CONSIDERATIONS ON THE CURRENTLY ONGOING TORTURE DEBATE

BY VOLKER STÜMKE

■

The topic "Torture" has once again become current in the German speaking world in recent years, as can be seen not only through the wealth of relevant literature but even more clearly through two topics of debate.

First, the *Daschner case* in 2002 raised anew the question of the "rescue torture" and its application: An arrested kidnapper refused to disclose the place where the kidnapped victim was hidden; since the police assumed that the kidnapped child was still alive (which proved to be erroneous), Deputy Chief Constable Daschner directed the interrogator to threaten the blackmailer with the infliction of pain; as a result, he led the police to the hidden corpse. Subsequently, both policemen were sentenced by the Frankfurt/Main district court for oppression and were mildly punished (a reprimand with a pending fine)[1]. What would have happened if the child had been still alive and had been rescued? Other, similar cases were examined in order to establish a plausible basis of legitimitacy of torture in such exceptional situations.

Secondly, since September 11, 2001, the US war on terror has resulted in the detention of suspects in prison camps outside their own territory (e.g., in Guantánamo and in Abu Ghraib), which has been described as torture[2]. And here as well, the question has been asked whether or not scenarios have become conceivable (and more likely) where an impending attack could be averted by means of torturing a detained terrorist, thereby saving the lives of many innocent people. What is particularly well known is the *"Ticking-Bomb Scenario"*. It is based on the assumption that an (arrested) terrorist has hidden a ("dirty") bomb that will detonate in a few hours and will horribly kill the population of a city. The scarcity of time available would be enough for neither an evacuation nor for an intensive search, and one would be

---

1 Cf. **Anders, Dieter**. 2007. Aktuelles Forum – Die Diskussion zur rechtlichen Zulässigkeit staatlicher Folter in Ausnahmesituationen. – **Goerlich, Helmut** (Ed.). 2007. Staatliche Folter. Heiligt der Zweck die Mittel? Paderborn, S. 13–40.

2 Cf. **McCoy, Alfred W**. 2005. Foltern und foltern lassen. 50 Jahre Folterforschung und -praxis von CIA und US-Militär. Frankfurt/Main.

> dependent on the information provided by the terrorist to be able to avoid the consequences.

These debates indicate two diverging core themes: on the one hand, the call for the permitting of torture in limited exceptional cases (that is, rescue and prevention); on the other hand, the insistence on the prohibition of torture without exception in order to avoid falling behind the achieved moral and legal level of the 20th century.

The intention of this paper is first to provide an overview of this subject through a systematic analysis of the current situation[3]. I consider this step to be of prime importance since the debate is very controversial and confusing. Firstly, the definition of torture will be presented and analyzed, since some lines of argument are affected by the fact that the terms are not precisely defined or are used deliberately imprecisely. In the second section, the legal provisions applicable in Germany will be presented, and then the legal arguments for limited permission for torture. In the third and last section, the current torture debate will be analyzed from an ethical perspective. The individual sections are concluded by my own assessments where they do not naturally form part of the structure.

1. The Definition of Torture and its Problems

In 1984, the UN Convention Against Torture was signed, which entered into force in 1987. Art. 1 of this document which is legally binding under international law, provides the following definition of torture:

> "For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[3] The references are necessarily not comprehensive and allow the readers only a rough orientation, but they can be used to find more different lines of arguments.

It is in line with our use of language to consider torture to be the deliberate infliction of pain; in this context, the convention does not mention only physical but also mental pain: The focus is put not only on bodily injury but also on deprivation of sleep and on isolation. The intention to break the victim's will is not explicitly mentioned; however, it can be presupposed (and even has to be, as will be shown later on)[4].

Moreover, three other provisions are noteworthy: Firstly, torture is not explicitly confined to one purpose; indeed, it may have many different purposes – from punishment through intimidation to the collection of information or simply the demonstration of power. Secondly, torture is performed by an official – unlike the implication of everyday speech, individuals cannot, by definition, torture; they can of course inflict pain on someone, which can be dealt with as a crime. Accordingly, the torture debate is not about severe maltreatment (as "common" crimes) but about the actions of the state and its institutions. It is implicitly assumed that the tortured individual is in state custody that is, he must be exposed to the power of the state. Thirdly and finally, torture is isolated from legally admissible punishments and interrogation methods – while they also may be brutal and violate human dignity (such as the death penalty or chopping off hands), but this does not violate the prohibition on torture but rather other legal requirements.

However, these three provisions have been challenged or undermined in the course of the current controversy. Combined with numerous sample cases, which have been presented, this results in an unclear and imprecise setting for the debate. In order to prevent justified inquiries and indications to problems from running into the ground, these inconsistencies of language need to be exposed and tested. Moreover, since the term "torture" definitely has a negative connotation, the purpose of this approach is to counter the risk that emotions or emphatical statements replace an argumentational discussion.

1.1. The Purpose of Torture

In the aforementioned definition, the purpose of torture is not defined but is only illustrated by way of examples. These examples were chosen, since they can after all be used to reconstruct, at least very broadly, the history of torture in Europe[5]. Torture was a means to various ends: In the ancient world, it could be considered as a means to confirm the witness statements

[4] Cf. **Bruha**, **Thomas**; **Steiger**, **Dominik**. 2006. Das Verbot der Folter im Völkerrecht. Stuttgart.

[5] Cf. **Peters**, **Edward**. 1991. Folter. Geschichte der Peinlichen Befragung. Hamburg.

of slaves, whose testimony would otherwise have been considered to be worthless, given their social status. In the Middle Ages, torture was not only used as a punishment but also developed into the standard method for obtaining a confession and rational proof of the guilt of a suspect within an established legal framework; in this way, torture replaced other procedures (such as an ordeal or a trial by battle), which were increasingly perceived as unsatisfactory. However, it was also used more and more excessively in the early modern age: The areas of application and, consequently, as the threat facing the population increased, the compulsory legal review was neglected and bypassed (witch trials[6]), so that some tortured victims no longer had any rights and, consequently – in anachronistic terms – their human dignity was violated. Summing up, the following purposes can be noted, which exist as objectives of torture to this day:

- Substantiation of witness testimonies;
- Punishment of crimes;
- Coercion of confessions;
- Intimidation of the population;
- Destruction of (self-) respect.

In the course of the Age of Enlightenment, torture was gradually prohibited throughout Europe; in this context, at least three factors of Enlightenment have to be mentioned here: Firstly, it contributed to the promotion of science as a means to the establishment of refined evidential procedures (evidence handling) in the detection of crime, so that a confession became less important. This development was supported by a changed court procedure: The evidence taking process (circumstantial evidence) allowed verdicts without a confession, and more discriminating punishments (penitentiaries, expulsion from the country) smoothened the consequences of potential errors of justice. Secondly, the Enlightenment reinforced as a moral force respect for the dignity of the individual and the corresponding protest against the contemptuous treatment of humans; in the Middle Ages, this protest was largely confined to denouncing the abuse of torture and, consequently, to advocating using it more sparingly, whereas one can now clearly see a categorical denial. Thirdly, the Enlightenment as a political movement restricted the arbitrary nature of the state and its grasp on the self-confident citizen. Since the state was no longer considered to be an authority vested by God and exclusively subordinate to him but a man-made product, its use of force also had to justify itself vis-à-vis the people.

With this prohibition, which comprises both torture for the purpose of punishment and torture for the purpose of taking evidence, the Enlightened

---

[6] Cf. **Schild**, **Wolfgang**. 2005. Folter einst und jetzt. – **Nitschke, Peter** (ed.). Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum, S. 69–93.

state limits its grasp on the citizens and documents the legal form, the binding character and the reliability of its self-restraint. The citizens can trust this state. The worldwide experience with the terror of the Nazi regime (and of other dictators) has shown us once more the value of this achievement. Summing up, it should be emphasised that, in accordance with the Enlightenment, this judgment is justified at three levels: Firstly, torture is unacceptable as a method of information collection since there are alternatives. Secondly, it is reproachable from a moral perspective, since it disregards human dignity and seeks to break the free will of humans. And finally, it is condemnable from a political perspective, since it presents the state with a reason, which blurs the boundaries of the state and its power beyond all measure, that is, into the individual's personal integrity. – Here as well, one can again identify the three aspects of the definition of torture.

In the current debate (as far as I can see), it is indisputable that the aforementioned purposes are neither legally nor morally acceptable. Nobody wants to fall behind the achieved state of Enlightenment. Indeed, a new purpose is established: The rescue of innocent victims – be it as a preventive measure (as in a modified ticking-bomb scenario) or an imminent or current one (as in the case of an abduction). Unlike in a trial, the purpose is not to sentence the perpetrator, which (in an Enlightened state) has to take place without coerced statements, but to obtain information, which may contain a threat of damage and avert disaster. This purpose was not mentioned in the definition of torture; however, this would be a weak argument, since the wording lays down only those examples that were listed. Indeed, it is laid out in its contents that this purpose clearly differs from the aforementioned, clearly despicable purposes. After all, the only thing that should be obtained by force is a specific piece of information: the place where the hostage or the bomb is hidden – for the sole purpose of saving the potential victims. But it must already be pointed out here that this objective can only be achieved by breaking the perpetrator's will and making him talk. Accordingly, the ostensible purpose of torture and the rescue-oriented interrogation would remain identical: The (individual's) will is supposed to be broken, however, the hidden purpose is distinctly different: rescue instead of confession (– see further statements at Para. 1.3).

At first glance, this hidden purpose, which is already emphasised by the discussion of a rescue-oriented interrogation, is irreproachable. Considered from a legal perspective, there is the difficulty that whilst on the one hand the perpetrator is obliged to make such a statement, on the other hand he does not have to incriminate himself. Now, the legal means available to coerce a testimony (coercive detention, fine) are unsuitable given the scarcity of time available, but this does not discredit the purpose: on the contrary – it is affirmed; only the means is at issue. From a historical

perspective, it can be argued that the coercion of a confession from witches was also designed to protect the general public but was then abused; however, potential abuse is never a strong argument. What is more problematic is the recognition of the real purpose behind the pretended affirmation: Have not dictatorships continuously pretended to only sound out the enemies of the people in order to avert danger? All too quickly a regime critic could be declared a terrorist. In order to evade this risk, the relevant scenario would have to be very clear and limited, and independent expertise would have to be involved to a significant extent. A rescue-oriented interrogation (proposed by Rainer Trapp following Niklas Luhmann), which would have to be ordered by a judge (rather than by the ruler), which took place under supervision, would be documented on film and would be confined to the exposure of a specific piece of information, would be an attempt to apply this aim through a procedure which could minimise the aforementioned risks[7]. There still remains, however, questions as to whether this morally good end, which is procedurally secured against abuse, justifies torture as a means and as to whether torture as a means is at all suitable for this end – but these questions lead to the third aspect of the definition of torture.

