The *Gäfgen Judgment* of the European Court of Human Rights: On the Consequences of the Threat of Torture for Criminal Proceedings

By Stephan Ast[*]

A. Introduction

Whether or not the prohibition of torture allows exemptions is controversial not only in Germany but worldwide. The European Court of Human Rights (ECHR) had to answer this question in the case of Gäfgen versus Germany (App. 22978/05). The Grand Chamber of the Strasbourg court delivered its judgment on 1 June 2010. It held that the prohibition of torture (Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) does not grant any exemptions, even if the life of another is at risk. The present case commentary agrees with this result of the judgment. The next question is even more interesting from the legal point of view: What are the legal consequences of a violation of Article 3 of the Convention, especially with regard to criminal court cases against the offender and the victim of torture? The ECHR emphasizes the necessity of the effectiveness of the protection of the fundamental rights under the Convention. As a result, it argues for a thorough investigation and deterrent punishment of the offenders on the one hand and for an extensive exclusion of evidence obtained as a consequence of torture from the proceedings against the victim of torture on the other.

This case note follows the structure of the judgment. First the facts of the case are presented (see B.). Within the legal assessment of the case the ECHR holds that the threat of torture is inhuman treatment in the meaning of Article 3 of the European Convention on Human Rights (see C.I.). This treatment cannot be justified even if the life of another is at stake (see C.II.). A sufficient redress for the victim of such treatment has to entail a noticeable punishment (see D.). Finally, the court had to decide, whether items of evidence that were obtained in consequence of a confession under the threat of torture are admissible in criminal proceedings (see E.). The ECHR tends with regard to Article 6 of the European Convention on Human Rights (hereafter: “the Convention”) to exclude all of them. The commentary analyzes the arguments of the ECHR and affords an overview of the German jurisdiction and discussion of this issue.

[*] The author is research assistant at the Chair for Criminal Law and Philosophy of Law (Prof. Dr. Joachim Renzikowski), Martin-Luther-University Halle-Wittenberg. Email: stephan.ast@jura.uni-halle.de, ast.stephan@gmail.com.

The relevant laws are Articles 3 and 6 of the Convention.[1] Article 3 reads as follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Article 6: "In the determination . . . of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The Convention as interpreted by the rulings of the ECHR has in Germany the same status as statutory law.[2] This is why the German courts including the German Federal Court are obliged to apply the Convention.

B. The Case

On 27 September 2002 Magnus Gäfgen (G.), a student in Frankfurt am Main, lured Jakob von Metzler (J.), son of a banking family, into his flat, killed the eleven year old boy, and hid his dead body. Subsequently he extorted the parents for a ransom. From the moment, when G. picked up the ransom, he was under police surveillance. On 30 September 2002 he was arrested. When searching G.´s flat the police found parts of the ransom money and a note concerning the planning of the crime. G. indicated that two kidnappers held the boy hidden in a hut by a lake. Concerned about the life of J., D., deputy chief of the Frankfurt police, ordered E., an officer, to threaten G. with considerable physical pain and, if necessary, to subject him to such pain in order to make him reveal the boy´s whereabouts. Because of E.´s threat, G. disclosed the whereabouts of J.´s corpse. The police found it under a dock at a pond around 60 miles from Frankfurt. Near that place the police discovered tire tracks left by G.´s car. G. confessed that he kidnapped and killed J. He indicated the police officers various other locations where the officers secured J.´s clothes and other items of evidence.

On 9 April 2003, the first day of the proceedings in the Frankfurt am Main Regional Court, G. made a preliminary application for the proceedings to be discontinued because of the threat of violence. Alternatively he sought at least a declaration, that all statements he had made to the investigation authorities and all items of evidence that had become known because of his confession were prohibited. The court found, that the threat was a violation of Article 136a of the Code of Criminal Procedure (CCP), of Article 1 and 104 § 1 of the German Basic Law and of Article 3 of the European Convention on Human Rights. Notwithstanding this breach of G.´s constitutional rights the court decided that the criminal proceedings were not barred.[3] The court accepted that in accordance with Article 136a § 3 of the CCP the confessions and statements of G. were inadmissible as evidence, but it refused to exclude the items of evidence that were found in consequence

[1] The text of the Convention is available at http://echr.coe.int (all citations last assessed Nov. 1, 2010).

