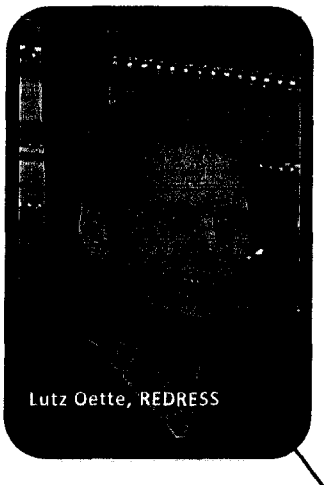

The European Court Grand Chamber Judgment in GAFGEN V GERMANY

Dr. Lutz Oette

"...there is an equally vital, compelling and competing public interest in the preservation of the values of civilised societies founded upon the rule of law. In such societies, recourse to subjecting individuals to inhuman or degrading treatment, regardless of its purpose, can never be permitted. There is, in addition, a critical public interest in ensuring and maintaining the integrity of the judicial process and the admission into a trial of evidence obtained in violation of an absolute human right would undermine and jeopardize the integrity of that process. In our view, criminal activity may not be investigated nor an individual's conviction secured at the cost of undermining the absolute right not to be subjected to inhuman treatment as guaranteed under Article 3. To hold otherwise would involve sacrificing core values and bringing the administration of justice into disrepute..."

Dissenting opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power

The significance of the Grand Chamber decision of the European Court of Human Rights (ECtHR) in *Gäfgen v Germany* for the prohibition of torture can hardly be overstated. The case brought into focus the debate surrounding the absolute nature of the prohibition of torture in instances of "Rettungsfolter", i.e. using torture to save someone's life.

The kidnapping and murder of the 11 yr old Jakob von Metzler (JvM) gripped and shocked the German public in 2002. The suspect, Magnus Gäfgen (G), a law student who was apprehended after collecting the ransom, later confessed that he had planned to abduct and kill JvM from the outset and the German courts duly sentenced G. to life imprisonment. This would have been the end of the matter had there not been a significant catch. The local deputy chief of the police, Daschner (D), having apprehended G. and assuming that JvM was still alive, instructed one of his officers, Mr. Ennigkeit (E), to threaten G. with torture if he did not disclose the whereabouts of the child. G. responded to the threat, leading police to the body of his victim.

In the subsequent legal proceedings in Germany, D. and E. were given the most lenient punishment possible in the circumstances (a suspended fine). G.'s request for legal aid to pursue compensation proceedings against the Land of Hesse was initially ruled out and the proceedings subsequently remitted are still pending. G.'s appeal against his criminal conviction was ultimately dismissed, a decision that the Constitutional Court found not to amount to a violation of G.'s basic rights. The ECtHR's chamber seized with the case ruled against G. in 2008, seemingly pursuing a similar line to that of the German courts. It found that his right to be free from inhuman treatment (Art. 3 ECHR) had been breached but that Germany had adequately remedied the breach. Germany had convicted and punished D. and E. and the compensation proceedings were pending. It further argued that the German courts had not relied on any confessions or evidence influenced by the ill-treatment but on a confession voluntarily given by G.

G. contested the ruling and the Grand Chamber decided to accept the case in late 2008. At this stage, the jurisprudence of the German courts and the Chamber ruling had generated considerable unease. Was this an instance of a hard case that resulted in bad law, with popular sentiment visibly influencing the judges reasoning? While the explicit affirmation of the absolute nature of the prohibition of torture was welcome, the Chamber's interpretation of Arts. 3 and 6 raised concerns that it was prone to lessen if not undermine the absolute prohibition thus proclaimed.

The Judgment of the Grand Chamber

The Grand Chamber had to address three key points, namely whether (1) the threats made constituted inhuman treatment if not torture; (2) Germany had fully remedied the breach through (i) an adequate investigation, prosecution and punishment of the perpetrator and (ii) the provision of redress; (3) evidence obtained as a result of torture can be used in criminal proceedings.

(1) Threats of Torture

The Court declared that the treatment "was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but ... did not reach the level of cruelty required to attain the threshold of torture." As recognised by the Court, threatening G. with intolerable pain instilled "considerable fear, anguish and mental suffering" which made him talk. The threatened treatment would have certainly caused "very serious and cruel suffering" and it is not readily apparent why the "severity of the pressure exerted and the intensity of the mental suffering caused" should not be equated with torture. The Court, instead of focusing in more detail on this vital aspect, introduced a further factor, namely that G. did not "establish any long-term adverse psychological consequences suffered or sustained as a result." This methodology is questionable as long-term mental suffering may be indicative of the severity but not necessarily constitutive. Spelling out more clearly the weight and interplay between objective and subjective factors in this context would have certainly helped in understanding the

formulaic distinctions made, but not satisfactorily explained, by the Court.

