PUBLIC
ANNEX C

Stuart D (2010) Charter Justice in Canadian Criminal Law, 5th edn. Carswell, Toronto
Stein A (2007) Das Verbot der Folter im internationalen und nationalen Recht: unter Betrachtung seiner Durchsetzungsinstrumente und seines absoluten Charakters. Verlag Dr. Kovač, Hamburg
Triffterer O (2008) (ed) Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article, 2nd edn. C.H. Beck et al., Baden-Baden
Vanderpuye K (2005) The International Criminal Court and discretionary evidential exclusion: toeing the mark? Tulane J Int Comp Law 14:127–177
Viljoen F (2012) International human rights law in Africa, 2nd edn. Oxford University Press, Oxford
Weigend T (2003) Is the criminal process about truth: a German perspective. Harv J Law Public Policy 26:157–173
Young (2011) "Internationally recognized human rights" before the International Criminal Court. Int Comp Law Q 60:189–208
Zahar A, Sluiter G (2008) International criminal law: a critical introduction. Oxford UniversityPress, Oxford
Zappalà S (2002) The rights of the accused. In: Cassese A, Gaeta P, Jones J (eds) The Rome Statute of the International Criminal Court: a commentary, vol 2. Oxford University Press, Oxford, pp 1319–135
Zappalà S (2003) Human rights in international criminal proceedings. Oxford University Press, Oxford

Chapter 5
Factors in the Balancing Exercise

Abstract Under Article 69(7) of the ICC Statute, not all legal violations committed during investigations lead to the exclusion of thereby tainted evidence. Instead, evidence is only excluded where such a violation has a specific negative impact on the proceedings of the ICC, namely because either the evidence lacks reliability or because its admission "*would be antithetical to and would seriously damage the integrity of the proceedings*". We have seen in Chap. 4 that the wording of Article 69(7) of the ICC Statute, while indicating a mandatory exclusionary rule at first sight, is ultimately a discretionary rule due to fact that these additional requirements were included in the provision. We have also seen in Chap. 4 that the exclusion of illicitly obtained evidence should be guided by the integrity theory, meaning the idea that the exclusion of evidence should serve the maintenance of the integrity of the Court. Under this theory, the exercise of the discretion granted under Article 69(7) of the ICC Statute requires the Court to strike a balance between the interests of '*due process*' and '*effective law enforcement*'. In order to guide this balance, this chapter will discuss a number of factors that may militate in favour of either one of these two poles.

Keywords Torture · Mandatory rule of exclusion · Good faith · Office of the prosecutor · Customary international law · Balancing of rights · Effective law enforcement · Discretion · Abuse of process doctrine · Lubanga

Contents

P. Viebig, *Illicitly Obtained Evidence at the International Criminal Court*, International Criminal Justice Series 4, DOI 10.1007/978-94-6265-093-0_5

5.1 Introduction

In the previous chapter, we have determined the kind of violations that may trigger the ICC exclusionary rule. But as depicted before, the establishment of such a violation does not automatically lead to exclusion under Article 69(7) of the ICC Statute. Instead, evidence is only excluded where one of the additional requirements in Article 69(7)(a) or (b) is met. Given the greater contentiousness of these cases, we will concentrate on Article 69(7)(b), which is meant to exclude evidence even where its reliability is not at issue. As the ICC Pre-Trial Chamber stated in *Lubanga*, Article 69(7)(b) of the ICC Statute gives the judges the discretion "*to seek an appropriate balance between the Statute's fundamental values in each concrete case*".[1] Under the integrity theory, the exercise of this discretion demands striking a balance between the interests of 'due process' and 'effective law enforcement'.[2] In order to guide this balance, the following sections will discuss a number of factors that may militate in favour of either one of these two poles.

5.2 The Seriousness of the Crime

With respect to domestic criminal proceedings, the seriousness of the crime that the accused is charged with is a factor that is treated differently among the various legal systems reviewed. While the ECtHR takes it into account when assessing the fairness of the trials within the Member States to the ECHR,[3] there is disagreement among domestic courts about whether the seriousness of a crime increases the interest in effective law enforcement.

Despite the gradual restriction of its exclusionary rule, the U.S. Supreme Court has not developed an exception for particularly serious crimes. The more inclusionary approaches of German and English courts in turn have deemed the seriousness of the crime to be a valid criterion. Its consideration has, however, raised criticism within legal academia in these countries.[4] The critiques have followed the same line as the recent jurisprudence in Canada, where the majority of the

[1] *Prosecutor v. Lubanga* (Decision on the confirmation of charges), ICC (Pre-Trial Chamber), decision of 29 January 2007, para 84. Also see *Prosecutor v. Mbarushimana* (Decision on the confirmation of charges), ICC (Pre-Trial Chamber), decision of 16 December 2011, para 61.

[2] See Sect. 4.3.2.2.5.

[3] See *Jalloh v. Germany*, ECtHR, decision of 11 July 2006 (Application no. 54810/00), paras 119 and 122; see also Sect. 3.2.4.

[4] For Germany, see German Constitutional Court (BVerfG), decision of 31 January 1973, *BVerfGE* 34, p. 250; see also Sect. 3.3.1. For the English approach, see *Regina v. Khan*, Court of Appeal of England and Wales, decision of 15 June 1992, [1993] Crim. L.R. 54; see also Sect. 3.3.3.

judges has rejected the criterion.[5] These critics make allowance for the fact that the seriousness of the crime not only impacts on the public interest in its prosecution; it also raises the level of the penalty that the accused must expect in the event of a conviction. Naturally this also increases the interest of the individual in the exclusion of the evidence. As a consequence, the gravity of the crime could be seen as militating both in favour and against exclusion.

At the international level, the exceedingly grave character of international crimes might tip the scales. The international core crimes are considerably more serious than even the gravest of those crimes that are regularly judged by domestic courts. At the same time, under the rule of law, the punishment of convicted perpetrators cannot be increased proportionally. This difference to domestic proceedings could be relied upon to argue that at the international level, crime seriousness should be a factor in favour of exclusion.[6] We will see, however, that this argument cannot be sustained.

One may argue that teleological deliberations support the significance of the seriousness of a crime at the international level. As previously stated, the socio-pedagogical aim pursued by international criminal institutions requires not only respect for due process guarantees. It also demands not undermining the confidence within the international community in the validity of international criminal law and in effective prosecution of violations.[7] In this respect, one may also advance policy concerns. International crimes are serious in particular because of their dimensions in terms of territory and affected persons, as well as because of the particular identity of the possible perpetrators. This is also what makes international proceedings so costly. And it is also what makes it often so difficult to take suspects into custody. Accordingly, there is an increased need for justification where such proceedings fail. Finally, the socio-pedagogical purpose is closely intertwined with the solidarity with the victims of these serious crimes. The use of procedural tools that hamper the enforcement of international criminal law would be met with particular incomprehension in light of the immense suffering of the victims.

Deliberations of this nature have lead the ICTY to refer to the seriousness of the crimes when deciding on the exclusion of evidence. The tribunal has held that it would be inappropriate, *inter alia* in light of the seriousness of the crimes under its jurisdiction, to exclude relevant evidence only for procedural considerations. It considered that excluding evidence in such *cases "would constitute a dangerous obstacle to the administration of justice"*.[8]

[5] *Regina v. Grant,* Supreme Court of Canada, decision of 17 July 2009, [2009] 2 S.C.R. 353, para 84. See also Sect. 3.3.4.

[6] In favour, Scharf 2008, p. 169.

[7] See in particular Sect. 2.2.3.

[8] *Prosecutor v. Brđanin* (Decision on the Defence "Objection to Intercept Evidence"), ICTY (Trial Chamber), decision of 3 October 2003, para 7. Similar, see *Prosecutor v. Karadžić* (Decision on the accused's Motion to exclude intercepted conversations), ICTY (Trial Chamber), decision of 30 September 2010, para 10. See also Safferling 2012, p. 501.

Conversely, at the ICC, the Trial Chamber in the *Lubanga* case unequivocally declined to consider the seriousness of the crimes when applying Article 69(7)(b) of the ICC Statute. It argued that all of the crimes under the jurisdiction of the Court were serious but that this was no argument for the admissibility of evidence.[9] The Trial Chamber's consistency can be welcomed. Enforcement interests and solidarity with victims, as important as they are, cannot serve as an argument to generally disregard basic principles of procedural fairness.

