The Thornburgh Doctrine: the end of international law

by F.A. Freiherr von der Heydte

The so-called Thornburgh Doctrine, according to which all traditional international and constitutional law is strictly subordinated to considerations of power politics and opportunism, a doctrine pushed aggressively by the Bush administration and already used on a grand scale in the invasion of Panama, received the blessing of the Supreme Court, the highest court of the United States, in a ruling of Feb. 28, 1990. There is no doubt that with this fateful decision U.S. policy on justice, the military, and foreign policy has taken on a new political-strategic quality. It confirms the radical rejection of the rights of national sovereignty, along with the simultaneous determination postulated by the Thornburgh Doctrine of the inequality of states and the implicit denial of fundamental rights for all "targets" that stand in the way of a (supposed) national interest of the United States. There will be serious consequences for the community of nations when the arrogant despotism of a world power raises itself up thus, to be the lord not only over war and peace, but even over law itself.

This decision, and the previous government directives which it sanctions concerning powers of the FBI, the military, and the intelligence services in foreign countries, have sent horror throughout the legal profession because of the unforeseeable consequences they have for international law and for the constitutionality of the United States itself.

I.

With the aforesaid decision in the case *United States v. Verdugo-Urquidez* (case No. 88-1353), the Supreme Court decided that American officials abroad can undertake searches and can seize materials without restriction and in circumvention of orderly legal proceedings. The court quashed an earlier decision of the Ninth Circuit Court of Appeals which decided that, without a court-ordered search warrant and without observing the limitations of the Fourth Amendment in a search of a Mexican residence, the evidence found by the appellant could not be used against that Mexican citizen. The Supreme Court, by a majority of 6-3, found that the Fourth Amendment, which prohibits unlawful government search and seizures, cannot be claimed by foreigners in foreign countries, since the relevant activities of American officials are not subject to the provisions of the U.S. Constitution and the Bill of Rights.

The decision follows a line of development of U.S. legal opinions and justice policy that has been recognizable for some time. The opinion that U.S. officials can simply take action in foreign countries and additionally make searches in violation of the Fourth Amendment corresponds to an opinion prepared by the Justice Department in June 1989, according to which the U.S. FBI may arrest individuals who have violated U.S. law, without the consent of the affected nations. In November of last year, a further legal opinion by the Justice Department was announced, that for the first time empowered the U.S. Armed Forces, in violation of established international law, to arrest presumed offenders in foreign countries, thereby annulling the 111-year-old Posse Comitatus Law that prescribes the strict separation of police and military powers. Simultaneously, a policy of the U.S. Justice Department under Richard Thornburgh was announced supporting the demand of William Webster, director of the CIA, the intelligence agency that is active in foreign countries, to annul the prohibition—valid since President Ford's administration—against participation in violent rebellions in foreign countries and assassination of foreign political figures. Relying on this new policy, the commander of the military special unit, the Special Operations Force, recently demanded that the legally prescribed report and control duties with regard to the National Security Council be annulled. In his motivation, he stated that clarifications such as had been previously required could have the effect of delaying the relevant planned actions, and favorable opportunities would possibly be lost.

This Thornburgh Doctrine—the worldwide extension of the sphere of application of U.S. law as well as the extension of U.S. executive power to the territory and against the will of foreign countries, without regard for U.S. constitutional provisions—was officially sanctioned by the highest U.S. court in its decision of Feb. 28.

II.

From testimony of the defenders of this doctrine, there is no doubt that the types of action which go along with it, are in violation of established international law. For example, one of the authors of the above-referenced June 1989 legal

opinion, William P. Barr of the Department of Justice, told the U.S. congressional Judiciary Committee at a hearing on the new powers of the FBI: "Under our constitutional system, the executive and legislative branches, acting within the scope of their respective authority, may take or direct actions which depart from customary international law. At least as respects our domestic law, such actions constitute 'controlling executive or legislative act(s)' that supplant legal norms otherwise furnished by customary international law."

Barr strictly rejected the requirement contained in a legal opinion delivered in 1980, which interpreted guidelines for the FBI exclusively in agreement with customary international law. President Carter had denied to the FBI any action not coordinated within the confines of a criminal prosecution in a foreign country, since it would amount to a kidnaping and would violate international law.