[2] *See* CHRISTOPH GRABENWARTER, EUROPÄISCHE MENSCHENRECHTSKONVENTION, para. 3, 6 (4th ed. 2009).

[3] Landgericht Frankfurt am Main [LG – Regional Court], 23 Strafverteidiger 327 (2003).

of G.´s statements.[4] After that, in his statements to the charges, G. admitted killing J. Later he also admitted that he had intended to kill J. from the outset. On 28 July 2003 the court convicted G., inter alia, of murder and sentenced him to life imprisonment.[5] The findings of facts concerning the commission of the crime were based on G.´s confession at the trial and were confirmed by the other items of evidence.

After the conviction G lodged an appeal on points of law with the Federal Court of Justice (BGH) and complained that the Regional Court had refused his preliminary application. The BGH refused the appeal without furnishing any reasons. Then G. lodged a complaint with the Federal Constitutional Court. It refused the complaint as inadmissible because it held that G. had failed to raise the question of the exclusion of the impugned items of evidence in the proceedings before the BGH. On 15 June 2005 G. lodged an application with the European Court of Human Rights. On 30 June 2008 a Chamber of the Fifth Section held, that there has been a violation of Article 3 of the European Convention on Human Rights, but that G. could no longer claim to be a "victim" of that violation. The chamber further denied a violation of Article 6 of the Convention.[6] The Grand Chamber of the ECHR, which G. requested to refer the case, held by eleven votes to six that G. may still claim to be the "victim" of the violation of Article 3 for the purposes of Article 34 of the Convention and by eleven votes to six that there had been no violation of Article 6 §§ 1 and 3 of the Convention.

C. Violation of Article 3 of the European Convention on Human Rights

Article 3 of the Convention forbids torture and inhuman or degrading treatment or punishment. The ECHR had to answer two questions: first, whether the threat of considerable pain was an inhuman treatment or even torture (see I.), second, whether it was justified in the case (see II.).

I. Classification of the Threat

The ECHR has developed in its case-law some criteria to define inhuman treatment.[7] Considering the effects of a conduct, it must cause either actual bodily injury or

[4] LG Frankfurt am Main, 23 Strafverteidiger 325 (2003).

[5] LG Frankfurt am Main, 5-22 Ks 2/03 3490 Js 230118/02, available at http://juris.de.

[6] Gäfgen v. Germany, Application 22978/05 (June 30, 2008), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=837249&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

[7] Gäfgen v. Germany, Application 22978/05 (June 1, 2010), para. 88-91, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=868977&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 [hereinafter Gäfgen v. Germany].

considerable physical or mental suffering.[8] Only if such effects occur may the person who was subjected to the conduct be called a "victim". Furthermore the treatment must attain a "minimum level of severity".[9] The assessment of this minimum depends on all the circumstances of the case: the intention to cause suffering, the purposes of the conduct, its duration and context, and the state of the person who was subjected to the treatment.

Inhuman treatment is called torture, if there are aggravating circumstances: intentional and severe pressure and intense physical pain or mental suffering.[10] Besides, the aim of a conduct, stigmatized as torture, is generally to obtain information, inflict punishment, or intimidate someone.[11] To threaten somebody with torture is forbidden and may constitute at least inhuman treatment.[12]

In the present case the ECHR finds that the threat of torture caused considerable fear, anguish and mental suffering, because G. was incited to confess where he had hidden the corpse. Furthermore, the officers had intended these effects. Regarding the circumstances of the case, the court holds that the impugned conduct attained the minimum level of severity to bring it within the scope of Article 3. The court does not find, however, the level of cruelty that is required to attain the threshold of torture.[13]

II. Justification of the Threat

The question, whether or not an impugned conduct is justified, the ECHR discusses while assessing the circumstances of the case. It has to do so, because at first glance the definition of inhuman treatment also includes unprohibited behaviour such as the justified use of force by the police, the imprisonment of an offender or the fighting of a war. If these actions are justified, they cannot be classified as inhuman treatment. Thus, the

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[8] Kudla v. Poland (GC), 2000-XI Eur. Ct. H.R. 510, para. 91-92.