This is particularly the case where the violation of human rights is concerned. The requirements of human rights law are minimum standards. Such basic principles cannot be circumvented even in order to prosecute the gravest crimes. This is further confirmed by the deliberations underlying the integrity rationale. We have opted above for a 'court-centred' version of the integrity theory.[10] From this perspective, the ICC must strive for the consistent application of the human rights values it was set up to promote. Given the limited mandate of the Court, this necessarily applies to alleged perpetrators of heinous crimes.

A comparison with the abuse of process doctrine is further instructive in this respect. This doctrine was one of the most controversially discussed procedural issues in the *Lubanga* case. The doctrine originates from common law and gives judges the power to stop a criminal process altogether where the rights of the accused have seriously been violated. Such a stay of proceedings has far more far-reaching consequences than the exclusion of single pieces of evidence. But even here, the seriousness of the crimes has not prevented the ICC judges from using this severe procedural sanction as an *ultima ratio*.[11]

If the ICC were to include crime seriousness in its balancing exercise, it would always have to admit the evidence. To rely solely on the concern for effectiveness and for the solidarity with victims would mean to concede exactly to the kind of 'public attitude' integrity we have dismissed earlier. Exclusionary rules for illicitly obtained evidence are exceptions to the general tendency in international criminal trials to admit most evidence. The Trial Chamber in *Lubanga* has emphasized this

[9] *Prosecutor v. Lubanga* (Decision on the admission of material from the "bar table"), ICC (Trial Chamber), decision of 24 June 2009, para 44.

[10] See Sect. 4.3.2.2.5.

[11] See *Prosecutor v. Lubanga* (Judgment on the Appeal of Mr. Thomas *Lubanga* Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2) (a) of the Statute of 3 October 2006), ICC (Appeals Chamber), decision of 14 December 2006. See also, *Prosecutor v. Lubanga* (Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(c) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008), ICC (Trial Chamber), decision of 13 June 2008; *Prosecutor v. Lubanga* (Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU), ICC (Trial Chamber), decision of 8 July 2010.

exceptional nature of Article 69(7) of the ICC Statute.[12] The very reason to provide for such derogation rules is that, even in light of the gravity of allegations, the guarantees of procedural fairness must be adhered to.

5.3 The Importance of the Evidence

Another factor that one might think is relevant is the importance of the evidence for the outcome of the trial. This includes the question whether the evidence is the only sustainable evidence as well as the question of its probative value.

We have seen that, according to international case law, the notion of probative value pertains to the reliability and significance of the evidence.[13] Reliability is clearly relevant under subpara (a) of Article 69(7) of the ICC Statute. But is it also a consideration where exclusion is discussed under subpara (b)? And what about the significance of a piece of evidence? The ICC Trial Chamber in *Lubanga* rejected the impact of probative value as a factor for the balancing exercise in Article 69(7)(b) of the ICC Statute. It based its decision in particular on the lex specialis nature of the provision.[14] A discussion of the different views adopted at the national and international level supports the conclusion drawn by the ICC judges.

First of all, the jurisprudence of the ICTY is of no avail even though it refers to this factor. The tribunal has emphasized that a restrictive approach to the exclusion of evidence was warranted in particular because "*excluding what would appear to be on a prima facie basis relevant and important evidence" would mean to deny the tribunal "the possibility of having available evidence which would be otherwise difficult, if not impossible, to obtain*". When assessing this reference to the importance of a piece of evidence, it should however be borne in mind that the ICTY does not usually base its decisions on exclusion on Rule 95 of its Rules of Procedure and Evidence but on Rule 89(D).[15] In the quoted case, the appreciation of the probative value of the evidence also results from the express wording of this provision. We have seen however that the relationship between Rule 89(D) and Rule 95 should in fact be characterized by the *lex specialis* nature of the latter

[12] *Prosecutor v. Lubanga* (Decision on the admission of material from the "Bar Table"), ICC (Trial Chamber), decision of 24 June 2009, para 44.

[13] See Sect. 4.3.1.

[14] *Prosecutor v. Lubanga* (Decision on the admission of material from the "Bar Table"), ICC (Trial Chamber), decision of 24 June 2009, para 41; confirmed by *Prosecutor v. Katanga and Chui* (Decision on the Prosecutor's Bar Table Motions), ICC (Trial Chamber), decision of 17 December 2010, para 64.

[15] See Sect. 3.1.3.

provision.[16] This is exactly the conclusion that the *Lubanga* Trial Chamber rightly draws for Articles 69(4) and 69(7) of the ICC Statute in the decision mentioned at the outset.

The importance of the tainted evidence has, however, also been taken into consideration at the domestic level. The Germancorr Federal Supreme Court has attached value to the significance of the evidence for combating serious crimes.[17] The Canadian Supreme Court as well, in the last prong of its Section 24(2) test, considers how important the evidence is for the outcome of the trial. This includes the assessment of whether the evidence is the only or at least the decisive proof of the crime.[18] In both systems, the fact that the evidence was of particular importance has been considered militating in favour of admissibility. The same approach also underlies the jurisprudence of the European Court of Human Rights, which has asked whether the evidence was decisive for the conviction in the respective ECHR member state or whether it was merely used for corroboration.[19]

Interestingly, English courts have adopted exactly the opposite view. According to English case law, the significance of a piece of evidence militates in favour of exclusion. This jurisprudence relies on the argument that where evidence against a suspect is especially strong, investigators will be particularly tempted "*to do what the provisions are aimed to prevent*". Consequently, in such a case, "*the protection of the rules is most needed*".[20]

The English approach alludes to an important consideration that confirms the general irrelevance of this factor as supported by the ICC Trial Chamber. Contrasting the different domestic approaches reveals that the same problem arises here as with the factor of crime seriousness discussed above. Ultimately, the importance of a piece of evidence increases the interest of both parties in a decision favourable to them. This consideration is applicable to both domestic and international proceedings.

As a consequence, the impact of evidence on the outcome of the trial should be seen neither as militating against nor in favour of exclusion. Where the reliability of a piece of evidence is concerned, this aspect is solely relevant under Article 69(7)(a) of the ICC Statute. The significance of the evidence in turn can be taken into account under the general admissibility rule of Article 69(4) but not under the exceptional exclusionary rule in Article 69(7)(b) of the Statute.

[16]See Sect. 3.1.3.

[17]See Trüg 2003, p. 230; Rogall 1979, p. 29 et seq., see also Sect. 3.3.1.

[18]See *Regina v. Grant,* Supreme Court of Canada, decision of 17 July 2009, [2009] 2 S.C.R. 353, para 79. Also see Sect. 3.3.4.

[19]*Jalloh v. Germany*, ECtHR, decision of 11 July 2006 (Application no. 54810/00), para 121.

[20]*Regina v. Keenan*, Court of Appeal of England and Wales, decision of 26 April 1989, [1990] 2 Q.B. 54.

5.4 The Seriousness and Character of the Offence

5.4.1 The General Impact of the Seriousness of the Violation

Among the judicial systems reviewed, the seriousness of the violation is the least controversial among all the possible factors. This factor has been considered relevant by the ICTY,[21] as well as by the ECtHR.[22] At the national level, all of those systems that openly base their decision on a balancing exercise, namely the German, the English and the Canadian systems, consider this a relevant factor.[23] We have seen that the U.S. system does not openly balance the interests involved. Instead, it permits derivations from the theoretically mandatory exclusionary rule only by way of exceptions. Since there is no such exception for particularly serious violations, the U.S. system is the only one among the reviewed systems that does not enable its judges to assess the gravity of a violation as such.[24] As we will see, U.S. doctrine instead leaves room for related aspects such as the question whether the investigative authorities have acted in good faith. These aspects will be treated separately below.

