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May Government Ever Use Torture? Two Responses From German Law

I. INTRODUCTION: A HYPOTHETICAL

May government ever use torture? When we consult our sense of right and wrong, our answer would and should be, "certainly not!" It would be unfortunate and a sad indication of our moral state of mind were we to respond otherwise. Would our minds change, though, if we were to envision government using torture not as a means to repress citizens, but for the legitimate purpose of protecting them against harmful individuals? Even then, most of us would probably still conclude that torture remains an illegitimate act. Even good ends do not justify all means.

Despite these initial reactions, doubts begin to arise when we turn from the general description of bad persons threatening good citizens with evil acts to more detailed and probable scenarios. All of you remember the terrorist attack, a few years ago, on the World Trade Center in New York City. Some of you will have seen the movie, *The Siege*, in which a U.S. Army General uses force to get the names of members of a suspected terrorist group from an Arab-American.[1] And, as some of you are aware, in 1996 the Israeli Supreme Court held that it was legal to extract information from detainees to prevent probable or imminent terrorist attacks.[2] Instead of using

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Talk given at the Law Schools of Georgetown University, Catholic University, Tulane University, Fordham University, and Notre Dame University during the Spring Semester 1999. The written version retains the dialogic style for reasons apparent in the text. For generous editorial help, I would like to thank Charles Abernathy and William Naugle, Georgetown University Law Center.

1. The movie ends with a ringing endorsement of the prohibition of any kind of torture.

2. See The Israeli Supreme Court, sitting as High Court of Justice, Decision HCJ 804/96, Muhammad Abd al-Aziz Hamdan v. General Security Service. Date of Decision: November 14, 1996. In this decision, the Court annulled an earlier provisional order prohibiting the use of force to extract information from the Petitioner. The Court stated: "[We] are satisfied that the Respondent indeed possesses information which could substantiate a substantiated suspicion that the Appellant possesses extremely vital information, the immediate procurement of which would prevent an awful disaster, would save human lives, and would prevent very serious terrorist

these real-world instances to address my topic, let me pose, instead, a hypothetical which I have carefully developed.[3] I am not using the hypothetical to shy away from real-world threats. Instead, the hypothetical is intended to test our conviction that torture should never, absolutely never, be practiced.

This hypothetical takes place in your home city that is threatened by a terrorist armed with a bomb containing deadly chemical agents. He has hidden the bomb. After he has been tracked down and detained by the police, he states, credibly, that he has activated the timer of the bomb. The bomb will detonate in five hours and kill all of the inhabitants of your city and its suburbs. All will suffer a horrible death. Despite police pressure the terrorist refuses to disclose the bomb's location. Instead, the terrorist demands ten millon dollars, the freeing of all death row inmates, and an airplane for his getaway. In addition, he wants ten hostages, so as to ensure a successful escape. The hostages must be ten prominent citizens of your home city. The police find that they are neither able to meet the terrorist's demands nor can they evacuate the city and the surrounding area in time. Only one solution seems to remain. They want to use physical force – torture – to compel the terrorist to divulge the location of the bomb. Are they allowed to use such methods?

What is your first reaction? I suppose most of you would say that we must not torture him, but . . . The "but" would imply that your previous strong and clear conviction, that torture can never be a legitimate means to obtain information, is no longer so strong and clear. And we are talking about torture here, there is no doubt about that. Both in the common and legal usage, the forceful extraction of a statement from some unwilling party by government agents using physical force and leading to a violation of physical integrity falls under the notion of torture.[4] It is, in fact, the prime example of torture.

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attacks." The Court based its decision on the defense of necessity in Art. 34 of the Penal Code but added later on: "Our decision is directed solely at the interim injunction and does not constitute a final position regarding the questions of principle which were put before us, and which relate to the applicability of the defense of necessity and its scope." This unofficial translation is taken from: *Legitimizing Torture. The Israeli High Court of Justice Rulings in the Bilveise, Hamdan and Mubarak Cases. An Annotated Sourcebook, January 1997.* Available on http://www.derechos.org/human-rights/mena/doc/hamdan.html. In a more recent decision, the same Court has clarified the relevance of the defense of necessity. See infra n. 17.

3. This is based on two German articles of mine which include numerous references: "Wuerde gegen Wuerde," 16 *Verwaltungsblaetter Baden-Wuerttemberg* 414, 446 (1995); "Darf der Staat ausnahmsweise foltern?," 35 *Der Staat* 67 (1996). The references here are kept to a minimum.

4. See the entry "torture" in *Random House Webster's Unabridged Dictionary* 1999 (2nd ed. 1997): "1. The act of inflicting excruciating pain, as punishment or revenge, as a means of getting a confession or information, or for sheer cruelty." For the legal usage of the term torture, see infra n. 11-14.

I do not intend to develop my responses on the basis of moral theory or the philosophy of law, although there are fascinating arguments to be made on both sides.[5] I intend, rather, to respond in terms of the legal sphere, based upon the German legal system.

II. Response One: The Absolute Prohibition on the Use of Torture in German and International Law

In the first part of my analysis, I will explain how German and international law would respond to this case, analyzing the relevant law on three levels: German police law, German constitutional law, and international law.