[9] Ireland v. the United Kingdom, 2 Eur. H.R. Rep. 25, para. 162; Labita v. Italy, 2000-IV Eur. Ct. H.R., para. 120; Gäfgen v. Germany, para. 88, 89; *see* JACOBS AND WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 80 (4th ed. 2006); DAVID HARRIS, MICHAEL O´BOYLE, EDWARD BATES, & CARLA BUCKLEY – LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 75 (2nd ed. 2009).

[10] Ireland v. the United Kingdom, para. 167; Gäfgen v. Germany, para. 90.

[11] Akkoç v. Turkey, 2000-X Eur. Ct. H.R., para. 115; Gäfgen v. Germany, para. 90. Compare also the definition of Art. 1 para. 1 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85. *See also, e.g.*, Eric Hilgendorf, *Folter im Rechtsstaat?*, 59 JURISTENZEITUNG 331, 334 (2004).

[12] Campbell and Cosans v. the United Kingdom, 4 Eur. H. R. Rep. 293, para. 26 (1982); Gäfgen v. Germany, para. 91, 108.

[13] Gäfgen v. Germany, para. 101 – 108.

argument of the ECHR that an inhuman treatment can never be justified[14] is correct, but it comprehends the *petitio principii* that the threat of torture by governmental authorities is inhuman treatment in every case one could imagine, even if it was to save a child´s life.

The ECHR does not accept weighing up interests at this point.[15] The law is unambiguous; the prohibition of torture in Article 3 of the Convention does not allow any exemptions.[16] It is only consistent that the same applies to the prohibition of the threat of torture.[17] The strict prohibition of torture is a lesson from history.[18] In the recent past Guantanamo is an example that argues for the inadmissibility of exemptions.[19] So it is not appropriate to differentiate between justified torture and not justified torture or between torture for the purposes of prosecution and of security. A situation in which torture suggests itself is always a situation of a mere suspicion, and a suspicion can be false. Furthermore, if torture is admitted, there will not be self-evident limits of its application.[20] These are historical and practical reasons. In the legal and ethical view one can deduce the severity of the prohibition of torture from the guarantee of human dignity or the conditions of the state´s legitimacy. This suggests a priority of a deontological over a consequentialist or teleological ethical theory.[21]

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[14] Gäfgen v. Germany, para. 107.

[15] Gäfgen v. Germany, para. 87, 176. *See also* Ireland v. the United Kingdom, para. 163; Chahal v. the United Kingdom, 23 Eur. H. R. Rep. 413, para. 79-81 (1997); Saadi v. Italy, Application 37201/06, para. 138 (February 28, 2008), available at http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=829510&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

[16] Explicitly stated in Article 15 para. 2 of the Convention and Article 2 para. 2 of the UN Convention Against Torture. *See also* Article 5 of the Universal Declaration of Human Rights, Article 7 of the UN Convenant on Civil and Political Rights and common Article 3 para. 1 a and c of the Geneva Convention.

[17] *Contra e. g.*, Rolf Dietrich Herzberg, *Folter und Menschenwürde*, 60 JURISTENZEITUNG 321, 325, 328 (2005).

[18] EDWARD PETERS, TORTURE (1996) (providing a historical overview).

[19] Amnesty International, *USA: Shadow over Justice, available at* http://amnesty.org/en/library/info/AMR51/094/2010/en (Oct. 1, 2010).

[20] *See* Jan Joerden, *Über ein vermeintes Recht (des Staates) aus Menschenliebe zu foltern*, 13 JAHRBUCH FÜR RECHT UND ETHIK 495, 518 (2005).

