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TORTURE AND TABOO: AN ESSAY COMPARING PARADIGMS OF ORGANIZED CRUELTY¹

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Abstract

This essay addresses some common misunderstandings about torture also perpetuated in the ongoing debates concerning “rescue” or “necessity torture” and introduces, in a comparative perspective, the structural properties of the different historical and current paradigms of organized state cruelty. Regarding “modern torture” the essay deconstructs its exceptionalism which is based on claims of a specific relationship to law and the rescue motive. The comparative remarks are followed by a brief look at some practical legal problems arising from the concept of “rescue torture” and some strategic and semantic moves to camouflage or deny violations of the torture taboo.

Keywords: torture; semantic moves; organized state cruelty.

Resumo

Tortura e tabu: um ensaio comparando paradigmas da crueldade organizada

Este artigo se dirige a alguns equívocos comuns em relação à tortura igualmente perpetuados em avançados debates no que concerne ao “resgate” ou “tortura necessária”, e introduz, em uma perspectiva comparativa, as propriedades estruturais de diferenças históricas e tendências paradigmáticas da crueldade estatal organizada. A respeito da “tortura moderna” o artigo busca desconstruir esse excepcionalismo em que estão baseadas as relações específicas entre a lei e os motivos do resgate. A comparação observada está compreendida em um olhar sintético acerca de alguns problemas da prática legal que surgem do conceito de “resgate da tortura” e algumas estratégias e movimentos semânticos para camuflar ou negar as violações do tabu da tortura.

Palavras-chave: tortura; movimentos semânticos; crueldade estatal organizada.

“La question est une invention merveilleuse et tout à fait sûre pour perdre un innocent qui a la complexion faible, et sauver un coupable qui est né robuste.”

(JEAN DE LA BRUYÈRE, 1688)²

“You know what is sometimes said for the justification of executioners: that one has to come to the decision to torture persons, when their confession saves the lives of hundreds.”

(JEAN-PAUL SARTRE, 1958)³

“I’m not in favor of torture, but if you’re going to have it, it should damn well have court approval.”

(ALAN DERSHOWITZ, 2002)⁴

I

In awe of the sacred or for fear of demons, “savages” avoid the taboo⁵. It is also fear which dictates neurotics to obey the forbidden. Those who deem themselves civilized may prefer the guidance of convention or wisdom to respect what is taboo or to approach the unfamiliar with caution⁶.

Torture might qualify for both – the unfamiliar and a taboo: until recently, torture, in Freudian terms, was not “generally accessible”; it was removed from public scrutiny and bestowed with the aura of the dangerous and strictly prohibited. Even legal norms declaring this practice unlawful dared not spell out the law of torture⁷ in detail, as if the taboo could not even semantically be approached.

What used to be taboo mutated recently, after a moment of initial reticence⁸, to a domestic animal – first in the media and then, what is of interest here, in the legal discourse. The domestication began with juridical speech-acts which were almost innocently rooted in the everyday. Long before September 11, a German scholar and philosopher of law inquired: “May the state, by way of exception, apply torture?”⁹. This happened also quite some time before the war on terrorism was declared, and some years after the provocation by the grand master of systems theory, Niklas Luhmann, in a lecture given at the University of Heidelberg. By way of introducing the topic, “Are there non-renounceable norms in our societies?” he presented the following case:

Imagine that you are a police officer. In your country – and this might also be Germany in a not too distant future – there are many leftist and rightist terrorists, and every day there are murders, killings, arson attacks, and damages affecting numerous innocent parties. Imagine that you captured the leader of such a group. You could, if you tortured him, presumably save the life of many people – tens, hundreds, or thousands – we may vary the case. Would you do it?¹⁰

Whether you would in fact *do* “it,” Luhmann did not really want to know. As a theoretician, he was merely interested in the functional differentiation between the systems of law and morality and wondered if it could be sustained in extreme and borderline situations¹¹.

Likewise, the German lawyer-philosopher who had in fact listened to Luhmann’s lecture does not want to know whether you would *do* “it”, but rather if and under what circumstances the law might justify the use of coercion. He argued, in a lawyer’s practical spirit, toward a legal solution. He moved from “the strict prohibition of torture to its conditional licence,” somewhat uneasily admitting that this might be “the second-best solution”¹².

What could be misunderstood, in the beginning, as a naïve “why not ask?” soon developed into a full-fledged exercise in legal doctrine concerning human dignity and the proportionality of police measures, and even including, as a somber highlight, a torture case in public law for students, meant to prepare them for the graduate exam¹³. Starting from the romantic setting of Heidelberg, calculated state violence gradually turned into a legal commodity for everyday use like any other standard, if certainly more drastic, police measure. Any observer of the German legal-scientific community would be surprised to register close to one hundred German publications addressing the topic of torture since the middle of the 1990’s¹⁴. One would also most likely be astonished that a theoretical provocation should set off a doctrinal debate. This debate was soon intensified by a kidnapping and murder case in Frankfurt, when the vice president of the police threatened the suspected kidnapper with “extremely painful coercion”. The torture discourse became more dynamic after the series of terrorist mass murders, first in New York and then in various European cities.

Comparatively speaking, the American legal discourse, motivated and accelerated by the politics of counterterrorism, covers a wider spectrum of argument which is united, though, by the rhetoric of necessity.

September 11, the war on terror, an imperial president who arguably authorized torture, and “rescue torture,” practiced notably in Guantánamo and Abu Ghraib, shook up the legal profession and became the focal points of critical and apologetic juridical interventions in the wake of the Military Commissions Acts of October 2006 and the earlier Patriot Act – an Orwellian shorthand for its full name: “United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001”¹⁵.

In general, quite a few participants of the discourse moved from strict prohibition to conditional licence, if only for exceptional cases. While some invoked the survival rule to limit coercive interrogations to situations when they are – in Abraham Lincoln’s words – an “indispensable necessity for the preservation of the nation,” other authors operated with more lenient necessity standards such as “a grave risk or danger for the nation”, “a tendency toward self-destruction” or simply a “rule of priority” – referring to “seasons of public danger” as George Mason might have commented.¹⁶ Yet others argued that torture should be banned but quietly practiced, as a certain double standard is called for in the fight against terrorists. The apologists of torture were strictly opposed by scholars sustaining its prohibition or advocating the *ex ante* legal regulation of coercion to make public and transparent an already ongoing “promiscuous” practice which “should damn well have court approval”¹⁷.

The discourse in both interpretive communities calls into question what multiple norms, laid down in national, supranational and international documents, absolutely prohibit. Many seem to be prepared to violate what has been introduced here as a taboo. Considering the many layers of prohibitive norms which persuasively, if not always with sufficient determinacy, outlaw torture. I do not want to discuss in detail the merits of the arguments for and against calculated state brutality under exceptional circumstances, obviously dictated by current events.¹⁸ Rather than adding a further opinion to the maze of justifications and refutations, I shall focus on how the arguments are structured. By comparing the structures of justificatory paradigms, I neither suggest nor imply that the different historical and political contexts can be disregarded or equated. The structural approach might help, though, to elucidate the role of law and ultimately to answer the intriguing question how a strict legal prohibition could be relativized.