The ICC, in its first case law on the application of Article 69(7) of the ICC Statute, has also referred to this factor. One commentator has asserted that the jurisprudence seems contradictory on this point.[25] In its decision on exclusion in *Lubanga*, the Trial Chamber held that "*the Statute does not 'quantify' the violation*", thereby claiming that even a non-serious violation could lead to the exclusion of evidence.[26] The judges relied on a historical approach. They held that the express limitation to 'serious violations' that earlier drafts had envisaged for the provision's chapeau, did not appear in the text finally adopted at the Rome Conference.[27] But at the same time, the decision, at a later point, considers the relevance of the fact that "*the violation was not of a particularly grave kind*".[28]

[21]See in particular *Prosecutor v. Brđanin* (Decision on the Defence "Objection to Intercept Evidence"), ICTY (Trial Chamber), decision of 3 October 2003, para 61; see also Sect. 3.1.4.

[22]See Sect. 3.2.4.

[23]On the English jurisprudence, see *Regina v. Keenan*, Court of Appeal of England and Wales, decision of 26 April 1989, [1990] 2 Q.B. 54; *Regina v. Absolam*, Court of Appeal of England and Wales, decision of 1 July 1988, [1988] Cr. App R. 332. See also Mellifont 2007, pp. 85–86. With respect to Canada, see *Regina v. Grant,* Supreme Court of Canada, decision of 17 July 2009, [2009] 2 S.C.R. 353, para 76. See also Stuart 2010, p. 318. On the German jurisdiction, see Sect. 3.3.1.

[24]On this systematic of the U.S. exclusionary rule, see Sect. 3.3.2.

[25]Alamuddin 2010, p. 301 et seq.

[26]*Prosecutor v. Lubanga* (Decision on the admission of material from the "Bar Table"), ICC (Trial Chamber), decision of 24 June 2009, para 35.

[27]*Prosecutor v. Lubanga* (Decision on the admission of material from the "Bar Table"), ICC (Trial Chamber), decision of 24 June 2009, fn. 67 to para 35.

[28]*Prosecutor v. Lubanga* (Decision on the admission of material from the "Bar Table"), ICC (Trial Chamber), decision of 24 June 2009, para 47.

This apparent contradiction can, however, be resolved by considering the scheme of Article 69(7). Under the chapeau of the provision, the seriousness of the violation is irrelevant. It is, however, a criterion that needs to be considered under the additional requirements, namely for the assessment of whether admitting the evidence would have an adverse effect on the integrity of the proceedings.

Admittedly, the decision in *Lubanga* is slightly misleading in this respect. At first sight, the previously made distinction is what the decision seems to come down to when it holds that "[i]*t is only in the second limb of the test that a requirement of a degree of 'seriousness' is introduced*". But the decision adds a rather confusing specification to the latter assertion. It states that the degree of seriousness introduced by the second prong "*is unconnected to the seriousness of the violation*".[29] This remark can be interpreted in two ways. Either the Chamber wanted to express that the fact that a violation was serious is irrelevant for Article 69(7) altogether. Or this statement only refers to the word 'violation' as contained in the chapeau of the ICC exclusionary rule. The latter interpretation of the decision seems preferable. Under the former, the Chamber would indeed be contradicting its later endorsement that the gravity of the violation is a factor relevant for the balancing exercise.

Ultimately, it is unlikely that the Chamber could have meant that the seriousness of the violation is not a factor to be considered at all. It seems in fact self-evident that the seriousness of the violation is relevant for the balancing exercise. In order to maintain the integrity of ICC proceedings, the weighting exercise under Article 69(7) is supposed to strike a balance between the interest of 'effective law enforcement' and 'due process'. The latter interests will obviously be affected to a greater degree depending on the extent to which a violation has interfered with specific rights and values.[30]

We will assume therefore that the seriousness of the violation is relevant for the balancing exercise. The problem is, however, that the details of this appraisal are unclear. In domestic discussions, this factor has been criticised most of all for its vagueness.[31] We have made a similar point for the jurisprudence of the *Ad hoc* tribunals.[32]

Admittedly, assessing whether a violation is particularly grave is an inherently subjective consideration. At the same time, the factor of seriousness can be specified at least to some degree. First of all, this factor must be distinguished from other criteria discussed below. To this effect, we will assume, first of all, that seriousness relates only to substantive aspects and not to the attitude of the

[29]*Prosecutor v. Lubanga* (Decision on the admission of material from the "Bar Table"), ICC (Trial Chamber), decision of 24 June 2009, para 35.

[30]Similar, Ambos 2010, p. 370. But see Edwards 2001, p. 339, who seems to reject the significance of whether the violation was serious.

[31]Slobogin 2013, p. 20 et seq.

[32]See Sect. 3.1.4.

investigators. This attitude will instead be treated under the heading of 'good faith'. Secondly, the specific actors involved in the measure will not be considered part of the question of seriousness but will be dealt with separately as well. Instead, seriousness will be understood as relating to the significance of the affected right and the extent to which the investigative measure has interfered with this right. The following sections will show that conclusions can be drawn in particular by looking at the most extreme cases at both ends of the scale.

5.4.2 Technical Mistakes

At the one end of the scale, the selective review of national and international jurisprudence carried out above suggests that the gravity factor is supposed to exclude in particular minor procedural mistakes, often referred to as 'technicalities'. This is a consideration that may be adopted for the ICC as well. The legitimacy of the proceedings would clearly suffer if adherence to formal rules would slavishly be regarded as indispensable at the expense of successful convictions. But what kind of cases does this involve?

A distinction can be made between the different categories of norms that may trigger the exclusionary rule. The notion of '*internationally recognized human rights*' contains broad principles instead of detailed regulations. As a consequence, minor deviations from widespread procedural practices will regularly not amount to a human rights violation. Violations of domestic law in turn are in principle irrelevant for the ICC exclusionary rule.[33] This includes both minor and more serious violations.

Accordingly, the question of 'technicalities' involves primarily cases where the initial violation pertains to the proper law of the ICC. But here, the low degree of regulation by the ICC proper law will have to be taken into account. We have seen that both the ICC Statute and the Rules of Procedure and Evidence concentrate on the regulation of essential procedural issues.[34] Moreover, according to the system of cooperation between the ICC and states, the main responsibility for investigations rests with the latter. This means that the ICC proper law contains only very few provisions setting out mere 'technicalities' and this is particularly true where the collection of evidence is concerned.

A small number of provisions which, depending on the circumstances of the case, may be qualified as 'technicalities' can be found in Chapter 5, section III of the ICC Rules of Procedure and Evidence. Examples pertain to the recording of certain statements and facts. Rule 111(2) of the RPE for instance requires that a record be made where a suspect is informed of his rights under Article 55(2)

[33]See Sect. 4.3.3.4.

[34]See Sect. 4.1.

of the ICC Statute. If the instruction as such is not disputed in the specific case, a violation of this rule might be considered a minor and thus negligible procedural mistake. A similar example would be Rule 112(1)(b) of the RPE, which demands for recording where the suspect waives his right to be questioned in the presence of counsel. Again, if the parties agree that the waiver was actually made, excluding a statement made under these circumstances would mean adhering to a technicality.

5.4.3 *Automatic Exclusion for Particular Rights?—The Example of Torture*

Conversely, on the opposite end of the scale, it has been established that a violation of certain 'super'-rights is generally so severe that exclusion is justified without the consideration of any further factors.[35] The assumption of such an automatic rule should be treated very carefully. As we have seen, excluding evidence requires a delicate balancing of interests that does not allow for inflexible bright-line rules. The following section will nevertheless demonstrate that a right may reach such a level of significance that other factors cannot outweigh its violation. To this end, a closer look will be given to the prohibition of torture. Torture is the most obvious example for a particularly grave violation. Accordingly, if the violation of any human rights norm is sufficiently grave to have such a dominant effect, this must be the prohibition of torture.