[21] Luis Greco, *Die Regeln hinter der Ausnahme: Gedanken zur Folter in sog. Ticking Time bomb- Konstellationen*, 154 GOLTDAMMER'S ARCHIV 628 (2007), LUIS GRECO, LEBENDIGES UND TOTES IN FEUERBACHS STRAFTHEORIE 128, 138 (2009).

The consequences of the court´s position might be difficult to accept,[22] as a variation of the present case illustrates. Assume that J. was still alive and no attempt to incite G. to confess was successful. In this case G. would have been legally obligated to disclose where he had hidden the boy, otherwise he would be a murderer by omission. But it would be unlawful for the police to constrain him to observe the law. Taking into account the interests at stake, there is on the one hand the life of the boy and on the other the autonomy (freedom) of G.´s will. Another aspect is that in this case everybody would have been allowed to threaten the suspected person with torture except the public authorities. Thus, it could be admissible to surrender this person to someone, who may act in justified self-defense. This reveals that the reason of the prohibition of torture is not the mere effect of this treatment on the person who is subjected to it. The primary reason is to limit the public power for protecting the people in general from dangers of the kind of violence that has no inherent limits. Torture and the threat of torture convey perhaps the most intense form of power, because the subjected person is entirely at the mercy of the state.[23] As a consequence, the court was right not to admit an exemption from the prohibition of torture.

D. The "Victim" Status

The status of a "victim" of a violation of the Convention remains as long as the national authorities do not afford sufficient redress to the person injured. In cases of willful ill-treatment it is necessary to investigate thoroughly and effectively what happened and to award compensation to the person injured.[24] Beyond that, the ECHR demands the prosecution and appreciable punishment of the persons responsible.[25] Furthermore, they should be suspended from duty while being investigated and in grave cases should be dismissed if convicted.[26]

In the present case the violation of Article 3 of the Convention was recognized by the German courts. The two police officers were convicted of coercion and incitement of

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[22] For a justification of torture in cases like this see, e. g., Winfried Brugger, *Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?*, 55 JURISTEN ZEITUNG 165 (2000). *See also* Joerden, *supra* note 20, at 503 (many further references to the German literature).

[23] The situation of torture would be the highest challenge for the power, because nobody can substitute the action, which is ordered. About the correlation between force, threat and power as a generalized medium of interaction, see NIKLAS LUHMANN, MACHT 9, 60 (2d ed. 1988), NIKLAS LUHMANN, DIE POLITIK DER GESELLSCHAFT 45, 55 (2000).

[24] Gäfgen v. Germany, para. 116-118.

[25] Gäfgen v. Germany, para. 117, 119, 123.

[26] Gäfgen v. Germany, para. 125 with further references.

coercion by the Frankfurt am Main Regional Court. But the fines were very modest, a suspended payment of 3.600 € for E. and of 10.800 € for D.[27] As for disciplinary sanctions both were transferred to posts, which do not involve association with the investigation of criminal offences, but D. later was promoted as the chief of a Headquarter of Administration.

The ECHR deems that in spite of some mitigating circumstances these sanctions were in a manifest disproportion to the gravity of the criminal offence.[28] It holds that they do not have the necessary deterrent effect in order to prevent further violations of Article 3 in future difficult situations. The court refers to the case Nikolova and Velichkova v. Bulgaria.[29] In this case two police officers willfully inflicted on a person grievous bodily harm negligently resulting in death. These officers were as in the present case sentenced to the minimum penalty allowed by law.

The ECHR infers the principle that the Convention should prevent effectively human rights violations from Article 1 of the Convention. A state is obliged to secure the Human Rights guaranteed by the Convention. These rights have to be "practical and effective" and not "theoretical or illusory".[30] Therefore a state even can be obliged to enact a certain penal law.[31] Consistently, also the courts of a state are obliged by the Convention as by every other law. This is why the criminal courts have to take account for the effectiveness of the rights guaranteed by the Convention. Besides, the victim has no right to claim a certain level of punishment which would correspond to that obligation. Its status as a "victim" is only a means to prevent future violations of the convention.