1.2. Government Authority as an Exercising Organ

By definition, torture is performed by the state or its officials – unlike private brutality. This restriction has at the present time become problematic given the increasing occurrence of de-nationalised force: Does this provision also concern a state which instructs private companies to conduct interrogations of prisoners and tolerates their brutal methods? And can it in turn be applied to warlords and paramilitary forces in collapsed states? Now the first case is most likely to be a political reaction to the definition of torture (which, consequently, is acknowledged to be binding): Whoever pursues the outsourcing of force to dodge the blame of torture may act unwisely politically but it confirms the justification for the present definition, which (including its legal consequences) he tries to evade. The second case refers to descriptive changes in the community of nations, which are very relevant in political terms but not relevant for the debate on torture. This is because the legal system, which would prevent torture and would make any violation a punishable act, collapses together with the state. It is also clear even

[7] Cf. **Trapp**, **Rainer.** 2006. Wirklich "Folter" oder nicht vielmehr selbstverschuldete Rettungsbefragung? – **Lenzen**, **Wolfgang** (ed.). Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 95–134.

without recourse to the concept of torture that from an ethical perspective the excessive brutality of marauding gangs can only be condemned.

The actual problems in the debate about torture become tangible by way of the analogies used, primarily when referring to the kidnapping example: As a private individual, the hostage's father would be allowed to tackle the kidnapper, and even acts of torture would be legally covered as a personal emergency aid/self-defence (leaving aside the issue of proportionality). According to Volker Erb, this very combination should be able to be extended, for instance, to the representative of the state, too, in order to achieve a personal justification of his use of torture[8]. However, based on the selected example alone, the scope of applicability of this analogy would be considerably limited: It would be suitable for the Daschner case; however, an individual will not be able to achieve anything against organised terrorists and their wide ranging activities but depends on the state's logistics and machinery of force[9]. Leaving that aside, the socio-ethical achievement of the differentiation of individuals and officials with their different fields of action would be undermined: How can a policeman with the means and with the facilities of the police act as a private person?

However, perhaps this answer is too fixated on the perpetrator and neglects the fact that in both cases the intensity of force is the same. Shouldn't one, in so far as the merciless behaviour of a criminal organisation and an (evil) state are identical, describe both as torture and thus emphasise their misanthropic brutality[10]? At least this equivocation is performed in everyday language, and in this way it is likely to express the common opinion. But there are actions which only a state can perform, even if they actually hardly differ from actions of individuals: Only a state, for instance, can declare a war or raise taxes; by definition, gang warfare or protection rackets have to be distinguished. The same applies to torture. The internal justification for this conceptual differentiation lies in the fact that the state is the last authority of appeal for the citizen. In theory, one is not helplessly

---

[8] Cf. **Erb**, **Volker**. 2006. Folterverbot und Notwehrrecht. – **Lenzen**, **Wolfgang** (ed.). 2006. Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 19–38.

[9] While this may be a weak objection at first sight, one has to insist already here on the aspect to be addressed in more detail later, that the reference to examples has to be conclusive in itself. One cannot step up the brutality and the horror scenarios on the one hand and assert on the other hand that an ordinary father of a family could avert such threats with his domestic means available to him. After all, which private individual has the manual and technical skills to effectively force a kidnapper to make a statement?

[10] Cf. **Pfordten**, **Dietmar von der**. 2006. Ist staatliche Folter als fernwirkende Nothilfe ethisch erlaubt? – **Lenzen, Wolfgang** (ed.). 2006. Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 149–172.

exposed to a gang of robbers (or to a father), since there is the state with its exclusive right to use force, which protects the citizen against this attack. Confining the concept of torture to government action takes this differentiation into account and notes that a torture victim is helpless and exposed – and not only factually (as most of the victims of a crime in a cellar) but also in political terms.

Only this accurate concept provides the current question as to the legalization and the legitimitacy of rescue-oriented torture with an obvious meaning: Is it permissible for the state, which seeks to meet its obligation to protect its citizens, to torture in specific cases in order to save the lives of innocent people? The fact that private citizens also use violence which can be compared with torture as a means, and that this in specific cases may be legal and legitimate (self-defence), does not interfere with this question (and is not suitable for an analogy), since the state with its exclusive right to use force and given its status as the citizen's last authority of appeal is not situated at the same level as an individual; accordingly, its violent action differs in categorical terms from the individual's action.

1.3. The Extent of Infliction of Pain

Currently, the mention of great physical or mental pain or suffering in the UN Convention Against Torture is the point of adhesion for the central controversy, since the wording in itself could suggest that suffering and pain should be rated only in quantitative terms, which may raise the question as to the transferability of the scale. But in the same sentence, the link with the various purposes states that torture is distinguished also in qualitative terms from other ways of inflicting pain. Whoever tortures a prisoner to coerce a testimony (be it confessions, information or self-humiliating statements) which he does not want to provide voluntarily, plans to use the inflicted pain to break his opposing will (and the self-respect combined with it). This applies above all to torture which is only designed to intimidate or debase people. Therefore, (according to Gerhard Beestermöller), torture can be described very pointedly as a rape of the will[11]. The fact that this breaking of the will documents the (supposed) power of the torturer (above all in

[11] I owe this wording to a most inspiring vacation talk with Beestermöller in July 2007. As to the reasoning, cf. **Beestermöller**, **Gerhard**. 2006. Folter – Daumenschrauben an der Würde des Menschen. Zur Ausnahmslosigkeit eines absoluten Verbotes. – **Beestermöller, Gerhard**; **Brunkhorst**, **Hauke** (ed.). 2006. Rückkehr der Folter? Der Rechtsstaat im Zwielicht. München, S. 115–129.

dictatorial regimes) and the helplessness of the victim[12] has been elaborated as just like the personality-destroying effect[13] of torture – and both are undisputed in the current debate. Thus, severe physical or mental pain or suffering is a symptom of a kind of force that disdains people (and/or their dignity).

But isn't there the risk that with these morally massive statements all differences of the application of force by state authorities are levelled and stigmatized? Using an unpleasant example, shouldn't the limited use of a truncheon be clearly distinguished from pulling fingernails? And doesn't the final phrase of the quoted passage of the UN Convention Against Torture rightly refer to the fact that there are also admissible sanctions that are painful, too? Moreover, there cannot be any doubt that the scope and the acceptance of such sanctions (e.g., corporal punishment) both in the course of history and in various cultures are subject to change[14]. Why is a policeman allowed to hurt a stubborn interferer with a truncheon but not a terrorist in the course of an interrogation? Whoever takes recourse all too quickly for a different purpose should not forget that the purpose of rescue-oriented interrogation has been assessed both in moral and political terms as a means for the purpose of the protection or rescue of innocent people. In addition, in both cases the purpose is to coerce the citizen to adopt a legally imposed behaviour (acceptance of the no-protest zone – obligation to testify).

Therefore, Rainer Trapp has proposed that particular emphasis be concentrated on outrageous practices in the concept of torture and to distinguish in linguistic and legal terms specific interrogation methods in the aforementioned exceptional situations from these practices by means of considering them as rescue-oriented interrogation (which is deemed to be legal or to be legalized)[15]. However, Trapp does not elaborate anywhere on which measures could be specifically concerned, but puts the relevant

---

[12] Cf. **Scarry**, Elaine. 1992. Der Körper im Schmerz. Die Chiffren der Verletzlichkeit und die Erfindung der Kultur. Frankfurt/Main.

[13] Cf. **Améry, Jean**. 1997. Jenseits von Schuld und Sühne. Bewältigungsversuche eines Überwältigten. Stuttgart. From the perspective of the treatment of torture victims: **Graessner**, **Sepp**; **Gurris**, **Norbert**; **Pross**, **Christian** (eds.). 1996. Folter. An der Seite der Überlebenden. Unterstützung und Therapien. München.

[14] Cf. **Burschel**, **Peter**; **Distelrath**, **Götz; Lembke**, **Sven** (eds.). 2000. Das Quälen des Körpers. Eine historische Anthropologie der Folter. Köln.

[15] Cf. to the following **Trapp, Rainer**. 2006. Folter oder selbstverschuldete Rettungsbefragung? Paderborn. The following remarks are found on the pages 44 (definition), 50 (medical experts), 66 (sparing procedure), 213 (30 minutes are enough), 181f (a caught perpetrator is not yet defeated).

responsibility in the hands of medical experts[16]. Nevertheless, he claims that these unknown measures are less harsh than torture since, after all, in the worst case, they would last half an hour. His claims are supported only by the repeated recourse to the described procedure.

I think that, with these vague descriptions, Trapp develops a dangerous pipedream, which can only be simulated as existing if its limits are not precisely stated – for, on the one hand, the interrogation measures are to differ clearly from the legal police actions which are alleged to be ineffective. After all, they must lead with a high degree of probability to the effective breaking of the will of the perpetrator (blackmailer or terrorist) – otherwise they would be simply superfluous. Yet on the other hand, they are supposed to differ just as vehemently from "real" acts of torture that is, they are to be limited both in terms of time and intensity to prevent them from causing any lasting physical or mental damage – otherwise, Trapp argues, they would not be acceptable given their character of "real" torture. I should like to raise doubts that there are such "magic means" which are able to achieve these two opposed goals at the same time[17]! This is neither a legal nor an ethical appreciation of his proposal but rather a claim that from a pragmatic perspective the proposed procedure cannot exist at all, so that any further assessment is unnecessary.

In order to clarify my doubts, I should like to review once more the facts: A criminal has been caught who threatens the lives of innocent people and who is the only person who can avert this threat entailing certain death by revealing the relevant information (the place where the hostage or the bomb is hidden). This threat is very imminent so that other police actions (such as, for instance, search or evacuation operations) are prevented from being implemented with any prospect of success, and one cannot afford, either, to put up with delaying acts of the perpetrator (lies, suggestions). In addition, the perpetrator is also aware of these circumstances; accordingly, he is not at all in a hopeless position (and is not defenceless, either, in this respect) but is rather likely in turn to exercise pressure and to raise demands (e.g., safe exit, freedom for like-minded persons)[18]. It remains to be seen for the time being

---

[16] Horst Herrmann provides an overview of torture methods which have become known: **Herrmann, Horst**. 2004. Die Folter. Eine Enzyklopädie des Grauens. Frankfurt/Main.

