

# May a State Torture Suspects to Save the Life of Innocents?

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## Abstract

*The old debate on the (Israeli) ticking bomb cases must be revisited in the light of the increasing threat by terrorist bombers and a recent German kidnapping case. Both cases may be combined as one 'model case' to test whether the claim of a truly absolute prohibition of torture can really stand in extreme situations where the use of torture may be the only means to obtain the necessary information to prevent great(er) harm for innocents. Even in these situations the absolute prohibition against torture must not be relaxed ex ante and in abstracto — given the unequivocal situation in international law and the negative policy implications a flexible approach would have. However, this does not necessarily entail the individual investigator's criminal responsibility ex post and in concreto given the conflicting duties — to respect the (terrorist) suspect's human dignity and at the same time (actively) protect potential victims of this suspect's action — he has to face. A just solution to this dilemma can only be found by distinguishing between, on the one hand, the state and the individual level, and on the other hand, between (non-) justification (wrongfulness) of the act of torture and excuse (personal blameworthiness) of the torturer. Thus, the investigator may be excused, but his conduct not justified, since this would convert the torture into something lawful or even socially acceptable and thus undermine the absoluteness of the conduct rule not to torture. This result is developed in the last part of this article taking into account the relevant*

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provisions of the Israeli and German Penal Codes and the ICC Statute (Part 4). Before the Israeli and German cases can be compared (Part 1), some clarifications as to the status and rationale of the international prohibition of torture must be made (Part 2) and a ‘model case’, where preventive torture may be necessary should be considered (Part 3).

## 1. The German (*Daschner*) Case and the Israeli Ticking Bomb Cases

The status of detainees has steadily deteriorated since September 11. Once they are labelled ‘terrorists’ they are no longer treated as ordinary citizens with rights but as enemies who must be combated by all — and not necessary lawful — means.<sup>1</sup> The ‘war on terror’ tends to deconstruct the criminal justice system abandoning old and fundamental principles such as the principle of culpability and fair trial in favour of dangerousness and military jurisdiction.<sup>2</sup> The debate has produced particularly sophisticated arguments with a view towards justifying exceptions to the international prohibition of torture for the sake of obtaining life-saving information from terrorists or other suspects. While the debate started long before 9/11 — it suffices to refer to the Israeli (Landau) Commission of Inquiry’s recommendation to exert a ‘moderate measure of physical pressure’ on terrorist suspects<sup>3</sup> — it recently took centre stage again with a German kidnapping case:<sup>4</sup> Magnus Gaeften, a law student, kidnapped the 11-year-old son of a Frankfurt bank executive and demanded one million Euro in return for the release of the child. While picking up the ransom

- 1 On the debate of a special criminal law for enemies on the European continent see K. Ambos, ‘Feindstrafrecht’, 124 *Schweizerische Zeitschrift für Strafrecht* (2006) 1 *et seq.* with further references.
- 2 For a general account see M. Delmas-Marty, ‘The Paradigm of the War on Crime’, 5 *Journal of International Criminal Justice* (2007) 584 *et seq.*
- 3 ‘Commission of Inquiry into the Methods of Investigation of the General Security Service regarding Hostile Terrorist Activity’ (hereinafter ‘Commission of Inquiry’), excerpts from the English translation reprinted in 23 *Israel Law Review* (1989) 146, at 184 (§ 4.7). Some lines before (at 184, § 4.6) the Report states: ‘The effective interrogation of terrorist suspects is impossible without the use of means of pressure, in order to overcome an obdurate will not to disclose information and to overcome the fear of the person under interrogation that harm will befall him from his own organization, if he does reveal information.’ See also the 1989 special issue of the *Israel Law Review* (vol. 23, nos 2–3) and for a critical summary of the findings M. Gur-Arye, ‘Can the War Against Terror Justify the Use of Force in Interrogations?’, in S. Levinson (ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004) 183, at 184 *et seq.*; for a general account of the Israeli experience D. Kretzmer, ‘The Torture Debate: Israel and Beyond’, in D. Downes et al. (eds), *Crime, Social Control and Human Rights, Essays in honour of Stanley Cohen* (Cullompton: Willan Publishing, 2007) 120–135.
- 4 Landgericht (District Court, hereinafter ‘LG’) Frankfurt, judgment of 20 December 2004, reprinted in *Neue Juristische Wochenschrift* (hereinafter ‘NJW’) (2005) 692–696. For a summary in English, see F. Jeßberger, ‘Bad Torture — Good Torture? What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany’, 3 *Journal of International Criminal Justice* (2005) 1059, at 1061–1062.

Gaefgen was arrested. After one day of unsuccessful interrogation, Frankfurt Police Vice-President Wolfgang Daschner, the official responsible for the investigation, ordered a subordinate police officer to threaten Gaefgen with the infliction of physical pressure if he continued to withhold information concerning the victim's location. More concretely, Daschner, as documented in an official note written by himself and attached to the record,<sup>5</sup> ordered that pain (without causing injuries) should be inflicted on Gaefgen after prior warning and under medical supervision since this was considered the only and last chance to find the victim and save his life. Immediately after Gaefgen was confronted with this new interrogation strategy he confessed that he had already killed the victim and he provided the police with the body's location. Gaefgen was sentenced to life imprisonment for extortionate abduction and murder.<sup>6</sup> Daschner and the subordinate police officer were also prosecuted and found guilty: the latter of coercion (*Nötigung*) under Section 240 of the German Penal Code (hereinafter: StGB), and the former of instructing a subordinate to commit an offence (*Verleitung eines Untergebenen zu einer Straftat*, Section 357(1) StGB) and of coercion.<sup>7</sup> Yet, the Court, invoking the rare provision of Section 59 StGB ('*Verwarnung mit Strafvorbehalt*'<sup>8</sup>), refrained from imposing a punishment since it considered, *inter alia*, that the overall assessment of the accused's conduct and his personality did not demand a punishment.<sup>9</sup> This is certainly a Solomonic decision which seems to strike a genial compromise between upholding the prohibition against torture — as an imperative conduct rule addressed to the state — and a certain tolerance and understanding towards the individual investigator who may not feel able to comply with this prohibition in extreme cases,<sup>10</sup> namely in cases where the recourse to torture may be the only means to obtain the information necessary to save human life (so aptly described in German by the term '*Rettungsfolter*').<sup>11</sup>

5 LG Frankfurt, *supra* note 4, at 692 right column.

6 LG Frankfurt, judgment of 9 April 2003, reprinted in *Strafverteidiger* (2003) 325–28; upheld on appeal, see Bundesgerichtshof ('BGH'), decision of 21 May 2004 (2 StR 35/04) and Bundesverfassungsgericht ('BVerfG'), decision of 14 December 2004 (2 BvR 1249/04). The case is still pending, however, before the European Court of Human Rights. It is clear that the evidence obtained by the threat of torture could not be used against the accused (cf. § 136a Strafprozessordnung); in a similar vein House of Lords, *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* (2004); *A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals)*, [2005] UKHL 71; for a critical comment see T. Thienel, 'Foreign Acts of Torture and the Admissibility of Evidence', 4 *Journal of International Criminal Justice* (2006) 401 *et seq.* See also K. Ambos, 'The "Transnational" Use of Torture Evidence', 41 *Israel Law Review* (forthcoming 2009).

7 LG Frankfurt, *supra* note 4, at 692. The judgment was not appealed.

8 A literal translation would be 'cautioning (or warning) with reservation of punishment'.

9 LG Frankfurt, *supra* note 4, at 696 right column.

10 Approving the Frankfurt judgment also C. Roxin, *Strafrecht-Allgemeiner Teil*, vol. I (4th edn, Munich: C.H. Beck, 2006), § 22 mn. 169; Jeßberger, *supra* note 4, at 1066.

11 According to E. Hilgendorf, 'Folter im Rechtsstaat?', 59 *Juristenzeitung* (hereinafter 'JZ') (2004) 331, at 334 with fn. 30 the term was coined by M. Vec in *Frankfurter Allgemeine Zeitung* (4 March 2003) 38; on the term and other forms of torture see also R. Merkel, *Folter und Notwehr*, in M. Pawlik and R. Zaczek (eds), *Festschrift* (hereinafter 'FS') für Günther

How can this German case now be related to the Israeli ticking bomb cases? Are the Israeli and German cases comparable at all? Can we even draw common conclusions and recommendations from the Israeli and German experience in dealing with these cases? I answer each question in the affirmative. If one compares the scholarly debate in Israel and Germany on these cases, or, more exactly, the international debate since the Commission of Inquiry Report and the seminal decision of the Israel Supreme Court of 6 September 1999<sup>12</sup> with the rather more national German debate on the *Daschner* case, one encounters many parallels. Take, for example, the distinction between preventive (administrative) torture with a view to obtain information to prevent further crimes, and repressive torture with a view to obtain evidence for the criminal trial; or the discussion of the *ex post* criminal responsibility of the torturer (in particular as to the grounds excluding criminal responsibility) which must be distinguished from the *ex ante* legality of torture methods. Both debates took place, and continue to take place, without taking notice of each other, a phenomenon which is unfortunately quite common for the civil-common-law discourse in comparative criminal law. Of course, there are, as always, some exceptions,<sup>13</sup> but on the whole it is fair to say that both debates do not stimulate each other. In my view, this gap must be filled and the comparative debate must be started sooner rather than later, since these cases will no go away but unfortunately — given the rise of international

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Jakobs (Berlin: Carl Heymanns, 2007) 375–403, at 381, 389; crit. L. Greco, 'Die Regeln hinter der Ausnahme. Gedanken zur Folter in sog. ticking time bomb-Konstellationen', 154 *Goldammer's Archiv für Strafrecht* (hereinafter 'GA') (2007) 628, at 642 with fn. 70; see also H. Shue, 'Torture', in Levinson, *supra* note 3, at 47, 53, 56 (distinguishing between 'terroristic' and 'interrogational' torture). On the original use of the concept of torture for a method to obtain evidence with a view to the criminal prosecution and conviction see J.H. Langbein, 'The Legal History of Torture', in Levinson, *supra* note 3, at 93 *et seq.*; G. Jerouschek and R. Kölbl, 'Folter von Staats wegen?', 58 *JZ* (2003) 613, at 614.