German Police Law

The case before us is not about a perpetrator who has already carried out his crime and who must, therefore, be prosecuted, convicted, and sentenced. Such a case would be regulated by substantive and procedural criminal law provisions. In Germany, the applicable law would be found in the Federal Criminal Code (*Strafgesetzbuch*) and the Federal Code of Criminal Procedure (*Strafprozessordnung*). Our case, though, is not concerned with punishing criminal acts but preventing a crime which would harm innocent people. It is the duty and actual purpose of the police to protect the life and bodily integrity of the population.[6] The legal basis for this protection lies within the police laws, or police power codes (*Polizeigesetz*), which exist in every German state. These codes vary in some respect from state to state, but not in aspects which are pertinent here. For reasons of brevity and uniformity, I will concentrate on the police law of the state of Baden-Wuerttemberg. Police power codes typically provide that it is the legal duty of a person to divulge information, "if [it is] necessary for the protection of life, health, or a person's freedom . . .".[7] The terrorist, thus, is obliged to divulge where the bomb is hidden.[8] Since he

5. See "Darf der Staat ausnahmsweise foltern?," supra n. 3, sections IV to VI, discussing Kantian, Rawlsian, and utilitarian arguments. See also the "Symposium on the Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity," in 23 *Israel Law Review* 142-406 (1989), with articles by Alan M. Dershowitz, S.Z. Feller, Mordechai Kremnitzer, Michael S. Moore, Sanford H. Kadish, Adrian A.S. Zuckerman, and Itzhak Zamir.

6. In Germany, there are two distinct and different legal systems at work, police law and criminal law. The first regime is concerned with preventing harm, the second with prosecuting criminal acts. When, in a case at hand, it is unclear which regime prevails, one has to analyze the main purpose of the police action which then determines the applicable law.

7. § 27 (4) [1]; (3) [No. 1] Police Law.

8. The duty to disclose can, at times, be in conflict with an individual's right to protect himself against self-incrimination. The Fifth Amendment of the U.S. Constitution states that no person "shall be compelled in any criminal case to be a witness against himself . . .". The German Federal Criminal Procedure Code has similar provi-

is unwilling to honor this legal obligation, what course of action can the police take to compel him to reveal the vital information? German police codes typically give the police three options in dealing with the lawbreaker, if they cannot eliminate the danger themselves: fines, imprisonment, and use of force. When any one of these methods promises to achieve the desired goal, the police, according to the principle of proportionality,[9] have to choose the least oppressive means. In our case, however, there are no lesser options to prevent the imminent danger to the life and physical integrity of the area's citizens; the only promising means of gathering the information is by the use of physical force, which ranges from sheer, brute force to the use of firearms.[10] So it appears that the only recourse that the police may have is to use coercion to retrieve the information.

A second look, though, points us in a different direction. These police codes include a limit on the use of physical coercion on persons in police custody. Section 35 of the Police Law states: "The police are not allowed to use coercion during interrogation." Immediately, one looks for exceptions to this prohibition. There are, however, none to be found, even in cases where the life and bodily integrity of innocent people are endangered. The result, then, according to the clear text of the Police Law, is that police can use physical force against lawbreakers, if it is necessary to prevent serious harm to others, but not when the lawbreaker is detained and interrogated. When detention is the situation, the use of coercion is absolutely forbidden.

German Constitutional Law

In our legal analysis, we should not end the discussion with the police law. Does the highest law of the land, the constitution, provide for the same or a different response? If the response at the constitutional level would differ from that at the police power level, then the higher law would prevail.

The German Constitution, or the Basic Law, as it is called in Germany, seems to provide for a different response. According to Art.

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sions in §§ 136 (1); 163 a (3), (4); 243 (4). How can this tension be resolved? The solution lies in insisting on compliance with the duty to disclose while at the same time excluding criminal prosecution for acts based on this information. But this does not exclude prosecution and criminal sanctions based on information available to the police before the compelled disclosure.

9. This principle is part of the German notion of *Rechtsstaat* (rule of law), found in Art. 20 (1) and 28 (1) of the Basic Law, the German Constitution. See Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 46 (2nd ed. 1997). It requires that whenever state actors interfere with constitutional liberties, (1) the abridgment must be conducive to reach the public goal, (2) there must not be a less intrusive means to reach this goal, and (3) the relationship between the importance of the public interest the government intends to foster and the cost to the rights holder must not be out of proportion. As a constitutional principle, it is also binding for police actions, but most police codes detail these elements more specifically.

10. See §§ 50-54 Police Law.

2 (2) [1], "Everybody has the right to life and physical integrity." But this right is not absolute, as can be seen from the accompanying limitation clause in senctence 3 which reads, "[This right] may not be encroached upon save pursuant to a law." This limitation appears as though it would permit the use of physical coercion to extract information from uncooperative lawbreakers, if a statute, such as the Police Law, would mandate such a method. But, as we saw in the Police Law, the first impression is deceptive. The German Constitution includes a more specific provision that pertains to persons held in police custody. Art. 104 (1) [2] states: "Detainees may not be subjected to mental or physical mistreatment." This is the constitutional counterpart to the police law provisions which, in general, permit the use of physical coercion, but place an absolute limit on those provisions in police custody cases. At the constitutional level, as well, there is no exception to this limit, not even in situations where the lives of innocent people are at risk.