Moreover, the ECHR itself concedes that it is not able to determine the appropriate sentence of an offender.[32] This is a question of individual guilt. This question can be assessed only by the court that is familiar with the criminal case and the persons involved. Thus, the ECHR should only intervene, if the national courts apparently protect the offenders from adequate punishment. The present case is not an example of this. Among other circumstances and in contrast to the case of Nikolova cited above, the person injured has given reason for the offence. G. was suspected rightly to have hidden J. and J.´s life was

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[27] LG Frankfurt am Main, 58 NEUE JURISTISCHE WOCHENSCHRIFT 692 (2005).

[28] Gäfgen v. Germany, para. 123-125; *contra* Gäfgen v. Germany (Casadevall, J., dissenting), para. 6.

[29] Nikolova and Velichkova v. Bulgaria, Application 7888/03, para. 60-64 (Dec. 20, 2007). See, in this context, HARRIS, ET AL., *supra* note 9, at 48, 108.

[30] Artico v. Italy, 3 Eur. H.R. Rep. 1, para. 33 (1980).

[31] X and Y v. Netherlands, 8 Eur. H.R. Rep. 235, para. 27 (1985). *See* HARRIS, ET AL., *supra* note 9, at 107, 384.

[32] Gäfgen v. Germany, para. 123.

supposed rightly to be in danger. Thus, even though the injustice was a violation of a human right, it was of minor severity. In another case the same injury that G. suffered could have been caused by a justified defense. An offender always puts his own rights at stake. Furthermore it is not clear that a more severe punishment of the officers would be more effective at preventing future offences. It was rather essential that the criminal court clarified in this precedent that the threat of torture is prohibited under all circumstances.

In addition to the objection of the lenient sanctions the ECHR criticizes the fact that G.´s compensation claim and the preliminary action to attain legal aid for that claim has taken more than three years to this point.[33] Beyond that, the court does not determine, whether sufficient redress for the violation of Article 3 of the Convention had to entail the exclusion of all items of evidence obtained as a result of the violation at the criminal proceedings.[34] This question coincides with the other question, whether or not the right to a fair trial (Article 6 of the Convention) was violated. In effect, though G. still may claim to be a "victim" of a violation of Article 3, he has scarcely attained an advantage. The sanctions for the two police officers cannot legally be changed, and the compensation claim is still pending and cannot be criticized in advance.

E. Violation of Article 6 of the European Convention on Human Rights

The real concern of G. was obtaining a new criminal trial from which the impugned evidence would be excluded. In this regard G. failed. The ECHR concludes that the Frankfurt Regional court did not violate G.´s right to a fair trial under Article 6 of the Convention.[35]

The following section first explores the structure of the right to a fair trial in relation to more specific procedural rules (see I.). It then shows that the ECHR concludes implicitly that the admission of the impugned evidence was a mistake. After that I will discuss the exclusionary rule that the ECHR postulates and put it into the context of the jurisdiction of the ECHR and of the German courts (see II.). Finally, I will explain, why, nevertheless, the ECHR denies a violation of the right to a fair trial (see III.). The trial as a whole was fair in terms of Article 6 of the Convention, because the conviction was founded by G.´s confession at the trial. This confession was not influenced in a relevant way by the inhuman treatment that he had suffered.

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[33] Gäfgen v. Germany, para. 126; Gäfgen (Casadevall, J., dissenting), para. 8.

[34] Gäfgen v. Germany para. 128, 129.

[35] Article 6 of the Convention is quoted in the Introduction of this case note.

