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BETWEEN DOCTRINE AND REALITY: THE INSTITUTIONAL FRAGILITY OF THE ABSOLUTE PROHIBITION OF TORTURE

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Abstract

This paper examines the doctrinal claim that the prohibition of torture and inhuman treatment under Article 3 of the European Convention on Human Rights is absolute, testing that claim against practice. Its analytical anchor is the Grand Chamber judgment in *Gäfgen v. Germany*, read together with *Jalloh v. Germany*, cases in which a police threat and a medical intervention respectively pursued clearly legitimate aims yet were nonetheless held to fall within the reach of Article 3. The paper argues that the recurring didactic device of the 'ticking time bomb' scenario, still reproduced in professional training and public discourse, is a rhetorical device unsupported by the documented architecture of actual terrorism, including the 2026 Monaco bombing. Extending the inquiry beyond the courtroom, the paper traces a second, empirical dimension of failure: even where states formally recognise the absoluteness of Article 3, mechanisms of enforcement, such as lenient sentencing, career advancement of implicated officials, and delayed compensation, allow instrumental justifications to re-enter through practice rather than doctrine, as shown by the aftermath of *Gäfgen* itself and by the author's own litigation practice in *Sklyarenko v. Ukraine*. The final section extends the argument to wartime Ukraine, applying Ruth Blakeley's *security-stability-legitimacy framework* to the domestic phenomenon of forced mobilisation known as 'busification', and showing that structurally similar mechanisms of exigency, expansion, and denial operate even where the resulting coercion is not formally classified as torture. The paper concludes that *instrumental rationality*, in whatever form it appears, remains a myth, not a legal or ethical construct, and that the genuine safeguard against its recurrence lies not in the formal text of the prohibition but in a sustained institutional and societal culture of intolerance towards torture and ill-treatment.

Keywords: absolute prohibition of torture, Article 3 ECHR, *Gäfgen v. Germany*, *Jalloh v. Germany*, *Sklyarenko v. Ukraine*, instrumental rationality, basification, forced mobilisation, wartime criminal justice, culture of intolerance towards torture.

Introduction

This paper is devoted to the study of the absolute character of the prohibition of torture and other forms of ill-treatment proscribed by Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter – the Convention), and it starts from a paradox that doctrine has long recognised without fully resolving: a norm that is universally accepted, both in scholarship and in the settled case-law of the European Court of Human Rights (hereafter – the ECtHR, the Court), as tolerating no exception whatsoever nonetheless continues to be treated, in professional training, in public discourse, and at moments even in the practice of national authorities, as a matter open to calculation, weighing, and instrumental justification. The foundational place within this inquiry belongs to the judgment of the Grand Chamber of the ECtHR in *Gäfgen v. Germany* [GC] (Application no. 22978/05, 1 June 2010) – a case whose factual matrix, as though constructed by life itself, brings the question of the instrumentalisation of torture to its sharpest possible expression: a police officer, acting from an evidently humane motive, threatens a suspect with the infliction of physical pain in order to save the life of a child who, at the moment of the threat, was believed still to be rescuable.

Although the paper draws extensively upon this well-known precedent, its purpose is not to retell *Gäfgen v. Germany*, nor *Jalloh v. Germany* [GC] (Application no. 54810/00, 11 July 2006), which is examined alongside it as a structurally related but factually far more mundane test of the same absolute standard. Rather, the paper's ambition is to subject the very category of the *absoluteness* of the prohibition of torture to critical revision under the conditions of the present decade – conditions that include, most conspicuously, the war waged by the Russian Federation against Ukraine, together with a number of specific and resonant episodes that allow the abstract myth of '*instrumental rationality*' to be tested against contemporary, documented fact rather than against the hypothetical constructions on which that myth has traditionally relied. Among these episodes are the 2026 terrorist bombing in Monaco and its aftermath, the domestic litigation practice of the author before the ECtHR, in particular the case of *Sklyarenko v. Ukraine* (30 April 2026), and the phenomenon of forced mobilisation that acquired, in Ukrainian public discourse of 2023–2026, the name '*busification*'.

We are conscious that the underlying question is *not* new. The very fact that it was raised by the Court in *Gäfgen v. Germany*, as well as in a number of other cases, could not but attract the sustained attention of practising lawyers and scholars throughout the world, given both the unprecedented factual circumstances of that case and the importance of the Court's holding that torture cannot be justified even for the purpose of attaining a manifestly high social ideal – in that instance, the saving of a human life. Our aim, however, is not merely to add one further commentary to an already extensive body of case-notes on *Gäfgen* but to use that judgment, together with *Jalloh*, as an analytical anchor for a broader inquiry into the mechanisms through which the theoretical absoluteness of Article 3 is placed under strain in practice – whether by a didactic device repeated in training rooms, by the institutional apparatus of a state that formally denies practising torture, by the domestic mismanagement of a victim's status after the fact, or by the operational pressures of a defensive war upon the state's own citizens.

Structurally, the Paper Proceeds Along Three Interlocking Lines of Inquiry

The first line revisits the doctrinal foundations of the absolute character of the prohibition of torture as established and consistently reaffirmed by the Court, and asks whether that absoluteness is genuinely unconditional or whether it is, in certain respects, a normative construct that national and even international practice has learned to circumvent without formally contesting it; this line is developed principally through a close reading of the factual matrix, the domestic proceedings, and the Grand Chamber's reasoning in *Gäfgen v. Germany*, read together with the comparatively more mundane but doctrinally consequential judgment in *Jalloh v. Germany*.

The second line examines the mechanisms – the didactic persistence of the '*ticking time bomb*' scenario, the institutionalised '*enhanced interrogation*' discourse that emerged in the United States after 11 September 2001, the domestic instrumentalisation of victim status illustrated by *Sklyarenko v. Ukraine*, and the wartime normalisation of coercive mobilisation practice examined under the label of '*busification*' – through which the protection that Article 3 is meant to guarantee has, in various settings, been diluted in practice even while remaining formally acknowledged as absolute.

The third line considers what these tensions imply for the future development of the Court's case-law and, more broadly, for the culture of intolerance towards torture that the Convention system, together

with the European Committee for the Prevention of Torture (hereafter – the CPT), seeks to instil among judges, prosecutors, and law-enforcement, prison, and security personnel.

In pursuing this inquiry, the paper does not seek to question the normative correctness of the absolute prohibition itself, nor to suggest that any exception to it could ever be legitimate. Rather, it seeks to draw a necessary distinction between the absoluteness of the norm, which is not in dispute, and the practical reliability of its enforcement, which, as the material examined below demonstrates, cannot always be taken for granted – whether the departure takes the shape of a sympathetic exception invoked to save a child's life, of a bureaucratic memorandum redefining the threshold of pain, of leniency and career advancement extended to a State agent who has crossed that threshold, or of a wartime practice that borders on arbitrary detention and ill-treatment without ever formally renouncing the domestic prohibition that condemns it.

Literature Review

The literature on which this paper draws falls into several distinct, and only partially overlapping, bodies of material, each of which is used for a different analytical purpose.

The first body consists of the case-law of the European Court of Human Rights establishing and elaborating the absolute character of the prohibition contained in Article 3. Alongside *Gäfgen v. Germany* and *Jalloh v. Germany*, this body includes the Court's earlier foundational pronouncements, such as *Ireland v. the United Kingdom* (18 January 1978) and *Selmouni v. France* [GC] (28 July 1999), the extradition and expulsion case-law represented by *Chahal v. the United Kingdom* (15 November 1996) and *Saadi v. Italy* [GC] (28 February 2008), the detention-conditions and ill-treatment-in-custody line represented by *Labita v. Italy* [GC] (6 April 2000) and *Bouyid v. Belgium* [GC] (28 September 2015), and the more recent jurisprudence on secret detention and extraordinary rendition, in particular *El-Masri v. the former Yugoslav Republic of Macedonia* [GC] (13 December 2012) and *Al Nashiri v. Poland* (24 July 2014). Read together, this jurisprudence demonstrates a remarkably consistent doctrinal line spanning more than four decades, across factual settings as different as inter-state conflict, ordinary criminal investigation, immigration control, and covert counter-terrorism cooperation – a consistency that the paper treats as the doctrinal baseline against which subsequent practical erosion will be measured.

The second body of literature comprises the academic and journalistic debate on the instrumental justification of torture that intensified after 11 September 2001. This includes explicit advocacy for a regulated, judicially sanctioned exception to the prohibition, most prominently associated with Alan Dershowitz's *Why Terrorism Works* (2002), as well as the critical literature that has since dismantled both the ethical and the empirical premises of that position – notably Costanzo and Gerrity's (2009) review of the research evidence on the effectiveness of torture as an interrogation device, Darius Rejali's *Torture and Democracy* (2007), which supplies the historical and comparative demonstration that democratic states have resorted to torture no less than authoritarian ones, and the phenomenological accounts offered by Elaine Scarry's *The Body in Pain* (1985) and Jean Améry's survivor testimony in *At the Mind's Limits* (1980), both of which are used sparingly, and strictly for their analytical value, to characterise what the 'ticking time bomb' scenario systematically abstracts away – the irreducibility of pain and its capacity to destroy the coherence of the person subjected to it.

The third body consists of the documentary and institutional record generated by the United States 'enhanced interrogation' programme itself, which the paper treats not as background but as primary source material illustrating how instrumental rationality becomes operationalised within a bureaucracy once it is accepted, even provisionally, as a legitimate premise. This includes the Bybee memoranda of the U.S. Department of Justice Office of Legal Counsel (2002), the declassified CIA *KUBARK Counterintelligence Interrogation* manual (1963) and *Human Resource Exploitation Training Manual* (1983), the Executive Summary of the U.S. Senate Select Committee on Intelligence's study of the CIA's detention and interrogation programme (2014), and the subsequent professional and medical-ethics reckoning documented by Physicians for Human Rights (2010, 2017), Miles (2015), Marks (2018), Soldz and colleagues (2015), and the Hoffman report commissioned by the American Psychological Association (2015). This cluster of sources is used to trace, in documentary form, the trajectory from legal memorandum to institutional practice to professional complicity and, ultimately, to public and academic repudiation – a trajectory that the paper treats as empirical confirmation of the operational, and not merely moral, failure of instrumental justification.

The fourth body of literature belongs to international relations and political theory rather than to legal doctrine, and its inclusion marks a deliberate departure from a purely doctrinal literature review.

Ruth Blakeley's (2007) article "Why Torture?" develops a tripartite analytical framework – security, stability, and legitimacy – for explaining why states, including formally liberal and rights-bound ones, resort to torture or torture-adjacent coercion. Blakeley's observation that the bulk of the scholarship on state torture has concentrated on authoritarian regimes, leaving its use by liberal democracies comparatively understudied, supplies the analytical opening that the paper exploits in its concluding case study: if Blakeley's stability and legitimacy models can explain coercive practice within a formally rights-respecting state, they should, in principle, be capable of illuminating coercive practice that falls short of torture in the strict Article 3 sense but shares its underlying structural logic – which is precisely the argument advanced in relation to Ukrainian wartime mobilisation.

The fifth body of literature is the emergent Ukrainian-language journalistic, parliamentary, and public-discourse material documenting the phenomenon of 'busification' during 2023–2026 – including reporting and commentary by Beniuk (2024), Berezhanskyi (2025), Pohorila (2024), UAINFO (2025), NV (2024a, 2024b), Ukranews (2026), Hromadske Radio (2024, 2026a), ArmyInform (2025, 2026), and Sud.ua (2026), together with the corresponding statements of the Parliamentary Commissioner for Human Rights (Ukraine). Because the phenomenon is too recent to have generated a settled academic literature, this material necessarily consists of journalism, official statements, and parliamentary initiative; the paper treats it accordingly – not as a substitute for academic analysis but as the raw documentary record from which the structural analogy to Blakeley's framework is constructed, and is read critically, with attention to the discursive strategies of denial and subsequent acknowledgment that the material itself displays.

Finally, the paper draws upon the standards and periodic and ad hoc visit reports of the European Committee for the Prevention of Torture, and upon the author's own litigation practice before the ECtHR, most directly the case of *Sklyarenko v. Ukraine*, which is treated as a primary source: a documented instance, arising from the author's direct professional involvement, of how the domestic instrumentalisation of a victim's own conduct can operate as a mechanism for the practical erosion of Article 3 protection notwithstanding its undisputed formal absoluteness.

Taken together, these six bodies of material share a common gap that the paper is designed to address: doctrinal commentary on *Gäfgen* and *Jalloh* rarely engages with the international-relations literature on the functions of state torture, the international-relations literature on state torture rarely engages with contemporary ECtHR doctrine, and neither body has, to date, been brought into contact with the Ukrainian wartime material on forced mobilisation. At the intersection of these otherwise separate literatures, the paper develops its central argument – the erosion of the absolute prohibition operates through structurally similar mechanisms regardless of whether the resulting conduct is formally classified as torture.

Methodology

This paper is built upon the ECtHR case-law, together with a range of institutional and doctrinal materials which, in American human-rights, counter-terrorism, and judicial practice, have sought to justify the admissibility of torture, and a body of contemporary documentary and journalistic material concerning events in Ukraine during the period of the full-scale war. It further draws upon the author's own litigation practice before the ECtHR, including the case of *Sklyarenko v. Ukraine*, which is used not as an illustrative aside but as a documented case study of the domestic instrumentalisation of a victim's conduct.

The analysis combines doctrinal legal research with a critical, case-oriented method, supplemented, in the paper's final section, by a structural comparison drawn from international-relations theory. On the doctrinal level, the paper examines the text of Article 3 of the Convention and the corpus of the ECtHR case-law establishing and elaborating the absolute character of the prohibition contained therein, together with the Court's reasoning on the inadmissibility of any balancing exercise or proportionality test in this domain.

On the critical, case-oriented level, the paper proceeds from a comparative reading of several categories of material: (a) the Court's own leading judgments on the absolute prohibition of torture and inhuman or degrading treatment, above all *Gäfgen v. Germany* and *Jalloh v. Germany*, read against the wider line of case-law establishing that same absoluteness across different factual settings; (b) national practical and doctrinal materials – memoranda, declassified training manuals, official reports, and academic argumentation – that have, at various points, sought to rationalise or instrumentalise the use of torture, in particular within American counter-terrorism and judicial practice after 11 September 2001; (c) the author's own litigation practice, including proceedings before the Court arising out of recent events in Ukraine, in particular the case of *Sklyarenko v. Ukraine*, which is employed as a case study illustrating how the theoretical absoluteness

of certain guarantees may, in practice, be placed under strain by the conduct of national authorities; and (d) contemporaneous documented events, in particular the 2026 bombing in Monaco and its aftermath, and the systemic practice of the Russian Federation in the context of the war against Ukraine, both of which are used to test the empirical validity of the “ticking time bomb” model against verified fact.