This is confirmed and buttressed by the first and foremost of the German constitutional rights, Art. 1 (1): "The dignity of man is inviolable. To respect and protect it shall be the duty of all state authority." According to German jurisprudence, even the dignity of lawbreakers has to be respected. It would not be respected, but rather denied, if the police were to subject a person to brute force in order to compel the disclosure of information. Breaking somebody's will through the use of force, in Germany, is judged to interfere with the dignity of human beings. Since this constitutional right is not accompanied by a limitation clause, the result, at the constitutional level, is the same as on the police- law level: There is an absolute prohibition on the use of torture, and breaking the will of an individual through the use of force would constitute torture.

International Law

In the third step of the legal analysis, we now turn from German police and constitutional law to international law to see whether there the response to the question in our hypothetical would be the same or different. There are many international conventions which forbid torture without exception. They include Art. 5 of the Universal Declaration of Human Rights of 1948,[11] Art. 7 of the International Covenant on Civil and Political Rights of 1966,[12] and the U.N. Con-

11. G.A.Res. 217 A, 3 GAOR, Resolutions (A/810), at 71. Art. 5 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

12. 999 U.N.T.S. 171. Art. 7 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." See also Art. 4 (no derogation of Art. 7) and Art. 10 (1) (obligation of state power to treat detainees with dignity).

vention Against Torture, and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 1984.[13] These provisions state clearly that the application of considerable physical coercion with the intent of obtaining a statement, or the use of other methods to weaken the resolve of a detainee, such as "truth" drugs, falls under the definition of torture. These provisions hold that any act which is inhuman and degrading is treated, in legal terms, the same as torture. Since I cannot discuss all of these provisions here, I will only mention a foremost example found in Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[14] This prohibition is also binding in emergency situations, as Art. 15 of the same convention demonstrates – there are no exceptions to the prohibition, not even during times of war or public emergencies.

Having analyzed the provisions found in German police law, German constitutional law, and international law, I am now able to summarize the first response to the question posed in our hypothetical. The use of considerable coercion by state agents with the intent to obtain information from individuals falls under the definition of torture (or that of inhuman and degrading treatment, depending on the intensity of the treatment). According to German and international law, state authorities are forbidden to use torture; there are no exceptions to this rule.

III. *Formulierungsluecke* and *Wertungsluecke*

The response at which I have arrived, thus far, may not satisfy everyone. In fact, I suspect that some of you would believe this response to be totally unacceptable and unjust, since we are placing the lives of innocent poeple in jeopardy and allowing a cold-blooded ter-

13. Art. 1 (1) defines torture in the following way: "For the purpose of this Convention, the term 'torture' means any act by which severe pain or suffering, either physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . . when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity . . .". See also Art. 2 (no derogation) and Art. 4. A similar definition is used in Sec. 3 (b) of the American Torture Victim Protection Act of 1991, 106 Stat. 73, which sets forth civil liability for torture: "Torture. – For the purposes of this Act – (1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a concession . . . (2) mental pain or suffering refers to the prolonged mental harm caused by or resulting from – (A) the intentional infliction or threatened infliction or severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses of the personality . . .".

14. 213 U.N.T.S. 222. Germany is a party to the Convention.

rorist to claim victory. Regardless of whatever doubts or moral outrage we may have, this response seems to be preordained by the clear and unmistakable language of specific legal provisions at all possible levels of the legal system in Germany – no torture, whatever the circumstances and consequences. Is our discussion of the law thus at an end? It would seem so, but there may be an alternative approach, even though we are confronted by clear and specific legal restraints.

Let me suggest a way to arrive at a different response. The first step we have to take is to distinguish between two kinds of gaps or loopholes in the law. In German jurisprudence, these loopholes are called *Formulierungsluecke* and *Wertungsluecke*. A Formulierungsluecke occurs when we expect a law to address a specific problem but it does not. Thus, for example, in a criminal code, we expect to find provisions on assault and murder. In our case, there is clearly no Formulierungsluecke. The question relates to the appropriateness of using torture, and the clear and specific answer is a resounding "no".

We could be faced, however, with a Wertungsluecke. A Wertungsluecke is not characterized, as is the former loophole, by a missing evaluation of a problem in a statute. A Wertungsluecke is a legal provision which expresses a legal valuation. But that judgment is in conflict or even inconsistent with other provisions and values also found in the legal system. In such a situation, the legal system sends conflicting signals, and the question then arises, which one should be the determinative signal? Thus, if we are dissatisfied with the result of the case so far, we have to look for other legal provisions on which we could base our conflicting convictions.

Before I do that, I should note some characteristics of the hypothetical. The case has eight characteristics. There is (1) a clear, (2) imminent and (3) severe danger to the (4) bodily integrity or life of an innocent person. (5) The danger has been caused by an identified individual. (6) The lawbreaker is the only person who can eliminate the danger, by moving back into the parameters of lawful behavior. (7) Under the relevant law, he has a duty to eliminate the danger. (8) Since the lawbreaker is unwilling to do so, forcibly extracting the information, that is, application of torture, is the only promising means of eliminating the danger.