As the single justification for the professed violation of international law, repeated reference is made—as, for example, in the case of the invasion of Panama last December, which violated international law and the laws of war—to the right of self-defense according to Article 51 of the Charter of the United Nations.

This often strained reference, however, stands or falls—and for the most part, it falls—on the question of whether the given current political and military situation is appropriate to meet the international legal criteria for permissible measures of self-defense. Didn't Hitler attempt to justify the attack on Poland as self-defense? Didn't the assertion for decades by the East German regime of a threatening internal and external state of siege serve as justification for its measures of suppression? In the case of Panama, I demonstrated in an evaluation from the standpoint of international law published in January [see *EIR*, Feb. 2, 1990, "The U.S. invasion of Panama: an evaluation from the standpoint of international law"], it was a matter of an armed attack by the United States in violation of international law that is not in any way to be justified by the right of self-defense, and that also involved serious war crimes.

Also, the examples put forward at the hearing referred to earlier by Abraham D. Sofaer, legal adviser of the U.S. State Department, accomplish nothing here. The Israeli action for freeing the hostages at Entebbe involve a completely different case, that of a humanitarian intervention recognized by international law. Likewise, it is incorrect when Sofaer attempts to prove, using the Eichmann kidnaping, that the international community is prepared to tolerate under certain circumstances a violent kidnaping violating territorial integrity. The incident was censured at that time by the prevailing doctrine.

That this sort of attempt at a legal justification is merely subsidiary argumentation, is emphasized by Sofaer himself with shocking clarity: "In considering the availability of the doctrine of self-defense to justify a breach of territorial integrity, it is essential to recognize that the President is not bound by the interpretations of international law taken by other states." We will consider later the claim of contemporary world powers such as the United States that it stands *above* international law.

III.

With equal clarity, the justification written by Chief Justice William Rehnquist shows a conscious rejection of any legal principles that are superior to positive law; indeed, they show a total absence of principled legal-ethical considerations. The Fourth Amendment, which, according to the opinion of the Supreme Court, American officials no longer need consider, reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Rehnquist refuses to grasp the overriding legal conception of this constitutional provision, retreating rather to the position that the expression "the people" encompasses merely U.S. citizens, or "such individuals who have developed an essential relation to the country." Unlike the Fifth and Sixth Amendments, which speak of "individuals" or the "accused" and thus accord fundamental procedural rights, the Fourth Amendment cannot be called upon here, in Rehnquist's view, because Verdugo-Urquidez is not a member of the American people, and because the allegedly unlawful search took place in a foreign country. It is without merit for the trial itself, which took place *inside* the United States. His admittedly legal but involuntary stay in the United States (brought about through his arrest) does not justify his claim to constitutional guarantees.

This linguistic exegesis of the constitutional text contradicts the historical truth of the origin of the Bill of Rights. Moreover, it cannot stand up to considerations derived from either basic international law or natural law.

Justice Brennan's dissenting opinion, published along with the decision, may well be considered as the single positive element in this finding. His devastating criticism of the formalistic constructs of the majority explicitly evokes natural law: "The Framers of the Bill of Rights did not purport to 'create' rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be preexisting." These rights—for example protection against illegal search and seizure—must "not be violated." The heart of the Fourth Amendment is to determine *what* the government is allowed to do, *how* it is allowed to act, and not against *whom* it may direct its sovereign actions in individual cases.

The United States is the first country in the world that attempted to mold into a constitution the inalienable rights that are given to any man, not from any given state or sover-

eignty, but simply because of his birth—that is, from nature. Justice Brennan rightly recalled this intention of the authors of the Constitution when he insisted that government actions by agencies of the United States always be subject to the Constitution, whether in California or in Mexico. He nevertheless conveniently overlooks the fact that such actions in Mexico must also be in conformity with international law. The Fourth Amendment, Brennan continues, was conceived as an inalienable correlate to use of the penal law. If U.S. agents carry out illegal searches, they thereby disregard the "values of the nation":

"For over 200 years, our country has considered itself the world's foremost protector of liberties. The privacy and sanctity of the home have been primary tenets of our moral, philosophical, and judicial beliefs." Ultimately, James Otis's statement, "a man's home is his castle," was directed against the comprehensive authority of British tax collectors, who in the colonies searched American homes whenever and wherever they pleased. In President Adams's opinion, the idea of American independence was born in Otis's passionate argument against this British practice.