The paper’s final analytical section departs from a purely doctrinal method and applies, by way of structural analogy rather than legal equivalence, Ruth Blakeley’s tripartite framework of security, stability, and legitimacy – developed in her theoretical account of why states resort to torture – to the Ukrainian domestic phenomenon of forced mobilisation known as *‘busification’*. This step is methodologically deliberate, not incidental: it tests whether a framework developed to explain torture in the strict sense retains explanatory power when applied to a coercive practice that has not been classified, and is not here classified, as torture under Article 3, but that shares the same underlying logic of exigency-based justification, expansion of the affected population over time, and discursive denial followed by partial institutional correction. The material used for this section consists principally of Ukrainian-language journalism, parliamentary and ombudsman statements, and draft legislation, read critically and cross-checked, where possible, against multiple independent sources.

This combination of doctrinal, case-oriented, and structurally comparative methods allows the paper to move beyond a purely descriptive account of the relevant case-law and to test the resilience of the category of absoluteness against contemporary practice, including the pressures generated by armed conflict and by the invocation of security-related and manpower-related justifications at the national level.

It should be stressed that the methodology adopted here is deliberately not comparative in the strict, cross-system sense. The American materials examined are used not in order to compare two legal systems on an equal footing, but in order to illustrate, by way of contrast, how a legal culture that has, at certain points, tolerated instrumental justifications of ill-treatment differs from the Convention system, which admits no such justification whatsoever. Similarly, the reference to the author’s own litigation practice is not intended as an exhaustive empirical survey, but as an illustrative device – a set of concrete, documented instances through which the abstract category of absoluteness can be tested against the realities of ongoing proceedings, including those connected with the war in Ukraine. The application of Blakeley’s framework to *busification* is, for the same reason, offered as a structural analogy that sharpens the paper’s central thesis rather than as a claim that forced mobilisation is legally equivalent to torture.

Finally, the sources relied upon throughout the paper are drawn from primary legal materials – the text of the Convention itself, the relevant judgments and decisions of the Court, and, where pertinent, the standards developed by the European Committee for the Prevention of Torture – read together with secondary academic literature addressing the theory of absolute rights, the international-relations theory of state torture, and the practical limits of both. Wherever national case-law, domestic procedural documents, or contemporary journalistic material are relied upon, they are used strictly for illustrative or documentary purposes, in order to ground the theoretical discussion in verifiable, documented fact.

Problem Statement: Instrumental Rationality as the Temptation of a Legal System

Every legal system built on the logic of human rights sooner or later confronts the temptation of *instrumental rationality* – that is, the idea that any norm, including the norm prohibiting torture, can and even must be subjected to a weighing of costs and benefits if the price of compliance with that norm appears too high. *Instrumental rationality* proposes to replace the categorical imperative with a *utilitarian calculation*: if a breach of the prohibited treatment could save a person’s life, is it not the moral duty of a public official to commit that breach? This question is deceptively simple, since it appeals to the most intuitively understandable human empathy – the value of a specific human life at stake at a specific moment in time.

However, a legal system built on recognising the absolute character of certain rights consciously refuses such weighing. Article 3 of the Convention for the Protection of Human Rights (hereafter – the *Convention*) is formulated in unqualified terms and, unlike the vast majority of Convention guarantees, tolerates no form of proportionality. That is precisely why *Gäfgen v. Germany* [GC] (no. 22978/05, 1 June 2010) is so valuable for analysing the myth of the *instrumentalisation of torture* – it is that rare case in which the factual circumstances were, as if constructed by life itself, almost ideally suited to testing the limits of absoluteness: a public official acting from an evidently noble motive threatens a suspect with the infliction of physical pain in order to save the life of a child who, at the moment of the threat, was believed still to be rescuable.

Our aim is to show that instrumental rationality, applied to the prohibition of torture, is not merely ethically questionable but a legally untenable construct. Drawing on the Grand Chamber's judgment in *Gäfgen v. Germany*, we will demonstrate that: (a) the "*ticking time bomb*" scenario is a *rhetorical* but not a legal instrument; (b) the ECtHR consistently refuses to recognise any exception to the prohibition of torture even where the price of compliance with that prohibition is the life of a child; (c) the empirical practice of applying the "*rescue*" justification at the national level – lenient punishments, career advancement of the perpetrators, delay in financial compensation for a victim of torture – demonstrates the systemic failure of instrumental logic even within the very legal system that attempted to apply it.

The persistence of the idea of the instrumental value of torture is explained, however, not by any lack of normative clarity – Article 3 of the Convention contains one of the few absolute prohibitions in international human rights law, admitting no derogation or exception whatsoever – but by the constant reproduction, in educational, training, and even professional law-enforcement practice, of one and the same didactic device known as the "*ticking-time-bomb scenario*."

We therefore face three tasks: (1) to critically examine this didactic construct in terms of its methodological soundness and its correspondence to the empirical reality of terrorism; (2) to analyse how ECtHR case law – above all through the example of *Gäfgen v. Germany* – has closed the question of the permissibility of "*instrumentalising*" torture; (3) to substantiate the thesis that the current stage in the development of the European human-rights order is characterized by a shift from the prohibition as a mere normative fact to a culture of intolerance towards torture as a cultural fact, transmitted from generation to generation among judges and the personnel of law-enforcement, prisons, and security institutions.

Torture as a Tool for Obtaining Information: The Genealogy of the Argument and the "Ticking Time Bomb" Scenario

The argument in favour of the "instrumental" use of torture or the threat of torture is traditionally built around the hypothetical "*ticking time-bomb scenario*": there is a bomb with a timing mechanism about to explode and kill dozens or even hundreds of innocent people; law-enforcement authorities hold a person who knows exactly where the bomb is located but refuses to cooperate; the only means available to the state to obtain this information in time is the use of torture or the threat of torture against a declared criminal. In such an extremely simplified and artificially isolated construction, torture appears not as an act of cruelty but as a forced, rational instrument for preventing much greater harm.

The problem with this argument lies not only in its *empirical rarity* (real situations almost never correspond to the *ideal conditions of the hypothesis* – exact knowledge that a threat exists, that the detained person indeed possesses the *relevant* information, and that torture will produce *truthful* information extracted under the pressure of pain). The key problem is methodological: the "ticking bomb" scenario is constructed as a *closed, isolated case* in which the State is attributed an exhaustive, limited set of options for action, while the State itself appears exclusively in the role of a *rational rescuer* rather than as an actor responsible for its prior failure to ensure adequate investigative and preventive capacities.

This is precisely what is emphasised in the critical reading of *Gäfgen v. Germany*: the essence of the absolute prohibition of torture and the inapplicability of "*ticking time bomb*" logic lies in the fact that the state must have – or is obliged to have – sufficient resources to maintain its intelligence, counter-terrorism, and law-enforcement capacities in proper form, to train personnel in advance, and to secure conditions that exclude the very temptation to resort to torture. In other words, the State must rely on professionalism, forensic science, police databases, and the development of investigative technologies instead of brute, essentially medieval force, which contradicts the very essence of the modern rule of law, the concept of human rights, and even logic. The concept of "*rescue torture*," in this sense, is not a legitimate legal institution but a manipulative idea designed to justify the state's own failure to properly investigate or prevent a crime, by shifting the entire burden of responsibility onto the suspect.

Even the theoretical admission of a single exception to the absoluteness of the prohibition of torture – "*only in this case, only to save one person (a child, a pregnant woman, etc.)*" – opens the way to the systemic destruction of the entire Convention mechanism of protection. If the standard of absoluteness can be departed from in even one case out of hundreds of thousands, this is, in essence, the opening of a Pandora's box that destroys not merely trust in the police of a given state, but trust in the entire legal system of the Council of Europe – in the Convention, in the Court, in the very concept of human rights as such.

The scenario that virtually every audience – student, cadet, trainee – consistently encounters in almost unchanged form runs roughly as follows: the listener is invited to imagine themselves as the head

of a counter-terrorism unit or a rank-and-file police officer who holds a person highly likely to be a terrorist and to possess information about the location of a bomb, its access code, or a still-living victim; at stake are the lives of hundreds of potential victims, or even the life of a single victim, while the time available to obtain the information is extremely limited. The listener is asked to choose between torturing one person and saving many.

The didactic appeal of this device for a lecturer, trainer, or teacher is understandable: by constructing the situation in this way, the instructor, first, remains *outside the moral choice*, since it is not they but the listener who must give the answer; second, they effectively shift the *burden of a traumatic ethical decision* onto an audience that *a priori* is not, and will not be, composed of police officers or counter-terrorism personnel – meaning that the formula "*imagine yourself as a police officer*" is itself methodologically flawed, requiring the listener to identify with a role whose experience and competencies the listener does not possess and cannot simulate within a classroom exercise.

The very structure of the scenario is, to a large extent, borrowed not from actual counter-terrorism practice but from cinematic and television narratives, in which certainty as to time, certainty as to the location of the explosion, and certainty as to the identity of the person possessing complete and reliable information are artistic conventions rather than empirical regularities.

The problem with the "ticking time bomb" model is not that it is emotionally powerful – on the contrary, that very emotional power is its principal *quasi-pedagogical resource* – but that it systematically and deliberately constructs conditions under which torture appears as the sole rational way out: the reliability of information about the bomb's existence is treated as *absolute*, the person being tortured undoubtedly possesses the sought information, the available time is *fixed* and *calculable*, and the result of torture is an immediate and reliable confession that will save, if not hundreds, then at least one life. None of these four conditions corresponds to the actual practice of investigating terrorist offences.

The Empirical Failure of the Model: the Terrorist Attack in Monaco as a Counterexample

If one turns to the array of actual terrorist acts, including those that meet the formal criteria of this category of crime, the "ticking bomb" model reveals a profound conceptual defeat – it lacks any grounding in real life and cannot be applied in reality. Terrorist acts are either spontaneous – in which case there is no actor who "knowingly" possesses precise information as to time and place that could be "extracted" through torture – or they are carefully planned, multi-level operations in which the lower-level operative, as a rule, has no complete knowledge of the operation's architecture whatsoever, which rules out the very hypothesis of "*saving thousands*" by obtaining information from a single detained person.

Illustrative in this respect is the recent parcel-bomb attack committed in the Principality of Monaco – one of the world's wealthiest and safest jurisdictions – an incident initially discussed in terrorism-related terms but officially investigated by the Monegasque authorities as attempted murder rather than terrorism. A thirty-nine-year-old citizen of Ukraine, Anastasia Berezovska, acting on the instructions of former and acting security service officers from Ukraine, committed the first *de facto* terrorist act with real human casualties in Monaco's history (Euronews, 2026, June 30; Associated Press, 2026, July 7; CNN, 2026, July 7; Euronews, 2026, July 7; NBC News, 2026, July 7).

This event is of fundamental methodological significance because it destroys the archetypal structure of the "ticking time bomb": the perpetrator turned out to be a person who fits none of the stereotypical profiles of a "conscious fanatic-terrorist" acting alone, at a great distance from Ukraine, in a Western European country, and singlehandedly possessing critically important information – while the operation itself is an example of delegated, multi-level, and fragmented knowledge, in which the direct perpetrator neither is nor can be the source of that exhaustive information whose extraction is supposedly meant to justify the use of torture. Perhaps due to the antiterrorist units' shortcomings, Monaco's public prosecutor confirmed that authorities are treating the parcel bomb attack as a case of attempted murder, not terrorism – despite the incident being characterised as an unprecedented event that has shaken the otherwise safe principality (Euronews, 2026, June 30).

It is equally instructive, for present purposes, *how* the perpetrator was identified. The extraordinary speed with which the French and Monegasque police established the identity of the accused and located her residence in Germany was a product of forensic science, criminalistic method, and cross-border professional coordination – not of any modality of coercive interrogation or of the direct extraction of statements from a suspect. Read in this light, the Monaco case supplies an independent empirical confirmation of the argument advanced throughout this paper: contemporary scientific policing does not

merely render torture-based extraction illegitimate; it renders it superfluous as an investigative technique. This success, however, cannot be generalised without qualification. Monaco is among the wealthiest jurisdictions in the world, and the case carried acute reputational stakes for a principality whose international standing rests substantially on its image as one of the safest places on earth; both factors incentivised, and financed, an investigation of a scientific rigour that is not equally available everywhere. It is reasonable to anticipate that this evidence-based model of policing will perform markedly less well in states with less developed economies and – of even greater consequence – a less developed culture of human rights protection, where law-enforcement bodies continue to rely on short-term investigative "successes" obtained through direct contact with, and pressure upon, witnesses and suspects, rather than through the patient accumulation of forensic evidence. This structural disparity is of direct relevance to the wartime Ukrainian material examined below: where investigative capacity is degraded by war and institutional incentives reward rapid, visible results, the pull toward such coercive shortcuts intensifies, regardless of the formal prohibition of torture.

In other words, the real architecture of terrorism is an *architecture of fragmented, distributed, often situational knowledge*, whereas the "ticking bomb" model is built on the fiction of a single person's complete, whole, and immediately accessible knowledge. That is why the thesis that terrorism "has too many faces to hide behind a single case" is not a rhetorical device but a precise description of the methodological flaw underlying the didactic model. The empirical counterexample of Monaco is also important for the legal analysis developed below on the material of *Gäfgen v. Germany*: it demonstrates that even in those rare cases where the State deals with a clearly identified perpetrator, the structure of that perpetrator's knowledge of the operation almost never meets the condition of "complete and immediately accessible knowledge" postulated by the "ticking time bomb" didactic model.

The Factual Matrix of Gäfgen v. Germany as an 'ideal model' for Testing the Instrumentalist Thesis

The analytical value of *Gäfgen v. Germany* lies in the fact that its factual circumstances almost verbatim reproduce the rhetoric of the proponents of the instrumentalisation of torture. The applicant, Magnus Gäfgen, kidnapped and killed an 11-year-old boy. At the moment of the applicant's arrest, the police did not know that the child was already dead: the deputy chief of the Frankfurt am Main police, D., ordered detective E. to threaten the applicant with the infliction of considerable pain in order to establish the child's whereabouts, believing that the child's life was in mortal danger owing to a lack of food and low temperatures. In a memorandum dated 1 October 2002, D. expressly stated that the sole purpose of the threat was to save the child's life, not to facilitate the criminal prosecution for kidnapping; the threat was to be carried out under medical supervision and without leaving marks (§§ 20, 95).

The Court found it established that the police officers acted in the sincere belief that their actions would save the child's life (§§ 95, 107). In other words, the motive of '*saving an innocent life*' – the central argument of proponents of instrumentalisation – is, in this case, not a hypothesis but a judicially established fact. Approximately ten minutes after the threat, the applicant disclosed the place where he had hidden the child's body, which by that time was already dead.