You may question the last element mentioned. Is there really no other way to eliminate the danger? What about the alternative, of giving in to the demands of the terrorist? That would certainly have grave and legally questionable consequences, as well. We would be forced to free all death-row inmates, which is against the law, and some of the inmates may resume their careers and perpetrate other crimes. In addition, innocent people in your home town would be subject to risking life and limb. Moreover, we do not know whether the terrorist would really deactivate the bomb, and what would keep him

from reactivating it, once he is on the airplane? I have to concede, though, that we do not know for certain that the terrorist would divulge the location of the bomb, if tortured. But judged from the relevant point in time, that is, *ex ante*, when the decision has to be taken, not by hindsight, the probability that he would give the information is high. That should suffice.[15] In my view, the alternative of giving in to the demands of the terrorist is not acceptable.[16] So, we are back to where we need to find legal provisions that lead to an exception to the absolute prohibition on the use of torture for cases such as the one described above.

What I would like to suggest in the second part of my talk is that there are, indeed, such exceptions in all the areas of law discussed previously, that is, police law, constitutional law, and international law. Before developing this alternative reading of the case, I would like to touch upon the usefulness of the right to self-defense, in this context. At first sight, the right to self-defense[17] looks like the most obvious and most pertinent provision to raise against the absolute prohibition of the use of torture by state agents. Self-defense allows

15. This is the view taken in German police law doctrine in the non-detention context. When assessing the chances of a means chosen to remove some danger to the public, the *ex ante*, not the *ex post*, point in time has to be taken into account, viewed from the standpoint of a reasonable police officer.

16. In American jurisprudence as well as under the German legal system, the plain meaning rule is not always followed. See, e.g., E. Allen Farnsworth, *An Introduction to the Legal System of the United States* 75 (3rd ed. 1996): "The rigors of this rule have been relaxed by permitting an exception where the result would be 'cruel', 'monstrous', or 'absurd', or sometimes merely 'impractical', 'unjust', or 'unreasonable'." In the Soraya case, translated in Kommers, supra n. 9, at 125, the German Federal Constitutional Court, in departing from a clear command in the *Buergerliches Gesetzbuch*, the German Civil Code, stated the following maxims: "Justice is not identical with the aggregate of the written laws . . . The judge's task is not confined to ascertaining and implementing legislative decisions. He may have to make a value judgment . . .; that is, bring to light and implement in his decisions those value concepts which are inherent in the constitutional legal order, but which are not, or not adequately, expressed in the language of the written laws."

17. See § 32 of the German Federal Criminal Code: "Whoever commits an act that is in self-defense, does not act illegally. (2) Self-defense is action which is necessary to avert an imminent, illegal attack against one's person or another person." The Israeli Supreme Court, supra n. 2, used the Israeli version of the right to self-defense to justify the use of violence against a suspected terrorist. As my remarks in the text make clear, this is not convincing to me, and it was not convincing to the Supreme Court of Israel in the decision of 6 September 1999 – Judgement on the Interrogation Methods Applied by the GSS – H.C. 5100/94 and others, available on http://www.derechos.org/human-rights/mena/doc/torture.html. The Court, in this new decision, denied that at the present time there exist provisions in Israel's legal order that justify the use of considerable force to obtain information from suspected terrorists. It mentioned the absolute prohibitions on the use of torture in Israeli and international law. But it also made clear that ticking-time-bomb situations presented a special problem, and that it was up to the legislature to decide whether it wanted to include provisions in the law whose function it was to cover the use of force in interrogations. The Court did not address the question of how such provisions would relate to the absolute prohibitions on the use of torture, should the legislature decide to enact such rules. The text here suggests one answer to this question.

one to do whatever is necessary to defend one's own physical integrity and life against serious infractions by third parties. If what is necessary turns out to be torturing a terrorist to discover the location of a ticking bomb, then that course of action is justified. But, on closer inspection, this argument loses its strength. All the legal provisions mentioned before are directed specifically against the use of torture against detainees by state agents, regardless of whether their lives are also threatened. These provisions cannot be understood other than by determining that the prohibitions imposed on these state actors, regarding treatment of detainees, trump the private interests and rights these state actors have as individual citizens against dangers caused by those detainees. Furthermore, one might argue that an *ex post* reason not to be punished should not count as an *ex ante* justification for state actors to infringe upon citizens' rights. And, in Germany, at least as far as the pertinent constitutional law and international law provisions are concerned, these provisions are also the higher and more recent law compared to the right to self-defense in the Criminal Code. Thus, the right to self-defense cannot help the police officers because the pertinent law clearly implies that their obligations as state actors supersede their interests and rights as citizens. So, if we are to find legal provisions that lead the way to a different result, then (1) we must find these provisions on the same level of the legal order as the prohibitions on the use of torture, and (2) arguments must be brought forward that demonstrate (or, at the least, make plausible) that the countervailing provisions should have stronger weight than the absolute prohibitions on the use of torture.