The history of the origin of the Bill of Rights likewise refutes the interpretation of "the people" proposed by Justice Rehnquist. Justice Brennan refers to the fact that, in the deliberations over the Fourth Amendment, no one had seen in this formulation a limitation to a certain group of people—i.e., to the people of the state who adopted this constitution. Rather, the concept of "people" was used as the counterpart of the concept of "government"; it is synonymous with "the ruled." And who would wish to deny that the accused whose home was searched and to whom the U.S. penal law is applied and who will supposedly spend the remainder of his life behind U.S. prison walls, is among "the ruled"?

The Thornburgh Doctrine, which presumes to place U.S. law above international law, additionally aims at undercutting the controls over government measures desired by the Founding Fathers. On the one hand, ignoring the original idea of the Constitution, it attempts to limit the sphere of application of the Constitution by means of formalistic linguistic interpretations; on the other hand, it seeks to evade congressional controls. It follows from the legal opinion of November 1989 on the authorization of the Armed Forces for police actions in foreign countries, that military actions abroad which are declared to be measures of criminal prosecution, are not scrutinized by the democratic committees responsible for defense measures or by the institutions of international law. The crucial congressional offices would also not be informed in a regular way of the various actions of the Department of Justice in these areas.

IV.

Justice Rehnquist's legal argument, which derives a whole structure of argumentation from two words, is the expression of an extreme legal positivism that must necessarily come continually into conflict with constitutional principles founded on natural law.

Logic and law, as they concern justice, are allied with one another only conditionally. This is shown, for example, by the statement, substantiated by several precedents, that the Fourth Amendment has no significance for the present case because an arrest order issued by a U.S. judge is not valid in foreign countries. This may be true according to the logic which the decision's author has set up for himself; however, it denies the purpose of the constitutional provision. This purpose lies in the requirement to obtain, *before* the government intervention, the decision of a impartial third party—the judge—who must first apply the measure of "probable cause," and then just precisely determine the extent and aim of the planned measures. This protective function, referred to above as the correlate to application of the penal code, is denied by legal-positivistic formal logic.

The example of the case decided by the Supreme Court in which in fact a search took place that was illegal in type and scope, shows the possibility of legitimizing illegal actions in the eyes of Justice Rehnquist's legal-positivistic conception of "according to the letter of the law."

To divorce not only the interpretation, but also the creation of what is called law from natural law, corresponds to the logic of positivism. Consistently, the Thornburgh Doctrine goes so far as to even consider state actions that violate recognized international law as a source for customary international law. Thus at the abovementioned hearing, the U.S. Department of Justice postulated not only the right of Presidents and high government officials, acting within their existing government powers, to violate the norms of international law in the national interest, but also that this right, according to William P. Barr, is "consistent with the very nature of customary international law. Customary international law is not a rigid canon of rules, but an evolving set of principles founded on the common practices and understandings of many nations. It is understood internationally that this evolution can occur by a state departing from prevailing customary international law principles, and seeking to promote a new rule of international custom or practice."

To that we reply that Hitler and Napoleon certainly made no contribution to the further development of international law, even though they may have subjectively felt justified in their manner of behavior. Any law, even international law, arises from the tension between two poles: on the one hand, the timeless concept of law given to every human being, and on the other, the temporally conditioned reality of coercive force. The law, born, as it were, in the space of an ellipse formed by two poles, lives from this tension, without which it would be an ineffectual, often unattainable fantasy. On the other hand, legal compulsion, which always proceeds from an institution, for the most part a state, would lose its moral basis without this tension. Without this legitimation, the actions of a state, simply on the basis of its

political and military power, can never serve as a source of international law, even if other nations must tolerate such actions for the time being.

V.

