Anti-Terrorism Crime and Security Act 2001, Part IV – Detention of foreign nationals where removal or deportation not possible – appeals to Special Immigration Appeals Commission – admissibility of evidence procured by torture and degrading treatment of a third party by foreign agents – rule against involuntary confessions – abuse of the process – Articles 3,5(4), 6 ECHR – Articles 1, 15 UNCAT

Law Reports
Court of Appeal: [2004] EWCA Civ 1123; [2005] 1 WLR 414

Time Occupied below:
Before the Court of Appeal: 5 days (excluding judgement)

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)

BETWEEN:

A and OTHERS

Appellants

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

A and OTHERS (FC) and ANOTHER

Appellants

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

(Conjoined appeals)

CASE FOR THE INTERVENERS (AMNESTY INTERNATIONAL & OTHERS)

CONTENTS

INTRODUCTION

1. These written submissions are presented on behalf of the AIRE Centre (Advice on Individual Rights in Europe), Amnesty International Ltd, the Association for the Prevention of Torture, British Irish Rights Watch, The Committee on the Administration of Justice, Doctors for Human Rights, Human Rights Watch, The International Federation of Human Rights, INTERIGHTS, The Law Society of England and Wales, Liberty, the Medical Foundation for the Care of Victims of Torture, REDRESS and The World Organisation Against Torture.

2. Brief details of each of these organisations are set out in the schedule to this case.

3. These Interveners have extensive experience of working against the use of torture and other cruel, inhuman or degrading treatment or punishment around the world. Between them, they have investigated and recorded incidents of torture and other forms of ill-treatment,[1] worked with survivors of such treatment, and carried out research into such practices. Some have contributed to the elaboration of international law and standards related to the prohibition of torture and other forms of ill-treatment. Some monitor and report on states' implementation in law and practice of these standards. Some of the Interveners have been engaged in litigation in national and international fora involving states' obligations arising from the prohibition of torture and other forms of ill-treatment. All of the Interveners have extensive knowledge of the relevant international law and standards and jurisprudence.

4. The prohibition of torture and other forms of ill-treatment (hereinafter "the prohibition") under international law is absolute and non-derogable. The Interveners oppose the use, reliance, proffering and admission in any proceedings of information which has been or may have been obtained as a result of a violation of the prohibition, by or against any person anywhere, except in proceedings

[1] The expression 'other forms of ill-treatment' is used here as an abbreviation for cruel, inhuman or degrading treatment or punishment.

against a person suspected of responsibility for a violation of the prohibition, as evidence that such information was obtained.

5. The decision of the fourteen national and international organizations to intervene in this appeal is motivated by grave concern about the undermining and circumvention of the absolute prohibition and the attendant obligations that give it effect. The Interveners are concerned that states, individually and collectively, are increasingly resorting to counter-terrorism measures that effectively bypass their obligations in respect of the absolute prohibition. Some states torture or ill-treat persons suspected of involvement in terrorism. Some have been "outsourcing" torture or other ill-treatment to third countries; some use statements in judicial or other proceedings obtained as a result of a violation of the prohibition in their own or other countries. In this context and in light of the global influence of the jurisprudence of Your Lordships' House, the Interveners consider that the outcome of this appeal will have profound and lasting implications in respect of the efforts to eradicate torture or other ill-treatment world-wide.

6. The Interveners believe that the obligations of states to take lawful measures to counter terrorism and their obligations to prevent and prohibit torture or other ill-treatment serve fundamentally the same purpose: the protection of the integrity and dignity of human beings.

7. The Interveners consider that there is a real danger that if the decision of the Court of Appeal in this case is upheld states would effectively be provided with a means of circumventing the absolute prohibition, rather than fulfilling their international human rights law obligations, which include the obligation to take effective measures to prevent torture or other ill-treatment wherever it occurs. This would give a "green light" to torturers around the world, whose unlawful conduct would find not only an outlet but also a degree of legitimacy in UK courts.

8. The Interveners also consider that the use as evidence in legal proceedings of statements obtained as a result of a violation of the prohibition of torture and other ill-treatment would bring the administration of justice into disrepute, and provide a cloak of legality for that which is unlawful.

9. Finally, the Interveners submit that if the decision of the Court of Appeal in this case were upheld, there would be an irreconcilable conflict between the UK's international obligations flowing from the prohibition of torture and other ill-treatment and the exclusionary rule on the one hand and domestic law on the other.

SUMMARY OF SUBMISSIONS

10. The Prohibition of Torture and Other Forms of Ill-Treatment[2]:

a. The prohibition of torture and other forms of ill-treatment is universally recognised and is enshrined in all the major international and regional human rights instruments;

b. The prohibition of torture and other forms of ill-treatment is absolute and non-derogable;

c. The prohibition of torture has achieved *jus cogens* status and imposes obligations *erga omnes;*

d. The prohibition of torture and other forms of ill-treatment gives rise to an obligation on states to take appropriate and effective steps to *prevent* torture;

e. As a consequence of the *erga omnes* nature of the obligations arising under the prohibition, all States have a legal interest in the performance of the obligations arising from the prohibition. Moreover, as a consequence of the *jus cogens* status of the prohibition, no State may recognise as lawful a situation arising from breach of the prohibition of torture.

[2] As noted above, the words 'other forms of ill-treatment' refer to cruel, inhuman or degrading treatment and punishment.

11. The Exclusionary Rule:

a. The history of the exclusionary rule provides strong evidence that it is inherent in the prohibition of torture and other forms of ill-treatment;

b. Article 15 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('UNCAT') is part of that history, and constitutes an explicit codification of the minimum requirements of the exclusionary rule in an international treaty;

c. The scope of the exclusionary rule is that, at a minimum, it prohibits the invoking of any statement which has been or may have been made as a result of torture, whether instigated or committed by or with the consent or acquiescence of the public officials of the State in question or by those of another State, as evidence in any proceedings, except against a person accused of such treatment as evidence that the statement was made;

d. The exclusionary rule is inherent in the prohibition of torture and other forms of ill-treatment and arguably enjoys the same *jus cogens* status as the prohibition, or at the very least, has itself attained the status of customary international law.

12. The Applicability of the Exclusionary Rule in Domestic Law:

a. Article 6 of the European Convention on Human Rights ('ECHR') requires the exclusion of evidence obtained by torture or other forms of ill-treatment. It should be interpreted consistently with the exclusionary rule including, at a minimum, the formulation enshrined in Article 15 of UNCAT.

b. By virtue of its status as customary international law, the exclusionary rule is already part of the common law. In the absence of unambiguous conflicting legislation, effect should be given to it.

c. Even if your Lordships House considers that the exclusionary rule has not yet attained the status of customary international law, Article 15 of UNCAT imposes obligations on the UK that directly affect statutory interpretation and the development of the common law.

d. Furthermore, the rule of law requires domestic courts to give effect to the exclusionary rule.

I. THE PROHIBITION OF TORTURE

13. The first section of these submissions deals with the origins and nature of the prohibition of torture and others forms of ill-treatment in human rights law.

14. The Interveners advance the following submissions:

a. The prohibition of torture and other forms of ill-treatment is universally recognised and is enshrined in international and regional human rights instruments;

b. The prohibition of torture and other forms of ill-treatment is absolute and non-derogable;

c. The prohibition of torture has achieved *jus cogens* status and imposes obligations *erga omnes*;

d. The prohibition of torture and other forms of ill-treatment gives rise to an obligation on states to take appropriate and effective measures to *prevent* torture.

e. As a consequence of the *erga omnes* nature of the obligations arising under the prohibition, all States have a legal interest in the performance of the obligations arising from the prohibition. In addition, as a consequence of the *jus cogens* status of the prohibition of torture, no State may recognise as lawful a situation arising from breach of the prohibition of torture.

The prohibition of torture and other forms of ill-treatment in international human rights instruments

15. The Universal Declaration of Human Rights was the first international human rights instrument adopted after World War II to contain a prohibition of torture and other ill treatment.[3] It was adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948. Article 5 states:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

16. On the same day that the General Assembly adopted the Universal Declaration of Human Rights, it requested the UN Commission on Human Rights ('UNCHR'[4]) to prepare a draft covenant on human rights and draft measures of implementation. The International Covenant on Civil and Political Rights 1966 ('ICCPR') was one of two covenants that resulted from this mandate. The ICCPR has been ratified by 154 states, including the United Kingdom. The prohibition of torture and other ill treatment is contained in Article 7 ICCPR, the first sentence of which mirrors Article 5 of the Universal Declaration on Human Rights, quoted above. Article 4(2) provides that the prohibition in Article 7 is non-derogable,

[3] A general prohibition against torture is also set out in numerous international humanitarian law instruments, including the Lieber Code and The Hague Conventions, in particular articles 4 and 46 of the Regulations annexed to Convention IV of 1907, read in conjunction with the `Martens clause' laid down in the Preamble to the same Convention, the Geneva Conventions of 1949 and their two Additional Protocols of 1977.

[4] The UN Commission on Human Rights was established in 1946 by the UN Economic and Social Council pursuant to Article 68 of the UN Charter. It sets the standards governing the human rights conduct of States and examines the implementation of those standards. It is composed of 53 States members. It is assisted in its work by the Special Rapporteur on Torture and the Special Rapporteur on the promotion and protection of human rights while countering terrorism.

"even in time of public emergency which threatens the life of the nation". The absolute prohibition of torture and other ill treatment in international treaty law is therefore contained in Article 7 in conjunction with Article 4(2).

17. The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Declaration against Torture") was adopted by General Assembly resolution 3452 (XXX) of 9 December 1975 as a "guideline" to States of measures that should be taken to give effect to the absolute prohibition of torture and other ill-treatment. Article 3 of the Declaration provides:

> "No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment".

18. The General Assembly has since reiterated this condemnation of torture, most recently in Resolution 59/182 (December 2004), by which the General Assembly:

> "*Condemns* all forms of torture and other cruel, inhuman or degrading treatment or punishment, including through intimidation, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and calls upon all Governments to implement fully the prohibition of torture and other cruel, inhuman or degrading treatment or punishment".[5]

19. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('UNCAT') was adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, and entered into force on 26 June 1987. As its preamble implies, UNCAT is founded on the prohibition of torture and other ill treatment contained in Article 5 of the Universal Declaration of Human Rights and Article 7 ICCPR. In particular, it was based on the Declaration against Torture as a means to "make more effective the struggle against torture and other cruel, inhuman or degrading

[5] General Assembly Resolution 59/182, 20 December 2004, UN Doc. A/RES/59/182

treatment or punishment throughout the world" and to "reinforce" states' commitment to the Declaration against Torture. UNCAT requires States parties to take "effective measures" to "prevent acts of torture" (Article 2(1)) and to "prevent…other acts of cruel, inhuman or degrading treatment or punishment" (Article 16(1)) (as well as to investigate suspected or alleged incidents, prosecute those responsible and ensure reparation, including redress to victims).

20. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment was formulated under the auspices of the UNCHR and approved by General Assembly Resolution 43/173 of 9 December 1988. Principle 6 contains the prohibition of torture and other ill treatment. The Guidelines on the Role of Prosecutors were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in September 1990.[6] Principle 16 requires prosecutors, *inter alia*, to refuse to use as evidence statements obtained by torture or other ill treatment, except in proceedings against those who are accused of using such means, and to take all necessary steps to ensure that those responsible for such actions are brought to justice. Both of these instruments constitute important guidelines to States.

21. Further expression of the prohibition is found in the regional human rights instruments: Article 3 of the ECHR, Article 5 of the American Convention on Human Rights and Article 5 of the African Convention on Human and People's Rights and Article 13 of the Arab Charter on Human Rights.

The absolute nature of the prohibition of torture and other forms of ill-treatment

22. The prohibition of torture and others forms of ill-treatment is absolute. This is reflected in international customary and treaty law. All of the international instruments that contain a prohibition of torture expressly recognise its absolute,[7]

[6] UN Doc. A/CONF.144/28/Rev.1 at 189
[7] The UN Convention against Torture provides, in Article 2(2), that,

non-derogable character.[8] The absolute, non-derogable character of these obligations has consistently been reiterated by human rights courts and monitoring bodies.[9]

23. For example, the European Court of Human Rights has recognised the absolute nature of the prohibition of torture in cases such as *Tomasi v France*,[10] *Aksoy v Turkey*[11] and *Chahal v UK*.[12]

24. In its General Comment 20 the UN Human Rights Committee[13] ('HRC') emphasised that:

> "The text of article 7 [of the ICCPR] allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force… [N]o

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> "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

Article 5 of the Inter-American Convention to Prevent and Punish Torture contains a similar provision:

> "The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture.
>
> Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture."

[8] The prohibition of torture is specifically excluded from the derogation provisions of human rights instruments of general scope: Article 4(2) ICCPR; Article 3 UN Torture Declaration; Article 15 European Convention of Human Rights; Article 27(2) American Convention on Human Rights; and Article 4(c) Arab Charter of Human Rights. No clause on derogation for national emergency is contained in the African Charter of Human and Peoples' Rights.

[9] The Committee Against Torture (CAT) has consistently followed this line in its conclusions and recommendations to states parties. See e.g. UN. Doc. A/51/44 (1996), para. 211 (Egypt); A/52/44 (1997) para. 80 (Algeria); para. 258 (Israel); UN Doc. A/54/44 (1999), para. 206 (Egypt); UN Doc. A/57/44 (2001), para. 90 (Russian Federation); UN Doc. A/58/44 (2002), para. 40 (Egypt); para. 51(Israel); para. 59 (Spain).

[10] (1992) 15 EHRR 1, para. 115

[11] (1996) 23 EHRR 553, para. 62

[12] (1997) 23 EHRR 413, para. 79. See also *Ireland v UK* (1978) 2 EHRR 25, para. 163;; *Selmouni v France* (1999) 29 EHRR 403, para. 95; *Kmetty v Hungary* (Application no. 57967/00), judgment of 16 December 2003, para. 32. For Inter-American cases see e.g. *Loayza-Tamayo Case* (Peru), Series C No. 33, judgment of September 17, 1997, para 57; *Castillo-Petruzzi et al.* (Peru), judgment of May 30, 1999. Series C No. 52, para. 197; *Cantoral Benavides case* (Peru), Series C No. 69, judgment of 18 August 2000, para 96; *Maritza Urrutia v Guatemala*, *supra* n. 524, para. 89.

[13] The UN Human Rights Committee was created by Article 28 of the ICCPR and monitors the implementation of the ICCPR.

> justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons".[14]

25. The absolute prohibition of torture is reaffirmed in Article 2(2) of UNCAT, which has been expressly commented upon by the Committee Against Torture ('CAT'):[15]

> "[A] State party to the Convention [against Torture]…is precluded from raising before [the] Committee exceptional circumstances as justification for acts prohibited by article 1 of the Convention. This is plainly expressed in article 2 of the Convention".[16]

26. Regional human rights courts have similarly so provided[17] and the same view was expressed by the ICTY in *Prosecutor v Furundzija*.[18]

27. The absolute nature of the prohibition of torture is reinforced by the *jus cogens* nature of that prohibition (see below). As the ICTY has noted, "the most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force…".[19] Any norm conflicting with the prohibition is therefore void.[20]

28. The prohibition of torture and other forms of ill-treatment does not yield to the threat posed by terrorism. On the contrary, the UN Security Council, the European Court of Human Rights, the Committee of Ministers of the Council of Europe and the UN Committee against Torture, among others, have all made clear that all anti-terrorism measures must be implemented in accordance with

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[14] HRC, General Comment No. 20 concerning prohibition of torture and cruel treatment or punishment (Art. 7), UN Doc. XXX (Forty-fourth session, 1992), para. 3

[15] The CAT, created by Article 17 of UNCAT, is the body of independent experts which monitors implementation of the UNCAT by its State parties. All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Convention and then every four years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of 'concluding observations.'

[16] A/52/44, para. 258 (1997) (report to the General Assembly); and see also A/51/44, paras. 180-222 (1997) (Inquiry under article 20).

[17] See footnote 13.

[18] ICTY Trial Chamber, IT-95-17/1-T (10 December 1998) 38 ILM 317, para. 144

[19] *Prosecutor v Furundzija*, paras 153-54

international human rights and humanitarian law, including the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.[21]

29. The Human Rights Chamber for Bosnia and Herzegovina[22] has analysed the position in international law in the following way:

> "The Chamber fully acknowledges the seriousness and utter importance of the respondent Parties' obligation, as set forth in paragraph 2 of the UN Security Council Resolution 1373 … [H]owever, the Chamber finds that the obligation to co-operate in the international fight against terrorism does not relieve the respondent Parties from their obligation to ensure respect for the rights protected by the Agreement… In summary, the Chamber finds that the international fight against terrorism cannot exempt the respondent Parties from responsibility under the Agreement, should the Chamber find that the hand-over of the applicants to US forces was in violation of Article 1 of Protocol No. 6 to the Convention or Article 3 of the Convention".[23]

30. This was affirmed in the subsequent case of *Bensayah*.[24]

31. The European Court of Human Rights, for its part, has a long history of affirming that the prohibition of torture and other forms of ill-treatment does not yield to the threat posed by terrorism. In *Klass and Others v Germany,* the Court held:

> "The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate".[25]

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[20] See also Vienna Convention on the Law of Treaties 1969, Article 53.
[21] See respectively, UNSC Resolution 1456 (2003), Annex para.6; *Aksoy v Turkey* (1996) 23 EHRR 553, para. 62**;** Guideline IV of the Council of Europe Guidelines on Human Rights and the Fight against Terrorism, 11 July 2002; "*Statement of the Committee against Torture in connection with the events of 11 September 2001*" of 22 November 2001, UN Doc. A/57/44 (2002), para. 17.
[22] The Human Rights Chamber of Bosnia and Herzegovina, a domestic court which included both national and international jurists, was set up under the Dayton Peace Agreement to examine cases of violations of the rights enshrined in the ECHR and other international human rights treaties and standards. It was empowered to issue decisions binding upon the authorities of the entities and the state government.
[23] *Boudellaa and others v Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina,* 11 October 2002, case no. CH/02/8679, CH/02/8689, CH/02/8690 and CH/02/8691) paras. 264 to 267.
[24] *Bensayah v Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, 4 April 2003, case no. CH/02/9499) para. 183.
[25] *Klass and Others v Germany* (1978) 2 EHRR 214

32. In *Leander v Sweden*[26] and in *Rotaru v Romania*[27] the European Court of Human Rights again warned of the danger of "destroying democracy on the ground of defending it."

