art. 170-174 Code de Procédure Pénale) *cf.* GASTON STEFANI & GEORGES LEVASSEUR & BERNARD BOULOC, *PROCÉDURE PÉNALE* [marginal number] (m. no.) 107, 777 (20th ed. 2006); FABIAN PFEFFERKORN, *EINFÜHRUNG IN DAS FRANZÖSISCHE STRAFVERFAHREN* 176, 178 (2006). On the UK Police and Criminal Evidence Act (PACE) 1984 see *infra* III(B)(2).

<sup>3</sup> Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; see *infra* III(A) for a detailed analysis; see also Tobias Thienel, *The Admissibility of Evidence Obtained by Torture under International Law*, 17 EUR. J. INT’L L. 349, 356 ff (2006).

use of torture evidence must also be distinguished from the *supranational use* of such evidence, i.e. its use before international criminal tribunals. After a short explanation of the theoretical point of departure with regard to the use of illegally obtained evidence, we will begin with the supranational level, since it may produce some important findings with a view to the transnational use of torture evidence before national tribunals.

## I. THE THEORETICAL POINT OF DEPARTURE

The positivist and unprincipled approach in the use of illegally obtained evidence was, in Germany and in procedural systems influenced by German thinking, only overcome at the beginning of the 20<sup>th</sup> century with Ernst Beling's theory of the *Beweisverbote*<sup>4</sup> [prohibitions of evidence]. The basic idea of this theory is that the search for truth in criminal procedure is limited by opposing collective and individual interests.<sup>5</sup> Where these limits lie is ultimately determined by the type of standing the legal order grants the *individual vis-à-vis* the public authority.<sup>6</sup> In a liberal constitutional democracy founded on the rule of law, this position is expressed in the fundamental rights, especially human dignity and the free development of the personality, guaranteed under the constitution or applicable human rights treaties.<sup>7</sup> In such a legal system there are areas that have been protected from governmental

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<sup>4</sup> ERNST BELING, *DIE BEWEISVERBOTE ALS GRENZEN DER WAHRHEITSFINDUNG IM STRAFPROZESS* (1903) [inaugural address at the University of Tübingen]; for earlier literature see HANS BENNECKE & ERNST BELING, *LEHRBUCH DES DEUTSCHEN REICHS-STRAFPROZESSRECHTS*, Breslau (1900), §§ 83 3., at 327 ff. See also Lothar Senge, preliminary observations before § 48 m. no. 20, in *KARLSRUHER KOMMENTAR ZUR STRAFPROZESSORDNUNG* (6th ed. 2008); Matthias Jahn, *Beweiserhebungs- und Beweisverwertungsverbote im Spannungsfeld zwischen den Garantien des Rechtsstaats und der effektiven Bekämpfung des Terrorismus*, in 1 *VERHANDLUNGEN ZUM 67. DEUTSCHEN JURISTENTAG* (DJT) ERFURT Part C, C 1-128, C 21 (2008).

<sup>5</sup> See also HEINRICH HENKEL, *STRAFVERFAHRENSRECHT* 271 (1968); Harro Otto, *Grenzen und Tragweite der Beweisverbote im Strafverfahren*, 117 *GOLTDAMMER'S ARCHIV FÜR STRAFRECHT* (GA) 289 (1970).

<sup>6</sup> See Otto, *supra* note 5, at 291 referring to, BELING, *supra* note 4.

<sup>7</sup> See also BELING, *supra* note 4, at 37:

Allseitig einverstanden wird man darüber sein, dass auch der Strafprozess die Menschenwürde achten muss, und dass daher ein unlöslicher Konflikt zwischen Menschenwürde und Strafprozessinteresse zu einem Beweisverbot führen muss. ... Aber auch von der Menschenwürde abgesehen wird die moderne Anschauung—und sicher mit Recht—darauf bestehen, dass jedem seine Persönlichkeitssphäre vor Staatszugriff sichergestellt werde, auch im Strafprozess. [Everyone would agree that the criminal trial also must respect human dignity and that an unsolvable conflict between human dignity and the interests of criminal procedure must lead to a prohibition of evidence. ... However, even without the idea of human dignity, the modern view demands—surely rightly—that everyone's personal sphere must be protected from intervention of the state, also in a criminal trial.]

interference by the constitutional lawmakers; therefore, in principle, the proof of facts by measures breaching procedural rules is inadmissible and forbidden.<sup>8</sup> According to the Bundesgerichtshof (BGH) [German Federal Court of Justice], “While the aim of the criminal trial is to discover the truth, in a constitutional state, the truth cannot be pursued at all costs.”<sup>9</sup> Consequently, the accused is recognized and respected as an active subject, and not simply the object of criminal proceedings.<sup>10</sup> His freedom to make up his mind and to manifest his will is, in principle, inviolable and untouchable; it must not be encroached upon or manipulated.<sup>11</sup> Manipulation of his free will through threats, force, deception, or other similar methods must be prohibited, and this prohibition must be enforced by appropriate sanctions.<sup>12</sup>

Yet prohibitions of evidence have not only an *individual component*—safeguarding individual rights<sup>13</sup> and vindicating their violation by the exclusion of illegally obtained evidence against<sup>14</sup> the accused.<sup>15</sup> They also possess a *collective dimension*—upholding

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See also Klaus Rogall, *Gegenwärtiger Stand und Entwicklungstendenzen der Lehre von den strafprozessualen Beweisverboten*, 91 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT (ZStW) 1, 9 (1979); ULRICH EISENBERG, BEWEISRECHT DER STRAFPROZESSORDNUNG, Part 1, Cap. 3, par. 330 (6th ed. 2008); HANS-HEINER KÜHNE, STRAFPROZESSRECHT, m. no. 880 (7th ed. 2007).

<sup>8</sup> Rogall, *supra* note 7, at 6.

<sup>9</sup> Bundesgerichtshof (BGH) [German Federal Court of Justice] Judgment, June 14, 1960, reprinted in 14 BGHSt [Official collection of Judgments] 358, 365 reprinted in 13 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1580, 1582 (1960):

Allerdings hat diese Rechtsauffassung zur Folge, daß wichtige, unter Umständen die einzigen Mittel zur Aufklärung von Straftaten unbenutzt bleiben. Das muß jedoch hingenommen werden. Es ist auch sonst kein Grundsatz der StPO, daß die Wahrheit um jeden Preis erforscht werden müßte (§§ 245, 52 ff, 252, 81 a ff, 95 ff, 69 Abs. 3 StPO).

See also BGH, Judgment, Mar. 17, 1983, reprinted in BGHSt 31, 304, 309, reprinted in 36 NJW 1570, 1571 (1983): die StPO zwingt nicht zur Wahrheitserforschung um jeden Preis.“

<sup>10</sup> See Brigitte Kelker, *Die Rolle der Staatsanwaltschaft im Strafverfahren*, 118 ZStW 389, at 420 ff (2006); for a principled perspective see Uwe Murmann, *Über den Zweck des Strafprozesses*, 151 GA 65, 65 ff (2004); see especially on the subject-object relation, Paul Roberts, *Subjects, Objects, and Values in Criminal Adjudication*, in 2 THE TRIAL ON TRIAL: JUDGMENT AND CALLING TO ACCOUNT 37, 40 ff (A. Duff, L. Farmer, S. Marshall, & V. Tadros eds., 2006).

<sup>11</sup> Eberhard Schmidt, *Zur Frage der Eunarkon-Versuche in der gerichtlichen Praxis*, SÜDDEUTSCHE JURISTENZEITUNG (SJZ), 449, 450 (1949).

<sup>12</sup> Löwe-Rosenberg (LR)-Gleß, in 2 STRAFPROZESSORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ [Commentary] § 136a m. no. 79 (Volker Erb et al. eds., 26th ed. 2007).

<sup>13</sup> See especially Rogall, *supra* note 7, at 16 ff

<sup>14</sup> It is controversial, though, whether exculpatory information should not be always admitted into evidence since it operates in favor of the accused (in this sense, Claus Roxin et al., *Die Mühlenteichtheorie, Überlegungen zur Ambivalenz von Verwertungsverboten*, 26 STRAFVERTEIDIGER (StV) 655-56, 659-60 (2006); Claus Roxin, *Beweisverwertungsverbot bei bewußter Mißachtung des Richtervorbehalts* (Bspr. von BGH StV 2007, 337), 27 NEUE ZEITSCHRIFT FÜR STRAFRECHT (NSTZ) 616, 618 (2007); conc. Jahn, *supra* note 4, at C 112 ff (114).

<sup>15</sup> On this “vindication” or “remedial” theory see PAUL ROBERTS & ADRIAN ZUCKERMANN, CRIMINAL EVIDENCE 151, 152 ff (2004).

the *constitutional integrity* of the legal order,<sup>16</sup> especially through the guarantee and realization of a fair trial.<sup>17</sup> This was recognized in 1961, long after Beling, by the U.S. Supreme Court when explaining the exclusionary rule—the equivalent to the doctrine of the “Beweisverbote” by “the imperative of judicial integrity,”<sup>18</sup> developed by others to “moral integrity.”<sup>19</sup> A positive side-effect of exclusionary rules may be the disciplinary impact these rules may have on the prosecutorial authorities; nevertheless, this cannot be their primary purpose, for there are specific administrative procedures for sanctioning the unlawful conduct of public officials.<sup>20</sup>

The public or state interest to find the truth in a criminal trial can be outweighed by *private interests* protected as fundamental guarantees or rights or even by the *collective interest* in the integrity of criminal proceedings and ultimately the constitutional order. This two-pronged *individual-collective approach* is also pursued on the international level, in particular as regards the possible impact of the use of “tainted” evidence on the integrity of the proceedings as discussed in Section II. The respective system of prohibitions of evidence or exclusionary rules may generate tensions between material justice (realization of the *jus puniendi*) and procedural justice (protection of rights and judicial integrity).<sup>21</sup> It may, in other words, entail a conflicting relationship between,

<sup>16</sup> See also II EBERHARDT SCHMIDT, LEHRKOMMENTAR STRAFPROZESSORDNUNG ETC. § 136a m. no. 21 for his doctrine of the moral superiority of the state, on the basis of which the demand for a fair trial is developed (*id.* vol. I, m. no. 40, 44, 49). Gerhard Fezer’s doctrine of the state’s self-limiting function points in this direction as well see GRUNDFRAGEN DER BEWEISVERWERTUNGSVERBOTE 20 ff (1995).

<sup>17</sup> WERNER BEULKE, STRAFPROZESSRECHT, m. no. 454 (10th ed. 2008); Thorsten Finger, *Prozessuale Beweisverbote—Eine Darstellung ausgewählter Fallgruppen*, 38 JURISTISCHE ARBEITSBLÄTTER (JA) 529, 530 (2006).

<sup>18</sup> *Mapp v. Ohio*, 367 U.S. 643, 659 (1961); see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 381 (3rd ed. 2002) (pointing, however, also to the subsequent case law coming close to renouncing the whole Fourth Amendment exclusionary rule).

<sup>19</sup> ROBERTS & ZUCKERMAN, *supra* note 15, at 157 ff.

<sup>20</sup> The “disciplinary” or “deterrence” effect is controversial: in favor the U.S. Supreme Court since *Mapp v. Ohio*, see DRESSLER, *supra* note 18, at 381-82; for a critical view see Otto, *supra* note 5, at 292, 301 (arguing that exclusionary rules are “kein geeignetes Mittel zur Disziplinierung der Strafverfolgungsorgane” [“not a suitable method for disciplining prosecutorial agents”]); see also ROBERTS & ZUCKERMAN, *supra* note 15, at 155 ff; in this critical vein also decision 2(d), Section of Criminal Law, 67 DJT (2008), *supra* note 4, according to which the function of the prohibitions or exclusions of evidence should not be the upholding of the lawful conduct of prosecutorial agencies (42 votes in favor, 31 against, 5 abstentions). See Frank Arloth, *Dogmatik in der Sackgasse—Zur Diskussion um die Beweisverwertungsverbote*, 153 GA 258, at 259 (2006) (discussing the practical consequences for police training); in this more positive vein, see also Cornelius Prittwitz, RICHTERVORBEHALT, BEWEISVERWERTUNGSVERBOT UND WIDERSPRUCHSLÖSUNG BEI BLUTENTNAHMEN GEM. § 81 A ABS. 2 StPO, 28 StV 486, 494 (2008); Jahn, *supra* note 4, at C 57 ff.