5.4.3.1 Mandatory Exclusion as an Internationally Recognized Human Right

As demonstrated above, the right not to be tortured is recognized almost universally.[36] This reflects the gravity of allegations of torture. In a number of domestic systems, this gravity has lead to the implementation of an automatic exclusionary rule where this prohibition is violated.[37] Among the systems reviewed in this research, automatic exclusion is recognized in both of the more inclusionary systems, the German and the English legal systems. In Germany, this derives from statutory law, namely from Section 136a of the German Code of Criminal Procedure. In the United Kingdom, the Supreme Court (formerly the House of Lords) has established the mandatory exclusionary rule through its jurisprudence. In the context of the fight against terrorism, following the September 11 attacks on the World Trade Center in 2001, the Court of Appeal claimed that where foreign states had passed over torture evidence to English authorities, this evidence could be admitted by UK Courts.[38] The House of Lords overruled this decision. The Lords held that it was a constitutional principle that evidence obtained by torture could never be received by a UK court, whatever the circumstances.[39]

At the international level, the problem has not yet come up in the practice of the international tribunals. The *Ad hoc* tribunals never had to decide upon the admissibility of torture evidence.[40] Their case law is therefore of little help. Some scholars have argued in favour of an automatic exclusion for the violation of certain rights, citing a number of quotes from the case law of both tribunals to support their argument.[41] These quotes, however, are of a very general nature and it doubtful whether they allow for such a conclusion. They rather seem to be the result of a lack of methodological depth in the said decisions. In particular, the respective decisions have failed to demonstrate in any way how their conclusions derive from the proper law of the tribunals.

More specific conclusions can be derived from international treaty law. Admittedly, under most of the conventions prohibiting torture, the admissibility of torture evidence remains unregulated. Two legal foundations exist in treaty law, however, that are valuable for this aspect of the construction of the ICC exclusionary rule.

Firstly, the European Charter of Human Rights provides a basis for the mandatory exclusion of torture evidence. Admittedly, the Charter does not set forth any explicit exclusionary rule for torture evidence. In particular, Article 3 of the Charter does not address the procedural consequences of a violation.[42] Moreover, we have seen that the ECtHR has generally been very reticent in its assessment of the inadmissibility of evidence.[43] The ECtHR has, however, treated violations of

35 Alamuddin 2010, p. 303; Triffterer 2008—Piragoff, Article 69, para 71.

36 See Sect. 4.3.3.5.3.

37 See *A. and Others v. Secretary of State for the Home Department*, House of Lords, decision of 8 December 2005, [2005] UKHL 71, paras 37 and 38 with further references.

38 *A. and others v Secretary of State for the Home Department*, Court of Appeal of England and Wales, decision of 11 August 2004, [2004] EWCA Civ 1123.

39 *A. and Others v. Secretary of State for the Home Department*, House of Lords, decision of 8 December 2005, [2005] UKHL 71, see in particular para 51. For a comprehensive discussion of this decision, see Thienel 2006, p. 401 et seq.

40 Klamberg 2013, p. 402.

41 See for instance Alamuddin 2010, p. 303, who quotes *Prosecutor v. Nchamihigo* (Decision on the Prosecutor's Application to Admit into Evidence the Transcript of the Accused's Interview as a Suspect and the Defence's Request to Hold a Voir Dire), ICTR (Trial Chamber), decision of 5 February 2007, para 21: "*It is well settled that a statement taken from a suspect would not be admitted into evidence at his trial if its rights during the investigation were not respected*". Similarly, see McKeever 2010, p. 627, who quotes *Prosecutor v. Delalić et al.*, (Decision on Hazim Delic's Motions Pursuant to Rule 73), ICTY (Trial Chamber), decision of 1 September 1997, para 15: "*The principle that confessions made by accused persons in the absence of their volition and arising from threats, inducement or hope of favour by persons in authority is inadmissible in evidence is well settled* [...]".

42 Ambos 2010, p. 383.

43 See Sect. 3.2.2.

the torture prohibition differently from other violations. While repeating their basic, generally reluctant, position, the European judges have held that violations of Article 3 generally affect the fairness of the trial as a whole. Their reasoning is essentially based on the significance of the torture prohibition in international law. The judges have held that Article 3 protects one of the most fundamental values of society and have concluded that torture evidence should never be relied upon.[44] We have seen that neither the ECHR nor the jurisprudence of its monitoring body is directly binding for the ICC. However, both the prohibition of torture and the right to a fair trial clearly fall into the category of '*internationally recognized human rights*'. Both Articles 3 and 6 of the Charter shape these rights and may therefore be referred to under Articles 69(7) and 21(3) of the ICC Statute. Their interpretation by the ECtHR in turn is relevant for the ICC as 'persuasive authority'.

Secondly, another international treaty is even more important for the interpretation of the ICC exclusionary rule. Beyond the regional ECHR regime, the widely recognized UN Convention against Torture (UNCAT)[45] also prohibits the use of torture evidence. The Convention goes in fact a step further than the ECHR. It explicitly sets forth an automatic exclusionary rule. While the already mentioned Article 2 of UNCAT is applicable only to the collection of the evidence, Article 15 provides for its subsequent exclusion from trial. It stipulates that all States Parties to the Convention "[…] *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.*" Like the ECHR, the provisions of UNCAT are not directly binding on the ICC since the Court, as an international organisation, cannot be party to the Convention. But given its widespread recognition, Article 15 of UNCAT is also evidence of the '*internationally recognized human right*' not to be tortured. It can therefore be used as an interpretative tool for Articles 69(7) and 21(3) of the ICC Statute.

[44]*Jalloh v. Germany*, ECtHR, decision of 11 July 2006 (Application no. 54810/00), para 105: [I]*ncriminating evidence—whether in the form of a confession or real evidence—obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture—should never be relied on as proof of the victim's guilt, irrespective of its probative value.*" See also *Gäfgen v. Germany*, ECtHR, decision of 1 June 2010 (Application no. 22978/05), para 167. The adverse effect of statements gained under torture on trial fairness can also be based on the right against self-incrimination, see Ambos 2010, p. 384; Thienel 2006, p. 404. This right is not explicitly mentioned in Article 6 of the ECHR. It appears however in Article 14(3)(g) of the ICCPR and has been held to be implied in the general right to a fair trial under Article 6(1) of the Charter, see Thienel 2006, p. 356.

[45]Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed on 10 December 1984, entered into force on 26 June 1987, available at http://www.un.org/documents/ga/res/39/a39r046.htm (last visited: October 2013).

5.4.3.2 Mandatory Exclusion as Part of Customary International Law

Beyond this the mandatory exclusion of torture evidence has even grown into a rule of customary international law. Accordingly, it is binding on the ICC under Article 21(1)(b) of the ICC Statute. International custom is generally considered to require the determination of a consistent state practice that is based on a corresponding opinio juris.[46] It can reasonably be argued that both of these elements exist with respect to the mandatory exclusion of torture evidence. The determination of such a customary rule is based in particular on Article 15 of UNCAT and its background.[47]

At the outset, we must note that a problem for the establishment of customary law is that the line between its two constituent elements has become increasingly blurred. It is often difficult to discern whether the acts of a state qualify as state practice or as its *opinio juris*.[48] It is contentious, for instance, whether treaties and conventions constitute state practice or whether they are the expression of the belief in a legal obligation.[49] The same question arises where states vote in favour of a resolution, for instance, at the UN General Assembly.

For the mandatory nature of the exclusion of torture evidence, the determination of a respective opinio juris has been based on the mandate of the drafters of UNCAT. Indeed, this mandate, provided by the UN General Assembly (GA), seems to focus on the codification of customary law.[50] This implies that states in the GA acted out of the belief that the rules laid down in the Convention already existed as international custom. Another GA resolution repeats the wording of Article 15 of UNCAT and may therefore also be considered evidence of such an *opinio juris*.[51]

A consistent state practice could, in light of the above, be established by simply referring to the act of ratifying or at least of signing UNCAT or of voting in favour of the above-mentioned GA resolutions. If however one considers these acts as belonging to opinio juris, the determination of state practice becomes more difficult. Many states have domestically implemented automatic rules of exclusion in cases of torture.[52] But these rules will often contain no explicit reference to

[46]See Werle 2012, para 154. See also Sect. 2.3.2.2.

[47]Thienel 2006, p. 365.

[48]Werle 2012, para 157.

[49]Roberts 2001, p. 757.

[50]See GA Resolution 32/62 of 8 December 1977, available at http://www.un.org/Depts/dhl/resguide/r32.htm (last visited: October 2013).

[51]UN GA Res. 59/182, para 6, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/59/182&Lang=E (last visited: October 2013). Altogether, see Thienel 2006, p. 365.