IV. Response Two: The Relativisation of the Absolute Prohibition of Torture

German Police Law

The Police Law prohibits the use of coercion to obtain information according to section 35 mentioned above. On the other hand, the same statute allows the use of force, even deadly force, including the use of firearms, if there is an immediate threat to the lives and physical well-being of innocent persons, provided that there is not a less intrusive means to avert the threat. Section 54 (2) provides that, "a gunshot, the result of which makes death highly probable, is only permissible when it is the only way to defend against a life-threatening situation or one in which there exists the threat of severe bodily injury." What is the guiding principle behind this far-reaching intrusion on the part of the state? It is the judgment that in cases where there is an unpreventable clash of life versus life or bodily integrity versus life, the interests of the innocent should take precedence over those of the lawbreaker – the law should therefore side with the victim, not the perpetrator.

Could we make use of section 54 (2) in our case? At first glance, the answer is "no". The legal consequence of the applicability of section 54 (2) is a fatal gunshot, not, as in our case, breaking someone's will. In the section 54 (2) situation, the perpetrator will be killed; in our case, he will have suffered serious harm, but will still be alive. Maybe one way to overcome this difference is to view the coercion of information as a less intrusive means, compared to the more intrusive act of taking a life. So the more intrusive means, the fatal gunshot, would include the less intrusive means, applying torture to get information. Although this point of view has some plausibility, all commentators in Germany agree that the two situations should not be seen as standing in a more-and-less relationship; but rather, they should be seen as being qualitatively different. Breaking a human will by torture is categorically different from shooting somebody.

I agree with those commentators, but only in the sense that we cannot directly apply section 54 (2). But we can apply this provision analogically if there is a close-enough relationship between the section 54 (2) case and our case. I think that there exist indeed sufficient similarities. Imagine on the one hand that the terrorist holds a pistol to the head of his victim. The police could shoot him to save the victim's life. Imagine on the other hand that the terrorist threatens a victim's life by strapping a bomb around him. Again, the police could shoot the lawbreaker. Should it make a legal difference if the terrorist has already activated the bomb strapped around the victim and the only way to prevent the catastrophe is to extract the information about deactivating the bomb from the terrorist? I think not. Should it, furthermore, make a legal difference that the section 35 situation is specifically geared toward the protection of detainees, whereas the fatal gunshot in section 54 (2) typically will be fired in a non-detention context? In principle yes, because in the first situation the detained person is helpless and is in need of special protection, whereas in the second situation the perpetrator is in command. But in the case to be resolved here, the opposite is true: The detained terrorist is in command, as is typically the case in the section 54 (2) situation. So, on a closer look, the section 54 (2) situation and evaluation has a close and specific relationship to the characteristics of the hypothetical. If this view is correct, then section 54 (2) is analogically applicable in our case, and we, therefore, have a contradiction between the absolute prohibition of coercion in section 35 and the permission of the use of deadly force in section 54 (2) in the Police Law.

How should such a contradiction be resolved? In my view, the analogical application of section 54 (2), for cases with the eight characteristics mentioned previously, should be read as a narrow excep-

tion to the absolute prohibition in section 35.[18] Put differently, in my view, after taking into account the range of application of section 54 (2), section 35 has been transformed from an absolute prohibition to a strong prohibition of the use of force against people detained by the police. Section 54 (2) serves as a limiting factor in the applicability of section 35. In the balancing process, section 35 has to undergo a "teleological" or "purposive reduction" (*teleologische Reduktion*), as expressed in German legal terminology.

German Constitutional Law

Is this alternative result justifiable under German constitutional law? Art. 104 (1) [2] of the Basic Law would seem to forbid such a conclusion in stating that "[d]etainees may not be subjected to mental or physical mis-treatment." Support for this view can be found in the dignity clause of the Constitution in Art. 1 (1) which states: "The dignity of man is inviolable. To respect it and protect it shall be the duty of all state authority." This highest command of the Constitution also protects lawbreakers. In our case, the terrorist can claim that the Constitution places an absolute prohibition on breaking someone's will in order to extract information, the prime example of torture. While all that is true, the picture painted so far has been rather one-sided. We have not yet analyzed the constitutional protections of the victims in our case.

It needs to be emphasized that the dignity clause in Art. 1 (1) addresses two competing absolutes – respect for everyone's dignity and protection of everyone's dignity. In our case, there is a clear conflict between the claim by the lawbreaker that his dignity should be respected, and the absolute claim by the victims that their lives and dignity should also be protected, by the same state agents, the police. Both of these claims cannot be honored at the same time. Indeed, to honor one would violate the other. Put differently, we confront an unavoidable collision of the negative and the positive aspect of the dignity clause of the Constitution. Respecting the negative command of the dignity clause would entail leaving the terrorist's physical integ-

18. In my article "Darf der Staat ausnahmsweise foltern," supra n. 3, I have not included the element "severity of threat to bodily integrity" or "life of the victim" among the explicit characteristics of the case. There, I used the analogy to section 54 (2) Police Law as an interpretive means to limit the reach of the exception to the prohibition of torture. Here, I make this implicit restriction explicit. In the German article, I also counted threats to, or violations of, dignity among the incidents justifying the use of torture, if the other conditions were given. While I still hold that to be correct in principle, I now believe that it is very hard appropriately to delimit the reach of that standard. In German jurisprudence, in theory, everybody states that only the most serious interferences with the respect due human beings count as a violation of human dignity, but in practice most scholars end up with broad catalogues of dignity interests. Thus, in order to counter the slippery slope argument, I now think it is better not to include the dignity interest in the exception clause.

rity intact; abiding by the protective aspect of the clause would lead to an interference with the terrorist's dignity. Which side should the police choose?