<sup>21</sup> See Knut Amelung, *Zum Streit über die Grundlagen der Lehre von den Beweisverwertungsverbote*, in FESTSCHRIFT FÜR CLAUS ROXIN 1259, 1279 (2001); MARKUS JÄGER, BEWEISVERWERTUNG UND BEWEISVERWERTUNGSVERBOTE IM STRAFPROZESS 128 (2003).

on the one hand, the interest in a functioning administration of criminal justice with the goal of the efficient investigation and punishment of criminal offenses, and, on the other, the protection of the fundamental rights of the accused and the integrity of the system as a whole.<sup>22</sup> It does not allow for an inflexible “simple, algorithmic, all-purpose rule”<sup>23</sup> but often demands a delicate balancing of interests that leads to decisions that seldom satisfy both parties, prosecutor and defense counsels, equally. In any case, principled rules governing the use of illegally obtained evidence, and their consequences, are the price that a constitutional state, predicated on the rule of law, a true *Rechtsstaat*, must be willing to pay.

## II. THE SUPRANATIONAL USE OF TORTURE EVIDENCE

Although the trials before the UN ad hoc tribunals (International Criminal Tribunal for the former Yugoslavia<sup>24</sup> (ICTY), and International Criminal Tribunal for Rwanda,<sup>25</sup> (ICTR)) are strongly influenced by the common law tradition,<sup>26</sup> with regard to the admission of evidence a liberal approach, more typical of the civil law tradition, has been adopted.<sup>27</sup> There are no strict technical rules. This is, on the one hand, due to the need of an international tribunal “to combine the legal traditions of many countries”;<sup>28</sup> on the other hand, it is the result of the fact that international criminal courts, given the violent context of their cases, are often confronted with a lack of evidence, which must be compensated for by flexible evidentiary rules.<sup>29</sup>

<sup>22</sup> Bundesverfassungsgericht [Federal Constitutional Court] (BVerfG) Entscheidungen [Decisions] vol. 44, at 353, 374.

<sup>23</sup> ROBERTS & ZUCKERMAN *supra* note 15, at 159.

<sup>24</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by SC May 25, 1993, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute].

<sup>25</sup> Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598, 1600 (1994) [hereinafter ICTR Statute].

<sup>26</sup> Jan Christoph Nemitz, *Die Hauptverhandlung unter besonderer Berücksichtigung des Beweisrechts*, in INTERNATIONALE STRAFGERICHTSHÖFE 53, 53 (Stefan Kirsch ed., 2005).

<sup>27</sup> RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 93 (2002); Kai Ambos, *The Structure of International Criminal Procedure: Adversarial, Inquisitorial or Mixed?*, in INTERNATIONAL CRIMINAL JUSTICE: A CRITICAL ANALYSIS OF INSTITUTIONS AND PROCEDURE 429, 477 ff (Michael Bohlander ed., 2007); INTERNATIONALES STRAFRECHT § 8 M. NO. 32 (2d ed. 2008).

<sup>28</sup> KARIM KAHN & RODNEY DIXON, ARCHBOLD, INTERNATIONAL CRIMINAL COURTS, PRACTICE PROCEDURE AND EVIDENCE § 9-1 (2d ed. 2005).

<sup>29</sup> *Cf.* MAY & WIERDA, *supra* note 27, at 95, 98 ff; KAHN & DIXON, *supra* note 28.

## A. ICTY/ICTR

The rules for the admission of evidence are found in the judge-made Rules of Procedure and Evidence (RPE) of both tribunals.<sup>30</sup> As both sets of norms are essentially identical, the discussion focuses on RPE-ICTY and indicates the differences where necessary. As yet, neither the ICTY nor the ICTR have had to adjudicate a question regarding the admissibility of torture evidence.

Rule 89, the “*Magna Carta*” of the law of evidence,<sup>31</sup> contains the general principle that “a chamber may admit any relevant evidence which it deems to have probative value”<sup>32</sup> and that it “may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.”<sup>33</sup> Although the RPE-ICTR does not contain such a specific exclusionary rule in the section on the Rules of Evidence (Rules 89 *et seq.*), Rule 70 (F) of the RPE-ICTR confirms the Chamber’s inherent power under Rule 89 (C) to exclude evidence “if its probative value is substantially outweighed by the need to ensure a fair trial.”<sup>34</sup> While Rule 89 (D) RPE-ICTY provides for a broad discretion regarding exclusion of evidence—unfettered by national rules of evidence (Rule 89 (A))—Rule 95 is more specific with regard to evidence obtained by certain (prohibited) methods and thus is specifically applicable to torture evidence. It reads as follows: “No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.”

While it is controversial whether this Rule constitutes *lex specialis* to Rule 89 (D)<sup>35</sup> or only clarifies the latter’s contents,<sup>36</sup> it is clear that it excludes evidence obtained by the prohibited methods without any further balancing as expressed, in contrast, in Rule 89 (D): “outweighed by the need.” Also, it still leaves discretion to the judges

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<sup>30</sup> ICTY Statute, *supra* note 24, art. 15; ICTR Statute, *supra* note 25, art. 14.

<sup>31</sup> Nemitz, *supra* note 26, at 56.

<sup>32</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rule 89 U.N. Doc. IT/32/Rev. 42, Feb. 11, 1994, (amended Nov. 4, 2008), *available at* [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_Rev42\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev42_en.pdf) [hereinafter RPE-ICTY] and UN Doc. ITR/3/Rev.1 (1995) [hereinafter RPE-ICTR].

<sup>33</sup> RPE-ICTY, *supra* note 32, Rule 89 (D).

<sup>34</sup> *See* May & Wierda, *supra* note 27, at 100; *see also* WILLIAM SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS—THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 459 (2006).

<sup>35</sup> *Compare* CHRISTOPH J. M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 295 (2003) with Nemitz, *supra* note 26, at 70 according to which Rule 95 has only *klarstellende Bedeutung* [a clarifying function].

<sup>36</sup> *Cf.* Nemitz, *supra* note 26, at 70.



to decide which methods “cast substantial doubt on its reliability,” or when the admission of evidence would be “antithetical” to and would “seriously damage” the proceedings. Thus, whether certain evidence is to be admitted or excluded depends on the circumstances of each case.

Interestingly, the original version of the Rule was clearer. It excluded the admission of evidence obtained by means “which constitute a serious violation of internationally protected human rights.”<sup>37</sup> Given the protection against torture in various human rights instruments and the status of the torture prohibition as *jus cogens*,<sup>38</sup> torture evidence constitutes “a serious violation of internationally protected human rights” and thus would necessarily have to be excluded. However, with the amendment of Rule 95, the exclusion is now “no longer a matter of means but one of result.”<sup>39</sup> As the Rule stands, even if internationally protected human rights, such as the freedom from torture, are violated, the judges still have discretion to admit torture evidence, as long as they consider it as reliable and not grievously damaging to the integrity of the proceedings. Thus, these admissibility conditions must be analyzed in more detail.

#### 1. DOES TORTURE CAST SUBSTANTIAL DOUBT ON THE RELIABILITY OF EVIDENCE?

The unreliability of torture evidence was the main reason, apart from humanitarian considerations, for its abolition in the post-revolutionary, enlightened reformed criminal procedure codes of the European continent.<sup>40</sup> Scholars agree that the infliction of torture is more likely to test a suspect’s capacity to endure pain than his loyalty to the truth.<sup>41</sup> Clearly, most people questioned under torture would admit almost anything to stop the infliction of further pain. In the old inquisitorial criminal

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<sup>37</sup> The original title read is “Evidence obtained by means contrary to international protected human rights”; modified by revision 12 of the RPE. Quoted according to KARIN N. CALVO-GOLLER, THE TRIAL PROCEEDINGS OF THE INTERNATIONAL CRIMINAL COURT—ICTY AND ICTR PRECEDENTS 97 (2006); see also SALVATORE ZAPPALÀ, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 151 (2003). (The original title read is “Evidence obtained by means contrary to international protected human rights”; modified by revision 12 of the RPE).

<sup>38</sup> See *supra* note 2.

<sup>39</sup> CALVO-GOLLER, *supra* note 37, at 97.

<sup>40</sup> See particularly ALEXANDER IGNOR, GESCHICHTE DES STRAFPROZESSES IN DEUTSCHLAND 1532-1846, 163 ff (2002) (pointing out that torture was not only considered as inhumane but also increasingly as inefficient as to the prosecution and punishment of the true criminals).

<sup>41</sup> JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF, EUROPE AND ENGLAND IN THE ANCIEN RÉGIME 8 (2006); HANS-HEINER KÜHNE, STRAFPROZESSRECHT m. no. 890 (7th ed. 2007); Rosemary Pattenden, *Admissibility in Criminal Proceedings of Third Party and Real Evidence Obtained by Methods Prohibited by UNCAT*, 10 INT’L J. EVIDENCE & PROOF 6 ff (2006).



procedure of mediaeval times the issue of reliability often led to limiting the use of torture to information which could be verified afterwards, e.g., by searching the place where the tortured suspect indicated the murder weapon lay.<sup>42</sup> The unreliability of torture evidence was also one of the reasons for the exclusionary rule of Article 15 CAT.<sup>43</sup> It was felt that to invoke such an unreliable statement before a court would be contrary to the principle of “fair trial.”<sup>44</sup> As a result, while a trial chamber should always exclude torture evidence, independent of its provenance, in light of the “substantial doubt” as to its reliability, this does not exclude the possibility that there may be cases where such evidence may prove to be correct and lead to further decisive evidence. Thus, the crucial question as to its admissibility is considered in the following section.

## 2. IS THE ADMISSION OF TORTURE EVIDENCE ANTITHETICAL TO AND WOULD IT SERIOUSLY DAMAGE, THE INTEGRITY OF THE PROCEEDINGS?

While this part of Rule 95 does not refer to the method by which the evidence is obtained but to the consequence of its admission for the proceedings as a whole, a trial chamber must still assess the evidence in light of the manner and surrounding circumstances in which it was obtained. Whether the admission of the evidence would be “antithetical” and “seriously damage the integrity of the proceedings” depends on the gravity of the violation committed to obtain the evidence. As a rule, with an increasing level of gravity of the violation, the likelihood that the admission would be “antithetical” and would “seriously damage” the proceedings increases as well.<sup>45</sup>

As to torture evidence, one may distinguish between such evidence obtained by the Tribunal’s investigators themselves or by third parties. In the former case there can be little doubt that such evidence will be deemed as highly antithetical and seriously damaging to the integrity of the proceedings and therefore would have to be excluded. This follows, first of all, from the importance of the torture prohibition, which the ICTY has recognized in its often quoted *Furundžija* decision referring

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<sup>42</sup> LANGBEIN, *supra* note 41, at 5.

<sup>43</sup> *See infra* note 46.

<sup>44</sup> J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATION CONVENTION AGAINST TORTURE—HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL INHUMAN AND DEGRADING TREATMENT AND PUNISHMENT 148 (1988).

<sup>45</sup> *See, e.g.*, Prosecutor v. Brđanin, Case No. IT-99-36-T, Decision on the Defence Objection to Intercept Evidence (Mar. 1, 2004), para. 61 ff.

to this norm as *jus cogens*<sup>46</sup> and as “one of the most fundamental standards of the international community.”<sup>47</sup> In *Nikolić*, a trial chamber even considered *obiter* that a serious mistreatment or torture of a suspect may constitute an obstacle to the Tribunal’s jurisdiction:

In circumstances where an accused is very seriously mistreated, maybe even subject to ... torture, before being handed over to the Tribunal, this may constitute a legal impediment to the exercise of jurisdiction over such an accused. This would certainly be the case where persons acting for SFOR or the Prosecution were involved in such very serious mistreatment ...<sup>48</sup>

“it would be inappropriate for a court of law to try a victim of these abuses.”<sup>49</sup>

From this it follows, *a fortiori*, that torture evidence would be antithetical and seriously damaging to the integrity of the proceedings and therefore must be excluded. This applies not only to such evidence obtained by Tribunal investigators but also by persons acting on behalf of the Tribunal, e.g., UN peacekeeping forces. Another question is, however, how evidence obtained by other, independent *third parties*, in particular national authorities, acting without any involvement of the Tribunals, must be treated. This question is of great practical importance for any international criminal tribunal since it normally has not enough staff to obtain all the evidence and depends on the cooperation of the national authorities.<sup>50</sup>

As noted above, the Tribunals have not taken a decision on the admission of torture evidence. However, they have had to deal with evidence obtained by national authorities in violation of the suspect’s rights applicable before the Tribunals. Thus, the *Čelebići* Chamber questioned whether it could admit evidence obtained in an interrogation by the Austrian police in the absence of the suspect’s counsel. Although the applicable national (Austrian) law of the time did not grant a right to counsel during police interrogation and therefore the evidence was legally obtained under Austrian law,<sup>51</sup> the Trial Chamber held that the Austrian procedure was in breach of the right

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<sup>46</sup> Prosecutor v. Furundžija, Case No. IT-95-17/1, Judgment, paras. 144, 153 ff (Dec. 10, 1998).