[52]Thienel 2006, p. 365. See also Association Against Torture, 'APT Background Paper on the Exclusionary Rule', *Background Bulletin*, 2012, available at: http://www.apt.ch/en/evidence-obtained-through-torture/ (last visited: October 2013).

international law. It is controversial whether, in such a case, state behaviour may be regarded as sufficient for customary international law.[53] Moreover, there is not yet any comprehensive survey of the way states have implemented automatic exclusionary rules for torture in domestic law, let alone how such rules have been applied by courts. This may refute the establishment of a consistent state practice.

Modern approaches to international custom focus, however, on the determination of an opinio juris. The traditional approach to custom used to determine customary rules through an inductive process, which primarily examined the particular instances of state practice. Modern approaches are more deductive. Custom is mainly inferred from the mere recognition of a legal rule through statements. Instances of inconsistent state practice are not supposed to have any impact on the existence of a rule as such, as long as they are treated as breaches of this custom.[54]

This is in fact a development of considerable importance for international criminal and human rights law since these legal areas suffer from a notorious lack of compliance.[55] Such problems of implementation also exist with respect to the prohibition of torture. We will address in the next section some of the attempts to curtail the prohibition of torture evidence. Applied to the present issue, the modern understanding of customary law allows a focus on the evidence for opinio juris to determine a mandatory exclusionary rule for torture evidence.

In addition, the customary status of the exclusionary rule is ultimately also supported by the interpretation of the right to a fair trial by the ECtHR.[56] The ECHR as such cannot be used as evidence for either state practice or opinio juris because its text does not contain any express exclusionary rule for torture evidence. Indirectly, the jurisprudence of international courts can, however, be indicative of the existence of customary law.[57] We have seen that the European judges have derived from Articles 6 and 3 of the Convention that torture evidence is always inadmissible. This jurisprudence of the ECtHR can be referred to as 'persuasive authority' that reflects the customary law status of a mandatory exclusionary rule for torture evidence.

5.4.3.3 An Exception to the Mandatory Exclusionary Rule?

The previous sections have demonstrated that, as a general rule, torture evidence must be excluded under Article 69(7) of the ICC Statute on the basis of the gravity

[53]Werle 2012, para 156.

[54]For a good example of this approach, see *Nicaragua v. The United States of America* (Case concerning military and paramilitary activities in and against Nicaragua), ICJ, decision of 27 June 1986, see in particular para 186 on the problem of inconsistent state behaviour.

[55]For international criminal law, see Werle 2012, para 159.

[56]Thienel 2006, p. 365.

[57]Werle 2012, p. 155.

of the violation alone. The question remains whether this quasi-automatic rule is absolute. Are ICC judges generally precluded from admitting such evidence, even in exceptional situations and regardless of any other considerations?

A case litigated before the Extraordinary Chambers in the Courts of Cambodia (ECCC) is interesting for this discussion. The judges had to decide on a defence motion that requested the exclusion of a number of witness statements. These statements had been made during interrogations at the notorious Khmer Rouge prison and torture facility S-21 and they concerned biographical information that victims of the facility had given at the beginning of their interrogation. The evidence was not therefore intended to be used against the victims of torture but against the leaders of their torturers.

The information was crucial to the prosecution's case because it was the only evidence of the command structure of the Khmer Rouge. During their regime, the Khmer Rouge had pursued a policy of intense secrecy. As a consequence, there was only very little documentation on its leadership. Of that scarce evidence, large parts were destroyed in face of the Vietnamese invasion in 1979. The archives of S-21, however, remained intact because they could not be destroyed in time before the arrival of the Vietnamese.[58]

The co-investigating judges acknowledged the binding nature of Article 15 UNCAT for the ECCC.[59] At the same time, they decided to exceptionally admit the said statements into evidence. The case is interesting for this research because it poses the question whether this decision indicates that, under certain circumstances, torture evidence is admissible in trials concerning international crimes.

Article 15 UNCAT does indeed allow the exceptional use of torture evidence. The scope of this exception however is extremely limited. The use of such evidence is only allowed against the torturer himself and only "*as evidence that the statement was made*". This exception is meant to make the prosecution of the international crime of torture possible. It ensures that evidence can be submitted that is required to prove that the crime of torture was committed. At the same time, the exception does not allow for a consideration of the content of torture evidence under any circumstances whatsoever.[60]

The judges of the ECCC did not dispute that the evidence in question did not meet the requirements of this exception. In their order however, they nevertheless admitted the statements, arguing that in light of the background of these

[58]On the history of the Khmer Rouge torture evidence, see Scharf 2008, p. 136 et seq.

[59]*Prosecutor v. IENG Thirith* (Order on the use of statements which were or may have been obtained through torture), ECCC (Office of the Co-investigating judges), decision of 28 July 2009. Other than for the ICC, UNCAT is directly applicable as a treaty to the ECCC. The ECCC formally remain part of the Cambodian domestic legal order and as such, they are bound by Cambodian law, see Zahar and Sluiter 2008, pp. 12 and 280. Cambodia has ratified the Convention in 1992, see the respective entry in the United Nations Treaty Collection, available at http://treaties.un.org/Pages/ViewDetails.asp?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited October 2013).

[60]McKeever, p. 617.

statements, Article 15 UNCAT could not be interpreted restrictively. The judges based their decision on teleological considerations. They claimed that a restrictive interpretation would be inconsistent with the object and purpose of UNCAT. Article 15 UNCAT had to be read in light of Article 31(3) of the VCLT, which means "*in good faith*". The Chamber's approach assumes therefore that while the prohibition of torture is absolute, exclusion of evidence tainted by torture is possible in exceptional cases.[61]

The decision has been criticized intensively. An assessment of these criticisms shows that there are several reasons why this case cannot serve as an example for the ICC. The discussion of this decision rather reveals that there are in fact no circumstances that could justify the admission of torture evidence by the ICC beyond the limited exception set forth in Article 15 of UNCAT.

The ECCC judges emphasized two aspects in their decision. Firstly, they referred to two purposes of exclusion, namely the deterrence rationale and the purpose of safeguarding the reliability of evidence. They held that in the particular case, these purposes did not require the exclusion of the evidence and that, as a consequence, its admission was justified.[62] Secondly, they emphasized that the statements would not be used against the person who was subjected to torture. Instead, it was supposed to serve as evidence against those accused of torture. The judges claimed that the latter should not be allowed to "*use the law designed to prevent torture to shield themselves from liability*".[63]

The ECCC judges were certainly right in dismissing any deterrent effect. The violations were committed 30 years ago by the officials of a political system that is no longer in existence. Their deliberations do not, however, give adequate consideration to the fact that the international exclusionary rule in Article 15 of UNCAT is based *inter alia* on integrity concerns.[64] The legitimacy of a trial against torturers would be seriously damaged if the respective court would essentially base its conviction on torture evidence.[65] This is not only supported by the widespread ban of torture as detailed above. Torture is also a crime under international law. If the same issue would be assessed by the ICC, it would even be a crime under the

[61] *Prosecutor v. IENG Thirith* (Order on the use of statements which were or may have been obtained through torture), ECCC (Office of the Co-investigating judges), decision of 28 July 2009, paras 24 et seq. See also Safferling 2001, p. 503 et seq.

[62] *Prosecutor v. IENG Thirith* (Order on the use of statements which were or may have been obtained through torture), ECCC (Office of the Co-investigating judges), decision of 28 July 2009, paras 24 et seq. With respect to deterrence, the ECCC Order refers to the lapse of time passed since the events took place, see para 24. The reliability concerns in turn are rejected with the assurance that the judges would take into account the problematic origin of the statements when evaluating the evidence, see para 28. Following a rather civil law oriented approach, the question of reliability is thus basically deemed a problem of weight rather than of admissibility.

[63] *Prosecutor v. IENG Thirith* (Order on the use of statements which were or may have been obtained through torture), ECCC (Office of the Co-investigating judges), decision of 28 July 2009, para 24.

[64] Scharf 2008, p. 154.

[65] Ambos 2010, p. 381.

Court's own Statute.[66] It seems highly hypocritical to prosecute a behaviour as an international crime and to use at the same time the outcome of this very behaviour for an effective prosecution.