Beyond the motive, the circumstances of the case contain a second element important for the classic "ticking time bomb" scenario – the detailed instrumental planning of the threat itself: a specially designated officer, a helicopter, medical supervision during the execution of the threat, as well as discussion of the possibility of using a "truth serum." This level of detail indicates not a spontaneous, affective reaction by an individual police officer but a consciously planned operation, sanctioned at the management level, to threaten the infliction of pain. The domestic court found that D.'s order was not a one-off spontaneous decision: he had given similar instructions on several prior occasions, growing increasingly impatient at his subordinates' reluctance to carry them out.

The case thus combines all elements of the "ideal model" of justification: a kidnapped child, police officers convinced of a mortal danger to the child's life, and a senior official who knowingly sanctioned the threat of torture in order to save that life. This is why an analysis of the Court's reasoning in this case provides an exhaustive answer to the question of why the instrumentalisation of torture is a myth.

Gäfgen v. Germany, despite a widespread simplified interpretation, is most often exploited in public and even professional discourse in the reverse, simplified form – as an example of the supposedly "justified" use of a threat of torture to save a child's life, and hence as empirical confirmation of the "ticking time bomb" model. Such an interpretation, however, is deeply mistaken and falls outside the general context

of the Court's case-law: what is legally significant in this case is not the fact of the threat of torture as such – the Court classified the methods applied to the applicant as *not* reaching the threshold of torture but as amounting to inhuman treatment – but rather the fact that the oral evidence obtained in this way was excluded by the domestic court from the body of evidence, and the conviction rested exclusively on evidence obtained lawfully, with respect for human rights. Precisely how often this case is exploited in simplified form as a counter-argument in favour of the instrumentalisation of torture is a vivid testament to the persistence of the myth under examination, even within professional circles – and a further argument in favour of a detailed analysis of its reasoning, undertaken below.

Gäffen v. Germany: the Absolute Character of the Prohibition as a Structural Property of the Convention, not a Mere Political Preference

The starting point of the Court's reasoning is the textual and structural unity of the Convention. Article 15 § 2 of the Convention places Article 3 among the narrow list of provisions from which no derogation is permitted even in time of war or other public emergency threatening the life of the nation. The Grand Chamber directly confirmed this principle: torture, or inhuman or degrading treatment, may not be inflicted even where a person's life is at risk; no derogations are permissible even in the event of a public emergency threatening the life of the nation (§ 107).

The Court went further, stating that Article 3 of the Convention enshrines an absolute right, guaranteeing to everyone that he or she will not be subjected to torture or to inhuman or degrading treatment, in any circumstances, even the most difficult, and that the philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests, irrespective of the conduct of the person concerned and the nature of the offence at issue (§ 107). This formula operates simultaneously in two dimensions: it is indifferent to the gravity of the threat the state seeks to avert, and equally indifferent to the degree of culpability of the person subjected to the prohibited treatment. A person who has murdered a child and is concealing the location of the body enjoys exactly the same protection under Article 3 as an innocent person.

In the judgment, the Court specifies this thesis in its procedural dimension: "Being absolute, there can be no weighing of other interests against it, such as the seriousness of the particular offence at issue or the public interest in effective criminal prosecution, for to do so would undermine its absolute nature" (§ 176). This position is further supplemented by a direct contrast between Article 3 (absolute) and Article 6 (relative, admitting elements of fair balancing) – an asymmetry that is a system-forming principle of the entire judgment and which will be examined in detail below (§ 177).

It is of fundamental importance that this refusal by the Court to conduct any weighing is not a practical concession to the circumstances but a categorical refusal *in principle*. Had Article 3 of the Convention been interpreted as a norm admitting a proportionality test – that is, weighing the probability and gravity of the threat to the child's life against the gravity and duration of the threat of pain – the outcome of such a weighing could quite plausibly have favoured the State. The Court's refusal to conduct any such calculation at all constitutes the most convincing evidence that Article 3 of the Convention is categorically absolute, and not merely in practice.

The entrenchment in Article 3 of the Convention of an absolute prohibition of any form of torture, regardless of circumstances, the victim's conduct, or the purpose pursued by the State, is one of the greatest achievements of European civilisation of the second half of the twentieth and the twenty-first centuries, attained in direct historical connection with the end of the Second World War and the recognition of the scale of state-organised violence. Unlike the vast majority of Convention rights, the right guaranteed by Article 3 in respect of the prohibition of torture is subject to no restriction whatsoever – neither under Article 15 of the Convention during a state of emergency threatening the life of the nation, nor by reference to the public interest, national security, or the fight against terrorism, as the Court has consistently emphasised (*Ireland v. the UK*, *Chahal v. the UK*, *Saadi v. Italy*, *Selmouni v. France*).

The problem, however, is that contemporary societies – and this is especially apparent in states without direct historical experience of mid-twentieth-century totalitarian violence – do not always properly appreciate and value this provision, namely the extent to which it secures the very possibility of human existence as such on the European continent and, to some extent, beyond it. The absolute character of the prohibition of torture is not a self-evident fact of natural law but the result of a prolonged, conflict-ridden, painful, and effortful process – a process that cost European states decades, numerous ECtHR judgments, and the systematic work of monitoring mechanisms, before the prohibition was transformed from a formally declared norm

into a practice and culture naturally and unquestioningly perceived and reproduced by police officers, penitentiary staff, and security forces, without the need for constant debate.

The False Collision between Articles 2 and 3 of the Convention: the Duty to Protect Life does not Legitimise a Breach of the Absolute Prohibition

One of the most telling elements of the respondent government's argument in *Gäfgen v. Germany* was its attempt to construct an artificial collision between the state's positive obligation to protect the right to life under Article 2 of the Convention (with reference to *Osman v. the United Kingdom*) and the negative obligation to refrain from breaching Article 3. The government's logic amounted to the claim that a minor, barely perceptible concession regarding the prohibition of torture – in this specific case – would secure a far *higher value*: the saving of a child's life still believed alive at the time of the threat.

The Court rejected this argument consistently and unequivocally: the state's obligation to protect the right to life can never justify a breach of the absolute prohibition of torture. The state is indeed obliged to protect the right to life but not by breaching the absolute prohibition under Article 3 or the right to a fair trial under Article 6. In the judgment, the Court states directly that neither the protection of human life nor the securing of a conviction may be obtained at the cost of compromising the protection of the absolute right not to be subjected to ill-treatment, since this would devalue those very values and undermine confidence in the justice system (§ 176).

From a methodological standpoint it is important to stress: a State found to be the violating party (i.e., a state held to have breached the Convention) cannot revive the *rescue torture argument* through purely procedural reclassification of the conduct – for instance, by artificially distinguishing a "mere threat" of torture from 'actual' torture. An attempt by the state to pit its own Convention obligations against one another – one obligation (under Article 2) against another (under Article 3) – is a *false dilemma*, since the Convention does not provide for any hierarchy in which one *absolute* or *near-absolute* obligation could override another. The rationality of the Court's position here goes far beyond purely philosophical or ethical considerations; were the state permitted today to breach Article 3 in order to comply with Article 2, this would become a systemic precedent that would totally destroy the entire Convention mechanism for the protection of human rights as such.

The Position of German Domestic Courts: Rejecting the Defence of Necessity as an Imperative of Human Dignity

The analytical value of *Gäfgen v. Germany* also lies in the fact that the German domestic courts confronted the defence of "necessity" and rejected it even before the case reached Strasbourg. The Frankfurt am Main Regional Court, in its judgment of 20 December 2004 concerning D. and E., stated directly that the investigative method applied was not justified, and categorically rejected the defence of necessity, noting that the method violated human dignity and that the protection of human dignity is absolute and permits no exceptions or balancing of interests (§ 48). The Federal Constitutional Court of Germany reached the same conclusion: necessity cannot be relied upon as a defence against a breach of the absolute protection of human dignity under Article 1 of the Basic Law, which also underlies Article 3 of the Convention (§ 120).

It is of fundamental importance that this conclusion was reached by the domestic courts notwithstanding an established fact: the officers' motive genuinely was to save the child's life, they acted under extraordinary institutional pressure, and there was no degrading purpose whatsoever behind their actions (§§ 95, 106). In other words, even while acknowledging the sincerity and nobility of the motive, the German domestic courts – within a legal system with a deep constitutional tradition of protecting human dignity – rooted the absoluteness of the prohibition in dignity as an unconditional value that cannot be instrumentally traded for an outcome, however desirable that outcome might be.

This is of fundamental significance for refuting the instrumentalist argument: if, even at the domestic level, within a legal system directly confronted with the extreme pressure of a specific case, the category of necessity is recognised as wholly inapplicable to breaches of Article 3 (regardless of the degree of threat sought to be averted), then any attempt to revive this category at the international level is legally untenable a fortiori.

The Officers' motivation: the Limits of Compassion and its Danger as a Precedential Formula

The Grand Chamber, in examining *Gäfgen v. Germany*, accepted as fact that the police officers acted in an attempt to save the child's life (§ 107), and acknowledged that they acted in a difficult and stressful

situation. However, this recognition of motivation is constitutionally irrelevant to the classification of their conduct under Article 3. The Court's statement that the prohibition applies "irrespective of the conduct of the victim or the motivation of the authorities" (§ 107) captures the very essence of absoluteness as a rule-based, rather than an outcome-based, guarantee.

At the same time, this recognition of motivation conceals a methodological danger worth separately highlighting for the purposes of this study. The point is that around the police officers – even in a judgment finding a violation of Article 3 – a kind of "*halo of nobility*" is constructed: the Court acknowledges the officers' motivation and the fact that they acted in a difficult and stressful situation, and this acknowledgment potentially diminishes their accountability, notwithstanding the formal confirmation of a violation. The risk is that such language of compassion – even while preserving a formally strict finding of violation – may turn into a precedential rhetorical formula on which other states will later rely to justify their own departures from the prohibition of ill-treatment by invoking the "*nobility*" of their agents' motives.

It is important to clearly distinguish between two planes that the instrumentalist argument deliberately conflates: empathy for the motives of specific officials (which may be considered solely at the sentencing stage within domestic criminal law) and the fundamental legal classification of an act as prohibited and admitting of no justification whatsoever. This conflation of the two planes – transforming emotional sympathy for a motive into a false legal conclusion about the permissibility of the act itself – constitutes the psychological foundation of the myth of instrumentalisation.

The Systematic and Planned Nature of the threat as an Aggravating Circumstance Neutralised by the Motive: the Asymmetry between Facts and Sanction

Particular attention is warranted by how the Court treated the systematic and planned nature of the threat. The domestic court found that D.'s order was not a spontaneous decision: similar instructions had been given repeatedly, despite objections from subordinates. This is a classic aggravating circumstance: a conscious, repeated, directed decision by a high-ranking official, rather than an affective reaction by an individual perpetrator under extreme stress. However, this circumstance had virtually no impact on the eventual punishment. Here arises the very asymmetry that is key to understanding the empirical failure of the instrumental justification: the established facts point to a planned, repeated, hierarchically sanctioned decision, yet the sanction applied by the state remained symbolic. This directly demonstrates that the *rescue motive argument*, in practice, functions not merely as one mitigating circumstance among others, but as a factor that almost neutralises the significance of aggravating circumstances – systematicity and planning – in determining punishment.

This asymmetry cannot be properly understood in isolation from the sequence of orders that preceded the impugned instruction, which deserves separate analytical attention because it reframes what might otherwise appear as an isolated lapse into a pattern of institutionally tolerated conduct. On the one hand, the chain of successive orders shows that the impugned instruction did not emerge in a vacuum but was the culmination of a series of similar directives; on the other hand, the officer's motive – protecting the life of a child – was expressly acknowledged as genuine by both the domestic courts and the ECtHR. The coexistence of these two elements, systematic repetition and an undisputedly benevolent motive, generates the doctrinal difficulty at the heart of this case. Where the motive is beyond reproach but the conduct is repeated and planned, the temptation for domestic courts is to treat the sincerity of the motive as if it discharged the systematic character of the conduct, rather than treating the two as analytically distinct: one going to culpability, the other to the gravity and predictability of the interference with an absolute right. Article 3 of the Convention tolerates no balancing exercise of this kind because its absolute character was designed to withstand exactly this kind of well-intentioned erosion.

This is where the so-called '*noble cause*' doctrine becomes analytically indispensable, since it was within this very framework that the conduct of the police officers involved was assessed. The officers in question sought to extract information from the suspect through the threat of torture, and it is the conjunction of three interlocking elements – the repeated and planned character of the orders, the *sincerity* of the rescue motive, and the resort to threatened torture as an interrogation method – that the Court placed at the centre of its reasoning. The resulting conclusion is of considerable doctrinal significance: the noble cause doctrine cannot, under any circumstances, relieve the state of responsibility for the conduct of its agents where those agents systematically resort to torture, or even to the threat of torture, against a suspect. In other words, the benevolence of the ultimate objective does not convert

an absolute prohibition into a qualified one, nor does it transform a repeated institutional practice into an excusable one-off deviation.

Read together with the sentencing asymmetry identified above, this suggests that the mitigating weight domestic courts attached to the rescue motive did not merely soften the sanction proportionately to the officer's culpability – it effectively displaced the aggravating significance of systematicity and planning altogether. This is a subtler and more troubling phenomenon than ordinary sentencing leniency: it indicates that where a motive is perceived as *noble*, courts may be inclined to reclassify repeated, planned conduct as though it were spontaneous and exceptional, thereby collapsing the very distinction – between an isolated act and an institutional pattern – that the aggravating-circumstances framework exists to preserve. The empirical consequence is that the deterrent function of the aggravating-circumstances doctrine is neutralised in those cases where it is most needed: cases in which officials, secure in the conviction that their motives are just, are most likely to normalise recourse to prohibited methods as a matter of *routine practice*.

The Empirical Failure of the Instrumental Justification: the "manifest disproportion" Test for Punishment

If the doctrinal part of the judgment demonstrates a categorical legal rejection of instrumentalisation, the factual part concerning the state's subsequent conduct after the finding of a violation demonstrates its empirical failure – that is, the fact that even the state that attempted to apply the "rescue" justification was unable to keep it within limits compatible with its own Convention obligations.

The Frankfurt am Main Regional Court, having found D. and E. guilty of coercion committed by a public official, imposed extremely lenient punishments – suspended fines of 60 and 90 daily rates respectively. In determining the sentence, the domestic court considered as a significant mitigating circumstance the fact that their sole motive was to save the child's life, together with the extreme pressure and tense situation in which they acted (§ 50).