<sup>47</sup> *Id.* para. 154; see also Ambos, *supra* note 1, at 265 ff.

<sup>48</sup> See Prosecutor v. Nikolić, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, (Oct. 9, 2002), para. 114; also quoted in Prosecutor v. Nikolić, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, (June 5, 2003), para. 28 [hereinafter *Nikolić Appeal Decision*].

<sup>49</sup> *Nikolić Appeal Decision*, *supra* note 48, para. 30.

<sup>50</sup> SAFFERLING, *supra* note 35, at. 292.

<sup>51</sup> The new Code of Criminal Procedure of 2004 grants such a right, see sect. 164(2).

to counsel according to Article 18(3) ICTY-Statute and therefore the statement before the police was inadmissible at trial.<sup>52</sup> A similar approach seems to have been taken by the ICTR's first appeal decision in *Barayagwiza*.<sup>53</sup> The question was whether the excessive period of the accused's pre-trial-detention in Cameroon, without being promptly informed of the charges brought against him, rendered his otherwise lawful arrest unlawful and constituted an obstacle to the Tribunal's personal jurisdiction on the basis of the "abuse of process doctrine." The Appeal Chamber answered this in the affirmative, separating the question of the organ responsible for the length of the detention from the effect of the violation as such:

even if fault is shared between the three organs of the Tribunals—or is the result of the action of a third party, such as Cameroon—it would undermine the integrity of the judicial process to proceed. Furthermore it would be unfair for the Appellant to stand trial on these charges if his rights were egregiously violated. Thus, under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's right.<sup>54</sup>

While it follows, again *a fortiori*, that torture evidence can never be admitted, a different appeals chamber later altered this decision focusing on the organizational responsibilities for the length of the detention, and denying a remedy for a violation of the accused's rights since it was the main responsibility of third parties.<sup>55</sup> In a similar vein, in *Brđanin*, a trial chamber admitted transcripts of illegally intercepted telephone conversations by the security forces of Bosnia and Herzegovina with the argument that the "function of this Tribunal is not to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence."<sup>56</sup> In other decisions the ICTR has abstained from supervising the legality of the acts of national authorities.<sup>57</sup>

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<sup>52</sup> Prosecutor v. Delalić et al., Case No. IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence para. 52 (Sept. 2, 1997).

<sup>53</sup> Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, Decision (Nov. 3, 1999).

<sup>54</sup> *Id.* para. 73.

<sup>55</sup> Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, Decision, para. 71 (Mar. 31, 2000), referring to new facts that "diminish the role played by the failings of the prosecutor as well as the intensity of the violation of the rights of the appellant."

<sup>56</sup> See *Prosecutor v. Brđanin*, *supra* note 45, para. 63 (no. 9); see also *Prosecutor v. Kordić et al.*, Case No. IT-95-14/2-T, Oral Decision of Judge May (Feb. 2, 2000), Transcript 13671: "It's not the duty of this Tribunal to discipline armies or anything of that sort" (referred to in *Brđanin id.*).

<sup>57</sup> See Göran Sluiter, *International Criminal Proceedings and the Protection of Human Rights*, 37 NEW ENG. L. REV. 935, 941 *see especially* n.25 (2002-2003).

Summing up this case law, it is clear that the Tribunals would not admit torture evidence produced by their own investigators or by forces acting on their behalf (as, for example, SFOR in *Nikolić*), but it is unclear how they would treat such evidence if it were produced by third parties acting completely independently. Torture evidence must not be admitted under any circumstance, independent of the provenance of this evidence. Given the status of the torture prohibition as “one of the most fundamental standards of the international community,”<sup>58</sup> it cannot be compared to the ordinary or minor breaches of procedural rules in the cases examined above. Even in these cases the Tribunals do not ignore the breach but only admit, in some cases, the evidence in question due to its importance for the respective trial. The fact that the evidence was produced by a third party may play a role in favor of its admission. In other words, the personal or organizational responsibility for the breach, i.e., the question whether the breach can be imputed to the Tribunals, is but one consideration in the underlying balancing of interests.<sup>59</sup> Clearly, the result of this balancing changes with the gravity of the procedural breach involved and the considerations in favor of admission of evidence cannot outweigh a breach of such an important prohibition as the one against torture.<sup>60</sup> In other words, the procedural rule—in *casu* the prohibition to obtain evidence by means of torture—can acquire such an importance that it forecloses any balancing of interests and its breach necessarily entails the exclusion of the evidence in question. Similarly, the U.S. Supreme Court’s “silver platter doctrine,”<sup>61</sup> on the basis of which evidence obtained by private parties or a foreign government was generally permitted,<sup>62</sup> has been limited to instances where the procedural breach, as in the case of torture, “shocks the conscience of American courts.”<sup>63</sup>

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<sup>58</sup> *Prosecutor v. Furundžija*, *supra* note 47, para. 154.

<sup>59</sup> Such a balancing can also be identified in *Prosecutor v. Brđanin*, *supra* note 45, paras. 63 (no.7), 63 (no. 8) where the Chamber states (referring to *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Tendering of Prosecution Exhibits 104-108, paras. 18-20 (Feb. 9, 1998)) that its task would be endangered if evidence could not be admitted because of “a minor breach of procedural rules” given the gravity of the charges brought before it in general and *in casu* against the accused. Thus, “it would be utterly inappropriate to exclude relevant evidence due to procedural considerations, as long as the fairness of the trial is guaranteed.”

<sup>60</sup> See also *Sluiter*, *supra* note 57, at 946-47 (emphasizing the nature of the violation).

<sup>61</sup> On the bases of the national silver platter doctrine, the U.S. Supreme Court also originally permitted the use of evidence in federal courts that had been obtained illegally by state officials. However, it later denounced this approach in *Elkins v. United States*, 364 U.S. 206, 80 S. Ct. 1437 U.S. (1960); see also JOHN L. WORRALL, CRIMINAL PROCEDURE 55 (David Repetto ed., 2d ed. 2007).

<sup>62</sup> *United States v. Janis*, 428 U.S. 433, 455 n.31 (1976).

<sup>63</sup> *United States v. Fernandez-Caro*, 677 F. Supp. 893, 895 (S.D. Tex. 1987): “If the conduct of foreign officers “shocks the conscience of American courts, the fruits of their mischief will be excluded” (further references omitted K.A.). See also Michael P. Scharf, *Tainted Provenance:*

There are additional considerations, based on the Tribunals' law, against the admission of torture evidence, even if obtained by third parties. First, the Tribunals' statutory obligation to ensure that a trial is fair and expeditious extends to pre-trial violations of procedural rules<sup>64</sup> since such violations may affect the fairness of the proceedings as such. Thus, such violations must be addressed and cannot be disposed of by mere organizational considerations related to the responsibility for the violation.<sup>65</sup> Second, Rule 95 should be interpreted in light of its original version which, as set out above, clearly prohibited the admission of torture evidence. The alteration of the rule was intended not to limit but to broaden the rights of the accused.<sup>66</sup> Third, on February 15, 2002 the *Brđjanin* Chamber itself issued an Order on the Standards Governing the Admissibility of Evidence, where it is stated that "statements, which are not voluntary but are obtained from suspects by oppressive conduct, cannot pass the test under Rule 95 of the Rules."<sup>67</sup> Similarly, within the framework of the guilty plea procedure, Rule 62*bis*, the plea must be made voluntarily in order to be accepted as a confession.<sup>68</sup> This shows that voluntariness, which is always quashed by torture, is a prerequisite for a declaration to be admitted.<sup>69</sup> Fourth, there is a teleological argument with regard to the crimes within the jurisdiction of the Tribunals: If torture

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*When, if ever, Should Torture Evidence be Admissible?*, 65 WASH. & LEE L. REV. 129, 151 ff (2008) (extending this argument to the use of torture evidence by the Tribunals if it is obtained by third parties).

<sup>64</sup> ICTY Statute, *supra* note 24, art. 20(1); ICTR Statute, *supra* note 25, art. 19(1).

<sup>65</sup> Cf. Sluiter, *supra* note 57, at 942 ff (arguing that "every human rights violation" must be taken into account).

<sup>66</sup> ZAPPALLÀ, *supra* note 37 (referring to the ICTY Second Annual Report, para. 26 with n.9 read together with the title) ("To broaden the rights of suspects and accused persons"), available at <http://www.un.org/icty/rappannu-e/1995/index.htm> (last visited Feb. 19, 2008).

<sup>67</sup> *Prosecutor v. Brđjanin*, *supra* note 45, para. 67.

<sup>68</sup> Cf. RPE-ICTY, *supra* note 32, Rule 62*bis*, which provides: "If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that: (i) the guilty plea has been made voluntarily; ..." (emphasis added K.A.).

<sup>69</sup> Clearly, the analogy to the guilty plea rests on the premise that it is a confession and as such a piece of evidence (Cf. ANTHONY HOOPER & DAVID ORMEROD, BLACKSTONE'S CRIMINAL PRACTICE 2009 F17.2 (s. 2645) (2008): "A plea of guilty is a confession for the purposes of PACE 1984, s.82(1), and as such admissible in evidence provided that the provisions of s. 76(2) are complied with"). Strictly speaking, however, it is only a forensic act and its admission into evidence may vary according to the circumstances of the case (Cf. *R v. Rimmer* [1972] 1 WLR 268 CA, invoked by Blackstone as cited above, but stressing the importance of the "facts of the case" and judicial discretion and stating that a plea will only "rarely" be admitted into evidence [272]; See also *R v. Adams (Ishmael)* [2008] 1 Cr App R 35, [2007] EWCA Crim. 3025: "Whether a suggestion of a plea at a case management hearing is or is not a provable admission or is or is not a safe basis for identifying what the issue is will vary from case to case.").

is part of these crimes, as a crime against humanity or a war crime,<sup>70</sup> it would be paradoxical, or at least hypocritical, if the Tribunals could admit evidence obtained by conduct that is then prosecuted by them.<sup>71</sup> This argument cannot be rebutted by the argument that the Tribunals have to prosecute the “gravest crimes that are known to mankind” and therefore a more flexible approach to the admission of torture evidence is justified.<sup>72</sup> This is not a substantive argument but a procedural one, discussed above with regard to the balancing of interests. Thus, the same counter-argument applies: there is a limit to the balancing exercise if one of the values in the balance is absolute, i.e., *in casu* the absolute prohibition of torture.

## B. THE INTERNATIONAL CRIMINAL COURT

The situation before the International Criminal Court (ICC) is essentially the same. Article 69(7) ICC Statute—*lex specialis* to the general admissibility rule of paragraph (4) of the same article<sup>73</sup>—repeats the (new) Rule 95 ICTY/ICTR stating: “Evidence obtained by means of a violation of this statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.” Thus, in principle, evidence obtained by violation of human rights, is not *per se* inadmissible, but the decision depends on its reliability and its effect on the integrity of the proceedings. As to torture evidence, the same considerations as above would lead to its absolute inadmissibility.<sup>74</sup> To ensure the integrity of the proceedings, this should apply to all torture evidence independent of its source or its effect in favor or against the accused.<sup>75</sup>

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<sup>70</sup> See ICTY Statute, *supra* note 24, arts. 2 (b), 5 (f) and *see also* ICTR Statute, *supra* note 25, arts. 4 (a) & 3 (f).

<sup>71</sup> *See also* Pattenden, *supra* note 41, at 15.

<sup>72</sup> Scharf, *supra* note 63, at 155.

<sup>73</sup> The International Criminal Court, created by the Rome Statute of the International Criminal Court, art. 69(4), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute] focuses on the “probative value” of the evidence and possible “prejudice” to a fair trial. *See also* Donald K. Piragoff, *Commentary on ICC Statute, Article 30*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 69, m. no. 54 (Otto Triffterer ed., 1999). The RPE-ICC (PCNICC/2000/1/Add 1, 2 Nov. 2000) does not contain more concrete rules, *see* Rules 63 ff.