This brings us to the ECCC's second, teleological argument, namely that the rule is not intended to shield those responsible for acts of torture from liability. The driving force behind this claim is essentially a concern for effectiveness. It is indeed difficult to accept that Article 15 of UNCAT can be used to the advantage of persons responsible for large scale torture. But once more, concerns for effectiveness alone cannot be used to circumvent the most basic human rights principles.[67] If the ICC would follow this route, it would resort to a 'public attitude' version of the integrity rationale while we have seen that it should implement a 'court-centred' integrity rationale.[68]

5.4.3.4 Interim Result

In conclusion, the consideration of the integrity rationale suggests that torture evidence is automatically excluded only because of the gravity of such violations. This mandatory outcome is not open to any exceptions beyond the literal wording of Article 15 of UNCAT. In particular, this exception cannot be expanded solely for concerns of effectiveness.

The example of torture shows that, as a matter of principle, under Article 69(7) of the ICC Statute, certain rights can in fact be of such significance that their violation quasi-automatically warrants exclusion. The automatic nature of exclusion does not mean that the test prescribed by Article 69(7) of the ICC Statute does not apply. Rather, the violation has such a major impact that the requirements of this test are always satisfied.[69]

It is doubtful, however, whether the current status of international human rights law allows the drawing of such a conclusion for rights other than the protection against torture. This would demand that a right has acquired such an indisputable status under international human rights law that non-admissibility would be the only consequence of a violation. At this point, other rights that have been suggested to have such a status, such as the right to silence or the right to counsel, probably don't share the same status within the international community. This is not to say that this state of affairs cannot evolve. As depicted elsewhere, human rights law is a dynamic legal area.[70] The significance of certain rights may thus increase. The understanding of Article 69(7) of the ICC Statute will then develop in turn.

[66] See Article 7(1)(f); Article 8(2)(a)(ii), alt. 1; Article 8(2)(c)(I), alt. 4 of the ICC Statute.

[67] Similar, Ambos 2010, p. 381; McKeever 2010, p. 622.

[68] On this distinction, see Sect. 4.3.2.2.5.

[69] See Alamuddin 2010, p. 303.

[70] See Sect. 4.3.3.3.

5.5 The Actors Involved in the Collection of Evidence

The system of cooperation between the ICC and states is of particular significance to the assessment of the next factor. We have seen that many investigative measures for ICC proceedings, particularly those that are coercive, have to be carried out by national police. Accordingly, the first question that arises is whether investigative mistakes committed by domestic authorities have the same impact as mistakes under the responsibility of the ICC Prosecutor. The distribution of responsibilities within the ICC cooperation system implies that this question must be treated differently from the way national systems sometimes treat the collection of evidence by a foreign state in a horizontal cooperation system. A second question will then relate to how the involvement of so-called intermediaries impacts on the issue of admissibility.

With respect to the first question, the U.S. system provides an illustrative example that can be contrasted against the ICC exclusionary rule. In U.S. doctrine, a further exception is made to the exclusionary rule for evidence gathered abroad. Under the so-called '*international silver platter doctrine*', the exclusionary rule does not apply to violations committed by foreign authorities. This doctrine is once again based on the deterrence theory. It is argued that the application of the exclusionary rule would not be able to influence the behaviour of foreign authorities.[71] The only instance where this exception does not apply is where a violation "*shocks the conscience of American courts*."[72]

The '*international silver platter doctrine*' cannot simply be transferred to the ICC. Admittedly, the ICC has no control over state authorities either. This, however, is exactly one of the reasons why deterrence is not the primary rationale of the ICC exclusionary rule in general.[73] Under Article 69(7) of the ICC Statute, the matter must rather be considered from the perspective of the integrity theory. Closely linked is the fact that, ultimately, a simple transposition of the '*international silver platter doctrine*' would lead to a far more significant restriction of the ICC exclusionary rule when compared to the domestic level. Unlike for domestic trials, such cases do not only arise exceptionally as evidence is routinely gathered by an external entity.[74]

[71]For a detailed explanation, see *United States v. Lee*, United States Court of Appeals for the Second District, decision of 7 June 2013, No. 12-0088-cr. See also Ambos 2010, p. 373; Scharf 2008, p. 152 et seq.

[72]See *United States v. Fernandez-Caro*, United States District Court for the Southern District of Texas, decision of 2 September 1987, 677 F.Supp 893 (1987), with further references. This seems to be a further indication of the, albeit limited, recognition of integrity concerns for the U.S. exclusionary rule; see also Sect. 3.3.2.

[73]See Sect. 4.3.2.2.3.

[74]But see Gallant 1999, p. 719, who refers to the doctrine and suggests that the involvement of OTP could be the decisive factor for drawing a line between admissible and non-admissible evidence under Article 69(7) of the ICC Statute.

Turning to another domestic example, the Canadian Supreme Court has followed a similar line to the United States, even though its exclusionary rule is explicitly based on the maintenance of judicial integrity. Based on the argument that Canadian Charter rights only apply on Canadian territory, the Supreme Court has rejected requests to exclude evidence under Section 24(2) of the Charter where foreign authorities were involved. Similar to the jurisprudence of the U.S. Supreme Court, in these circumstances, exclusion is only possible in exceptional cases. This would be the case where evidence was gathered "*in violation of principles of fundamental justice*".[75]

Despite the Canadian adoption of the integrity theory, this example cannot be transferred to the ICC either. Not only would this lead to the insignificance of the ICC exclusionary rule in large parts, but the ICC cooperation system also clearly sets it apart from the horizontal relationship between sovereign states. We have seen earlier that there is a sufficiently strong connection between the ICC and domestic authorities involved in evidence gathering to endorse the integrity theory.[76] In fact, this connection is closer than the relationship between states and foreign investigative authorities. Under the ICC cooperation regime, states have to conduct many investigative measures for the ICC because the Court itself lacks its own enforcement mechanisms. The Court cannot, however, escape accountability for acts of domestic authorities simply because the necessary investigations have been outsourced through a deliberate choice of its States Parties. As a consequence, the integrity of the Court is also endangered where it gets involved with domestically gathered tainted evidence.

This corresponds to international case law. The ICC, like the *Ad hoc* tribunals, has held that evidence can be excluded even if it has been collected by national authorities. In this respect, national investigative activities are measured not against the respective domestic law but in view of their conformity with ICC proper law and with '*internationally recognized human rights*'. We have seen above that a violation of national law is not as such sufficient to trigger the application of the ICC exclusionary rule.[77] The abidance by national law in turn is no guarantee for the admissibility of evidence. This conclusion has also been drawn by the ICTY. In the case, the tribunal rightly held that "[t]*he Trial Chamber is governed by its Rules. Accordingly, any evidence to be admissible in proceedings before it must satisfy the law as provided in the Statute and Rules*."[78] Similarly, evidence introduced in ICC trials must meet the standards set forth by Article 69(7) of the ICC Statute, even where the measure was conducted by national

[75]*Regina v. Harrer*, Supreme Court of Canada, decision of 19 October 1995, [1995] 3 S.C.R. 56, para 13. On the application of the Canadian Charter where Canadian officials are involved in enforcement measures abroad, see Rennie and Rothschild 2009, p. 127 et seq.

[76]See Sect. 4.2.2.2.5.

[77]See Sect. 4.3.3.4.

[78]*Prosecutor v. Delalić et al.* (Decision on Zdravko Mucic's Motion for the Exclusion of Evidence), ICTY (Trial Chamber), decision of 2 September 1997, paras 46 et seq.

authorities. In principle, this includes cases where the national authorities have not acted on behalf of the Prosecutor.[79] In such cases, however, the applicability of the ICC exclusionary rule is limited to instances of '*internationally recognized human rights*'. As we have seen before, independent investigations of sovereign states are not subject to the standards of the ICC proper law, even if the respective state is a State Party to the ICC Statute.[80]

But while a violation by national authorities generally suffices to meet the requirements of the chapeau of Article 69(7), there is reason to make further distinctions under its subpara (b), depending on the actors involved in an investigative measure. The identity of these actors influences the degree to which violations can be attributed to the Court. Three situations can be distinguished: either domestic forces have carried out the measure on their own; or they have conducted the measure on the request or in the presence of OTP staff; or the international investigators themselves were in control of the measure. The greater the extent to which OTP staff was involved, the more intense is the connection with the Court. Conversely, where domestic authorities act without the involvement of the Prosecutor, this would call for lowering the degree of attribution. While the Court cannot free itself from any responsibility for domestic mistakes, admitting evidence gathered by means of an illicit act committed by its own prosecutor would deeply affect its integrity.[81]

The idea that the participation of international investigators in rights violations is more serious than independent violations by domestic officials has also been alluded to in the case law of the *Ad hoc* tribunals.[82] And in the *Lubanga* case, the ICC Trial Chamber seems to have drawn the same conclusion for Article 69(7) of the ICC Statute. Here, OTP personnel was present, but did not control the controversial search. The judges explicitly found this to be a factor militating against the exclusion of the disputed evidence.[83]

Alongside the question of the involvement of national authorities, a second question arises with respect to the above-mentioned involvement of so-called intermediaries in ICC investigations.[84] In principle, the ICC must be held accountable for the conduct of private persons on which it relies in its investigations. Similar to the reliance on national authorities, the integrity of the Court is endangered where it uses evidence tainted by the illicit behaviour of intermediaries. As a

[79] See Alamuddin 2010, p. 301.