The Grand Chamber subjected this approach to sharp criticism, formulating its own standard of supervision over domestic sentencing – the "manifest disproportion" test, with reference to *Nikolova and Velichkova v. Bulgaria* and *Ali and Ayşe Duran v. Turkey*. The suspended fines were found inadequate, since they lacked the necessary deterrent effect (§§ 123-124). The Court emphasised that the practical absence of punishment – punishment that was symbolic in nature and, moreover, deferred in time – destroys the principle of the inevitability of punishment, meaning that the state creates no preventive effect whatsoever in cases of torture, one of the gravest crimes against human dignity.

It is also worth focusing on the Court's judgment in *Barovov v. Russia*, in which the Court examined the same issue – the manifest disproportionality between the actions of the police officers involved and the punishments subsequently imposed on them as perpetrators of torture.

In *Barovov v. Russia*, as to the officers convicted of torture, the domestic courts suspended a six-year custodial sentence, citing the lapse of time, positive character references, absence of prior convictions, and law-abiding conduct after the offence – reasoning the Court declined to accept as justification for suspended sentences imposed on police officers convicted of conduct proscribed by Article 3 and classified domestically as a particularly serious crime (*Barovov*, § 41).

As regards the officers' conviction for abuse of office, carrying up to ten years' imprisonment, they were sentenced to five years' imprisonment but subsequently released from criminal liability upon expiry of the statutory limitation period – a result of an investigation flawed for over nine years by repeated unlawful suspensions, reflecting a manifest lack of diligence that deprived the criminal proceedings of any deterrent effect capable of preventing further ill-treatment by police (*Barovov*, § 42). The ECtHR accordingly found that the aim of effective protection against acts of ill-treatment had not been achieved (*Barovov*, § 42).

The ECtHR expects States to be even more stringent in punishing their own law-enforcement officers for such grave, life-endangering offences than they would be with ordinary offenders, since what is at stake is not merely individual criminal liability but also the State's duty to combat any sense of impunity among officials who may believe they can abuse the rights of those under their control by virtue of their position (*Barovov*, § 42), as well as public confidence in and respect for the law-enforcement system (*Barovov*, § 42). The ECtHR further underscored the importance of suspending State agents from duty while under investigation or on trial, and their dismissal in the event of conviction – measures that were absent in this case, since one officer remained head of a police unit at the time of his conviction and the other simply resigned (*Barovov*, § 42).

The release of police officers from criminal liability and their exemption from punishment through suspended sentences, manifestly disproportionate to the gravity of their acts, were devoid of any deterrent effect on State agents inclined to believe they may abuse detainees' rights with impunity (*Barovov*, § 45). The ECtHR accordingly concluded that there had been a violation of Article 3 of the Convention under its procedural limb (*Barovov*, § 46).

Career Advancement of The Perpetrator and Delay in Compensation as Independent Indicators of Systemic Failure

A second indicator of empirical failure was the disciplinary aspect of the case. The Court found that D.'s appointment as head of a police authority – after his conviction for incitement to coercion – gave rise to serious misgivings as to the adequacy of the State's response (§ 125). D.'s new post was not even connected with the investigation of crimes; nonetheless, the mere fact of the career advancement of a person found guilty of applying prohibited treatment is telling evidence that, at the institutional level, the state did not treat the violation of Article 3 as requiring genuine, rather than symbolic, consequences.

A third indicator was the delay in the civil compensation proceedings: the procedure for examining the claim for non-pecuniary damage lasted more than three years without any examination on the merits (§§ 126-127). The Court found this to be an independent, self-standing ground for concluding that the remedies (redress) were ineffective, regardless of the outcome of the criminal proceedings.

Taken together, these three elements – an inadequate criminal sanction, disciplinary inadequacy (career advancement), and delay in compensation – create a single *cumulative victim-status test* (§§ 129-130): it was the cumulative effect of these insufficient measures, rather than any need to separately prove the intentional nature of torture, that led to the conclusion that the applicant – despite being a convicted child-murderer – remained a victim of a violation of Article 3. This is the "bridge" connecting the leniency of the sanctions imposed on the state's agents with the finding of an independent violation of Article 3: the cumulative effect of the state's inadequate response constitutes a violation, in addition to the primary violation committed during the threat itself.

The significance of this finding for the analysis of the myth of instrumentalisation is fundamental: even assuming (purely hypothetically) that the motive of saving the child's life might serve as a legitimate mitigating factor at the sentencing stage, the empirical practice of its application in *Gäffen v. Germany* demonstrates that, in practice, the "rescue" motive functions not as a narrow, controlled exception but as a systemic channel for the erosion of accountability – from an almost symbolic punishment to career reward for the perpetrator. This is the empirical failure of instrumental logic: the stated goal of proving that "in this particular case," a departure from the standard is justified is, in practice, transformed into systemic leniency that undermines the very preventive function of the prohibition of torture.

What remains largely unarticulated in the Court's reasoning, yet operates as its silent structural premise, is a counterfactual caveat of considerable normative weight: had the respondent State imposed a criminal sanction commensurate with the gravity of the impugned conduct, refrained from rewarding D. with career advancement, and discharged the civil compensation claim promptly and in a sum reflective of the harm suffered, the applicant would, in all likelihood, have forfeited his status as a *victim* within the meaning of Article 34 of the Convention, and the ECtHR would never have reached, still less upheld, an independent finding of a violation of Article 3.

This inference follows directly from the logic of §§ 129-130: it is not the threat of torture as an isolated empirical event that generated the international finding of violation but rather the State's own subsequent failure to translate its formal acknowledgment of wrongdoing into genuine, proportionate, and timely redress at the domestic level. The doctrinal consequence is unsettling: adequate punishment and swift compensation do not retroactively undo the ill-treatment that has already occurred as a matter of fact, but they possess the legal capacity to foreclose its recognition as a violation by an international court, by depriving the applicant of standing to complain of it. In other words, the Court's *cumulative victim-status test* reveals that the international-law consequences of a threat of torture are not fixed by the act itself but remain, in a very real sense, hostage to the quality of the State's own remedial conduct after the fact – a state of affairs that leaves the preventive function of Article 3 dependent not on the absolute and unconditional character of the prohibition, as its peremptory status would seem to demand, but on the contingent adequacy of subsequent institutional accountability, which the state itself controls and which, as the *Gäffen* practice demonstrates, it may just as easily choose to withhold.

The Procedural Continuation of Absoluteness: The Doctrine off "Fruit off the Poisonous Tree" and the Distinction between *Fortwirkung* and *Fernwirkung*

The absolute character of Article 3 of the Convention is not confined to the sphere of substantive law – it extends to the procedural consequences of a violation, in particular to the admissibility of evidence obtained as a result of ill-treatment. The Court held that the use of statements obtained as a result of treatment breaching Article 3 – regardless of whether it is classified as torture or as inhuman treatment – automatically renders criminal proceedings unfair, with reference to *Örs and Others v. Turkey*, *Harutyunyan v. Armenia*, and *Levința v. Moldova* (§ 166). Real evidence obtained directly as a result of acts classified as torture must never be used, "whatever their probative value," since to hold otherwise would be to "afford brutality the cloak of law" (§ 167, referring to *Jalloh v. Germany* [GC], § 105).

At the same time, this part of the judgment gives rise to one of the most vulnerable doctrinal constructions in the case – the distinction, drawn by German legal doctrine, between two types of impact of the initial violation on subsequent proceedings: *Fortwirkung* (continuing effect) and *Fernwirkung* (remote, derivative effect) (§§ 24-25). The threat of torture directly led to the applicant's *first confession* – and this confession, together with all statements obtained under its direct influence, was found inadmissible.

However, real evidence – the child's body, tyre tracks from the applicant's car, and other physical items discovered thanks to information obtained under the threat – was found admissible, since, in the view of the domestic courts and subsequently the Court, the chain of causation was broken by the applicant's *second confession*, made at trial after due explanation of his procedural rights (§§ 180, 184). Consequently, as the Court held, the applicant's confession referred to many additional elements which were unrelated to what could have been proven by the real evidence (§ 184).

This construction is vulnerable primarily because it calls into question the very realism of the assumption of *voluntariness* of a repeat confession made by a defendant who has just lost a motion to exclude the initial evidence and finds himself in a situation where the psychological effect of the initial threat (the awareness that the state is prepared to resort to extreme measures) can hardly be fully neutralised by a formal explanation of rights. Moreover, the Court deliberately left open the question whether automatic inadmissibility of evidence applies only to evidence obtained by torture as such, or also to evidence obtained by inhuman or degrading treatment (§ 173). This uncertainty is directly connected to the problem of under-classification discussed above: if a real, meticulously planned threat of torture is classified as "merely" inhuman treatment, not as torture, it is potentially subject to weaker procedural protection under Article 6.

The Court's comparative argument regarding the absence of a uniform European consensus on the exclusionary rule (§ 174) is a methodologically telling example of using the absence of consensus to narrow protection – an approach that contrasts sharply with the logic of evolutive interpretation that the Court typically applies to broaden the scope of Convention guarantees in other categories of cases.

At the same time, this procedural component of the judgment provides grounds for an important clarification regarding the very essence of *Gäfgen v. Germany* in the context of refuting the myth of the "ticking time bomb": despite a widespread simplified interpretation, the case in fact confirms the absolute character of the prohibition enshrined in Article 3.

Gäfgen v. Germany confirms the absolute substantive prohibition under Article 3, while simultaneously revealing the limits of its procedural transmission into Article 6: the original confession was excluded, whereas derivative real evidence was admitted and the proceedings as a whole were found fair.

Thus, *Gäfgen v. Germany* not only fails to confirm the thesis of the instrumental justifiability of torture or its threat, but, on the contrary, demonstrates that even in a situation maximally approximating the didactic model (a threat to a child's life, time pressure, police conviction that the suspect held critical information), a legal system adhering to the standards of Article 3 consistently refuses to recognise the fruits of ill-treatment as a legally significant and morally acceptable means of investigation.

Jalloh v. Germany [GC]: A Less Extreme but Far More Frequent Scenario, And the Distinction Between Forms of Obtaining Evidence

If *Gäfgen* is an ideal model for testing the absoluteness of Article 3 because its factual circumstances almost verbatim reproduce the rhetoric of instrumentalisation through an *extreme, cinematic scenario* of saving a child's life, then, for the completeness of the analysis, another Grand Chamber case is of fundamental significance – *Jalloh*, whose facts are far more mundane, yet much closer to the daily practice of law-enforcement bodies. Modelling a hypothetical situation comparable in scale to the events

of 11 September 2001 through the lens of *Gäfgen* would be, as noted above, unrealistic, at least in the foreseeable future.

Jalloh, by contrast, describes a situation that in real life occurs an order of magnitude more frequently, and can therefore serve as a down-to-earth benchmark, devoid of any dramatic flourish, for law-enforcement bodies and courts – without the need to construct abstract cases of the "ticking time bomb" variety, which fortunately occur extremely rarely.

The factual basis of the case is typical of everyday counter-narcotics practice: four undercover police officers observed a scene that, as it later transpired, involved the sale and purchase of cocaine. During the arrest, the suspect managed to swallow a capsule containing the drug. The detainee was accordingly taken to a hospital, where, under medical supervision and with the professional assistance of a doctor, emetic substances were administered to him through the nasal passage, resulting in the recovery of the drug and the suspect's eventual conviction (*Jalloh*, §§ 11-14, 20). The suspect's arguments concerning the inadmissibility of evidence obtained in this manner were rejected by both the first- and second-instance courts, and subsequently the Federal Constitutional Court of Germany also sided with the state (*Jalloh*, §§ 22, 25, 27).

In examining this case, the Grand Chamber analysed both Article 3 and Article 6 of the Convention through the lens of two sequential questions: *first*, what was, in legal terms, the nature of the treatment inflicted on the applicant; and *second*, whether the statements, items, and materials obtained as a result of such a mundane yet potentially frequent situation – a suspect swallowing a drug during arrest – could be used as evidence.

The Court's answer consists of two elements, each of independent doctrinal significance.

First, the Court emphasised that the treatment inflicted on the applicant did *not* reach the level of torture (*Jalloh*, § 106). However, given that Article 3 is of a general character and covers *all forms* of ill-treatment, not merely torture, the evidence obtained as a result of such treatment was found to be contrary to the requirement of fairness of the trial under Article 6 (*Jalloh*, §§ 105, 107-108). This construction – non-recognition of the act as torture combined with a finding of a violation of the fairness of proceedings owing to the admission of the evidence obtained – is the very same doctrinal solution that the Court subsequently reproduced in *Gäfgen*: it was in *Jalloh* that the thesis of the impermissibility of affording '*brutality the cloak of law*' (§ 105) was first formulated, a thesis to which the *Gäfgen* judgment directly refers (§ 167) and which later became a cross-cutting principle of the Court's entire subsequent case-law on the admissibility of evidence obtained through ill-treatment.

Second, the Court conducted a thorough comparative analysis of the various methods, differing in their factual nature, by which police obtain evidence in everyday practice – from requiring a suspect to provide documents or access to certain information, to taking samples of blood, saliva, hair, or DNA (*Jalloh*, §§ 112-115). With respect to this category of evidence-gathering methods, the Court confirmed a settled principle: *interference* with a suspect's personal sphere that does not exceed a minimal threshold of severity is an independent, relatively tolerated area that does not call the fairness of the proceedings into question as such. *Penetration* of the human body itself, by contrast – which is inviolable and must enjoy special personal protection – constitutes a fundamentally different category of interference. It is on this contrast – the taking of saliva, blood, DNA, or hair samples, on the one hand, and the administration of powerful emetics against the will and wishes of the suspect himself, who, according to the case file, was restrained by four police officers while the procedure itself was carried out by a doctor, on the other – that the Court's subsequent reasoning is built.

The Court particularly emphasised that even where the treatment found does *not* suffice for classification as *torture* but rather concerns another, *less serious* yet equally prohibited form of ill-treatment under Article 3, this does *not* release the state from its obligation not to turn a fair criminal process into a form of absolute arbitrariness involving excessive physical violence and bodily intrusion – even where the state pursues the most legitimate aim connected with protecting society from crime (*Jalloh*, § 99).

The Court expressly acknowledged that it fully understood the challenges that modern manifestations of crime, including drug trafficking, pose for contemporary states (*Jalloh*, § 77). This acknowledgment, however, did not shake the central conclusion: the state is obliged to apply other forms and methods of combating crime *de facto* – ones that, under no circumstances, may cross the boundary of the absolute prohibition of any form of ill-treatment established by Article 3. This thesis is a direct development, and at the same time an empirical confirmation, of the central thesis of this paper: the state must rely on professionalism, forensic science, and the development of investigative technologies instead of brute, essentially situational force that appeals to the "exceptional" nature of a particular case.