The U.S. legal positivism criticized here, does not attempt to appeal to this sort of superior principles of law. The principle unmistakenly applied—"might makes right"—is subject to only one restriction, that of utilitarianism. What is justified, is what "serves the national interest."

Thus, we find repeated reference to pragmatic considerations in recent legal opinions of the U.S. Department of Justice and the Supreme Court decision under discussion here. Sofaer, to shore up his legal position, used a quote from former Secretary of State Henry Kissinger in which Kissinger speaks of "moral and practical imperatives" and the parallel goals of "law and pragmatism."

Purely pragmatic grounds are also drawn upon for the selective application of U.S. penal law without simultaneous consideration of all constitutional provisions: Justice Rehnquist thinks that any other decision would too sharply impair U.S. activities abroad. He explicitly includes U.S. military actions here: Two hundred times in U.S. history, the military has taken action in defense of U.S. citizens or U.S. national interest. Application of the Fourth Amendment to all circumstances in which there could be search-and-seizure actions "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest," and could possibly entail unforeseeable damage claims by foreigners. The global applicability of the Fourth Amendment would throw U.S. officials active in foreign countries into "a sea of uncertainty." The appellate court, which demanded that searches carried out in foreign countries be strictly limited in scope and purpose and only with probable cause, cannot be followed. Finally, situations could arise in half the world that threaten U.S. interests and possibly demand an armed reaction.

Justice Kennedy goes even further in his pragmatic evaluation of the case. In general, he does not want to contest the validity of constitutional provisions in foreign countries, but believes that the specific form of the case makes as application of the Fourth Amendment appear to be "not practical and anomalous."

Quite in the spirit of the Thornburgh Doctrine, Justice Rehnquist comes to the conclusion that the highest necessity is the ability of the government to act in "the national interest." Germans who read this cannot help recalling the time of the National Socialists and their leading legal ideologist, Carl Schmitt, who considered any action in "the national interest" to be justified.

However this so often belabored "national interest" may be defined, it has nothing to do with the law, even if there are many historic examples for such pragmatism being the determining factor of government actions or even legal opinions.

A supposed legal uncertainty must not be allowed to stand in the way of the application of the Constitution. Here it cannot be a matter of legal certainty or uncertainty, but merely the question of where the limit on governmental interventions is to be drawn. The protection of the Fourth Amendment is not a technical prescription, but rather, as presented above, a fundamental right inseparably connected with the principles of fair criminal proceedings and rooted in natural law.

Complying with the Constitution may in individual cases appear to be "impractical" and complicated; but violating it—even if in the supposed "national interest"—is always illegal. Law is the counterpole to power, and the mixing of the two can never establish law. To measure with two standards—to require of foreigners that they obey U.S. penal law, while the government officials themselves escape from the limitations imposed by the Constitution—cannot be a means, no matter what the ends are.

The fact that in the present case, it is not the decision of the highest court of some minor country, but rather of the United States of America, cannot be ignored. In my contribution to a *Festschrift* published last year for Dietrich Schindler, I described the attitude of today's world powers, who are offering, "at least within their sphere of power to be able to determine the content of *every* law, and thus also of international law, without being subject to that law under all circumstances."

VI.

This is the essential feature of the contemporary dilemma in international law, which is sharply distinguished from the classical international law that was still binding three decades ago. The ordering principle of classical international law rests on the coexistence of a series of sovereign states that are considered equally entitled: the equality of all in freedom. This principle of equality stands in clear contrast to the power politics of the world powers. The examples of Afghanistan, Nicaragua, and, recently, Panama demonstrate that today's world powers demand to be allowed to violate the sovereignty of other nations "within their sphere of power."

However, it would be insufficient to limit criticism of this behavior, so contrary to international law, to how it touches on the sanctuary of "national sovereignty." For, this concept is derived in part from traditional international law, and is founded on the integrity of the sovereign, who, without regard to the legal order of any state, was the bearer of its "sovereignty" and possessed, internally and externally, the ultimate power of decision. While in classical international law the protection of the individual devolved upon the guardianship of the given state, contemporary international law, as a supranational law, increasingly concerns itself with laws for the protection of individuals. The individual is, of course, not the subject of international law, but is predominantly the most important object of the protection afforded by interna-

tional law. Thus, today it is self-evident that the equality of the races be a concern for international law, without that being considered as interference into the internal affairs of foreign states. Today, the individual human being himself, by means of his function in the legal order of the state, is the bearer of sovereignty. From this it follows that the protection of international law today is guaranteed first for the individual human being, and for the nation only secondarily.