33. In *Chahal v UK*[28], the European Court of Human Rights was emphatic that no derogation is permissible from the prohibition of torture and other forms of ill-treatment and the positive obligations arising from it (such as non-refoulement), even in the context of terrorism:

34. "Article 3 enshrines one of the most fundamental values of democratic society" (see the above-mentioned *Soering* judgment, p. 34, para. 88). The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.

35. The same approach was taken by the Special Rapporteur on Torture (Sir Nigel Rodley). In response to the events of 11 September 2001 he said:

> "However frustrating may be the search for those behind the abominable acts of terrorism and for evidence that would bring them to justice, I am convinced that any temptation to resort to torture or similar ill-treatment or to send suspects to countries where they would face such treatment must be firmly resisted. Not only would that be a violation of an absolute and peremptory rule of international law, it would be also responding to a crime against humanity with a further crime under international law. Moreover, it would be signalling

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[26] (1987) 9 EHRR 433, para. 60: "Nevertheless, in view of the risk that a system of secret surveillance for the protection of national security poses of undermining or even destroying democracy on the ground of defending it, the Court must be satisfied that there exist adequate and effective guarantees against abuse".
[27] (2000) 8 BHRC 449, para. 59: "The Court must also be satisfied that there exist adequate and effective safeguards against abuse, since a system of secret surveillance designed to protect national security entails the risk of undermining or even 11destroying democracy on the ground of defending it".
[28] (1997) EHRR 413 at para. 79

to the terrorists that the values espoused by the international community are hollow and no more valid than the travesties of principle defended by the terrorists".[29]

36. Similarly, the HRC has expressly confirmed that the "fight against terrorism" is no justification for torture or other ill treatment:

> "Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: …article 7 [prohibition of torture or cruel, inhuman or degrading punishment]…The rights enshrined in these provisions are non-derogable by the very fact that they are listed in article 4, paragraph 2".[30]

37. And later:

> "The Committee is aware of the difficulties that State party faces in its prolonged fight against terrorism, but recalls that no exceptional circumstances whatsoever can be invoked as a justification for torture, and expresses concern at the possible restrictions of human rights which may result from measures taken for that purpose".[31]

38. See also the response of the Committee Against Torture to the events of 11 September 2001, where it made a statement reaffirming the content of Article 2:

> "The Committee against Torture reminds State parties to the Convention of the non-derogable nature of most of the obligations undertaken by them in ratifying the Convention. The obligations contained in Articles 2 (whereby 'no exceptional circumstances whatsoever may be invoked as a justification of torture')… must be observed in all circumstances".[32]

39. In its Second Periodic Report to the Committee Against Torture, Israel claimed that physical and psychological pressure techniques had prevented 90 terrorist attacks.[33] The Committee concluded that the techniques that Israel had employed were in breach of UNCAT, even though they were designed with the purpose of

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[29] Statement by the Special Rapporteur to the Third Committee of the General Assembly, delivered on 8 November 2001, Annex III, UN Doc. E/CN.4/2002/76, p. 14
[30] General Comment No. 29 (2001) (States of Emergency), para. 7
[31] CCPR/CO/76/EGY, para. 4 (2002)
[32] Statement CAT/C/XXVII/Misc.7 (22 November 2001)

protecting Israeli citizens from terrorist attacks. The Committee had previously stated that:

> "The Committee acknowledges the terrible dilemma that Israel confronts in dealing with terrorist threats to its security, but as a State party to the Convention Israel is precluded from raising before the Committee exceptional circumstances as justification for acts prohibited by article 1 of the Convention. This is plainly expressed in article 2 of the Convention".[34]

40. Again, in the context of counter-terrorism measures taken since 9/11, the following joint statement was adopted by the Committee Against Torture, the Special Rapporteur on Torture, the Chairperson of the twenty-second session of the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture, and the Acting United Nations High Commissioner for Human Rights on 26 June 2004, the International Day in Support of Victims of Torture:

> "We wish to take this opportunity to express our serious concern about continuing reports of torture and other cruel, inhuman or degrading treatment or punishment taking place in many parts of the world.
>
> There is an absolute prohibition of torture under international human rights and humanitarian law. The non-derogable nature of this prohibition is enshrined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as in several other instruments. States must take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under their jurisdiction and no exceptional circumstances whatsoever, whether a state of war, or a threat of war, internal political instability, or any other public emergency may be invoked as a justification of torture.
>
> Under international law States also have the duty to investigate torture whenever it occurs, prosecute the guilty parties and award compensation and the means of rehabilitation to the victims. Too often, public authorities are remiss in fulfilling their duties in this respect, allowing torture to continue to occur with impunity".[35]

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[33] CAT/C/33/Add.2/Rev.1, paras. 2-3, and 24, cited in S. Joseph, J. Schultz and M. Castan, *International Covenant on Civil and Political Rights: cases, materials and commentary* (1st ed., 2000), pp. 150-151

[34] CAT/C/18/CRP1/Add.4, para. 134. A similar view was held by the HRC: see CCPR/C/79/Add.93, paras. 19, 21 (1998)

[35] See CAT report to the General Assembly, A/59/44 (2004), at para. 17 (emphasis added).

41. The Council of Europe's Guidelines on Human Rights and the Fight Against Terrorism also categorically confirm that no measures taken against terrorism must be permitted to undermine the rule of law or the absolute prohibition of torture and other forms of ill-treatment.[36]

42. In the context of counter-terrorism measures, the General Assembly has reaffirmed that any measures taken must comply with international human rights law and that the rights specified under Article 4 ICCPR (which refers to Article 7) are non-derogable in all circumstances. Resolution 59/191 of 2005:

> "1. Reaffirms that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law;
>
> 2. Also reaffirms the obligation of States, in accordance with article 4 of the International Covenant on Civil and Political Rights, to respect certain rights as non-derogable in any circumstances, recalls, in regard to all other Covenant rights, that any measures derogating from the provisions of the Covenant must be in accordance with that article in all cases, and underlines the exceptional and temporary nature of any such derogations".[37]

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[36] Adopted by the Council of Europe Committee of Ministers on 11 July 2002, H(2002)004. See in particular Guidelines II to IV:

> "II. Prohibition of arbitrariness
>
> All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.
>
> III. Lawfulness of anti-terrorist measures
> 1. All measures taken by States to combat terrorism must be lawful.
> 2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.
>
> IV. Absolute prohibition of torture
> The use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted."

[37] UN Doc. A/RES/59/191 (2005)

43. The same position has been taken by the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.[38]

44. This is also the position endorsed by the General Assembly in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment:

> "No circumstances whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment".[39]

45. The UN Security Council has, in a declaration on the issue of combating terrorism attached to Security Council Resolution 1456 (2003), stated that:

> "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law".[40]

46. Most recently, the UN Summit Declaration of September 2005 has again emphasised that measures taken to combat terrorism must comply with international law including international human rights law:

> "We recognize that international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter and relevant international Conventions and Protocols. States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law".[41]

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[38] See Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (Robert K. Goldman), E/CN.4/2005/103, 7 February 2005, at para. 49, referring to the absolute prohibition of torture and other forms of ill-treatment in human rights law.
[39] UN Doc. A/RES/43/173 (1988), Principle 6
[40] UN Doc. S/RES/1456 (2003), Annex, para. 6
[41] UN World Summit Declaration 2005, para. 85, adopted by the Heads of State and Government gathered at the UN Headquarters from 14-16 September 2005, UN Doc. A/60/L.1, A/RES/60/1

The *jus cogens* and *erga omnes* nature of the prohibition of torture

47. As a consequence of the fundamental importance of the prohibition of torture to the international community, it is widely accepted that the prohibition of torture constitutes both a norm of *jus cogens* and an obligation owed by every State to the international community as a whole (*erga omnes*).

The concepts of jus cogens *and* erga omnes

48. The category of obligations arising under peremptory norms of general international law (or *jus cogens*) was established as part of positive international law in the Vienna Convention on the Law of Treaties 1969, which defines the concept of "peremptory norm" in Article 53 in the following way:

> "For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

49. *Jus cogens* status thus connotes the fundamental, peremptory character of the obligation, which is, in the words of the International Court of Justice, "intransgressible".[42]

50. The notion of obligations *erga omnes* was identified by the International Court of Justice in the *Barcelona Traction* case,[43] in which the Court found that:

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[42] Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, p. 226 at p. 257, para. 79. Although the ICJ found that there was no need to decide whether the basic rules of international humanitarian law were *jus cogens*, in view of its description of them as "intransgressible" it would seem justified to treat them as peremptory. See James Crawford, *The International Law Commission's Articles on State Responsibility; Introduction, Text and Commentaries* (Cambridge, CUP, 2002), p. 246.

[43] Cf. the discussion in Ragazzi, *The Notion of Obligations* Erga Omnes, (Oxford, OUP, 1997), pp. 7-12, attributing the notion to Manfred Lachs, later a judge and president of the International Court of Justice, and a member of the court which decided the *Barcelona Traction case* I.C.J. Reports 1970, p. 3. Arnold (Lord) McNair had earlier used the phrase in relation to treaties: "Treaties Producing Effects '*Erga Omnes*'", *Scritti di Diritto Internazionale in onore di T. Perassi*, vol. II, (Giuffré, Milan, 1957), p. 23.

> "… an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".[44]

51. The concept of obligations *erga omnes* is now widely accepted. It has been applied in international jurisprudence[45] and in the work of the International Law Commission ('ILC') in its Articles on the Responsibility of States for Internationally Wrongful Acts ('Articles on State Responsibility'), which it adopted in August 2001.[46]

52. *Jus cogens* goes to the overriding, unconditional and non-derogable nature of the obligation while *erga omnes* goes to the reach of the obligation, denoting the legal interest of all states in the protection of the correlative right and their standing to invoke its breach.

53. Although the two categories (*jus cogens* and *erga omnes*) are not coterminous, there is at the very least substantial overlap in their content. In the context of its codification of the international law of State responsibility, the International Law Commission discussed the relationship between the two in the following way:

> "Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which the International Court has given of obligations towards the international community as a whole all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the Vienna Convention involve obligations to the international community as a whole. But there is at least a

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[44] *Barcelona Traction, Light and Power Company Limited, Second Phase,* I.C.J. Reports 1970, p. 3, at p. 32, para. 33. Cf the discussion in Ragazzi.

[45] *Application of the Genocide Convention (Bosnia and Herzegovina v Yugoslavia),* Preliminary Objections, ICJ Reports 1996, p. 595 at pp. 615-616, paras. 31-32 *East Timor (Portugal v Australia,* ICJ Reports 1995, p. 90 at p. 102, para. 29 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136, at pp. 199-200 (paras. 155-158)

[46] For the Articles and Commentaries see *Report of the International Law Commission on the Work of its Fifty Third Session*, UN Doc. A/56/10, Chapter IV. The Articles and Commentaries are reproduced with an introduction and accompanying analysis in Crawford, op. cit..

> difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance — i.e., in terms of the present articles, in being entitled to invoke the responsibility of any State in breach".[47]

The prohibition of torture as a jus cogens *norm and* erga omnes *obligation*

54. The prohibition of torture is incontrovertibly a *jus cogens* norm giving rise to obligations *erga omnes*.

55. The *jus cogens* nature of the prohibition of torture is well established in international and domestic case law.

56. In his first report to the UNCHR in 1986, the Special Rapporteur on Torture stated that the prohibition of torture is a rule of *jus cogens*:

> "Torture is now absolutely and without any reservation prohibited under international law whether in time of peace or of war. In all human rights instruments the prohibition of torture belongs to the group of rights from which no derogation can be made. The International Court of Justice has qualified the obligation to respect the basic human rights, to which the right not to be tortured belongs beyond any doubt, as obligations *erga omnes*, obligations which a State has vis-à-vis the community of States as a whole and in the implementation of which every State has a legal interest. The International Law Commission in its draft articles on State responsibility has labelled serious violations of these basic human rights as 'international crimes', giving rise to the specific responsibility of the State concerned. In view of these qualifications the prohibition of torture can be considered to belong to the rules of *jus cogens*. If ever a phenomenon was outlawed unreservedly and unequivocally it is torture".[48]

57. There is now an ample body of case law recognising the prohibition of torture as having *jus cogens* status.

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[47] ILC, Introductory Commentary to Part II, Chapter 3, paragraph (7) [footnotes omitted]. See also Crawford, op. cit., pp. 244-245.
[48] Report of the Special Rapporteur on Torture (P Kooijmans), E/CN.4/1986/15, at para. 3

58. As long ago as 1980, the prohibition of torture was found to have achieved at least the status of customary international law. In *Filartiga v Peña-Irala*,[49] the US Second Circuit Court of Appeals had to decide whether torture was a "violation of the law of nations", from which customary international law is the direct descendant. If it were, the US federal courts would enjoy jurisdiction in a tort claim brought under the Judicial Act 1789.[50] The question was answered in the affirmative:

> "[T]here are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody…
>
> Turning to the act of torture, we have little difficulty discerning its universal renunciation in the modern usage and practice of nations... The international consensus surrounding torture has found expression in numerous international treaties and accords... The substance of these international agreements is reflected in modern municipal i.e. national law as well. Although torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced. According to one survey, torture is prohibited, expressly or implicitly, by the constitutions of over fifty-five nations...
>
> Having examined the sources from which customary international law is derived – the usage of nations, judicial opinions and the works of jurists – we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens".[51]

59. Similarly, the District of Columbia Circuit held in *Tel-Oren v Libyan Arab Republic*[52] that "commentators have begun to identify a handful of heinous actions – each of which violates definable, universal and obligatory norms," and that these include, at a minimum, bans on governmental "torture, summary execution, genocide, and slavery".[53]

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[49] 630 F. 2d 876 (30 June 1980)
[50] Codified at 28 USC §1350 (Alien Tort Claims Act)
[51] per Kaufmann J at 881-84
[52] 726 F.2d 774 (3 February 1984)
[53] 726 F.2d 774 (3 February 1984) at 781, 791, per Edwards J. See also *Forti v Suarez-Mason*, 672 F. Supp. 1531, 1541, in which the Northern District Court of California held that "official torture constitutes a cognizable violation of the law of nations" and described the prohibition against official torture as "universal, obligatory, and definable".

60. Subsequently, in the landmark case of *Siderman de Blake v Republic of Argentina*,[54] the Ninth Circuit suggested that the prohibition of torture had already achieved the status of *jus cogens* in 1980, when the Second Circuit delivered its ruling in *Filartiga*. It was in any event clear to the Ninth Circuit that by 1992 the prohibition of 'official torture' had been elevated from 'ordinary' customary international law to a *jus cogens* peremptory norm. Referring to jurisprudence and treaty law subsequent to *Filartiga*, including the adoption of UNCAT, the Court held:

> "In light of the unanimous view of these authoritative voices, it would be unthinkable to conclude other than that acts of official torture violate customary international law. And while not all customary international law carries with it the force of a *jus cogens* norm, the prohibition against official torture has attained that status. In CUSCLIN, 859 F.2d at 941 -42, the D.C. Circuit announced that torture is one of a handful of acts that constitute violations of *jus cogens*. In *Filartiga*, though the court was not explicitly considering *jus cogens*, Judge Kaufman's survey of the universal condemnation of torture provides much support for the view that torture violates *jus cogens*. In Judge Kaufman's words, "[a]mong the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture." 630 F.2d at 890. Supporting this case law is the Restatement [of the Foreign Relations Law of the United States], which recognizes the prohibition against official torture as one of only a few *jus cogens* norms: Restatement 702 Comment n (also identifying *jus cogens* norms prohibiting genocide, slavery, murder or causing disappearance of individuals, prolonged arbitrary detention, and systematic racial discrimination). Finally, there is widespread agreement among scholars that the prohibition against official torture has achieved the status of a *jus cogens* norm…
>
> Given this extraordinary consensus, we conclude that the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*. The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being. That states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens. See

[54] 965 F. 2d 699 (22 May 1992)

Filartiga, 630 F.2d at 884 (noting that no contemporary state asserts 'a right to torture its own or another nation's citizens'); id. at n. 15 ('The fact that the prohibition against torture is often honoured in the breach does not diminish its binding effect as a norm of international law.'). Under international law, any state that engages in official torture violates *jus cogens*".[55]

61. In *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*[56] Lord Hope cited *Siderman de Blake* as persuasive authority for the proposition that at the time of UNCAT's adoption, there was already widespread agreement that the prohibition of torture had achieved the status of *jus cogens*.[57]

62. The ICTY has also recognised the *jus cogens* status of the prohibition of torture. In *Prosecutor v Delalic and others*[58], the Court emphasised that both treaty and customary international law prohibit torture. It continued:

"Based on the foregoing, it can be said that the prohibition of torture is a norm of customary law. It further constitutes a norm of *jus cogens,* as has been confirmed by the United Nations Special Rapporteur for Torture".[59]

63. In *Prosecutor v Furundzija,* the ICTY held that:

"Because of the importance of the values it protects, this principle [proscribing torture] has evolved into a peremptory norm of general international law, that is, a norm which enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.

Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority

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[55] per Fletcher J
[56] *(No. 3)* [2000] AC 147
[57] [2000] 1 AC 147, 247
[58] ICTY Trial Chamber, IT-96-21-T (16 November 1998)
[59] para. 454, citing the Report of the Special Rapporteur, P Kooijmans, appointed pursuant to Commission on Human Rights res. 1985/33 E/CN.4/1986/15, dated 19 Feb. 1986, para. 3

that the prohibition of torture is an absolute value from which nobody must deviate".[60]

64. And in *Prosecutor v Kunarac* the ICTY held:

> "Torture is prohibited both in times of peace and during an armed conflict. The prohibition can be said to constitute a norm of *jus cogens*".[61]

65. In the English courts the status of the prohibition of torture as *jus cogens* has been recognised by Your Lordships' House in *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.3)*.[62] In that case it was conceded by Chile that the prohibition of torture had *jus cogens* status. Lord Browne-Wilkinson held that "the international law prohibiting torture has the character of *jus cogens* or a peremptory norm, i.e. one of those rules of international law which have a particular status".[63] Lord Hope cited with approval US decisions that the prohibition of torture constitutes *jus cogens* as well as constituting an obligation owed to the international community as a whole.[64]

66. Likewise, the European Court of Human Rights. In *Al-Adsani v UK*,[65] the European Court emphasised the special stigma attached to torture under Article 3 of the ECHR, especially when read in the context of prohibitions in other international instruments:

> "Within the Convention system it has long been recognised that the right under Article 3 not to be subjected to torture or to inhuman or degrading treatment or punishment enshrines one of the fundamental values of democratic society. It is an absolute right, permitting of no exception in any circumstances (see, for example, *Aksoy*, cited above, p. 2278, § 62, and the cases cited therein).
>
> Other areas of public international law bear witness to a growing recognition of the overriding importance of the prohibition of torture. Thus, torture is

[60] ICTY Trial Chamber, IT-95-17/1-T (10 December 1998) 38 ILM 317, paras 153-54
[61] ICTY Trial Chamber, IT-96-23-T and IT-96-23/1-T (22 February 2001), para. 466
[62] [2000] AC 147
[63] per Lord Browne-Wilkinson, p.198
[64] [2000] AC 147, 247
[65] (2002) 34 EHRR 11

> forbidden by Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights. The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment requires, by Article 2, that each State Party should take effective legislative, administrative, judicial or other measures to prevent torture in any territory under its jurisdiction, and, by Article 4, that all acts of torture should be made offences under the State Party's criminal law (see paragraphs 25-29 above). In addition, there have been a number of judicial statements to the effect that the prohibition of torture has attained the status of a peremptory norm or *jus cogens* [reference is made to *Furundzija* and *Pinochet (No. 3)*]…
>
> …the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law…".[66]

67. Most recently, in *Jones v Ministry of Interior of Saudi Arabia,*[67] Lord Phillips of Worth Matravers MR described the prohibition of torture in the following terms, referring to the widespread ratification of UNCAT:

> "The crime of torture has acquired a special status under international law. It is an international crime or a breach of *jus cogens.* That status is reflected by the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 ('the Torture Convention') to which there are 148 signatories, including the United Kingdom and Saudi Arabia".[68]

68. The *erga omnes* nature of the obligations arising under the prohibition of torture has long been established. In the *Barcelona Traction case*[69] in 1970 the ICJ observed that:

> "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the *principles and rules concerning the basic rights of the human person*, including protection from slavery and racial discrimination".[70]

69. See also UN General Comment 31, which makes clear that every state has a legal interest in the performance by every other State Party to the ICCPR of its

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[66] paras 59-61. In the Court of Appeal (*Al-Adsani v Government of Kuwait and ors*, 107 ILR 536, 541), Stuart-Smith LJ refrained from accepting that the prohibition of torture was *jus cogens* but made no finding either way on the issue.
[67] [2005] 2 WLR 808, 28 October 2004, CA
[68] para. 108
[69] (1970) ICJ Reports p.3

obligations.[71]

70. The judgment of the ICTY in *Prosecutor v Furundzija* is to the same effect:

> "Furthermore, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued".[72]

71. So too the approach of the Inter-American Commission on Human Rights:

> "The American Convention prohibits the imposition of torture or cruel, inhuman or degrading treatment or punishment on persons under any circumstances. While the American Declaration does not contain a general provision on the right to humane treatment, the Commission has interpreted Article I of the American Declaration as containing a prohibition similar to that under the American Convention. In fact it has specified that "[a]n essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations *erga omnes*".[73]

72. The *jus cogens* nature of the prohibition of torture and the *erga omnes* nature of the obligations arising under the prohibition have important consequences. These consequences – relating to preventative obligations, the duty on States not to endorse, adopt or recognise acts which breach the prohibition of torture, and the scope of the exclusionary rule – are set out below.

The obligation to take appropriate and effective steps to prevent torture

73. The prohibition of torture and other ill-treatment gives rise to an obligation on States to take appropriate and effective steps to *prevent* it. This obligation is

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[70] *Ibid.,* at p. 32, para. 34, emphasis added
[71] CCPR/C/21/Rev.1/Add.13, para. 2
[72] ICTY Trial Chamber, IT-95-17/1-T (10 December 1998) 38 ILM 317, para. 151
[73] Report on Terrorism and Human Rights, 22 October 2002, OEA/Ser.L/V/II.116, Doc. 5 rev 1 corr., para. 155

derived from the requirement that torture and other ill-treatment be prohibited absolutely. It is reinforced by the fact that the prohibition of torture is a *jus cogens* norm of international law and gives rise to *erga omnes* obligations.

74. The notion of prevention runs through UNCAT. It starts with the preamble, which sets out the intention of those ratifying UNCAT to "make more effective the struggle against torture". It is also found in Article 2 (the general duty to prevent acts of torture), Article 3 (the non-return provision), Articles 4 and 5 (the universal jurisdiction provisions), Article 9 (the international co-operation provision), Article 10 (the education and training provision), Article 11 (the review provision), Articles 12-14 (the investigation, complaint and redress provisions), Article 15 (the exclusionary rule) and Article 16 (the obligation of prevention in relation to other forms of ill-treatment).

75. The duty of prevention is also reflected in ECHR case law starting with the case of *Soering v UK,*[74] which was relied on in *Prosecutor v Furundzija* where the ICTY confirmed that the prohibition of torture imposes preventative obligations:

> "given the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. As was authoritatively held by the European Court of Human Rights in *Soering*, international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment). It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition".[75]

76. It is submitted that the admission of evidence that has been or might have been obtained by torture is contrary to the prohibition of torture. A rule permitting the

[74] (1989) 11 EHRR 439
[75] ICTY Trial Chamber, IT-95-17/1-T (10 December 1998) 38 ILM 317, para. 148

admission of such evidence would contravene the preventative obligations on states in relation to the prohibition of torture.

77. The UN Special Rapporteur on Torture has also stressed the importance of preventative measures:

> "Given the fact that the condemnation of torture is so general and unequivocal, it seems surprising indeed that the phenomenon of torture is still so widespread. At any rate it is evident that the outlawry of torture – indispensable as it may be as an initial step – is far from sufficient. The international community has therefore escalated the struggle against torture. In the first place it adopted a convention containing various venues and mechanisms to suppress and ultimately prevent torture."[76]

78. Likewise, the HRC has also clearly stated that it is not sufficient for states to prohibit torture or other ill treatment. In General Comment No. 7, the HRC described the component parts of the prohibition of torture and cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR. It then continued:

> "The Committee notes that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make it a crime.
> …
> As appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood".[77]

79. Subsequently the HRC elaborated on this in General Comment 20:

> "The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.[78]"

80. General Comment 20 sets out the measures which the HRC considers form the component parts of the prohibition against torture and that are reflected in UNCAT, such as the duty to provide practical safeguards during detention and

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[76] Report of the Special Rapporteur on Torture (P Kooijmans), E/CN.4/1986/15, at para. 6.
[77] HRC General Comment No. 7 (1982) paras. 1 and 2, (emphasis added)
[78] HRC General Comment No. 20, para. 8 (emphasis added)

interrogation (Article 11 UNCAT) and the exclusion of confessions and other statements obtained through torture (Article 15 UNCAT).

81. This General Comment makes a clear link between the prohibition of torture and the exclusionary rule. This link is important because the prohibition of torture has the status of *jus cogens* and, as is submitted further below, this status arguably extends to the exclusionary rule. This link is also important because once it is accepted that the exclusionary rule is inherent in Article 7 ICCPR, the conclusion is inescapable that the exclusionary rule is also inherent in Article 3 ECHR (which is essentially in the same terms as Article 7 ICCPR) with the consequence, as is argued below, that exclusion is required under the Human Rights Act 1998.

The nature of the obligations arising under the prohibition of torture and the duty to refrain from recognising a situation arising from a breach of the prohibition.

82. As noted above, the fact that the prohibition of torture is *jus cogens* and gives rise to *erga omnes* obligations has important consequences in relation to the obligation to prevent torture, the duty not to endorse, adopt or recognise acts that breach the prohibition and the scope of the exclusionary rule of evidence.

83. A breach of such a norm entails international legal consequences not only for the State in breach of its international obligations, but also for all other States. The clearest articulation of this is the recent Advisory Opinion concerning the separation barrier constructed in the Occupied Palestinian Territories. In that case the ICJ confirmed that the right to self-determination and certain provisions of international humanitarian law give rise to obligations *erga omnes*. It then continued:

> "Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem …

> … They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end."[79]

84. Thus there is a clear obligation not to endorse, adopt or recognise any breach of a norm of international law that has acquired the status of *jus cogens* and imposes obligations *erga omnes*.

85. This notion has already found some reflection in English law. In *Kuwait Airways Corporation v Iraqi Airways Company and Others,*[80] Your Lordships' House held that it would be contrary to English public policy and "wholly alien to fundamental requirements of justice as administered by an English court"[81] for English courts to enforce or recognise a foreign law (in that case an Iraqi law purporting to transfer the property of Kuwait Airways Corporation to Iraqi Airways Corporation after the first Gulf War) which was in breach of a *jus cogens* norm of international law. Lord Nicholls of Birkenhead noted that

> "a breach of international law of this seriousness is a matter of deep concern to the worldwide community of nations".[82]

86. Noting the *jus cogens* nature of the international prohibition of the use of force, Lord Steyn stated:

> "An English court may not give direct or indirect recognition to Rule 369 [a provision of Iraqi law] for any purpose whatsoever. An English court may not recognise any Iraqi decree or act which would directly or indirectly enable Iraq or Iraqi enterprises to retain the spoils or fruit of an illegal invasion."[83]

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[79] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136, at p. 200, para. 159
[80] (2002) 2 WLR 1353
[81] Ibid paragraph 16
[82] Ibid Paragraph 29
[83] Ibid Paragraph 117

87. It is submitted that that the underlying rationale of the *Kuwait Airways* case – that the English courts can and must enquire into the legality of actions and laws of foreign states where *jus cogens* norms of international law are engaged – applies with even greater force where fundamental human rights are at stake.

88. This position is reinforced by the law relating to serious breaches of *jus cogens* norms of international law. The relevant provisions of the International Law Commission's Articles on State Responsibility (Articles 40 and 41) make clear that in the event of a serious (gross or systematic) breach of an obligation arising under a peremptory norm of general international law (*jus cogens*), all other States have certain obligations.[84] These include the obligation to cooperate in bringing an end to any such breach, and a duty not to give recognition (in law or otherwise) to situations resulting from a breach of a *jus cogens* norm of international law – and not to aid or assist in maintaining any such situation.[85] The rules on state responsibility in relation to serious breaches of *jus cogens* thus go beyond merely providing a *faculty* for a State to take certain action in the face of torture, as is the case in relation to any obligation owed to it, and instead *oblige* all States to take action in certain circumstances. It is submitted that admitting evidence that has

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[84] Article 40 (2) of the ILC's Articles provide that "a breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation".

[85] The regime of consequences attaching to breaches of *jus cogens* norms is codified in Part II, Chapter 3 of the ILC Articles entitled "Serious breaches of obligations under peremptory norms of general international law". The relevant articles provide:

"Article 40
Application of this Chapter

1. This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41
Particular consequences of a serious breach of an obligation under this Chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law."

been or might have been obtained by torture would clearly conflict with this obligation.[86]

89. The *erga omnes* character of obligations resulting from the prohibition of torture is also important. *Erga omnes* obligations are not reducible to bilateral or multilateral right-obligation relationships: they are obligations owed to the international community as a whole – and every State therefore has a legal interest in ensuring the performance of such obligations. Articles 42 and 48 of the ILC's Articles on State Responsibility underscore this distinction between, on the one hand, normal bilateral or multilateral right/obligation relationships and, on the other, obligations owed to the international community as a whole (*erga omnes*).

90. Under Article 48(1)(b), in the event of the breach of an obligation owed to the international community as a whole, *any* State is entitled to invoke the responsibility of another State even if it is not an "injured State." This contrasts with the general rule, set out in Article 42, that an injured State is entitled to invoke the responsibility of another State if the obligation breached is either owed to the former individually, or is owed to a group of States, including that State, and specially affects that State. Significant legal consequences flow from this power to invoke responsibility, including the power of all states to take countermeasures that might otherwise be unlawful (e.g. suspending performance of one or more of their own obligations that are owed to the wrong-doing State in order to ensure compliance).

91. The compliance regime associated with *erga omnes* characterisation reflects the importance attributed by the international community to obligations of this type, and the fact that the international legal order depends on other states responding to, and thus ultimately curtailing and preventing, violations which threaten its very foundations.

[86] The Interveners submit that any breach of the prohibition of torture is by its very nature, serious.

92. The significance in this case of the fact that the prohibition of torture is a *jus cogens* norm of international law and gives rise to *erga omnes* obligations is that all States have a legal interest in breaches of the prohibition *wherever* those breaches occur, and all states have a duty not to endorse, adopt or recognise such breaches. The admission as evidence in legal proceedings of a statement which has been or may have been obtained by torture purely on the basis that it was obtained abroad without the connivance of UK officials clearly conflicts with this interest and duty. The enforcement of the most fundamental obligations owed to the international community as a whole is not contingent on the locus of the wrong or the nationality of the perpetrator or victim.

II. THE EXCLUSIONARY RULE

93. The following section sets out the history and scope of the rule prohibiting the use of statements made as a result of torture. The Interveners advance the following submissions:

a. The history of the exclusionary rule provides strong evidence that it is inherent in the prohibition of torture and other ill-treatment.

b. Article 15 UNCAT is part of that history, and constitutes an explicit codification of the minimum requirements of the exclusionary rule in an international treaty.

c. The scope of the exclusionary rule is that it prohibits at a minimum the invoking as evidence in any proceedings of any statement which has been or might have been made as a result of torture whether instigated by or with the consent or acquiescence of the public officials of the State in question or by those of any other State, except against a person accused of such treatment as evidence that the statement was made.

d. The exclusionary rule is inherent in the prohibition of torture and arguably enjoys the same *jus cogens* status as the prohibition or, at the very least, has itself attained the status of customary international law.

The history of the exclusionary rule

94. The link between the prohibition of torture and other forms of ill-treatment and the exclusionary rule is clear from the origins and history of the exclusionary rule in international human rights law. In 1975, the UN General Assembly adopted a Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration against

Torture), annexed to GA Resolution 3452 (XXX) of 9 December 1975.[87] The final paragraph of the Resolution states that the Declaration against Torture was adopted "as a guideline for all States and other entities exercising effective power". Article 12 of the Declaration against Torture provides: "Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings." Resolution 3452 (XXX) was adopted without a vote (i.e. by consensus),[88] which demonstrates its universal acceptance from the very start.

95. The next step was Resolution 3453 (XXX), also adopted on 9 December 1975, in which the General Assembly requested the UN Commission on Human Rights to study the question of torture and any necessary steps for ensuring the effective observance of the Declaration against Torture.

96. Two years later, in Resolution 32/62 (8th December 1977), which was also adopted by consensus,[89] the General Assembly asked the Commission on Human Rights to draw up a draft Convention against torture and other cruel, inhuman or degrading treatment or punishment "in the light of the *principles* embodied in the Declaration" (emphasis added). In Resolution 32/63 adopted the same day, again by consensus, the General Assembly reiterated that "the Declaration should serve as a guideline for all States and other entities exercising effective power" and requested the UN Secretary-General "to draw up and circulate among Member States a questionnaire soliciting information concerning the steps they have taken,

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[87] For the background to the Declaration, see JH Burgers and H Danelius, *The United Nations Convention Against Torture*, Nijhoff, 1988, pp. 13-16.

[88] Under Art 18 of the UN Charter, decisions of the General Assembly on "important questions" are made by a two-thirds majority of the members present and voting. Decisions on other questions are made by a majority of the members present and voting. Each Member State has one vote. However, the majority of General Assembly resolutions are adopted without a vote. Records show that of the 217 resolutions adopted in 1975, 96 were adopted without a vote, 89 by a two-thirds majority and 2 by a simple majority (http://www.un.org/law/repertory/art18.htm). If a vote is taken, it is documented either as a recorded vote or as a summary vote. Only a recorded vote, which must be requested before voting is conducted, clearly identifies the stand that each Member State took on the issue. In the absence of such a request, only the voting summary (i.e. the number of countries which voted for or against a resolution as well as those abstaining) is recorded, without identifying how each Member State voted (http://www.un.org/Depts/dhl/resguide/gavote.htm).

[89] See *UN General Assembly Resolutions and Decisions*, 31st-33rd sessions, 1976-1979

including legislative and other measures, to put into practice the *principles* of the Declaration" (emphasis added).

97. Three years after it was adopted, the European Court of Human Rights relied on the Declaration in *Ireland v United Kingdom*[90] when defining "torture" for the purposes of Article 3 ECHR.[91] And two years later, in *Filartiga v Pena-Irala*,[92] the US Court of Appeals (Second Circuit) held that the Declaration was "particularly relevant" in helping to establish that the prohibition of torture was part of customary international law.

98. Two years later, in 1982, the HRC issued General Comment No. 7 on Article 7 of the ICCPR. This was an important development because it located the exclusionary rule which had first been articulated in Article 12 of the 1975 Declaration Against Torture in Article 7 of the ICCPR itself:

> "1. … The Committee notes that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make it a crime. Most States have penal provisions which are applicable to cases of torture or similar practices. Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control.
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> …
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> Among the safeguards which may make control effective are provisions against detention incommunicado, granting, without prejudice to the investigation, persons such as doctors, lawyers and family members access to the detainees; provisions requiring that detainees should be held in places that are publicly recognized and that their names and places of detention should be entered in a central register available to persons concerned, such as relatives; *provisions making confessions or other evidence obtained through torture or other treatment contrary to article 7 inadmissible in court*; and measures of training and instruction of law enforcement officials not to apply such treatment.
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> 2. As appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood..." .[93]

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[90] (1978) 2 EHRR 25, para. 167
[91] See also the Concurring Opinion of Judge De Meyer in *Tomasi v France* (1993) 15 EHRR 1.
[92] *Loc. cit*.
[93] HRC General Comment No. 7 (1982), paras 1-2 (emphasis added)

99. As will be seen below, the HRC reinforced this connection between the prohibition of torture in Article 7 ICCPR and the exclusionary rule in 1994.