- 12 See Judgment, *Public Committee Against Torture et al. vs. State of Israel et al.*, Supreme Court of Israel, 6 September 1999, reprinted in Levinson, *supra* note 3, at 165 *et seq.* For a summary and critical analysis of this decision, see A. Imsei, 'Moderate Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgement Concerning the Legality of General Security Services Interrogation Methods', 19 *Berkeley Journal of International Law* (2001) 328, at 339 *et seq.*; Gur-Arye, *supra* note 3, at 186 *et seq.*; Kretzmer, *supra* note 3, at 127–129 (for the initial abandonment of certain forms of physical pressure); crit. on the former case law of the Court on this issue M. Kremnitzer and R. Segev, 'The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue?', 34 *Israel Law Review* (2000) 509, at 513 *et seq.*; see also E. Benvenisti, 'The Role of National Courts in Preventing Torture of Suspected Terrorists', 8 *European Journal of International Law* (1997) 596 *et seq.*

- 13 From the Israeli side I would quote the profound study on the Commission of Inquiry Report by Prof. M. Kremnitzer ('The Landau Commission Report: Was the Security Service Subordinated to the Law, or the Law to the Needs of the Security Service?', 23 *Israel Law Review* (1989) 238 *et seq.*) who thoroughly analyses the German debate on necessity (*Notstand*). From the German side one may quote the works of Prof. W. Brugger (especially 'Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?', 55 *JZ* (2000) 165, at 168 with fn. 13) who, at least, is aware of the Israeli case law on the matter. His position can be seen in English in 'May Government ever use Torture? Two Responses from German Law', 48 *American Journal of Comparative Law* (2000) 661. See also Greco, *supra* note 11, at 629 and *passim*.

terrorism — will only increase in the future. This article intends to make a modest contribution to this necessary debate by, first, making some clarifications as to the status and rationale of the international prohibition against torture (*infra* Part 2) and, secondly, developing, on the basis of the Israeli and German cases, a kind of ‘model case’ where preventive torture may be necessary (*infra* Part 3); finally and most importantly the criminal responsibility of the torturer in this model case will be examined, including the question whether this will have any effect on the legality of the preventive application of torture (*infra* Part 4). To be sure, the whole inquiry starts from the assumption that torture cases must and will be prosecuted.<sup>14</sup>

## 2. Necessary Clarifications as to the Status and Rationale of the International Prohibition against Torture

International law prohibits torture categorically in a number of instruments of International Humanitarian and Human Rights Law (hereinafter: ‘IHL’ and ‘IHR’).<sup>15</sup> This prohibition has even attained the status of *ius cogens*<sup>16</sup> and is absolute in the sense that ‘[N]o exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.’ (Article 2 CAT).<sup>17</sup> This is not even disputed by those who argue for a more flexible approach in our cases.<sup>18</sup> Yet, there are two important limitations. First, torture as defined

14 For the contrary Israeli practice since the 1999 Supreme Court decision (*supra* note 12), see Kretzmer, *supra* note 3, at 130.

15 See for Human Rights law Art. 7 ICCPR, Art. 2 UN-CAT, Art. 3 ECHR, Art. 5(2) ACHR; for IHL see common Art. 3(1) of the Four Geneva Conventions of 1949, Art. 17(4) III Geneva Convention; Art. 32 IV Geneva Convention, Art. 75(2)(ii) Add. Prot. I and Art. 4(2)(a) Add. Prot. II to the Four Geneva Conventions.

16 Judgment, *Furunžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, §§ 153–157; see also Benvenisti, *supra* note 12, at 603 and fn. 42; P. Gaeta, ‘May Necessity be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?’, 2 *Journal of International Criminal Justice* (2004) 785, at 787.

17 This is confirmed by decisions of the Committee against Torture, e.g. the decision regarding Belgium of 27 May 2003, CAT/C/CR/30/6, where the Committee recommended that Belgium include a provision in the Penal Code expressly prohibiting the invocation of a state of necessity to justify the violation of the right not to be subjected to torture, available at [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.30.6.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.30.6.En?Opendocument) (visited 10 March 2008).

18 See, e.g. Brugger, *supra* note 13, at 167 left column; Merkel, *supra* note 11, at 383–384. Brugger wants, however, to read an exception into the strict prohibition of Art. 3 ECHR by an analogy to Art. 2(2) which allows for the use of force with deadly consequences under certain conditions, e.g. in case of self-defence. *Ibid.* at 170 left column. Similarly on the basis of an identical scope of protection for life and dignity, see G. Wagenländer, *Zur strafrechtlichen Beurteilung der Rettungsfolter* (Berlin: Duncker & Humblot, 2006) 191 *et seq.* This is a blatant interpretation *contra legem* whose underlying premise — the comparability of killing and torture — is flawed since torture is always a violation of human dignity but killing not necessarily (crit. also Kinzig,

in Article 1 CAT<sup>19</sup> ‘does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’. Second, and more important, the non-derogability clause of the CAT only refers to torture *stricto sensu*, i.e. as defined in Article 1 CAT, but it does not include acts falling short of torture such as ‘inhuman and degrading treatment’. Yet, while the CAT apparently distinguishes between torture and other forms of inhuman treatment,<sup>20</sup> the general human rights treaties treat torture and ‘cruel, inhuman or degrading treatment or punishment’ equally, they prohibit both (Articles 7 ICCPR, 3 ECHR and 5 ACHR) and also declare both non-derogable (Articles 4(2), 15(2)<sup>21</sup> and 27(2)).<sup>22</sup> This obvious contradiction between the CAT — as a specific human rights treaty — and the general human rights treaties could have been resolved by the *lex specialis* and *lex posterior* rule giving prevalence to the CAT,<sup>23</sup> would Article 16(2) CAT not defer to the general human rights treaties by its ‘without prejudice’ clause.<sup>24</sup>

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‘Not kennt kein Gebot.’ 115 *Zeitschrift für die gesamte Strafrechtswissenschaft* (hereinafter ‘ZStW’) (2003) 791, at 805 *et seq.*; Jeroschek/Kölbel, *supra* note 11, at 617 left column with fn. 42; B. Kretschmer, ‘Folter in Deutschland: Rückkehr einer Ungeheuerlichkeit’, 39 *Recht und Politik* (2003) 102, at 107; F. Saliger, ‘Absolutes im Strafprozeß? Über das Folterverbot, seine Verletzung und die Folgen seiner Verletzung’, 116 *ZStW* (2004) 35, at 46–47; W. Schild, ‘Folter(androhung) als Straftat’, in G. Gehl (ed.), *Folter — zulässiges Instrument im Strafrecht* (Weimar: Bertuch, 2005) 59, at 70–71; Wagenländer, *supra* note 18, at 150–151; from the perspective of German constitutional law F. Wittreck, *Menschenwürde als Folterverbot*, in Gehl, *ibid.*, 37, at 46 *et seq.*; distinguishing between killing and torture with regard to human dignity also Hilgendorf, *supra* note 11, at 336; C. Roxin, ‘Kann Staatliche Folter in Ausnahmefällen zulässig oder wenigstens straflos sein?’ in J. Arnold et al. (eds), *FS für Albin Eser* (München: C.H. Beck, 2005) 461, at 464; K. Lüderssen, ‘Die Folter bleibt tabu – kein Paradigmenwechsel ist geboten’, in K. Rogall et al. (eds), *FS für Hans-Joachim Rudolph* (Neuwied: Luchterhand, Wolters Kluwer, 2004) 691, at 701–702; see also F. Jeßberger, ‘Übungsklausur StR »Wenn Du nicht redest, füge ich Dir große Schmerzen zu.«’ 25 *Jura* (2003) 711, at 714 left column with the exact contrary argument to Brugger, namely that the fact that Art. 3 does not contain the restriction of Art. 2(2) shows that such a restriction is not admissible for Art. 3; for a comparison of torture to just combat killing Shue, *supra* note 11, at 48 *et seq.*

- 19 The respective part reads: ‘... torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.
- 20 For a detailed discussion see Y. Shany, ‘The Prohibition against Torture and Cruel, Degrading and Inhuman Treatment and Punishment: Can the Absolute be Relativized under International Law?’, 56 *Catholic University Law Review* (2007) 101, at 119–120.
- 21 The ECHR has repeatedly held that exceptions to the Art. 3 prohibition are not admissible, see originally Judgment, *Lawless v. Ireland*, 1 July 1961 (application n° 332/57), §§ 21–22; recently Judgment, *Öcalan v. Turkey*, 12 March 2003 (application n° 46221/99), § 218.
- 22 Apparently overlooked by R. Herzberg, ‘Folter und Menschenwürde’, 60 *JZ* (2005) 321, at 324–325.
- 23 For the *lex posterior* rule see Art. 30(3) Vienna Convention on the Law of Treaties of 22 May 1969, UNTS 1155, 331.
- 24 Art. 16(2) reads: ‘The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment ...’



This clause gives prevalence to the absolute ban on torture *and* inhuman treatment and its non-derogability as provided for in the Human Rights Treaties.<sup>25</sup> This result is confirmed by the prohibition against torture *and* inhuman treatment in IHL instruments since 'this body of law constitutes a nonderogable specific legal regime particularly designed to govern emergency situations'.<sup>26</sup> It is also confirmed by jurisprudence in International Criminal Law (hereinafter 'ICL') according to which the prohibition against torture constitutes 'an absolute value from which nobody must deviate'.<sup>27</sup> In the result this means that the distinction between torture and other inhuman treatment within the meaning of Articles 7 ICCPR, 3 ECHR and 5 ACHR remains without legal effect as to possible exceptions to the prohibition against torture and inhuman treatment.<sup>28</sup> Yet, the distinction between different degrees of torture, in line with the 'degrees theory' of the ECHR,<sup>29</sup> is not totally irrelevant since ill-treatment which does not 'attain a minimum level of severity'<sup>30</sup> does not fall within the scope of the prohibition provided for in Articles 7 ICCPR, 3 ECHR and 5 ACHR.<sup>31</sup> Clearly, the three degrees of ill-treatment — torture, inhuman treatment and 'ordinary' ill treatment — cannot be convincingly distinguished *in abstracto*,<sup>32</sup> but only on a case-by-case basis. Thus, while an isolated measure of 'moderate physical pressure' in the sense of the Commission of Inquiry Report<sup>33</sup> or measures 'inherent to the investigation power' in the sense of the Israeli Supreme Court, for example the suspect's cuffing,<sup>34</sup> may still not attain the necessary severity, their combined effect with other measures may do so.<sup>35</sup> It is for these definitional

25 See Art. 30(2) Vienna Conventions, *supra* note 23. For the same result Shany, *supra* note 20, at 120–121; Delmas-Marty, *supra* note 2, at 595 *et seq.*; seeing some ambiguity in this regard Kadish, 'Torture, the State and the Individual', 23 *Israel Law Review* (1989) 345, at 350–351.

26 Shany, *supra* note 20, at 121 with further references in fn. 88.

27 *Furundžija*, *supra* note 16, § 154.

28 It may only have an effect on the scope of the remedy afforded to the victims, see Shany, *supra* note 20, at 119.

29 See Judgment, *Ireland v. UK*, ECHR, 18 January 1978, (application n° 5310/71), § 167: 'Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.' See also Benvenisti, *supra* note 12, at 604–605; Shany, *supra* note 20, at 118–119.

30 *Ireland v. UK*, *supra* note 29, § 162.

31 Thus, this threefold distinction is not just 'definitional juggling' as criticized by O. Gross, 'Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience', 88 *Minnesota Law Review* (2004) 1481, at 1488.

32 As to the assessment of the required minimum of severity the ECHR, § 162 states that it 'is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc'. For the approach of the Human Rights Committee see Benvenisti, *supra* note 12, at 606. For Merkel, *supra* note 11, at 398 *et seq.* the concept of torture depends (also) on the rights involved.

33 See *supra* note 3.

34 Israel Supreme Court, §. 26.

35 *Ireland v. UK*, *supra* note 29; Israel Supreme Court, § 30: 'Their combination, in and of itself gives rise to particular pain and suffering.'

problems that any attempt to determine the scope of the prohibition or, vice versa, the permitted conduct *ex ante* and *in abstracto*, in particular by a parliamentary law as proposed by the Israeli Supreme Court,<sup>36</sup> is doomed to failure and will not solve the dilemma faced by the individual investigator in a concrete case: Either such a law only restates the international law, e.g. Article 7 ICCPR, and then it is, in fact, superfluous, or it tries to be more concrete and then runs the risk of exceeding the limits of international law and making the legislator the target of international criticism.<sup>37</sup> *A fortiori*, *ex ante* measures authorizing the use of torture or inhuman treatment, e.g. ‘torture warrants’ as suggested by Dershowitz,<sup>38</sup> which do not even enjoy the legitimacy of parliamentary approval, are so blatantly in violation of international law that they do not deserve any further discussion.<sup>39</sup>

At this juncture it must be stressed that the rationale of the strict prohibition of torture lies — notwithstanding the positive, written law on the matter — in the frontal attack on the victim’s human dignity by the application of torture. There is no other act that so profoundly violates this dignity;<sup>40</sup> indeed, the

36 Israel Supreme Court, §§ 14, 37, 39. The same applies to infra-legal rules like directives of the General Prosecutor which were also implicitly mentioned in *ibid.*, § 38 and have later been issued, see Kretzmer, *supra* note 3, at 129.