<sup>74</sup> For the same result CALVO-GOLLER, *supra* note 37, at 286 (“The difficulty does not lie in cases of evidence obtained by means of grave breaches of an internationally recognized human right, such as torture for example, but by means of less severe measures.”)

<sup>75</sup> *See also* Piragoff, *supra* note 73, art. 69 m. no. 75 (“no distinction between evidence proffered by the Prosecutor or the accused, or requested by the Court”). The point is controversial though as for torture evidence used against the torturer; *see* the discussion of Scharf’s position *infra* notes 101 ff.

From paragraph 8 of Article 69<sup>76</sup> follows the irrelevance of national law for the ICC, since the Court shall not even “rule on the application” of that law. Consequently, the ICC must judge the admissibility on the basis of its law; in particular, its “application and interpretation ... must be consistent with internationally recognised human rights.”<sup>77</sup> This clear reference to fundamental human rights, such as the freedom from torture, is a further strong argument that there “are some violations which, by their nature, are so egregious or so inconsistent with internationally recognized human rights that the admission of evidence obtained” by such means will always be antithetical and damaging to the integrity of the proceedings.<sup>78</sup> Last but not least, admission of guilt, the procedure for which is provided for in Article 65 ICC Statute, must be made “voluntarily”<sup>79</sup> and would be “null and void”<sup>80</sup> if obtained by means of torture.

### C. FIRST INTERMEDIATE CONCLUSION WITH REGARD TO SUPRANATIONAL TORTURE EVIDENCE

Torture evidence is always inadmissible in the supranational proceedings. Such evidence is unreliable and, more importantly, its use is antithetical and damaging to the integrity of the proceedings. To consider this evidence inadmissible it suffices that one of these two defects exist since Rule 95 ICTY/ICTR and Article 69(7) ICC Statute provide for an alternative (“or”) wording. A distinction between torture evidence obtained by Tribunal investigators as opposed to third parties cannot reasonably be made. It would undermine the general rule that international criminal tribunals, as models for national criminal justice, are expected to fully comply with internationally recognized human rights. This implies that they cannot use evidence obtained in violation of these rights. As Sluiter has put it:

As models for international criminal justice, the ICTY and the ICTR may be expected to fully respect internationally protected human rights. In the long run, the support for and confidence in forms of international criminal adjudication, including the recently

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<sup>76</sup> ICC Statute, *supra* note 73, art. 67(8): “When deciding on the relevance or admissibility of the evidence collected by a State, the Court shall not rule on the application of State’s national law.”

<sup>77</sup> *Id.* art. 21(3).

<sup>78</sup> Piragoff, *supra* note 73, art. 69 m. no. 80; *see also* Pattenden, *supra* note 41, at 15.

<sup>79</sup> *See* ICC Statute, *supra* note 73, art. 65(1)(b).

<sup>80</sup> Fabricio Guariglia, *Rules of Procedure and Evidence—An Overview*, in COMMENTARY ON THE ROME STATUTE, *supra* note 73, at art. 65, m. no. 9.



established permanent international criminal court (ICC) will depend on whether or not the tribunals can live up to this expectation.<sup>81</sup>

### III. THE TRANSNATIONAL USE OF TORTURE EVIDENCE

The transnational use of torture evidence has been the object of two recent high court judgments in England and Germany, which can inform the discussion and serve as model cases. In the case of *A and others v. Secretary of State for the Home Department*,<sup>82</sup> the English House of Lords determined whether English courts could lawfully admit statements in evidence which may have been obtained under torture by officials of a foreign state without the involvement of the English authorities. The applicants were detained under Section 23 of the Anti-terrorism, Crime and Security Act 2001;<sup>83</sup> Section 21 of the Act allowed for an indefinite period of detention of suspects certified as international terrorists if it is impossible for legal or practical reasons to deport them. Section 25 allows the person certified to appeal to the Special Immigration Appeals Commission (SIAC) against the certification arguing that there are no reasonable grounds for the suspicion. The applicants submitted that in issuing the certificates the Secretary of State had relied illegally on torture evidence provided by another state. However, SIAC held that the evidence on which the suspicion was partly founded could be used and therefore dismissed the appeal. On December 8, 2005 the Law Lords unanimously overruled the decision of the SIAC and the Court of Appeal for England & Wales, agreeing with the appellants submission, that the common law forbids the admission of torture evidence, "irrespective of where, or by whom, or on whose authority the torture was inflicted."<sup>84</sup>

In another case, the Oberlandesgericht (OLG) [German Higher Regional Court] of Hamburg had to deal with a similar question in *El Motassadeq*.<sup>85</sup> Motassadeq was

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<sup>81</sup> Sluiter, *supra* note 57, at 935.

<sup>82</sup> *A and Others v. Secretary of State for the Home Department* (No. 2), [2005] UKHL 71, [2005] 3 WLR 1249, available at <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm> (last visited Feb. 25, 2008) [hereinafter *A and others*, HL]

<sup>83</sup> S. 21-32 of this Act has been repealed by the Prevention of Terrorism Act 2005 which was subsequently amended by the Counter-Terrorism Act 2008, available at [www.statutelaw.gov.uk](http://www.statutelaw.gov.uk). (See also Clive Walker, *Keeping Control of Terrorists without Losing Control of Constitutionalism*, 59 STAN. L. REV. 1395 (2007).

<sup>84</sup> *A and others*, HL, *supra* note 82, para. 10 (Lord Bingham).

<sup>85</sup> Oberlandesgericht (OLG) [German Higher Regional Court] OLG Hamburg, Decision, June 14, 2005, reprinted in 58 NEUE JURISTISCHE WOCHENZEITSCHRIFT (NJW) 2326, 2326 (2005) [hereinafter OLG Hamburg, *El Motassadeq*]

charged with the conspiracy-like provision of Section 30(2) 3rd *Strafgesetzbuch*<sup>86</sup> [German Criminal Code] with regard to the attacks of September 11, 2001. The U.S. State Department provided, via fax, summaries of statements of three high-ranking *Al Qaeda* members made in interrogations carried out by U.S. authorities while under U.S. custody.<sup>87</sup> Because of the general suspicion, based on human rights and press reports, that *Al Qaeda* members were subjected to torture, the Court sought information about the place and circumstances of the questioning, but no such information could be obtained. While the Court ultimately admitted the statements into evidence, given that, relying on a free assessment of the available evidence, torture could not be proved<sup>88</sup>—it also stated, *obiter*, that any statement obtained by torture, regardless of its provenance (national or foreign authorities), cannot be admitted into evidence.<sup>89</sup>

It is most striking that in both cases the national authorities were *not* involved in procuring the respective evidence. Recalling the distinction, made in the introduction, between the proactive procuring of evidence by sending suspects to torture states (first situation) and the accidental acquisition of such evidence (second situation) these cases correspond to the second situation. If even in this situation the admission of torture evidence must be considered legally impossible, the same applies *a fortiori* to the first situation. For the following analysis this means that the second situation must be examined first and the first situation only if in this (second) situation torture evidence is considered admissible.

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<sup>86</sup> Agreement with another to commit a crime or instigate it.

<sup>87</sup> It is not clear where exactly the witnesses were held. The OLG Hamburg, *El Motassadeq*, *supra* note 85, at 2327 states that they were “mit hoher Wahrscheinlichkeit zumindest im Zugriffsbereich der Administration der USA ...” [“most probably within the domain of the US-administration”].

<sup>88</sup> See the discussion on the burden of proof, *infra* IV.

<sup>89</sup> OLG Hamburg, *El Motassadeq*, *supra* note 85, at 2326 refers in the second guiding principle “Leitsatz” to Article 15 CAT and applies this provision to torture testimonies obtained by foreign authorities:

Verbot der gerichtlichen Verwertung von durch Folter herbeigeführten Aussagen, das ... auch bei im Ausland durch Organe anderer Staaten mittels Einsatzes von Folter herbeigeführten Aussagen eingreift. [Furthermore, in its third guiding principle, the OLG held that § 136a StPO is also applicable, by analogy, if such prohibited methods of interrogation are practised by foreign authorities and constitute a blatant violation of human dignity] auf die Anwendung unzulässiger Vernehmungsmethoden durch Angehörige anderer Staaten entsprechend anwendbar, sofern die Erkenntnisse, um deren Verwertung es geht, unter besonderes krassem Verstoß gegen die Menschenwürde zu Stande gekommen sind.

## A. THE TRANSNATIONAL USE OF TORTURE EVIDENCE IN THE LIGHT OF INTERNATIONAL LAW

The transnational use of torture evidence may be incompatible with Article 15 CAT and the fair trial principle as especially recognized by Article 6 of the European Convention of Human Rights<sup>90</sup> (ECHR) and the respective case law.

### 1. ARTICLE 15 CAT

#### a. RATIONALE AND SCOPE

Article 15 CAT is the only international rule that explicitly excludes torture evidence: “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.” The *travaux préparatoires* of CAT<sup>91</sup> demonstrate that this mandatory rule was included in the convention essentially for two reasons: The first one was to safeguard the fairness of the trial as any statement made under torture is, as already argued above, susceptible to being an unreliable one. The second reason was to discourage the use of torture by removing one of the main incentives to apply it. In addition, Article 15 CAT reflects the “wider principle,”<sup>92</sup> also expressed in Rule 95 ICTY/ICTR and Article 69(7)(b) ICC Statute, of safeguarding the integrity of judicial proceedings.<sup>93</sup> By preventing the use of torture evidence in legal proceedings, Article 15 CAT ensures that not only unreliable evidence is excluded but also evidence that “abuse[s] and degrade[s] the proceedings”<sup>94</sup> and “involve[s] the state in moral defilement.”<sup>95</sup>

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<sup>90</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

<sup>91</sup> See BURGERS & DANIELIUS, *supra* note 44, at 148.

<sup>92</sup> *A and others, HL*, *supra* note 82, para. 39 (Lord Bingham).

<sup>93</sup> The provision does not extend to administrative proceedings carried out by the executive branch, for a discussion see Tobias Thienel, *Foreign Acts of Torture and the Admissibility of Evidence*, 4 J. INT’L CRIM. JUST. 401, 406 (2006).

<sup>94</sup> *A and others, HL*, *supra* note 82, para. 39 (Lord Bingham). Lord Bingham refers to *United States v. Toscanino*, 500 F.2d 267, 276 (2d Cir. 1974) but with a different emphasis: “Drawing again from the field of civil procedure, we think a federal court’s criminal process is abused or degraded where it is executed against a defendant who has been brought into the territory of the United States by the methods alleged here [torture].”

<sup>95</sup> *The people (Attorney General) v. O’Brien* (1965) IR 142, 150; *reprinted in A and others, HL*, *supra* note 82, paras. 17, 39 (Lord Bingham).

Article 15 CAT does not only, obviously, apply to the classical situation in which the state uses its own torture evidence in a criminal trial against the tortured defendant<sup>96</sup> but also to the admission of transnational torture evidence. This follows from a literal interpretation of Article 15 CAT which does not limit the exclusion to a particular jurisdiction's national torture evidence but generally prohibits that "any statement ... made as a result of torture" shall not be invoked as evidence "in any proceedings," i.e., torture evidence must not be admitted independent of its provenance.<sup>97</sup> In addition, its poisoned fruits are also excluded.<sup>98</sup> The unlimited scope of the provision can be explained by its rationale: to remove incentives for the use of torture as well as to prevent the production of unreliable evidence and any damage to the integrity of the proceedings; the provenance of the evidence does not change its unlawful nature and negative effects. In addition, if the drafters had wanted to limit the scope of the provision, they could have easily done so as they have done with regard to other obligations arising from the CAT.<sup>99</sup> In fact, they have indeed done so with regard to the exceptional use of torture evidence against the torturer itself as to the existence of the torture statement.<sup>100</sup> Yet, an expanded application of this exception by way of analogy to cases against the torturer, as recently suggested by Scharf,<sup>101</sup> is to be rejected.

Scharf makes the case that the biographical statements from the detainees of the Khmer Rouge's Tuol Sleng torture centre should be admitted as evidence in the trial against the Khmer Rouge leaders before the Extraordinary Chambers of the U.N. established international Tribunal.<sup>102</sup> Scharf is well aware of the risk that such an

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<sup>96</sup> I.e., evidence obtained by torturing the defendant or other persons who may incriminate the defendant, see Thienel, *supra* note 3, at 358-59; Pattenden, *supra* note 41, at 7; on the application to derivative evidence, i.e., evidence found as a result of a statement made under torture, *id.*, at 8-10.