[80] See Sect. 4.3.3.1.

[81] Alamuddin 2010, p. 301. See also Gallant 1999, p. 719; Sluiter 2002, p. 226.

[82] See for instance *Prosecutor v. Mrkšić* (Decision Concerning the Use of Statements Given by the Accused), decision of 9 October 2006; *Prosecutor v. Barayagwiza* (Decision), ICTR (Appeals Chamber), decision of 3 November 1999, para 61. See also Alamuddin 2010, p. 301; Sluiter 2002, p. 226.

[83] *Prosecutor v. Lubanga* (Decision on the admission of material from the 'Bar Table'), ICC (Trial Chamber), decision of 24 June 2009, para 47.

[84] See Sect. 4.2.

consequence, where such persons violate the rights of the accused or the rights of other individuals, in particular of the witnesses they contact, this may theoretically trigger the ICC exclusionary rule. This applies all the more to those intermediaries who have, according to more recent practice, been provided with contracts and that are thus bound to the ICC on a verifiable legal basis.[85] As with the involvement of national authorities, the fact that an intermediary, and not a member of the OTP, has committed the violation may, however, impact on the weight to be attached to such a violation. The relevance of this factor would then depend on the specific bonds between the OTP and the intermediary, namely on the intensity of its involvement in the investigations, as well as on the legal terms of this involvement, in particular on the existence and the terms of a contract with the ICC.

In practice, however, is seems unlikely that, in cases where intermediaries commit a violation, evidence will often be excluded under Article 69(7) of the ICC Statute. This is due to the actual circumstances of the involvement of intermediaries in the investigations. First of all, intermediaries have not been authorised to participate in the actual questioning of witnesses.[86] The questioning, however, is where the rights of victims and witnesses are most likely to be violated. Intermediaries rather play a role in the preliminary phases: They establish the contact between the witnesses and the OTP, they collect the witnesses from their homes and organise meetings with the ICC investigators.[87]

What is more, past investigations have shown that intermediaries are more likely to convince victims that it is in their own interest to give false statements than to violate the victims' rights by applying pressure.[88] Manipulating witnesses in this way must certainly be considered a violation in terms of Article 69(7) of the ICC Statute, in particular with view to Article 70(1)(c) of the ICC Statute, as well as to the general fair trial rights of the accused. In such cases, however, the more important aspect will clearly be the deliberate decision of the witness herself to give false testimony. It thus seems more straightforward, instead of discussing the more complicated application of the ICC exclusionary rule, to simply not accord any evidentiary weight to the respective statements. Accordingly, the Trial Chamber, in the *Lubanga* case simply considered that where an intermediary has suborned a witness into giving false testimony, the respective statements were unreliable. As a consequence, the Chamber held that these statements were unable to establish beyond a reasonable doubt that the accused had committed the crime he was charged with.[89]

[85] On such contracts, see *Prosecutor v. Lubanga* (Judgment pursuant to Article 74 of the Statute), ICC (Trial Chamber), decision of 14 March 2012, paras 203, 204.

[86] *Prosecutor v. Lubanga* (Judgment pursuant to Article 74 of the Statute), ICC (Trial Chamber), decision of 14 March 2012, para 185.

[87] *Prosecutor v. Lubanga* (Judgment pursuant to Article 74 of the Statute), ICC (Trial Chamber), decision of 14 March 2012, para 191.

[88] Given the prospect of relocation for victims, there is a danger that witnesses may be motivated to give false testimony by pointing out the financial benefits, see Buisman 2013, p. 60 et seq.

[89] *Prosecutor v. Lubanga* (Judgment pursuant to Article 74 of the Statute), ICC (Trial Chamber), decision of 14 March 2012, para 191.

5.6 Good Faith

The next question is whether the attitude of prosecutors of international crimes towards a violation impacts on the decision about exclusion. Does is make a difference whether the responsible authorities disregarded rights deliberately or whether they made a mistake?

Without further explanation, the ICTY, in its case law, has considered good faith on the part of the investigating authorities to be a factor militating against exclusion.[90] At the national level, the attitude of investigators has also been deemed significant. It has been considered relevant in all of the domestic systems reviewed in this research, albeit to varying degrees. In the German,[91] as well as in the English legal system,[92] good faith is but one factor among others in a comprehensive balancing exercise. Bad faith usually leads to exclusion in these systems. Good faith in turn does not always result in admissibility. In contrast, both in Canada[93] and in the United States,[94] evidence is almost automatically admissible where investigators have acted in good faith.

In principle, it seems obvious that the mental element of the violation is also relevant for Article 69(7)(b) of the ICC Statute. At the same time, some further distinctions are necessary to assess the concrete impact of this factor.

The fact that we have adopted the integrity rationale as the decisive rationale for the ICC, does not fundamentally prevent us from taking into account good faith as a relevant factor. Admittedly, the prevalence of the deterrence theory is the reason that such great significance is attached to this factor in the United States. The reasoning goes as follows: Where investigators are not aware of their illicit behaviour, striving for deterrence will mostly become void, leaving only the possibility to raise awareness among investigators in order to avoid negligent mistakes. Once more, this reasoning, which is based on deterrence, falls short for the ICC

[90]*Prosecutor v. Haraqija and Morina* (Decision on Haraqija and Morina's Second Request for a Declaration of Inadmissibility and Exclusion of Evidence), ICTY (Trial Chamber), decision of 24 November 2008, para 20, 26; *Prosecutor v. Haraqija and Morina* (Judgment), ICTY (Appeals Chamber), decision of 23 July 2009, para 28; *Prosecutor v. Brđanin* (Decision on the Defence "Objection to Intercept Evidence"), ICTY (Trial Chamber), decision of 3 October 2003, para 63. See also Sect. 3.1.4.

[91]See Sect. 3.3.1.

[92]See *Regina v. Walsh*, Court of Appeal of England and Wales, decision of 13 July 1989, [1990] 91 Cr. App R. 161; *Regina v. Alladice*, Court of Appeal of England and Wales, decision of 8 May 1988, [1988] WL 624104. See also Mellifont 2007, p. 86. See also Sect. 3.3.3.

[93]See *Regina v. Grant*, Supreme Court of Canada, decision of 17 July 2009, [2009] 2 S.C.R. 353, para 75; see also Sect. 3.3.4.

[94]See *United States v. Leon*, United States Supreme Court, decision of 5 July 1984, 468 U.S. 897 (1984). See also *Arizona v. Evans*, United States Supreme Court, decision of 1 March 1995, 514 U.S. 1 (1995); more recently *Herring v. United States*, United States Supreme Court, decision of 14 January 2009, 07-513 (2009); see also Sect. 2.3.2.

because deterrence is not the decisive rationale behind Article 69(7)(b) of the ICC Statute. Integrity concerns, however, also justify the consideration of an investigator's attitude. This is demonstrated most clearly by the Canadian example, which also attaches great importance to this factor and which, as we have seen, is mainly based on the integrity theory. Honest mistakes clearly threaten the integrity of a court less than deliberate misbehaviour.[95]

Beyond that, there is reason not to apply the good and bad faith distinction categorically. The establishment of good faith should not directly result in the admission of tainted evidence. The Canadian and American systems should not be taken as an example in this respect. The recent jurisprudence of the Canadian Supreme Court attaches such an excessive importance to good faith that it almost amounts to an automatic rule. The new approach to Section 24(2) of the Canadian Charter has in fact been criticized in particular because of its focus on the mental element of the violation. This focus does not do justice to the broad discretion allocated to the judges under Section 24(2).[96] The same would be true for Article 69(7) of the ICC Statute. We have seen that the provision grants wide discretion to the ICC judges. Consequently, the establishment of good faith on the part of the authorities does not preclude the judges from concluding that the integrity of the proceedings is endangered by other characteristics of a specific case. The adoption of the integrity rationale warrants for a comprehensive balancing of interests which proscribes any sort of bright-line rule.