37 On the problem of legitimacy see also Feller, ‘Not “actual” Necessity, but “possible” Justification; not “moderate” Pressure but either “Unlimited” or “None at all”’, 23 *Israel Law Review* (1989) 201, at 213; on the impossibility of a general definition see Lüderssen, *supra* note 18, at 794; on the legal uncertainty produced by a balancing of interests Herdegen, in Maunz/Dürig, *Grundgesetz*, 44th supplement of 2/2005, Art. 1(1) mn. 45 (at 33); against a legislative authorization Gur-Arye, *supra* note 3, at 187, 190; crit. also Kinzig, *supra* note 18, at 808; Gaeta, *supra* note 16, at 792; R.A. Posner, ‘Torture, Terrorism, and Interrogation’, in Levinson, *supra* note 3, 291, at 297. In favour of a law however A.M. Dershowitz, ‘Is it Necessary to Apply “Physical Pressure” to Terrorists — and to Lie about it?’, 23 *Israel Law Review* (1989) 192, at 197; *idem*, ‘Tortured Reasoning’, in Levinson, *supra* note 3, 257, at 263–264; A. Enker, ‘The Use of Physical Force in Interrogations and the Necessity Defence’, in Hebrew University of Jerusalem/Center for Human Rights, *Israel and International Human Rights Law: The Issue of Torture* (1995) 55, at 63 *et seq.*; it is, indeed, the only possibility to authorize the use of physical pressure during interrogation if one goes for an *ex ante* and abstract regulation, see *infra* note 163 and text.

38 A.M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002), 158–63. It is by no means clear why a judge should be in a better situation to judge the necessity of torture than the actual investigator who sits in front of the suspects and knows the details of the case; also, Dershowitz seems to overestimate the efficiency of *ex ante* judicial control to achieve accountability; crit. also E. Scarry, ‘Five Errors in the Reasoning of Alan Dershowitz’, in Levinson, *supra* note 3, at 281 *et seq.*; Posner, *supra* note 3, at 296 (as to the efficiency of judicial warrants); Waldron, ‘Torture and Positive Law: Jurisprudence for the White House’, 105 *Columbia Law Review* (2005) 1681, at 1687, 1702–1703, 1713 *et seq.*; for a general rebuttal Dershowitz, ‘Tortured Reasoning’, *supra* note 37, at 257 *et seq.* (esp. 266 *et seq.*, 274) stressing the necessary distinction between (his) empirical assessment and normative preference.

39 For the same result with all the relevant arguments Gross, *supra* note 31, at 1534 *et seq.*; Shany, *supra* note 20, at 122.

40 See for an excellent account of the relationship between human dignity and torture Hilgendorf, *supra* note 11, 337; see also Kremnitzer, *supra* note 13, at 249 *et seq.* Crit. on the thesis of the inviolability of human dignity enshrined in Art. 1 German *Grundgesetz*, Herzberg, *supra* note 22, at 322–323.



protection of human dignity lies at the heart of the torture prohibition<sup>41</sup> and therefore the prohibition of torture is 'one of morality's firmest norms'.<sup>42</sup> A state, bound by the Rule of Law, cannot allow torture as inherently repugnant and evil<sup>43</sup> without betraying its own principles<sup>44</sup> and losing credibility at the international level. For a law-abiding state there is no alternative than to reaffirm the strong symbolic message of the prohibition against torture, thereby setting a clear standard<sup>45</sup> and invoking the principle of reciprocity.<sup>46</sup> This said, it is also true that the absoluteness of the prohibition vis à vis the state does not necessarily entail the individual's responsibility for an act of torture. While the state must take into account — in a kind of 'pragmatic absolutism' — institutional considerations,<sup>47</sup> the individual may face situations where instead of institutional compliance, civil 'official disobedience' may be tolerated or even expected;<sup>48</sup> clearly, being disobedient presupposes a serious *deliberation* on the part of the respective investigator, a deliberation which must and cannot be substituted by legislative *fiat*.<sup>49</sup> The underlying *state-individual*

41 Israeli Supreme Court, § 22; see also Delmas-Marty, *supra* note 2, at 592 (torture prohibition as expression of the universal value of human dignity). Greco, *supra* note 11, at 636 *et seq.* emphasizes the violation of the free will.

42 M.S. Moore, 'Torture and the Balance of Evils', 23 *Israel Law Review* (1989) 280, at 332. In the same vein Waldron, *supra* note 38, at 1681: 'legal archetype... emblematic of our larger commitment to nonbrutality in the legal system'; and at 1692–1693 considering torture prohibited as 'malum in se'; also 1717, 1718 *et seq.* (against the genius and spirit of the law), 1723 *et seq.* (explaining his concept of 'archetype').

43 Shany, *supra* note 20, at 106–107.

44 See also Commission of Inquiry, *supra* note, at 182 (§ 4.3) ('The law... is the keystone for the existence of a State such as ours, which believes in values of liberty and equality... If we do not preserve the rule of law zealously in this area as well, the danger is great...'); at 184 (4.5) ('we are convinced that this [the preservation of the law, K.A.] is essential for the moral strength of Israeli society'); Israel Supreme Court, § 39 ('Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its [the state's, K.A.] understanding of security'). See also Kinzig, *supra* note 18, at 807, 808–809 (referring to the decision of the Israel Supreme Court); Kretschmer, *supra* note 18, at 108; Waldron, *supra* note 38, at 1737–1738 (danger of corrupting legal system), 1739 *et seq.* (undermining rule of law).

45 On this aspect Benvenisti, *supra* note 12, at 608; Lüderssen, *supra* note 18, at 707. This is also important in times of asymmetrical conflicts (for a more flexible approach in so far apparently Shany, *supra* note 20, at 117).

46 This is especially relevant in IHL, but not in IHR, see Shany, *supra* note 20, at 110 *et seq.*

47 On these see Gross, *supra* note 31, at 1550 *et seq.*; Shany, *supra* note 20, at 107–108.

48 The concepts of 'pragmatic absolutism' and 'official disobedience' come from Gross, *supra* note 31, at 1500, 1519, 1553 who for the former supports an absolute ban on torture (1490 *et seq.*) and for the latter allows the individual to go 'outside the legal order' in case of extreme circumstances (1486–1487, 1489, 1519 *et seq.*). For the same distinction between the state and the individual Kadish, *supra* note 25, at 347, 352 *et seq.*; A. Zuckerman, 'Coercion and the Judicial Ascertainment of Truth', 23 *Israel Law Review* (1989) 357, at 371; Wittreck, *supra* note 18, at 43; Shue, *supra* note 11, at 58; similarly distinguishing between *ex ante* 'official empowerment' and *ex post* 'justifications', Gur-Arye, *supra* note 3, at 189 (following explicitly Kadish, *supra* note 25, at 190–191).

49 According to Gur-Arye, *supra* note 3, at 189, the investigator should even be forced to deliberate 'whether in the concrete circumstances the balance indeed justifies breaking the law'.

*dichotomy* of this approach is, in turn, reflected by the dichotomy between the relevant IHR and IHL, as addressed to the state, and ICL, as addressed to the individual. While the former contains an absolute prohibition on torture, the latter is more flexible and allows for grounds excluding criminal responsibility.<sup>50</sup> These allow for an *ex post* judgment whether the individual's disobedience was required and acceptable (more detailed *infra* Part 4).<sup>51</sup>

### 3. The 'Model Case' as a Test Case for the Reasonableness of the Absolute Prohibition of Torture

The model case consists of the central facts of the German *Daschner* and the Israeli ticking bomb cases. Both cases have to be interpreted narrowly, however, to fit to the situation of *Rettungsfolter* as defined previously.<sup>52</sup> For the ticking bomb case, in its narrowest form, this means that the suspect is not only a member of a terrorist group or possesses mere knowledge of the location of the bomb but has — as the sole perpetrator or together with others — prepared and carried out the bomb attack. Thus, there must be a quite precise objective of the application of torture, namely to find out where the bomb is located and to prevent its detonation; general objectives such as the one formulated by the Israeli Supreme Court — 'to gather information regarding terrorists and their organizing methods'<sup>53</sup> — are too vague to justify the use of torture. As to the *Daschner* case the question arises whether the threat to inflict pain falls within the scope of the torture prohibition in the first place. The Frankfurt District Court ignored this issue, some scholars want to put the threatening and the actual application of torture on the same footing,<sup>54</sup> but this goes clearly against the wording of Article 1 CAT which requires the actual 'infliction' of torture.<sup>55</sup> If one were to treat the threat to commit a crime equally with its actual commission inchoate offences as Section 241 StGB (*Bedrohung*, threat to commit a crime) would be rendered superfluous. Another question is whether the threat with torture may itself constitute torture or at least

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In contrast Dershowitz, *supra* note 37, at 263, considers that it is unfair to shift the risk of being punished to the investigators.

50 For the same dichotomy see Gaeta, *supra* note 16, at 789–790; in a similar vein Shany, *supra* note 20, at 126 *et seq.*, confronting the strict nature of IHL with the 'relativity' of ICL as expressed in Art. 31(1) ICCSt. Benvenisti, *supra* note 12, at 609 sees an 'incoherence between the international and national spheres'.

51 For such an *ex post* judgment or ratification also Benvenisti, *supra* note 12, at 609 *et seq.*; Gross, *supra* note 31, at 1526 *et seq.*; Shany, *supra* note 20, at 123 (but limited to measures falling short of torture).

52 *Supra* note 11 and main text.

53 Israeli Supreme Court, § 1.

54 Roxin, *supra* note 18, at 464; H. Düx, 'Meinungen zur "Folterdiskussion"', 36 ZRP (2003) 180.

55 *Supra* note 19. For the same view Kretschmer, *supra* note 18, at 107; Herzberg, *supra* note 22, at 326; Merkel, *supra* note 11, at 401.

inhuman treatment. This has been affirmed by the European Court of Human Rights if such a threat is 'sufficiently real and immediate'.<sup>56</sup> Anyway, this can only be decided on a case-by-case basis.

Taking these restrictions into account the model case goes as follows: A person, suspect of having committed a crime (e.g. kidnapped another person) or having planted a bomb, is arrested but refuses to cooperate with the investigators. If they do not immediately obtain information about the whereabouts of the kidnapped person or of how to disarm the bomb the victim will die and the bomb explode. In order to prevent this from happening, the investigators extract the necessary information from the suspect by applying torture. The victim can then be saved and the bomb disarmed. It goes without saying that the investigators are state agents; the situation may be different for private investigators or citizens performing the task of investigators but this is beyond the scope of this study.<sup>57</sup>

I call this case a model case for two reasons. First, it is a *fictitious, theoretical* case which will hardly ever occur in this form in practice. Thus, in many cases the police will not be sure if the arrested person was really involved in the crime or, at least, what his or her contribution was. Consequently, it will be uncertain what information can be obtained from the suspect and whether the infliction of pain can be effective at all. In other cases the bomb will not be ticking, i.e. the danger to be averted will not be immediate. For these and other reasons especially the ticking bomb scenario is not very realistic, one may even say it is completely theoretical — we will come back to this point.<sup>58</sup> In any case, this does not mean that the model case be dismissed for our purpose, namely *to test the reasonableness of the claim of an absolute prohibition of torture*. For such a claim can logically only be upheld if there is no imaginable case where it must suffer an exception, i.e. where torture must be allowed.<sup>59</sup> This brings us to the second reason to call our case a model case: it is modelled with a view to the legal requirements of a ground of exclusion of responsibility. In other words, if the criminal responsibility of the torturer cannot even be excluded in this extreme case it can, *a fortiori*, never be excluded in the (admittedly more realistic) less-extreme cases.