<sup>97</sup> For the same result see Thomas Bruha, *Folter und Völkerrecht*, in *DAS PARLAMENT, AUS POLITIK UND ZEITGESCHICHTE* (2006), available at [www.bundestag.de/dasparlament/2006/36/Beilage/003.html](http://www.bundestag.de/dasparlament/2006/36/Beilage/003.html) (last visited Sept. 7, 2009); Thienel, *supra* note 3, at 360-61; Pattenden, *supra* note 41, at 10; see also OLG Hamburg, *El Motassadeq*, *supra* note 85, second guiding principle as quoted in *supra* note 89.

<sup>98</sup> MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE art. 15 m. no. 2, 75 ff 88 (2008); Robert Esser, *EGMR in Sachen Gäfgen v. Deutschland* (22978/05), *Urt. v. 30.6.2008*, 28 NSrZ 657, 658-59 (2008).

<sup>99</sup> See, e.g., CAT, *supra* note 3, art. 2(1), 12 and 13; see also *A and others v. Secretary of State for the Home Department* (No 2) [2004] EWCA Civ 1123, [2005] 1 WLR 414, available at <http://www.bailii.org/ew/cases/EWCA/Civ/2004/1123.html> (last visited Feb. 25, 2008), para. 448 [hereinafter *A and others*, *EWCA*].

<sup>100</sup> See CAT, *supra* note 3, art. 15, "except against a person accused of torture as evidence that the statement was made."

<sup>101</sup> Scharf, *supra* note 63, at 159 ff.

<sup>102</sup> See <http://www.eccc.gov.kh> (last visited Sept. 7, 2009); see generally Subhash Kashyap, *The Framework of Prosecutions in Cambodia*, in *NEW APPROACHES IN INTERNATIONAL CRIMINAL JUSTICE*

exception undermines Article 15 CAT and therefore proposes four criteria that should be satisfied before a court can consider torture evidence. First, such evidence must never be used in a trial where the victim of such abuse is the defendant. Second, it must never be used where the prosecuting authorities were directly or indirectly involved in the acts of ill-treatment. Third, it must not be considered unless it meets a high level of corroboration. Fourth, it should not be admitted if, with reasonable efforts, the prosecution could obtain non-tainted evidence that would be effective in establishing criminal liability.<sup>103</sup> While it is difficult to accept that defendants like the Khmer Rouge's leaders take advantage of Article 15 CAT—a provision which certainly was not designed to shield them from criminal responsibility—damage to the legitimacy of a trial against torturers that *essentially relies on torture evidence* should not be underestimated and can certainly not be outweighed by the four criteria proposed by Scharf. In fact, these criteria are not concerned with the question of integrity or fairness of the proceedings but sacrifice these considerations on the altar of “evidentiary efficiency” with a view to convicting the defendants as smoothly as possible. Such “flexibility,” a recent example of which is the trial against Saddam Hussein,<sup>104</sup> does, in the long run, a disservice to international criminal justice.

b. THE IMPACT OF ARTICLE 15 CAT IN DOMESTIC LAW

CAT, like any international treaty, has no binding force in domestic law unless it is given effect by an explicit incorporation, be it by an act of parliament or statute or, in addition, in some common law jurisdictions, by principles of customary international law.<sup>105</sup> Thus CAT is part of German law but not of English domestic law because only in the former has the necessary legislative act been adopted by parliament.<sup>106</sup> Whether the respective treaty can be directly applied, fully or partially, by domestic courts depends on the nature and contents of its norms, i.e., if they are precise and clear

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189 ff (Kai Ambos & Mohamed Othman eds., 2003) (providing a general account of the legal framework).

<sup>103</sup> Scharf, *supra* note 63, at 170-71.

<sup>104</sup> See Kai Ambos & Pirmurat Said, *Das Todesurteil gegen Saddam Hussein*, 62 JURISTEN ZEITUNG (JZ) 822-28 (2007).

<sup>105</sup> See *UK A and others, HL*, *supra* note 82, para. 27 (Lord Bingham) with further references; for Germany see) Grundgesetz [German Basic Law], art. 59(2); see also KARL DOEHRING, VÖLKERRECHT, m. no. 708 ff (2d ed. 2004); PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 65 ff (7th ed. 2007).

<sup>106</sup> Bürgerliches Gesetzbuch (BGB) [German Civil Code] see BGBl 1990 II p. 246

enough to be “self executing” with regard to individuals without the need for further clarification by domestic provisions.<sup>107</sup> Otherwise, the effect of such a treaty would be limited to imposing a general obligation in public international law to adjust the legal order to the aims laid down by its rules.<sup>108</sup>

Lord Justice Neuberger in *A and Others*,<sup>109</sup> denied that Article 15 is self-executing before the English courts since it is addressed to each state party. Yet, from a public international law perspective, this is not a convincing argument since international treaties do not always distinguish between the government and other organs of the state.<sup>110</sup> Rather, the fact that Article 15 CAT obliges state parties to ensure that torture evidence is not be invoked in (judicial) proceedings implies that it is directed to the judicial branch.<sup>111</sup> The German Bundesverfassungsgericht [Federal Constitutional Court]<sup>112</sup> has taken the same view, although the case law of the UN Committee against Torture and state practice are not uniform.<sup>113</sup> Be that as it may, the OLG Hamburg applied Article 15 CAT as a self-executing domestic exclusionary rule.<sup>114</sup> Even against a dualist background it cannot be denied that Article 15 CAT is binding upon the state parties to CAT, and as such informs the interpretation of the respective domestic law and practice. Thus, the House of Lords correctly used Article 15 as a guideline to interpret the English domestic law and its obligations under the ECHR.<sup>115</sup>

## 2. ARTICLE 6(1) ECHR

There is no explicit exclusionary rule for the use of torture evidence in the ECHR. The prohibition against torture found in Article 3 ECHR does not address the issue

<sup>107</sup> See DOEHRING, *supra* note 105, m. no. 731, 735; MATTHIAS HERDEGEN, VÖLKERRECHT § 22 m. no. 5 (6th ed. 2007); Philip Kunig, in VÖLKERRECHT 99 (Graf Wolfgang Vitzthum ed., 3rd ed. 2004).

<sup>108</sup> See also Thienel, *supra* note 3, at 351 ff.

<sup>109</sup> *A and others*, EWCA, *supra* note 99, para. 435

<sup>110</sup> See, e.g., ECHR, *supra* note 90, art. 6; see also OLG Hamburg, *El Motassadeq*, *supra* note 85, at 2328; Thienel, *supra* note 3, at 352.

<sup>111</sup> See also Thienel, *supra* note 3, at 352.

<sup>112</sup> BVerfG, decision May 31, 1994 reprinted in 47 NJW 2883 (1994).

<sup>113</sup> For a discussion see Thienel, *supra* note 3, at 353.

<sup>114</sup> OLG Hamburg, *El Motassadeq*, *supra* note 85, at 2326: “innerstaatlich unmittelbar geltendes und im Strafverfahren zu beachtendes Verbot der gerichtlichen Verwertung ....”

<sup>115</sup> *Id.* *A and others*, HL, *supra* note 82, para. 27 (Lord Bingham):

The appellants rely on the well established principle that the words of a United Kingdom statute, passed after the date of a treaty and dealing with the same subject matter, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the treaty obligation and not to be inconsistent with it.

(quoting *Garland v. British Rail Engineering Ltd.* [1983] 2 AC 751, 771).

of procedural consequences of a violation of this right; in particular, it does not establish an exclusionary rule.<sup>116</sup> Notwithstanding, such a rule may be inferred from a systematic and teleological interpretation of the fair trial principle enshrined in Article 6(1) ECHR.

The European Court of Human Rights (ECtHR) does not prescribe rules of admissibility of evidence but leaves the state parties wide discretion in this respect;<sup>117</sup> it only examines, in a kind of overall effect test, if the proceedings were fair as a whole. Thus, in *Schenk v. Switzerland* the Court held that its task was not to decide “as a matter of principle and in abstract” whether evidence, which was obtained contrary to the domestic law, may be admissible in trial without depriving the applicant of his right to a fair trial, but to analyze whether the proceedings as a whole were fair.<sup>118</sup> Taking this view the Court emphasized the fact that the unlawfully recorded telephone conversation in question was not the only evidence on which the defendant’s conviction was based<sup>119</sup> and that he had had sufficient opportunity to challenge the authenticity of the recording.<sup>120</sup> Also, in the case of evidence obtained in violation of Article 8 ECHR that guarantees the right to private and family life, the Court stated that the admission of such evidence only violates Article 6(1) if the specific violation affects the fairness of the proceedings as a whole.<sup>121</sup> The Court, *in casu*, denied this, taking into account the nature of the violation and the opportunity of the accused to challenge the evidence involved.<sup>122</sup>

The Court has, however, taken a different view with regard to the prohibition on inhuman and degrading treatment under Article 3 ECHR. In the case of *Jalloh v. Germany*<sup>123</sup> after repeating the general principle of an overall assessment, the Court

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<sup>116</sup> In favor of such a rule however see Esser, *supra* note 98, at 658-59.

<sup>117</sup> *Schenk v. Switzerland*, 140 Eur. Ct. H.R., (ser. A), para. 46 (App. No. 10862/84) (given July 12, 1988); *Mialhe v. France*, (No. 2), Eur. Ct. H.R., (ser. A) at 256-C, para. 43 (App. No. 18978/91) (Sept. 26, 1996).

<sup>118</sup> *Schenk v. Switzerland*, *supra* note 117, para. 46.

<sup>119</sup> *Id.* para. 48.

<sup>120</sup> *Id.* para. 47; *Khan v. United Kingdom*, 2000-V Eur. Ct. H.R., para. 38 (App. No. 35394/97) (May 12, 2000).

<sup>121</sup> *Khan v. United Kingdom*, *supra* note 120, para. 34; see also *P.G. and J.H. v. United Kingdom*, 2001-IX, Eur. Ct. H.R., para. 76 ff (App. No. 44787/98) (Sept. 25, 2001) (stressing that the tainted evidence was “not the only evidence against the applicants” (*Id.* para. 79)).

<sup>122</sup> *Khan v. United Kingdom*, *supra* note 120, paras. 38 ff; *P.G. and J.H. v. United Kingdom*, para. 79 ff. See also JENS MEYER-LADEWIG, *EUROPÄISCHE MENSCHENRECHTSKONVENTION, HANDKOMMENTAR*, art. 6 m. no. 55b (2d ed. 2006).

<sup>123</sup> In the case *Jalloh v. Germany*, Eur. Ct. H.R. (App. No. 54810/00) (July 11, 2006 the police forcibly administered emetics to the applicant, who was suspected of drug dealing, in order to obtain drugs hidden in the applicant’s body to use as evidence against him.



determined that different considerations apply to evidence obtained by methods which constitute a violation of Article 3 ECHR, since this norm protects one of the most fundamental values of society and does not, unlike other provisions, allow for exceptions.<sup>124</sup> While the Court did not rule on whether the admission of evidence obtained by inhuman and degrading treatment in itself renders the trial unfair,<sup>125</sup> it was more explicit with regard to torture:

[i]ncriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture should never be relied on as proof of the victim’s guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe ...<sup>126</sup>

By explicitly excluding torture evidence the Court stressed the nature and gravity of the violation, confirming what the *Khan v. UK* Court had already done *in abstracto*.<sup>127</sup> It is also worth noting that the Court limited the scope of its statement to “incriminating evidence ... relied on as proof of the victim’s guilt” thereby leaving the issue of admissibility of torture evidence in favor of the defendant unresolved. While this view may pay tribute to the accused’s broad right to defense found in Article 6(3)(c) ECHR, it still conflicts with the rationale of the exclusionary rule in Article 15 of CAT, and should therefore be rejected.<sup>128</sup>

With that said, the Court confirmed its position in *Harutyunyan v. Armenia* in which the defendant was found to have been deprived of a fair trial by the admission of his confession and of other incriminating witness statements and declarations, all of which had been extorted by torture. The Court ruled—expressly recalling the principles developed in *Jalloh v. Germany*<sup>129</sup>—that “regardless of the impact of the statements obtained under torture had on the outcome of the applicant’s criminal proceedings, the use of this evidence rendered his trial as a whole unfair.”<sup>130</sup> After

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<sup>124</sup> *Id.* para. 99.

<sup>125</sup> *Id.* para 107.

<sup>126</sup> *Id.* para 105.

<sup>127</sup> *Khan v. United Kingdom*, *supra* note 120, para. 34.