100. In 1984, when the *Filartiga* case returned to the US District Court for the Eastern District of New York for the assessment of damages, that Court also recognised the special significance of the 1975 Declaration against Torture:

> "The international law described by the Court of Appeals does not ordain detailed remedies but sets forth norms. But plainly international law does not consist of mere benevolent yearnings never to be given effect. Indeed, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted without dissent by the General Assembly, recites that where an act of torture has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation 'in accordance with international law', article 11, and that 'each State shall ensure that all acts of torture are offences under its criminal law', article 7". [94]

101. Meanwhile UNCAT was taking shape. It was drafted in the late 1970s and early 1980s and adopted for signature on 10 December 1984.[95] It entered into force on 26 June 1987. Today it has 142 parties,[96] including nearly all the Member States

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[94] 577 F.Supp. 860, January 10 1984

[95] General Assembly Resolution 39/46, adopted without a vote. The UN Bibliographic Information System (UNBISnet), an online index to UN documentation, includes a database called Voting Records giving access to voting information for General Assembly resolutions adopted either without a vote or with a recorded vote since 1983.

[96] The following 140 States are parties to UNCAT as of 1 September 2005: Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, China, Colombia, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Holy See, Honduras, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Vincent and the Grenadines, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia and Montenegro, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, The Former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Uzbekistan, Venezuela (Bolivian Republic of), Yemen and Zambia

of the Council of Europe[97] and all five permanent members of the UN Security Council (China, France, Russia, United Kingdom, United States of America). This represents around 75% of the members of the international community.

102. Article 15 of UNCAT provides:

> "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."

103. This marks an important point in the history of the exclusionary rule in international human rights law and imposes express treaty obligations in its own right on contracting States, such as the UK.

104. No State Party to UNCAT has made a reservation to Article 15.[98] This, it is submitted, is strong evidence of its normative quality and is consistent with the widespread acceptance that has always been afforded to the exclusionary rule.

105. The drafting history of Article 15 is described by Burgers and Danelius in their book *The United Nations Convention Against Torture*.[99] Article 13 of the original Swedish draft convention[100] provided:

> "Each State Party shall ensure that any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment

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[97] Of the 46 Member States of the Council of Europe, only Andorra and San Marino have not ratified UNCAT, though both have signed it.

[98] See http://www.ohchr.org/english/countries/ratification/9.htm#N12. According to Article 2(1)(d) of the Vienna Convention on the Law of Treaties 1969, a reservation is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".

[99] *Op cit*, pp. 69-70. Burgers was a member of the Netherlands delegation to the UN Commission on Human Rights. In 1982-84 he served as Chairman/Rapporteur of the Working Group set up by the Commission to draw up the text of the Convention. Danelius was Under-Secretary for Legal and Consular Affairs in the Swedish Ministry of Foreign Affairs. He wrote the initial draft of both the 1975 Declaration and the Convention and participated in all the sessions of the Working Group. The point of departure for the Working Group's discussions was a draft convention submitted by Sweden to the thirty-fourth session of the Commission on Human Rights. See Commission on Human Rights, Report on the Thirty-Fifth Session (12 February-16 March 1979), p 36, para. 12 (Doc E/1979/36).

[100] Doc E/CN.4/1285 (Burgers and Danelius, *op. cit.*, p. 203)

or punishment shall not be invoked as evidence against the person concerned or against any other persons in any proceedings".

106. However, it was suggested that there should be an exception in order to permit use of a statement made under torture as evidence against the torturer. The UK proposed that at the end of the draft Article the words "except against a person accused of obtaining such statement by torture" be added. Similar proposals were made by Austria and the USA. The Swedish draft was then revised to read:

> "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 obtaining that statement by torture."[101]

107. The principle enshrined in Article 15 was evidently uncontroversial; the final version of that Article was settled and adopted by consensus at the 1980 session of the Working Group set up by the UNCHR to draw up the text of the Convention.[102]

108. One year after UNCAT was adopted and opened for signature, the Organisation of American States concluded the Inter-American Convention to Prevent and Punish Torture 1985. Article 10 of this Convention contains an exclusionary rule similar to Article 15 UNCAT:

> "No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means."

109. In 1992, the Special Rapporteur on Torture, Mr P. Kooijmans, in his report to the UN Commission on Human Rights, analysed the rationale for the exclusionary

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[101] Doc E/CN.4/WG.1/WP.1 Burgers and Danelius, *op. cit*, p. 208). By this time the provision had become Article 15 of the draft convention.

[102] Commission on Human Rights, Report on Thirty-Sixth Session (4 February – 14 March 1980) Economic and Social Council, Official Records, 1980, Supplement No. 3 p. 66, para. 84 (Doc E/1980/13-E/CN.4/1408. For confirmation that the wording of Article 15 was settled in 1980, see UNCHR, Report on the Thirty-Seventh

rule and observed in forceful terms how the toleration of torture by, *inter alia,* the courts' acceptance of statements obtained under torture was responsible for the "flourishing of torture". He noted that by excluding such evidence the courts could make torture "unrewarding and therefore unattractive". He continued as follows:[103]

> "588. The Committee further states that those who violate article 7, whether by encouraging, ordering, *tolerating* or perpetrating prohibited acts, must be held responsible… [emphasis added]
>
> 589. Without exception, these measures have been recommended by the Special Rapporteur. If each and every State took such measures and vigorously supervised their implementation by the various branches of State authority, no torturer could do his dirty work in the expectation that he could evade punishment. For it is impunity which makes torture attractive and feasible. Far too often the Special Rapporteur receives information…that courts admitted and accepted statements and confessions in spite of the fact that during trial the suspect claimed that these had been obtained under torture…
>
> 590. It is no exception that this chain of situations, which are all extremely conducive to the practice of torture, is in clear violation of the prevalent rules. Laxity and inertia on the part of the highest executive authorities and of the judiciary in many cases are responsible for the flourishing of torture.
>
> 591. Governments should be aware that they cannot go on condemning the evil of torture on the international level while condoning it on the national level. The judiciary in each and every country should bear in mind that they have sworn to apply the law and to do justice and that it is within their competence, even when the law is not in conformity with international standards, to bring the law nearer to these standards through the interpretation process. The judiciary should be aware that there is no place for impartiality if basic human rights are violated because, by virtue of their oath, they can only choose the side of the downtrodden. It is within their competence to order the release of detainees who have been held under conditions which are in flagrant violation of the rules; it is within their competence to refuse evidence which is not freely given; it is within their power to make torture unrewarding and therefore unattractive and they should use that power".[104]

Session (2 February –13 March 1981), Economic and Social Council, Official Records, 1981, Supplement No. 5, p. 69 (Doc E/1981/25-E.CN.4/1475).

[103] Doc E/CN.4/1993/26, 15 December 1992

[104] E/CN.4/1993/26

110. Like the HRC, the Special Rapporteur thus acknowledged and maintained the essential link between the prohibition of torture and the exclusionary rule.

111. Two years later, the HRC itself returned to Article 7 of the ICCPR in its General Comment 20 (1994):[105]

> "It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment".[106]

112. This further supports the link between the prohibition of torture and the exclusionary rule.

113. In February 1994 the International Criminal Tribunal for Yugoslavia ('ICTY') adopted its Rules of Procedure and Evidence. These included a rule dealing specifically with the admissibility of evidence obtained in violation of human rights norms. In its original form, Rule 95 ("Exclusion of Certain Evidence") rendered inadmissible evidence which was "obtained directly or indirectly by means which constitute a serious violation of internationally protected human rights". The rule was amended in 1995 and now reads:

> "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."

114. This amendment was introduced, in part at the instigation of the British Government, in order to remove ambiguity in the original text and to make it clear that evidence obtained improperly would not be admitted. According to the ICTY's second Annual Report,

> "The amendment to Rule 95, which was made on the basis of proposals from the Governments of the United Kingdom and the United States, puts parties on notice that although a Trial Chamber is not bound by national rules of

[105] HRC General Comment No. 20 replaces General Comment No. 7 while " reflecting and further developing it".
[106] HRC General Comment No. 20 (1994), para. 12

evidence, it will refuse to admit evidence – no matter how probative – if it was obtained by improper methods."[107]

115. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda ('ICTR') contain a provision identical to the ICTY provision.[108]

116. Similar provisions were included in the rules governing proceedings in the International Criminal Court ('ICC'). The Rome Statute of the ICC was adopted in 1998 and has 99 States parties. Article 69(7) provides:

> "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."[109]

117. This provision refers to a violation of "internationally recognised human rights" (i.e. the whole range of human rights), not simply torture (which has been universally condemned as one of the gravest violations of human rights). It is submitted that while not every breach of human rights will necessarily be serious enough to qualify, the admission of a statement established to have been made as a result of torture would certainly be treated as "antithetical to and would seriously damage the integrity of the proceedings."[110]

118. In 1999 the UN Special Rapporteur on Torture (Sir Nigel Rodley) made further important comments on the exclusionary rule, and in particular about its scope:

> "The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and

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[107] Note by the Secretary-General to the UN Security Council, UN Doc. A/50/365-S/1995/728, 23 August 1995, footnote 9

[108] ICTR Rules of Procedure and Evidence, Rule 95. See Jones and Powles, *International Criminal Practice* (OUP, 3rd ed, 2003), pp. 753-54.

[109] Jones and Powles, *op. cit.*, p. 892

[110] In accordance with Article 21 of the Statute, Article 69 must be interpreted in light of international law, which would include Article 15 UNCAT.

> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment establishes other legal obligations to prevent torture and other cruel, inhuman or degrading treatment. These… legal obligations, which the Special Rapporteur takes into consideration when he communicates with a State or undertakes an *in situ* visit, include the following:
>
> …(e) Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned *or against any other person in any proceedings*".[111]

119. As will be seen, this approach to the scope of the exclusionary rule is consistent with statements made by other bodies charged with supervising and adjudicating allegations of breaches of the prohibition of torture.

120. In 2002, the Committee against Torture overtly followed the lead of the HRC in linking the exclusionary rule (in its case, the rule in Article 15 UNCAT) to the general prohibition of torture itself. In *PE v France* the Committee observed that:

> "the generality of the provisions of Article 15 derive from the absolute nature of the prohibition of torture and imply, consequently, an obligation for each State party to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as a result of torture".[112]

121. In 2003 the UN Special Rapporteur on the human rights situation in Sudan, Gerhart Baum, also commented on the scope of the exclusionary rule in his report to the UN Commission on Human Rights on the human rights situation in Sudan. He relied on the 1975 Declaration against Torture as authority for the principle that:

> "Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings."[113]

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[111] UN Doc. A/54/426, 1 October 1999, para. 12, emphasis added
[112] CAT/C/29/D/193/2001, 19 December 2002, para. 6.3
[113] Doc E/CN.4/2003/42, 6 January 2003, Annex 1, para. 3

122. In 2004, the UN General Assembly itself took further measures to reinforce the exclusionary rule and emphasise its scope. Paragraph 6 of General Assembly Resolution 59/182 (20th December 2004) on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which like the 1975 Resolution and Declaration was adopted without a vote:

> "*Urges* States to ensure that any statement that 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".

123. The word "urges" is among the strongest formulations used by the General Assembly. Identical language was employed by the UN Commission on Human Rights in its Resolution 2005/39, also adopted by consensus. This Resolution was co-sponsored by the EU (including the UK), as has been the practice for several years, and has been described by the Foreign and Commonwealth Office in its latest annual human rights report as "a good resolution on torture".[114]

124. The Council of Europe has also endorsed and adopted the exclusionary rule. On 26th April 2005, the Parliamentary Assembly of the Council of Europe adopted Resolution 1433 (2005) on the Lawfulness of detentions by the United States in Guantanamo Bay. In paragraph 8 the Assembly called on the US Government:

> "vi. to respect its obligations under international law and the Constitution of the United States to exclude any statement established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment, except against a person accused of such ill-treatment as evidence that the statement was made".

125. Similarly, in paragraph 10 the Assembly called on Member States of the Council of Europe:

> "iv. to respect their obligations under international law to exclude any statement established to have been made as a result of torture or other cruel,

[114] FCO Human Rights Report 2005, p.128

inhuman or degrading treatment or punishment, except against a person accused of such ill-treatment as evidence that the statement was made".

The scope of the exclusionary rule

Broad interpretation

126. It is submitted that the exclusionary rule should be given a broad interpretation. The absolute nature of the rule has been repeatedly emphasised by the persons and bodies charged internationally with supervising and monitoring compliance with the rule. It is arguable that the rule covers evidence that has been or might have been obtained by torture or other forms of ill-treatment. Article 12 of the Declaration against Torture (which has been heavily relied on throughout the history of the rule), the HRC's location of the exclusionary rule in Article 7 of the ICCPR (which prohibits torture and cruel, inhuman or degrading treatment or punishment) and the consistent approach of the UN Special Rapporteur on Torture support such an approach to the exclusionary rule. On the other hand, Article 15 UNCAT and Article 10 of the Inter-American Convention to Prevent and Punish Torture are cast in narrower terms and confine the rule to evidence that has been obtained by torture.

127. Against that background, it is submitted that it is clear that the exclusionary rule *at a minimum* requires the exclusion of evidence that has been or may have been obtained by *torture* and that it may also require the exclusion of a wider body of evidence.

128. As to the scope of the rule, the Interveners submit that a plain and ordinary reading of the exclusionary rule set out in Article 12 of the Declaration against Torture and Article 15 UNCAT is that it prohibits the use of *any* evidence obtained by torture in *any* proceedings. As noted above, the absolute nature of the rule has been repeatedly emphasised by the persons and bodies charged internationally with supervising and monitoring compliance with the rule. It has

never been suggested that the rule is confined to criminal proceedings, or that the rule does not require the exclusion of evidence that has been or might have been obtained by torture merely because that evidence was obtained from a third party, or that the rule does not require the exclusion of evidence that has been or might have been obtained by torture merely because that evidence was obtained without the connivance of the State with jurisdiction over the proceedings in question. Again, as noted above, no State Party to UNCAT has made any reservation to Article 15 (whether confining its scope or otherwise).

129. The Committee against Torture, which is charged with supervising and monitoring compliance with Article 15 UNCAT, and whose views on its proper interpretation thus carry considerable weight, has always interpreted the exclusionary rule as requiring the exclusion in *all proceedings* of evidence that has been or may have been obtained by torture.

130. In *GK v Switzerland* the Committee against Torture, emphasising the absolute nature of the exclusionary rule, observed that:

> " … the broad scope of the prohibition in article 15, proscribing the invocation of any statement which is established to have been made as a result of torture as evidence 'in any proceedings', is a *function* of the absolute nature of the prohibition."[115]

131. This is consistent with its repeated insistence by the Committee Against Torture that Article 15 contains a "categorical prohibition".[116]

132. Examination of the concluding observations of the Committee against Torture on states parties' reports discloses the same approach. For instance, in its concluding observations about Ukraine, the Committee recommended that Ukraine:

> "Ensure in practice *absolute* respect for the principle of the inadmissibility of evidence obtained through torture".[117]

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[115] Views adopted on 7 May 2003, CAT/C/30/D/219/2002, para.6.10, emphasis added
[116] CAT/C/33/L/GBR, List of Issues for the UK, 15-26 November 2004, no 22
[117] UN Doc. A/57/44 (2002), para. 58(h), re Ukraine, emphasis added

133. In relation to Yugoslavia, the Committee Against Torture similarly observed that:

> "One of the essential means in preventing torture is the existence, in procedural legislation, of detailed provisions on the inadmissibility of unlawfully obtained confessions and other tainted evidence… Evidence obtained in violation of article 1 of the Convention should *never* be permitted to reach the cognizance of the judges deciding the case, in any legal procedure".[118]

134. Other observations show that the Committee against Torture always interprets Article 15 UNCAT as requiring the adoption of "clear legal provisions prohibiting the use as evidence of any statement obtained under torture" and their strict observance in practice.[119]

135. UN Special Rapporteurs on Torture have consistently adopted a similarly broad approach. As noted above, in his report to the UN Commission on Human Rights in 1992, Mr P. Kooijmans emphasised that Article 7 ICCPR is breached not only by the perpetration of acts that violate the prohibition of torture, but also by the *toleration* of such acts. In 1999, Sir Nigel Rodley observed that the exclusionary rule prohibits the invoking of "any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment … as evidence against the person concerned or against any other person in any proceedings".[120] And in 2003, the Special Rapporteur on the human rights situation in Sudan, Gerhart Baum, adopted exactly the same approach in his report to the Commission on Human Rights.

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[118] UN Doc. A/54/44 (1999), para. 45, re Yugoslavia, emphasis added

[119] See e.g. CAT/C/CR/34/ALB, 21 June 2005 (Albania); CAT/C/CR/31/2, 10 December 2004 (Morocco); CAT/C/CR/31/6, 5 February 2004 (Cameroon); CAT/C/CR/30/2, 27 May 2003 (Cambodia); CAT/C/CR/30/3, 27 May 2003 (Iceland); CAT/C/CR/30/6, 27 May 2003 (Belgium); CAT/C/CR/28/4, 6 June 2002 (Russian Federation); CAT/C/CR/28/6, 6 June 2002 (Sweden); CAT/C/CR/28/7, 6 June 2002 (Uzbekistan); CAT/C/XXVII/Concl.2, 21 November 2001 (Ukraine); A/56/44, paras 121-129, 17 May 2001 (Kazakhstan); A/56/44, paras 115-120, 16 May 2001 (Brazil); and A/56/44, paras 60-66, 6 December 2000 (Cameroon).

[120] UN Doc A/54/426, 1 October 1999, para.12

Extension to third parties and third States

136. It is submitted the exclusionary rule prohibits the invoking as evidence in any proceedings of *any* statement that has been or might have been obtained by torture whoever is the victim and irrespective of the identity or nationality of the torturer. As noted above, it has never been suggested by the persons or bodies charged with supervising and monitoring compliance with the exclusionary rule that it does not require the exclusion of evidence that has been or might have been obtained by torture merely because that evidence was obtained from a third party, or that the rule does not require the exclusion of evidence that has been or might have been obtained by torture merely because that evidence was obtained without the connivance of the State with jurisdiction over the proceedings in question.