56 Judgment, *Campbell and Cosans v. UK*, 25 February 1982 (= EuGRZ 1982, 153), § 26. For a good discussion with further references see Kinzig, *supra* note 18, at 799 *et seq.*, concluding that 'eine ernst gemeinte und Ernst empfundene Androhung von Folter. . . einen Fall von Folter darstellen kann', at least it constitutes inhuman treatment within the meaning of Art. 3 ECHR; for the same result focusing on the violation of human dignity Kretschmer, *supra* note 18, at 107.

57 On self-defence in cases of 'private' torture see W. Perron, 'Foltern in Notwehr?', in B. Heinrich (ed.), *FS für Ulrich Weber* (Bielefeld: Giesecking, 2004) 143, at 150 *et seq.*; Lenckner and Perron, 'Notwehr', in A. Schönke and H. Schröder (eds), *Strafgesetzbuch* (27th edn, Munich: C.H. Beck, 2006) § 32 mn. 62a; Hilgendorf, *supra* note 11, at 335; Kretschmer, *supra* note 18, at 108 *et seq.*; Schild, *supra* note 18, at 73 *et seq.* (all these authors, in essence, argue for an almost identical prohibition); see also Wittreck, *supra* note 18, at 40 with further references on the position in constitutional law; for the inapplicability of constitutional limitations in case of private individuals Wagenländer, *supra* note 18, at 123 *et seq.*

58 See *infra* notes 151–152 and main text.

59 On this argument of logic see Merkel, *supra* note 11, at 379; also Enker, *supra* note 37, at 73; Kretzmer, *supra* note 3, at 123; Greco, *supra* note 11, at 629 and 643; for such an extreme case also Shue, *supra* note 11, at 57.

#### 4. Possible Grounds for Excluding the Criminal Responsibility of the Torturing Investigator

The criminal responsibility of the torturer may be excluded by reason of self-defence, necessity or other (supra-legal) grounds. The invocation of these grounds is based on the assumption that they are applicable for police or other public investigators.<sup>60</sup> While both self-defence and necessity are recognized in comparative and ICL in general and in Israel and Germany in particular, there are some important differences which may have an effect on the applicability of the respective ground. In addition, the distinction between *justification and excuse*, crucial in our case, is neither formally recognized in common law jurisdictions nor in ICL.<sup>61</sup> Its significance is, however, acknowledged even by common law and also Israeli scholars.<sup>62</sup> One may even argue that the Israeli Supreme Court construed necessity as an excuse by rejecting its ‘additional normative value’ and emphasizing the investigator’s ‘feeling of necessity’.<sup>63</sup> In any case, this distinction runs along the lines of not wrongful (justified, permitted) and wrongful, but not blameworthy (excused, not culpable) conduct. It offers the only way out of the dilemma between the absolute prohibition on torture and an individual’s understandable failure not to comply with this prohibition in extreme cases like our model case.

##### A. Self-defence

As to self-defence the three relevant provisions read:

Section 34J (34-10) Israeli Penal Code 1977, as amended in 1994 (Self-defense)<sup>64</sup>

A person shall not incur criminal responsibility for an act immediately needed to repel an unlawful attack which posed an actual risk of harm to his or someone else’s life, liberty,

60 The point is disputed in Germany but must be affirmed, for a thorough analysis see Wagenländer, *supra* note 18, at 29 *et seq.*, 93 *et seq.*, 198–199; see also Roxin, *supra* note 10, § 15 mn. 108 *et seq.*, § 16 mn. 103–104; Lüderssen, *supra* note 18, at 697 *et seq.*; Kretschmer, *supra* note 18, at 104–105; Perron, *supra* note 57, at 145–146; Herzberg, *supra* note 22, at 321–322; Schild, *supra* note 18, at 67; crit. Merkel, *supra* note 11, at 382–383. Kinzig, *supra* note 18, at 810 distinguishes between self-defence and necessity and dismisses the applicability of the latter because of the more specific rules prohibiting torture; this is unconvincing, since the subsidiarity of necessity operates only with regard to other (more specific) grounds excluding responsibility but not with regard to (primary or secondary) norms of prohibition.

61 See for a more detailed discussion K. Ambos, ‘Toward a Universal System of Crime: Comments on George Fletcher’s Grammar of Criminal Law’, 28 *Cardozo Law Review* (2007) 2647, at 2659 *et seq.*, 2669.

62 Cf. Moore, *supra* note 42, at 284, 308, 320; Dershowitz, *supra* note 37, at 200; P. Robinson, ‘Letter to the Editor’, 23 *Israel Law Review* (1989) 189, at 190; Kremnitzer and Segev, *supra* note 12, at 535–536; Gur-Arye, *supra* note 3, at 188.

63 Israel Supreme Court, §§ 36, 38. See also Gur-Arye, *supra* note 3, at 188; conc. Greco, *supra* note 11, at 632 with fn. 31.

64 Amendment No. 39, in force 1995; translation by Dr Yuval Shany, Hebrew University, prepared for the author.

body or property; however, a person is not acting in self-defence if he brought upon himself the attack by way of his improper behaviour while anticipating the possible developments

### Section 32 StGB *Notwehr* (Self-defence)<sup>65</sup>

- (1) Whoever commits an act demanded by self-defence does not act unlawfully.
- (2) Self-defence is that defence which is required in order to avert a present unlawful attack from oneself or another.

### Article 31(1) ICC Statute

- (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.

Both the Israeli and German law require an unlawful *attack*, the ICC Statute requires an unlawful *use of force*. The attack or force must be directed against the defender himself or against a third person, the defender must defend himself or this third person, this defence must be directed against the attacker or his legal interests.<sup>66</sup> In our model case the attack or force is directed against the liberty of the kidnapped person or against the life, physical integrity, etc. of the potential victims of the terrorist attack. The torture (as the defence act) is directed against the kidnapper and the terrorist responsible for planting the bomb, i.e. against attackers within the meaning of self-defence and not against innocents who may have mere knowledge, e.g. the spouse or relatives of the terrorist;<sup>67</sup> this is an important difference to the necessity defence and indeed speaks in favour of self-defence in our case.<sup>68</sup> More problematic is however the *temporal requirement* contained in the words 'immediately', 'actual' (Article 34-10 Israel Penal Code), 'present' (Section 32(2) StGB) and 'imminent' (Article 31(1)(c) ICC Statute). This requirement wants to limit self-defence to attacks which are immediately antecedent (and therefore the danger is 'imminent'), are presently carried out or still enduring.<sup>69</sup> While the attack by a continuing offence as deprivation of liberty by kidnapping is a classical example for a still enduring attack, in the ticking bomb cases the immediacy or imminence of the attack is indeed questionable. How long does the bomb tick before it explodes and what period of time would still comply with the immediacy requirement? In normal self-defence case we speak here of minutes, not hours: the attacker is loading his rifle to shoot the victim, the attacker is lifting his arm with the knife to stab the

65 Author's translation. For a slightly different translation see G.P. Fletcher, 'The Right and the Reasonable', 98 *Harvard Law Review* (1985) 949, at 967 (employing the term 'wrongful' instead of 'unlawful').

66 Roxin, *supra* note 10, § 15 mn. 124 *et seq.*; Moore, *supra* note 42, at 323 *et seq.*

67 Explicitly Moore, *supra* note 42, at 324.

68 For this reason Enker, *supra* note 37, at 75 *et seq.* and Gur-Arye, *supra* note 3, at 191 *et seq.* (194), prefer self-defence over necessity.

69 See K. Ambos, 'Other Grounds Excluding Responsibility', in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds), *The Rome Statute of the ICC: A Commentary*, vol. I (Oxford: OUP, 2002) 1003–1048, at 1032.

victim etc.; a pre-emptive strike against a feared attack is excluded.<sup>70</sup> Thus, self-defence in the ticking bomb cases normally fails because of the absence of the immediacy requirement.<sup>71</sup> It is correct, therefore, that the Israeli Supreme Court and most scholars do not even discuss self-defence in these cases<sup>72</sup> but deal directly with the necessity defence. In contrast, in the kidnapping case the attack is present as long as the deprivation of liberty still continues;<sup>73</sup> or one sees the suspect's attack in his refusal (omission) to give the necessary information although he is obliged — either by his previous unlawful behaviour or by specific administrative (police) law<sup>74</sup> — to do so.<sup>75</sup>

The complications start here with the analysis of the *act of self-defence*, the actual counter-attack of the defender. This act must be 'needed' (Article 34-10 Israel Penal Code), 'required' and 'demanded' (Section 32 StGB) or 'reasonable' and 'proportionate' (Article 31(1) ICC Statute). Apart from the meaning of these terms the reach of self-defence depends very much on its underlying *rationale*. First of all, self-defence is, independent of its codification in positive law, the most original and natural right of the individual to prevent the intrusion of privacy; as such it delimitates right from wrong.<sup>76</sup> Consequently self-defence is based not only on the protection of the individual interests at stake (*Individualschutz*) but also on the reaffirmation of the law as such

70 For a discussion see Roxin, *supra* note 10, § 15 mn. 21 *et seq.*; see also G.P. Fletcher, *Basic Concepts of Criminal Law* (New York: Oxford University Press, 1998), 133–134; Ambos, *supra* note 69, at 1032.

71 Similarly V. Erb, 'Notwehr als Menschenrecht', 25 *NStZ* (2005) 593, at 600 left column arguing that the recourse to torture to prevent a terrorist attack 'some time in the future' (*irgendwann in der Zukunft*) cannot be justified by self-defence because of the lack of the immediacy of the attack; see also M. Jahn, *Das Strafrecht des Staatsnotstandes* (Frankfurt am Main: Klostermann, 2004), 249–250.

72 An exception is Moore, *supra* note 42, at 323 who considers that 'the principle uncovered as the moral basis for the defense may be applicable' but he recognizes that 'the literal law of self-defense is not available' for lack of the immediacy requirement (*ibid.*). In contrast, Enker, *supra* note 37, at 75 *et seq.* and Benvenisti, *supra* note 12, at 606–607 apply self-defence both apparently overlooking the immediacy requirement; similarly Gur-Arye, *supra* note 3, at 193 *et seq.*

73 See Perron, *supra* note 57, at 147–148 explaining this view with the interest in the reaffirmation of the law as such to be protected by self-defence (on this dualist conception see *infra* note 77 with main text); see also Wagenländer, *supra* note 18, at 117; Jeßberger, *supra* note 18, at 713 left column; Erb, *supra* note 71, at 598 left column; Merkel, *supra* note 11, at 387 *et seq.*

74 The duty to cooperate follows from specific duties of information codified in the states' police laws, see e.g. § 12(2) cl. 1 of the Hesse Police Law or § 20(1) 27(4) cl. 1, (3) no. 1 Baden-Württemberg Police Law. For a discussion Wagenländer, *supra* note 18, at 46 *et seq.*; G. Haurand and J. Vahle, 'Rechtliche Aspekte der Gefahrenabwehr in Entführungsfällen', 22 *NVwZ* (2003) 513, at 516 *et seq.*; see also Jerouschek and Kölbel, *supra* note 11, at 615–616; Kretschmer, *supra* note 18, at 104.