[17] Cf. **Stümke**, **Volker**. 2006. Beispielhaft an der Folter vorbei. Eine Randbemerkung zur gegenwärtigen Folterdebatte. – ZEE 50. Gütersloh, S. 216–220.

[18] As rightly stated by **Brugger**, **Winfried**. 2005. Das andere Auge. Folter als zweitschlechteste Lösung. – **Nitschke**, **Peter** (ed.). 2005. Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum, S. 107–117. Therefore, when talking about the defencelessness of the torture victim, one should emphasize it also comprises both the factual and political absence of an authority of appeal and does

whether torture in this specific situation could not, even, be interpreted as a negotiation weakness and, consequently, would be counter-productive. In any case, the will of that criminal would have to be broken, he would have to be pushed from his comfortable negotiating position and would have to be forced to talk without having any alternative option. The key question Trapp has to be asked is: What means, which clearly differ from the incriminated torture measures, are suitable to achieve this goal in the shortest time possible? I think that at this point (at the pragmatic level) there cannot be any soft alternative to "real" torture where force is applied in a massive manner in order to break the individual's will.

Consequently, the definition quoted at the beginning rightly suggests that torture should be distinguished from other inflictions of pain not only in quantitative terms, but it also differs from them in qualitative terms by the characteristic of breaking the will of the tortured individual. The pain and suffering inflicted must be such as to ensure that they achieve this very goal. Therefore, any debate which is lopsidedly based on the assumption that torture comprises merely of particularly brutal interrogation methods and, accordingly, is designed to pursue a merely quantitative shift of permitted acts of force, is too short-sighted – although there may be such a trend which is inherent in the system of society[19]. A rescue-oriented interrogation falls into the category of the concept of torture: It is performed by state officials, so that the tortured individual no longer has any other authority of appeal, and it massively applies force in order to break the prisoner's will and to induce him to make statements which otherwise he would not have been prepared to make. It is merely the hidden purpose of this rescue-oriented torture, which distinguishes itself from, that of previous torture practices, since it is designed to rescue innocent people and backs up this intention by an appropriate procedure.

1.4. The Relevance of the Pictures

In the course of the current torture debate, pictures and scenarios are often used both for the purpose of reinforcement of arguments and in order to prove their limits. Such an approach is indispensable for the mere reason that torture comprises a specific bundle of actions. Opponents of torture rightly refer to the documentation of the horror that this inhuman method has

---

not only say that the victim does not have any possibility of physical or mental resistance; only this way torture remains clearly distinguished from private brutality as described above.

[19] Cf. **Luhmann**, **Niklas**. 1993. Gibt es in unserer Gesellschaft noch unverzichtbare Normen? Heidelberg. This paper has significantly inspired the torture debate.

caused, and still does cause, in order to thus underscore their argument for the maintenance of an absolute prohibition of torture. However, the advocates of a rescue-oriented torture are also allowed to show the conceivable, and, to some extent, even real, resultant costs that this prohibition entails or may entail. Yet two aspects have to be taken into account when resorting to pictures:

On the one hand, pictures more than concepts tend to evoke emotional reactions[20]. This is quite appropriate to the subject provided that the danger of thinking about violence against people in an abstract manner is averted. The debate is very specifically about the pain and suffering with which not only the tortured individual but also the potential victims of the crime are inflicted. The description of torture in literature serves above all to prevent the Unvoiced, at least that which many victims cannot relate, from being given over to silence and forgetfulness[21]. However, there is the risk that the moral outrage over the necessary argumentational discussion dominates, or is even evoked for this purpose, so that a defamation of the opponent replaces an objective discussion of its concepts. This danger should be avoided at all costs. As far as I can summarize the debated situation, pictures have been used with necessary caution and consideration, so that this warning does not have to be intensified.

What seems to be more dangerous to me is the increasing recourse to torture-like measures in movies – be it the rescue-oriented torture in the film "Dirty Harry", the punishment torture in the "Harry Potter" movie (Order of the Phoenix), scenes from the latest James Bond movie, or, above all, in the television series "24", where a special agent again and again has to save the USA under time pressure from terrorist attacks and in doing so repeatedly uses torture-like means[22]. In so far as torture is laid out here as a measure which can be accurately dispensed and, therefore, never causes the evils of which it is otherwise accused, does not cause any subsequent damage to the torturers, and overcomes on a regular basis the most evil rogues and their assassination attempts, torture is undermined and belittled. What is continuously suggested is the perception that torture is harmless and indispensable to successfully prevail against the "bad ones" and, thus, to be able to survive as a citizen.

---

[20] Cf. **Ulbrich**, **Stefan**. 2005. Die normative Kraft der Bilder: Zur Funktion des Bildhaften in der Diskussion über Zulässigkeit staatlicher Folter. – **Nitschke**, **Peter** (ed.). 2005. Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum, S. 119–132.

[21] Cf. **Kramer**, **Sven**. 2004. Die Folter in der Literatur. Ihre Darstellung in der deutschsprachigen Erzählprosa von 1740 bis "nach Auschwitz". München.

[22] Cf. the article of **Rehfeld**, **Nina.** 2007. Der Mann, der uns das Foltern lehrt. – Frankfurter Allgemeine Zeitung (FAZ) of 27 June 2007.

On the other hand, examples by no means have to correspond with the ordinary for the very reason that they are chosen freely and may go to extremes; but they have to be intrinsically consistent and have to meet the requirement. In my opinion, some examples in this respect miss the point of torture. While they may illustrate the legal or moral problem and may affectively support above all the author's position, their excessive distance from any conceivable reality is counterproductive. Thus, for instance, I consider thirty minutes of rescue-oriented interrogation of a terrorist as an approach to be mere window-dressing; additionally, I miss the comparison with the legal and tolerated police methods. Likewise, the ticking-bomb scenario is inspired by a criminal profile, which raises questions: Why should the perpetrator ignite such a bomb in the first place if the blackmailed ransom is paid[23]? Moreover, the scenario construes tension between the lack of time on the one hand and the criminal's viciousness on the other hand, which would be most likely to result in the failure of any problem-solving strategy (including torture)[24]. Put in a nutshell, one can talk with reproach about a normative blackout in such cases: The legal (or ethical) validity is emphasized, and for the purpose of plausibility it is simply determined that torture is available and efficient at any given time without reviewing these prerequisites against reality.

---

[23] Cf. the question of **Bernhard Schlink** at a panel discussion with **Winfried Brugger** on 28 June 2001 at the Humboldt Universität in Berlin. Documented at: **Brugger, Winfried**; **Schlink, Bernhard**; **Grimm, Dieter**. 2002. Darf der Staat foltern? Eine Podiumsdiskussion. – HFR Publikationen, Beitrag 4/2002. S. 1–15. (<http://www.humboldt-forum-recht.de/druckansicht/druckansicht.php?artikelid=44>).

[24] For the purpose of illustration: If there was enough time (until the detonation of the bomb), the police would not depend on torture as the last resort but they could also search for the bomb and evacuate the residents at the same time. Moreover, they could contact potential interlocutors to get support to dissuade the terrorist from his insane action ... But if there was only very little time available, the torture would not only have to make the terrorist speak very quickly without allowing him to faint, but it would also have to result most likely in a true statement, for any lie would mean a loss of time, and the time would be scarce, all the more so since the hideaway would still have to be found and the bomb would have to be defused. And once one would have begun to torture the terrorist, it would hardly be possible to negotiate with him in a "normal" way afterwards.

2. The Legal Situation and its Changeability

The following remarks are largely confined to the communication of the most diverse jurisprudential arguments. Since I am not a lawyer, I will refrain from indulging in expert judgments.

According to the prevailing opinion, the current legal situation in Germany concerning torture is very clear; this is not disputed even by the current inquiries which indeed assert new cases or changed convictions, based on which the legal provisions are to be changed, if appropriate. So far an absolute prohibition of torture applies. This is already indicated in the German Constitution (= GG) by Art. 1 (inviolability of human dignity, acknowledgement of the inviolable and inalienable human rights) and Art. 2 (rights of liberty, which explicitly comprise the right to life and physical integrity) and is found explicitly in Art. 104 Para. 1 covering the legal guarantees in the event of detention:

> "Freedom of the person may be restricted only pursuant to a formal law and only in compliance with the procedures prescribed therein. Persons in custody may not be subjected to mental or physical mistreatment."

In this paragraph, it is clearly stated that torture, which is prohibited without exception, would be committed against persons detained (by the state and its authorities). Moreover, it is emphasized that even detention as a limitation of personal freedom is legal only in particular cases which already result from the emphasis of the individual freedom rights in the first articles of the German Constitution.

The prohibition of torture is confirmed both in police law and in international legal agreements. Thus, according to § 35 (1) of Baden-Württemberg police law, the police are not allowed to use any coercion in the course of interrogations in order to obtain a testimony, which is already fundamentally expressed in § 136 a of the Code of Criminal Procedure: Neither the volition nor the memory of a defendant must be affected by coercive measures (such as abuse, causing fatigue, medical or suggestive interference). At the international level, Germany has been bound by the European Human Rights Convention (since 1953), which in Art. 3 provides for an explicit prohibition of torture (inhuman or humiliating punishment or treatment), a provision, which is non-derogable in accordance with Art. 15: Even in case of a war or any other public emergency which threatens the life of the

nation, it is not permitted to deviate from Art. 3[25]. Together with the United Nations Convention Against Torture, which has already been mentioned, the non-derogable and comprehensive prohibition of torture, which as authoritatively applicable law in Germany, of course, is also binding for the Bundeswehr and its soldiers[26].

This reliability upon the citizen of the state for restricting him/herself and bindingly submitting to the law is an experience, which was cast into the form of laws. However, there may be new social, technical as well as political conditions, which tend to modify the applicable law – a typical process in an open society. With regard to torture, such a new point of debate has developed over the last few years. On the one hand, social matters, of course, have eroded: What is understood by human dignity in the light of increasing medical possibilities is disputable at the borders of life (pre-natal diagnostics, assisted suicide). What is no longer primarily in focus, either, is the state as a perpetrator and, accordingly, the citizen as a victim of encroachments of the state; indeed the state has been profiled to an increasing extent as the protector that is supposed to protect or rescue the (civil) victim of (civil) perpetrators. On the other hand, political changes, in particular the end of the Cold War and the outbreak of new wars, are unmistakable. Since wars, like a chameleon, continuously change their form of appearance, they result in new challenges facing the state: How does a state fight against terrorists? According to these two changes, torture not only enters into view as punishment or a means of hearing evidence, but also as rescue-oriented torture or preventive torture (or defense torture).