<sup>128</sup> For a flexible approach Pattenden, *supra* note 41, at 11, 36 ff (arguing that the exclusion depends on the importance of the evidence for the accused); if it is critical for his defence the exclusion would be unfair); *see also infra* note 160, and accompanying text.

<sup>129</sup> *Harutyunyan v. Armenia*, Eur. Ct. H.R., para. 63 (App. No. 36549/03) (June 28, 2007).

<sup>130</sup> *Id.* at para 66.

reaching this conclusion, the Court did not find it necessary to address the separate issue if the admission of torture evidence also violates the right not to incriminate him or herself (*nemo tenetur se ipsum accusare*).<sup>131</sup> While the scope of this right is limited to incriminating statements to the detriment of the accused, it is highly relevant in our case.<sup>132</sup> This right, although not explicitly mentioned in Article 6 ECHR, is an internationally recognized principle and, in a way, presents the flip side of the presumption of innocence enshrined in Article 6(2) ECHR.<sup>133</sup> It follows that the prosecution must seek to prove its case without resorting to evidence extorted from the accused by oppression against his will. Otherwise, the Court has to decide if the use of such evidence amounts to an unjustifiable violation of the right in the light of all the circumstances of the case.<sup>134</sup> As its underlying rationale is to respect and protect the will of the accused and to avoid a miscarriage of justice,<sup>135</sup> it is plain that any statement obtained by torture—as a method explicitly designed to break the suspect’s will, often producing false confessions—constitutes a blatant violation of this right and therefore must be excluded to preserve the fairness of the trial. Last but not least, in the recent *Gäfgen* case<sup>136</sup> the Court distinguished between the use of evidence, which is a direct result of a violation of Article 3 ECHR, and that which is only the by-product of such a violation. While in the former case the evidence should never be relied on as proof of the victim’s guilt, irrespective of its probative value,<sup>137</sup> in the latter case there is at least a “strong presumption” that the use of such evidence renders a trial as a whole unfair.<sup>138</sup>

In sum, under recent case law of the ECtHR, the admission of torture evidence a violation of Article 6(1) ECHR since torture, as a prohibited method, is so serious that its use would render the proceedings as a whole unfair.<sup>139</sup> While the Court does not

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<sup>131</sup> *Id.* para. 67.

<sup>132</sup> See also Thienel, *supra* note 3, at 356-57, 362; Thienel, *supra* note 93, at 404 (without further arguments).

<sup>133</sup> MEYER-LADEWIG, *supra* note 122, art. 6 m. no. 52. See also with a view to the international criminal tribunals, Kai Ambos, *The Right of Non Self-incrimination of Witnesses Before the ICC*, 15 LEIDEN J. INT. L. 155, 156 ff (2002).

<sup>134</sup> Saunders v. United Kingdom, 1996-VI, Eur. Ct. H.R. para. 68 ff (App. No. 19187/91) (Dec. 17, 1996).

<sup>135</sup> *Id.* at para 68 ff.

<sup>136</sup> Gäfgen v. Germany, Eur. Ct. H. R., para. 99, 105 ff (App. No. 22978/05) (June 30, 2008).

<sup>137</sup> *Id.* para. 99.

<sup>138</sup> *Id.* para. 105.

<sup>139</sup> Conc. Pattenden, *supra* note 41, at 34 ff for a general exclusionary rule under ECHR, *supra* note 90, art. 6; see also KARSTEN GAEDE, FAIRNESS ALS TEILHABE—DAS RECHT AUF KONKRETE UND WIRKSAME TEILHABE DURCH VERTEIDIGUNG GEMÄSS ART. 6 EMRK 322 (2007); Thienel, *supra* note 3, at

deal explicitly with the transnational use of torture evidence, analysis of the case law, especially with regard to the importance given to the protection from torture, implies that the Court would not rule any differently if the torture evidence were obtained by third parties. In fact, in *Schenk v. Switzerland*, the Court did not take issue with the fact that the recording was done by a private person and could not, as in the case of foreign national authorities, be directly attributed to the state but essentially focused on the nature of the violation in the balancing of interests involved.<sup>140</sup> The decisive question is whether the violation of the accused's interest is such that outweighs the state's interest in using the evidence and, therefore, renders the whole trial unfair. Interestingly, the same conclusion was drawn by the House of Lords in *A and others*. While the ECtHR, at the time of the Lords' decision, had not yet made a decision in *Harutyunyan v. Armenia*, Lord Bingham of Cornhill stated that he had little doubt that the Court would find that the admission of torture evidence constitutes a violation of Article 6(1) ECHR.<sup>141</sup> To reach this conclusion the Lords invoked Article 15 CAT to interpret the fair trial guarantee of Article 6 ECHR,<sup>142</sup> incorporated into UK domestic law by the Human Rights Act 1998.<sup>143</sup> From the perspective of public international law this is a correct approach since Article 31(3)(c) of the Vienna Convention on the Law of Treaties<sup>144</sup> provides that "any relevant rules of international law applicable in the relations between the parties" shall be taken into account when interpreting international treaties. The ECtHR itself invoked the definition of torture in Article 1 CAT to give the term "torture" in Article 3 ECHR a concrete meaning.<sup>145</sup> The reference to Article 15 CAT is also convincing since it is the only provision that clearly excludes torture evidence, in absolute terms and independently of its provenance. Given the

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404; Sebastian Lubig/Johanna Sprenger, *Beweisverwertungsverbote aus dem Fairnessgebot des Art. 6 EMRK in der Rechtsprechung des EGMR*, 3 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 433, 439 (2008), available at <http://www.zis-online.com> (who, however, only argue in favor of an exclusionary rule in case of a violation of rights of participation); Stefan Talmon, *Der Anti-Terror-Kampf der USA und die Grundrechte*, in AXEL KÄMMERER (ED.), AN DEN GRENZEN DES STAATES, 75-100, 75, 94 ff (2008) (stressing the "Anspruch auf materielle Beweisteilhabe," at 98); Esser, *supra* note 98, at 661-62.

<sup>140</sup> See also Thienel, *supra* note 3, at 362.

<sup>141</sup> *A and Others*, HL, *supra* note 82, para. 26 (Lord Bingham). See also Pattenden, *supra* note 41, at 13 (emphasizing correctly the seriousness of the violation).

<sup>142</sup> *A and others*, HL, *supra* note 82, para. 29 (Lord Bingham).

<sup>143</sup> RICHARD MAY & STEVEN POWLES, CRIMINAL EVIDENCE 369 (5th ed. 2004); The Human Rights Act 1998, available at [http://www.opsi.gov.uk/acts/acts1998/ukpga\\_19980042\\_en\\_1](http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1) (last visited Feb. 25, 2008).

<sup>144</sup> Jan. 27, 1980, 1155 U.N.T.S. 331.

<sup>145</sup> *Selmouni v. France*, 1999-V Eur. Ct. H.R., para. 97 (App. No. 25803/94) (July 28, 1999).

status of the CAT as a treaty and the fundamental importance of the torture prohibition in international law, this is the authoritative and final answer.

#### B. THE TRANSNATIONAL USE OF TORTURE EVIDENCE IN LIGHT OF THE GERMAN CIVIL LAW AND THE ENGLISH COMMON LAW TRADITIONS

As can be seen from the references to the German and English case law, the approach of these two jurisdictions with regard to our issue is very similar. Given that these jurisdictions belong to different legal families (Romano-Germanic civil law and Anglo-American common law), a similar or identical result with regard to our issue produces a strong argument and starting point for a general principle of law within the meaning of Article 38(c) of the ICJ Statute.

##### 1. SECTION 136A OF THE GERMAN CRIMINAL PROCEDURAL CODE

Section 136a the German Procedural Code contains a mandatory exclusionary rule for all torture evidence, procured by national authorities. Although torture is not expressly mentioned in paragraph 1 of this provision, the methods enumerated therein amount to torture. While there are many rules in the Code to safeguard individual rights, Section 136a is one of the few cases in which the law explicitly provides for an absolute prohibition against using such illegal evidence before court. The reason for such a strict exclusionary rule is the protection of human dignity in Article 1 of the Grundgesetz [German Basic Law], the *Grundnorm* of the German Constitution.<sup>146</sup> To force the accused by torture or similar methods to make a statement would degrade him to an “object” of the criminal proceedings, a status incompatible with his status as a party to the proceedings<sup>147</sup> and with his right to respect for his dignity. The exclusionary rule also applies to witness statements.<sup>148</sup>

While Section 136a is addressed explicitly only to the national authorities<sup>149</sup> and, therefore, is not directly applicable to third parties,<sup>150</sup> including foreign authorities, it

<sup>146</sup> BVerfG, Decision, Oct. 19, 1983, *reprinted in* 37 NJW 428, 428 (1984); BGH, Judgment, Feb. 16, 1954 *reprinted in* BGHSt 5, 332, 333, 7 NJW 649, 649 (1954).

<sup>147</sup> BGH, Judgment, Feb. 16, 1954, *supra* note 146, at 333 (NJW 649): “Der Beschuldigte ist Beteiligter, nicht Gegenstand des Strafverfahrens” (arguing against the use of a lie detector).

<sup>148</sup> StPO, *supra* note 2, § 69(3)(§136a StPO is also applicable for witnesses).

<sup>149</sup> BGH, Judgment, Dec. 6, 1961 *reprinted in* BGHSt 17, 14, 19, 15 NJW 598, 598 (1962); LUTZ MEYER-GOSSNER, KURZKOMMENTAR ZUR STRAFPROZESSORDNUNG § 136 a, m. no. 2 (50th ed. 2007).

<sup>150</sup> MEYER-GOSSNER, *supra* note 149, § 136 a m. no. 3.

is generally acknowledged that evidence, independent of its provenance, cannot be used if it was procured in a manner that constitutes an especially grave violation of the dignity of the accused. In the case of torture evidence, Section 136a(3) should be applied by analogy.<sup>151</sup> In fact, in *El Motassadeq*, the OLG Hamburg found that the exclusionary rule also applies in the case of torture evidence obtained by organs of another state.<sup>152</sup> This is the correct view for various reasons.

First, the use of such evidence by a national court would be in itself a violation of a state's obligations under CAT. Article 15 CAT excludes any statement obtained by torture independent of its origin.<sup>153</sup> Furthermore, a combined reading of the obligations under CAT, in particular Articles 2(1), 4 and 14(1), and the *jus cogens* status of the prohibition leads to the conclusion that a state must do anything reasonably required to prevent and refrain from condoning torture.<sup>154</sup> While states' obligation to protect persons from torture, even by private parties,<sup>155</sup> can only extend to their territory<sup>156</sup> it is in the sovereign decision of their courts to accept, or to reject, transnational torture evidence in a criminal trial. To accept it would send the opposite message, namely that torture by some is inadmissible but by others tolerated, as if this would change the nature of the act of torture from a blatant attack on human dignity. To admit torture evidence would also undermine the general deterrent effect of the exclusionary rule, i.e., to discourage the national, or in this case foreign, authorities from using torture.<sup>157</sup> Second, the use of torture evidence would re-victimize the torture victim

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<sup>151</sup> *Id.* § 136a m. no. 3; Jahn, *supra* note 4, at C 102, 103; *see also* OLG Celle, Judgment, 19. Sept. 1984 reprinted in 38 NJW 640, 641 (1985) (referring to the analogous application of the *nemo tenetur* principle towards private parties).

<sup>152</sup> OLG Hamburg, *El Motassadeq*, *supra* note 85, third guiding principle as quoted in *supra* note 89, at 2329; in this sense *see also* MEYER-GOSSNER, *supra* note 149, § 136 a m. no. 3; STRAFPROZESSORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ, *supra* note 12; leaving the question open recently BGH, NStZ 2008, 643. In favor of an exclusionary rule in the case of private information obtained by illegal means or even by a violation of the human dignity; *cf.* decisions no. 12 c) cc) and dd) of the section "Criminal Law" of the 67 DJT (2008), *supra* note 4.

<sup>153</sup> As concluded *supra* IIA(1).

<sup>154</sup> In the same vein Lord Bingham noted in, *A and others*, HL, *supra* note 82, para. 34: "There is reason to regard it a duty of state, ... to reject the fruits of torture inflicted in breach of international law" (referring to various international sources); *see also* Thienel, *supra* note 3, at 363 ff; *cf.* Pattenden, *supra* note 41, at 15 ff; Scharf, *supra* note 63, at 23.

<sup>155</sup> MEYER-LADEWIG, *supra* note 122, art. 3 m. no. 3.