75 Cf. Hilgendorf, *supra* note 11, at 339; Roxin, *supra* note 18, at 464; Wagenländer, *supra* note 18, at 116; also O. Mieke, 'Nochmals: Die Debatte über Ausnahmen vom Folterverbot', *NJW* (2003) 1219, at 1220; for another view Kretschmer, *supra* note 18, at 111–112 only interpreting an omission as an attack within the meaning of self-defence if it entails an intrusion in the personal sphere of the victim, i.e. if it is '*grenzverletzend*'; he denies this for our case for hiding the whereabouts of the kidnapped victim.

76 See with further references Merkel, *supra* note 11, at 385 *et seq.*



(*Rechtsbewährung*) against the unlawful attacker<sup>77</sup> — in line with the classic German phrase, '*Das Recht braucht dem Unrecht nicht zu weichen*' ('Right need never yield to Wrong').<sup>78</sup> As a consequence self-defence can hardly have any limits, in particular not a mere proportionality test, as long as the actual act of self-defence is 'required' (*erforderlich*), i.e. the suitable (*geeignet*) and least severe, but equally effective (*relative mildeste*) means to avert the attack.<sup>79</sup> This latter point has been rejected by the Frankfurt District Court in the *Daschner* case finding that the threat to use force was neither the only nor the least severe means at the disposal of the police since other means could have been applied, e.g. the confrontation of the suspect with the siblings of the victim.<sup>80</sup> While one may generally doubt the suitability and general effectiveness of torture in light of the historical experience with the reliability of torture confessions in the framework of the inquisitorial trial,<sup>81</sup> modern interrogation techniques seem to enable the police to apply a more sophisticated system of measures before resorting to sheer physical force.<sup>82</sup> While it appears somewhat cynical to distinguish between degrees of torture with regard to the requirement of 'least severe, but equally effective',<sup>83</sup> *in casu* it is highly questionable whether alternative measures would have really been equally effective, given the time pressure and imminent danger to the victim.<sup>84</sup> No alternative measure would have caused the kidnapper to confess immediately, given the kidnapper's evasive and misleading behaviour during the interrogation.<sup>85</sup> Thus, in general, in

77 Cf. Roxin, *supra* note 10, § 15 mn. 1 *et seq.*; Perron, *supra* note 57, at 147.

78 Cf. A.F. Berner, 'Die Notwehrtheorie', 29 *Archiv des Criminalrechts* (1848) 547, at 557, 562; translation from Fletcher, *supra* note 65, at 968. This author also explains in an excellent way the importance of the concept of 'Right' in German legal discourse with regard to self-defence (*ibid.*, at 964 *et seq.*).

79 Lenckner and Perron, *supra* note 57, § 32 mn. 34. On the same meaning of 'reasonably' in Art. 31(1)(c) ICCSt., see Ambos, *supra* note 69, at 1034.

80 LG Frankfurt, *supra* note 4, at 693 right column: 'Die Androhung von Schmerzzufügung war jedoch nach Art und Maß nicht das mildeste Gegenmittel, da mit dem Stufenkonzept noch andere Maßnahmen zur Verfügung standen.' In a similar vein W. Hecker, 'Relativierung des Folterverbots in der BRD?', 36 *Kritische Justiz* (2003) 210, at 216.

81 See the fundamental work of A. Ignor, *Geschichte des Strafprozesses in Deutschland 1532–1846* (2002), 163 *et seq.* demonstrating that the torture was not only considered inhuman but ineffective with a view to the prosecution of the true criminals. Crit. in our context also Zuckerman, *supra* note 48, at 366; Jerouschek and Kölbel, *supra* note 11, at 617–618; Perron, *supra* note 57, at 148.

82 See Kinzig, *supra* note 18, at 807; conc. Perron, *supra* note 57, at 148 (but for a different result in the concrete case, see *infra* note 86).

83 Crit. in this respect Jerouschek and Kölbel, *supra* note 11, at 618 right column. Crit. also Kremnitzer, *supra* note 13, at 250, 254 since any use of physical pressure violates human dignity and the use of force is a dynamic process. For a similar distinction however see Moore, *supra* note 42, at 334.

84 The fact that the victim *in casu* was already dead before the interrogation started does not change the possible justification for the torture; it only converts the self-defence situation in a putative self-defence which, according to the dominant opinion in the German doctrine, would negate the accused's *mens rea* (see for a discussion from a comparative perspective Ambos, *supra* note 61, at 2661 *et seq.*).

85 See the factual findings of the LG Frankfurt, *supra* note 4, at 692 right column.

a kidnapping or similar situation the threat of use of force could be ‘required’ within the meaning of self-defence.<sup>86</sup> In any case, this can only be decided on a case-by-case basis.

While the German self-defence provision — for the aforementioned reasons — does not require proportionality, it does not allow for limitless self-defence but requires that the act must be ‘demanded’ (*geboten*). This is a normative concept which calls for certain ‘socio-ethical restrictions’ of self-defence, e.g. in the case of attacks by not fully responsible or culpable agents (children, mentally deranged persons, etc.), in the case of insignificant attacks, etc.<sup>87</sup> In the Frankfurt Court case,<sup>88</sup> as the majority of German scholars have argued, the violation of human dignity implicit in the threat of torture entails the lack of ‘*Gebotenheit*’ of self-defence and consequently the unlawfulness of the (threat of) torture.<sup>89</sup> At first sight this seems to be convincing, but how can something which is prohibited (torture and violation of human dignity) at the same time be ‘demanded’ (*geboten*)?<sup>90</sup> This provokes some doubts about the alleged inalienability or inviolability of human dignity.<sup>91</sup> Do we not all the time violate the human dignity of persons who do not comply with our rules: e.g. the drug courier who is forced to take a drug in order to get the smuggled drugs out of his body;<sup>92</sup> or the African refugees who flee to our rich countries and are locked up in camps without minimum human rights standards?<sup>93</sup> Does this not mean that even the principle of human dignity has inherent limitations?

86 For the same result Hilgendorf, *supra* note 11, 339 left column; Perron, *supra* note 57, at 148–149; Erb, *supra* note 71, at 598–599 (especially crit. of the opposite assessment of the LG Frankfurt); see also Wagenländer, *supra* note 18, at 118 *et seq.*; Jeßberger, *supra* note 18, at 713 left column; Lenckner and Perron, *supra* note 57, § 32 mn. 62a.

87 Roxin, *supra* note 10, § 15 mn. 55 *et seq.*

88 LG Frankfurt, *supra* note 4, at 693–694.

89 Roxin, *supra* note 18, at 465; *idem*, *supra* note 10, § 15 mn. 106–107; Perron, *supra* note 57, at 149–150; Lenckner and Perron, *supra* note 57, § 32 mn. 62a with further references.

90 Cf. Roxin, *supra* note 18, at 465. For the same result Bernsmann, *Entschuldigung durch Notstand* (1989) 93–94; Kinzig, *supra* note 18, at 811; Jeßberger, *supra* note 18, at 714 left column; Hilgendorf, *supra* note 11, at 339 left column; Jerouschek and Kölbl, *supra* note 11, at 619–620 (distinguishing between public and private torture and accepting the limitation only for the former); Saliger, *supra* note 18, at 48–49; Schild, *supra* note 18, at 72.

91 The inviolability doctrine, based on Art. 1 of the German *Grundgesetz*, is one of the great stakes of German constitutional law; it has, however, provoked critical reactions, especially with regard to our case: see Lüderssen, *supra* note 18, at 702 calling it ‘*die große Lebenslüge des Verfassungsrechts*’, that human dignity should be spared from any ‘*Prozess der Abwägung*’ (process of balancing). Crit. also Herzberg, *supra* note 22, at 322; Merkel, *supra* note 11, at 396 *et seq.*; for a thorough analysis of the different views see Wagenländer, *supra* note 18, at 135 *et seq.*

92 In such a case — an alleged drug dealer was forced to take emetics in order to provoke the regurgitation of the bag — Germany was even convicted by the European Court of Human Rights, *inter alia*, because of a violation of Art. 3 (by ten votes to seven), see Judgment, *Jalloh v. Germany* (application n° 54810/00), 11 July 2006.

93 According to a report by AI the camps set up on the Spanish Islands do not fulfil minimum standards and the refugees are even exposed to sexual and other abuse, ACT 34/003/1997, 19 March 1997, available at <http://web.amnesty.org/library/index/engACT340031997> (visited 10 March 2008).

With regard to our case, the question is how we account for the human dignity of the victim who, locked up in a tiny, dark room, might die a slow and painful death from thirst and starvation?<sup>94</sup> Why should the legal order give the dignity of the culpable offender more value than that of the innocent victim? Is not the kidnapper — in accordance with the structure of self-defence — responsible for the attack and therefore for the consequences up to the extreme of submitting him to torture?<sup>95</sup> Does he, after all, not control the situation and could he not avert the physical threat easily by providing the information required,<sup>96</sup> while the victim has no other alternative than to wait for his saviours coming from outside? Does, therefore, the victim not have more rights than the kidnapper?<sup>97</sup> These questions carry serious and important arguments which seem to call for a more flexible approach. In any case, they show that the invocation of self-defence in a kidnapping *Daschner*-like-case — or the invocation of necessity in a ticking bomb case — cannot easily be dismissed by an almost reflexive recourse to the international or constitutional prohibition against torture.<sup>98</sup> Clearly, we face in such a situation the dilemma that human dignity (of the suspect) stands against human dignity (of the victim) — an apparent stalemate between conflicting interests of equal value.<sup>99</sup> Indeed, in this situation, a state which categorically prohibits torture apparently abandons the victim and, in so doing, violates his human dignity.<sup>100</sup> Against this background, some authors understandably argue that the victim's interests must prevail over the suspect's interests and that constitutional, international, or other prohibitions against torture must be teleologically restricted.<sup>101</sup> Consequently, an act of self-defence would be 'demanded'

94 On the violation of the dignity by the kidnapping Wagenländer, *supra* note 18, at 165–166.

95 For this argument based on the structures of attribution in self-defence Merkel, *supra* note 11, at 390 *et seq.*; generally also Wittreck, *supra* note 18, at 52.

96 For the same argument Kremnitzer and Segev, *supra* note 12, at 543–544; Gur-Arye, *supra* note 3, at 194; crit. Shue, *supra* note 11, at 52 *et seq.*

97 See for this argument Merkel, *supra* note 11, at 397.

98 But see Delmas-Marty, *supra* note 2, at 592 dismissing an individual defence to preventive torture with the much too general recourse to human rights as an interpretation standard in Art. 21(3) ICCSt.

99 W. Brugger, 'Darf der Staat ausnahmsweise foltern?', 35 *Der Staat* (1996) 67, at 79; *idem*, *supra* note 13, 169 left column; conc. Jerouschek and Kölbl, *supra* note 11, at 618; Erb, *supra* note 71, at 599 left column; Wagenländer, *supra* note 18, at 167; see also Kinzig, *supra* note 18, at 792.