The occurrence of such impulses of change does not mean that their proposals are also reflected legally. Indeed, the decision about the rewording or the retention of law lies with the legislator; consequently, it is a political vocation. However, there are voices that indicate that there are also taboo issues and even would have to be – such as the prohibition of torture. Accordingly, they demand not only that the applicable law be adhered to, but moreover that the debate not be forced but rather, if possible, not be allowed

---

[25] Cf. **Poscher**, **Ralf.** 2006. Menschenwürde im Staatsnotstand. – **Lenzen**, **Wolfgang** (ed.). 2006. Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 47–65.

[26] It has to be briefly noted that the firm establishment of the prohibition of torture in the international law has resulted in the establishment of two competing subjects. Not only states but cititzens as well can now assert their rights vis-à-vis (other) states. Yet this change is not confined to the prohibition of torture but applies to all rights of individuals which the international law grants; therefore, it doe not have to be discussed in more detail here.

to occur, since here fundamentals of the society would be undermined[27]. Apart from the fact that such a call, in most cases, rings out too late, and should rather be appreciated as a descriptive observation that a taboo has just been broken, an argument against this position is the fact that it tends to vote with prohibitions instead of arguments. In my opinion, what is required is not a tabooing but the argumentational disproving of the expressed calls for exceptions with regard to the prohibition of torture[28].

In the following, four jurisprudential arguments in favour of a limited legality of torture measures will be presented: Firstly, the concept of the "value gap", then the discourse of the enemy criminal law is analyzed; thirdly, what follows is the recourse to a "semi-legalization", according to which torture in exceptional cases is to remain prohibited but should not be punished. Finally, the distinction between a "core meaning" and a "marginal meaning" of human dignity according to Art 1 GG is presented; it will show the way from the legal to the ethical examination of the prohibition of torture.

2.1. Is the Legal Situation Incomplete?

Winfried Brugger applied the concept of the "value gap" to the assessment of rescue-oriented torture[29]. Accordingly, he holds that there is on the one hand the absolute prohibition of torture, which does not have any wording gap, whereas on the other hand this prohibition interferes with other legal propositions, so that their weighting is clarified. Furthermore, he marks several gaps: According to police law, the final lethal shot in the aforementioned scenarios is legal if this is the only way to protect the law and to effectively avert the danger – whereas torture is not. Likewise, self-

---

[27] Cf. **Fischer**, **Johannes.** 2004. Der Ritter und die schwarze Spinne. Gibt es Notsituationen, die die Folter eines Menschen erfordern und rechtfertigen? – Zeitzeichen 7/2004, S. 8–10.

[28] Cf. **Lübbe**, **Weyma**. 2006. Konsequentialismus und Folter – Kommentar zu R. Poscher. – **Lenzen**, **Wolfgang** (ed.). 2006. Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 67–75.

[29] Cf. **Brugger**, **Winfried.** 1996. Darf der Staat ausnahmsweise foltern? – Der Staat 35. Berlin, S. 67–97; **Brugger**, **Winfried**. 2000. Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter? – Juristenzeitung 55. Tübingen, S. 165–173; **Brugger**, **Winfried**. 2005. Das andere Auge. Folter als zweitschlechteste Lösung. – **Nitschke**, **Peter** (ed.). Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum, S. 107–117; **Brugger**, **Winfried**. 2006. Einschränkung des absoluten Folterverbot bei Rettungsfolter? – Aus Politik und Zeitgeschichte 36. Frankfurt/ Main, S. 9–15.

defense is permitted to a private individual but forbidden to a policeman in an otherwise identical situation. The German Constitution emphasizes the inviolability of human dignity – but here is dignity not opposed to dignity, since it was ignored in both the torture (of the perpetrator) and the agonizing deaths (of the victims) through inactivity? According to Brugger, the respect of the perpetrator's dignity and the protection of the victim's dignity are opposed to each – and both are tasks of the state and its executive bodies. Likewise, the mutual right to physical integrity and to freedom of will collide, since in case of both conceivable options of action available to the police, these rights would be violated at least for one party: Either the perpetrator is tortured in order to break his will or the victims remain in captivity against their will and have to die there miserably. In such a case, Brugger advocates to rate the victims' right higher than the perpetrators' right that is, to make an assessment, which for once permits torture.

However, this argument is subject to legal objection. With regard to police law, Brugger himself notes that the lethal shot does not bend the perpetrator's will but only averts the danger; accordingly, a difference has to be stated here. In addition here, reference should be made to the fact that government bodies do not act directly against the victims, since they are locked up by the perpetrator and threatened with death, but they would actually directly attack the perpetrator. Furthermore, the rule applies that a private individual by definition does not torture, so that that this analogy is erroneous (see above). According to Mathias Hong, what applies with regard to the German Constitution is that the rule for the obligation of respect, is rated higher than the obligation to protect, i.e., that the protection of man in his dignity vis-à-vis the state is more serious than protection by the state[30]. Going along with Brugger, one may consider this legal position as unfair, since his description of the legal situation provides for uneasiness (not only in me) – but in legal terms, this way one leaves the purely legal level and argues in terms of legal ethics. Accordingly, this would not be a legal but indeed a legal ethics assessment problem, which is promoted by new crimes and different experiences of the state.

[30] Cf. **Hong**, **Mathias**. 2006. Das grundgesetzliche Folterverbot und der Menschenwürdegehalt der Grundrechte – eine verfassungsjuristische Betrachtung. – **Beestermöller**, **Gerhard**; **Brunkhorst**, **Hauke** (eds.). 2006. Rückkehr der Folter? Der Rechtsstaat im Zwielicht. München, S. 24–35.

2.2. Does One Have to Treat Enemies and Citizens Equally?

Günther Jakobs has contributed the distinction between civil criminal law and enemy criminal law to the discussion[31]. Accordingly, enemy criminal law is applied against fundamental deviationists since they – unlike citizens, even in case of a breach of law – would not ensure that they adhere to the applicable laws and to respect the social order. According to this position, such enemies have to be fought in order to eliminate the danger they represent, whereas citizens would be held responsible under the provisions of criminal law to make up for the damage – be it in terms of material compensation or symbolically (by means of imprisonment). According to Jakobs, organized crime and terrorists are enemies who jeopardize the survival of the state; accordingly, the security of the citizens can be ensured only by severe measures, which also include preventive acts (engagement legislation). While Jakobs does not mention torture in this context, he does refer on the one hand to the war-like reaction to the hostile attack of September 11, 2001, which also includes preventive torture, while claiming on the other hand that the state must not treat such enemies as persons, since they do not ensure personal – that is, basically standard-compliant – behavior.

Initially, this distinction appears to be appropriate; however, a terrorist represents a different risk – which is more threatening to co-existence – than a private individual who, for instance, slays his or her rich uncle who is assumed to leave a considerable inheritance. And certainly what terrorists have in mind is to fight this state and its order and to extensively re-organize it. But would not the Enlightened state promote this very goal by violating its own principles (i.e, the connection to the law and the acceptance of the limit of personality)? Does the de-personalization of the terrorist not tend to promote the return to ancient conditions, where slaves were allowed to be tortured because they did not enjoy civil rights, in order to document the slaves' reliability which otherwise could not be assumed to exist? Jakobs takes recourse to the contract theoreticians Hobbes and Kant, who considered rigorous measures of force as a legal means within the scope of constituting the state: Whoever is not prepared to accept the condition of state would have to be excluded (that is, to be killed or banned). But can one interpret this philosophically construed transition from the natural state to state order as a real description of the foundation of the state? And can one beyond that invoke such a first foundation in order to describe the struggle of

[31] Cf. **Jakobs**, **Günther**. 2004. Bürgerstrafrecht und Feindstrafrecht. – Höchstrichterliche Rechtsprechung Strafrecht – HRRS. Aufsätze und Urteilsanmerkungen, 3/2004. S. 88–95.

terrorists? Wouldn't the enemies rather have to be anarchists? A terrorist has different political ideals, which he derives from his ideology and which he would like to have implemented without any compromise. But he does not deny the "That", the mere existence of an (organized) order differing from the natural state. Therefore, stricter provisions governing the way of dealing with terrorists may be considered from a legal perspective, yet the approach of denying them their personality (thereby opening a loophole to torture) is not covered by the enemy law but rather induces the Enlightened state to contradict itself.

2.3. Should "Dirty Harry" be Legalized?

The fact that torture itself is illegal in the aforementioned scenarios is hardly denied. Therefore, it cannot be called for as a police measure. But it would be quite conceivable that there are policemen who in such a case would commit an illegal act for a morally good reason – that is, in order to save innocent victims. Such cases are not unknown in the domain of jurisdiction, either; a classical example is tyrannicide, and a current case would be rescue-oriented torture. In accordance with a movie of 1971, such a torturing policeman is called "Dirty Harry". However, the moral acknowledgement of the rescuer goes hand in hand with his legal punishment: a tragic solution[32] – and here the question arises whether the legislator should leave the police in such a situation alone with their conscience. If "Dirty Harry's" action was morally impeccable, then why shouldn't it be legalized, thereby providing the police with freedom of action and an easing of their mental stress in this tense situation? In any case, such a change would exert pressure on policemen if they were then required to perform rescue torture, against which the moral grounds are just as strong. In such a dilemma situation, security of action cannot be established. Indeed, both options are very stressful for the policemen[33], therefore, this cannot be used as a reason to modify the applicable law.

However, perhaps it is possible to legally justify or excuse rescue-oriented torture[34], so that at least the action remains exempt from punish-

[32] Cf. **Poscher**, **Ralf**. 2006. Menschenwürde im Staatsnotstand. – **Lenzen, Wolfgang** (ed.) 2006. Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 47–65 (S. 61f).

[33] Cf. **Boppel**, **Peter**. 2006. Persönlichkeitsbildung von Folterern und die Frage der "Rettungsfolter". – **Goldbach, Michael** (ed.). 2006. Die Wahl der Qual. Folter durch Polizei und Militär. Hofgeismar, S. 33–43.