One could argue that, insofar as the population is concerned, it is only their lives which are in jeopardy; whereas both the perpetrator's life *and* dignity are threatened, so it is his interests that should prevail. The counter-argument would be that the protection of life is the vital prerequisite for human dignity, so both rights should be treated the same way. Moreover, the hypothetical is such that the victims would suffer horribly. You can restate that in the following way: "not only would their lives be taken, their dignity would also be violated." So even if you would want to make a difference between the taking of life and the breaking of a will, in this case we confront an unavoidable conflict of dignity versus dignity, a conflict between the negative and positive aspect of Art. 1 (1) of the German Constitution. In such a conflict, as I have already mentioned, the state is justified in siding with the victim, against the lawbreaker. Art. 104 (1) [2] of the Basic Law with its absolute prohibiton on the use of force against detainees thus has – as section 35 of the Police Law – to undergo a "teleological" reduction in its range of application. As far as cases with the eight characteristics of the hypothetical are concerned, the dignity clause of the Constitution in conjunction with the limitation clause attached to the right to life in Art. 2 (2) allow for an exception to the absolute prohibition. So, to my own surprise, German constitutional law would allow torture in exceptional cases.

International Law

Is this alternative view compatible with international law? Since I cannot address all pertinent conventions, I will again concentrate on the European Convention of Human Rights, assuming that the arguments I am going to advance could, in the same or a similar fashion, also be made with regard to other legal provisions outlawing torture. Art. 3 of the European Convention prohibits torture and other inhuman or degrading punishment and treatment. There are no exceptions to this rule, as Art. 15 of the same Convention demonstrates.

There is no doubt that coercing someone to divulge information would fall under Art. 3. On the other hand, the same Convention also includes Art. 2. Art. 2, in clause 1, secures the right to life, but this right is not absolute. Clause 2 states: "Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: a) in defence of any person from unlawful violence; . . ..". This limitation clause serves not only as a justification for individual self-defense; it also empowers member states of the Convention to set up police power provisions, which allow for the use of deadly force in order to

protect the population against third party threats. Section 54 of the Police Code, which provides for the use of force, including fatal gunshots, is an apt illustration of a legal provision which would fall under, and be justified by, Art. 2 of the European Convention of Human Rights.

Under the European Convention, we encounter the same opposing signals as in the Police Code and the German Constitution. Art. 3 states unconditionally that the use of torture is forbidden. Art. 2 states that the life of a lawbreaker may be taken, if that is the only means by which to protect innocent victims. Art. 3 seems to be the more specific provision, because it specifies the outlawed means, whereas Art. 2 only covers a similar, but not identical, severe method: the taking of life. One can argue, however, that in another respect Art. 2 is closer to the problem at hand. The right-to-life provision addresses the question as to which life should prevail, if there is a conflict of life versus life or life versus bodily integrity, and the parties constitute a lawbreaker and a victim. This last element is not specifically addressed in Art. 3, only in Art. 2. Hence, in this respect, Art. 2 is the more pertinent provision.

So, if you have found my development of an alternative view a plausible response to the topic of my discussion, you can see the direction in which we are heading. As we did with the levels of police power law and constitutonal law, we will apply the countervailing provision, Art. 2 of the European Convention, as a limitation on the absolute character of the prohibition on torture in Art. 3. Art. 3 is thus, to use the German expression, "teleologically reduced" in its range of applicability. Instead of an absolute prohibition, it now comprises only a strong prohibition on torturous, inhuman, and degrading treatment. Exceptions are possible as far as cases with the eight characteristics are concerned.[19]

Referring to these eight characteristics has an important function: The requirements delineate and limit the exceptions to the prohibitions on the use of torture. They try to be as specific as possible so that the slippery slope argument can be countered. This argument holds that once we start with one instance of using torture, then others are bound to follow, and soon breaking the will of detained people will become one of the regular instruments of police action. This critique is serious – one should not be naïve regarding the challenges and temptations of police work! On the other hand, it is the task of law to draw the right distinctions and teach institutional actors the applicable standards. The eight requirements are my propo-

19. The arguments used with regard to Art. 3 of the European Convention could, in a similar fashion, be used regarding other legal instruments outlawing torture without exception. One has to find a countervailing right-to-life provision with an explicit or implicit limitation clause that allows one to advance the arguments made above.

sal for an internal exception clause in the provisions outlawing the use of torture unconditionally. Whether one finds these requirements too broad or too narrow or agrees with them, hard cases are bound to follow.[20] But this is not an argument against the specification of exceptions. Some uncertainties in the interpretation of any legal standard are inevitable, and it is the task of the legal system to develop standards and case law for further refinement.