100 See also Hilgendorf, *supra* note 11, at 338; Erb, *supra* note 71, at 599 left column; Lüderssen, *supra* note 18, at 701; Merkel, *supra* note 11, at 396, 402; against this argument Kretschmer, *supra* note 18, at 108; against him Wittreck, *supra* note 18, at 52 with fn. 83. This author (at 49 *et seq.*, 56) stresses the conflict between the duty to respect (the suspect) and to protect (the victim) which may lead to a justification if the act of torture is proportional (in a similar vein Wagenländer, *supra* note 18, at 155 *et seq.*, 199–200). This recourse to the doctrine of justifying collision of duties (*rechtfertigende Pflichtenkollision*) presupposes, however, that the conflicting duties are both duties to act, not as in this case a duty to act (regarding the victim) and a duty to omit (regarding the suspect), see also Wagenländer, *supra* note 18, at 114–115; Saliger, *supra* note 18, at 47–48; Schild, *supra* note 18, at 71–72.

101 This view has been most forcefully defended by Brugger, *supra* note 99, 74 *et seq.*; *idem*, *supra* note 13, 168 *et seq.*; in a similar vein Erb, *supra* note 71, at 599 arguing that the stalemate between the human dignity of the suspect and the victim (*supra* note 99 and text) entails a restriction of the prohibition of torture by recourse to self-defence or necessity in

(*geboten*) in such a case,<sup>102</sup> the state organs may even be obliged to use torture and the potential victims or their relatives may have a right to that remedy.<sup>103</sup>

Yet, despite all these arguments, I still think that the *fundamental principle* enunciated previously, namely that a state which orders or allows torture can no longer be considered a state governed by the rule of law, a *Rechtsstaat*, also applies to the *ex post* qualification of official acts as right or wrong, as lawful or unlawful. First of all, self-defence as a cause of justification<sup>104</sup> would make the act of torture lawful, i.e. it would negate the wrongfulness of torture.<sup>105</sup> This would create an irreconcilable contradiction between the upholding of the prohibition at the state level and its abandonment at the level of individual justification. Indeed, if torture cannot be lawful for the state it cannot be either for the police investigator as the representative of the state. In addition, if the torture was lawful the torture victim could not defend himself against the torturer's attack on his human dignity, but would have to tolerate it since self-defence presupposes an *unlawful* attack.<sup>106</sup> Also, the recognition of torture as a lawful act would ultimately convert torture into something legally and socially acceptable. The prohibition against torture would be undermined — a danger not only for less stable democracies than Israel and Germany<sup>107</sup> — by a slippery slope that could not be contained.<sup>108</sup> Last but not least, the apparent repeal of the suspect's dignity by the victim's dignity is a *petitio principii* since it presupposes the argument that first needs to be demonstrated, i.e. the relativity of the torture prohibition. The alleged state violation of the victim's dignity by *not* torturing the suspect is based on the assumption that the original crime committed by an autonomous agent, e.g. the kidnapping of an 11-year-old boy,

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these cases; for a similar result also Posner, *supra* note 3, at 293–294; H. Otto, 'Diskurs über Gerechtigkeit, Menschenwürde und Menschenrechte', 60 JZ (2005) 473, at 480–481.

102 Cf. Wagenländer, *supra* note 18, at 170, 199; for a justification because of the absence of torture *stricto sensu* Herzberg, *supra* note 22, at 328.

103 Brugger, *supra* note 13, at 170–171; see also Wagenländer, *supra* note 18, at 176 *et seq.*; Jakobs, 'Terroristen als Personen im Recht', 117 ZStW (2005) 839, at 849; crit. Wittreck, 18, at 56 with the convincing argument that in these extreme cases of a 'dignity collision' the law gets onto such a shaky ground that strict legal duties cannot be construed.

104 See Fletcher at 132–133; Ambos, *supra* note 69, at 1021 *et seq.*; 1032 with fn. 161.

105 This is even accepted by common law scholars, see Moore, *supra* note 42, at 320–321.

106 For this argument based on the German doctrine of the 'Notwehrprobe' ('self-defence test'), see Lüderssen, *supra* note 18, at 698–699 who for this reason rejects self-defence.

107 Even Brugger, *supra* note 99, 84–85 see this danger but only for less stable democracies.

108 See also Kremnitzer, *supra* note 13, at 272; Zuckerman, *supra* note 48, at 372 ('abandonment of the ordinary criminal procedure'); D. Kretzmer, 'Introduction', in Hebrew University of Jerusalem Center for Human Rights, *Israel and International Human Rights Law: The Issue of Torture* (Jerusalem: Hebrew University, 1995), 4; *idem*, *supra* note 3, at 124; Jerouschek and Kölbl, *supra* note 11, at 619 left column; Gaeta, *supra* note 16, at 792–793 ('risk of abuse'); Gross, *supra* note 31, at 1506 *et seq.*; Shany, *supra* note 20, at 108–109, 110, 114; E. Weßlau, 'Die staatliche Pflicht zum Schutz von Verbrechenopfern und das Verbot der Folter', in N. Paech et al. (eds), *Völkerrecht statt Machtpolitik* (Hamburg: VSA, 2004) 390, at 400 *et seq.*; Waldron, *supra* note 38, at 1734 *et seq.*; Greco, *supra* note 11, at 639. The slippery slope argument is even admitted by authors against the absolute prohibition of torture, see Brugger, *supra* note 99, 97; *idem*, *supra* note 13, 172–173; against this argument Erb, *supra* note 71, at 601–602; crit. also Wagenländer, *supra* note 18, at 167–168; crit. for principled reasons Merkel, *supra* note 11, at 379–380.

can be imputed to the state, just because the state refuses to authorize its officials to torture suspects in order to save their victims.<sup>109</sup> This line of argument is incompatible with a normative theory of imputation which puts the acts of an autonomous agent in its centre and only severs the link of imputation between these acts and the agent if other autonomous agents actively and voluntarily intervene in the ordinary course of events.<sup>110</sup> While one may, albeit with a somewhat naturalist, mechanical concept of causation, hold the kidnapper responsible for his own torture since he kidnapped the victim in the first place and now refuses to cooperate, this description goes too far in construing the state's complicity in the victim's final death for not torturing the kidnapper. The kidnapper and the state investigator are autonomous agents in the chain of events, the latter cannot be made responsible for a result of an act of the former for not using an investigation technique prohibited by international and national law. For all these reasons torture can, in the result, never be 'demanded' by self-defence and the same must apply, *a fortiori*, to self-defence provisions which provide for a stricter proportionality requirement. In other words, if torture cannot not even be 'demanded' by self-defence it can with less reason be proportional within the meaning of self-defence.

### B. Necessity

The provisions for justificatory necessity read as follows:

Section 34k (34-11) Israeli Penal Code 1977, as amended in 1994 (necessity)<sup>111</sup>

A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from the particular state of things [circumstances], at the requisite timing, and absent alternative means for avoiding the harm.

Section 34 StGB: *Rechtfertigender Notstand* (justificatory necessity)<sup>112</sup>

Whoever commits an act in order to avert a present and otherwise unavoidable danger to the life, limb, liberty, honour, property or other legal interest of himself or of another does not act unlawfully if, taking into consideration all the conflicting interests, in particular the legal ones, and the degree of danger involved, the interest protected by him significantly outweighs the interest harmed. This rule applies only if the act is an appropriate means to avert the danger.

Article 31(1) ICC Statute

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing

109 For this line of attribution see in detail Merkel, *supra* note 11, at 393 *et seq.*; against a duty of the state to torture in these cases Kretschmer, *supra* note 18, at 108.

110 See for the origins and meaning of this theory Ambos, *supra* note 61, at 2664 *et seq.*

111 Amendment No. 39, in force 1995; taken from Israeli Supreme Court, § 33.

112 My translation.

or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control.

The necessity defence has taken centre stage in the debate about the ticking bomb cases.<sup>113</sup> The Commission of Inquiry Report attached 'central importance' to this defence and considered that the 'great evil' of terrorism 'justifies counter-measures' in the sense of this defence.<sup>114</sup> According to the Israeli Supreme Court, the defence of necessity

is open to all, particularly an investigator, acting in an organizational capacity of the State in interrogations of that nature and 'likely to arise in instances of ,ticking time bombs'... if a GSS investigator — who applied physical interrogation methods for the purpose of saving human life — is criminally indicted, the 'necessity' defence is likely to be open to him in the appropriate circumstances.<sup>115</sup>

On the basis of the distinction between justification and excuse,<sup>116</sup> necessity in its classical form constitutes a *justification* since its most prominent feature is the *balancing of interests* or choice of evils.<sup>117</sup> The balancing test is central for our case; indeed, some authors rely exclusively on this test as if necessity had no other requirements.<sup>118</sup> Be that as it may, the test is provided for in all the relevant provisions, either explicitly ('taking into consideration all the conflicting interests... the interest protected by him significantly outweighs the interest which he harms,' Section 34 StGB; 'not intend to cause a greater harm than the one sought to be avoided,' Article 31(1)(d) ICC Statute) or implicitly ('substantial danger'... 'absent alternative means,' Article 34(11) Israel Penal Law). If necessity is considered an *excuse*, as for example by Section 35 StGB (see *infra* Section C), it is framed differently and in particular does not contain the balancing test. Yet, before applying this test to our case the other requirements of necessity must be dealt with. The first issue arises with regard to the immediacy requirement ('act immediately necessary... requisite timing,' Article 34(11) Israel Penal Law; 'present... danger to the life,' Sect. 34 StGB; 'threat of imminent death or... imminent serious bodily harm,' Article 31(1)(d)

113 For the distinction between necessity and duress see Ambos, *supra* note 69, at 1023 *et seq.*, 1036. The latter defence is not relevant in our case since the investigator resorting to torture is not, at least not directly, coerced to do this by the kidnapping or terrorist suspect, i.e. he does not lack the freedom of will in the face of an immediate threat.

114 Commission of Inquiry, *supra* note 3, at 186 (§ 4.13).

115 Israeli Supreme Court, § 34. Crit. on the defence of necessity in our context however Dershowitz, *supra* note 37, at 197; *idem*, 'Tortured Reasoning', *supra* note 37, at 262, 264; Enker, *supra* note 37, at 56 *et seq.*, 80, 82. These authors, however, start from the — incorrect — assumption that the contours of necessity cannot be precisely defined.

116 See *supra* note 61 and text.

117 The classical example is Sect. 3.02 US MPC requiring that 'the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented...'. See also Moore, *supra* note 42, at 284–285; Ambos, *supra* note 69, at 1036–1037.

118 See e.g. Shue, *supra* note 11, at 57; Posner, *supra* note 3, at 293 *et seq.*



ICC Statute) which, as argued previously, leads to the exclusion of self-defence in the ticking bomb cases since in these cases the attack does not occur immediately within the meaning of the self-defence provisions. Thus, the question arises whether the immediacy requirement in necessity is to be understood more broadly, including the so-called cases of preventive or pre-emptive defence. While this is the general view of the doctrine and case law,<sup>119</sup> the reasoning, if given at all, is not always convincing.<sup>120</sup> In addition, a precise temporal limitation is lacking. While it is clear that for the different situations of justification in self-defence and necessity — the former presupposing a quite narrow attack or use of force, the latter a broader danger or threat<sup>121</sup> — the immediacy requirement must be understood more broadly in necessity, the materialization of the danger cannot lie too far in the future. For in this case alternative counter-measures would suffice to avert the danger and thus the 'otherwise unavoidable' requirement (Sect. 34 StGB; absent alternative means for avoiding the harm, Article 34(11) Israel Penal Law), i.e. that there are no alternative, less intrusive measures at the disposal of the investigator, would not be fulfilled. In effect, a danger can only be considered to be 'present' if a later countermeasure would not be possible any more or only under much greater risks.<sup>122</sup> In light of this standard it is difficult to argue, as done by the Israeli Supreme Court,<sup>123</sup> that the imminence criterion would even be satisfied if the bomb is expected to explode only 'after a few weeks'.<sup>124</sup> If the materialization of the danger is so distant it can be expected with some certainty that the information necessary to prevent the explosion can be obtained by other means than torture, namely by the effective investigation and intelligence of the security organs.