137. On the contrary, in 1997 the Committee against Torture specifically stated that:

> "Statements obtained *directly or indirectly* under torture should not be admissible as evidence in the courts".[121]

138. And, as Neuberger LJ recognised in the Court of Appeal,[122] the Committee Against Torture had no hesitation in 2002 in holding in *PE v France*[123] that Article 15 of UNCAT precluded evidence obtained by torture in one country being used in the courts of another country, although, on the evidence, the Committee was not persuaded that torture had in fact been used (see paras 6.3 and 6.6). A similar approach was adopted in *GK v Switzerland*[124] (also a 2002 case) which also concerned extradition and where the complainants also alleged that evidence against them had been obtained through torture in another country.[125]

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[121] UN Doc. A/52/44 (1997), para. 109, re Poland, emphasis added. The Committee has made similar or identical statements regarding, for instance, Finland, UN Doc. A/51/44 (1996), para. 137; Germany, UN Doc. A/53/44 (1998), para. 193; and Yugoslavia, UN Doc. A/54/44 (1999), para. 51.
[122] Paragraph 450
[123] (2002) 10 IHRR 421
[124] CAT 219/2002
[125] Article 15 has been raised in other complaints, but the Committee has not made any notable comments: *Imed ABDELLI v Tunisia* (CAT 188/2001), *Dhaou Belgacem THABTI v Tunisia* (CAT 187/2001), *Bouabdallah LTAIEF v Tunisia* (CAT 189/2001) - the Committee found violations of articles 12 and 13 but did not go on to consider the alleged violation of article 15; *Encarnación Blanco Abad v Spain* (CAT 59/1996) – the Committee

139. Perhaps most compelling are the comments of the Committee against Torture in 2004 (after the Court of Appeal judgment in this case) in respect of the UK. In its conclusions and recommendations, the Committee emphasised that:

> "article 15 of the Convention prohibits the use of evidence gained by torture wherever and by whomever obtained".

140. The Committee also expressed concern that:

> "notwithstanding the State party's assurance set out in paragraph 3 (g), supra, the State party's law has been interpreted to exclude the use of evidence extracted by torture only where the State party's officials were complicit".[126]

141. The Committee's recommendation in response to these concerns was as follows:

> "[T]he State party should appropriately reflect in formal fashion, such as legislative incorporation or by undertaking to Parliament, the Government's intention as expressed by the delegation not to rely on or present in any proceeding evidence where there is knowledge or belief that it has been obtained by torture; the State party should also provide for a means whereby an individual can challenge the legality of any evidence in any proceeding plausibly suspected of having been obtained by torture".[127]

142. Having analysed the work of the Committee Against Torture in detail, the Interveners submit that these comments are consistent with the Committee's general approach; none of its reports and conclusions in respect of any State Party suggests that the exclusionary rule in Article 15 is limited to evidence obtained by torture by, or at the instigation of, public officials of the State in question.

143. Equally compelling evidence of the scope of the exclusionary rule comes from the Council of Europe's Commissioner for Human Rights. He visited the UK in November 2004 and published a report on 8th June 2005, in which he observed:

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found that the allegation of a violation of article 15 was not sufficiently corroborated; and *Qani Halimi-Nedzibi v Austria* (CAT 8/1991) – the allegations of ill-treatment were not sustained therefore article 15 did not fall to be considered.

[126] CAT/C/CR/33/3, para. 4(i), 10 December 2004

[127] Para. 5(d)

> "A subsidiary issue to arise in relation to control order proceedings concerns the possible reliance on evidence obtained through torture in the determination of the suspicion of involvement in terrorism-related activity. Such evidence is clearly inadmissible in criminal proceedings, which may, indeed, render an effective prosecution more difficult. There is good reason for this inadmissibility however. To use evidence obtained under torture to secure criminal convictions is to condone an entirely indefensible practice. The same consideration should apply to any proceedings affecting the liberty of an individual, as is evidently the case with control orders. The Government has variously announced its refusal to rule out taking evidence suspected of being obtained under torture into account in its assessment of the threat presented by individuals, so long as the evidence was not extracted by, or with the connivance of, UK agents. A Court of Appeal ruling examining the admissibility of such evidence in the context of proceedings under the derogating provisions of the 2001 Act accepted that such evidence might be used in support of the Home Secretary's suspicion. Consideration would, however, have to be attached to the weight to be given to the evidence in the light of its possible provenance. This view is difficult to reconcile with the absolute nature of the prohibition of torture in Article 3 of the ECHR; *torture is torture whoever does it*, judicial proceedings are judicial proceedings, whatever their purpose –the former can never be admissible in the latter".[128]

144. The Commissioner recommended that the British authorities "ensure that evidence suspected of having been extracted through torture is in no case admissible and in particular is not relied on in control order proceedings."[129] The United Kingdom, commenting on the report, noted that the issue would be considered by the House of Lords in October 2005, and that "it is not the Home Secretary's intention to rely on, or present to Special Immigration Appeals Committee or to the Administrative Court in relation to control orders, evidence which he knows or believes to have been obtained by a third country by torture".[130]

145. There is also the material put before Your Lordships' House by the Commonwealth Lawyers' Association, which is hereby adopted without repetition. That material establishes that:

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[128] Strasbourg, 8 June 2005: CommDH(2005)6, paras 26-7, emphasis added
[129] Recommendation 2 at page 9
[130] p. 16

a. In those few comparative law and domestic cases where the implications of the alleged torture of a third party by agents of a foreign State have been considered the case law is almost exclusively to the effect that such evidence should not be admitted.[131] This has been held to be the case in the context of both criminal proceedings and extradition proceedings.

b. Comparative law sources indicate that the rationale behind the general prohibition of the admission of evidence obtained by torture includes the following elements (i) the unreliability of evidence obtained as a result of torture (ii) the outrage to civilised values caused and represented by torture (iii) the public policy objective of removing any incentive to undertake torture anywhere in the world (iv) the need to ensure protection of the fundamental rights of the party against whose interest the evidence is tendered (and in

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[131] Cases cited: Canada: *India v Singh* [1996] BCJ No. 2792; France: *Le Ministere Public et Irastorza Dorronsoro* (No. 238/2003 Arret 16/5/03); *Haramboure et al v The French Republic, No. of Appeal 94-81254;* Netherlands: *Hoge Raad* 1996 1 October 1996, NJ 1997, 90; United States of America: *Emilio Valdez Mainero et al. v Stephen S Gregg, United States Marshal for the Southern District of California* 164 F. 3d 1199; *LaFrance v Bohlinger* 499 F. 2d 29; *Clanton v Cooper*, *129 F, 3d 1147*; *Buckley v Fitzsimmons 20 F 3d 789;* England & Wales: *R v Governor of Brixton Prison ex p. Levin* [1997] AC 741; *Re Proulx* [2001] 1 All ER 57; *R (Saifi) v Governor of Brixton Prison* [2001] WLR 1134; European Union review of evidence obtained illegally: CFR-CDF.opinion3-2003 (November 2003): the sections of the report relating to Cyprus, Denmark, Finland, Germany and Ireland each indicate that evidence obtained as a result of torture or other serious ill-treatment would be excluded under the law of those countries.
Two contrary decisions in USA, *Gill v Imundi No. 88 Civ 1530 (RWS) (1990) 450 Federal Supplement 672* and *In the Matter of the Extradition of Mahmoud Abed Atta aka Mahmoud El-Abed Ahmad No. 88 CV 2008 (ERK) (1989) 706 Federal Supplement 1032* are distinguished from the present case where the proceedings under consideration are determinative in effect and where no question of extradition to face a conventional criminal process, with all its attendant safeguards and mechanisms for challenging evidence, is contemplated.
The Interveners note, in addition, a recent Canadian case, *Charkaoui (Re)* [2004] FCJ No 1236, judgment of 23 July 2004 (Federal Court, Montreal) the applicant had been detained under the Immigration and Refugee Protection Act since 21 May 2003 on the ground that he was a danger to national security. He sought judicial review of his detention, arguing that in accordance with Article 15 UNCAT (to which Canada is a party), the statements of Abu Zubaida and Ahmed Ressam (that they had seen him at a training camp in Afghanistan) should be withdrawn from the record since they had been obtained by "contracted-out" torture. Noël J rejected the application insofar as it concerned the evidence of Mr Ressam, as the interviews "were held in the presence of a lawyer who was representing him and… at two distinct points Mr Ressam instantly and without hesitation identified Mr Charkaoui on two different photographs" and "the Court had verified this statement" (paras 28-29). However, the judge held that Mr Zubaida's statement had to be treated differently: "bearing in mind the objectives of the Convention against Torture and the conflicting evidence presented by the two parties" (i.e. concerning the alleged torture), the judge decided not to take Mr Zubaida's statement into consideration but did not withdraw it from the record "in view of the type of evidence presented by the parties and the contradiction that exists in the evidence" (paras 30-31). Nevertheless, it is evident that the Court would have excluded the statements if it could have been established that they had been made as a result of torture.

particular those rights relating to due process and fairness) and (v) the need to preserve the integrity of the judicial process.

c. The fundamental nature of each of these elements indicates that the exclusionary rule is itself of a fundamental nature and is not to be categorised simply as a rule of evidence.[132]

146. The applicability of the exclusionary rule to extraterritorial torture has also been recognised by scholars.[133]

147. It is also submitted that the *jus cogens* nature of the prohibition of torture and the *erga omnes* nature of the obligations arising from the prohibition support a broad interpretation of the exclusionary rule. As has already been argued, there is a clear obligation in international law not to endorse, adopt or recognise any breach of a norm of international law that has acquired the status of *jus cogens* and imposes obligations *erga omnes*.

148. It should also be observed that this approach to the scope of the exclusionary rule is consistent with the approach taken in respect of other measures designed to give practical effect to the prohibition of torture. For example, torture is a crime of universal jurisdiction and in England and Wales, section 134(1) of the Criminal Justice Act 1988 confers jurisdiction on our courts to try crimes of torture committed anywhere in the world. As a result, trials are taking place involving torture abroad even when the perpetrator and the victim are both foreign.[134] In a similar vein, *Jones & Mitchell v Kingdom of Saudi Arabia Prince Naif &*

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[132] Cited in support: Argentina: *Corte Suprema de Justicia de la Nación, Fallos 303/1938;* Australia: *Bunning v Cross* (1978) 141 CLR 54, 74; Canada: *R v Oickle [2000] 2 SCR 3; [2000] SCJ No. 38; R v Collins* [1987] 1 SCR 265; Ireland: *The People (AG) v O'Brien [1965] IR 142;* New Zealand: *R v Shaheed* [2002] 2 NZLR 377; United States of America: *Rochin v People of California* 242 US 165 (S. Ct. 1952); *Jackson v Denno* 378 US 368 (S. Ct. 1964); *In re Guantanamo Detainees 02-CV-0299 et al (2005);* Zimbabwe: *S v Nkomo* 1989 3 ZLR (SC) 117

[133] See e.g. A Byrnes, "Civil Remedies for Torture Committed Abroad", in Scott (ed), *Torture as Tort* (Hart, 2001), pp. 538, 541 and D Sloss, "The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties" (1999) Yale Journal of International Law 129 at 205, n 362.

[134] For example, in July 2005 the Afghan warlard Faryadi Zardad was sentenced in the Central Criminal Court to 20 years' imprisonment for torture and hostage taking of Afghan citizens in Afghanistan.

Others[135] the Court of Appeal recognised that while foreign states themselves retain immunity from being sued for their agent's acts of torture, such immunity does not extend to the agents of the state when they are sued as individuals.

149. The Interveners submit that any use of any evidence that has been or may have been obtained by torture violates the prohibition of torture and is wholly inconsistent with the UK obligations in international law not to endorse, adopt or recognise the results of torture, the prohibition of which is *jus cogens* and gives rise to *erga omnes* obligations in international law.

The status of the exclusionary rule in international law

150. The Interveners advance two propositions about the status of the exclusionary rule in international law. First, that the exclusionary rule is clearly rooted in the prohibition of torture and integral to it. As such, it arguably enjoys the same *jus cogens* status. Secondly, that, at the very least, the exclusionary rule has attained the status of customary international law in its own right.

151. As to the first proposition, the history and origins of the exclusionary rule, set out above, plainly support the proposition that the exclusionary rule is integral to the prohibition of torture. The rule was conceived of as a measure to give effect to the prohibition of torture and both the HRC and the Committee against Torture have observed the link between the prohibition of torture and the exclusionary rule. Moreover, to admit evidence which has been or may have been obtained under torture is to endorse, adopt or at least to recognise torture and is thus incompatible with the *jus cogens* nature of the prohibition and the *erga omnes* obligations that flow from it: see above.

152. As to the second submission, the Interveners note that customary international law is evidenced by a general practice accepted as law.[136] As Rosalyn Higgins observes,

[135] [2004] EWCA Civ 1349

> "[I]t is the practice of the vast majority of states that is critical, both in the formation of new norms and in their development and change and possible death… A new norm cannot emerge without both practice and *opinio juris*; and an existing norm does not die without the great majority of states engaging in both a contrary practice and withdrawing their *opinio juris*".[137]

153. The emergence of an exclusionary rule in customary international law is clear. As noted above, General Assembly Resolution 3452 (XXX), which contains the 1975 Declaration against Torture, was adopted without a vote (i.e. by consensus and therefore without dissent). Brownlie explains that although General Assembly resolutions are not binding on UN Member States,

> "when they are concerned with general norms of international law, then acceptance by a majority vote constitutes evidence of the opinions of governments in the widest forum for the expression of such opinions. Even when they are framed as general principles, resolutions of this kind provide a basis for the progressive development of the law and the speedy consolidation of customary rules".[138]

154. Elsewhere he states that "the mere formulation of principles may elucidate and develop the customary law".[139]

155. In the *Nuclear Weapons Case*,[140] the ICJ observed:

> "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or

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[136] Article 38(1)(b) of the Statute of the International Court of Justice states that the Court shall apply "international custom as evidence of a general practice accepted as law". However, this provision is interpreted to mean "international custom as evidenced by a general practice accepted as law". It is practice which evidences custom, not the other way round. See Higgins, *op cit*, pp. 18-19.
[137] Higgins, *op. cit.*, p 22. HE Judge Rosalyn Higgins has been a member of the International Court of Justice since 12 July 1995.
[138] Brownlie, *Principles of Public International Law*, OUP, 6th edition, 2003, pp. 14-15
[139] *Ibid*, p 663
[140] *Legality of the Threat or Use of Nuclear Weapons* ICJ Reports 1996, p 226, para. 70

a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."[141]

156. Reflecting its authoritative status as a source of fundamental principles, and as noted above, the 1975 Declaration against Torture has been invoked by a number of courts and quasi-judicial bodies. Of particular relevance to the customary status of the exclusionary rule is *Prosecutor v Furundzija*, in which the ICTY Trial Chamber observed that the Declaration against Torture's adoption by consensus showed that no UN Member State had objected to its definition of "torture" and added: "In other words, all the members of the United Nations concurred in and supported that definition".[142] Similarly, the Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135 states that the Declaration's "adoption by consensus…offers evidence of an emerging norm of international criminality as of 1975".[143]

157. The very extensive ratification of UNCAT, and the fact that no State Party has made any reservation in respect of Article 15 UNCAT, has already been observed. The exclusionary rule in Article 15 can thus be said to reflect a consensus which is representative of customary international law.[144] Article 15 is part of the history of the exclusionary rule, and expresses the minimum requirements of that rule in treaty form.

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[141] In para. 71, the Court noted that several of the resolutions under consideration in that case (proclaiming the illegality of the use of nuclear weapons) had been adopted with substantial numbers of negative votes and abstentions. It concluded: "thus although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons."

[142] ICTY Trial Chamber, IT-95-17/1-T (10 December 1998) 38 ILM 317, para. 160

[143] Delivered on 18 February 1999, http://www1.umn.edu/humanrts/cambodia-1999.html, para. 78.

[144] Cf *Prosecutor v Delalic* Case no IT-96-21-T, judgment of 16 November 1998, para. 459, where the ICTY Trial Chamber held that although the definition of torture in UNCAT was broader than that laid down in the Declaration, the UNCAT definition "reflects a consensus which the Trial Chamber considers to be representative of customary international law". The Trial Chamber in *Furundzija*, *loc cit*, paras 160-161, shared that conclusion, observing: "The broad convergence of… international instruments and international jurisprudence demonstrates that there is now general acceptance of the main elements contained in the definition set out in article 1 of the Torture Convention."