At the same time, the Court did not deny the possibility of considering, in exceptional cases, factors of public interest, the interests of justice, or the profile of a case. However, this consideration, according to the Court's explicit direction, in no way means that any form of ill-treatment may be given a "green light" in order to justify what is presented as a great social good – the protection of society, the fight against crime, or the exposure of a large-scale criminal organisation (*Jalloh*, § 119). This qualification is of fundamental importance for refuting the "soft" version of the myth of instrumentalisation: unlike the radical thesis on the permissibility of torture to save a life, here the attempt is to justify a less severe but equally prohibited form of treatment by reference to the public benefit of combating crime in general, rather than of saving a specific human life. The Court's refusal, even in this significantly 'softer' version of the argument, to recognise the State's right to any such weighing is an additional, and in some respects even more compelling, proof of the absoluteness of the Article 3 standard than *Gäfgen* itself: if even in a situation devoid of the drama of mortal danger the Court refuses to recognise the legitimacy of any weighing, this confirms that what is at issue is not exceptional strictness in extreme cases, but the structural, cross-cutting invariability of the standard.

Jalloh thus performs a *dual methodological function* within this paper.

On the one hand, alongside the Monaco counterexample, it further confirms the thesis of the empirical rarity and artificiality of the "ticking time bomb" scenario: instead of a hypothetical situation of saving hundreds of lives through the instantaneous extraction of information, actual law-enforcement practice in the overwhelming majority of cases deals with mundane situations devoid of extreme time pressure, such as the arrest of a person who swallows a drug.

On the other hand, it was in *Jalloh* that the Court first formulated the doctrinal architecture – the distinction between non-torturous but still prohibited treatment and the automatic inadmissibility of evidence obtained in this manner under Article 6 (*Jalloh*, §§ 105-108) – which it subsequently applied, almost unchanged, in *Gäfgen*.

This provides grounds for regarding *Jalloh* not as a secondary or "shadow" precedent but as the *direct doctrinal foundation* on which the entire subsequent reasoning of the Grand Chamber concerning the impermissibility of instrumentalising any form of ill-treatment is built – regardless of whether the issue concerns saving a child's life or combating drug trafficking.

Gäfgen v. Germany: the Asymmetry between Articles 3 and 6 of the Convention as the System-Forming Principle of the Judgment, and the Split within the Grand Chamber

The asymmetry between the absolute character of Article 3 and the relative character of Article 6 (§§ 176, 178) enabled the Court to find, simultaneously, a violation of Article 3 (in respect of the threat of torture) and no violation of Article 6 (in respect of the overall fairness of the trial). At first glance this combination appears internally contradictory for a norm proclaimed absolute: if the initial violation of Article 3 is so serious as to admit of no balancing whatsoever, how can subsequent criminal proceedings, resting on the indirect fruits of that violation, remain fair?

The Court's answer lies in the fact that the absoluteness of Article 3 concerns the substantive legal classification of the State's own conduct, whereas Article 6 remains a relative guarantee that allows for an assessment of the fairness of the proceedings as a whole. This solution allows the Court to avoid a harsh "domino effect," whereby any violation of Article 3 would automatically render impossible any subsequent criminal prosecution of a person, even in cases where guilt is established on the basis of evidence causally unconnected to the initial violation.

This construction was not unanimous: the Grand Chamber's judgment in *Gäfgen* was adopted by a split of eleven votes to six on three of the four operative points. This split signals a profound disagreement, even within the Grand Chamber, as to the limits of the "break in the causal chain," and points to a normative weakness in the reasoning of the majority position. The separate opinions of the minority judges constitute an independent stratum for further analysis – in particular on the question of whether the very distinction between *Fortwirkung* and *Fernwirkung*, which allowed the Court to avoid finding a violation of Article 6, is sufficiently convincing.

The Significance of the Precedent for Subsequent Case-law of the Court and for the Context of War Crimes

Gäfgen v. Germany remains the basic precedent of the "help-me-catch-the-killer" justification – an example relied upon by states in attempts to justify a departure from Article 3 by reference to the lives

of third parties. The position formulated in this case is consistent with the Court's settled case-law on the absolute character of Article 3, traceable, in particular, in *Saadi v. Italy* [GC] and *Selmouni v. France*, where the Court likewise refused to admit any exception to the prohibition regardless of the victim's conduct or status. The logic developed in *Jalloh v. Germany* [GC] (§ 105) regarding the impermissibility of affording "brutality the cloak of law" was directly applied in *Gäfgen* as well.

The subsequent reception of the principles of the case is traceable, in particular, in cases connected with programmes of "extraordinary rendition" and with measures applied against persons suspected of terrorism – such as *El-Masri v. the former Yugoslav Republic of Macedonia* [GC] and *Al Nashiri v. Poland*, in which the Court likewise refused to accept the legitimacy of arguments concerning national security or the fight against terrorism as grounds for weakening the absolute character of the prohibition of ill-treatment.

For the context of war crimes and mass violations of Article 3 committed in situations of armed conflict, the significance of the principles formulated in *Gäfgen v. Germany* is twofold.

First, the doctrine of categorical rejection of instrumentalisation rules out any attempt to justify torture or inhuman treatment by reference to "*military necessity*," even where such necessity is framed as protecting the lives of the civilian population or of one's own personnel.

Second – and perhaps even more important for the practice of documenting and prosecuting war crimes – the cumulative victim-status test model formulated in §§ 129-130 of the *Gäfgen* judgment provides a valuable methodological tool for argumentation in Ukrainian cases concerning the re-appointment of law-enforcement or military-command personnel found responsible for ill-treatment to leadership positions: the mere combination of an inadequate criminal sanction, disciplinary inadequacy, and delay in compensation may constitute an independent violation of Article 3, regardless of the outcome of the original criminal proceedings against the direct perpetrators.

The Emergence of "instrumental" Discourse after 11 September 2001

A special place in the history of the discussion on the instrumental value of torture is occupied by the period following the terrorist attacks of 11 September 2001, when part of Western, primarily American, political-legal discourse attempted to legitimise so-called *enhanced interrogation techniques* as a supposedly necessary and proportionate means of countering a new quality of terrorist threat. This attempt found expression not only in journalism and academic polemics but also in official legal opinions of the executive branch, the best known of which are the *Bybee memos* of the U.S. Department of Justice of 2002, which attempted to narrow the legal definition of torture.

At the same time, this historical episode, together with subsequent ECtHR practice assessing *special investigative methods* – including cases concerning programmes of transferring detainees (extraordinary rendition) and secret places of detention involving the intelligence services of European states – effectively put an end to the debate on the permissibility of instrumentalising torture for the purposes of preventing and investigating terrorist acts and saving actual or potential victims. In retrospect, the experience of the 2001-2009 'War on Terror' demonstrated not only the ethical and legal unacceptability of *enhanced interrogation techniques* but also their operational ineffectiveness: information obtained under torture systematically proved either unreliable, already operationally stale, or consistent with the interrogator's expectations rather than with objective reality – a phenomenon well described in the criminological and psychological literature on false confessions.

This, however, by no means signifies that the practice of torture has disappeared from the territory of states that formally recognise the absolute prohibition enshrined in Article 3. Rather, it means that the human rights era – that is, the normative and cultural regime in which instrumental argumentation in favour of torture has lost legitimacy in public and professional discourse – is not universal and has clear geographical and political boundaries.

For twenty-first-century legal scholarship, it is evident that all discussions on the desirability or permissibility of torture gained fresh momentum after the terrorist attacks of 11 September 2001, when the United States declared a global 'War on Terrorism'. Terrorism itself, during this period, acquired a fundamentally new face – one that was, to a significant degree, simulacral in character. That is, it was constructed as an image of threat, continually reproduced and sustained by the very state that had proclaimed itself endangered. Be that as it may, it was against this backdrop that a body of ECtHR cases arose concerning the use of secret prisons of the U.S. Central Intelligence Agency (CIA) on the territory of European states, in particular Poland, which created new grounds for discussion on the absolute character of the prohibition of torture and the limits of permissibility of so-called "*enhanced interrogation techniques*," "*special*

interrogation methods," or "*extraordinary interrogation methods*" – terms that themselves performed a euphemistic function, concealing the true nature of the practice, whatever it was called.

At the core of the discussion lies the approach introduced in the United States immediately after 11 September 2001, one that subsequent American administrations attempted to avoid, deliberately failing to mention – although this forgetting, it would seem, was markedly temporary in character. The practice of detentions and related procedural measures has grown noticeably under the presidency of Donald Trump: within the first year of his second term, the average daily ICE detained population rose by approximately 75%, from roughly 40,000 to over 73,000 individuals, while average daily arrests climbed to 821 – a 170% increase over the final year of the Biden administration – with nearly three-quarters of all detainees never having been convicted of any criminal offence (American Immigration Council, 2025; Taking Stock, 2025; University of Colorado Boulder, 2026).

In any event, at the level of domestic courts, judicial doctrine, memoranda, and internal notes of government officials – that is, within national policy as such – it was effectively recognised that torture could and should be applied under certain circumstances, although, of course, it was *not* directly called *torture*. On the contrary, it was consistently, and somewhat bashfully, emphasised that the means applied to obtain information from persons suspected of terrorism did not constitute torture. The most telling documentary embodiment of this approach is the memorandum of Jay Bybee, Assistant Attorney General of the United States, addressed to Alberto Gonzales, Counsel to the President, dated 1 August 2002 (Bybee, 2002), which consistently maintains the thesis that the prohibition of torture established under Section 2340A of the U.S. Code (18 U.S.C. §§ 2340-2340A) extends only to the most extreme forms of physical and mental harm, whereas numerous techniques of psychological and physical pressure applied by the CIA did *not*, in their intensity, reach that threshold (Bybee, 2002).

It is telling that this logic of "collective necessary defence," which the Bybee memorandum derives from the factual circumstances of 11 September 2001, was not an organic continuation of prior American judicial practice but rather a deliberate break with it. Before 11 September 2001, the position of American courts in cases concerning the use of physical coercion to obtain vitally important information was substantially different, resting exclusively within the classic doctrine of voluntariness of confession, without any resort to constructs of necessity or self-defence.

Illustrative in this respect is *Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984) – one of the few genuine "ticking time bomb" cases in American judicial practice: a suspect in a kidnapping was detained by police who demanded that he immediately disclose the victim's whereabouts, the victim likely still being alive; following his refusal, the police applied physical coercion – twisting his arm and choking him – as a result of which the suspect indicated where the victim was being held. The Eleventh Circuit Court of Appeals found that the *first confession*, obtained in this manner, was to be excluded from evidence as failing to meet the requirement of voluntariness, notwithstanding that the police had acted to save the victim's life – the court did not, in any way, consider the possibility of justifying the use of coercion itself by reference to necessity or any form of collective or individual self-defence. However, the *second confession*, obtained five hours later by different investigators uninvolved in the coercion, following the explanation of constitutional rights under the Miranda procedure, was found by the court to be voluntary and admissible, applying the traditional "*break in the stream of events*" test formulated by the U.S. Supreme Court in *United States v. Bayer*, 331 U.S. 532 (1947). Thus, even in a situation maximally approximating the image of the "ticking time bomb," American judicial practice prior to 2001 consistently assessed the admissibility of a confession exclusively through the prism of voluntariness and compliance with procedural guarantees, without resorting to any legal construction capable of justifying the use of physical coercion as such. This contrast makes evident how fundamentally new was the legal strategy proposed in the Bybee memorandum: where prior practice excluded an involuntary confession regardless of the police's motives, the new construction attempted to justify the very use of force, substituting classic procedural voluntariness with the doctrine of "necessary defence" against an *abstract collective threat*.

On the other hand, the absolute prohibition of torture proved consistent, categorical, and – it must be acknowledged – resistant to the assault of the '*War on Terror*' simulacrum on the European continent. This confrontation emerged as a conflict between an approach that can conditionally be called '*chivalrous*', characteristic of Europe equipped with the ECtHR and its consistent case-law, on the one hand, and the American doctrine of justifying violence against detainees, on the other. The ECtHR, relying on its settled practice, put an end to this question – although, as will be shown below, this "end" is conditional rather than final, since the very logic underlying the justification of torture remains capable of reproduction.

What the United States presented in 2001-2002 was not fundamentally new in substance. From time to time, American practice – initially in secret, and subsequently, as details leaked out, publicly – disclosed new manuals for conducting extraordinary interrogation methods under extraordinary circumstances, methods that, by their very nature, remained essentially unchanged (KUBARK Counterintelligence Interrogation manual, 1963; Human Resource Exploitation Training Manual, 1983; Senate Intelligence Committee "Torture Report", 2014; Başoğlu & Reyes, 2017; Costanzo & Gerrity, 2009; Eban, 2007; Hoffman et al., 2015; Kaye, 2014; Marks, 2018; Miles, 2015; Physicians for Human Rights, 2010, 2017; Soldz et al., 2015). The only thing that genuinely changed over time was the rhetorical emphasis: the 'previous' manual was declared to have indeed been inhuman and to have created conditions for torture, whereas the 'new' one was presented as one that took the errors of the past into account and, for that very reason, could not be classified either as torture or as inhuman treatment, or indeed as falling under any Convention or domestic criminal-law prohibitions whatsoever. In this sense, the construct devised from 2001-2002 onward is a kind of *phoenix* that periodically rises from the ashes whenever a new *simulacrum* of collective threat appears – in the case under consideration, for the United States of America.

The description of these methods, presented both in the memoranda themselves and in the judgments of the ECtHR, cannot fail to shock, cannot fail to frighten a European, although, for an American, the reaction to such methods is probably not to be described in categories of shock. Rather, it is a matter of profound astonishment, of acceptance or rejection of the justification offered. The relevant memoranda and the domestic judicial practice of the United States are, in essence, merely the outward facade behind which far deeper and more important legal-conceptual matters are concealed. And, indeed, the central idea deserving particular attention in this context is the substitution of concepts.

The criminal code of virtually any modern state contains a concept of *necessary self-defence*, applicable in the context of defence against a *physical person* carrying out an aggressive, violent attack. There is, in fact, nothing new in the concept of necessary self-defence itself, and little can be added to it – it is a settled, almost universal institution of criminal law. But it is the distortion of the concept of necessary self-defence that lies at the heart of all the prohibited enhanced interrogation methods that rose once again from the ashes in 2001-2002 and served as grounds for subsequent judicial decisions, proceedings, and scandals.