119 Commission of Inquiry, at 170 *et seq.* (§ 312), 186 (§ 4.13): 'not only when the perpetration of such activity is actually imminent, but also when it exists potentially, so that it is liable to occur at any time'. Conc. Robinson, *supra* note 62, 189; diss. Feller, *supra* note 13, at 207–208 calling for a 'concrete, imminent' — in contrast to a 'possible, future' danger. See also Israel Supreme Court, § 34: 'the immediate need . . . refers to the imminent nature of the act rather than that of the danger. Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, provided the danger is certain to materialize and there is no alternative means of preventing its materialization. In other words, there exists a concrete level of imminent danger of the explosion's occurrence'. Similarly, in Germany, although both §§ 32 and 34 StGB use the term 'present' (*gegenwärtig*) with regard to the attack or danger, there is a consensus that it has to be understood more broadly in case of necessity, see Roxin, *supra* note 10, § 16 mn. 20.

120 Thus, the Israel Supreme Court's interpretation, as quoted in *supra* note 119, is difficult to reconcile with the wording of Art. 34(11) since this provision refers to a 'danger . . . imminent from the particular state of things [circumstances]'. . .

121 Zuckerman, *supra* note 48, at 365 is mixing self-defence and necessity up requiring for both indistinctively an 'impending danger'.

122 See for many Roxin, *supra* note 10, § 16 mn. 20.

123 Israel Supreme Court, as quoted in *supra* note 119.

124 Similarly, the Commission of Inquiry, at 174 (§ 3.15) dismissed the time factor lightly by outplaying it against the — conceptually different — choice of evils test and stating in this context: 'what difference does it make, in terms of the necessity to act, whether the charge is certain to be detonated in five minutes or in five days?'.

The ‘otherwise unavoidable’ requirement is not explicitly provided for in Article 31(1)(d) ICC Statute but may be interpreted as the other (reverse) side of the immediacy requirement,<sup>125</sup> or read into the ‘necessary’ and ‘reasonable’<sup>126</sup> requirements of necessity (see Article 31(1)(d) ICC Statute and Article 34(11) Israel Penal Law).<sup>127</sup> The ‘necessary’ requirement in turn must be assessed similarly as in the case of self-defence, i.e. the central question is whether the countermeasure is suitable at all and required in the strict sense. This is not the case if the act is not effective or if other, less severe and equally effective means are at the disposal of the agent. *In casu*, the same considerations as in the case of self-defence apply,<sup>128</sup> one may in particular doubt the effectiveness of torture with a view to obtaining the correct information or the information at all.<sup>129</sup> This does not absolutely rule out situations in which the torturer can indeed be certain that the victim possesses and can provide information required to prevent concrete harm,<sup>130</sup> but there can be no absolute certainty and the application of torture must be predicated on such certainty. In any case, the information to be obtained must be precise enough; general information about explosives in the possession of the suspect or the structure of the group to which the suspect belongs does not suffice.<sup>131</sup> Equally, the mere necessity of an interrogation does not, contrary to the Commission of Inquiry Report,<sup>132</sup> suffice. Rather it must be specifically demonstrated that the use of force up to the degree of torture was necessary.

Unlike self-defence,<sup>133</sup> the necessity countermeasure must neither necessarily be directed against the source of the danger or threat nor is it limited to ‘innocent’ persons.<sup>134</sup> While the latter so-called aggressive necessity

125 In this sense Kremnitzer, *supra* note 13, at 245 (‘imminence’ as ‘facet of the absence of an alternative course of action’; see also U. Kindhäuser, *Allgemeiner Teil* (2nd edn, Baden-Baden: Nomos, 2006), § 17 mn. 19).

126 Jeßberger’s ‘human rights-oriented interpretation’ of the ‘reasonably’ requirement leading to the conclusion that preventive torture is always unreasonable (*supra* note 4, at 1072, 1073) is not convincing since it is not clear what he understands by reasonableness and therefore his conclusion can be accepted or rejected, depending on this understanding; if, on the other hand, he considers reasonableness as an expression of proportionality [as appears from p. 1072: ‘... resort to it [torture, K.A.] is always out of proportion to the danger to life and limb to be prevented or averted’] his assessment finds a better place in the choice of evils test. In fact, ‘reasonable’ in Art. 31(1)(d) ICCSt. can be considered an umbrella term encompassing ‘necessary’, ‘proportionate’, etc. (Ambos, *supra* note 69, at 1040).

127 See, e.g. Roxin, *supra* note 10, § 16 mn. 23 with regard to Sect. 34 StGB since this provision does not explicitly require a ‘necessary’ act.

128 See *supra* note and main text.

129 See already *supra* note 81 and in the context of necessity Kremnitzer, *supra* note 13, at 248; Kremnitzer and Segev, *supra* note 12, at 551; Gaeta, *supra* note 16, at 791–792.

130 See also Jeßberger, *supra* note 4, at 1070; Kretzmer, *supra* note 3, at 123–124.

131 But in this sense Commission of Inquiry, at 172 (§ 3.13); crit. also Enker, *supra* note 37, at 73.

132 Commission of Inquiry, at 173 (§ 3.14).

133 See *supra* note 66 and main text.

134 This clearly follows from the wording of Art. 31(1)(d)(i) which refers to a threat ‘made by other persons’: these other persons are necessarily responsible for the threat and therefore not innocent. Incorrect therefore Gaeta, *supra* note 16, at 791; convincingly against her Jeßberger, *supra* note 4, at 1070.

(*Aggressivnotstand*) — directed against the innocent — may be the regular case, it is by no means the only case. There is also the notion of defensive necessity (*Defensivnotstand*), which is directed against the source of the threat itself. The difference is that in this case the defender has more right — similar to the person acting in self-defence — than in the case of acting against the innocent. In other words, the interests of the responsible are less protected than that of the innocent and rightly so!<sup>135</sup> For our case, that means that it is clearly more justified to apply physical pressure against the terrorist or kidnapper, responsible for the ticking bomb or the deprivation of liberty of another, than against the less responsible or even innocent.<sup>136</sup> One may even argue — drawing a parallel to the argument made for self-defence<sup>137</sup> — that in light of the gravity of torture, torturing the innocent can never be justified.<sup>138</sup> To avoid this issue I have construed our model case with a suspect responsible for the attack or danger. If the necessity defence does not operate in this case it cannot, *a fortiori*, operate in a case where the countermeasure is directed against the innocent.

If necessity ultimately excludes the responsibility of the torturing investigator, it depends on the balancing of the values at stake. The balancing test lies at the heart of the necessity defence as a justification and is therefore part of all the relevant provisions, including the (unclear) Israeli one.<sup>139</sup> While it appears for the above reasons,<sup>140</sup> too simple to dismiss on the basis of an absolute, strict deontological view of morality,<sup>141</sup> any balancing with a view to the absolute prohibition against torture and the implicit violation of human dignity,<sup>142</sup>

135 See for a good discussion of aggressive necessity, interfering with the autonomy of the innocent, and defensive necessity with more far reaching rights for the defender and less protection for the person responsible for the threat Roxin, *supra* note 10, § 16 mn. 46 *et seq.*, 72 *et seq.*; see also Benvenisti, *supra* note 12, at 601; Wagenländer, *supra* note 18, at 132–133.

136 See also Moore, *supra* note 42, at 326; Kremnitzer, *supra* note 13, at 272; Kremnitzer and Segev, *supra* note 12, at 548–549 criticizing that the Commission of Inquiry and the Supreme Court consider involvement in the terrorist activity as sufficient.

137 See *supra* note 67 and main text.

138 See also Moore, *supra* note 42, at 315, 333 (the apparent and ambiguous exception regarding ‘most horrendous consequences’ does not become relevant in our case since such consequences are not likely to occur in the ticking bomb cases, *ibid.*); conc. Benvenisti, *supra* note 12, at 601, 607; for the same view Wagenländer, *supra* note 18, at 123; Gur-Arye, *supra* note 3, at 183–184, 191, 193 who for this reason rejects necessity as ‘too broad’ (at 191); in a similar vein Dershowitz, ‘Tortured Reasoning’, *supra* note 37, at 272.

139 The balancing test was explicitly provided for in the former provision of 1977 and there is no indication that the legislator wanted to abolish it; crit. on the current provision Kremnitzer/Segev, *supra* note 12, at 545.

140 See *supra* note 99 *et seq.* and main text.

141 Crit. Moore, *supra* note 42, at 297–298. For a good discussion of the deontological and consequentialist moral theories and their varieties in our context Moore, *supra* note 42, at 286 *et seq.* opting himself for a middle ground; Gross, *supra* note 31, at 1490 *et seq.* opting for a ‘more sophisticated’ pragmatic absolutism (1491, 1500 *et seq.*); a quite pragmatic consequentialist position is taken by Posner, *supra* note 3, at 293 *et seq.* (without however clarifying the philosophical basis of this position); see also Waldron, *supra* note 38, at 1712–1713; for a rather deontological view Greco, *supra* note 11, at 634 *et seq.*

142 In this vein e.g. Kremnitzer, *supra* note 13, 107–108, 114; Jeßberger, *supra* note 18, at 714 left column.

an isolated, mere quantitative balancing offsetting the kidnapped person and the potential victims of a terrorist attack against the victim of torture is equally unconvincing. If one, for the sake of argument, were to undertake such a balancing it would lead to different results in our two basic cases: in the kidnapping case a (significant) outweighing of the protected interest (the life and admittedly human dignity of the victim) over the harmed interest (human dignity of the kidnapper) would have to be denied, while in the ticking bomb case it would have to be answered in the affirmative (life and human dignity of several victims over human dignity of one victim).<sup>143</sup> This result shows that this kind of balancing leaves out important general and institutional considerations<sup>144</sup> which reach well beyond the current case. These considerations can be taken into consideration though a comprehensive, qualitative balancing test.<sup>145</sup> This would account for the negative consequences that a flexible approach towards the torture prohibition would entail for the legal order as a whole,<sup>146</sup> the risk of a slippery slope, and the damage for the reputation of the state at the international level,<sup>147</sup> i.e. arguments which have been already formulated above in relation to the absolute prohibition against torture in international law<sup>148</sup> and self-defence.<sup>149</sup> In addition, one must not overlook that necessity as a justification would have the same justificatory effect as self-defence, i.e. it would convert torture into something lawful and permitted.<sup>150</sup> Last, one must recall the uncertainties and practical difficulties with the ticking bomb cases.<sup>151</sup> In fact, in most cases it will only be known

143 For this view apparently Moore, *supra* note 42, at 333 when he states that ‘those who culpably cause the need for torture by planting the bomb . . . may be tortured when absolutely necessary to remove the threat they have caused’. More bluntly Commission of Inquiry, at 174 (§ 3.15): ‘the alternative is: are we to accept the offence of assault entailed in slapping as suspect’s face, or threatening him, in order to induce him to talk and reveal a cache of explosive materials meant for use in carrying out an act of mass terror against a civilian population, and thereby prevent the greater evil which is about to occur? The answer is self-evident’. Subsequently, this test is even framed in subjective terms focusing on the reasonable belief of the investigator applying the use of force (at 174–175, § 3.16). For a mistaken balancing Enker, *supra* note 37, at 72 setting the ‘use of force to extract information’ (instead of the human dignity of the suspect) against ‘the saving of lives’.