In this short essay I intend to address some common misunderstandings about torture also perpetuated in the ongoing debate (II). Thereafter, I introduce the structural properties of the different paradigms and focus on their exceptionalism based on a specific relationship to law as well as the rescue motive (III). The comparative remarks will be followed by a brief look at some practical legal problems arising from the concept of “rescue torture” (IV). The concluding chapter deals with strategic and semantic moves to camouflage or deny violations of the torture taboo (V).

II

Seismographs of human rights violations all over the world register the manifold incidences of organized cruelty executed or tolerated by states. *Human Rights Watch*, anti-torture-committees and, with remarkable persistence, *Amnesty International*, keep us informed about the ubiquitous violations of the taboo. Unwillingly, they help sustain the common image – and misconception – of a random, medieval practice which has returned.

A *return* may only be noted in regions (actually, under regimes) where cruelty as practiced or tolerated by governments, for whatever official purposes, had been disapproved or tabooed to this very day. “Return” would therefore mean that torture has become acceptable contrary to an established practice based on categorical legal prohibitions¹⁹ – not in exotic countries where crazy tyrants rage or where, as some like to assume, a cruel “asianism”²⁰ stops at nothing, but even under the hands and eyes of “governments of laws and not of men”²¹.

Torture is widely associated with the dark Middle Ages and characterized as the senseless and indiscriminate application of extreme physical pain and mental agony, directed against whoever was suspected of a crime. It is correct that torture, also referred to as the “painful question,” can be traced back to the medieval administration of justice. Its origins, however, reach back to the Greco-Roman world whence violence in criminal legal procedures accompanied the reception of Roman Law and proliferated since the thirteenth century across Europe, including the Holy Roman Empire of the German Nation.²² During the first half of the eighteenth century, the extortion of confessions in criminal trials within and without the Inquisition gradually waned²³. In Prussia, Frederick I permitted torture subject to royal review in 1720. By the time of Frederick the Great, “the new law of proof had already displaced judicial torture from its former regularity”²⁴. Hence it comes as no surprise that, within a month of his accession to the throne, the enlightened monarch abolished torture in 1740, but felt obliged to allow it for “especially serious cases.” Provoked by various requests for permission to put suspects to torture, Frederick ordered the complete cessation of judicial torture in 1754²⁵. Historians have noted a similar development elsewhere in continental Europe: over time, abolition legislation substituted the new law of proof for the old law of torture.

At first glance, the image of the medieval nature of torture is underscored by the standard historical accounts, before John Langbein’s study revealed the relationship between torture and the proof system, and by the prevailing opinion in philosophy booking the end of torture in the account of the Enlightenment. Reliance on Thomasius, Voltaire, Montaigne, Bentham, Beccaria, and other critics as principal witnesses seems to be problematic, though. Contrary to views relating the skeptical discourse on torture to the philosophy of the Enlightenment, this discourse can actually be traced back to antiquity, enlisting Aristotle and Cicero among many other prominent opponents²⁶. Contrary to the once dominant interpretation, the enlightened midwives of modernity were neither consistently nor primarily led by their worry about the individual bestowed with reason and dignity. Like many of his contemporaries, Cesare Beccaria for example, while denouncing torture as “barbarism,” was mainly concerned about the lack of effectiveness and the faultiness of a procedure which uses pain as the “measuring pole for truth”²⁷ – very much like Frederick the Great finding it both “gruesome” and “an uncertain means to discover the truth”²⁸. In retrospect, one may therefore plausibly assume that after the murderous witch-trials, there were no significant incidents and cases where torture was applied and that it was abolished jointly with the “collapsing of the [old] proof system”²⁹ because there was ample evidence of its dysfunctional results.

The medieval image of torture is further at odds with its more recent history. For state violence – despite its formal abolition in the eighteenth century throughout Europe – accompanied as an ugly shadow a modernity, which by definition was deemed civilized and respectful of the individual’s right to physical integrity. Interestingly enough, the past decennium was labelled somewhat paradoxically as “the century of human rights and torture” by Hannah Arendt³⁰. And the twenty-first century – at least at this point – does not seem to steer a different course.

To turn to a second misunderstanding: apart from barbaric witch hunts³¹ and tyrannical orgies, history reveals that torture was almost never applied *indiscriminately*. On the contrary, one may detect changing patterns of selectivity³². The Greeks reserved torture for slaves and traitors. The law of the Roman Republic added free citizens. Medieval and later canon law, following the letters and logic of the papal Bull *Ad extirpanda*, brought primarily heretics to the torture rack. During the thirteenth and fourteenth centuries, the circle of victims was considerably extended on the basis of secular criminal law to “unwholesome people” (“*landschädliche Leute*”) and whoever was suspected of witch-craft. While there never existed a uniform practice of the judicial torture in the different European countries, one may still conclude that, as a rule, the “painful question” was directed

against certain types of perpetrators – or rather, suspects. But children and juveniles, honorable persons and aristocrats usually, though not always, enjoyed the privilege to be exempt from the painful question. Its application was further reserved for certain categories of penal acts, preferably heresy and high treason.

Finally, the idea of a *disorderly practice* misses crucial aspects of the history of torture, at least of the regularized torture in continental criminal and canon procedures.³³ To be sure, within the framework of Inquisition and other criminal trials, cruel treatment did not follow strict provisions of procedural law according to any current understanding of due process. Step by step, however, regulatory insights and norms were implemented, at least at certain historical moments. The extortion of confessions was only to be applied upon a sufficient suspicion that an exceptional crime had been committed. The Roman-canon law required “half proof” for torture. And in general it had to be applied “*messiglich auß Vernunft*,” i.e., within reason³⁴.

To be sure, such indeterminate standards left sufficient room for arbitrariness and violence, above all in the execution of witch-hunts. Nevertheless, torture was integrated into a para-legal setting based on canon law, imperial privileges or resolutions of the Imperial Diet (*Reichstag*). That is why contemporaries could consider torture as basically “legal”. According to contemporary sources its normal application was “embedded in a genuine algebra of real, direct, indirect, legitimate, presumptive, artificial, manifest, remarkable, incomplete, light, partial, urgent, necessary, near or distant proofs and evidence”³⁵. As a matter of fact, apart from excesses, judicial torture appears to have been “a court procedure with strict rules,” devised by a “jurisprudence of torture”, following a “juridical code of suffering”³⁶.