(2) Victim Status

i. Prosecution & punishment

The verdict against the two police officers responsible for the threats against G. raised a number of vexing issues, not least because of a series of mitigating factors that the German court had taken into consideration. The main question for the Court was therefore the degree to which it should and can exercise a supervisory function. The majority rightly stressed that there must be a measure of control where the national authorities clearly fail to protect the right in question, including by means of proportionate penalties. The sentences imposed by the German courts were clearly token ones and their seeming purpose was to use the lightest sanction possible. This effectively sent a message that the conduct was not deemed worthy of punishment. The final verdict was therefore "manifestly disproportionate to a breach of one of the core rights of the Convention...." The fact that D. was later appointed as chief of the Police Headquarters for Technology, Logistics and Administration further reinforced the impression that the German authorities did not want to sanction if not condone altogether the violation of Art. 3. The ruling on the punishment imposed is welcome as a matter of legal policy as a proportionate punishment upon conviction is a necessary corollary of effective investigations. However, the real problem lies at the enforcement stage: whereas investigations can be carried out subsequent to a judgment of the ECtHR (though there may be difficulties caused by the delay), final judgments in criminal cases are res judicata and proceedings can in most legal systems, including in Germany, only be reopened under narrowly circumscribed circumstances. A finding by the ECtHR that the punishment imposed was inadequate does normally not count as one of the grounds permitting the reopening of proceedings.

ii. Compensation

The Court found a breach of the state's positive obligation to provide an effective remedy because of the lengthy delays in proceedings (pending for more than three years). Again, this is a clear indictment of the German authorities' lack of willingness to advance the case, which was illustrated by the reluctance to even contemplate awarding someone referred to in the German public as "child murderer" compensation for ill-treatment.

The Court was not called upon to address the underlying "hard" question, namely what would constitute appropriate reparation on the merits. However, in an intriguing aside, it observed: "... that, in practice, it has made awards under Art. 41 of the Convention in respect of non-pecuniary damage in view of the seriousness involved in a violation of Art. 3." The Court itself was spared from having to make the difficult determination of adequate compensation as G. had not claimed damages pursuant to Art. 41.

(3) Evidence obtained as a result of torture

The alleged violation of Art. 6 was at the heart of the case and raised complex issues. The Court recalled that it had left open the question whether the use of real evidence obtained as a result of a breach of Art. 3 renders a trial unfair in the *Jalloh v Germany* case because Art. 6 does not provide an absolute right. It then came close to recognising that the use of such evidence would normally constitute a violation of Art. 6. However, instead of finding a violation of Art. 6, the Court introduced a further element according to which such a finding hinged on the question whether the use of real evidence had a "bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence." The Court, in what is arguably the most controversial aspect of the judgment, effectively endorsed the position of the German Government that G.'s conviction for murder was based on an entirely voluntary second confession made during the trial. Several judges subjected this reasoning to trenchant criticism in their dissenting opinion: "Neither "a break in the causal chain" nor any other intellectual construct can overcome the inherent wrong that occurs when evidence obtained in violation of Art. 3 is admitted into criminal proceedings." Moreover, "Being absolute, all violations thereof are serious and, in our view, the most effective way of guaranteeing that absolute prohibition is a strict application of the exclusionary rule when it comes to Art. 6. Such an approach would leave State agents who are tempted to perpetrate inhuman treatment in no doubt as to the futility of engaging in such prohibited conduct. It would deprive them of any potential incentive or inducement for treating suspects in a manner that is inconsistent with Art. 3."

Assessment

From a jurisprudential point of view, the judgment is of mixed blessing. It affirms contracting parties' obligations to provide sufficient redress by means of effective investigation, prosecution and punishment as well as effective remedies and appropriate reparation. For all intents and purposes, it also prohibits the use of evidence obtained as a result of a violation of Art. 3. However, this principle is qualified by requiring that the evidence is material to the outcome of proceedings, i.e. that there is a causal chain. This creates a level of legal uncertainty that is prone to undermine the absolute nature of the rule that the use of such evidence constitutes a violation of Art. 6. Finally, the manner in which the Court derived at the qualification of threats of torture as inhuman treatment must count as a missed opportunity to elucidate the applicable subjective and objective elements.

The Court's judgment appears to be a carefully crafted compromise that censures Germany for its patent failure to provide sufficient redress while avoiding any findings that would be overly controversial or require action to be taken on the part of Germany (as it stands, it is not clear what action Germany must or can take in light of the res judicata considerations made above in relation to the D. and E. case other than hearing G.'s reparation claim on the merits). This reading would explain the legally controversial parts of the judgment, which, had they been decided along the lines suggested by the dissenting opinion mentioned above, would have necessitated a retrial as a result of a finding of a violation of Art. 6. The majority must have been keenly aware that such a finding would have caused outrage in Germany. It was therefore rather convenient to follow the "voluntary confession" and "broken causal chain" argument. The dissenting opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power provides compelling reasons why an alternative interpretation would have constituted better legal policy.