In summarizing my remarks so far, I would state that the response of German and International Law to the question posed at the beginning of my talk is this: There is not one solution, but two. No, government may never use torture, whatever the circumstances! Yes, government may use torture in exceptional circumstances! One can arrive at both results in a way that is methodologically correct. Solution One is quite easy to reach, one has only to find and read the pertinent law. Solution Two is more complicated but still within the bounds of accepted use of legal methods.[21] If these two solutions are possible, then the result one wants to reach in this case depends on deeper substantive convictions about what is right and wrong in the situation described.

V. A Constitutional Duty to Use Torture?

Up to this point, I have only discussed whether the state should be allowed to use torture in the present case. If the answer is "yes" for exceptional cases such as in the hypothetical, then, in German constitutional law, another question arises: Do the police have a constitutional duty to torture? This question will probably come as a shock to most American lawyers, as the notion of duties on the part of government vis-à-vis the people is, for the most part, an alien one to American constitutional law. The American Supreme Court stated in *DeShaney v. Winnebago County Dept. of Social Services* that "nothing in the language of the Due Process Clause . . . requires the State to protect the life, liberty, and property of its citizens against invasion by private actors . . . [Its] purpose was to protect the people from the State, not to ensure that the State protected them against each other.

20. See supra n. 18. Must there be many victims or is it sufficient that there is a conflict of one perpetrator against one victim? I think the fact that there is a threat to only one victim does not make a normative difference; that is why I speak of "an innocent person" in describing the characteristics of the hypothetical in section III; others might disagree. Under German police law doctrine it is possible to some extent to stretch the meaning of the imminence of the danger if the danger, should it materialize, would lead to significant damage – for example, if the health of not only one person but the lives of many persons are threatened. Should that make a difference in the context of torture? Should it be of relevance if the terrorist is underage, or if he is insane but dangerous?

21. See supra n. 16.

The Framers were content to leave the extent of governmental obligations in the latter area to the democratic political processes . . .".[22]

In German constitutional law, the situation is quite different. The German Federal Constitutional Court has, for a long time, interpreted constitutional rights as having two distinct levels. The first level is the negative level of telling the government not to interfere illegally with constitutional commands, that is, either the state shall not interfere with liberties at all, or, if there is an intrusion, it must respect the pertinent limitation clause. The second level is that constitutional rights are thought of as objective and positive values which all governmental actors should strive to support and strengthen.[23] The general idea of governmental support for constitutional rights has been developed by the Court into several distinct doctrinal precepts. I will only mention the one relevant here. As far as life is concerned, the Court is of the opinion that this constitutional right is of such importance that the government must efficiently protect it against third party threats. The Court explained this doctrine in its famous abortion case of 1975.[24] But a case closer to our hypothetical is the Schleyer kidnapping case of 1977.[25]

Hanns Martin Schleyer, president of the German Federation of Industries, was brutally abducted by terrorists who had killed four of his aides in the process. The kidnappers threatened to execute their hostage if the federal government refused to release eleven of their comrades from prison and ensure a safe exit out of Germany. When the government refused to comply, Schleyer's son petitioned the Federal Constitutional Court for a temporary injunction on behalf of his father. Invoking the right to life clause in Art. 2 (2) of the Constitution, the son argued that the state authorities were obligated to meet the terrorists' demands. The motion was rejected by the Court, but not because it refuted the concept of positive state obligations to protect the lives of its citizens. The Court explicitly stated that "Art. 2 (2) [1] in conjunction with Art. 1 (1) [2] of the Constitution commits the state to the protection of each human life. This obligation is comprehensive. It requires the state to support and protect life; this means, principally, to protect it from unlawful interference by others. This

22. 489 U.S. 189, at 195-96 (1989). The hypothetical case would not fall under one of the narrow exceptions to the *DeShaney* rule. In *DeShaney*, the majority said that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being." Id. at 199-200. This exception only supports a special duty regarding the detainee, not the population at large.

23. See Kommers, supra n. 9, at 48-49, 338, 344.

24. The case is translated in Kommers, supra n. 9, at 336-346. The Court stated id. at 338: "The obligation of the state to furnish protection is comprehensive . . . Human life represents a supreme value within the constitutional order that needs no further justification; it is the vital basis of this human dignity and the prerequisite of all other rights."

25. For the following excerpts, see Kommers, supra n. 9, at 356-57.

precept is mandatory for all state authorities in accordance with their respective specific tasks. Because human life represents a supreme value, the state must take its duty to protect [life] particularly seriously."

Still, the Court rejected the argument that the government had a duty to release the convicted comrades of the kidnappers and to secure their safe exit out of Germany. It was rejected on the basis that such a precedent, though possibly saving Mr. Schleyer's life, would cost the lives of many others in the future, were it to become known that such duties are applicable in kidnapping situations. In situations, the Court's reasoning went, where there are several reasonable ways to protect the lives of citizens, it is not the Court's business to require any particular way. But the Court added a thought which relates to our hypothetical: If it is the case that only one of several ways to protect life is available, then the right-to-life clause of the Constitution may very well require government actors to undertake this course of action. "[The government's] discretion in the selection of protective measures may under special circumstances be reduced to the selection of one specific measure."