In the context of criminal trials, the judicial torture functioned as a method or procedure of proof, as a tool for the ascertainment of truth. The extorted confession was understood as “proving” the guilt of the accused and “justifying” the judge’s verdict. Thus, the repressive torture, as a “creature of the so-called statutory system of proofs” within the Roman-canon law of evidence, replaced archaic practices like the oath, the ordeal or duel³⁷. It accompanied the new understanding of combating crime as a public task as well as the rise and fall of the Inquisition. Calculated violence, one may somewhat daringly conclude, modernized criminal procedure.

The limitation of violent interrogations to certain crimes and criminals – or rather, suspects – and to certain methods, suggests a correspondence between the Inquisition and other criminal trials on the one hand and modest beginnings of what may be called juridification on the other. These tender sprouts should not be taken to down play the brutality of the “painful question”³⁸. The inquisitorial “queen of agony” knew quite well how to produce extremely gruesome pains when she bent over the body to extract from it the “material truth”. She was partial to applying her tools to those joints of the body which are particularly sensitive to pain. She ordered that the victim be bound in the most gruesome way, or subjected to thumb or leg screws. If necessary, she repeated the cruel procedure until the suspect began to speak. Sometimes she even rated silence as a confession because it was taken to indicate the support of the devil.

During the nineteenth century, the repressive procedural practice retreated from Europe to islands beyond the pale of the “community of civilized states”. Torture raged where relicts of the Inquisition, particularly its evidence system focusing on the confession, survived in peace and quiet outside the luminous beam of the enlightenment. Meanwhile, in Europe, contemporary critics celebrated the end of torture. “Torture has already disappeared in the abyss of dregs where the Inquisition lies and whither the death penalty will follow soon”, Victor Hugo wrote in 1851³⁹.

Prematurely so, as it will turn out. Until this very day, the above-mentioned seismographs of cruelty and especially asylum-seekers from all over the world submit reports about the terrors of cruelty ordained by governments within and without criminal trials⁴⁰.

III

At the beginning of the twentieth century, the contours of a different paradigm, both ancient and new, become manifest. Under dictatorial regimes “orgies of torture” reduce the inquisitorial “queen of agony” to a cameo on the stage of violence enacted by or in the name of governments. Despite those islands of quasi-inquisitorial trials and judicial torture in countries where circumstantial evidence is either not admitted or not considered a sufficient basis for conviction, as for instance in Turkey, it is the political paradigm that coins the twentieth century’s mark of Cain.

While sharing its regularity, political torture, also referred to as “modern torture”⁴¹, is distinct from its judicial sibling because it generally eschews the light of the public and is practiced in the dark. It stays “hidden in the sense that it remains outside or at the margins of prevailing political discourse”⁴². To a much lesser degree, this applies to the blood feasts of tyrants which celebrate the excesses of cruelty, at times conspicuously, and therefore are seen as perpetuating the tradition of witch-hunts. However, the political paradigm is marked less by the random, orgiastic brutality of dictators than by the gruesome, calculated technology of agony as developed and applied by regimes of terror. That is why it qualifies as the “legitimate” successor of the ritualized procedural torture as practiced in inquisitorial and other criminal trials.

Political torture seems to have very little in common with its judicial predecessor as it needs neither specific incidents nor serious crimes to be unleashed. It may be triggered by the slightest suspicion, a presumptive “insult of the ideal personality of the state”⁴³ or any behavior qualified as oppositional. It shares, however, a certain selectivity with the judicial practice of torture: its political agenda is reflected by the selection of its victims. As an example, one may refer to a decree issued by Heinrich Himmler in 1942: “[For the purpose of extorting confessions or prying information] the ‘third degree’ may only be applied to communists, Marxists, Jehova’s Witnesses, saboteurs, members of resistance movements, antisocial elements, oppositional elements or political or ethnic vagabonds”⁴⁴.

Inspired by their various political ideologies, the executors of violence are bent on seeking revenge, humiliating, and destroying. In the cellars of the Gestapo, in Soviet Gulags, in the dungeons of colonial rulers and military Juntas, in the interrogation cells of numerous secret police and military installations, “political torture” is executed with beastly cruelty and an archaic lust of the victims’ suffering. Obedient henchmen of authoritarian regimes inflict pain and fear for the sake of domination by breaking resistance and demoralizing oppositional minds⁴⁵. They also terrorize the suspecting public into submission which marks modern torture as a form of “disciplinary knowledge”⁴⁶.

The torturers of dictators and terror regimes do not seek to extort a “material truth,” however illusionary, from their victims. Yet, with regard to the thirst for information, one may draw a line from the extortion of information about “oppositional elements” and traitors to the judicial extraction of truth in inquisitorial and other criminal trials.

As regards its relationship to law, political torture appears to have no affinity to the “legalized,” or rather “juridified”, procedures of judicial torture. While the political torturer may deem his trade to be his duty or necessary to save his own skin, he may not seriously consider, however, his methods and practice to be legal in any substantial and understandable sense. William Blackstone’s casual and all-too-fine distinction of the torture rack as “an instrument of the state, not of the law”⁴⁷, which was validated in the nineteenth and, more terribly and on a mass scale, throughout the twentieth century⁴⁸, captures quite succinctly the distance of political torture from the legal claims of judicial torture.

Political cruelty always had a military companion from which it was at best only analytically distinguishable, mainly with regard to the strategic ends pursued in the different historical-political contexts. Affinities and

correspondences abound not only at first glance. Both, authoritarian regimes and military commanders share the concept of the victim as enemy as well as a preventive orientation. Within political and military contexts, coercive interrogation methods were systematically developed, at times even with scientific support⁴⁹. Today, the infamous “third degree” comprises practices which focus less on the joints of the body but rather on the sensory system and the psyche so as to leave no physical traces. They employ sensory deprivation, isolation cells, electro-shocks, the “water method”, jailing victims with rats or insects, or other forms of extreme emotional destabilization⁵⁰.

All potential informants qualify as victims: prisoners of war, spies, insurgents, combatants, saboteurs, and members of the civil population. In military prisons and camps, calculated cruelty becomes an element of modern warfare – during the two World Wars: total-warfare. Without abandoning the politics of terror, military torture is primarily targeted at prying useful information. Like the calculated political torture, it pursues a preventive goal: the prevention of danger caused by an enemy. Thus, both political and military coercive interrogation refer to the most recent pattern of practice and interpretation: the so-called “rescue torture” or “necessity torture”.

Comparison between the fading inquisitorial and the ongoing political-military cruelty in interrogation situations on the one hand and the new paradigm on the other reveals striking affinities and contrasts. Despite claims to novelty and legal decency, “rescue torture” – which I use in the following as a shorthand for both variations – is less exceptional than its justifiers are inclined to suggest.

In fact, “rescue torture” resembles its inquisitorial and judicial predecessor in that it does not shun the light of the public, but knocks on the door of the legal citadel and calls for a doctrinal invitation or “court approval”. While it certainly stands aloof from witch-hunts and tyrannical orgies of pain, the new paradigm still resides in the ugly neighborhood of political and military coercion whose rhetoric of necessity it echoes and it is affiliated, if only implicitly, with the concept of a war and its inherent friend/enemy-distinction. It also reiterates the shift in the political-military approach to controlling harmful conduct by moving away from the traditional reliance on deterrent and reactive approaches of criminal and police law against wrongdoers toward more preventive and proactive approaches against evildoers.