I. The Right to a Fair Trial in Relation to Specific Procedural Rights

At first it is important to analyze the structure of the rules that the ECHR postulates, because it is not clear that the ECHR postulates specific rules on the admissibility of evidence. In its arguments the ECHR distinguishes implicitly between a single procedural act (*"Prozesshandlung"*) that can be called unfair and the trial as a whole. A single "unfair" procedural act is able to make the whole trial unfair but does not do so necessarily. The unfairness of the trial is not a matter of necessity or causation but of an assessment of the trial as a whole.[36] Accordingly, it is possible to distinguish two kinds of rules respectively rights of the defendant. The primary rule is the precept to the court to provide a fair trial and a fair judgment. This rule refers to the results of a proceeding. Rules of the second kind prescribe and forbid specific procedural acts.[37] The violation of such rules does not result necessarily in a violation of the first rule, because the fairness of a trial is a matter of assessment of the trial as a whole. This is why a violation of a rule of the second kind has in some cases no legal consequences in respect of Article 6 of the Convention. However, it is necessary that the ECHR accepts a rule of the second kind if it only denies the unfairness of the trial as a whole. The court has to indicate procedural acts that are able to make a trial unfair. The fairness of a trial cannot depend exclusively on random circumstances as in the present case the confessions of G. or in other cases the question, whether or not other rights of defense were disregarded. Thus, the ECHR postulates necessarily specific rules also in respect of the use of evidence.[38] However, one could say that these rules are weak, because its violation does not lead to a "sanction" necessarily.[39]

The question whether or not the ECHR postulates specific rules in this context remains controversial.[40] The court itself has denied postulating such rules to this point, for example in the case Schenk v. Switzerland:[41] "While Article 6 of the Convention guarantees the right

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[36] Gäfgen v. Germany, para. 163-165.

[37] For a similar differentiation of two kinds of rules in another context, see STEPHAN AST, NORMENTHEORIE UND STRAFRECHTSDOGMATIK 16, 22 (2010). One can distinguish effect- or causation- norms and action- norms. It is a peculiarity of the precept to render a fair trial that the ascertainment of this "effect" is a matter of evaluation.

[38] On the character of procedure rules as constitutive rules and their relation to regulative rules like the prohibition of torture, see Matthias Mittag, *A Legal Theoretical Approach to Criminal Procedure Law: The Structure of Rules in the German Code of Criminal Procedure*, 7 GERMAN LAW JOURNAL 637, 643 (2006).

[39] One could understand the judgment in an alternative way. Possibly the ECHR assumes only hypothetically rules of the second kind and denies anyway the impact of the breach of these rules on the results of the proceeding. However, by reading the judgment it seems that that the court does not assume these rules only hypothetically.

[40] For a detailed analysis, see KARSTEN GAEDE, FAIRNESS ALS TEILHABE – DAS RECHT AUF KONKRETE UND WIRKSAME TEILHABE DURCH VERTEIDIGUNG GEMÄß ART. 6 EMRK 804, 813 (2007).

[41] Schenk v. Switzerland, 13 Eur. H.R. Rep. 242, para. 46 (1988).

to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether [the] trial as a whole was fair."[42] One can understand well that the ECHR abstains from clear conclusions. As opposed to the national courts it is not its task to determine the procedural law in detail. However, both, the national courts and the ECHR, have necessarily to make explicit the rule, whether certain evidence may be used. Furthermore, they have to give reasons for such a rule (see II.) and have to decide, whether a violation of that rule should be subjected to a legal sanction in a single case (see III.).

II. The Exclusionary Rule

The rule that all evidence obtained as a remote result of a breach of Article 3 of the Convention must not be used in criminal proceedings is the most important outcome of the judgment, because this is a new rule in the context of the German law as well as in the case-law of the ECHR itself.[43] The ECHR justifies this rule with two reasons. The first one refers to the legitimation of a criminal proceeding: "There is also a vital public interest in preserving the integrity of the judicial process and thus the values of civilized societies founded upon the rule of law."[44] The second argument refers to the effectiveness of the protection of the human rights under the Convention: "Admittedly, in the context of Article 6, the admission of evidence obtained by conduct absolutely prohibited by Article 3 might be an incentive for law-enforcement officers to use such methods notwithstanding such absolute prohibition."[45]

This preventive purpose is only carefully accepted within the German discussion, because the specific means to prevent infringements by law-enforcement officers are penal and disciplinary sanctions, but not a sanction, which could paralyze a criminal proceeding and impede a just punishment.[46] Instead, the German jurisprudence has recognized three

[42] *See* Khan vs. the United Kingdom, 2000-V Eur. Ct. H.R., para. 35; Gäfgen v. Germany, para. 162-165.