The ordering principle of international law in the formation of positive law, which occurs in tension between the concept of law and the compulsion of material circumstances, is thus itself subject to change. The authority of modern international law, whether codified in treaties or appearing as customary law, results in every case from natural law as a suprapositive law.

There are many obstacles, however, to the creation of a new worldwide order of international law that can guarantee the worldwide recognition and observance of human rights founded on natural law.

The world powers that have the material means to practice compulsive force, consider themselves as *legibus soluti*, as a "law unto themselves," and subject to no other moral authority than "national interest." From this the conception follows of a hierarchy of national orderings of law in which the world powers not only enjoy a greater freedom than other nations, but are tied to one another in order to protect these privileges. The resistance against a realization of the German people's right to self-determination furnishes an eloquent example for this.

It appears to me to be hardly accidental, that the legal adviser of the U.S. Department of State, in his presentation on the effects of extraterritorial powers of the FBI, which necessarily conflict with the laws of other nations, cited the example of a kidnaping done by the Soviet Union. He quoted the well-known 1952 case of Dr. Walter Linse, who was abducted from the American sector in Berlin into the Soviet Zone and was finally sentenced by a Soviet court. Two of Linse's kidnapers were later arrested in West Berlin and convicted of abduction.

An international law that arises out of the principle of inequality, is not worthy of the name.

The second and no less serious problem of a new, just order of international law, is the determination of the substance of the concept of law. Is this same concept of law still recognized as binding in the American-European cultural area, or do there not exist considerable differences in the community of values of Europe and of the United States? Already, the domestic legal system in the United States is characterized by a subordination of subjective rights, a differential of power that has increased at a growing rate ever since the founding of the United States. America is further than ever from realizing the ideals of the U.S. Declaration of Independence and its Constitution: the equality of all in freedom.

The determining factor of the U.S. value system today is utilitarianism and a ruthless pursuit of profit. In justification of violations of international law against other states, "national interest" in protecting one's own nation against threats such as the drug trade or terrorism is always emphasized. Would it not be in the national interest to immediately seize all drug profits deposited in U.S. banks? There is much to be said for that option, since tracking such money is possible using modern computer investigatory techniques. That these possibilities are not used could be considered as an aid to the drug traffic; not exploiting these possibilities can only be explained in that it is not at all in the "national interest" to suddenly withdraw the many hundreds of billions of dollars of drug profits from U.S. banks. It would contradict the mentality of values which is aimed at a maximum momentary profit.

In his dissenting opinion, the fact also does not escape Justice Brennan, that the "national interest" that is cited to justify illegal actions is in direct opposition to the American idea of the free state postulated 200 years ago.

In light of the superior might of the world powers on the one hand, and the absence of a universally binding value system on the other, there does not exist any one worldwide organization that could implement a just international order against the despotism of a single state. The original idea of the League of Nations and the United Nations—to enforce in the world that which the majority of the states recognized as law—has never been realized. The precondition for such a worldwide order of international law would, above all, be respect for an ordering principle which is binding *for all* states, and such does not today exist. The U.S. Supreme Court has made clear in its Feb. 28 decision that it rejects this fundamental principle of all protection of law.

It is one of the most important tasks of modern international law, to counterpose an international order legitimized by natural law to the despotism of the world powers, born out of consummate state power and driven by the whim of the world powers as it is expressed in the Thornburgh Doctrine. The future of the United States also depends on the completion of this task. As long as justice bows to power, especially in the United States, peace and the protection of law are not guaranteed in the world.

Professor Von der Heydte, a noted expert on civil and international law, is the author of the book which was published in English in 1986, *Modern Irregular Warfare*. In 1962, he was named Brigadier General of the Reserves for the West German army, from 1966–70, he was a member of the Bavarian State Parliament for the Christian Social Union party.