Today “rescue torture” has become part and parcel of counterterrorism⁵¹ and also, if on a lower scale, of combating crime. Both the terrorist and the perpetrator who threatens the life of his victims – notably the kidnapper – are treated *de facto* and *de jure* as enemies⁵². Differences between macro crimes and micro crimes, between Al Qaeda and the law student from Frankfurt who kidnapped and murdered a young boy, and between the protection of society and the protection of victims are blurred in the universal founding moment of the new paradigm: the “*ticking bomb*”-scenario. Only the captured terrorist-suspect knows where the bomb is hidden and how it can be defused. Only the arrested kidnapper-suspect knows where to find the victim and how he can be rescued. Are not the police obliged to do something, indeed anything possible, to save the lives of hundreds of people or of one boy?

Along the lines of an answer to this rhetorical question, violence may equally be applied in situations of police and military danger. Its preventive – or rather: pre-emptive – orientation is only one small step away from the *rescue motive*.

On closer scrutiny, this motive is not at all peculiar to the “new torture”. It operates as a more or less visible accomplice in all paradigms which inspire the recurrent attempts to justify violence in interrogation procedures. The Inquisition introduced the rescue motive under the guise of a paternalistic form of ethical perfectionism: coercion was meant to save the sinner’s soul, if need be against her will, from the grasp of the devil. The Christian duty to liberate the “true self” from the evil allowed the Inquisitor to ignore the actual

pain and agony of the existing self and to regard torture as a blessing⁵³. In military scenarios the rescue motive reappears without a Christian ideology and blessing. Coercion is not utilized to save the prisoner's better self but to save the company, the army or ultimately society from enemy attacks. It is true that within the political paradigm, the rescue motive has often thinned out to a mere pretext. It is still invoked, however, to justify violence against all elements threatening the stability of the system, the international reputation of the regime, the Turkishness of Turkey, etc.

Aside from the rescue motive, the "new" torture's claimed exceptionalism rests on its *legality*. It is to be executed in the name of the *law* – which means: ultimately in the name of the popular sovereign, thus including the torture victim as a member of "We the People"⁵⁴. In contrast to the rules and regulations of the Inquisition, advocates of the new paradigm may argue that their concept is thoroughly secular and based on a reasoned elaboration balancing human dignity and the right to life and health. Still, they have to accept the Inquisition as an unpleasant, if historically distant, neighbor-in-law.

The legal correspondence between "rescue torture" and the political-military paradigm is less tangible. The latter tends to borrow its thin coat of legality – or actually: legitimacy – from an imagined or real *état de siège*. Within the context of counterterrorism, the *état de siège* seems to have migrated into the legal realm where it operates as a background assumption within the different schemes basing torture on rules for an exception or extreme situation⁵⁵.

Compared with its political and military siblings, "rescue torture" usually seeks a warmer legal outfit. While the German academic discourse focuses on the question "May the State torture at least in extreme situations?", participants in the U.S.-American discourse prefer arguments of necessity or ask whether torture should be regulated and made public. With questions like these, polite as they may seem, the advocates of coercion contemplate a legal licence to enter the taboo zone by loosening the ties of due process and softening human rights restrictions. In Germany, the doctrine of "rescue torture" did not crystallize around a massive and unprecedented terrorist attack or a comparable human catastrophe. Thus, one would have expected vehement criticism⁵⁶ or at least moderately critical reactions⁵⁷ reminding the justifiers of historical precedents and the disastrous effects once one unleashes the demons banned by the taboo or, in a more pragmatic attitude, of the "slippery slope" we better keep away from. Therefore, the number of scholars who joined the justifiers even before September 11 comes as a surprise⁵⁸.

The spirit of the "*ticking-bomb*," fabricated new laws and arguments. In the United States, it has been said that since September 11, the Bush administration, supported by academic voices, changed the rules on how to deal with terrorism and created conditions in which the ends justify the means⁵⁹. Likewise, German scholars soon brought up other extreme police measures for discussion. Initially, they re-introduced the "final rescue shot", which is to say: the right of the police not only to disable dangerous persons but also to shoot to kill. The former civil-rights lawyer and Minister of the Interior suggested pre-emptive measures, asking: "Don't we have an emergency law against terrorists who plan mass murders? Which leads to the question, whether the killing of a person may be justified in extreme cases as self-defence"⁶⁰. Following this logic, a German law-maker recently permitted the armed forces to shoot down airplanes presumed to be in the hands of terrorists. After the Federal Constitutional Court struck down this law as unconstitutional⁶¹, politicians are now considering changing the constitution.

IV

If we look more closely at the legal arguments designed to justify torture in extreme or exceptional situations, we generally discover a logic which operates in a Manichean world, where the military and the

police represent the good which they defend against the evil and evildoers threatening society with calculated brutality, if need be.

On closer scrutiny, three different paths of justification can be distinguished. Some authors bypass the principled prohibition to balance life against life and the prohibition to subject human dignity to any kind of restriction by invoking a regime of extra-legal measures, and thus not even maintaining a veneer of legality⁶². Other authors frame the decisional situation provoked by terrorists as a “tragic choice.” They call for an “ethics of prudence rather than first principle,” thus opening the venue to a reshaping of constitutional-legal arrangements in times of crisis⁶³. Both approaches openly soften the standard of deference to law owed by the executive and widen the courts’ discretion in dealing with terrorism⁶⁴.

The third approach, purporting to defend the principle of legality in times of crisis, is characterized by a shift of focus away from the state to the justificatory structure⁶⁵. According to the argumentative strategy of its protagonists, the kidnapper-terrorist’s evil deed and the victim’s innocent suffering constitute a normative asymmetry based on a hierarchy of human dignity claims which then predetermines the outcome of the balancing operation. Once the kidnapper’s or terrorist’s dignity and physical integrity claims have been ranked as inferior, the police or the military are introduced as the altruistic executors of the State’s duty to protect individuals, groups or the whole society. So in this fashion, it is not the State which is acting; instead human beings are. And “because of the life-saving purpose”⁶⁶, they should be freed from the risk of possible criminal sanctions in the line of duty. That is why the justifiers come up with two types of violence. They distinguish the “good” rescue torture from those cruel and unusual interrogation practices which gave torture its bad name. As a matter of consequence, the police or military officer cannot be blamed for violating human dignity⁶⁷ because the actual or potential prevention of innocent suffering outbalances the perpetrator’s pain and thus justifies emergency measures. Ultimately, the advocates of justified coercion hold the kidnapper or terrorist liable for what happens to him in the interrogation room. Thus, the torturer is absolved from violating the taboo. Critics of the measures may be charged with neglecting the plight and suffering of innocent victims.