158. The relationship between treaties and customary international law is explained by Antonio Cassese[145] in his book *International Law*.[146] He states that treaties may have the following effects: (i) a declaratory effect - simply codifying or restating an existing customary rule;[147] a crystallising effect - bringing to maturity an emerging customary rule, that is, a rule that was still in the formative stage; [148] and/or a generating effect - when a treaty provision creating new law sets in motion a process whereby it gradually brings about, or contributes to, the formation of a corresponding customary rule.[149]

159. Article 38(1)(b) of the Statute of the ICJ implicitly recognises that treaty provisions can represent customary international law when they constitute "evidence of a general practice accepted as law ". ICJ case law reflects this. In the *Nicaragua Case (Merits)*, the ICJ observed that "customary international law continues to exist and apply, separately from international treaty law, even where the two categories of law have an identical content."[150]

160. Examples of non-compliance with the exclusionary rule do not necessarily compromise the rule's normative quality. In the *Nicaragua Case (Merits),* the International Court of Justice held:

> "If a State acts in a way prima facie incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained

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[145] Professor of International Law, University of Florence, former President of the Council of Europe Committee for the Prevention of Torture and former Judge and President of the International Criminal Tribunal for the former Yugoslavia (ICTY).
[146] OUP, 2nd edition, 2005, p168. See also Higgins, *op cit*, pp. 28-32 'The Overlap between Treaty and Custom'.
[147] See e.g. *Legal Consequences for States of the Continued Presence of South Africa in Namibia* ICJ Reports 1971, p 47, *Fisheries Jurisdiction Case (United Kingdom v Iceland) (Jurisdiction)* ICJ Reports 1973, p 18 and *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary v Slovakia)* ICJ Reports 1997, para. 46 (re Articles 60-62 of the Vienna Convention on the Law of Treaties 1969, concerning the termination and suspension of the operation of treaties). See also the Geneva Convention on the High Seas 1958, which was "declaratory of established principles of international law".
[148] See e.g. *North Sea Continental Shelf Cases (FRG v Denmark; FRG v The Netherlands)* ICJ Reports 1969, p 39 (re Articles 1 and 3 of the Geneva Convention on the Continental Shelf 1958, defining the continental shelf and the rights of States related thereto) and *Fisheries Jurisdiction Case (UK v Iceland) (Merits)* ICJ Reports 1974, p 14 (re Article 52 of the Vienna Convention on the Law of Treaties, concerning the invalidity of treaties concluded under the threat or use of force).
[149] In the *North Sea Continental Shelf Cases* (*FRG v Denmark; FRG v Netherlands*), ICJ Reports 1969, p 3, paras 72-74, the ICJ explained how a treaty provision can generate a rule of customary international law.
[150] ICJ Reports 1986, p 14, para. 179

within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attribute is to confirm rather than to weaken the rule".[151]

162. Furthermore, while a State may contract out of a custom in the process of formation by consistently and unequivocally manifesting a refusal to accept it, it cannot do so (without the acquiescence of other States, at least) once the customary rule has come into existence.[152]

163. Since the conclusion of UNCAT in 1984, the exclusionary rule has repeatedly been confirmed and consolidated. The observations and findings of the HRC, the Committee Against Torture and UN Special Rapporteurs on Torture have already been noted. The exclusionary rule has been incorporated into the Inter-American Convention to Prevent and Punish Torture. It has also been incorporated into the rules of the ICC, the ICTY and the ICTR. In addition the exclusionary rule has been re-affirmed by the UN General Assembly as recently as 2004[153] – again without a vote – and has been endorsed and adopted by the Council of Europe in Resolution 1433 (2005).

164. Moreover, such evidence as there is of internal state practice supports the proposition that the exclusionary rule has at least attained the status of customary international law. The Interveners have analysed all the country reports to the Committee against Torture on compliance with the provisions of UNCAT: 136 reports in all covering the period 1993 to 2003.[154] This analysis suggests that 85% of countries purport to comply with Article 15 UNCAT in that they identify provisions in their law enshrining the exclusionary rule and the Committee Against Torture has raised no comment of concern in their individual cases.

165. Against that background it is submitted that the origins and history of the exclusionary rule establish that, even if the rule does not enjoy *jus cogens* status as

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[151] *Loc cit*, at p 98. *A fortiori* if the State denies acting inconsistently with a recognised rule.
[152] Brownlie, *op. cit.,* pp. 11-12
[153] Resolution 59/182 (20th December 2004)
[154] CAT reports are held on the Office of the High Commissioner for Human Rights' website, www.ohchr.org .

an inherent aspect of the general prohibition of torture, it has, at the very least, attained the status of customary international law in its own right.

166. It is accepted that international courts and tribunals have not yet expressed the exclusionary rule in terms of a rule of customary international law. But, it is submitted, that is not conclusive. It is the evidence of State practice and *opinion juris* (i.e. a belief that a norm is accepted as law)[155] that matters. As Nourse LJ has observed,

> "An uncertain question of international law is one which cannot be settled by reference either to an opinion of the International Court of Justice or to some other usage, custom or general principle of law recognised by all civilised nations. The authorities show that where it is necessary for an English court to decide such a question, it can and must do so; being guided by municipal legislation and judicial decisions, treaties and conventions and the opinions of international jurists; and, where no consensus is there found, by those opinions which are the most nearly consistent with reason and justice".[156]

[155] See Higgins, *op. cit.*, p. 19.
[156] *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry and others* [1989] 1 Ch 72, 209H-210A

III. THE APPLICABILITY OF THE EXCLUSIONARY RULE IN DOMESTIC LAW

167. The interveners make the following submissions on the applicability of the exclusionary rule in domestic law:

a. Article 6 of the ECHR should be interpreted as including within it the exclusionary rule and effect should be given to the exclusionary rule by the Human Rights Act 1998.

b. Because the exclusionary rule has attained the status of customary international law it is already part of the common law. Unless clear and conflicting legislation requires otherwise, effect should be given to it.

d. Even if your Lordships House considers that the exclusionary rule has not yet attained the status of customary international law, Article 15 of UNCAT imposes obligations on the UK which directly affect statutory interpretation and the development of the common law.

e. The rule of law requires domestic courts to give effect to the exclusionary rule.

168. Each of these propositions will be developed below.

The Human Rights Act 1998

169. It is submitted that there are three reasons why Article 6 of the ECHR should be interpreted as including within it the exclusionary rule. They can be summarised as follows:

a. First, because Article 6 should be interpreted consistently with Article 15 of UNCAT.

b. Second, because Article 6 has always been read as requiring the exclusion of evidence obtained by torture or improper compulsion.

c. Third, because the exclusionary rule is inherent in the prohibition of torture and other forms of ill-treatment in Article 3 of the ECHR and Article 6 should be interpreted so as to give effect to Article 3.

170. Although each of these reasons has a separate foundation, it is submitted that their effect is cumulative. It is further submitted that by incorporating Article 6 into domestic law, the Human Rights Act requires domestic courts to give effect to the exclusionary rule.

Article 6 of the ECHR and Article 15 of UNCAT

171. It is submitted that the European Court of Human Rights has a long history of examining and using other human rights instruments to assist in the proper interpretation of the ECHR itself and as evidence of present-day standards when considering how to interpret the ECHR as a living instrument.

172. In *Loizidou v Turkey* the European Court held:

> "[T]he Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties and that Article 31 para. 3 (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties" (see, inter alia, the *Golder v the United Kingdom* judgment of 21 February 1975, Series A no. 18, p. 14, para. 29, the *Johnston and Others v Ireland* judgment of 18 December 1986, Series A no. 112, p. 24, para. 51, and the above-mentioned *Loizidou* judgment (preliminary objections), p. 27, para. 73). In the Court's view, the principles underlying the Convention cannot be interpreted and applied in a vacuum".[157]

173. Similarly, in *Al Adsani v UK* the European Court stated:

> "The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account…. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity".[158]

174. Consistently with this approach, the European Court has repeatedly relied on other international instruments in order to interpret the scope of ECHR rights and safeguards. For example, in *V v United Kingdom*[159] it relied on Article 40(2) (b) of the UN Convention on the Rights of the Child, rule 8 of the Beijing Rules and the 1987 Recommendation of the Committee of Ministers of the Council of Europe in assessing whether the subjection of a child to public criminal proceedings designed for adults breached Article 3 of the ECHR. In *Kosik v Germany*[160] the EcomHR interpreted Article 10 of the ECHR in light of the International Convention on the Elimination of All Forms of Racial Discrimination. In *Muller v Switzerland*[161] and *Groppera Radio AG v Switzerland*[162] the European Court relied on Article 19 of the ICCPR, including its drafting history, in interpreting the scope of Article 10 of the ECHR. And in *Jersild v Denmark*[163] the European Court examined the International Convention on the Elimination of All Forms of Racial Discrimination in assessing the scope of Article 10 of the ECHR.

175. There are numerous other examples. These include *Pretto v Italy*,[164] in which the European Court examined the ICCPR to determine the scope of the obligation to pronounce judgments in public under Article 6 of the ECHR. In *Can v Austria*,[165] the EcomHR interpreted Article 6 of the ECHR to conform with Article 14 of the ICCPR and the UN Standard Minimum Rules for the Treatment of Prisoners. In *H.N. v Poland*,[166] the European Court made the following observation:

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[157] (1995) 20 EHRR 99, para. 43
[158] (2002) 34 EHRR 11, para. 55
[159] (1999) 30 EHRR 121
[160] (1986) 9 EHRR 328
[161] (1991) EHRR 212
[162] (1990) 12 EHRR 321
[163] (1995) 19 EHRR 1
[164] (1983) 6 EHRR 182
[165] (1986) 8 EHRR 121
[166] App. no 77710/01 (13 September 2005)

> "Lastly, the Court reiterates that the Convention must be applied in accordance with the principles of international law, in particular with those relating to the international protection of human rights …Consequently, the Court considers that the positive obligations that Article 8 of the Convention lays on the Contracting States in the matter of reuniting a parent with his or her children must be interpreted in the light of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, all the more so where the respondent state is also a party to that instrument".[167]

176. Most significantly, the European Court has often relied on UNCAT itself when interpreting the ECHR. For example, in *Aydin v Turkey*,[168] the European Court relied on Article 12 of UNCAT to interpret Article 13 of the ECHR as including a duty to proceed to a prompt and impartial investigation of allegations of torture. In *Soering v UK*,[169] the European Court relied on Article 3 of UNCAT in finding that the prohibition of torture under Article 3 of the ECHR was absolute. And in *Selmouni v France*[170] and *Mahmut Kaya v Turkey*[171] the Court relied on Article 1 of UNCAT in defining treatment amounting to torture.

177. Hence, it is submitted that Neuberger LJ was correct when he said in the present case:

> "I have come to the conclusion that, bearing in mind that ECHR Article 6(1) must be treated as informed by other international treaties, the general international determination to eliminate torture in all circumstances, and the terms of Article 15 of CAT… I do not think that any party mounting a s25 appeal before SIAC can be said to have had fair trial within ECHR Article 6 (1) ECHR if evidence obtained by torture is used against him".[172]

178. The interveners further submit that to interpret Article 6 of the ECHR in light of Article 15 of UNCAT is not, as was suggested by Laws LJ and Pill LJ in the Court of Appeal, an improper incorporation by another route of non-incorporated international obligations. The scope of the ECHR obligations that are incorporated

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[167] Para. 75
[168] (1998) 25 EHRR 251
[169] (1989) 11 EHRR 439
[170] (1999) 29 EHRR 403
[171] App. no. 22535/93 (28 March 2000)
[172] [2005] 1 WLR 414, para. 467

in English law by the Human Rights Act 1998 must be interpreted by reference to the European Court of Human Rights' own approach, which as noted takes account of other relevant international human rights instruments, including those which are not incorporated into the domestic law of all States Parties to the ECHR. Moreover, such an approach has been endorsed by the English courts at the highest level. For example, in the derogation case (*A and Others v Secretary of State for the Home Department*), Lord Bingham interpreted Article 14 of the ECHR in light of Resolution 1271 of the Parliamentary Assembly of the Council of Europe, the General Policy Recommendations of the European Commission against Racism and Intolerance, the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and comments by the UN Human Rights Committee on the scope of Article 26 of the ICCPR.[173]

Article 6 and the exclusionary rule

179. Adopting a generous and purposive interpretation intended to give practical effect to the ECHR, the Strasbourg bodies and domestic courts have repeatedly found that Article 6 ECHR is breached by the admission of evidence obtained under torture or other improper compulsion from the accused in a criminal trial.

180. As long ago as 1963, in the case of *Austria v Italy,*[174] the European Commission on Human Rights held, *obiter*, that the use of evidence obtained contrary to Article 3 of the ECHR against an accused person in criminal proceedings would breach the presumption of innocence under Article 6(2) of the ECHR.[175]

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[173] [2005] 2 AC 68, paras 47-63
[174] [1963] YB 740 at 784
[175] 'Since Article 6 (2) is thus primarily concerned with the spirit in which the judges must carry out their task, it may be asked whether it does not also apply to the attitude of other persons taking part in the proceedings such as counsel for the Prosecution and for the civil plaintiff, experts and witnesses. If such persons express themselves towards the accused in flights of language such as might disturb the calm of the Court by their violence or insulting nature, such behaviour would nonetheless bring no blame upon the Court from the point of view of Article 6(2) except inasmuch as the presiding judge, by failing to react against such behaviour, might give the impression that the Court shared the obvious animosity towards the accused and regarded him from the outset as guilty. *The same applies if the accused, during the preliminary investigation, has been subjected to any maltreatment with the object of extracting a confession from him; Article 6 (2) could only be regarded as being*

181. In more recent cases, the European Court and Commission have consistently examined whether confessions were extracted by torture or coercion in assessing whether there has been a breach of Article 6 of the ECHR. In *Magee v UK*[176] the European Court held that the admission in evidence of statements made by person detained under the Prevention of Terrorism Act 1984 at a police station in austere detention conditions which were "intended to be psychologically coercive" and without access to a lawyer breached Article 6(1) of the ECHR. In *Ferrantelli v Italy*[177] the European Court, in assessing whether a breach of Article 6(1) had taken place, examined the question of whether a confession had been extracted by physical coercion. In *Dikme v Turkey*[178] the EcomHR, in finding that there had been a breach of Article 6(3)(c) (access to a lawyer), examined the question of whether confessions had been extracted by torture.

182. In *Montgomery v HM Advocate,*[179] Lord Hoffmann took it to be axiomatic that the admission in evidence of a confession obtained under torture from the accused in a criminal trial would breach Article 6(1) ECHR. He stated obiter:

> "If the reception of evidence makes the trial unfair, it is the court that is responsible. Of course, events before the trial may create the conditions for an unfair determination of the charge. For example, an accused who is convicted on evidence obtained from him by torture has not had a fair trial. But a breach of Article 6 (1) ECHR lies not in the use of torture (which is separately a breach of Article 3) but in the reception of the evidence by the court for the purpose of determining the charge".[180]

183. In this case in the Court of Appeal, Laws LJ accepted that Article 6(1) ECHR, like the common law, required the exclusion of involuntary confessions made by the defendant in a criminal trial:

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violated if the Court subsequently accepted as evidence any admissions extorted in this manner. ' [emphasis added].

[176] (2001) 31 EHRR 822

[177] (1996) 23 EHRR 288

[178] 20869/92, 11th July 2000

[179] [2003] 1 AC 641

[180] 649D-E

> "… the Strasbourg cases sit easily with the common law: a man will not be confronted with a confession wrung out of him and proceedings based on State misconduct will not be entertained."[181]

184. Pill LJ also appears to have accepted that Article 6(1) ECHR required the exclusion of involuntary confessions made by the defendant in a criminal trial.[182]

185. However, the majority in the Court of Appeal held that to read the exclusionary rule as excluding evidence obtained from a third party would be inconsistent with the European Court's insistence that evidential rules are matters for domestic law. The Interveners respectfully disagree. Although it is true that the European Court has frequently expressed the view that rules of evidence are matters for the domestic authorities, that principle is not without limits and the exclusion of evidence that has been or might have been obtained by torture is one such limit.

186. The case law shows that the European Court limits the application of the principle that rules of evidence are for the domestic authorities at a much lower threshold than the admission of evidence that has been or may have been obtained by torture. In *Saunders v United Kingdom*[183] and in *Teixeira de Castro v Portugal*,[184] for example, the admission of evidence obtained by compulsion and by police entrapment respectively was found to breach a defendant's right to a fair trial. As was accepted by Pill LJ in the Court of Appeal in this case, *Looseley*[185] provides an example of a domestic case "where Article 6 has required the existence of an exclusionary rule in a criminal trial".[186]

187. The rationale for the inadmissibility under Article 6(1) ECHR of evidence obtained by improper compulsion, appears to be the Court's abhorrence of compulsion, its concern about the unreliability of the evidence and the need to protect the integrity of its proceedings. Once this rationale is accepted, it is clear

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[181] [2005] 1 WLR 414, para. 265
[182] See para. 98.
[183] (1997) 23 EHRR 313
[184] (1998) 28 EHRR
[185] *Attorney-General's Reference (No.3 of 2000)*, [2001] 1 WLR 2060
[186] Para. 98

that the prohibition of torture and the rules of evidence that inform the interpretation of Article 6(1) also require the exclusion of evidence obtained under torture from a third party, including where instigated or committed by the public officials of another State.

188. The approach of the Divisional Court in two extradition cases is instructive on this issue.

189. *R (on the application of Ramda) v Secretary of State for the Home Department*[187] concerned extra-judicial confessions extracted, potentially under torture, from a third party. Sedley LJ and Poole J found that there was a "risk of a fundamentally unfair trial" and that Article 6(1) of the ECHR would be breached if such confessions were relied on against a defendant at trial in France. Where the Home Secretary was making an extradition decision,

> "among the issues for the Home Secretary to determine may be whether the trial to be faced by the wanted person will be a fair trial. This may involve the voluntariness of extra-judicial confessions relied on as evidence against him… Both Articles 3 and Article 6(1) ECHR require the state to conduct a sufficiently thorough investigation to explain injuries received in police custody."[188]

190. In *Re Saifi*[189] the Divisional Court found that the activities of the Indian police, including allegations of torture against a third party to extract a confession implicating the applicant, were such that the applicant could not have a fair trial if extradited. The Court was satisfied that:

> "the appearance of misbehaviour by the [Indian] police in pursuing their inquiries and the significant risk that the activities surrounding that misbehaviour have so tainted the evidence as to render a fair trial impossible".[190]

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[187] [2002] EWHC 1278 (Admin)
[188] Paras 9, 22
[189] [2001] 1 WLR 1134
[190] Para. 66

191. Furthermore, the rationale for the inadmissibility of evidence obtained by compulsion based on unreliability applies with even greater force where the evidence has been or might have been obtained by compulsion from a third party. The third party is less likely to be present in court to give evidence about the circumstances under which his statement was obtained, and thus reliability can never be properly tested. This point was powerfully made by Neuberger LJ in this case in the Court of Appeal:

> "[I]t appears to me that in some respects it would be even more unfair on a detainee to rely upon a statement extracted from a third party under torture, than to rely upon a confession extracted from the detainee himself under torture. In the latter type of case, the detainee will normally know of all the circumstances in which the confession was extracted, and will be able to give evidence of those circumstances, and possibly to give other evidence to rebut the reliability of the confession. However, it will be a very rare case where the detainee would know very much about the circumstances in which the statement was extracted from a third party, or where the detainee would be able to arrange for evidence to be given about those circumstances. Almost by definition, he will not be able to call or cross-examine the third party with a view to the third party explaining or rebutting the statement. Indeed, if the third party were available the statement extracted under torture would normally not be admitted, as he would be able to give evidence directly to the court".[191]

192. Thus it is submitted that Article 6(1) ECHR should be read as including a rule excluding evidence obtained under torture whether from the accused or from a third party.