<sup>156</sup> *Cf.* CAT, *supra* note 3, art. 2(1) "under its jurisdiction"; ECHR, arts. 3 with art. 1 "within their jurisdiction"; *crit.* Thienel, *supra* note 3, at 361; for a possible extra-territorial application of the ECHR in the rendition cases *see infra* IIIC.

<sup>157</sup> For the majority of the German doctrine this deterrent effect is only a side effect, *see* KLAUS VOLK, GRUNDKURS StPO, § 28 m. no. 7 (5th ed. 2006); *crit.* from a common law perspective ROBERTS & ZUCKERMAN, *supra* note 15, at 155 ff; for MAY & POWLES, *supra* note 143, at 298 (it

again attacking her dignity.<sup>158</sup> Third, the unreliability of torture evidence<sup>159</sup> does not change with the provenance of this evidence. Last but not least, torture evidence admitted in a trial would always, wherever it comes from, damage the integrity of the proceedings.<sup>160</sup>

For the same reasons it is not sound to make an exception from the strict exclusionary rule if the torture evidence operates in favour of the accused.<sup>161</sup> The fact that Section 136a is, in principle, designed to protect the defendant, does not change the overall critical assessment of the use of torture evidence. The effective exercise of the right to defence does not depend on the admission of torture evidence favourable to the accused.

## 2. ENGLAND AND WALES: AN EXCLUSIONARY RULE?

The common law approach to the admission of non-confessional evidence can be described as overtly liberal and unprincipled, basically admitting all evidence considered relevant.<sup>162</sup> A nineteenth-century judge is quoted as saying: "It matters not how you get it: if you steal it even, it would be admissible."<sup>163</sup> Only at the end of the last century this position has become more restrictive, allowing judges to exclude relevant<sup>164</sup> evidence if it was obtained illegally and its admission would be unfair or in violation of the rule against self-incrimination.<sup>165</sup> Human rights considerations gained

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is not the function of the courts to discipline the police); MICHAEL ZANDER Q.C., *THE POLICE AND CRIMINAL EVIDENCE ACT 1984*, at 362 (5th ed. 2005) (referring to the criticism of the Philips Royal Commission).

<sup>158</sup> See VOLK, *supra* note 157, § 28 m. no. 35.

<sup>159</sup> See the discussion *supra* II. A. 1.

<sup>160</sup> See the discussion *supra* II. A. 2.

<sup>161</sup> This is the majority view see Karlheinz Boujong, in *KARLSRUHER KOMMENTAR ZUR STRAFPROZESSORDNUNG*, § 136a m. no. 37 (5th ed. 2003); Ernst-Walter Hanack, in *LÖWE-ROSENBERG*, *supra* note 12, § 136a m. no. 63 (Peter Rieß ed., 25th ed. 2004) (note in the new edition the author and the position changed); MEYER-GOSSNER, *supra* note 149, § 136 a m. no. 27; VOLK, *supra* note 157, § 28 m. no. 24; for an exception see FRIEDRICH DENCKER, *VERWERTUNGSVERBOT IM STRAFPROZESS* 73 ff (1977); see also BGH, Judgment, May 7, 1953, *reprinted in* BGHSt 5, 290, 290-291 according to which the prohibition of § 136a does not depend on the result obtained (distinguishing *in casu* between a correct and false confession). See, *supra* note 128, and accompanying text for a discussion on the international aspects.

<sup>162</sup> See MAY & POWLES, *supra* note 142, at 285-86; ROBERTS & ZUCKERMANN, *supra* note 15, at 148 ff; ZANDER, *supra* note 157, at 360.

<sup>163</sup> Quoted according to MAY & POWLES, *supra* note 143, at 286.

<sup>164</sup> On the importance of relevance as the first question of admissibility ROBERTS & ZUCKERMAN, *supra* note 15, at 96, 98 ff, 150-51.

<sup>165</sup> Cf. MAY & POWLES, *supra* note 143, at 286 ff.

weight with the Police and Criminal Evidence Act (PACE) 1984<sup>166</sup> and the Human Rights Act 1998, essentially reproducing the ECHR, especially Article 6, into UK law.<sup>167</sup> Still, the current system may be described as flexible; Evidence admissibility is determined on a case by case basis through a balancing of the interests involved.<sup>168</sup>

Section 76(2) and 76A(2) PACE provide that confessions obtained by “oppression” or rendered “unreliable” by the way of interrogation “shall not” be admitted in evidence.<sup>169</sup> This is an exclusionary rule<sup>170</sup> that was first justified by the inherent unreliability of such evidence and later, in addition, with the *nemo tenetur* principle and the importance of proper behaviour of the police toward persons in custody.<sup>171</sup> The term oppression is to be understood broadly, including in particular torture discussed in Subsection 8 PACE.<sup>172</sup> According to Section 78, the court may exclude evidence that may have “such an adverse effect on the fairness of the proceedings that the Court ought not to admit it.”<sup>173</sup> It is at the discretion of the trial judge<sup>174</sup> to exclude evidence which is, following the traditional common law rule admissible *prima facie* but may be excluded *in casu* because it would be unfair

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<sup>166</sup> On its importance see ZANDER, *supra* note 157, at 360 ff (366); ROBERTS & ZUCKERMANN, *supra* note 15, at 147.

<sup>167</sup> In this context scholars speak of a “constitutionalization” of the law of criminal evidence, see ROBERTS & ZUCKERMANN, *supra* note 15, at 175; see also MAY & POWLES, *supra* note 143, at 304-06.

<sup>168</sup> ROBERTS & ZUCKERMANN, *supra* note 15, at 162: “sensible relationship of proportionality between the seriousness of a rule violation and the implications for justice and public safety of excluding evidence ...”

<sup>169</sup> See also sect. 11(5) of Code C to PACE (Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers) which prohibits “the use of oppression” in order “to obtain answers or elicit a statement.”

<sup>170</sup> See also *A and others, HL*, *supra* note 82, para. 15 (where Lord Bingham states that the significance of this principle lies in the fact “that common law has refused to accept that oppression ... should go to the weight rather than the admissibility of the confession”).

<sup>171</sup> *Id.* at paras. 16-7 with further references; see also ZANDER, *supra* note 157, at 342.

<sup>172</sup> See ZANDER, *supra* note 157, at 347 ff.

<sup>173</sup> The full wording is more complicated: “In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”

<sup>174</sup> See also sect. 82(3) PACE providing that nothing in Part VIII of the Act (relating to evidence in criminal proceedings generally) “shall prejudice any power of a court to exclude evidence at its discretion.” The legislative history shows that it was intended to broaden the court’s discretion compared to the traditional common law (*cf.* ZANDER, *supra* note 157, at 363-64; see also ARCHBOLD CRIMINAL PLEADING, EVIDENCE AND PRACTICE, § 15-453 (P.J. Richardson et al. eds., 2007). *Crit.* on the concept of judicial discretion in this context, see ROBERTS & ZUCKERMAN, *supra* note 15, at 96 who, however, concede in their concrete analysis of Section 78, that there “is no feasible substitute for trial judges’ good faith judgement in the exercise of their discretion ...” (*Id.* at 174).



to admit it,<sup>175</sup> in particular if it “has been obtained in a way which outrages civilised values.”<sup>176</sup> While the *fairness* argument was strengthened by the Human Rights Act, it is intimately linked to the idea of preserving the *moral integrity* of criminal proceedings<sup>177</sup> and preventing abuse of process.<sup>178</sup> The later doctrine forbids “the exercise of State power in an arbitrary, oppressive or abusive manner,” in particular to “receive evidence in ongoing proceedings, if to do so would lend aid or reward to the perpetration of any such wrongdoing by an agency of the State.”<sup>179</sup> Yet, while Section 78 seems to be “moulded into a primary bulwark of fairness and moral integrity in English criminal proceedings,”<sup>180</sup> the rule is limited to prosecution evidence,<sup>181</sup> and the case law provides little guidance as to its concrete application apart from requiring a significant and substantial violation.<sup>182</sup>

It is controversial whether Section 78 applies to transnational torture evidence produced without the involvement of English authorities. While the use of torture certainly qualifies as a significant and substantial rule violation, it is a different question if this also makes torture evidence obtained by foreign authorities inadmissible. The Court of Appeal in *A and others* denied this.<sup>183</sup> Lord Bingham, speaking for all seven Law Lords, affirmed it, arguing that the abuse of process doctrine also applies if the foundation for the case would be morally unacceptable.<sup>184</sup> Lord Nicholls invoked the universal condemnation and the repugnance of torture to justify its exclusion. He

<sup>175</sup> See *Halawa v. F.A.C.T.* [1995] 1 Cr. App. R. 21, 33.

<sup>176</sup> *Regina v. Governor of Brixton Prison (ex p. Levin)*, [1997] AC 741, 748, HL.

<sup>177</sup> Cf. ROBERTS & ZUCKERMANN, *supra* note 15, at 157 ff, 179-80.

<sup>178</sup> On this doctrine see also *id.* at 179; Pattenden, *supra* note 41, at 30 ff.

<sup>179</sup> See *A and others, EWCA*, *supra* note 99, para. 248; ROBERTS & ZUCKERMANN, *supra* note 15, at 179.

<sup>180</sup> ROBERTS & ZUCKERMANN, *supra* note 15, at 180.

<sup>181</sup> This follows from the wording: “evidence on which the prosecution proposes to rely ...”; see also Pattenden, *supra* note 41, at 39.

<sup>182</sup> For a thorough and critical analysis see ROBERTS & ZUCKERMANN, *supra* note 15, at 160 ff (164: “judicial task of developing an admissibility regime ... remains an unfinished project ...”; 174: “little or no concrete guidance for trial judges ...” by Court of Appeal); see also ZANDER, *supra* note 157, at 67 ff (“on a case-by-case basis, without any clearly articulated theory.” *id.* at 367; “no general guidelines” *id.* at 378); MAY & POWLES, *supra* note 143, at 293 ff (“no hard and fast rules” *id.* at 301); but see also ARCHBOLD, *supra* note 174, noting on the one hand “precise scope ... unclear” (*id.* § 15-453), on the other “substantial guidance” by the case law (*id.* § 15-455) and then again “no general guidance” (*id.* § 14-457).

<sup>183</sup> See *A and others, EWCA*, *supra* note 99, paras. 137, 252, & 253: “given that the specific rule against involuntary confessions is not engaged (we are not dealing with tortured defendants), the general rule—evidence is admissible if it is relevant, and the court is not generally concerned with its provenance—applies.” Interestingly, none of the Law Lords in *A and others, HL*, *supra* note 82, took this view.

<sup>184</sup> See *A and others, HL*, *supra* note 82, para. 19 (Lord Bingham).

further distinguished between the preventive use of torture used by the police to prevent a ticking bomb” from exploding, and the repressive use of this evidence to convict an accused. While the former, in the opinion of Lord Nicholls, may be considered correct, the latter cannot be admitted.<sup>185</sup> The distinction between preventive and repressive torture is indeed an important one, and reminds us of the controversial discussion of the punishability of the preventive torturer in the ticking bomb cases (where, in any case, the prohibition of the use of such evidence at trial was uncontroversial).<sup>186</sup> Thus transnational evidence can only be admitted if the procedures in the foreign state are complied with in the first place.<sup>187</sup> This is not the case if evidence was obtained by torture. The admission of such evidence would always, independent of its provenance, damage the integrity of the proceedings and constitute an abuse of process.

#### C. SECOND INTERMEDIATE CONCLUSION WITH REGARD TO TRANSNATIONAL TORTURE EVIDENCE

Both the applicable international law<sup>188</sup> and the national laws of Germany and England & Wales<sup>189</sup> indicate that the prohibition on the use of torture evidence is categorical and extends also to transnational torture evidence obtained by national authorities accidentally, without being involved in any way in procuring it.<sup>190</sup> The respective exclusionary rule also applies, *a fortiori*, to the first situation where the state proactively produces such evidence or, at least, is involved in its production. Any other conclusion would leave the door open for double standards and undermine the absolute nature of the prohibition of torture.

In the first situation, of a proactive state, an additional argument in favor of the exclusionary rule can be made. According to Article 3 ECHR (or Article 7 ICCPR) a state party is obliged to refrain from any act which would expose persons under its jurisdiction to torture; in particular, it is well established that a person must not

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<sup>185</sup> See *id.* paras. 67 ff (Lord Nicholls); for flexibility and a similar balancing without, however, distinguishing between preventive and repressive torture see Pattenden, *supra* note 41, at 32 ff; for admissibility in the ticking bomb case see also ROBERTS & ZUCKERMANN, *supra* note 15, at 153.