Conversely, where the authorities have acted in bad faith, admitting the respective evidence will considerably increase the danger of damage to a court's integrity. It is imaginable in cases of bad faith that the evidence will be admitted nonetheless, for example in cases of technical mistakes. But it seems likely that the negative effect of bad faith will regularly be greater than the exonerating effect of good faith.

A closer look reveals, however, that any meaningful consideration of the good faith and bad faith distinction requires further distinctions. The first question is whether bad faith only describes intentional conduct or whether negligence on the part of the investigating authorities is sufficient. Regarding searches and seizures, the German Supreme Court, for instance, in its case law on exigent circumstances, only considers exclusion to be appropriate where the investigators have "*deliberately or arbitrarily*" disregarded the requirement of a search warrant.[97] Negligence, on the other hand, does not warrant exclusion.[98] Under U.S.[99] and Canadian[100] law, however, negligence is sufficient to establish a case of bad faith.

[95]Similar Alamuddin 2010, pp. 231 and 305.

[96]Eberdt 2011, pp. 73 and 82.

[97]German Federal Supreme Court (BGH), decision of 12 April 2005, *Neue Juristische Wochenschrift* 2005, p. 1917 et seq.

[98]Meyer-Goßner 2013, Section 98, para 7.

[99]*United States v. Leon*, United States Supreme Court, decision of 5 July 1984, 468 U.S. 897 (1984).

[100]*Regina v. Harrison*, Supreme Court of Canada, decision of 17 July 2009, [2009] 2 S.C.R. 494, para 22.

For the ICC, this question cannot be answered entirely, apart from the factor discussed in the previous section. The assessment of the different sorts of attitudes depends to a great deal on the actors involved in an investigative measure. Once again, the maintenance of integrity imposes higher demands on the international prosecutor than it does where national authorities have collected the evidence.

In principle, it cannot generally be precluded that a grossly negligent mistake impacts on the integrity of the proceedings. Again, any categorical preclusion would impede on the judicial discretion accorded by Article 69(7) of the Statute. This is particularly the case where international investigators were in charge, where they were present during the measure or where they requested it. The OTP itself is part of the ICC and thus part of an institution striving for legitimacy. This requires a rather high degree of diligence on the part of its staff. The well-trained staff of the Prosecutor can ultimately also be expected to be able to comply with these demands. At the same time, negligence would naturally have a minor impact when compared to a deliberate mistake. Where the often less well-trained domestic authorities have committed a negligent mistake, the exclusion of evidence remains a possible consequence as well. But in such a case, important other factors will probably have to militate in favour of exclusion.

A related question is whether ignorance must pertain to the factual circumstances or whether good faith might also result from a misjudgment of the legal situation. Does it make a difference whether a police officer has searched the wrong person or whether he was simply misled in his legal assessment of the existence of exigent circumstances? Once again, there is no consensus at the domestic level. The Canadian Supreme Court has held that it is possible to exclude evidence where investigators have made legal mistakes. It argued that "*ignorance of Charter standards must not be rewarded or encouraged and negligence or wilful* [sic] *blindness cannot be equated with good faith*".[101] In Germany, on the other hand, a violation that results from a legal mistake does not amount to a reason for exclusion.[102]

For the ICC, we can draw on the previous findings. Ignorance of the law can never be deliberate, accordingly these are always cases of negligence. In this context, the difference between the standards that should be applied to the ICC Office of the Prosecutor when compared to national authorities is becoming even bigger. OTP staff should be well-educated in the law of criminal procedure and human rights law, and awareness of the legal standards to be met during the collection of evidence can be expected. The same standard cannot be expected from the staff of national authorities, in particular since evidence gathering often takes place in post-conflict states with little experience with rule of law standards.

[101] *Regina v. Grant,* Supreme Court of Canada, decision of 17 July 2009, [2009] 2 S.C.R. 353, para 75. For a similar assessment with respect to domestic exclusionary rules in general, see Slobogin 2013, p. 19.

[102] Meyer-Goßner 2013, Section 98, para 7.

References

Alamuddin A (2010) Collection of evidence. In: Khan K, Buisman C, Gosnell C (eds) Principles of evidence in international criminal justice. Oxford University Press, Oxford, pp 231–305

Ambos K (2010) The transnational use of torture evidence. Isr Law Rev 42:362–397

Buisman C (2013) Delegating investigations: lessons to be learned from the Lubanga judgment. Northwest J Int Hum Rights 11:30–82

Eberdt B (2011) Impaired exclusion: exploring the possibility of a new bright line rule of good faith in impaired driving offences. Rev Curr Law Law Reform 16:65–83

Edwards G (2001) International human rights law challenges to the new International Criminal Court: the search and seizure right to privacy. Yale J Int Law 26:323–412

Gallant K (1999) Individual human rights in a new international organization: the Rome Statute of the International Criminal Court. In: Bassiouni C (ed) International criminal law, Vol. II: procedural and enforcement mechanisms, 2nd edn. Transnational Publishers, New York, pp 693–723

Klamberg M (2013) Evidence in international criminal trials: confronting legal gaps and the reconstruction of disputed events. Martinus Nijhoff Publishers, Leiden

McKeever D (2010) Evidence obtained through torture before the Khmer Rouge tribunal unlawful pragmatism? J Int Crim Justice 8:615–630

Mellifont K (2007) The derivative imperative: how should Australian criminal trial courts treat evidence deriving from illegally or improperly gained evidence? Professional doctorate thesis, Queensland University of Technology. http://eprints.qut.edu.au/16388/1/Kerri_Mellifont_Thesis.pdf. Accessed 14 May 2015

Meyer-Goßner L (2013) Strafprozessordnung, 56th edn. C.H. Beck, Munich

Rennie J, Rothschild R (2009) The Canadian Charter of Rights and Freedoms and Canadian officials abroad. Supreme Court Law Rev 47:127–146

Roberts A (2001) Traditional and modern approaches to customary international law: a reconciliation. Am J Int Law 95:757–791

Rogall K (1979) Gegenwärtiger Stand und Entwicklungstendenzen der Lehre von den strafprozessualen Beweisverboten. Zeitschrift für die gesamte Strafrechtswissenschaft 191:1–44

Safferling C (2001) Towards an international criminal procedure. Oxford University Press, Oxford

Safferling C (2012) International Criminal Procedure. Oxford University Press, Oxford

Scharf M (2008) Tainted provenance: when, if ever, should torture evidence be admissible? Washington Lee Law Rev 65:129–172

Slobogin C (2013) A comparative perspective on the exclusionary rule in search and seizure cases. Vanderbilt Public Law research paper no. 13-21. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247746. Accessed 14 May 2015

Sluiter G (2002) International criminal adjudication and the collection of evidence: obligations of states: obligations of states. Intersentia, Antwerpen

Stuart D (2010) Welcome Flexibility and Better Criteria form the Supreme Court of Canada for exclusion of evidence obtained in violation of the Canadian Charter of Rights and Freedoms. Southwestern J Int Law 16:313–332

Thienel T (2006) The admissibility of evidence obtained by torture under international law. Eur J Int Law 17:349–367

Triffterer O (2008) (ed) Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article, 2nd edn. C.H. Beck et al., Baden-Baden

Trüg G (2003) Lösungskonvergenzen trotz Systemdivergenzen im deutschen und US-amerikanischen Strafverfahren. Mohr Siebeck, Tübingen

Werle (2012) Völkerstrafrecht, 3rd edn. Mohr Siebeck, Tübingen

Zahar A, Sluiter G (2008) International Criminal Law: A critical introduction, Oxford University Press, Oxford