Article 6 and Article 3 of the ECHR

193. The clear links between the prohibition of torture and other forms of ill-treatment and the exclusionary rule have already been noted. Article 12 of the Declaration against Torture (which has been heavily relied on throughout the history of the rule), the HRC's location of the exclusionary rule in Article 7 of the ICCPR (which prohibits torture or "cruel, inhuman or degrading treatment or punishment") and the consistent approach of the UN Special Rapporteur on

[191] Para. 464

Torture support the proposition that the exclusionary rule is inherent in the prohibition itself. On that analysis, it is submitted that the exclusionary rule is also inherent in Article 3 of the ECHR, which protects against torture and other forms of ill-treatment in almost identical words to Article 7 ICCPR.

194. It is well established in the case law of the European Court and Commission of Human Rights that the ECHR, as an international treaty and as a human rights instrument, requires an interpretation which has regard to the objects and purpose of the Convention as a whole and which renders it practical and effective.

195. In *Wemhoff v Germany*, the European Court held that:

> "given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, and not that which would restrict to the greatest possible degree the obligations undertaken by the parties."[192]

196. In *Artico v Italy*, the European Court stated that:

> "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."[193]

197. And in *Soering v United Kingdom* the Court held that:

> "The Convention is to be read as a whole and Article 3 should therefore be construed in harmony with the provisions of Article 2".[194]

198. Against that background, it is submitted that because the exclusionary rule is inherent in the prohibition of torture and other forms of ill-treatment in Article 3 of the ECHR, Article 6 should be interpreted so as to give effect to Article 3.

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[192] (1979-1980) 1 EHRR 55
[193] (1981) 3 EHRR 1
[194] (1989) 11 EHRR 439

Customary international law and the common law

199. It is submitted that because the exclusionary rule enshrined in Article 15 of UNCAT is a rule of customary international law, it forms part of the law of England and Wales and should be applied by the courts as such.

200. It has long been established that customary international law is part of the law of England and Wales. In his Commentaries on the Laws of England (1769) (Book 4 Public), Sir William Blackstone, in Chapter V at page 66 stated that:

> "The law of nations is a system of Rules, deducible by natural reason, and established by universal consent among the civilised inhabitants of the world, in order to decide all disputes to regulate all ceremonies and civilities and to ensure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. This general law is founded upon this principle that different nations ought in time of peace to do one another all the good they can; and in time of war do as little harm as possible, without prejudice to their own real interests. And, as none of these states will allow superiority in the other, therefore neither can dictate nor prescribe the rules of this law to the rest. But such rules must necessarily result from those principles of natural justice, in which all the learned of every nation agree: or they depend upon mutual contact or treaties between the respective communities, in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject. In arbitrary states this law, wherever it contradicts, or is not provided for by the municipal law of the country, is enforced by the royal power: but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be part of the law of the land."

201. In *Trendtex Trading Corpn v Central Bank of Nigeria,* Lord Denning stated that:

> "Seeing that the rules of international law have changed – and do change – and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law." [195]

202. Shaw LJ stated that:

> "What is immutable is the principle of English law that the law of nations (not what was the law of nations) must be applied in the courts of England. The rule of *stare decisis* operates to preclude a court from overriding a decision which binds it in regard to a particular rule of (international) law, it does not prevent a court from applying a rule which did not exist when the earlier decision was made if the new rule has had the effect in international law of extinguishing the old rule."[196]

203. The authorities and commentaries were recently reviewed by the Court of Appeal in *R v Jones.*[197] Latham LJ, giving the judgment of the Court, referred to the following passage by Nourse LJ in *Maclaine Watson & Co v Department of Trade*:

> "For up to two and a half centuries it has been generally accepted amongst English judges and jurists that international law forms part of the law of this country, at all events if it can be shown there is an established rule which, first, is derived from one or more of the recognised sources of international law and, secondly, has already been carried into English law by statute, judicial decision or ancient custom". [198]

204. Latham LJ continued:

> "There is no doubt, therefore, that a rule of international law is capable of being incorporated into English law if it is an established rule derived from one or more of the recognised sources, that is a clear consensus, evidenced by the writings of scholars or otherwise, or by treaty. The second requirement referred to by Nourse LJ, namely that it has been carried into English law by statute, judicial decision or ancient custom is, it seems to us, more doubtful. Whilst clearly its recognition by statute will ipso facto, give it effect, in so far as it is suggested that there must be either a previous judicial decision or ancient custom, in other words, in effect, some clear acceptance by the court of the existence of the rule as part of English law, that would emasculate the principle. It would in effect prevent any clearly established rule of international law becoming part of English law other than by statute".[199]

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[195] [1977] 1 QB 529, 554G
[196] [1977] 1 QB 529, 579A
[197] [2005] QB 259
[198] [1988] 3 WLR 1033, 1115, cited at para. 23 of Jones
[199] para. 24

205. It is submitted that the approach adopted by Latham LJ is plainly correct with the result that if the exclusionary rule is a rule of customary international law, it already forms part of the law of England and Wales and should be applied by the courts as such.

206. If your Lordships House considers, as contended, the exclusionary rule is part of the common law, it is submitted that it is protected by the principle of legality as it was articulated by Lord Hoffmann in *R v SSHD, ex parte Simms:*

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."[200]

207. In this case, as is submitted further below, there is no clear legislative provision that requires the common law exclusionary rule to be abrogated.

Statutory interpretation and development of the common law

208. It is further submitted that even if the exclusionary rule has not yet attained the status of customary international law, Article 15 of UNCAT imposes obligations on the UK which directly affect statutory interpretation and the development of the common law.

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[200] [2000] 2 AC 115, 131E-132B

Statutory interpretation

209. The basic principles are well known and uncontroversial. The Interveners obviously accept that, if their submission in respect of the proper interpretation of Article 6 of the ECHR and/or their submission in respect of the customary international law/the common law are rejected, then, as a provision in an unincorporated treaty, Article 15 of UNCAT is not part of domestic law with the result that clear and unambiguous statutory provisions are to be enforced notwithstanding any inconsistency with Article 15 of UNCAT.[201]

210. However, it is very well established that, in construing any legislation (whether primary or subordinate) which is ambiguous, *in the sense that it is capable of a meaning which either conforms to or conflicts with treaty obligations*, the courts will presume that the legislature intended to legislate in conformity with treaty obligations, not in conflict with them.[202]

211. In *Garland v British Rail Engineering Ltd*, Lord Diplock formulated the presumption as follows:

> "… it is a principle of construction of the United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out that obligation, and not to be inconsistent with it".[203]

212. This emphasises that legislation should be treated as ambiguous if it is "reasonably capable of bearing such a meaning", i.e. a meaning consistent with a treaty obligation as well as a meaning inconsistent with that obligation. It also represented an expansion in the scope of the treaty presumption in that the range of legislation to which the presumption applied was extended beyond

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[201] See the analysis of Lord Bridge in *R v Secretary of State for the Home Department, ex parte Brind* [1991] AC 696 at p.747.
[202] See further the analysis of Lord Bridge in *ex parte Brind* at pp. 747-748.
[203] [1983] 2 AC 751, p. 771A-B

implementing legislation to any legislation "dealing with the subject matter of the international obligation".

213. This approach has become entrenched. In *Ahmad v ILEA*[204] and *Williams v Home Office (No.2)*,[205] the presumption was applied to non-implementing legislation. And in *ex parte Brind*, Lord Bridge referred to the "canon of construction" whereby the courts, when confronted with a simple choice between two possible interpretations of some statutory provision, "prefer that which avoids conflict between our domestic legislation and our international obligations".[206]

214. More recently, in *R v Lyons*[207] Lord Hutton said:

> "This House has stated that international treaties do not create rights enforceable in domestic law: see *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 476-477, 483C, 500C-D. But the present case relates to the fairness of the appellants' trial and is not one where the appellants claim to enforce a right which is given to them only by the Convention and is not recognised by English domestic law. As Lord Woolf CJ stated in *R v Togher* [2001] 3 All ER 463, 472, para 33: 'The requirement of fairness in the criminal process has always been a common law tenet of the greatest importance.' Therefore in a case such as the present one concerned with the issue of fairness, I consider that the principle stated in Rayner's case does not mean that an English court should not regard a judgment of the European Court on that issue as providing clear guidance and should not consider it right to follow the judgment unless (as I would hold in the present case) it is required by statute to reach a different conclusion. As Lord Goff of Chieveley stated in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283G: 'I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under this treaty' [the ECHR]".[208]

215. In the same case, Lord Hoffmann observed:

> "Of course there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United

[204] [1978] QB 36
[205] [1981] 1 All ER 1211
[206] p. 748
[207] [2003] 1 AC 976
[208] Para. 69

Kingdom in breach of an international obligation".[209]

216. See also Lord Bingham:

> "It is true, as the Attorney General insisted, that rules of international law not incorporated into national law confer no rights on individuals directly enforceable in national courts. But although international and national law differ in their content and their fields of application they should be seen as complimentary and not as alien or antagonistic systems. Even before the Human Rights Act 1998 the Convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law. I would further accept as [counsel] strongly contended, with reference to a number of sources, that the efficacy of the Convention depends on the loyal observance by member states of the obligations that have undertaken and on the readiness of all exercising authority (whether legislative, executive or judicial) within member states to seek to act consistently with the Convention so far as they are free to do so".[210]

217. Against that background it is submitted that, unless the provisions of the Anti Terrorism Crime and Security Act 2001 ('ATCSA') relating to the admission of evidence clearly show a Parliamentary intention to establish rules of evidence that are incompatible with Article 15 of UNCAT, they should be interpreted in accordance with the exclusionary rule in Article 15 of UNCAT, bearing in mind that peremptory norms of general international law generate strong interpretative principles.[211] It is submitted further below that ATCSA does not clearly show a Parliamentary intention to establish rules of evidence that are incompatible with UNCAT.

The common law

218. The authorities establishing that the common law should be interpreted and developed compatibly with international human rights obligations are very well

[209] Para. 27
[210] Para. 13
[211] See Crawford, *op. cit.*, p. 187.

known,[212] as are the authorities that international human rights obligations can be used when a court is considering how to exercise a judicial discretion.[213] Indeed, before this case, it was treated as obvious that the common law reflected the UK's international human rights obligations under Article 15 of UNCAT. In *Re Saifi* Rose LJ stated that:

> "In our judgment reference to the Torture Convention adds nothing to the case. The intent of Article 15 has been ensured in our law, by the common law and statute".[214]

219. The scope and extent of the jurisdiction of domestic courts to prevent an abuse of their process is already broad. In *R v Horseferry Magistrates Court ex p Bennett*[215] and *R v Latif*[216] jurisdiction to prevent an abuse of process was established even where the fairness of the trial was not in issue. In *Bennett* Lord Lowry observed that:

> "the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused…the principle goes…even beyond the rights of those victims who are or may be innocent. It affects the proper administration of justice according to the rule of law and with respect to international law."[217]

220. Lord Griffiths, for his part, stated:

> "If the court is to have the power to interfere with the prosecution in the present circumstances, it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule of law. My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The

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[212] Derbyshire CC v Times newspapers Ltd [1992] QB 770; DPP v Jones and Lloyd [1999] 2 All ER 257
[213] AG v Guardian Newspapers [1987] 1 WLR 1248; Rantzen v Mirror Group Newspapers [1994] QB 670
[214] [2001] 1 WLR 1134, 1156
[215] [1994] 1 AC 42
[216] [1996] 1 WLR 104, [1996] 1 All ER 353
[217] [1994] 1 AC 42, 76C-H

> great growth of administrative law in the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it". [218]

221. In *Latif* Lord Steyn observed that:

> "If the court concludes that a fair trial is not possible, it will stay the proceedings. That is not what the present case is concerned with…In this case, the question is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system".[219]

222. In *R v Governor of Brixton Prison ex p Levin*,[220] Lord Hoffman found that it would be very rare for evidence to be excluded from extradition proceedings but held, *obiter*, that evidence which 'has been obtained in a way which outrages civilized values' might be excluded. This test (whether evidence 'has been obtained in a way which outrages civilized values') was adopted and applied by the Divisional Court in *Armand Proulx v The Governor of Brixton Prison and the Government of Canada*.[221]

223. The Interveners submit that in so far as common law rules of fairness apply to SIAC, the common law should be interpreted and/or developed compatibly with the UK's international human rights treaty obligations, including Article 15 of UNCAT. The Interveners also submit that in so far as SIAC has a common law abuse of process jurisdiction, the scope and extent of that jurisdiction should be interpreted and/or developed compatibly with the UK's international human rights treaty obligations, including Article 15 of UNCAT.

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[218] 61H-62C
[219] [1996] 1 WLR 104, 112G-H
[220] [1997] AC 741, 748
[221] [2001] 1 All ER 57

The rule of law

224. It is clear that running through the cases and commentaries on the exclusionary rule is the notion that the admission of evidence that has been or might have been obtained by torture is antithetical to and would seriously damage the integrity of the proceedings.

225. Burgers and Danelius identified this notion when they indicated that the drafters of UNCAT were motivated by two concerns when setting out the exclusionary rule in Article 15 of UNCAT:

> " … the rule laid down in article 15 [UNCAT] would seem to be based on two different considerations. First of all, it is clear that a statement made under torture is often an unreliable statement and it could therefore be contrary to the principle of "fair trial" to invoke such a statement as evidence before a court. Even in countries whose court procedures are based on a free evaluation of all evidence, it is hardly acceptable that a statement made under torture should be allowed to play any part in court proceedings. In the second place, it should be recalled that torture is often aimed at ensuring evidence in judicial proceedings. Consequently, if a statement made under torture cannot be invoked as evidence, an important reason for using torture is removed, and the prohibition against the use of such statements as evidence before a court can therefore have the indirect effect of preventing torture."[222]

226. Article 69(7) of the Rome Statute, which addresses the admissibility of evidence in the International Criminal Court, also indicates the same two justifications for the exclusionary rule of fairness and expressing the Courts' abhorrence of torture. As noted above, Article 69(7) provides that:

> "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".

[222] JH Burgers and H Danelius, *op. cit.*, p. 148

227. A similar approach has been taken in the US Supreme Court. In *Rochin v People of California* the Court said of a case in which police officers had forcibly opened a man's mouth to extract the contents of his stomach:

> "This is conduct that shocks the conscience. . They are methods too close to the rack and the screw… Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct that naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society." [223]

228. The United States Supreme Court said with regard to involuntary confessions in *Jackson v Denno:*

> "It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will', Blackburn v Alabama, 361 U.S. 199, 206 -207, and because of 'the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves', Spano v New York, 360 U.S. 315, 320 –321". [224]

229. A similar approach has been taken in Canada. In *R v Oickle,* the Canadian Supreme Court said of the Canadian common law rule excluding confessions made as a result of oppression:

> " … the confessions rule is concerned with voluntariness, broadly defined. One of the predominant reasons for this concern is that involuntary confessions are more likely to be unreliable. The confessions rule should recognize which interrogation techniques commonly produce false confessions so as to avoid miscarriages of justice…

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[223] 242 US 165 (S. Ct. 1952)
[224] 378 US 368 (S. Ct. 1964) at pp. 385-386

> A final consideration in determining whether a confession is voluntary or not is the police use of trickery to obtain a confession … this doctrine is a distinct inquiry. While it is still related to voluntariness its more specific objective is maintaining the integrity of the criminal justice system ….".[225]

230. In *R v Collins* the Canadian Supreme Court examined s.24(2) of the Canadian Charter, which provides that evidence obtained in breach of Charter protected rights should be excluded if its admission would 'bring the administration of justice into disrepute:

> " … the purpose of s. 24(2) is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. This further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory or prosecutorial authorities". [226]

231. In *Wong Kam-Ming v The Queen,*[227] the Judicial Committee of the Privy Council held that even if evidence obtained under torture were demonstrably reliable and true, it should nonetheless be excluded as a mark of the Courts' abhorrence of oppression. In that case, the Privy Council decided that where a defendant asserts his confession was extracted by oppression, the sole permissible questioning on a *voir dire* is to determine the voluntariness of the confession – not whether the confession is true or false. Giving judgment, Lord Edmund-Davies noted that to allow questioning of the defendant as to the truth or falsity of his confession would have 'startling consequences'. Such an approach would suggest that if a statement were true, it would be admissible regardless of how much physical or mental torture or abuse had been inflicted to extract that confession. Lord Edmund Davies cited with approval the following passage of Hall CJ from the Canadian case of *Regina v Hnedish:*

> "I do not see how under the guise of 'credibility' the court can transmute what is initially an inquiry as to the 'admissibility' of the confession into an inquisition of an accused. That would be repugnant to our accepted standards

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[225] [2000] 2 SCR 3; [2000] SCJ No. 38, paras 32, 65
[226] [1987] 1 SCR 265, para. 31
[227] [1980] 1 AC 247

> and principles of justice; it would invite and encourage brutality in the handling of persons suspected of having committed offences."[228]

232. A similar approach has been taken by English courts. In *R v Mushtaq,* Lord Hutton reviewed common law principles relating to the admissibility of confession evidence:

> "It is clear that there are two principal reasons underlying the rule that a confession obtained by oppression should not be admitted in evidence. One reason, which has long been stated by the judges, is that where a confession is made as a result of oppression it may well be unreliable, because the confession may have been given, not with the intention of telling the truth, but from a desire to escape the oppression imposed on, or the harm threatened to, the suspect. A further reason, stated in more recent years, is that in a civilised society a person should not be compelled to incriminate himself, and a person in custody should not be subjected by the police to ill-treatment or improper pressure in order to extract a confession."[229]

233. Notably, in this case, Pill LJ accepted that these two considerations underlay the common law rule as to the exclusion of forced confession evidence in criminal proceedings as well as s.76 of the Police and Criminal Evidence Act 1984:

> "The rule was based not merely on concerns about the reliability of evidence obtained by oppression; it protected accused persons from oppression and marked the repugnance of the common law, in the context of criminal trials, to evidence so obtained from a defendant. Section76 of the 1984 Act, influenced I would expect by the jurisprudence under Article 6 of the Convention, embodied the same principle."[230]

234. The Interveners submit that the rule of law requires domestic courts to give effect to the exclusionary rule. The twin considerations that underpin the courts' abuse of process jurisdiction – the concern over the unreliability of evidence obtained by oppression and the courts' abhorrence of oppression and desire to maintain the integrity of judicial proceedings – apply with the same or greater force where the evidence in question comes from a third party who is not available to be cross-examined, and where the agents of another State are implicated in torture.