<sup>186</sup> See Ambos, *supra* note 1, at 263, n.6.

<sup>187</sup> Cf. MAY & POWLES, *supra* note 143, at 300.

<sup>188</sup> *Supra* Section II.

<sup>189</sup> *Supra* Section IIIB.

<sup>190</sup> See *supra* Introduction & B *in fine*.

be extradited to a state where he runs the risk of being tortured.<sup>191</sup> The extraditing state in this situation is considered responsible for the violation of Article 3 ECHR since it made the violation in the requesting state possible. This is true even if this was not the extraditing state's intention. An even worse case is that of rendition to a torturing state, the surrendering state even enables torture in the receiving state<sup>192</sup> and has, at one point, jurisdiction" within the meaning of Article 1 ECHR over the person surrendered.<sup>193</sup> Similarly, if the state receiving the evidence was involved in its illegal production its subsequent use would constitute an abuse of process.<sup>194</sup>

#### IV. THE BURDEN AND STANDARD OF PROOF

While the foregoing considerations are based on the assumption that torture, leaving the definitional problems aside,<sup>195</sup> was applied, in practice this is often unknown. Thus the question arises as to who carries the burden of proof and which standard of proof is to be applied.

Generally, the burden of proof can only be allocated between the different parties in the judicial procedure and leaves the responsibility of the production and presentation of evidence in the hands of these parties. In an adversarial system, like the English one, the burden of proof as to the guilt of the accused rests, as a rule, with the prosecution, but the burden as to other evidentiary issues falls, as a general common law principle, on the party which seeks to adduce them.<sup>196</sup> In contrast, in an inquisitorial or judge-led system, such as the German one, it is always the state, i.e., the prosecutor and the judge, not the parties that have to inquire into the issue. While the defendant may propose the hearing of relevant evidence, the court does not

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<sup>191</sup> See, e.g., *Soering v. United Kingdom*, Eur. Ct. H.R. (ser. A) para. 111 (App. No. 14038/88) (July 7, 1989).

<sup>192</sup> See also Thienel, *supra* note 3, at 366.

<sup>193</sup> See the meaning of jurisdiction in ECHR, *supra* note 90, art. 1. See also *supra* note 156 and Thienel, *supra* note 3, at 366-67.

<sup>194</sup> Cf. MAY & POWLES, *supra* note 143, at 300; for the same result with reference to extradition Talmon, *supra* note 139, at 93-94.

<sup>195</sup> On these with further references Ambos, *supra* note 1, at 265 ff.

<sup>196</sup> Cf. MAY & POWLES, *supra* note 143, at § 04-35 ("The burden of establishing the conditions of admissibility of other evidence will fall on whichever side is seeking to adduce it."); STEPHEN SEABROOKE & JOHN SPRACK, *CRIMINAL EVIDENCE & PROCEDURE* 14 (2d ed. 2004) ("In general the burden of proof in the 'voir dire' will be upon the party who asserts that the evidence should be admitted."); ROBERTS & ZUCKERMANN, *supra* note 15, at 331 ("rule of thumb that the proponent on any issues bears the burden of proof").

depend on this submission. The judge is obliged to inquire into the facts *ex officio*<sup>197</sup> extending the hearing of evidence to all facts that are relevant for the case.<sup>198</sup>

As to transnational torture evidence, it is questionable whether the ordinary approaches described above are appropriate. In an adversarial procedure, the defendant would need to prove the use of torture in order to quash the evidence introduced; in an inquisitorial procedure the court must inquire into the matter; but the risk that torture cannot be proved is shifted to the defendant.<sup>199</sup> Thus, in *El-Motassadeq*, the OLG found no proof that the U.S. summaries of the statements of the three witnesses were obtained by torture and therefore admitted them in evidence.<sup>200</sup> Both approaches are inappropriate, for both practical grounds and considerations of fairness. In practical terms, it is hardly possible for the defendant to prove the use of torture if he was not himself the victim of torture and has no physical signs to demonstrate it. In nearly all cases of possible torture of witnesses the defendant is not in a position to provide reliable evidence of torture.<sup>201</sup> Thus, the defendant can at best “advance some plausible reason ... that evidence has, or is likely to have, come from one of those countries widely known or believed to practice torture.”<sup>202</sup> In fact, Section 78 PACE allows the court to exclude evidence “if it appears to the court ...” i.e., it would be sufficient that the defense raises the issue.<sup>203</sup> With this, the burden rests on the party that adduces the alleged torture evidence, normally the state, to prove that no torture was applied or that there exists no “real risk” in that regard.<sup>204</sup> This

<sup>197</sup> See StPO, *supra* note 148, § 244(2).

<sup>198</sup> BGH, Judgment, Apr. 4, 1951, reprinted in BGHSt 1, 94, 96; BGH, Decision, Oct. 17, 1983, reprinted in BGHSt 32, 115, 122 = 37 NJW 247, 248 (1984).

<sup>199</sup> BGH, Judgment, June 28, 1961, reprinted in BGHSt 16, 164, 167 = 14 NJW 1979, 1980 (1961); MEYER-GOSSNER, *supra* note 149, § 136 a m. no. 32.

<sup>200</sup> OLG Hamburg, *El Motassadeq*, *supra* note 85, at 2326, 2328.

<sup>201</sup> *A and others*, HL, *supra* note 82, para. 55 (Lord Bingham) and para. 116 (Lord Hope). For the same reasons Sir Nigel Rodley, UN-Special Rapporteur on Torture, recommended that no “conclusive proof of physical torture” should be required of the detainee, in Report of Visit to Turkey, para. 113(e), U.N. Doc. E/CN. 4/1999/61/Add.1 (1999), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G99/104/37/PDF/G9910437.pdf?OpenElement>; in a similar vein see NOWAK & McARTHUR, *supra* note 98, at m. no. 81.

<sup>202</sup> *A and others*, HL, *supra* note 82, para. 56 (Lord Bingham), see also para. 116 (Lord Hope): “All he can reasonably be expected to do is to raise the issue ...” Cf. NOWAK & McARTHUR, *supra* note 98, at m. no. 84. Cf. with regard to ECHR, *supra* note 90, art. 6(1); see Thienel, *supra* note. 93, at 407.

<sup>203</sup> Cf. MAY & POWLES, *supra* note 143, at 308.

<sup>204</sup> *A and others*, HL, *supra* note 82, para. 56 (Lord Bingham), cf. para. 80 (Lord Nicholls) and para. 98 (Lord Hoffmann) (It is important to recognize that this decision is not concerned with section 78 PACE but rests on general common law given that the SIAC proceedings are

is in conformity with the UN Committee Against Torture's interpretation of Article 15 CAT according to which the provision entails a positive duty on the state to examine whether statements brought before its courts were made under torture.<sup>205</sup> In an inquisitorial system, the same solution could be reached by the analogous application of the principle *in dubio pro reo*, usually only applicable with regard to facts concerning the defendant's guilt,<sup>206</sup> to the case of evidence procured by torture or comparable methods.<sup>207</sup> If, as in *El-Motassadeq*, the use of torture cannot be proved, the existence of doubt would operate in favor of the defendant and it would be assumed that the controversial evidence was produced under torture and therefore could not be admitted. It could, in turn, only be admitted if the use of torture could be definitely disproved.<sup>208</sup> In a similar vein, the German Supreme Court assumes that the suspect was not adequately informed about his rights, and thus the respective statement must not be admitted into evidence, if it cannot be convincingly demonstrated that the suspect was adequately informed.<sup>209</sup>

The latter consideration shows that the question of the burden of proof is linked to *the standard of proof*. What needs to be demonstrated to exclude the evidence? Is it sufficient to demonstrate a real risk or a high probability that torture was applied, or must torture be proved beyond reasonable doubt? While the House of Lords took the former more flexible position, opting either for a real risk (minority)<sup>210</sup> or a "balance

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administrative, not criminal proceedings). Cf. NOWAK & McARTHUR, *supra* note 98, at m. no. 82, 84. For another view see ZANDER, *supra* note 157, at 380-81 (according to which the defence has "to persuade the court that there is a serious issue as to unfairness ..." which, in sum, comes "remarkably close" to laying the burden of proof on the defendant); see similarly ARCHBOLD, *supra* note 174, at § 15-462 ("evidential burden ... that there is an issue to be decided ... will rest on the defence").

<sup>205</sup> P.E. v. France, Communication No. 193/2001, at 150, para. 6.3, U.N. Doc. A/58/44 (2003), G.K. v. Switzerland, Communication No. 219/2002, *id.* at 185 para. 6.10; Thienel, *supra* note 3, at 355 (follows from this that Article 15 reduces "any burden of proof on persons other than the state to an evidentiary burden only of triggering the positive obligation of the state").

<sup>206</sup> BGH, Judgment, June 28, *supra* note 199, at 166.

<sup>207</sup> See, e.g., VOLK, *supra* note 157, at § 18, m. no. 22 in the case of § 136 a StPO; in this context see also Talmon, *supra* note 139, at 84.

<sup>208</sup> For the underlying reversal of the burden of proof see also Jahn, *supra* note 4, at C 109; Talmon, *supra* note 139, at 84.

<sup>209</sup> BGH NSTZ-Rechtsprechungs Report [RR] 2007, 80 (81) requiring *hinreichend verlässliche Anhaltspunkte* [sufficient reliable indicia].

<sup>210</sup> See *supra* note 204 and main text.

of probabilities (majority),<sup>211</sup> the OLG Hamburg<sup>212</sup> took the latter, stricter position that finds support in Article 15 CAT, referring to a statement “which is established to have been made as a result of torture.” Yet, here again, the question arises whether such a strict standard is appropriate in light of the difficulty of proving the use of torture by a foreign state, which is unlikely to cooperate in clarifying the facts and without the cooperation of which it is difficult to procure firm evidence of torture.<sup>213</sup> Further, the real risk or even high probability that evidence was obtained by torture suffices to taint the evidence and thus discredits the proceedings. In fact, the real risk in the sense of a serious possibility that torture evidence was used suffices to make the trial appear unfair,<sup>214</sup> and thus cannot be tolerated by a state based on the rule of law. In sum, the lower standard of a real, serious risk, as applied by the minority in *A and others*, should be considered sufficient.<sup>215</sup>

#### CONCLUSION: AGAINST THE ADMISSION OF TRANSNATIONAL TORTURE EVIDENCE

The analysis of the law of the international criminal Tribunals shows that supranational torture evidence must not be admitted since such evidence is unreliable and damages the integrity of the proceedings). The same applies to the admission of transnational torture evidence before national tribunals. The strict exclusionary rule of Article 15 CAT confirms this view. The rationale for this rule is found in the general unreliability

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<sup>211</sup> See *A and others*, HL, *supra* note 82, para. 120 ff, 121 (Lord Hope) : “Is it *established*, by means of such diligent inquiries into the sources that it is practicable to carry out and on a balance of probabilities, that the information relied on by the Secretary of State *was* obtained under torture?” (emphasis in the original K.A.); see also *id.* paras. 138 ff (Lord Rodger), paras. 156 ff (Lord Carswell), paras. 172 ff (Lord Brown).

<sup>212</sup> The OLG Hamburg required overwhelming proof of torture and considered that remaining doubts about the circumstances of the questioning concern the weight, not the admissibility of the statements (OLG Hamburg, *El Motassadeq*, *supra* note 85, at 2326, 2328).

<sup>213</sup> See also *Jahn*, *supra* note 4, at C 109 (proof “practically impossible”); in the same vein Talmon, *supra* note 139, at 84.

<sup>214</sup> For this argument with regard to ECHR, *supra* note 90, art. 6(1); see also Thienel, *supra* note 93, at 408-09. On the European Court’s similar standard of “presumptions of fact” see Esser, *supra* note 98, at 660 (left column. no.).

<sup>215</sup> For the same result see Thienel, *supra* note 93, at 409 (not clearly distinguishing between real risk and high probability though); NOWAK & McARTHUR, *supra* note 98, at m. no. 84; similarly Jahn, *supra* note 4, at C 109 with constitutional considerations.

of torture evidence, its offensiveness to civilized values and its degrading effect on the administration of justice.<sup>216</sup> Given the defense's disadvantage in a criminal trial, the burden of proof must rest with the party that wants to present the controversial evidence i.e., the state. For practical and fundamental considerations of fairness, such evidence should not be admitted if there is a real, serious risk that it was obtained by torture.

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<sup>216</sup> See the appellants' position as quoted in *A and Others, HL*, *supra* note 82, para. 28(6) (Lord Bingham).