[34] Whereas a justification means that the present action can be proven to be in conformity with the legal situation, an apology states the illegality of an action, for

ment – analogous to specific cases of abortion (Section 218, German Criminal Code). For that purpose, torture would have to be incurred by a special emergency situation; consequently, there would have to be either an individual self-defense situation, or a national emergency would have to have been proclaimed or at least identified. However, we have already noted that self-defense by definition does not apply to torture and that the prohibition of torture is worded to be non-derogable. Thus, there is no legal substantiation in sight. But could - and should – not the definition of self-defense be extended to the aforementioned cases? Self-defense is defined as "defense that is required to avert an imminent unlawful assault from oneself or another" (Section 32, German Criminal Code) – and after all, these two very criteria are met in both scenarios[35]. But this interpretation also entails problems: First of all, it is questionable whether a means which is so clearly prohibited such as torture could ever be required at all[36]. Moreover, it is disputable whether a blackmailing really represents an assault or not merely a punishable behavior[37]. However, above all there would be the risk that a legal black hole would be created for the executive if it were granted such extensive exemption clauses in the event of necessity, which, after all, knows no law. The fact that in the Daschner case very lenient sentences were passed proves the ability of jurisdiction to take into account the particular tragedy of the case – although the sentence itself is controversial, since this taking into account was also interpreted as an assault on the unrestricted normativeness of fundamental rights. In the light of this sentence, what is at least waived is the moral pressure to make legal changes here, all the more so since these are very rare cases.

2.4. The Changeability of Law

The focus of the debate described above is placed on fundamental legal provisions, since the absolute prohibition of torture refers to Art. 1 GG, which

---

which nevertheless there were good reasons, so that a reproach of guilt and then a punishment can be waived.

[35] Cf. **Erb**, **Volker**. 2006. Folterverbot und Notwehrrecht. – **Lenzen**, **Wolfgang** (ed.). 2006. Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 19–38.

[36] Cf. **Kreuzer, Arthur**. 2005. Zur Not ein bisschen Folter? Diskussion um Ausnahmen vom absoluten Folterverbot anlässlich polizeilicher "Rettungsfolter". – **Nitschke, Peter** (ed.). 2005. Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum, S. 35–46.

[37] Cf. **Schild**, **Wolfgang**. 2005. Folter einst und jetzt. – **Nitschke, Peter** (ed.). 2005. Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum, S. 69–93 (S. 85f).

declares the dignity of man to be inviolable and obliges any government power to respect and protect this dignity. Yet is it so clearly defined what the concept of human dignity comprises? Or does the debate about torture not rather – in addition to several other discussions (above all in the domains of medicine and biology) – call for a specific examination as to when this dignity is neglected? And do such specific examinations not presuppose a differentiated consideration – which is precisely what a categorical prohibition does not provide for?

In his comment on this article in 2005, Matthias Herdegen also states that the claim to dignity of man has to be specifically determined – above all weighed against human life, which was also termed by the Federal Constitutional Court as an ultimate value within the scope of the order of the German Constitution[38]. This way he opposes the postulation of a superpositive, prescribed foundation of dignity, which belongs to man qua nature or in his capacity as God's image. Vis-à-vis such settings, Herdegen advocates considering human dignity as a positive – that means set by people and changeable – basis of our value system. In order to ensure that the necessary stability and legal reliability of the concept of dignity is preserved, he proposes that a core of dignity which should never be allowed to be violated be distinguished from a marginal concept, with balancing considerations up to a "balancing overall appreciation". Accordingly, for instance, the freedom of assembly (Art. 8 GG) and the prohibition of extradition (Art. 16 GG) feature only "loosely related to human dignity" and, thus, would be changeable without leaving the ground of the German Constitution.

On the other hand, Herdegen holds that torture in accordance with current consensus belongs "to the few modally defined abuses which [...] are interpreted without any reservation as violations of dignity". In such a case, the purposes do not have to be taken into account; the ways and means of the act of torture are sufficient to come to a clear prohibition. But here as well he opens a loophole: Not every physical or mental intervention should be judged in purely modal terms and, accordingly, condemned as torture; indeed, in some cases the colliding legally protected rights, the purpose and the perpetrator's behaviour are taken into account. For instance, the administration of truth drugs or a compulsory medical treatment could

---

[38] Cf. **Herdegen**, **Matthias**. 2005. Artikel 1. – **Maunz**, **Theodor**; **Dürig**, **Günter** (eds.). 2005. Kommentar zum Grundgesetz, Lieferung Nr. 44. München. The following remarks are found on pages 16 (Life as a Supreme Value), 28 (Striking an overall appreciation balance), 17 (loose relations), 32 (Prohibition of Torture) and 31 (Coercive Treatment). – Currently the new comment by Herdegen and the previous one by Günter Dürig co-exist; accordingly, Herdegen has not replaced Dürig as otherwise usual. This circumstance proves how controversial the current debate situation.

"precisely not violate the claim to dignity due to the finality designed to save lives". However, these exceptions do refer to torture; Herdegen explicitly dissociates himself from legalizing lesser forms of inflicting pain (such as the rescue-oriented interrogation) through this hidden path. However, as he does not even categorically consider a "will-breaking [...] coercive treatment" to be a violation of dignity, his remarks become ambivalent, and his adherence to the absolute prohibition of torture becomes hollow.

In terms of wording, Herdegen continues to adhere to the absolute prohibition of torture, since torture as a means alone already contradicts the principle of inviolability of human dignity. At the same time, his commentary, apart from the criticised ambiguity, marks a change in the strategy of justification, which corresponds to societal change, which also shows itself in the torture debate. A derivation of a general binding truth is replaced by a grown consensus, which in terms of its substantial characteristics is quite changeable; the substance of which, however, is designed to be retained according to the legislator's intention. Yet in this way, the case examples are also weighted differently; they are no longer merely designed to illustrate the applicable law, but they may contribute to modifying the consensus and, thereby, to creating a new political majority situation, in particular if they address social changes. The fact that some authors go further than Herdegen and want to modify the absolute prohibition of torture as well is commensurate with his approach[39]. However, the applicable law raises high obstacles so that proposals of change depend on ethical support. Whoever wants to legalize rescue-oriented torture (and preventive torture) in exceptional cases will have to legitimize this concern in the light of the all too clear legal situation.

3. The Current Debate Situation from an Ethical Perspective

The change in the justification strategy made by Herdegen has distinct equivalents in the domain of ethics, which cannot be surprising, if it is backed by social change. The recourse to generally acknowledged premises, which then are specified and mark clear limits at the same time, has lost out, in terms of persuasive power since such premises can hardly be found any more or are so abstract that their derivations appear to be arbitrary – for instance, in a plural society the biblical recourse to man being made in the image of God

[39] Cf. **Rottmann, Frank**. 2005. Das Mißhandlungsverbot des Art. 104 Abs. 1 S. 2 GG als Maßstab verfassungskonformer Auslegung. – **Goerlich, Helmut** (ed.). 2005. Staatliche Folter. Heiligt der Zweck die Mittel? Paderborn, S. 75–95.

can no longer claim to be generally binding, unless it is hollowed out to an empty phrase. Accordingly, one can only adhere to an established consensus despite differing derivations, which, of course, is combined with the argumentative promotion of the own foundation. However, social changes on the one hand and, on the other hand, the capability of man to be personally responsible for the legal proposition without being able to take recourse to any "sacrosanct" premises result in the erosion of this normative consensus, too. For the purpose of illustration of this very development, Niklas Luhmann presented the Ticking Bomb scenario as an example in 1992 and, thus, significantly promoted the debate, which has vigorously confirmed his thesis[40].

The ethical debate about torture is firstly involved in a fundamental dispute, which is determined by the perceived change: There are deontological and consequentialist lines of argumentation. Whereas the focus of the latter is put on the foreseeable consequences of an action and it makes a balanced consideration here, the deontological thinking makes recourse to binding obligations, which result from clear ethical standards. At first glance, this results in an unambiguous allocation: A prohibition of torture is assumed to be advocated by the Deontologists, who continue to derive it from the inalienability of human dignity, whereas taking all consequences into account would result in exemptions in cases where otherwise negative consequences would prevail. But this impression is deceptive for the mere reason that some consequentialists also maintain an absolute prohibition. Above all, however, this comparison of positions is much too coarse, in particular in issues of political ethics, since Deontologists also take consequential considerations into account in their arguments[41].

However, the core issue of the dispute remains: The insistance on a reasonable derivation of all normative propositions, which in most cases is combined with the standard that such a derivation is obtained by the demonstration of positive consequences, contradicts the recourse to generally binding premises, which in specific cases have to be updated, taking the consequences into account, but are firmly established as supreme propositions. But this way the premise is qualified – in linguistic terms by the very relationship to the consequences alone; and in factual terms since in some situations these consequences may also fail to occur or may be overlapped by other consequences. Yet premises cannot be qualified (and cannot be substantiated, either); in this very case, they would cease to be premises. In

---

[40] Cf. **Luhmann, Niklas**. 1993. Gibt es in unserer Gesellschaft noch unverzichtbare Normen? Heidelberg.

[41] Cf. **Birnbacher**, **Dieter**. 2006. Ethisch ja, rechtlich nein – ein fauler Kompromiss? Ein Kommentar zu R. Trapp. – **Lenzen, Wolfgang** (ed.). 2006. Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 135–148.

fact, they are replaced by the call for a reasonable derivation, which in turn originates from the aspiration of man to autonomously decide which actions are allowed in which cases, and also who puts any ethical or legal standards before him within the scope of this autonomy, and decides about their applicability. This aspiration of autonomy then represents a new premise; it is no longer scrutinized but used as a basis for derivation.

This dispute about premises cannot be pursued any longer here; on the contrary, our gaze should be refocused on the torture debate. Therefore, the breakdown of the arguments does not follow the fundamental debate but is governed by the reference values. First, the arguments that refer to the dignity of man are analyzed; in a second step, the state as a player is considered. What follows thirdly is the "breach of the dyke" argument, in so far as it outlines very trenchantly the implications for criminal justice procedure. Finally, the discourse of the tragic situations in life is addressed. By way of introduction, I should like to indicate that, to my knowledge, the recourse to potential consequences, no matter whether they are invoked to retain or relax the prohibition of torture, is hardly based on reliable information, so that the weight of the individual argument is hard to determine. Therefore, I cannot assess the likeliness of the occurrence of the consequence and the intensity of its implication.