Most recent doctrines of calculated state brutality betray a certain historical naiveté as well as a rather peculiar and narrow construction of the rescue scenario. Not without concern, but still quite uninhibited, they deny the insights which delegitimated torture as “counterproductive”, puzzling even its seasoned experts⁶⁸. There are several problems with such a strategy.

To begin with, the rescue motive implies the timeliness and usefulness of the extracted knowledge. Though geared toward practice, the justificatory discourse does not even address, let alone answer, a number of crucial practical questions. It ignores that whoever is tortured may not have the coveted knowledge and therefore may not be the right person or that he may say anything just to end the suffering, if only for the time being, or that the person under torture may have other reasons for not disclosing the information. In short, problems of uncertainty and error are almost methodically left out of the account⁶⁹. Dealing with the risks of uncertainty would invariably bring about the collapse of the doctrinal bridge across the assumed “value gap” between the perpetrator’s rights and dignity and the victim’s rights and dignity, and between the prohibition of torture on the one hand and the state’s duty to protect those who are in danger on the other. If the concept of a “rescue torture” is meant to be taken seriously, then the prognostic uncertainty and fallibility of preventive and pre-emptive decisions concerning the nature and severity of the danger, as well as the necessity and urgency of rescue⁷⁰ call for a much more rigorous reasoned elaboration.

What if the person to be tortured in fact does have the knowledge required to rescue? Then the forcibly extracted confession could prove useful. Nevertheless, questions pertaining to the rule of law would have to be addressed: How may the new torture be applied *lege artis* in terms of procedure and substance? How can

it tread as lightly as possible on basic rights?⁷¹ Indicating, as happened in the Frankfurt case, that violence would be executed by experienced police officers who “hold a licence by the German Sports Association ... to prevent the occurrence of injuries” and would be supervised by a medical doctor⁷², hardly meets even the most modest standards of due process. From the rules regulating state violence we may infer that a professional, experienced in the trade of inflicting pain, and medical supervision may have the blessing of tradition, but scarcely suffice to gain court approval⁷³.

More importantly, the justificatory discourse would have to deal to some extent with the test of proportionality governing all police and military measures under domestic and international law⁷⁴. Yet differentiated considerations correlating the infliction of pain with the dimension of the probability and magnitude danger are still waiting.

A manual of admissible violence, if at all conceivable, might correspond to the practical purpose and rationality of “rescue torture,” but would inevitably transgress the boundaries of the rule of law and undermine the idea of due process. Ultimately, an explicit operative concept of “rescue torture” would deconstruct its claim to legality.

V

The impossibility of answering the crucial practical questions raised by the legalization of torture may be one of the reasons why quite a few authors favor an extra-legal emergency regime or prefer to “virtualize” torture. It may also be why political-military practitioners prefer to deny or camouflage illegal violence rather than admitting that a taboo is being violated.

A first move leads the advocates of “rescue” or “necessity torture” away from reality. Their doctrinal proposals are based on the construction of an “extreme situation” which they suggest will never actually happen. For that purpose, they enumerate a list of conditions that must be met before torture may be applied. First, there has to be “a clear, immediate, and significant danger for the life and physical integrity of an innocent person”. Second, “the danger must be caused by an identifiable perpetrator”. Third, “the perpetrator is the only person who can remove the danger by returning within the borders of the law”. Fourth, “the perpetrator must be obliged to do so”. And finally, “the application of physical pain is the only promising means to obtain the information”⁷⁵.

In short, we are led to believe that we are only participating in an academic thought experiment. Virtual torture then. No need to worry. The UN Convention Against Torture, however, already anticipated such attempts to bypass the prohibition and therefore implemented it “with religious austerity”⁷⁶. “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture” (Art. 2, sec. 2).

A second move is performed by practitioners rather than academics. Its parasitic exploitation of the polysemy of torture amounts to nothing less than a simple denial of the violation of the taboo. In this vein, states spare no trouble to argue that they neither practice nor tolerate torture – “even if that involves admitting the conduct was cruel, inhuman or degrading”⁷⁷. This strategy is met halfway by legal documents which construct torturous coercion in a “generalized vocabulary”, criticized by historians as the “language of Eden”⁷⁸. As a matter of fact, the indeterminacy of prohibition norms shifts the juridical debates from exception to definition and opens up semantic spaces for escape attempts from the taboo zone. Such attempts can be traced in the euphemizing and cynical language of “extreme prison conditions”, “disadvantageous” or “full coercive treatment”, of “torture lite” or “extra encouragement” in interrogation situations⁷⁹.

A third move is brought into play where euphemisms fail because cruelty, like electroshocks or the method of waterboarding, evidently reaches the level of torture or has been publicly dramatized as such.

When torture has left the realm of remote possibilities and contradicts the palliative rhetoric of interrogation techniques, its commanders and practitioners resort to deceptive maneuvers. They camouflage the chains of command, defer legal responsibility, and prevent or curb public protest. *Torture by proxy* and *offshore torture*⁸⁰ illustrate that, in keeping with the logic of *outsourcing*⁸¹, political office-holders, military commanders and secret services have taken to delegating the application of violence to *proxyholders* well-known for brutal interrogation techniques, like Jordan, Pakistan, Singapore, Somalia, Uzbekistan, or Egypt. In a flanking movement military interrogations have been privatized, i.e., subcontracted to non-governmental security services.

As a prerequisite to torture by proxy, the U.S. Army has installed special removal units since the beginning of the 1990s and increasingly after September 11 to transfer suspected terrorists, outside of regular extradition procedures, to reliable regimes, i.e., regimes known for their “brass-knuckled quest for information”. Because of the secret and irregular nature of these “renditions,” the mandator of torturous practices may easily deny any responsibility for torture while risking being charged with a violation of international law for the rendition⁸². Thus torture *by proxy* or *offshore* permits the actual instigator to cultivate its rule of law image as an almost *innocent bystander*⁸³ and allows other clients to freely utilize the intelligence obtained by brutal violence. If need be, any promptings of the conscience may be silenced by referring to the “responsibility for our security”, as did the present German Minister of the Interior. “If we had to vouch for the information of other secret services that they were obtained by observance of the proprieties of constitutional principles we might as well shut down business”⁸⁴.

“Security”⁸⁵ is the keyword which redirects us to the citadel of law where we discover a fourth move out of the taboo zone: the *remoralization* of law to lower the legal barriers against coercion exercised by the state. The ethics of rescue so virulent in the German debate and the ethics of necessity in the U.S.-American discourse, whatever their differences in style may be, overlap in two crucial regards. First, they subscribe to the rationality that good ends justify bad means. And second, they operate on the basis of a utilitarian calculus: it is not the individual’s, but the greater number’s happiness that counts.