If classic necessary self-defence is defence in real time – "*right now, right this second*" – against an attacker or group of attackers, then the distortion of the concept of necessary self-defence used by American authorities is a protracted necessary defence against an *abstract collective subject* with an *undetermined number of persons* supposedly participating in the realisation of such an attack, one *wholly unidentified in time and space*, having only isolated, fragmentary manifestations and an idea that – and this is the more important point – is itself shaped by the very country that has declared itself to be in a state of danger. This distortion, which unleashed the application of so-called enhanced or special interrogation methods, met with resolute resistance on the European continent – a resistance manifested in the relevant ECtHR judgments, which are worth reading carefully in order to grasp the essence of this transatlantic confrontation.

The legal architecture of this – collective and protracted – necessary defence is elaborated in detail and consistently in the *Bybee memorandum*. Proceeding from the classic criminal-law doctrine of necessity, often called the doctrine of the "*lesser evil*," the memorandum asserts that conduct which a person considers necessary to avoid harm or evil to himself or another is justified provided that the harm sought to be avoided is greater than that which the law defining liability for the relevant act seeks to prevent (Bybee, 2002). From this general formula, an even more radical conclusion is drawn; under certain circumstances, necessity may justify even the intentional taking of one person's life to save others, since, following the logic of "the lesser evil," the evil connected with a breach of criminal-law norms may be lesser than the evil that would result from literal compliance with that law (Bybee, 2002). The memorandum directly transposes this logic to the situation of interrogating a detainee: since the terrorist attack of 11 September 2001 took thousands of lives, and the existence of other "sleepers" cells and intentions to use weapons of mass destruction is allegedly not excluded, any harm that might arise during interrogation is deemed negligible compared to the harm that would be avoided by preventing a new attack of the same or greater scale (Bybee, 2002). In other words, a dangerous speculation is introduced into circulation: "*To save a thousand lives, we are entitled to torture, say, a hundred suspects.*"

The memorandum separately stipulates two factors that, in the design of its authors, are to determine the limits of permissibility of relying on necessity: first, the greater the officials' certainty that a particular person possesses information necessary to prevent an attack, the more "necessary" the interrogation becomes;

second, the more probable a terrorist attack appears and the greater the expected harm from it, the more "necessary" the interrogation becomes for obtaining information (Bybee, 2002). This construction effectively transforms any *abstract, unproven threat* into a legal basis for the use of force against a specific detained person, with the assessment of "necessity" resting not on objective criteria but on the subjective conviction of executive officials. The memorandum adds to this the doctrine of individual self-defence, extending it, by analogy with the President's constitutional powers as Commander-in-Chief to defend the State from attack, to officials conducting interrogations: if the State's right to self-defence was triggered by the events of 11 September 2001, then a government agent acting within the scope of official duties should, in the authors' view, be able to claim that his actions during interrogation were justified not merely by individual self-defence, but by the exercise of the executive branch's constitutional powers to defend the state (Bybee, 2002). It is precisely at this point – the shift from individual self-defence '*here and now*' to a collective defence of the State, stretched out in time and space, against an abstract collective threat – that the substitution of concepts occurs, one that constitutes the true legal construction of torture disguised as legitimate defence.

The memorandum arrives at another conclusion: notwithstanding the recognition that torture is an evil subject to criminal prosecution, not every use of force, even one bearing the external hallmarks of torture, should be classified as torture (Bybee, 2002). Viewed through the prism of this – now *collective* in nature – necessary defence, individual acts of CIA agents may remain unconstitutional or even criminally punishable in the abstract, yet all such acts, considered through the lens of the Bybee memorandum's argumentation, gain a significant prospect of exemption from criminal liability by virtue of "collective necessary defence" against an undefined terrorist threat (Bybee, 2002). This is the conceptual boundary behind which the true function of the memorandum is concealed: not the prohibition of torture as such, but the creation of a branching system of legal safeguards capable, in the overwhelming majority of practical cases, of neutralising criminal liability for it.

This distortion of the concept of necessary self-defence, which effectively unleashed the application of so-called *enhanced interrogation methods* or *special interrogation methods*, met with consistent and resolute resistance on the European continent, most vividly manifested in ECtHR case-law – above all in the judgment in *Al Nashiri v. Poland* (2014), which should be regarded as one of the key texts for understanding the essence of this transatlantic confrontation. It should be recalled that the case concerns what CIA agents allegedly did on Polish territory, and the ECtHR describes this in very great detail, while explicitly stressing that a considerable part of the information remains unknown to it.

However, given that the relevant actions were carried out on the basis of the same memoranda and internal CIA circulars applied both in America itself and in other countries, the following conclusion suggests itself. The Court established that, after the 11 September 2001 attacks, the U.S. President signed a secret order (Presidential Finding) on 17 September 2001, authorising the CIA to detain terrorism suspects and to establish secret detention sites outside the United States, and that, within the CIA's Counterterrorist Center, a programme was created that later became known as the "*HVD Programme*," the "*CTC program*," or the "*RDI Programme*" (*Al Nashiri*, §§ 47-48). In August 2002, the U.S. Department of Justice provided the CIA with a legal opinion under which ten specific enhanced interrogation techniques were found not to breach the prohibition of torture (*Al Nashiri*, § 49), and a key documentary source of this period became the 2004 CIA Inspector General's Report, supplemented by a CIA background paper of 30 December 2004 on the combined application of interrogation methods and the 2009 Report of the U.S. Department of Justice's Office of Professional Responsibility (*Al Nashiri*, §§ 57, 62).

The Court reproduced in detail the content of the methods, divided into two categories by degree of intensity: standard measures – without physical or substantial psychological pressure (shaving, stripping, use of diapers, hooding, isolation, "white noise" or loud music, constant lighting or darkness, reduced-calorie diet, shackling in various positions, dousing with water, sleep deprivation of up to 72 hours) – and enhanced measures – involving physical or psychological pressure beyond the above, including facial holds, facial slaps, abdominal slaps, prolonged use of diapers, sleep deprivation beyond 72 hours, stress positions, "walling," confinement in a tight box, and waterboarding (*Al Nashiri*, § 55). The ten specific enhanced interrogation techniques were detailed in the 2004 Report itself: the attention grasp; walling; the facial hold; the facial slap; cramped confinement; the insect placed in the box; standing against the wall; stress positions; sleep deprivation – up to eleven days; and waterboarding (*Al Nashiri*, § 54), with the Bybee memorandum, appended to the 2004 Report, itself providing the legal grounds for applying these methods both individually and in combination (*Al Nashiri*, § 56). The Court also set out a systematic account of the "*prototypical*

interrogation," which, according to the CIA background paper itself, rested on a systematic, comprehensive, and cumulative combination of physical and psychological pressure aimed at overcoming the detainee's resistance and creating a state of "learned helplessness" and dependence (*Al Nashiri*, § 62), and which consisted of clearly defined stages – initial capture and reception at the "black site," an initial interview, followed by successive interrogation "sessions," within which sleep deprivation could last from 70 to 120, and, in exceptional cases, up to 180, hours, while the overall duration of the process could reach thirty days (*Al Nashiri*, §§ 64-68). This extreme degree of detail, sequencing, and bureaucratic orderliness in the description only intensifies the sense of shock referred to above: what we see is not spontaneous, situational violence, but a formalised, clinically documented procedure.

In this context the Court established that the applicant, during his secret detention in Poland from 5 December 2002 to 6 June 2003, was subjected to so-called "*unauthorised*" *interrogation methods* – that is, methods that were not even included in the officially sanctioned list – in particular, two mock executions: one involving an unloaded pistol "cocked" near his head while the applicant was shackled in a sitting position, and another involving an electric drill, while the applicant was forced to stand naked and hooded (*Al Nashiri*, § 511).

In addition, the applicant was subjected to so-called "*potentially traumatic stress positions*," which included kneeling with the body forced backwards, stress positions combined with pushing in that position, and lifting off the floor by the arms, bound behind his back with a belt, resulting in his arms nearly being dislocated from his shoulders; he was also threatened that, should he refuse to "talk," his mother and other family members would be brought to the site, making clear that female relatives could be harmed in front of him, while an "interrogator" stood on his shackles, causing additional pain and bodily injury, and blew smoke in his face and scrubbed him with a hard brush intended for removing "ingrained dirt" (*Al Nashiri*, § 511). The Court further established that the team continued applying "enhanced interrogation techniques" to the applicant over two weeks in December 2002, and that, when his behaviour was perceived as "withholding information," the use of the hood and handcuffs was resumed (*Al Nashiri*, § 512), while the remainder of the relevant section of the report, covering the period from December 2002 to September 2003, was redacted, making it impossible to establish what other methods might have been applied thereafter.

In view of the established circumstances, the Court concluded that the treatment the applicant suffered at the hands of the CIA during his detention in Poland should be classified as torture, noting that all measures were applied in a pre-planned and organised manner, on the basis of a formalised, clinical procedure that established a wide range of legally sanctioned methods specifically designed to obtain information, confessions, or intelligence from captured terrorism suspects, with the openly declared aim of psychologically dislocating the detainee, maximising his sense of vulnerability and helplessness, and diminishing or eliminating his will to resist, as well as creating a state of "learned helplessness" and dependence (*Al Nashiri*, § 515). In sum, the Court found that the treatment the applicant suffered at the hands of the CIA during his detention in Poland was not merely inhuman treatment, nor merely a violation of Article 3 but torture within the meaning of Article 3 – that is, the most flagrant form of prohibited treatment (*Al Nashiri*, § 516).

In doing so, the Court found the Republic of Poland responsible for this violation not through the direct participation of Polish officials in the specific acts of ill-treatment – on the contrary, the Court found it improbable that they observed what was happening inside the facility or had definite knowledge of it – but by reason of the fact that Poland knew of the nature and purpose of the CIA's activities on its territory, cooperated in the preparation and conduct of rendition, secret detention, and interrogation operations, and, given the increasingly widespread public information on the ill-treatment of terrorism-suspect detainees held by U.S. authorities, ought to have been aware that, by permitting the CIA to hold such persons on its territory, it exposed them to a serious risk of treatment contrary to the Convention (*Al Nashiri*, § 517). Accordingly, the Polish state, in view of its "acquiescence and connivance" in the implementation of the High Value Detainee Programme on its territory, was found responsible for the violation of the applicant's rights under Article 3 committed on its territory (*Al Nashiri*, § 517); the Court further found that Poland was also aware that the applicant's transfer to and from its territory was carried out by way of "extraordinary rendition" – the extrajudicial transfer of persons from one jurisdiction to another for the purposes of detention and interrogation outside the ordinary legal system, in the presence of a real risk of torture or cruel, inhuman, or degrading treatment – such that the risk of a violation of Article 3 was particularly high and had to be regarded as inseparable from the transfer procedure itself (*Al Nashiri*, § 518). On these grounds, the Court unanimously

found a violation of Article 3 both in its *procedural aspect* – through the failure to conduct an effective investigation into the applicant's allegations – and in its substantive aspect – through Poland's complicity in the CIA's "High Value Detainee" Programme (*Al Nashiri*, § 519).

Thus, we have two texts describing, in essence, the same reality but from opposing legal positions: the Bybee memorandum constructs a *protracted, collective necessary defence*, directed against an *abstract subject*, capable of justifying almost any intensity of physical and psychological pressure on a detainee, whereas the judgment in *Al Nashiri v. Poland* consistently and thoroughly dismantles this construction, showing that what is at issue is not defence "here and now," but a pre-planned, formalised, clinically documented system of torture disguised as legitimate state defence. This juxtaposition of two approaches must necessarily be considered in formulating any further academic discussion on the desirability or impermissibility of the use of torture, since attempts at such legitimisation will arise again in the future. They will arise following yet another terrorist attack by yet another terrorist organisation, one that a national security service fails to prevent. At such moments, political elites will pull out from the drawer the dust-covered old arsenal of applying collective security against an abstract source of threat, in which the victims will each time turn out to be ordinary people subjected to banal torture – though calling this torture "banal" would be an impermissible oversimplification.

It is worth pausing separately on why it was the construct of necessary self-defence – rather than, say, a direct denial of the applicability of the prohibition of torture as such – that the memorandum's authors chose as their instrument of legitimisation. A direct denial of the absolute character of the prohibition of torture would have been too vulnerable from the standpoint of international law, since the prohibition of torture is recognised as a norm of *jus cogens*, admitting of no derogation whatsoever, including in time of war or threat to national security. That is why the Bybee memorandum is constructed not as a denial of the prohibition but as a *dual legal strategy*: first, narrowing the very concept of torture to an extremely narrow circle of the most extreme acts, and second – even where a particular act does fall within that narrow definition – constructing a ground excluding criminal liability for its commission. The second component of this strategy rests on the substitution of the concept of necessary self-defence discussed above: where the direct prohibition cannot be abolished, a justificatory doctrine is introduced that, in practice, neutralises the consequences of that prohibition without formally repealing it.

This strategy has an important structural consequence: it shifts the burden of proving the absence of torture from the State to the victim, while at the same time opening up the possibility of practically unlimited expansion of the list of permitted methods through reference to the "cumulative" and "combined" nature of their application. This is precisely what the description of the "prototypical interrogation" in the 2004 CIA background paper, reproduced in the ECtHR judgment, directly indicates: the methods were not applied in isolation but combined according to a predetermined logic – from "conditioning techniques" through "corrective techniques" to "coercive techniques," each with clearly defined rules for combination with others (*Al Nashiri*, § 67). This "clinical" orderliness of violence is, perhaps, the most eloquent evidence that what is at issue is not a spontaneous response to an imminent threat but a planned, bureaucratically formalised system, designed for *repeated* application to an *undefined* circle of persons for an *undefined* period.

The fundamental contradiction between the logic of the Bybee memorandum and the classic doctrine of necessary self-defence, reproduced in any modern criminal code, becomes apparent. Necessary self-defence is always an exception, applicable to a specific, unique situation limited in time, where the defender has no opportunity to resort to other, less harmful means of protection. The "*prototypical interrogation*" described in CIA documents, by contrast, is a rule – a standard operating procedure, applicable to a wide circle of persons according to a predetermined scenario, providing for a sequence of sessions, combinations of methods, and even limiting periods of sleep deprivation calculated in hours and days (*Al Nashiri*, §§ 64-68). An exception transformed into a rule – this is the essence of the substitution of concepts discussed above: necessary self-defence, which by definition must be exceptional, reactive, and limited, becomes a permanently operating, proactive, institutionalised mechanism.