In our hypothetical, such an extraordinary situation is at hand. The lives of many citizens are endangered. For all we know, there is only one method of preventing a catastrophe or other grave illegalities, and that is to extract the necessary information from the terrorist. This method, as I have pointed out, is apparently outlawed by several legal provisions, but as we face an unavoidable clash of respecting versus protecting opposite constitutional commands, with innocent victims and a lawbreaker being the parties in question, the law should side with the victims and seek to protect their lives and dignity. If this conclusion is correct, then it is no longer a question of whether the government is allowed to protect the lives of the victims, the government must proctect their lives by using the only available means – torture.

VI. A Subjective Right to the Use of Torture?

If there is a constitutional duty on the part of the police to torture the terrorist in such a situation, is there a corresponding right of the endangered citizens, which requires the police to extract the information from the detained terrorist? For American lawyers, such a question will sound even more macabre than the one of constitutional duties. For German constitutionalists, however, a familiar doctrinal concept comes to mind: *Schutznormtheorie*. According to the Schutznormtheorie, loosely described as the transformation from duty to right, not every governmental duty benefitting an individual entails a claim of that individual to the benefit. Such duty-to-right-transformation only occurs if the following requirements are met. A

legal provision must impose on the governmental actor a particular duty. This duty must not only objectively benefit private citizens, but, in the light of the legislative will or constitutional values, should also give them the benefit as a matter of right. This can especially be presupposed if the number of individuals who profit from the obligation is foreseeable, and the individual interest is strong and constitutionally valid.[26] Thus, for example, duties of administrative agencies to further wide-ranging public interests such as clean water and air typically do not confer individual rights on citizens – the number of people benefitting from the respective standards is too big, and the specification of "clean" may not be exact enough.

The Schutznormtheorie has been developed for legislatively imposed duties on government, not for constitutional obligations. However, it can and should be applied in the constitutional area as well, given the fact that the Federal Constitutional Court, in many decisions, has developed the theory that constitutional rights should be interpreted in a way that strenghtens their effectiveness.[27] Given the fact that the right to life is such an important right, and that in a situation such as the one described in our case, this right depends on effective governmental protection of a specific kind, the conclusion would be that the individuals negatively affected by the terrorist's demands have a right vis-à-vis the police, which requires the police to torture the terrorist.[28]

I shall end with a personal remark. No German law professor in the last fifty years has ever, to my knowledge, publicly advocated the use of torture in general or even in exceptional circumstances. One finds only a few intimations in the scholarly literature that in a conflict of life or dignity versus dignity the unconditional prohibition on extracting information in Art. 1 (1) and Art. 104 (1) [2] can seem problematic. That certainly is true but it is not a sufficient discussion of the problem. The long and menacing shadow of the Third Reich with its pervasive and abhorrent use of torture has prevented an open reflection of the conflict at hand. This abysmal period in the history of Germany, however, should not be a cause to refrain from reflecting on this problem in the present, so that we are prepared for the future. Terrorist attacks such as the one described here, or similar ones,[29] or different ones,[30] have happened or will happen sooner

26. See, e.g., Hartmut Maurer, *Allgemeines Verwaltungsrecht* § 8 (I) (3) (13th ed. 2000) and Ferdinand Kopp & Wolf-Ruediger Schenke, *Verwaltungsgerichtsordnung*, § 42 (12), especially at n. 83-84 (11th ed. 1998).

27. See Kommers, supra n. 9, at 48-49, 344, 363.

28. See generally on constitutional rights as sources of positive claims to protection (without discussion of the torture question) Hans D. Jarass & Bodo Pieroth, *Grundgesetz*, Vorbemerkung vor Art. 1, n. 4, 8; Art. 1 n. 14; Art. 2 n. 50-52 (4th ed. 1997).

29. See the Israeli case, supra n. 2.

or later, and the legal system should be prepared to deal with them effectively and justly.

At the present time, the law's textual answer is: *Fiat lex, pereat mundus* – Let the law be done – no torture ever – though the world should perish. Some will view this result to be justified. Others, myself included, think the result to be unjust and unjustifiable. For these, there are two ways to proceed. One may live within the text of the law hoping that, if such a situation should come to pass, the police would use torture and the courts would follow the alternative route developed here. This way, one might feel more strongly equipped to counter the slippery slope argument. Or one may think that the legal order has to be honest, also and especially in hard cases, because it has to make clear whether it sides with the perpetrator or the lawful citizen. Then one should opt for a textual revision of the prohibitions on the use of torture, specifying the exceptions and making sure that the legal order is careful in drawing the right distinctions.

30. In Ireland v. United Kingdom, the European Court of Human Rights (Judgment of 18 January 1978, No. 25, 2 E.H.R.R. 25, held that the so-called "five techniques" used by British police forces against suspected IRA terrorists (wall-standing, hooding, subjection to noise, deprivation of sleep, deprivation of food and drink) amounted to inhuman and degrading treatment, but not torture within the meaning of Art. 3 of the European Convention of Human Rights. In this case, the situation was not such that the exception clause proposed here would have been applicable. See No. 36 of the opinion: "The authorities therefore came to the conclusion that it was necessary to introduce a policy of detention and internment of persons suspected of serious terrorist activies but against whom sufficient evidence could not be laid in court. This policy was regarded as a temporary measure primarily aimed at breaking the influence of the IRA . . .".