EPILOGUE

This essay, predictably, does not end with a solution to the problem of torture. At least we may answer, if only tentatively, Niklas Luhmann’s theoretical question whether there are non-renounceable norms. From the discourse on anti-terrorism and torture we may infer that necessity knows no law. To be more precise: necessity knows no non-renounceable norms.

On a more practical note, touching upon the religious dimension of a taboo, one might want to add: whoever advocates “rescue torture” may claim to be more sensitive to the dilemma of police and military decisions in situations of extreme danger. He should be aware, however, that he is signing a pact with the devil.

NOTES

¹ Revised version of the Eason-Weinman Lecture 2007 at Tulane Law School. The article first appeared in the American Journal of Comparative Law 56, 403 (2008). I am indebted to Dean Ponoroff for inviting me to give this lecture and to teach at Tulane Law School. I am grateful to Rainer M. Kiesow and Rainer Forst for commenting on an earlier version of this text.

² LA BRUYÈRE, Jean de. *Les Caractères*. Paris. Julien Benda ed. Paris, 1951. (1688).

³ SARTRE, Jean Paul; ALLEG, Henri. *La question*. at 11. 1958. In his introduction to *La question*, Sartre characterizes torture as a “plague” and refers to the torture to save others as “hypocrisy”.

⁴ DERSHOWITZ, Alan. For elaborated monographic versions of this quotation. *Why Terrorism Works – Understanding the Threat, Responding to the Challenge*. 2002. *Preemption: A Knife that Cuts Both Ways*. 2006.

- ⁵ FREUD, Sigmund. *Totem and Taboo: Resemblances Between the Psychic Lives of Savages and Neurotics*. 1918.
- ⁶ HORST, Reimann. *Tabu, Staatslexikon Recht Wirtschaft und Gesellschaft*. at 420. 7th ed. 1989.
- ⁷ *Universal Declaration of Human Rights*. art. 5. Dec. 10, 1948. “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. *European Convention on Human Rights*. art. 3. Mar. 20, 1952. “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.
- ⁸ RALF, Poscher. *Die Würde des Menschen ist unantastbar*. Juristenzeitung. p. 756-62 . 2004.
- ⁹ BRUGGER, Winfried. *Darf der Staat ausnahmsweise foltern?* Der Staat 35, 1996. p. 67-97.
- ¹⁰ LUHMANN, Niklas. *Gibt es in unserer Gesellschaft noch unverzichtbare Normen?* Heidelberger: Heidelberger Universitätsreden IV, 1993.
- ¹¹ Strangely enough, he recommended at the end of the article, regardless of all legalistic concerns, “a licence for torture issued by internationally supervised courts, monitored by television in Geneva or Luxemburg, so as not to sacrifice innocent people to the fanaticism of terrorists”. Luhmann, *supra* note 9, at 27.
- ¹² BRUGGER, Winfried. *Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?* Juristenzeitung. p. 165-73. 2000; *Das andere Auge. Frankfurter Allgemeine Zeitung*. Mar. 10. 2003.
- ¹³ BRUGGER, Winfried. *Würde gegen Würde – Examensklausur im öffentlichen Recht*. Verwaltungsblätter Baden-Württemberg, 1995. p. 414-16.
- ¹⁴ Listed by juris, the German legal document center, since the middle of the 1990’s.
- ¹⁵ ABRAHAM, David. *The Bush Regime from Elections to Detentions: Amoral Economy of Carl Schmitt and Human Rights*. 2006. (unpublished manuscript on file with the author), who compared these two acts to the Nazi Ermächtigungsgesetz (Empowerment Act) of 1933. See also, *US Dept. of Justice, Office of the Inspector General, Report to Congress on Implementation of Sec. 1001 of the US-PATRIOT ACT*, July 17, 2003. For a critique of the anti-terrorism measures; GOODIN, Robert. *What’s Wrong With Terrorism*. John Torpey ed, 2006; *Old Europe, New Europe, Core Europe: Transatlantic Relations after the Iraq War*. 2005; *The Constitution in Wartime: Beyond Alarmism and Complacency*. Mark Tushnet ed, 2005; *The Powers of War and Peace: The Constitution and Foreign affairs after 9/11*. 2005; POOLE, Thomas. *Courts and Conditions of Uncertainty in “Times of Crisis” LSE Law. Society and Economy Working Papers*, 2007. <<http://www.lse.ac.uk/collections/law/wps/wps.htm>>. For a comprehensive review of the anti-terrorism measures such as internet monitoring, detentions, renditions, etc.; COLE, David; DEMPSEY, James. *Terrorism and the Constitution*. 2006.
- ¹⁶ See *The Records Of Federal Convetion*. vol I. at. 346. M. Farrand ed, 1966.
- ¹⁷ DERSHOWITS, *supra* note 3, *Why Terrorism Works, and Preemption*; DERSHOWITS, Alan. *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. Sch. L. Rev. 275-77. 2003. Similarly, BAGARIC, Mirkos; CLARKE, Julie. *Advocate the Adoption of a legal Framework to Regulate Torture Which Under Certain Circumstances May be Morally Justifiable*. See, BAGARIC, Mirkos; CLARKE, Julie. *Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justifiable*, 39 U.S.F.L. REV. 581. 2005. For a critique of any *ex ante* or *ex post* justification of torture, see STRAUUS, Marcy. *Torture*, 48 N.Y.L. Sch. L. Rev. p. 268. 2003.
- ¹⁸ Concerning the debate about the law of the exception in the Unitedstatesean discourse, see, FERREJOHN, John; PASQUINO, Pasquale. *The Law of the Exception: A Typology of Emergency Powers*, 2 Int’l J. of Const. L. 210. 2004; ACKERMAN, Bruce. *The Emergency Constitution*, 113 Yale L. J. 1029. 2004, and DYZENHAUS, David. *Schmitt v. Dicey*, 27 Cardozo L. Rev. 2005, 2006.
- ¹⁹ See *The Universal Declaration of Human Rights (1948) and the European Convention on Human Rights*. 1952, *supra* note 6.
- ²⁰ In his quite informative and recommendable study: MELLOR, Alec. *La torture – son histoire, son abolition, sa réapparition au XXème siècle*, Alec Mellor held “asianism” responsible for the proliferation of torture in the twentieth century. MELLOR, Alec. *La torture – Son Histoire, Son Abolition, Sa Réapparition au XXème Siècle*. 1949.
- ²¹ CONST, MASS. part I, art. XXX. 1780.
- ²² CHARLES, Lea. ALLEG, Henry. *A History of the Inquisition of the Middle Ages*. 1887; LANGBEIN, John. *Torture and the Law of Proof*, 1976; and PETERS, Edward. *Torture*. 1996.
- ²³ LANGBEIN, John. *Torture and the Law of Proof*, *supra* note 21.
- ²⁴ *Id.*, at 61.
- ²⁵ *Id.*, at 62.
- ²⁶ *Id.*, at 8-12.
- ²⁷ KIESOW, Rainer M. *Das Experiment mit der Wahrheit. Folter im Vorzimmer des Rechts, Rechtsgeschichte*, p. 98-103. 2003.
- ²⁸ *Id.*, with further references.
- ²⁹ This is Rainer Kiesow’s interpretation. See *supra* note 26, at 101.
- ³⁰ ARENDT, Hannah. *The Origins of Totalitarianism*. 1951.
- ³¹ BEHRINGER, Wolfgang. *Hexen und Hexenprozesse in Deutschland*. 2000. From a then-contemporary perspective, see Friedrich Spee von Langenfeld, *Cautio Criminalis*. 1631.
- ³² See *supra* note 21, with further references.
- ³³ See LANGBEIN, *supra* note 21, at 12-16; VAN CAENEGEM, Raul C. *La preuve dans le droit du moyen age occidental*, 17 *Recueils de la Société Jean Bodin pour l’histoire comparative des institutions* 691. 1965; FIORELLI, Piero. *La tortura giudiziaria nel diritto commune*, vol. I: 1953, II. 1954.
- ³⁴ See LANGBEIN, *supra* note 21, at 13-16.
- ³⁵ KIESOW, *supra* note 26, at 101, concerning the characterization of evidence in contemporary sources.
- ³⁶ LANGBEIM, *supra* note 21, at 3-5, 12-15, and FOUCAULT, Michel. *Discipline and Punish: The Birth of the Prison*, at 46. 1977.
- ³⁷ LANGBEIM, *supra* note 21, at 3.
- ³⁸ See the common torture devices reproduced in LANGBEIM, *supra* note 21, at 19-26, and DIRNBECK, Josef. *Die Inquisition. Eine Chronik des Schreckens*. 2002.