Another aspect deserving attention is the role of the temporal factor in both constructions. The Bybee memorandum deliberately operates in the future tense and with undefined probability: what is at issue is not an attack that has already occurred or is occurring but an attack that might occur, with the probability and scale of that attack assessed by the very officials interested in obtaining justification for their actions (Bybee, 2002). This construction of a "preventive," *future-oriented* necessary defence fundamentally contradicts the very idea of defence as an immediate response to an existing, actual attack. The ECtHR, by contrast,

consistently operates in categories of established facts, proven "beyond reasonable doubt": the specific date of the applicant's arrest – 5 December 2002 – the specific date of his transfer – 6 June 2003 – and a specific list of acts carried out during this period (*Al Nashiri*, §§ 510-511). This contrast between a *future-oriented*, never ultimately confirmed risk, on the one hand, and a concrete, established, documented fact of harm caused, on the other, is, in essence, yet another manifestation of the same confrontation between the distorted and the classic conceptions of necessary self-defence.

No less telling is the difference in how the two texts treat the subject against whom defence is required. In classic necessary self-defence – and in the criminal legislation of the vast majority of states – this is always a *specific natural person* whose actions directly and inescapably threaten life or health. In the Bybee memorandum, this subject dissolves into abstraction: reference is made to Al-Qaeda as a *network*, to undefined " sleeper " cells, to hypothetical future attacks of undefined scale (Bybee, 2002). The detainee subjected to *enhanced interrogation techniques* is, most often, not a person directly carrying out an attack " *here and now* " – he, by the memorandum's own admission, " does not plant the bomb or fly the hijacked plane, " but merely, hypothetically, " possesses information " about possible future actions of others (Bybee, 2002). In other words, defence is directed not against the attacker, but against a source of information about a hypothetical attacker – a construction that goes far beyond any established understanding of necessary self-defence and approaches, rather, a form of *preventive punishment on suspicion*.

The description of the specific acts committed against the applicant in *Al Nashiri v. Poland* acquires particular significance: it shifts the discussion from the plane of abstract legal constructs to the plane of documented, judicially established fact. These facts, established by the ECtHR, included two mock executions, stress positions capable of causing shoulder dislocation, threats against the applicant's relatives, the deliberate infliction of pain by standing on his shackles, blowing smoke in his face, and scrubbing him with a hard brush (*Al Nashiri*, § 511). The contrast between the language of probabilities and hypotheses employed by the Bybee memorandum, and the language of established facts employed by the ECtHR judgment, is perhaps the most compelling empirical refutation of the very idea of " *collective necessary defence* " as a legally sound construction.

Both texts – the Bybee memorandum and the *Al Nashiri* judgment – acknowledge one and the same thing: some form of influence upon the detainee did indeed take place. The disagreement between them concerns not the fact of the use of force but its legal classification. The memorandum insists that this force does not reach the threshold of torture or, even if it does, is subject to justification through the doctrines of necessity and self-defence (Bybee, 2002). The ECtHR, having examined virtually identical factual material – the same memoranda and internal CIA documents – reached the directly opposite conclusion: the treatment at issue constituted torture, the most flagrant form of ill-treatment prohibited under Article 3 (*Al Nashiri v. Poland*, § 516), and neither necessity nor self-defence, whether individual or collective, was capable of providing any legal justification for it. The Court thereby rejected the central construction of the Bybee Memorandum, which sought to preserve necessity and self-defence as possible grounds for excluding criminal liability even where the treatment concerned fell within its narrowly defined concept of torture.

This final observation is, in our view, of fundamental significance for understanding the nature of the confrontation described at the beginning of this section. The European approach – " *chivalrous*, " to use the figurative terminology employed above – consists not merely in condemning specific CIA acts on the territory of Poland or other European states. It consists in a categorical refusal to recognise any right of the state to " *balance* " the prohibition of torture against any other considerations – national security, the prevention of future attacks, the protection of citizens. It is precisely this refusal to balance that constitutes the legal answer to the attempt to substitute the content of necessary self-defence: where the Bybee memorandum proposes weighing harm against harm, benefit against benefit, the Court insists that certain forms of treatment are *absolutely prohibited*, regardless of what harm they are supposedly capable of averting.

Sklyarenko v. Ukraine: the Instrumentalisation of Victim Status at the Domestic Level

Sklyarenko v. Ukraine (2026) illustrates how difficult it can be even for a State Party to the Convention that formally recognises the absolute prohibition of torture to implement the relevant standards at the domestic level.

In this case, an officer of a Kyiv Pre-Trial Prison, having been tortured by a group of prisoners, faced, at the domestic level – both during the pre-trial investigation and subsequently in the proceedings before

the ECtHR – a systematic attempt by the State to cast doubt on his victim status by reference to a circumstance of no legal significance whatsoever for the classification of the treatment inflicted on him: the fact that he had consumed alcohol on the eve of the incident, on New Year's night 2017.

This case is telling precisely because it demonstrates another, less obvious, but no less dangerous variety of instrumentalisation – not the instrumentalisation of torture as a method of obtaining information but the *instrumentalisation of the victim's behaviour* to discredit *the victim* in order to avoid the institutional responsibility of the State.

The absolute character of the prohibition enshrined in Article 3 of the Convention directly excludes any consideration of the victim's conduct as a circumstance affecting the classification of the act or the scope of protection to be afforded to him: the prohibition admits no exception and applies irrespective of the conduct of the person concerned, and any recourse to force not made strictly necessary by that conduct constitutes, in principle, a breach of Article 3 (*Chahal v. United Kingdom*, 1996; *Labita v. Italy*, 2000; *Ribitsch v. Austria*, 1995; *Saadi v. Italy*, 2008; *Gäfgen v. Germany*, 2010; *Bouyid v. Belgium*, 2015).

Nonetheless, as domestic enforcement practice demonstrates, the state, showing no restraint or awareness of the limits of what is permissible, resorts to such arguments in an attempt to diminish its own responsibility – which is direct evidence of the incompleteness of the process of forming a culture of intolerance towards torture even in a state that officially recognises and declares the relevant standards. Together with *Gäfgen*, *Sklyarenko* outlines two opposite but equally dangerous forms of instrumentalisation that this paper has sought to refute: *in the first case*, the State attempts to instrumentalise the prohibited treatment itself as a means of achieving a legitimate aim (saving a life); *in the second*, it instrumentalises the status of the victim as a means of avoiding its own responsibility for a violation already committed. In both cases, the absolute character of Article 3 rules out any weighing whatsoever: neither the purpose for which the prohibited treatment is inflicted, nor the conduct of the victim who suffers it, can serve as grounds for weakening the protection afforded by this norm.

The mechanism by which this instrumentalisation unfolded in the present case deserves closer scrutiny, precisely because it operated not through an overt denial that ill-treatment had occurred but through a quieter, more institutionally embedded route: the characterisation of the victim's own conduct as the causative factor of the incident. The internal disciplinary committee established by the head of the detention facility, tasked with investigating the attack, concluded that the applicant himself, together with two colleagues and their manager, had failed to comply with the instructions governing their professional duties – in particular, that he had been drunk at the workplace – and it was this finding, rather than any assessment of the conduct of the detainees who inflicted the injuries, that formed the basis for imposing disciplinary sanctions (*Sklyarenko*, § 9).

What is significant for the purposes of this paper is not the finding of a disciplinary breach as such – the presence of a prison officer under the influence of alcohol while on duty is self-evidently a serious professional failing, irrespective of any subsequent victimisation – but the use to which that finding was subsequently put in the framework of the Convention proceedings. The Government's position before the Court did not confine itself to a submission on the length or quality of the investigation; it extended, at the admissibility stage, to an argument that the applicant had abused his right of individual application by allegedly misleading the Court as to the circumstances of the incident and as to the assistance he had received (*Sklyarenko*, § 50). The Court declined to accept this argument, holding that the mere existence of discrepancies between what had been submitted domestically and what had been submitted to Strasbourg did not, without more, amount to an abuse of the right of petition, particularly since the applicant had annexed to his application form the very documents that made it possible to reconstruct what he had said at the domestic level (*Sklyarenko*, § 52). The rejection of this objection is significant in its own right: it confirms that the Court was not prepared to allow considerations extraneous to the treatment inflicted – still less considerations touching on the personal conduct of the person subjected to it – to operate as a threshold bar to the examination of an arguable claim under Article 3.

It is at the level of the substantive limb of Article 3, however, that the tension identified in this paper becomes most visible. The Court, addressing the merits of the complaint concerning the State's direct responsibility for the attack, expressly recalled the finding of the internal investigation that the incident had occurred owing to the applicant's failure to follow the instructions given for his duties, in particular that he had been drunk at the workplace (*Sklyarenko*, § 60), and on that basis concluded that the applicant had failed to adduce sufficient evidence that it was the State's fault that he had been attacked, declaring the substantive complaint manifestly ill-founded (*Sklyarenko*, §§ 61–62).

It must be stressed that the Court did not in terms hold that alcohol consumption deprived the applicant of his status as a victim of ill-treatment, nor did it purport to weigh his conduct against the gravity of the treatment inflicted upon him, in a manner that would have been flatly incompatible with the absolute character of Article 3. The Court's reasoning was addressed to a narrower and, in formal terms, a legitimate question – whether the State itself bore responsibility for the fact that the attack occurred, as opposed to the question of how the ensuing suffering should be classified.

Yet it is precisely this formal narrowness that, in the submission advanced here, allowed the domestic narrative built around the applicant's alcohol consumption to migrate, largely unexamined in its evidentiary weight, from an internal disciplinary file into the framework of an international human-rights adjudication, where it came to occupy a place adjacent to – even if not identical with – an assessment of victim status.

The danger illustrated by *Sklyarenko* thus lies not in an explicit judicial endorsement of the State's argument, which the Court refrained from giving, but in the structural vulnerability of the procedural architecture of Article 3 itself: a fact wholly irrelevant to the classification of ill-treatment can nonetheless determine, at the level of attribution of State responsibility, whether that ill-treatment receives any substantive remedy at all. Where, as here, the substantive complaint is declared inadmissible while the procedural complaint, concerning the protracted and largely inert investigation that spanned close to eight years (*Sklyarenko*, §§ 55–58), succeeds, the practical outcome is that the individual who suffered the treatment is left with a finding on the quality of the inquiry into what happened to him, but without any adjudicated finding on state responsibility for the fact that it happened – a result which, however doctrinally correct on its own terms, leaves ample room for the domestic authorities to continue invoking the victim's own conduct as a shield against institutional accountability, precisely as the state had already attempted to do before the internal committee and, at the admissibility stage, before the Court itself.

It is this asymmetry – between the Court's formal fidelity to the absolute character of Article 3 in its explicit reasoning, and the practical latitude that its procedural/substantive distinction leaves for domestic authorities to instrumentalise circumstances of the victim's own conduct in order to escape responsibility – that renders *Sklyarenko v. Ukraine* a paradigmatic illustration of the second form of instrumentalisation identified in this paper. Where *Gäfgen* concerned the temptation to treat prohibited methods as a proportionate means to a legitimate end, *Sklyarenko* concerns the temptation, no less corrosive of the absolute prohibition, to treat the victim's own imperfections as a proportionate means of diminishing the State's own exposure to liability. Both temptations must be resisted with equal rigour if the prohibition of torture and inhuman or degrading treatment is to retain, in practice and not merely in doctrine, the unconditional character that the Court has consistently attributed to it since *Ireland v. the UK*.

From Prohibition to a Culture of Intolerance: a Paradigm Shift

Summarising the foregoing, it may be stated that the thesis of the instrumental value of torture is a myth – a myth dangerous in its practical consequences but at the same time a myth that has long since been refuted from a philosophical, ethical, and legal standpoint. At the same time, any modern argumentation in favour of refuting this myth ultimately comes down, in one way or another, to a simple reference to the prohibition itself, without the need to reproduce in detail the reasons and grounds for its establishment – much as a religious commandment is perceived by a believer as a self-sufficient normative basis requiring no repeated rational justification.

This is precisely the key thesis of this subsection: the prohibition of torture has gradually become one of the ideological, almost quasi-religious foundations of European society, although this nature of it usually remains unnoticed and unspoken – it is perceived as something that *simply exists*, without reflection on the path that European states had to travel in order not merely to formally enshrine the prohibition of torture in Article 3 but to transform it into a practice naturally and unquestioningly perceived and reproduced by police officers, prison staff, and security forces – without debate and without objection.

In the twenty-first century, in the era of human rights, further argumentation regarding the absence of instrumental value in torture for obtaining information appears, to a significant extent, exhausted: the examples cited above – *Gäfgen v. Germany* and the post-9/11 experience of *enhanced interrogation techniques* – sufficiently confirm this thesis both at the empirical and the legal level. This, however, does not mean that the natural state of affairs achieved requires no continuous maintenance. On the contrary – precisely because the absolute prohibition is not a natural but a historically and institutionally constructed state, it requires uninterrupted reproduction and support at the level of *culture*, not merely of norm.

Key to understanding the current stage in the development of the relevant legal and institutional order is an analysis of the shift in the paradigm itself: from a *prohibition* of torture justified through demonstrating the absence of instrumental significance and value of torture for the State and its agents, to a *culture of absolute non-acceptance of torture as such*, transmitted from generation to generation among law-enforcement personnel and inseparable from an analogous culture of intolerance towards torture in broader society. It would be *naïve*, and even dangerous, to analyse a culture of absolute intolerance towards torture and other forms of ill-treatment within law-enforcement institutions and prisons in the absence of the same culture in society at large: institutional intolerance cannot exist in isolation from societal intolerance; it is derivative of it, just as it also shapes it.

Yet this account of a slowly maturing *culture of intolerance* should not be read as suggesting that the prohibition of torture is received uniformly across the professional community it is meant to bind. Empirical experience, gathered from long-term engagement with police officers, prison staff, and security personnel across a range of jurisdictions, points to at least two distinct patterns of reception, which for analytical purposes may be treated as ideal types. For a considerable part of this community, the absolute prohibition already functions in the manner described above: as a *self-sufficient normative axiom*, felt rather than reasoned, requiring no further justification and admitting no exception regardless of the punishment that domestic criminal law may attach to its breach. For this group, the culture-based paradigm is not merely a desirable end state; it is already, in essence, the operative reality.

However, there exists a second population within law-enforcement institutions and prisons for whom this pre-reflective moral commitment either has not yet formed or has been displaced by a competing professional socialisation. These are, typically, officers who entered the profession without systematic exposure to rights-compliant investigative interviewing methodology, and who instead absorbed, early in their careers, an informal "*craft knowledge*" transmitted by more experienced colleagues – a set of practices in which coercive or borderline-coercive means of extracting statements were modelled as effective and, within the closed culture of the unit, unremarkable. In the absence of any competing model grounded in professional standards, human-rights training, or structured interviewing techniques, such practices could be, and often were, absorbed as simply "*how the job is done*," without their being subjected to independent ethical scrutiny at all.