3.1. The Dignity of Man

The inviolability of human dignity is not only defined by the German Constitution but also corresponds to the normative individualism that characterizes our (enlightened) self-concept. It states that dignity cannot be balanced as a value against other values. Indeed, the individual sets a bar to any action of the state. Even his personal freedom may be restricted by the state only in justified execptional cases (e.g., arrest); his volition, which makes him a self-determined subject of his actions and failure of action, as it is developed in other individual rights (e.g., freedom of religion), must not be attacked at all. Torture as the forceful breaking of the will which deprives man of any chance of holding on to his autonomy, is so clearly an attack at the self-determination of man that the absolute prohibition of torture undoubtedly results from this image of humanity.

This classical position has been scrutinized with two arguments in the course of this torture debate. Both of them refer to normative individualism by insisting that there are two subjects, those are, perpetrators and victims, with their rights and their dignity. The first argument says: Not only the dignity of the perpetrator but also that of the victim is inviolable. What is now at the focus of the controversy is the policeman (or the soldier), who

would either be expected to make a balanced assessment of dignity or would have laid down for him, whose dignity is to remain inviolable[42]. In the first case, the uncertainty of action of the policeman would only be intensified, since he would now have two options of equal rank. In the second case, a change for what is presumed to be the better could be achieved only if the concept of dignity were clearly weighted in favour of the victim – which would, however, explode the conventional concept of dignity (as opposed to value). For the opposite position, which can be reached without such deliberation, is also unambiguous. Consequently, this counter-argument clearly illustrates the ethical problems of normative individualism; yet it does not offer a better solution but only, to an increasing extent, the insight that here we are faced with a dilemma and in a tragic situation. Now whoever adds that man in such a situation must not remain idle but has to act, refers to the other premise of the sovereignty of the person acting, which, however, would be jeopardized if one were to have to establish impotence here – for the policeman would not in any way remain idle if he "only" interrogated or took other action, but his autonomy and the expectation of achieving a solution with his action would be scrutinized. Torture as a compensation (or even as a displacement activity) in the light of the powerlessness of a policeman in a tragic situation cannot be ethically legitimized.

Additionally, one can object to the first argument that not the civil servant but the perpetrator violates the dignity of the victim. Even though Art. 1 GG calls for the protection of the dignity (of the victim) in addition to the respect of dignity (of the perpetrator), one must not level the distinctions in the actions – especially not from an ethical viewpoint. However, what cannot be denied is the fact that the victim's life is imminently threatened – and this second argument is stronger: If the torture of the victim were limited in terms of time and if he or she were then released, one would hardly recommend a rescue-oriented torture – at least this scenario has never been considered, as far as I know. But what is impending at the end of the degrading treatment is death. If life is considered to be the supreme value within the scope of the order of the German Constitution and, in addition, is the vital basis of dignity, wouldn't then the rescue-oriented torture, which saves the life of the victim(s) at the expense of the violation of the perpetrator's dignity, be the lesser evil? For isn't it worse to be killed than to be tortured? Does not this hierarchy already result from the fact that victims of torture do not kill themselves but fight for their survival[43]?

---

[42] Cf. **Nitschke**, **Peter**. 2005. Die Debatte über Folter und die Würde des Menschen: Eine Problemskizze (zur Einleitung). – **Nitschke**, **Peter**. (ed.). 2005. Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum, S. 7–34 (S. 16f).

[43] Cf. **Steinhoff, Uwe**. 2006. Warum Foltern moralisch manchmal erlaubt, ihre Institutionalisierung durch Folterbefehle aber moralisch unzulässig ist. – **Lenzen**,

While one could object to this second argument that soldiers, if necessary, have to risk their lives for the freedom of their country which is even determined as a general expectation by means of compulsory military service – a war (even as a state of defense), which is here referred to, cannot be approved from an ethical perspective but should be considered at best as a lesser evil. Thus, the fact that soldiers are killed in war does not argue against the supreme valuation of life but merely shows what bad acts occur. More important might be the indication that combatants would be expected even under the extreme stress of a life-threatening operation to observe specific rights and to refrain from torturing even if this prohibition would even increase risk to their own life.

What is problematic about the second argument, which calculates dignity against life, is not the appropriate analysis of the scenarios, but indeed the certainty – which I consider to be pretended – with which, here, consequences are estimated and weightings are defined. We cannot think of ourselves as being dead - and we cannot think of ourselves as having lost our personality and our self-determination, either. Thus, there are quantities on both sides of the balanced consideration that we cannot command, since "I think" in both cases cannot accompany our considerations any longer. Consequently, it is not possible here to perform an accurate assessment. Analogical conclusions are not helpful at this point, either, since there is no unambiguity. There have been victims of torture who committed suicide because they no longer felt at home in the world (Jean Améry); likewise, there were victims of torture who had to be treated for their lifetime because they did not get rid of their traumas. And if one takes a look at the debate about self-determined dying, there are also people who would prefer death to a life that is no longer consciously lived. But, likewise, there are also the contrary votes. Therefore, one can only call for restraint in the face of this argument. The argument illustrates what is at stake with regard to rescue-oriented torture. But the presented problem also shows that it is not appropriate to headily adopt a position. Life and dignity cannot be considered against each other with a claim to rationality and universal validity.

3.2. The Self-Limitation of the State

Historically, human rights have been prized from the state. They limit the access of state power, and it is the achievement of the Enlightened state that

---

Wolfgang (ed.). 2006. Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 173–197.

it voluntarily accepts this limitation and has codified it in legal terms[44]. After all, it was the state that arbitrarily arrested, tortured and killed. The fact that the Human Rights Conventions were adopted, above all after World War Two, underscores the focus that was put on the state as a perpetrator. But by now this experience has not only faded away in the course of history and been overshadowed by life in a working democracy; in addition, there are new challenges which profile the state as a protector against new and different threats. We no longer encounter National Socialists as (presumed) vigilantes or disguised politicians but as gangs of criminals against whom the police – and, if possible, the politicians, too – may protect us. Terrorist attacks, which – as in the Ticking-Bomb scenario – are aimed directly at the civilian population, provide evidence for this change, whereas the kidnapping scenario merely impresses by an increased maliciousness of the kidnapper.

Consequently, the new threats evoke an increased need of the population for security, which is brought to a firmly established democratic constitutional state. On the other hand, threats to personal freedom are considered to be less significant; many preventive measures which have been taken over the last few years would not have been accepted thirty years ago. But if the population desires an amendment of the social contract and attaches more weight to its security than to its freedom, a correspondingly "strong state" would not by any means lose its legitimacy. Of course, it should be discussed critically whether this desire is based on a very emotionally foundation and fails to sufficiently take into account the potential risks, but the democratic constitutional order would not be jeopardized. Does this also apply if rescue-oriented torture is included into the desired package of measures? The pragmatic objection that in the aforementioned scenarios rescue-oriented torture would hardly be effective is suitable only to a certain extent as a counter-argument, since the sense of security nevertheless could be reinforced. In addition, what are lacking are reliable empirical values.

In order to prevent the prohibition of torture from being softened in the light of new security risks, human dignity is referred to as a normative bar to the state power: It is said that the torturing policeman overrides the constitutional state and replaces the legal procedure by mere force[45] – thereby marking a qualitative difference to the sharpening of laws and measures within the constitutional state. But does this also apply if the torture measures were legally permitted and regulated in exceptional cases?

---

[44] Cf. to the following **Reemtsma**, Jan Philipp. 2005. Folter im Rechtsstaat? Hamburg. The statements on obligatory cooperation are found on page 125f (quote: 126).

[45] Cf. **Enders**, **Christoph**. 2005. Die Würde des Rechtsstaats liegt in der Würde des Menschen. Das absolute Verbot staatlicher Folter. – **Nitschke**, **Peter** (ed.). 2005. Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum, S. 133–148.

According to Jan Philipp Reemtsma, the constitutional state is not only characterized by governing regulations and procedures but also by keeping open the individual's possibility not to cooperate and, thus, to adhere to his/her own aversion or will. This very "minimum possibility of resistance" is removed by torture by forcefully breaking the individual's will. The state would become an absolute ruler, the "almighty state", the citizen would be submitted to its complete power of control, he or she would not have a personal or legal authority of appeal which could be called upon against brutality. Therefore, the need for security is considered to have to be submitted to an absolute limit by the prohibition of torture.

One could object that only specific citizens would have this experience that is, the perpetrators who proved to be obstinate and act like "enemies" of the state. The vast majority of the population would never have this experience, since they would not want to adopt criminal behaviour – at least not to that extent. What they feared much more would be to become the victims of such perpetrators. But don't they demand that the state adopt the level of force of the criminals and that it should respond to terror with torture? And would not the torturing state thus contribute to the further escalation of violence? In that case, the need for security would then be satisfied at a high price and would have been achieved only temporarily, and the state would change even more its once enlightened shape[46]. But the presentation of these potential consequences in this way is not yet convincing, for it relies on the instability of our democratic constitutional state (including its population) and on its inability to clearly distinguish the required shift of limitations from boundlessness.

This argument becomes much stronger if the symbolic consequences that the permission to torture would entail, both internally and externally, are taken into account. Externally, the permission to torture could cause a severe setback to the international struggle against human-rights violations. While no dictatorship is likely to be impressed by the fact that torture is not applied here, the symbolic characteristic of our country that has been so far evident at the international level, that it is possible to live together in security and peace without torture, would not apply any longer – and the relevant aspiration would collapse. Indeed, our country would also meet the characteristics of terrorism insofar as it would accept its means, its brutal force without consideration of individuals in order to achieve political goals. Thus, it would be hardly possible to counter the assertion that any talking about human dignity was only power rhetoric. The counterargument that, after all, torture was subject to legal limitations is neither pragmatically nor ethically conclusive. In pragmatic terms, it has been proven that any torture is applied

[46] Cf. **Derrida**, **Jacques.** 2003. Schurken. Zwei Essays über die Vernunft. Frankfurt/Main.

to break the individual's will – otherwise it is superfluous. Any belittlement of this infliction of force would quickly be exposed as such. And in ethical terms, the decisive limit is already crossed with the permission.

Within society, this external effect corresponds to sceptical restraint: Would we still be proud of our free democratic constitutional order if it went along with torture? Would we be happy to live in a state that has restored pre-modern age methods[47]? I assume that the call for more security would turn silent if specific measures were presented which could be suitable for breaking the will of a terrorist with the necessary efficiency[48]. A state, which boundlessly subordinates any individual to its state rationale and thus fails to respect him, will hardly gain the trust and confidence of the citizens. If one considers in addition that – thank God – the cases looked at so far have been rare, it becomes evident that the symbolic price for an aspired gain in terms of security is very high: This would promote a "comprehensive coverage mentality" of the population which would face the state with unrealizable claims. A need for security which is not linked back to – and thus, limited by – the freedom of the citizens tends to entail a normalization of the state of emergency[49] – not only at the expense of the perpetrators. Indeed, a central achievement of the modern state would be endangered that is, the fact that it is not a divine authority but a product of people, thereby ceasing, however, to be so in the horizon of omnipotence and omniscience.