[43] The ECHR has already decided that statements obtained as a result of ill-treatment in breach of Art. 3 are generally inadmissible, as well as real evidence obtained as a direct result of acts of violence. *See* Gäfgen v. Germany, para. 166-168; HARRIS, ET. AL., *supra* note 9, at 257. The most important judgment in this context is Jalloh v. Germany, 2006-IX Eur. Ct. H.R., para. 105-108. The U.S. Supreme Court, to which the ECHR refers, in Gäfgen v. Germany, para. 73, accepts the doctrine of the "fruit of the poisonous tree." *Nix v. Williams*, 467 U.S. 431 441 (1984).

[44] Gäfgen v. Germany, para. 175.

[45] Gäfgen v. Germany, para. 176-178.

[46] *See, e.g.*, CLAUS ROXIN, BERND SCHÜNEMANN – STRAFVERFAHRENSRECHT, para. 24/60 (26th ed. 2009).

principles respectively purposes at stake if one justifies or repudiates the so called *"Beweisverwertungsverbote"* (prohibitions of the use of evidence).[47] The first purpose is to retain the legitimation of punishing.[48] This principle is important in the present case, because the criminal trial has to avoid the impression of being based on an act of torture or inhuman treatment. The second principle corresponds to the purpose of the criminal proceeding itself, namely to find out the truth and to render a just punishment.[49] This purpose mostly contradicts prohibitions to use manifest evidence.

Finally one could accept in general so-called *"Informationsbeherrschungsrechte"* (rights to control information).[50] These are legal admitted rights of a person to determine when and how she or he provides information. If such a right is violated—e. g. if the person is coerced unlawfully to reveal information—then the person has a right to the reversal of the consequences of the violation (*"Folgenbeseitigungsanspruch"*). Similar rights are accepted widely in the public law if a subjective right is violated.[51] By means of these assumptions one can justify the *"Fernwirkung"* (long range effect) of prohibitions to obtain certain evidence. In principle, all evidence that is found in consequence of the threat of torture is inadmissible. The right to the reversal can only be limited if the information would have been attained also in a legal way. *De facto* the ECHR has acknowledged the aforementioned right in case of the violation of Article 3 of the Convention, but the arguments of the court are based exclusively on an objective point of view.

German law accepts only restrictively long-range effects of prohibitions to obtain or use evidence. The Federal Court of Justice (BGH) has delivered some judgments concerning the problem, whether evidence that was found as a consequence of an unlawful investigatory measure is admissible in criminal proceedings.[52] To resolve this problem the BGH considers the circumstances of the case, above all the gravity of the defendant´s charge and of the unlawfulness of the measure in question. In the case 34 BGHSt 362 the court, as in the present case, found a coercion contrary to Article 136a of the Code of Criminal Procedure (CCP). The defendant was imprisoned in his cell with another defendant who collaborated with the police. He disclosed the robbery that he had committed to the other defendant. Consequently, a further witness of prosecution was found. The court decided that the

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[47] KNUT AMELUNG, INFORMATIONSBEHERRSCHUNGSRECHTE IM STRAFPROZEß 14-29 (1990).

[48] *See* 31 BGHSt, 304, 308.

[49] *See* 27 BGHSt, 355, 357.

[50] AMELUNG, *supra* note 47, at 24, 30. With reference to the American information-transaction approach, Schrock & Welsh, *Up from Calendra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1975).

[51] *See* HARTMUT MAURER, ALLGEMEINES VERWALTUNGSRECHT, para. 30 (17th ed. 2009).

[52] 29 BGHSt 244; 32 BGHSt 68; 34 BGHSt 362.

testimony of this witness was admissible. In regard to effective prosecution and crime-prevention the court held that a single unlawful act should not disable the whole proceeding. Furthermore, it was hardly possible to conclude that the witness would not have been detected otherwise. Article 136a § 3 of the CCP establishes solely that statements obtained in breach of the prohibition of coercion, threat and deceit must not be used in evidence. Thus, the more remote results of the statements are not inadmissible in general.