144 On their decisive role Shany, *supra* note 20, at 113, 129.

145 Generally on this balancing approach Kremnitzer, *supra* note 13, at 247 *et seq.*; against justification also F. Molina, ‘La Ponderación de Intereses en Situaciones de Necesidad Extrema: ¿Es Justificable la Tortura?’ in *La Respuesta del Derecho Penal ante los Nuevos Retos* (Madrid: Dykinson, 2006), 265, at 269 *et seq.*

146 On the negative impact for the interrogators Enker, *supra* note 37, at 74.

147 See Kremnitzer, *supra* note 13, at 247 (‘including legal and moral consequences’, ‘harm suffered by the legal system’); Robinson, *supra* note 62, at 189 (‘precedent that it would set for the use of force in the interrogation of prisoners generally’); Benvenisti, *supra* note 12, at 601–602; Jerouschek and Kölbel, *supra* note 11, at 618, 620.

148 See *supra* note 45 *et seq.* and main text.

149 See *supra* notes 107–108 and main text.

150 See already *supra* note 105.

151 See Kremnitzer and Segev, *supra* note 12, at 549 *et seq.* See also Kremnitzer, *supra* note 13, at 264 *et seq.* (271) deviating from the Commission of Inquiry in the assessment of the terrorist threat and the concrete danger posed in the ticking bomb cases (at 264: no threat to the

*ex post* if a ticking bomb did really exist.<sup>152</sup> These uncertainties suggest that our model case will be very rare in practice and that it is very risky to justify torture — with all its consequences — on such a thin empirical basis. In sum, a comprehensive, qualitative balancing excludes the use of preventive torture in interrogations. This result is reinforced if by a normative threshold such as *Angemessenheit* (appropriateness), explicitly contained in Section 34 StGB and, arguably, in Israeli and other necessity provisions.<sup>153</sup> In fact, this threshold encompasses all normative considerations derived from constitutional and human rights law relevant in our case and is therefore an expression of a deontological approach.<sup>154</sup>

### C. The Call for an Excuse

Although upholding the prohibition against torture is necessary for the maintenance of a law-abiding state's integrity and legitimacy, it does not do justice to the individual police officers or security agents who may find themselves in a situation where torture is the only available means to avert a serious danger for human life. In such a situation, it cannot always be expected that the agent will 'overcome pressures and avoid committing wrongs'.<sup>155</sup> Yet, this individual level, concerned with the categories of personal blameworthiness and culpability, can be accounted for by granting these officials an excuse instead of a justification.<sup>156</sup> The model case, similar to a situation of extreme duress,<sup>157</sup> demonstrates impressively the advantage of this distinction in situations where the wrongfulness of the act, for *raison d'état*, must be upheld, but the individual wrongdoer, for reasons of personal blameworthiness, should be

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existence of Israel; no life in concrete, immediate danger; information obtained of general nature; group of suspects too broad extending to passive supporters etc.); on the uncertainty for the investigators see also Enker, *supra* note 37, at 73 and Gur-Arye, *supra* note 3, at 192; on the practical problems also Lenckner/Perron, *supra* note 57, § 32 mn. 62a.

152 See also Benvenisti, *supra* note 12, at 602; Scarry, *supra* note 38, at 284; Waldron, *supra* note 38, at 1715. Zuckerman, *supra* note 48, at 367–368 correctly reminds us of the difficulties of finding the truth will even exist in the trial taking place *ex post*.

153 Cf. Moore, *supra* note 42, at 288–289; Kremnitzer and Segev, *supra* note 12, at 547; Kretschmer, *supra* note 18, at 106, 112–113.

154 While some question the sense of this requirement given that all considerations form already part of the balancing of evils the dominant opinion in German doctrine still gives it considerable weight as a kind of second stage of normative control; this is convincing as long as the balancing at the first stage is not reaching beyond the concrete case, in the comprehensive sense explained above (*supra* note 145 and main text); for a discussion see Roxin, *supra* note 10, § 16 mn. 91 *et seq.* with further references. *In casu* the LG Frankfurt, *supra* note 4, at 693 *et seq.* and most scholars dismissed the appropriateness of (a threat of) torture, see Roxin, *supra* note 18, at 465; Jekberger, *supra* note 18, at 714 left column; further references in LG Frankfurt, *supra* note 4, at 694–695.

155 For this strict view, however, Gur-Arye, *supra* note 3, at 188.

156 As said before (*supra* note 62) this distinction is even accepted *in casu* by scholars whose legal systems do not accept the distinction between justification and excuse *in general*.

157 For a discussion of the *Erdemović* case in this regard cf. Ambos, 'Other Grounds Excluding Responsibility', in Cassese et al., *supra* note 69, at 1042 *et seq.*

exempted from responsibility. The doctrinal device to reach this exemption is of secondary importance as long as it is an excuse. In German law, the resort to the excusing necessity (*entschuldigender Notstand*) of Section 35 StGB<sup>158</sup> is normally blocked by the requirement of a close relationship between the person acting in necessity and the endangered person, but it has been convincingly argued that in exceptional circumstances an extra-statutory ground of exculpation may be invoked.<sup>159</sup> The accused could then be absolved, instead of being punished with a mitigated sentence,<sup>160</sup> or convicted but spared from punishment as in the *Daschner* case.<sup>161</sup> To avoid misunderstandings it is important to stress that the exemption from responsibility or punishment is no automatism but depends on the circumstances of each case. The investigator must always seriously deliberate about the use of torture since he always runs the risk of being punished.

## 5. An Advance Effect on Preventive Torture?

The remaining question, whether this treatment of the criminal responsibility of the torturer would have an advance effect on the lawfulness of preventive torture, can be answered quickly. If one follows the excuse solution defended in this article, such an effect is *a limine* precluded by the personal, agent-related nature of an excuse. Yet, even if one favours a justification solution, either invoking self-defence or necessity, this would not change the result with regard to the unlawfulness of preventive torture. This has been correctly held by the Israeli Supreme Court:

The ‘necessity’ defence does not constitute a source of authority, allowing GSS investigators to make use physical means during the course of interrogations. The reasoning underlying

158 In Israeli law there is no such provision. Paragraph 1 of Sect. 35 StGB reads:

‘(1) Whoever commits an unlawful act in order to avert an imminent and otherwise unavoidable danger to his own life, limb, or liberty, or to that of a relative or person close to him, acts without guilt. This rule does not apply if under the prevailing circumstances the perpetrator could be expected to have assumed the risk, especially because he was himself the cause of the danger or because he found himself in a special legal relationship. If however, the perpetrator did not have to assume the risk with regard to a special legal relationship, the punishment may be reduced in accordance with the provisions of § 49(1).’

159 Cf. Roxin, *supra* note 18, at 468–469 concretely proposing a ‘supra-legal necessity excluding responsibility’ (*übergesetzlicher verantwortungsausschließender Notstand*) but only for the ticking bomb, and not for the kidnapping cases à la *Daschner* (for this case in favour of a supra-legal excuse Wittreck, *supra* note 18, at 44); for a general discussion *idem*, *supra* note 10, § 22 mn. 146 *et seq.*, esp. mn. 166 *et seq.* Against this solution Jeßberger, *supra* note 18, at 714–715 according to whom a torturer is always to be blamed (conc. Kinzig, *supra* note 18, at 812; in the result also Schild, *supra* note 18, at 79 albeit crit. of Jeßberger apodictic position and in favour of an excuse for private individuals); yet, this author welcomed the Frankfurt judgment (3 *Journal of International Criminal Justice* (2005), at 1066) which, with a similar reasoning as Roxin, opts for an exemption of punishment.

160 For this solution Gaeta, *supra* note 16, at 793–794.

161 *Supra* note 8.



our position is anchored in the nature of the 'necessity' defence. This defence deals with deciding those cases involving an individual reacting to a given set of facts; [i]t is an ad hoc endeavour, in reaction to a[n] event. It is the result of an improvisation given the unpredictable character of the events . . . Thus, the very nature of the defence does not allow it to serve as the source of a general administrative power.<sup>162</sup>

The necessity defence, as any substantive ground for excluding criminal responsibility, allows for an *ex post* assessment of an individual's conduct which entailed the fulfilment of the objective and subjective elements of an offence (*actus reus* and *mens rea*). It does not set a general standard of behaviour or contain general rules to orient human conduct *ex ante* and *in abstracto* — for that purpose a law to be enacted by parliament is needed<sup>163</sup> — but only evaluates an individual's commission of a criminal offence *ex post* (after the fact) and *in concreto* with a view to its compatibility with the legal order as a whole and taking into account the extraordinary circumstances of the conduct.<sup>164</sup>

162 Israel Supreme Court, §§ 35–37 (36). For the same result Kremnitzer, *supra* note 13, at 237 *et seq.*; Kremnitzer and Segev, *supra* note 12, at 536 *et seq.*; Hecker, *supra* note 80, at 215. For a different view only Brugger, *supra* note 13, at 168 *et seq.* arguing with counter-norms which prevail over the torture prohibition; his teleological restriction of the torture prohibition has however already been rejected above.

163 Commission of Inquiry, at 184 (§ 4.5): 'The law itself must ensure a proper framework for the activity of the GSS [Israeli General Security Service, K.A.] regarding Hostile Terrorist Activity (HTA), with all their attendant problems and dilemmas'; Israel Supreme Court, § 36: 'The Rule of Law . . . requires that an infringement on a human right be prescribed by statute, authorizing the administration to this effect.'; § 37: 'general directives governing the use of physical means during interrogations must be rooted in an authorization prescribed by law'; Enker, *supra* note 37, at 63 *et seq.*; Kremnitzer and Segev, *supra* note 12, at 538 ('preferable that a power to carry out an action, as the lesser evil, will be set in a specific and explicit legislation'); see also Herdegen, *supra* note 37, Art. 1(1) mn. 45 (at 33) according to whom the legislator would have to define the scope of permitted violations of human dignity if such violations are to be accepted at all.

164 See also Israel Supreme Court, § 36: 'allowing one who acts . . . to escape criminal liability . . . does not possess any additional normative value'; Kremnitzer, *supra* note 13, at 238: 'based upon the unique, isolated and extraordinary character of the situation which makes it an exception to the rule . . . granted ad hoc, after the fact . . . difficult to conceive it as guiding behaviour in advance in a specified situation,' at 241: 'ad hoc decision in a concrete case'; Kremnitzer and Segev, *supra* note 12, at 538: 'the basic idea behind the concept of the lesser evil, embodied in the necessity defense, is that it is hard (perhaps impossible) to determine in advance all types of actions that are justified under extraordinary circumstances'. Enker, *supra* note 37, at 61–62: 'after-the-fact judgment based on a narrow set of considerations in which we are concerned with the immediate consequences, not far-reaching and long-range consequences, on the basis of a clearly established order of priorities of both means and ultimate values. . . . The defence of Necessity does not define a code of primary normative behaviour'. Gross, *supra* note 31, at 1550: 'ex post ratification serves, at most, as an ad hoc, individualized defense to specific state agents against civil or criminal charges in particular cases. It cannot serve as a general, institutional, conduct-guiding rule to be relied upon ex ante'.