- ³⁹ AUBES – *Rêveries au bord de Victor Hugo*. Harald Szeemann et al. (eds), 2002.
- ⁴⁰ In 1999, *Amnesty International classified torture as one of the main problems of the year* (see AI-Index 44/18/00).
- ⁴¹ See PARRY, John T. *The Shape of Modern Torture*, 6 Melb. J. of Int'l. L. 516. 2005; PARRY, John T. *Torture in the Modern World*, (Lewis & Clark College – Law School working paper. 2005) <http://ssrn.com/abstract=899113>; REJALI, Darius. *Torture and Modernity: Self, Society, and State in Modern Iran*. 1993; and the naïve and fairly ignorant review demonstrated by CHIROT, Daniel. *Torture and Modernity: Self, Society, and State in Modern Iran*, 23 Contemp. Soc. 678. 1994.
- ⁴² PARRY, John T. *The Shape of Modern Torture*, supra note 40, at 521.
- ⁴³ *Turkish Antiterror Law*, n. 3713, art. 8.
- ⁴⁴ PETERS, Edward. *Torture*. supra note 21. at 125.
- ⁴⁵ PARRY, John T, *The Shape of Modern Torture*, supra note 40 at 525, characterizing modern torture as “total domination”.
- ⁴⁶ See FOUCAULT, Michel. ‘*Society Must be Defended*’: *Lectures at the Collège de France*. 1975-76 (David Macey trans., 2003); FOUCAULT, Michel. *Power/Knowledge: Selected Interviews and Other Writings 1972-77*, at 92-106. 1980.
- ⁴⁷ BLACKSTONE, William. *Commentaries on the Laws of England (1796)*; see also PETERS, Edward. *Torture*, supra note 21, at 103-40, with further references.
- ⁴⁸ See MELLOR, Alec. *La torture*, supra note 19; ALLEG, Henri. *La question*. supra note 2; LEVINE, Emmanuel H. *The Third Degree: American Police Methods*. 1933. As a document for the brutality of political torture as a system of hatred, see *The Report of the Argentine National Commission on the Disappeared: Nunca Más* 1986. Dershowitz claims that torture is used “promiscuously” today. DERSHOWITZ, Preemption, supra note 3.
- ⁴⁹ Concerning the supportive advisory role of physicians and behavioral scientists at Guantánamo Bay, see MAYER, Jane. *The Experiment: The Military Trains People to Withstand Interrogation – Are Those Methods being Misused at Guantánamo?* 81 *The New Yorker*, at 60, 2005; and PARRY, John T. *The Shape of Modern Torture*, supra note 40, at 522.
- ⁵⁰ Regarding the torture methods in the twentieth century see PETERS, Edward. supra note 21, at 169-76.; *Amnesty International, Wer der Folter erlag*. 1984. and the reports in *Nunca Más*, supra note 47.
- ⁵¹ From the vast literature concerning terrorism, law and emergency, see only WALTER, Christian. *Terrorism as a Challenge for National and International Law: Security versus Liberty?* et al. eds., 2004; NEUMAN, G. *Comment, Counter-Terrorist Operations and the Rule of Law*, 15 *Eur. J. Int'l L.* 1019. 2004; GEARTY, Connor. *Terrorism and Human Rights* 19 *Legal Studies* 367. 1999; and DYZENHAUS, David. *The Constitution of law: Legality in a Time of Emergency*. 2006.
- ⁵² The German scholar of criminal law, JAKOBS, Günter., developed and defended his observation and, later, his affirmative distinction of a “criminal law reserved for citizens and a criminal law directed against enemies”: JACOBS, Günter. *Kriminalisierung im Vorfeld einer Rechtsgutsverletzung*, *Zeitschrift für Strafrechtswissenschaft* 97, 751. 1985 and JACOBS, Günter. *Staatliche Strafe: Bedeutung und Zweck*. 41. 2004.
- ⁵³ AUGUSTINE. *De Civitate Dei, XIII*; Rainer Forst, *Toleranz im Konflikt*. 78 2003; BERLIN, Isaiah. *Two Concepts of Liberty, Four Essays on Liberty*. 118-33. 1969.
- ⁵⁴ Concerning the war on terrorism, see MCCOY, Alfred. *Folter und Foltern Lassen: 50 Jahre Folterforschung Und-praxis der USA*. 2005; For a critique of rescue torture in the German context, see JEROUSCHEK, Günter; KÖLBEL, Ralf. *Folter von Staats wegen?*, *Juristenzeitung*. 613-20. 2003; MARX, Reinhard. *Folter: eine zulässige polizeiliche Präventionsmaßnahme?* *Kritische Justiz*, 278-304. 2004, and KIESOW, Reiner M. supra note 26.
- ⁵⁵ PARRY, John T. *The Shape of Modern Torture*, supra note 40, at 522-25, 526-28.
- ⁵⁶ See KIESOW, Reiner M., supra note 26; HECKLER, Wolfgang. *Relativierung des Folterverbots in der BRD?*, *Kritische Justiz*, H. 210-18. 2003; and MARX, Reinhard., supra note 53. at 278.
- ⁵⁷ Compare REEMTSMA, Jan Philipp. *Folter im Rechtsstaat?* 2005. with IGNATIEFF, Michael. *The Lesser Evil. Political Ethics in an Age of Terror*. 2004.
- ⁵⁸ *The chairman of the German Judges' Association [Deutscher Richterbund] Mackenrodt*. *Frankfurter Rundschau*. Feb. 22, 2003; “*Bund deutscher Kriminalbeamter*”. *Darmstädter Echo*. Feb. 22, 2003; SCHMUDE, Marcus V. “*Müssen wir foltern?*”, *Frankfurter Rundschau*, Dec. 28, 2001; KIRCHHOFF, Paul. *Die Zulässigkeit des Einsatzes staatlicher Gewalt in Ausnahmesituationen*, 2 *Rechtsstaat in der Bewährung*, 83-114, 1976. and STARCK, Christian; KLEIN, Mangoldt., *Grundgesetz-Kommentar I*, art. I, 71, 4th ed. 1999.
- ⁵⁹ See *The Torture Papers: The Road to Abu*. GHRAIB, Karen Greenberg & Joshua Dratel eds. 2005; STEYN, Johan. *Guantanamo Bay: The Legal Black Hole*, 53 *Int'l. & Comp. L. Q.*, 1, 2004; SCHEPPELE, Kim. *North American Emergencies: The Use of Emergency Powers in Canada and the United States*, 4 *Int'l. J. Const. L.* 213. 2006.
- ⁶⁰ SCHILY, Otto. (former German Minister of the Interior). Interview, *Der Spiegel*, n. 18, September. 2004, at 47. Similar statements were issued by the security experts of the conservative parties see *Der Tagesspiegel*, Feb. 21, 2003.
- ⁶¹ *The decision of the First Senate* of Feb. 15. 2006 – 1 BvR 357/05 – held that § 14 sec. 3 of the *Luftverkehrsgesetz* [Air Security Act] violated the right to life (art. 2 sec. 2 German Basic Law) and the protection of human dignity (art. 1 sec. 1 German Basic Law).
- ⁶² TUSHNET, Mark. *Controlling Executive Power in the War on Terrorism*, 118 *Harv. L. Rev.* 2673, 2005; GROSS, Oren. *Chaos and Rules: Should Responses to Violent Crisis Always be Constitutional?* 112 *Yale L.J.* 1011, 2003.
- ⁶³ IGNATIEFF, Michael. *The Lesser Evil*. 2004.
- ⁶⁴ POOLE. supra note 14, at 3 (with further references).
- ⁶⁵ BRUGGER, Winfried. supra note 10. For a defense of the absolute prohibition of torture, see FISS, Owen. *The War Against Terrorism and the Rule of Law*, 26 *Oxford J. Legal Studies* 235, 2006), and STRAUSS, supra note 13.
- ⁶⁶ HERDEGEN, Matthias. in Maunz/Dürig, *Grundgesetz Kommentar*, art. 1 n. 45. 2003.
- ⁶⁷ Referring to the extreme situation of kidnapping, see DI FABIO, Udo. *Grundrechte als Werteordnung*, *Juristenzeitung*, 1-5, 2004. For a justification of a criminal law directed against terrorists and organized crime, see JACOBS, Günter. *Kriminalisierung im Vorfeld einer Rechtsgutsverletzung*, supra note 51. After the decision of the Federal Constitutional Court concerning the *Luftverkehrsgesetz* [Air Security Act], one may hardly assume that the Court will find this argument acceptable.