The present judgment of the ECHR can be integrated in this jurisdiction, because the impugned evidence was found in consequence of the violation of a basic human right. For example in the case 27 BGHSt 355 the Federal Court accepted a long-range effect, because the constitutional right to freedom of telecommunication was violated.[53] Admittedly, the crime charged was of minor gravity.

III. Limits of the Exclusionary Rule

Thus, the ECHR assumes that the criminal court has violated a rule that follows from the precept of a fair trial. The criminal court was not allowed to admit the evidence that had been found in consequence of the threat of torture. Nevertheless, the ECHR denies a violation of Article 6 of the Convention. The trial as a whole was fair, because the breach of Article 3 of the Convention did not have a bearing on the conviction and sentence. At the beginning of the proceeding G. confessed voluntarily that he had murdered J. Before this confession the court instructed him that none of the statements he had previously made on the charges could be used as evidence against him. The judgment was primarily based on this confession. The impugned items of evidence only were used to test its veracity. The ECHR concludes: "It can thus be said that there was a break in the causal chain leading from the prohibited methods of investigation to the applicant´s conviction and sentence in respect of the impugned real evidence."[54]

Six judges of the court were dissenting in this respect.[55] They argued that the violation of Article 3 had a bearing on the confession of G as well as his conviction and sentence. On the first day of the proceeding G. made a preliminary submission to exclude the impugned evidence. After the refusal of this submission he only confessed to what had already been proven. It is obvious that G.´s defense-strategy depended on this point. Thus, the refusal was a condition of the concrete confession.

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[53] In contrast, the ECHR considered in cases of a violation of Art. 8 of the Convention the obtained evidence admissible. *See* Schenk v. Switzerland, *supra* note 41, at para. 46-49; Khan v. the United Kingdom, *supra* note 42, at para. 38-40. Kühne & Nash, *Case Commentary on Khan v. the United Kingdom*, 55 JURISTENZEITUNG 997 (2000) (skeptical).

[54] Gäfgen v. Germany, para. 180.

[55] Gäfgen v. Germany (Rozakis, J., dissenting).

To analyze this problem it is important to differentiate between the bearing of the violation of Article 3 on the conviction and the bearing of the exclusionary rule that the ECHR postulates. Surely, the refusal of G.´s preliminary submission was a condition of the confession and had in this way a bearing on the trial and the conviction. But this is not relevant. The main purpose of the exclusionary rule is to prevent the breach of Article 3 from having an influence on the conviction. This follows from the argument of the ECHR in respect of the legitimacy of the trial and judgment. The conviction may in no way be affected by the breach of Article 3 of the Convention. However, in the present case the conviction and sentence are apparently not, or only marginally, based on the items of evidence that were found in consequence of the violation of Article 3. This is why the purpose of the exclusionary rule is achieved. The confession of G. itself was not a consequence of the violation of Article 3. It was a consequence of the court´s announcement of the breach of the exclusionary rule. However, the right way to react to mistakes of a court is always to appeal to a higher court. Because of this, the court´s mistake does not have the effect to exclude the freedom of G.´s confession.[56] Thus, his confession "breaks the causal chain" as the ECHR states.[57] This is not a matter of a naturalistic understood causation but of an assessment which is primarily based on the purposes of the rules in question.

F. Conclusion

In summary, the result of the judgment in ECHR´s own words is that "the repression of, and the effective protection of individuals from, the use of investigation methods that breach Article 3 may . . . also require, as a rule, the exclusion from use at trial of real evidence which has been obtained as the result of any violation of Article 3, even though that evidence is more remote from the breach of Article 3 than evidence extracted immediately as a consequence of a violation of that Article. Otherwise, the trial as a whole is rendered unfair. However, the Court considers that both a criminal trial´s fairness and the effective protection of the absolute prohibition under Article 3 in this context are only at stake if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence."[58] This has not been shown in the present case.

[56] In conformity with 27 BGHSt 355, 358.

[57] Gäfgen v. Germany, para. 180.

[58] Gäfgen v. Germany, para. 178.