

KANZLEI RECHTSANWÄLTE
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- I. Statutory sources**
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I. Statutory sources

1. The *European Convention of Human Rights* – ECHR (hereinafter: Convention)
2. The *Rules of Procedure* (RoP) of the *European Court of Human Rights* (ECHR)
3. The *International Covenant on Civil and Political Rights* and The General Comment
4. The *United Nations Convention against Torture* (CAT)

II. Leading cases which regard to elementary principles of Convention and of International Law and Human Rights Law

1. Selmouni v. France
2. Murray II v. UK (1996)
3. Funke v. France, Case 82/1991/334/407
4. Saunders v. UK; case no. 43/1994/490/572
5. Heaney and Mc Guinness v. Ireland
6. Magee v. UK (2000)
7. Ocalan v. Turkey, Grand Chamber, 2005
8. Jalloh v. Germany, 2006

III . Further example: The case *Gäfgen vs. Germany*, Application no. 22978/05

1. The facts of the case
2. The Court's findings; Art. 3, Art. 6 of the Convention

IV. Additional References

1. ECHR: <http://www.echr.coe.int/echr/>
2. Article: <http://www.ejiltalk.org/author/nsimonsen> 'Is torture ever justified?': The European Court of Human Rights decision in *Gäfgen v Germany* by Natasha Simonsen



- Art. 14 III (g) IPBPR (CCPR) and the General Comment Nr. 13/21 (12th April 1984): contains an important definition for the question of items of evidence which are attained unlawfully and especially in breach of human rights law and the privilege of self-incrimination (= *The right not to incriminate oneself / „nemo tenetur seipsum accusare“*):

14. Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

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- In *Selmouni v. France* Art. 1 of the *United Nations Convention against Torture* (CAT) was integrated in the *case-law* of the Court (see “CONCURRING OPINION OF JUDGE ZUPANČIČ” in *Jalloh vs. Germany*). The definition of torture is, accordingly:

[T]he term "torture" means any act by which [1] *severe pain or suffering*, whether physical or mental, is [2] *intentionally inflicted* on a person for such purposes as [a] obtaining from him or a third person information or a confession, [b] punishing him for an act he or a third person has committed or is suspected of having committed, or [c] intimidating or coercing him or a third person, or [d] 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 [3] *public official* or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.

^[1] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.



- in *Jalloh vs. Germany, 2006, the Court has stated:*

„(No. 97) ...However, public interest concerns cannot justify measures which extinguish the very essence of an applicant’s defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention (see, *mutatis mutandis, Heaney and McGuinness v. Ireland*, no. 34720/97, §§ 57-58, ECHR 2000-XII).”

(...)

“(99). However, different considerations apply to evidence recovered by a measure found to violate Article 3. An issue may arise under Article 6 § 1 in respect of evidence obtained in violation of Article 3 of the Convention, even if the admission of such evidence was not decisive in securing the conviction (see *İçöz v. Turkey* (dec.), no. 54919/00, 9 January 2003; and *Koç v. Turkey* (dec.), no. 32580/96, 23 September 2003).”



Art. 3 of the Convention prohibits torture, and "inhuman or degrading treatment or punishment". There are no exceptions or limitations on this right.

ARTICLE 15

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from **Articles 3**, 4 (paragraph 1) and 7 shall be made under this provision.



IV. Additional References

1. ECHR: <http://www.echr.coe.int/echr>
2. Article: <http://www.ejiltalk.org/author/nsimonsen> 'Is torture ever justified?': The European Court of Human Rights decision in *Gäfgen v Germany* by Natasha Simonsen
Substantial findings of the Court in leading cases

Murray II v. UK (1996), par. 45:

„No 45. Although not specifically mentioned in Article 6 (art. 6) of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie in the heart of the notion of a fair procedure under Article 6 (art. 6) (see the Funke judgement cited above, loc. cit.). By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6.”



Funke v. France, Case 82/1991/334/407, par. 44:

„No 44...Being unable or unwilling to procure them by other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. The special feature of customs law (see paragraphs 30-31 above) cannot justify such an infringement of the right to anyone “charged with a criminal offence”, within the autonomous meaning of this expression in Article 6 (art. 6), to remain silent and not to contribute to incriminating himself.”



Saunders v. UK; case no. 43/1994/490/572 par. 68 and 69:

„No 68. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.”...

No 69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent.”



In Heaney and Mc Guinness v. Ireland:

„No 40... Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6.”



Murray v. UK (1996):

No 62. “The Court observes that it has not been disputed by the Government that Article 6 (art. 6) applies even at the stage of the preliminary investigation into an offence by the police. In this respect it recalls its finding in the Imbrioscia v. Switzerland judgment of 24 November 1993 that Article 6 (art. 6) – especially paragraph 3 (art. 6-3) may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (art. 6-3) (Series A no. 275, p. 13, para. 36). As it pointed out in that judgment, the manner in which Article 6 para. 3 (c) (art 6-3-c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case (loc. cit., p. 14, para. 38).”



Murray vs. United Kingdom, (loc. cit.):

„National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances Article 6 (art. 6) will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stage of police interrogation.”

„66. The Court is of the opinion that the scheme contained in the Order is such that is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stage of police interrogation.



Magee v. UK (2000) par. 43:

„No. 43...The austerity of the conditions of his detention and his exclusion from outside contact were intended to be psychologically coercive and conducive to breaking down any resolve he may have manifested at the beginning of his detention to remain silent. Having regard to these considerations, the Court is of the opinion that the applicant, as a matter of procedural fairness, should have been given access to a solicitor at the initial stages of the interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confess his interrogators.”



Jalloh vs. Germany, 2006:

„(No. 97) ...However, public interest concerns cannot justify measures which extinguish the very essence of an applicant’s defence rights, including the privilege against self-incrimination guaranteed by Article 6 of the Convention (see, mutatis mutandis, Heaney and McGuinness v. Ireland, no. 34720/97, §§ 57-58, ECHR 2000-XII).”

(...) “99. However, different considerations apply to evidence recovered by a measure found to violate Article 3. An issue may arise under Article 6 § 1 in respect of evidence obtained in violation of Article 3 of the Convention, even if the admission of such evidence was not decisive in securing the conviction (see İçöz v. Turkey (dec.), no. 54919/00, 9 January 2003; and Koç v. Turkey (dec.), no. 32580/96, 23 September 2003).”



Gäfgen vs. Germany

„The Court reiterates that Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even of a public emergency threatening the life of the nation“



further references with respect to Art 6 ECHR an the right not to incriminate oneself: ECHR Judgement 5 Nov 2002 – 48539/99 *Allen vs United Kingdom*; the right applies without respect to the sort of crime which shall be committed: *Bykov v Russia* NJW 2010, 2012 (Judgement 10 March 2009 – 4378/02)