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[228] (1958) 26 W.W.R. 685, 688; cited at [1980] 1 AC 247, 257A
[229] (2005) 1 WLR 1513, para. 7
[230] Para. 92

The Court of Appeal's judgment

Weight and admissibility

235. The Interveners respectfully submit that Laws LJ in the Court of Appeal[231] erred in finding (as had the Special Immigration Appeals Commission), that the fact that evidence had been or might have been obtained through torture from a third party would be a matter of weight rather than admissibility.

236. It is submitted that if evidence that had been or might have been obtained by torture was admitted, assessing its weight would inevitably involve Courts in an extremely unattractive and potentially debasing exercise. Courts would arguably have to conduct a more thorough, and evidentially difficult, investigation into the circumstances in which the evidence in question was obtained. Moreover, some assessment would have to be given to different degrees of torture. This would imply that some forms of torture were more acceptable than others, which is wholly inconsistent with the absolute nature of the prohibition on torture.

The distinction between evidence obtained by torture, with the connivance of the UK authorities, and evidence obtained by torture without such connivance

237. In this case, Pill LJ accepted that neither Part 4 of ATCSA nor Rule 44(3) of the SIAC Procedure Rules:

> " … deprive the Commission of an abuse of process jurisdiction. Indeed, the existence of such a jurisdiction is inherent in the judicial function. It is a fundamental principle of the rule of law…There remains a residual jurisdiction even in this context."[232]

238. Similarly, Laws LJ accepted that if torture were brought about with the connivance of the English authorities, the courts, including the Special

[231] Paras 262-265

Immigration Appeals Commission, would have jurisdiction to exclude the resulting evidence because "it is a cardinal principle of the rule of law" that:

> " … the courts will not entertain proceedings or receive evidence in ongoing proceedings if to do so would lend aid or reward to the perpetration of …wrongdoing by an agency of the State[233] …"

239. Therefore,

> "… were the Secretary of State to rely before SIAC on a statement which his agents had procured by torture, or which had been procured with his agents' connivance at torture, SIAC should decline to admit the evidence, and this is so however grave the emergency."

240. The Interveners respectfully submit that this distinction between evidence obtained by torture with the connivance of the UK authorities which courts *would be obliged to exclude*, and evidence obtained without such connivance, which the courts *would lack the power to exclude*, is unsustainable.

241. First, because if the Courts, under the ACTSA and SIAC legislation, retain the power to exclude improperly obtained evidence, then it follows that the nothing in the legislation itself precludes the legislation from being read subject to the exclusionary rule set out in these submissions. Second, because the distinction drawn by the majority in the Court of Appeal is incompatible with the absolute nature of the prohibition of torture, the preventive function of the exclusionary rule and the *erga omnes* nature of the obligations relating to the prohibition on torture. Third, because the rationale underlying the rule of law and the abuse of process jurisdiction – the concerns over the unreliability of evidence obtained by torture, the courts' abhorrence of torture and desire to maintain the integrity of judicial proceedings – apply whether or not the evidence has been obtained with the connivance of the UK authorities. Fourth, because the Secretary of State, in seeking to rely on the proceeds of torture by the agents of another State, adopts that torture. As Neuberger LJ pointed out in his judgment in the Court of Appeal:

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[232] Para. 137

"it is the UK Government, through the Secretary of State which is seeking to rely on evidence which, at least according to the appellants, was extracted under torture While this is not a case where there is any question of the executive having been in any way connected with the torture, it remains the case that it is the executive which is seeking to rely in legal proceedings upon the evidence which is alleged to have been obtained through torture. In a sense, therefore, it can be said that the executive has "adopted" the means by which the evidence was extracted, and therefore that the duty of the court to intervene has arguably been triggered."[234]

The interpretation of ATCSA and the SIAC Procedure Rules

242. The Interveners respectfully submit that Pill LJ[235] in the Court of Appeal erred in finding that Part 4 of ATCSA and rule 44 of the SIAC Procedure Rules prohibited SIAC from excluding from its consideration statements obtained through torture.

243. Under s. 21 (1) ATCSA, the Secretary of State may certify a person as a suspected international terrorist

"If the Secretary of State reasonably –

(a) believes that the person's presence in the United Kingdom is a risk to national security, and

(b) suspects that the person is a terrorist"

244. Under s.25(2) ATCSA,

"The Commission must cancel the certificate if -

(a) it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21 (1) (a) or (b) or

(b) it considers that for some other reason the certificate should not have been issued."

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[233] Paras 248-252
[234] Para. 413
[235] Paras 129-133

245. Rule 44(3) of the Special Immigration Appeals (Procedure) Rules 2003 which applies to procedures in s.25 appeals before the Special Immigration Appeals Commission provides:

> "The Commission *may* receive evidence that would not be admissible in a court of law" [emphasis added].

246. Nothing in Part 4 of ATCSA 2001 addresses the question of what evidence may be considered by the Secretary of State, or by the Special Immigration Appeals Commission, in determining whether there are reasonable grounds to believe that a person's presence in the United Kingdom is a risk to national security (ATCSA s.21(1) (a)) or reasonable grounds to suspect that he is a terrorist (ATCSA s. 21 (1) (b)).

247. Rule 44(3) confers a discretion to admit evidence not normally admissible in a court of law. Rule 44(3) does not require the Commission to accept all evidence submitted to it. Nor, it is submitted, does it follow from Rule 44(3) that there are *no* rules of evidence; or, more narrowly, that any evidence can be admitted whatever its source.

248. As already set out above, it was accepted in the Court of Appeal that the Courts would be required to exclude evidence obtained by torture with the connivance of the UK authorities. It is respectfully submitted that this is inconsistent with the suggestion that the ATCSA and SIAC legislation *requires* the courts to admit *all* evidence.

249. Further, the Secretary of State has himself accepted that the statutory scheme does not prevent the UK from complying with its international obligations under Article 15 UNCAT. In the Conclusions and Recommendations following consideration of the United Kingdom's report under article 19 of the Convention, the Committee against Torture noted under the heading "positive aspects":

> " … the State party's affirmation that 'evidence obtained as a result of any acts of torture by British officials, or with which British authorities were complicit,

would not be admissible in criminal or civil proceedings in the United Kingdom,' and that the Home Secretary does not intend to rely upon or present 'evidence where there is a knowledge or belief that torture has taken place'".[236]

CONCLUDING OBSERVATIONS

250. The Special Rapporteur on Torture's first report to the UNCHR in 1986 sets out the rationale for the prohibition of torture:

> "What distinguishes man from other living beings is his individual personality. It is this individual personality that constitutes man's inherent dignity, the respect of which is, in the words of the preamble of the Universal Declaration of Human Rights, "the foundation of freedom, justice and peace in the world". It is exactly this individual personality that is often destroyed by torture, in many instances, torture is even directed at wiping out the individual personality". [237]

251. Because torture strikes at human dignity, the prohibition of torture has an almost unique status in international human rights law: it is absolute and non-derogable and has the status of *jus cogens*. The prohibition not only requires States to refrain from torture but requires them to take measures to prevent torture. All States are under obligations, *erga omnes*, not to endorse, adopt or recognise any breach of the prohibition of torture.

252. The purpose of torture being often to extract information, the exclusionary rule is integral to the prohibition of torture and fundamental to efforts to prevent and eradicate torture. The exclusionary rule must be interpreted broadly and has been interpreted by authoritative human rights bodies to include evidence obtained from third parties and evidence obtained at the instigation of the agents of a foreign State.

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[236] Para. 3(g)
[237] Report of the Special Rapporteur on Torture (P Kooijmans), E/CN.4/1986/15

253. The right to a fair trial under Article 6 of the ECHR includes within it the rule excluding evidence which has been or might have been obtained under torture. This is because the admission of evidence which has been or might have been obtained under torture is inimical to the right to a fair trial and to the integrity of judicial proceedings; it is also because Article 6 of the ECHR must be read in light of other international human rights instruments, including Article 15 of UNCAT and because Article 6 of the ECHR must be read in a manner which gives effect to the prohibition of torture contained in Article 3 of the ECHR.

254. Arguably, because it is integral to the prohibition of torture, the exclusionary rule itself enjoys the status of *jus cogens*. At a minimum, the exclusionary rule is so widely accepted in state practice and *opinio juris* that it has attained the status of a customary norm of international law and is therefore part of the UK's common law. Further, the exclusionary rule as contained in Article 15 of UNCAT forms part of the UK's international treaty obligations and must inform statutory interpretation and the development of the UK common law. Because the admission of evidence which has been or might have been obtained under torture is inimical to a fair trial and debases the integrity of judicial proceedings, the exclusionary rule is also integral to the rule of law.

255. If the ATCSA and SIAC statutory framework precluded the application of the exclusionary rule, the legislation would be incompatible with Article 6 of the ECHR.

256. However, Rule 44(3) of the SIAC Procedure Rules – one, generally or ambiguously worded line in subordinate legislation – is manifestly insufficient to indicate Parliament's intention to override the fundamental human rights or the UK's international obligations which are at stake in this case.

257. Laws LJ accepted in the Court of Appeal that the exclusionary rule would apply in s.25 ATCSA proceedings if:

> "there exists some over-arching or constitutional principle, not capable of being abrogated by [rule 44(3) of the SIAC Procedure Rules] …in particular, the principle must be one which by force of its constitutional or fundamental nature, subordinate legislation such as rule 44(3) cannot lawfully override in the absence of express or at least specific authority."[238]

258. The Interveners submit that the exclusionary rule holds such a status and that nothing in the ACTSA legislation or SIAC Procedure Rules precludes the Courts from applying the exclusionary rule:

a. as required by s.3 Human Rights Act 1998, to read and give effect to the ACTSA and SIAC legislation in a manner compatible with the UK's obligations under Article 6 ECHR;

b. as required by the principle of legality, to give effect to a common law rule, because the exclusionary rule, as, at a minimum, a norm of customary international law, forms part of the common law and/or because the common law has developed to reflect the UK's international human rights obligations and/or because the exclusionary rule is integral to the rule of law; and

c. as required by principles of statutory interpretation to give effect to the UK's international treaty obligations under Article 15 UNCAT.

Professor Nicholas Grief

Bournemouth University

Keir Starmer QC

Mark Henderson

Joseph Middleton

Peter Morris

Laura Dubinsky

[238] Para. 243

Doughty Street Chambers

SCHEDULE: THE INTERVENERS

The AIRE Centre

The AIRE Centre provides direct legal representation in applications to the European Court of Human Rights, and has been involved in more than 60 cases against 12 jurisdictions. A number of these cases concerned applicants who were threatened by expulsion to countries where they might have faced torture, inhuman or degrading treatment. The organisation also provides training for judges, public officials, lawyers and human rights NGOs across the 46 member states of the Council of Europe. This has included training at ELENA/ECRE courses and training for the International Association of Refugee Law Judges.

Amnesty International Ltd

Amnesty International Ltd is a company limited by guarantee. Amnesty International aims to secure the observance of the Universal Declaration of Human Rights and other international standards throughout the world. Amnesty International monitors law and practices in countries throughout the world in the light of international human rights and humanitarian law and standards. It is a worldwide human rights movement of some 1.8 million people (including members, supporters and subscribers). It enjoys Special Consultative Status to the Economic and Social Council of the United Nations and Participatory Status with the Council of Europe

Amnesty International's mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression and freedom from discrimination, within the context of its work to promote all human rights. The organisation works independently and impartially to promote respect for human rights, based on research and international standards agreed by the international community.

It does not take a position on the views of persons whose rights it seeks to protect. It is concerned solely with the impartial protection of internationally recognised human rights.

The Association for the Prevention of Torture

The Association for the Prevention of Torture (APT) is an independent non-governmental organization based in Geneva, Switzerland, since 1977. Its objective is to prevent torture and ill-treatment of persons deprived of their liberty, in all countries of the world. To achieve this the APT: advocates for the adoption and implementation of legal norms that prohibit torture and ill-treatment; promotes monitoring of places of detention and other control mechanisms that can prevent torture and ill-treatment; strengthens the capacity of persons seeking to prevent torture, especially national human rights organizations. In December 2004 it was awarded the French Republic's Human Rights Prize for its prevention work.

British Irish Rights Watch.

British Irish Rights Watch is an independent non-governmental organisation that monitors the human rights dimension of the conflict and the peace process in Northern Ireland. Its services are available to anyone whose human rights have been affected by the conflict, regardless of religious, political or community affiliations, and the organisation takes no position on the eventual constitutional outcome of the peace process. One of BIRW's charitable objects is the abolition of torture, and the organisation has fifteen years' experience of working to combat torture and cruel, inhuman or degrading treatment and of monitoring conditions in detention.

The Committee on the Administration of Justice

The Committee on the Administration of Justice Ltd.(CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. The Committee seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the 1998 Council of Europe Human Rights Prize.

Doctors for Human Rights

Doctors for Human Rights' is the trading name of 'Physicians for Human Rights - UK', which is a registered in England and Wales as a charity [No. 1078420] and as a limited company [No. 03792515]. Doctors for Human Rights is an organization of British health professionals dedicated to ensuring that the ideals, skills and expertise of their discipline are brought to the service of human rights.

Human Rights Watch

Human Rights Watch (HRW) is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It maintains offices in Berlin, Brussels, Geneva, London, Los Angeles, Moscow, New York, San Francisco, Tashkent, Toronto, and Washington. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring international public opinion to bear upon offending governments and others and thus bring pressure on them to end abusive practices. HRW has filed amicus briefs before various bodies, including the European Court of Human Rights, courts in the European Union and United States, and international tribunals.

The International Federation for Human Rights

The mandate of the International Federation for Human Rights (FIDH) is to act effectively and practically to ensure the respect of all the rights laid down in the Universal Declaration of Human Rights and in other Human Rights treaties. The FIDH was set up in 1922. It is now a federation of 141 national or regional Human Rights organisations. The FIDH co-ordinates and supports their activities and provides them with a voice at the international level. Like its member organisations, the FIDH is linked to no party, no religion, and is independent vis-à-vis all governments.

INTERIGHTS

INTERIGHTS is an international human rights law centre based in London. It conducts human rights litigation before international, regional and domestic courts and tribunals. It also frequently intervenes as *amicus curia* in cases that raise issues of general importance concerning the interpretation of fundamental rights. INTERIGHTS has intervened in cases before the European Court of Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples Rights and the UN Human Rights Committee, as well as domestic courts. INTERIGHTS also engages in legal education of judges and lawyers and the publication of legal resource materials. Its main purpose is to assist judges and lawyers to understand and apply international and comparative law for the more effective protection of human rights and the rule of law.

The Law Society of England and Wales

The Law Society regulates and represents the solicitors' profession in England and Wales and has a public interest role in working for reform of the law.

Liberty

Liberty, a company limited by guarantee, was formed in 1934 and is a respected and independent body whose central objectives are the protection of civil liberties and the promotion of human rights in the United Kingdom. It has had a legal department with employed staff for 25 years, although supporting cases has been part of its work since 1934. Liberty acts for clients as solicitor and regularly practises in the courts in this country and in the ECHR. Liberty has also developed considerable experience in providing written submissions to the European Court of Human Rights and domestic courts as intervener. In addition, Liberty has a particular interest and expertise in anti-terror legislation, and assists Parliamentary Committees in their scrutiny of anti-terror and civil emergency policy.

The Medical Foundation for the Care of Victims of Torture

The Medical Foundation for the Care of Victims of Torture is a human rights organisation that works exclusively with survivors of torture and organised violence, both adults and children. It has received more than 40,000 referrals since it began in 1985. The Foundation offers its patients medical treatment and documentation of the signs and symptoms of torture, providing 750 to 1,000 forensic medical reports each year as well as a range of therapeutic services.

REDRESS

REDRESS is an international human rights nongovernmental organisation with a mandate to assist torture survivors to seek justice and other forms of reparation. Over the past 12 years, it has accumulated a wide expertise on the various facets of the right to reparation for victims of torture under international law. REDRESS regularly takes up cases on behalf of individual torture survivors and has wide experience with interventions before national and international courts and

tribunals. At the domestic level, REDRESS assists lawyers representing survivors of torture seeking some form of remedy such as civil damages, criminal prosecutions or other forms of reparation including public apologies. At the international level, REDRESS represents individuals who are challenging the effectiveness of domestic remedies for torture and other forms of ill-treatment, including the scope and consequences of the prohibition of torture in domestic law, the State's obligation to investigate allegations, prosecute and punish perpetrators, as well as the obligation to afford adequate reparations to the victims.

World Organization Against Torture (OMCT)

The World Organization Against Torture (OMCT), based in Geneva, Switzerland, is the largest international coalition of non governmental organisations (NGOs) fighting against torture, summary executions, forced disappearances and all forms of cruel, inhuman or degrading treatment. As the coordinator of the SOS-Torture network which comprises 282 national, regional, and international organizations in 89 countries, OMCT has 20 years of experience assisting victims of torture and local NGOs including through litigation in national systems in many different regions of the world. OMCT brings to this *amicus* intervention its legal expertise on the prohibition of torture and ill-treatment under international law developed also in the context of its advocacy activities before the United Nations Treaty Bodies (HRC and CAT) and interventions in regional human rights *fora* including the African and Inter-American systems.

IN THE HOUSE OF LORDS

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)

BETWEEN:

A and Others

Appellants

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

A and Others (FC) and ANOTHER

Appellants

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

CASE FOR THE INTERVENERS (AMNESTY INTERNATIONAL and Others)

Leigh Day & Co.
Priory House
25 St John's Lane
London EC1M 4LB

Tel: 020 7650 1200
Fax: 020 7650 1294
Ref: RS/Amnesty