---

[47] Cf. **Falk**, **Ulrich**. 2006. Rechtsstaatliche Folter? Rechtshistorische Anmerkungen zu einer tickenden Bombe. – **Anders**, **Freia**; **Gilcher-Holtey**, **Ingrid** (eds.). 2006. Herausforderungen des staatlichen Gewaltmonopols. Recht und politisch motivierte Gewalt am Ende des 20. Jahrhunderts. Frankfurt/Main, S. 90–111.

[48] According to a poll of the Norddeutsche Rundfunk (NDR) in November 2004, the population was divided in the assessment of the Daschner case; 51% considered the approach to be correct, the other half rejected any threat – information provided based on **Lenzen**, **Wolfgang**. 2006. (")Folter("). Menschenwürde und das Recht auf Leben – Nachbetrachtungen zum Fall Daschner. – **Lenzen**, **Wolfgang** (ed.). 2006. Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 199–224 (S. 199). The balance presumably would shift if the basis of assumption would change from the threat to the torture and from the exception to the law.

[49] Cf. **Frankenberg**, **Günter**. 2006. Folter, Feindstrafrecht und sonderpolizeirecht. Anmerkungen zu Phänomenen des Bekämpfungsrecht. – **Beestermöller**, **Gerhard**; **Brunkhorst**, **Hauke** (eds.). 2006. Rückkehr der Folter? Der Rechtsstaat im Zwielicht. München, S. 55–68.

3.3. Breach of the Dyke?

The "breach of the dyke" argument belongs to the standard repertoire of consequentialism. It indicates that a flood of negative consequences results from a considered change and would thrust society into chaotic circumstances. Therefore, this argument is used to advocate the maintenance of the prohibition of torture. However, in the light of the experience that, despite numerous – and some serious – innovations, we still live in well-ordered circumstances, the weight of this arguments should not be rated too highly; often one gets the impression that it only conceals the fear of what is new. Moreover, the argument describes a typical characteristic of jurisdiction that is, to refer to precedents and, thus, to extend successively their area of applicability[50]. Finally, the argument has an anthropological connotation; it makes evident that people may tend to reinforce institutionalized cruelties[51]. In the following, the dreaded swing to the criminal procedure is limited: What could happen to the police and to jurisdiction if torture were permitted on an exceptional basis?

According to the "breach of the dyke" argument, the admission of torture would gradually arouse new desires – and relatively independent of its success. Successful torture will probably be extended, but if it fails to be successful as assumed, it could be perceived that the torture intensity was too low. In both cases, the result would be an escalation of the, initially limited, torture. Rainer Trapp precisely describes the potential extensions, with the sequence – apart from the final item – being neither objective nor chronological[52]:

- Methodical extension: Tougher measures are taken
- Conditional extension: The identification of the perpetration is weakened (the mere suspicion alone is enough)
- Final extension: Other information which is relevant to the police may be extorted
- Personal extension: Relatives or accomplices are involved
- Final breach of the dyke: Extension to the entire range of crime fighting

---

[50] Cf. **Bielefeldt**, **Heiner**. 2005. Das Folterverbot im Rechtsstaat. – **Nitschke, Peter** (ed.). 2005. Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum, S. 95–106 (S. 101).

[51] Cf. **Milgram**, **Stanley**. 1974. Das Milgram-Experiment. Zur Gehorsamsbereitschaft gegenüber Autorität. Reinbek, and **Zimbardo**, **Philip G**. 2005. Das Stanford-Gefängnis-Experiment. Eine Simulationsstudie über die Sozialpsychologie der Haft. 3rd edition. Goch.

[52] Cf. to the following **Trapp**, **Rainer**. 2006. Folter oder selbstverschuldete Rettungsbefragung? Paderborn, S. 192f.

It should be undisputable that nobody can desire these consequences; all of them are to be condemned from an ethical perspective. But this does not mean that the likeliness of their occurrence has been decided yet. Therefore, it is recommendable to exercise restraint vis-à-vis these arguments. They refer to potential risks, but they do not provide reliable forecasts.

What are more worrying are the consequences for the police: In order to be able to apply torture effectively in the aforementioned scenarios, a sufficient number of appropriately trained policemen must be available. Given the scarcity of time, it is likely that at least one policeman in every rural and urban district would have to be a specialist in the interrogation method in order for him to be both quickly on the scene and suitably acclimatised to the local situation and for him to be able to act precisely[53], for the consequences of poorly measured torture would be awkward – both the unconsciousness or the death of the perpetrator and the endurance of a torture which is too soft would be sure to entail the death of the victims, since this perpetrator will no longer be willing to negotiate. Apart from the cost incurred by the provision of such trained personnel, there is the risk of the brutalization of those policemen, which has been frequently observed in torturers – be it due to the isolation from their comrades or due to the personality changes resulting from the stress[54].

3.4. Dilemma or "Tragic Choice"?

When striking a balance of the reasoning we have been pursuing so far, it is obvious that the arguments for a relaxation of the absolute prohibition of torture has not convinced me. However, this is not due to the fact that I wish to belittle the described emergency situation. There may be these extreme cases, where finally the only solution we see is unchecked force. In parti-

---

[53] A conceivable alternative would be that some specialists were available in a central location in Germany and would be flown in, if required. But apart from logistic problems (transport of specialists and equipment and its installation), which suggests a prolongation of the period until the arrival, the lack of familiarity with the specific local situations is an argument against this solution. Additionally, the criticized consequence of brutalization would be much more serious, since these policemen could easily deprave to torturers.

[54] Cf. **Grüny**, **Christian**. 2003. Zur Logik der Folter. – **Liebsch**, **Burkhard**; **Mensink, Dagmar** (eds.). 2003. Gewalt verstehen. Berlin, S. 79–115 (S. 105ff), and **Rothkegel, Sibylle**. 2006. Die Psychologie der Opfer. – **Goldbach**, Michael (ed.). 2006. Die Wahl der Qual. Folter durch Polizei und Militär. Hofgeismar, S. 45–52. The book of **Gustav Keller** (1991). Die Psychologie der Folter. Frankfurt/Main, which was published by amnesty international, is still of fundamental importance.

cular, the statement of Reemtsma, who, in the light of his own experience as a kidnapping victim admits having used force in similar situations until stopped by disgust at his own actions[55], makes me think, all the more so since I – above all in my role as the father of a family – can imagine scenes, which already in my imagination cause a strong emotional reaction. On the other hand, I share Reemtsma's conviction that I would not like to live in a state that tolerates such a behavior, let alone a state that practices torture itself, but that I expect that I would be taken to account and punished for this brutality.

Both scenarios are real dilemma situations – although I do have reservations about the description, they primarily refer however to the likeliness of success of the proposed solution. Dilemmas are thoroughly suitable for bringing forth the issue of which fundamental attitudes are authoritative for us, whether we have non-derogable convictions, and which taboos of action (not thinking bans!) we deliberately imposed on ourselves. I am convinced that we are in a tragic situation since we only have morally evil alternatives of action, both of which, in addition, offer only minor prospects of success. And at this very point my antipathy against the presented permission to torture develops: I share neither the excessive security-oriented thinking nor the claim to autonomy to be able to master every situation by means of rationally balanced action.

It is certainly correct that freedom and security have to be respected and protected by the state in a balanced form. Likewise, it has to be stated that the balance may shift in the light of changes both in the world and in our convictions. Moreover, there are differing personal preferences here, which are also reflected in the political environment, so that political compromises are necessary. I think it is worrying that the need for security is invoked even against the fundamental rights of our constitution. Is this really a reflection of the interest of the population – rather than the fundamental attitude of the "movers and shakers", who objectify everything, considering that they are able to work on it[56] and, accordingly, cannot stand to be brought to the limits of their options of action? I feel that the "strong state" is a political option in which I do not have to share but rather have to accept, whereas an "almighty state" represents a self-imposed overload of the state under which the citizens will suffer.

Accordingly, it makes a considerable difference if the discourse of a tragic situation is modified to the term "tragic choice", since this expression insinuates that we as players (still) hold the reins in our hands. But in the

---

[55] Cf. **Reemtsma**, **Jan Philipp**. 2005. Folter im Rechtsstaat? Hamburg, S. 122.

[56] Cf. also **Spaemann, Robert**. 2001. Über den Begriff der Menschenwürde. – **Spaemann, Robert** (ed.). 2001. Grenzen. Zur ethischen Dimension des Handelns. Stuttgart, S. 107–122.

aforementioned scenarios, this applies only to a limited extent, since the perpetrator is not defenceless but makes demands and, what is more, has time on his side, so that the public servants' passivity would reinforce his position. This is not supposed to ethically legitimate the perpetrator nor to call for fatalism; the point is simply to bring forward the simple truth that we both as individuals and as a state may get into situations where we do not have any appropriate options of action. This may mean, on the one hand, that we do not see any promising alternative; on the other hand, it may mean that we will not be able to avoid becoming guilty given the remaining options of action – a thought which Dietrich Bonhoeffer developed in his ethics[57].

In the course of the debate, the movie hero "Dirty Harry" was repeatedly referred to, who in a dilemma situation, comparable with Reemtsma's pronouncement, acted illegally based on moral conviction. The policeman tortured a kidnapper in order to save a hidden girl from suffocation. Such an option can never be ruled out as an alternative. It calls for respect if the perpetrator stands trial, thereby documenting that he does not want to let his action become the rule. However, if "Dirty Harry" is taken as a role model and an appropriate action is called for, the argumentation line changes. The point is no longer a deliberate acceptance of guilt but the call for "a strong man" who solves any problem, if possible. Yet there is no such person. We as Christians hope that God will judge perpetrator(s) and victim(s) on the Last Judgement. Even those who do not share this belief can understand that the concept of God marks a limitation here and rejects excessive claims of man to power.

Reference list

Améry, Jean. 1997. Jenseits von Schuld und Sühne. Bewältigungsversuche eines Überwältigten. Stuttgart.

Anders, Dieter. 2007. Aktuelles Forum – Die Diskussion zur rechtlichen Zulässigkeit staatlicher Folter in Ausnahmesituationen. – **Goerlich, Helmut** (Ed.). 2007. Staatliche Folter. Heiligt der Zweck die Mittel? Paderborn, S. 13–40.