- ⁶⁸ See BOWDEN, Mark. The Dark Art of Interrogation, *The Atlantic Monthly*, at 51-76. Oct. 2003
- ⁶⁹ As to the “conditions of uncertainty”, see POOLE, supra note 14.
- ⁷⁰ Concerning “terrorism and the government of risk”, see POOLE. supra note 14, at 13-17.
- ⁷¹ From a critical perspective, see FUCHS, Peter. *Eine tragische Wahl? Über die Schwierigkeiten und Folgen rechtsstaatlichen Folterns*, Frankfurter Rundschau, Jan. 9, 2005.
- ⁷² Reports in the Frankfurter Rundschau, Feb. 22, 2003 and *Der Spiegel*, Feb. 24, 2003; BUSCH, Heiner. Rechtsstaatlich geregelte Folter? 74 *Bürgerrechte & Polizei/CILIP*. 2003.
- ⁷³ Called for by DERSHOWITS, *The Torture Warrant*, supra note 16; see also BAGARIC E CLARKE, supra note 16.
- ⁷⁴ Similarly, GRIMM, Dieter. Es geht ums Prinzip, *Frankfurter Allgemeine Zeitung*, May, 26. 2004.
- ⁷⁵ BRUGGER, Winfried. supra note 11.
- ⁷⁶ FREUD, Sigmund. supra note 4, at 303.
- ⁷⁷ PARRY, John T. *The Shape of Modern Torture*, supra note 40, at 520.
- ⁷⁸ PETERS, Edward. supra note 21, at 152.
- ⁷⁹ See BOWDEN, Mark; and HERSH, Seymour. *Chain of Command*, at 19-20. 2004.
- ⁸⁰ See The Committee on International Human Rights of the Association of the Bar of the City of New York & The Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: International and Domestic Law applicable to ‘Extraordinary Renditions,’* Oct. 29, 2004; Interview with MAYER, Jan. *The New Yorker*, Feb. 14, 2005; Torture by Proxy, *The New York Times*, Mar. 8. 2005.
- ⁸¹ MAYER, Jane. Outsourcing Torture, 81 *The New Yorker*, 106, 2005.
- ⁸² See PARRY. *The Shape of Modern Torture*, supra note 40 at 528-33; BARTELT, Dawid D. Das Rendition-Programm der USA und die Rolle Europas, *Aus Politik und Zeitgeschichte*, Nr. 36, Sept. 4, 2006; MARTY, Dick. Alleged Secret Detentions and Unlawful Interstate Transfers, *Information Memorandum II*, AS/JUR., June 7. 2006; Amnesty International, *Partners in Crime. Europe’s Role in US Renditions*, AI index: EUR 01/008/2006.
- ⁸³ Unless political office-holders, like the Vice President of the United States, suggest almost publicly that their own secret service, the CIA, be exempt from the prohibition of torture, and unless a presidential *executive order* condones those interrogation techniques. See the report in *Human Rights News*, New York Dec. 21, 2004.
- ⁸⁴ The Minister of the Interior, SCHÄUBLE, Wolfgang. as quoted by *Der Spiegel online*, Jan. 1, 2006.
- ⁸⁵ For a sample of the critiques of the security imperative dominating the academic and political discourses on anti-terrorism, see Jeremy Waldron, Security and Liberty: The Image of Balance, 11 *J. Pol. & Phil.* 191 2003; FRANKEMBERG, Günter. Kritik des Bekämpfungsrechts, *Kritische Justiz* 370-86. 2005; LOADER, I.; and WALKER, N. *Civilizing Security*. 2007.

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