Beestermöller, **Gerhard**. 2006. Folter – Daumenschrauben an der Würde des Menschen. Zur Ausnahmslosigkeit eines absoluten Verbotes. – **Beestermöller, Gerhard**; **Brunkhorst**, **Hauke** (ed.). 2006. Rückkehr der Folter? Der Rechtsstaat im Zwielicht. München, S. 115–129.

Bielefeldt, **Heiner**. 2005. Das Folterverbot im Rechtsstaat. – **Nitschke, Peter** (ed.). 2005. Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum, S. 95–106 (S. 101).

[57] Cf. **Bonhoeffer**, **Dietrich**. 1998. Ethik. Ed. by **Tödt**, **Ilse** ***et al.*** 2nd edition. München, S. 245ff.

Birnbacher, **Dieter**. 2006. Ethisch ja, rechtlich nein – ein fauler Kompromiss? Ein Kommentar zu R. Trapp. – **Lenzen, Wolfgang** (ed.). 2006. Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 135–148.

Bonhoeffer, **Dietrich**. 1998. Ethik. Ed. by **Tödt**, **Ilse *et al.*** 2nd edition. München.

Boppel, **Peter**. 2006. Persönlichkeitsbildung von Folterern und die Frage der "Rettungsfolter". – **Goldbach, Michael** (ed.). 2006. Die Wahl der Qual. Folter durch Polizei und Militär. Hofgeismar, S. 33–43.

Brugger, **Winfried.** 1996. Darf der Staat ausnahmsweise foltern? – Der Staat 35. Berlin, S. 67–97;

Brugger, **Winfried**. 2000. Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter? – Juristenzeitung 55. Tübingen, S. 165–173

Brugger, Winfried; **Schlink, Bernhard**; **Grimm, Dieter**. 2002. Darf der Staat foltern? Eine Podiumsdiskussion. – HFR Publikationen, Beitrag 4/2002. S. 1–15. (<http://www.humboldt-forum-recht.de/druckansicht/druckansicht.php?artikelid=44>).

Brugger, **Winfried**. 2005. Das andere Auge. Folter als zweitschlechteste Lösung. – **Nitschke**, **Peter** (ed.). 2005. Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum, S. 107–117.

Brugger, **Winfried**. 2006. Einschränkung des absoluten Folterverbot bei Rettungsfolter? – Aus Politik und Zeitgeschichte 36. Frankfurt/Main, S. 9–15.

Bruha, **Thomas**; **Steiger**, **Dominik**. 2006. Das Verbot der Folter im Völkerrecht. Stuttgart.

Burschel, **Peter**; **Distelrath**, **Götz; Lembke**, **Sven** (eds.). 2000. Das Quälen des Körpers. Eine historische Anthropologie der Folter. Köln.

Derrida, **Jacques.** 2003. Schurken. Zwei Essays über die Vernunft. Frankfurt/Main.

Enders, **Christoph**. 2005. Die Würde des Rechtsstaats liegt in der Würde des Menschen. Das absolute Verbot staatlicher Folter. – **Nitschke**, **Peter** (ed.). 2005. Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum, S. 133–148.

Erb, **Volker**. 2006. Folterverbot und Notwehrrecht. – **Lenzen**, **Wolfgang** (ed.). 2006. Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 19–38.

Falk, **Ulrich**. 2006. Rechtsstaatliche Folter? Rechtshistorische Anmerkungen zu einer tickenden Bombe. – **Anders**, **Freia**; **Gilcher-Holtey**, **Ingrid** (eds.). 2006. Herausforderungen des staatlichen Gewaltmonopols. Recht und politisch motivierte Gewalt am Ende des 20. Jahrhunderts. Frankfurt/Main, S. 90–111.

Fischer, **Johannes.** 2004. Der Ritter und die schwarze Spinne. Gibt es Notsituationen, die die Folter eines Menschen erfordern und rechtfertigen? – Zeitzeichen 7/2004, S. 8–10.

Frankenberg, **Günter**. 2006. Folter, Feindstrafrecht und sonderpolizeirecht. Anmerkungen zu Phänomenen des Bekämpfungsrecht. – **Beestermöller**, **Gerhard**; **Brunkhorst**, **Hauke** (eds.). 2006. Rückkehr der Folter? Der Rechtsstaat im Zwielicht. München, S. 55–68.

Graessner, **Sepp**; **Gurris**, **Norbert**; **Pross**, **Christian** (eds.). 1996. Folter. An der Seite der Überlebenden. Unterstützung und Therapien. München.

Grüny, **Christian**. 2003. Zur Logik der Folter. – **Liebsch**, **Burkhard**; **Mensink, Dagmar** (eds.). 2003. Gewalt verstehen. Berlin, S. 79–115

Herdegen, **Matthias**. 2005. Artikel 1. – **Maunz**, **Theodor**; **Dürig**, **Günter** (eds.). 2005. Kommentar zum Grundgesetz, Lieferung Nr. 44. München.

Herrmann, Horst. 2004. Die Folter. Eine Enzyklopädie des Grauens. Frankfurt/ Main.

Hong, **Mathias**. 2006. Das grundgesetzliche Folterverbot und der Menschenwürdegehalt der Grundrechte – eine verfassungsjuristische Betrachtung. – **Beestermöller**, **Gerhard**; **Brunkhorst**, **Hauke** (eds.). 2006. Rückkehr der Folter? Der Rechtsstaat im Zwielicht. München, S. 24–35.

Jakobs, **Günther**. 2004. Bürgerstrafrecht und Feindstrafrecht. – Höchstrichterliche Rechtsprechung Strafrecht – HRRS. Aufsätze und Urteilsanmerkungen, 3/2004. S. 88–95.

Keller, Gustav. 1991. Die Psychologie der Folter. Frankfurt/Main.

Kramer, **Sven**. 2004. Die Folter in der Literatur. Ihre Darstellung in der deutschsprachigen Erzählprosa von 1740 bis "nach Auschwitz". München.

Kreuzer, Arthur. 2005. Zur Not ein bisschen Folter? Diskussion um Ausnahmen vom absoluten Folterverbot anlässlich polizeilicher "Rettungsfolter". – **Nitschke, Peter** (ed.). 2005. Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum, S. 35–46.

Lenzen, **Wolfgang**. 2006. (")Folter("). Menschenwürde und das Recht auf Leben – Nachbetrachtungen zum Fall Daschner. – **Lenzen**, **Wolfgang** (ed.). 2006. Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 199–224

Luhmann, Niklas. 1993. Gibt es in unserer Gesellschaft noch unverzichtbare Normen? Heidelberg.

Lübbe, **Weyma**. 2006. Konsequentialismus und Folter – Kommentar zu R. Poscher. – **Lenzen**, **Wolfgang** (ed.). 2006. Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 67–75.

McCoy, Alfred W. 2005. Foltern und foltern lassen. 50 Jahre Folterforschung und –praxis von CIA und US-Militär. Frankfurt/Main.

Milgram, **Stanley**. 1974. Das Milgram-Experiment. Zur Gehorsamsbereitschaft gegenüber Autorität. Reinbek.

Nitschke, **Peter**. 2005. Die Debatte über Folter und die Würde des Menschen: Eine Problemskizze (zur Einleitung). – **Nitschke**, **Peter**. (ed.). 2005. Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum, S. 7–34 (S. 16f).

Peters, **Edward**. 1991. Folter. Geschichte der Peinlichen Befragung. Hamburg.

Pfordten, **Dietmar von der**. 2006. Ist staatliche Folter als fernwirkende Nothilfe ethisch erlaubt? – **Lenzen, Wolfgang** (ed.). 2006. Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 149–172.

Poscher, **Ralf.** 2006. Menschenwürde im Staatsnotstand. – **Lenzen**, **Wolfgang** (ed.). 2006. Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 47–65.

Reemtsma, Jan Philipp. 2005. Folter im Rechtsstaat? Hamburg

Rehfeld, **Nina.** 2007. Der Mann, der uns das Foltern lehrt. – Frankfurter Allgemeine Zeitung of 27 June 2007.

Rothkegel, Sibylle. 2006. Die Psychologie der Opfer. – **Goldbach**, Michael (ed.). 2006. Die Wahl der Qual. Folter durch Polizei und Militär. Hofgeismar.

Rottmann, Frank. 2005. Das Mißhandlungsverbot des Art. 104 Abs. 1 S. 2 GG als Maßstab verfassungskonformer Auslegung. – **Goerlich, Helmut** (ed.). 2005. Staatliche Folter. Heiligt der Zweck die Mittel? Paderborn, S. 75–95.

Scarry, Elaine. 1992. Der Körper im Schmerz. Die Chiffren der Verletzlichkeit und die Erfindung der Kultur. Frankfurt/Main.

Schild, **Wolfgang**. 2005. Folter einst und jetzt. – **Nitschke, Peter** (ed.). Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum, S. 69–93.

Spaemann, Robert. 2001. Über den Begriff der Menschenwürde. – **Spaemann, Robert** (ed.). 2001. Grenzen. Zur ethischen Dimension des Handelns. Stuttgart, S. 107–122.

Steinhoff, Uwe. 2006. Warum Foltern moralisch manchmal erlaubt, ihre Institutionalisierung durch Folterbefehle aber moralisch unzulässig ist. – **Lenzen**, Wolfgang (ed.). 2006. Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 173–197.

Stümke, **Volker**. 2006. Beispielhaft an der Folter vorbei. Eine Randbemerkung zur gegenwärtigen Folterdebatte. – ZEE 50. Gütersloh, S. 216–220.

Trapp, **Rainer.** 2006. Wirklich "Folter" oder nicht vielmehr selbstverschuldete Rettungsbefragung? – **Lenzen**, **Wolfgang** (ed.). Ist Folter erlaubt? Juristische und philosophische Aspekte. Paderborn, S. 95–134.

Trapp, Rainer. 2006. Folter oder selbstverschuldete Rettungsbefragung? Paderborn

Ulbrich, **Stefan**. 2005. Die normative Kraft der Bilder: Zur Funktion des Bildhaften in der Diskussion über Zulässigkeit staatlicher Folter. – **Nitschke**, **Peter** (ed.). 2005. Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum, S. 119–132.

Zimbardo, **Philip G**. 2005. Das Stanford-Gefängnis-Experiment. Eine Simulationsstudie über die Sozialpsychologie der Haft. 3rd edition. Goch.

Volker Stümke, *Dr. theol*., associate professor for social ethics, *Führungsakademie der Bundeswehr* (Hamburg)