For officers formed within this second trajectory, moral or quasi-religious argumentation of the kind described earlier tends to be inert. Such argumentation presupposes precisely the pre-reflective internalisation that this group, by definition, lacks: an appeal to the sanctity of the prohibition, to its character as an inviolable ideal not to be crossed under any circumstances, speaks in a moral register the addressee has not yet acquired, and therefore fails to engage him at all. It would be naïve to expect a purely moral appeal to dislodge a practice that was never adopted through moral reasoning in the first place. If a shift away from ill-treatment is to be achieved for this segment of the professional community, it cannot rely on moral condemnation alone; it requires an argument couched in terms the addressee already uses to reason about his own conduct – that is, a rational, consequentialist argument, addressed not to conscience but to prudence.

The substance of such a rational argument is, in essence, an inversion of the instrumentalist claim itself. Even granting, for the sake of argument, that coercion occasionally yields a statement that happens to be true – the very premise this paper has sought to dismantle at the level of principle – the argument can be met on its own instrumentalist terrain and still be shown to fail, once the analysis is extended beyond the immediate moment of the coerced statement to its foreseeable downstream consequences for the officer himself. What looks, at the moment of extraction, like an operational success is, from a longer and more complete perspective, very rarely a net gain even for the individual perpetrator, let alone for the institution or the State.

Consider, by way of illustration, a police officer who resorts to ill-treatment in the course of investigating a comparatively minor offence and thereby obtains a confession from a suspect already in custody. Judged solely by the immediate metric of case clearance, the officer has succeeded. Yet this success is asymmetrical and, on any rational accounting, self-defeating. The officer has, in the first place, inflicted upon himself a moral and psychological injury that does not dissipate with time and from which he does not fully recover; this is a cost he carries regardless of whether the act is ever discovered. Beyond this internal cost, he has exposed himself to a wholly realistic prospect of criminal investigation and prosecution for the ill-treatment itself, together with disciplinary proceedings capable of ending his career; and he has placed at risk his own standing in the eyes of colleagues, superiors, family, relatives,

and neighbours – a form of reputational destruction that, once triggered, is rarely reversible. Measured against these foreseeable and substantial personal costs, the gain secured – resolution of a minor property crime – is trivial. A rational actor, made to see this asymmetry clearly and in advance, has every reason, even absent any moral conviction whatsoever regarding the wrongness of torture as such, to conclude that ill-treatment does not serve his own interests.

This is precisely the function that a properly constructed rational argument can perform for the segment of the professional community not yet reached by the culture of intolerance: it operates as a first line of rescue, a prudential lifebelt thrown to those who have not internalised, or have not yet internalised, the deontological prohibition, but who remain capable of calculating consequences to themselves. It does not purport to substitute for the moral and cultural transformation described earlier in this subsection, nor does it claim to produce genuine ethical conversion; its ambition is more modest and, for that reason, more immediately achievable – to arrest the conduct itself, even where the underlying attitude has not yet changed, by making the personal cost of that conduct concrete, foreseeable, and disproportionate to any conceivable benefit.

This differentiated understanding of how the prohibition is enforced carries direct implications for the design of national policy against ill-treatment in law-enforcement and prison settings. A prevention strategy built exclusively around the register of moral suasion – training modules, codes of conduct, and institutional messaging that appeal to conscience and to the inviolability of human dignity – will, on the analysis offered here, reach only the part of the professional community already disposed to receive it, while leaving unaddressed precisely the officers most likely, in practice, to resort to coercive methods. An effective strategy must therefore operate simultaneously at two levels: at the *macro level*, through the sustained cultivation of an institutional and societal culture of intolerance towards torture and ill-treatment, of the kind discussed above, targeting the professional community and the wider public as a whole; and at the *micro level*, through the deliberate and targeted communication of individually calculated, rationally framed consequences to those officers and units identified – whether through complaint patterns, disciplinary records, exposure to high-risk operational contexts, or assignment to interrogation and custodial functions – as most susceptible to recourse to ill-treatment. National training curricula, CPT country-level recommendations, and internal disciplinary guidance addressed to police and prison services would accordingly benefit from incorporating this second, rational register explicitly, rather than relying, as much existing training material still does, on moral appeal alone.

These two levels are not in competition with one another; they are complementary, and, over time, sequential. Theories of moral development and of norm internalisation within organisations consistently observe that compliance secured initially through prudential, consequence-based reasoning frequently precedes, and can gradually give way to, a more principled internalisation of the underlying norm, particularly once that norm is reinforced by institutional culture, peer example, and consistent enforcement. Understood in this light, the rational argument addressed to the individual officer is not a rival to the culture-based paradigm this subsection has described; it is one of the mechanisms through which that culture is, in practice, built and transmitted at the level of the individual actor, complementing rather than displacing the CPT's broader role – examined throughout this paper – in shaping a culture of zero tolerance towards torture and other forms of ill-treatment.

The paradigm shift described in this subsection should therefore be understood as operating along two simultaneous and mutually reinforcing tracks rather than a single uniform trajectory. Where the moral and cultural argument addresses the professional community and society as a bearer of shared values, gradually transforming the unspoken normative environment within which law-enforcement and prison personnel act, the rational argument addresses the individual officer as a calculating agent, meeting him precisely where moral appeal alone cannot yet reach. Recognising this plurality of psychological entry points is not a retreat from the absolute character of the prohibition itself, which remains non-negotiable and admits no instrumental justification; it is, rather, a recognition that the practical route by which different members of the professional community come to respect that prohibition in action is not, and need not be, the same for all of them.

Busification' as a Case Study: How War Dissolves the Absolute Prohibition and Normalises Coercive Practice

The most telling example of a territory at whose borders the human rights era has effectively come to a halt is the Russian-Ukrainian war and the systemic practice of the Russian Federation in applying torture, both to the civilian population in temporarily occupied territories and to prisoners of war and civilian

detainees held on the territory of Russia. Unlike the didactic model of the “ticking time bomb,” which postulates torture as an exceptional, last-resort means applied under conditions of acute necessity to obtain specific life-saving information, the documented practice of torture and other forms of ill-treatment carried out by agents of the Russian Federation bears the hallmarks of systematicity and mass scale, and is devoid of any connection to genuine operational necessity – it functions as an instrument of intimidation, punishment, dehumanisation, and the suppression of national identity, which directly contradicts the very logic of “instrumental” justification that this paper seeks to refute.

In this sense, a comparative analysis of the European culture of intolerance towards torture, on the one hand, and the practice of the aggressor state, on the other, provides grounds for an important methodological conclusion: the very presence or absence of a societal and institutional culture condemning torture as such is a far more accurate indicator of the actual state of compliance with Article 3 than the formal accession of a State to the relevant international treaties. Ratification of the Convention and recognition of the jurisdiction of the ECtHR are necessary but evidently insufficient conditions; without a deeply rooted institutional culture of intolerance, the formal prohibition remains a declaration devoid of practical content.

It would, however, be methodologically incomplete to locate the erosion of the absolute prohibition solely at the external border between the aggressor state and its victims. A war does not merely licence violence against the enemy; it also recalibrates, within the defending state itself, the threshold of what is regarded as tolerable coercion against one’s own citizens.

The Ukrainian experience of *forced mobilisation* in 2023–2026 offers a striking domestic illustration of this mechanism. In public discourse, the practice acquired its own name – ‘*busification*’ – denoting a situation in which a person of conscription age is forcibly detained in the street, put into a minivan (a ‘bus’), deprived of the ability to communicate with relatives or counsel, pushed through an accelerated military medical commission, and within days transported to a training centre, frequently without prior notice or any individualised assessment of qualification or motivation (Beniuk, 2024). The very fact that the phenomenon required a dedicated neologism, subsequently recognised as the word of the year 2024 by the dictionary of contemporary Ukrainian slang, is itself evidence of the scale and social salience the practice had attained (Berezhanskyi, 2025).

The causes identified by Ukrainian scholars and public officials mirror, in structure if not in gravity, the logic that sustains torture in wartime more generally: exhaustion of a legitimate resource (the voluntary mobilisation pool), the absence of vertical solidarity on the part of influential social strata, and collective psychological disillusionment following military setbacks (UAINFO, 2025). Where the instrumental justification of torture claims necessity in the face of an imminent threat, the instrumental justification of busification claimed necessity in the face of manpower shortages – in both cases, an appeal to exigency is used to displace the question of lawfulness.

Before 2024, examples of ‘*busification*’ were quite rare. A member of the Ukrainian Parliament, Solomiia Bobrovska, noted that the practice was applied systematically in three regions – Zakarpattia, Odesa, and Chernivtsi – while accountability for the use of force fell on only a handful of employees of the territorial recruitment centres (hereinafter – “TCC”) (NV, 2024a). Later, *busification* practices reached the level of a nationwide phenomenon, pointing to the asymmetry between the systemic character of the practice and the isolated character of accountability.

A more systematic theoretical grounding for this structural analogy can be found in the international relations literature on the functions of state torture. Ruth Blakeley observes that, although the bulk of scholarship on state torture has concentrated on authoritarian regimes, comparatively few researchers have examined its use by liberal democracies (Blakeley, 2007:373). Ukraine, as a liberal, ECHR-bound state that nonetheless tolerated a mass coercive practice bordering on ill-treatment for the sake of sustaining its capacity to wage a defensive war, constitutes precisely such an understudied case, and Blakeley’s tripartite framework of security, stability, and legitimacy supplies a vocabulary that maps with striking precision onto the domestic mechanics of busification.

Structurally, the phenomenon sits closest to what Blakeley terms the *stability model*: a form of coercion whose function is not to defeat an external threat but to secure, through fear and enforced compliance, the continued interests of a governing elite confronted with a crisis for which it bears substantial responsibility. For over three decades of independence, successive Ukrainian political elites tolerated endemic corruption within the defence and security sector instead of investing in the creation of a genuinely professional standing army; when the full-scale invasion exposed the consequences of that omission, the resulting shortfall in personnel was resolved not through structural reform but by transferring its human

cost directly onto the civilian population, most immediately onto citizens of conscription age who had neither volunteered for service nor been meaningfully prepared for it. Political elites who had, over decades, converted the absence of a professional army into a source of illicit rent thereby chose, at the moment that absence became a matter of state survival, to convert citizens' bodies into a substitute for the reform they had never undertaken – a transaction that protected their own material and political positions at the direct expense of the population they governed.

Consistent with the pattern Blakeley identifies across her comparative cases, the coercive practice did not remain confined to a narrow, clearly defined target group but expanded steadily in scope as the underlying pressure – in this instance, the operational demand for personnel at the front – intensified. The earliest and most visible waves of *busification* targeted precisely those social strata least able to resist or to mobilise public sympathy: persons with alcohol or drug dependency, homeless individuals, and other socially declassified groups, whose seizure attracted little institutional or media scrutiny. As battlefield losses continued to outstrip the pool of willing volunteers, however, the practice broadened well beyond this initial population, encompassing increasingly random segments of the male population encountered in public space, irrespective of health, family circumstances, or professional indispensability. This trajectory – from a targeted practice tolerated because its first victims were socially marginal, to an indiscriminate one sustained by institutional inertia and manpower necessity – replicates, in a domestic and comparatively lower-intensity register, the dynamic that Blakeley documents in relation to torture deployed for the stability of authoritarian and transnational elite networks.

The legal dimension of the problem sharpens the analogy further. The TCC, as a body of military administration, is not vested with law-enforcement powers: it has no authority to stop citizens in the street, to check documents without the involvement of the police, or to detain individuals independently, since these functions are legislatively reserved to the National Police (Sud.ua, 2026). In 2026, draft law No. 15076 was even introduced in the Ukrainian Parliament with the specific aim of prohibiting the TCC from independently applying physical force – a legislative response that presupposes, and thereby confirms, the prior absence of any lawful basis for such force (Sud.ua, 2026). At the same time, the police publicly declared themselves unprepared to assume mobilisation-related functions, citing staffing shortages and risks to public trust (Sud.ua, 2026). The result was a jurisdictional vacuum in which coercive practice outran legal authorization – precisely the condition under which, as the preceding analysis of the aggressor state's conduct suggests, an institutional culture of restraint either holds the line or fails to.

The discursive trajectory surrounding *busification* is at least as instructive as the practice itself because it reveals how a democratic state under wartime pressure can reproduce the denial mechanisms typically associated with authoritarian cover-ups of ill-treatment. For an extended period, official representatives of the Ministry of Defence and the TCC avoided acknowledging the problem, instead attributing responsibility to citizens who allegedly “*consciously ignored*” their duty to update military registration data (Espresso.TV, 2024). A particularly telling illustration is the statement of a spokesperson for the Poltava regional TCC asserting that aggression toward TCC personnel predated the emergence of the term ‘*busification*’ itself, and that the problem lay not in the conduct of personnel but in society's unwillingness to accept the reality of war (ArmyInform, 2025). The same outlet subsequently went further still, publishing an editorial contending that the words “*busification*,” “*manhunters*,” and a pejorative term for TCC staff were artificial labels invented by Russian propaganda to dehumanise TCC and recruitment-support personnel and to undermine trust in the recruitment system, and that they should therefore be taboo (ArmyInform, 2026). It is true that mobilisation had become one of the most active targets of Russian disinformation, accompanied by fabricated video material (Hromadske Radio, 2026a).

At the same time, this discursive strategy corresponds closely to what Blakeley calls the *legitimacy model* of torture: state actors seek to secure the right to use coercive measures by presenting them as an aberrant but exceptional necessity, one that only the state itself is entitled to define and invoke. As Blakeley observes, “the state determines when certain exceptional conditions are met” under which such extraordinary measures may be used, and outside those self-declared conditions the same conduct would be condemned as illegitimate (Blakeley, 2007:393). The Ukrainian discourse surrounding *busification* reproduces this logic in a domestic key: officials and sympathetic media did not, for the most part, deny that coercion occurred but instead constructed conscription-age citizens as having forfeited their claim to ordinary legal protection by “*consciously ignoring*” civic duty, thereby recasting the population itself, rather than the state's own failure to build a sustainable mobilisation system, as the source of the crisis. This rhetorical move performs a double function identical to the one Blakeley describes: it authorises the practice

as a *regrettable but necessary exception*, and it simultaneously reassigns responsibility for the resulting suffering from the political elites who created the shortfall in personnel to the ordinary citizens who bore its consequences. By framing busification as a painful but indispensable instrument for saving the state, those same elites – whose decades of tolerated corruption had precluded the alternative of a professional standing army – were able to present coercive mobilisation as a shared national sacrifice rather than as a policy choice for which they themselves bore responsibility.

This pattern of denial reached, and then receded from, the very institution constitutionally tasked with its scrutiny. In early December 2024, a regional representative of the Verkhovna Rada Commissioner for Human Rights stated that busification had been almost eradicated in Ukraine, a claim the Commissioner himself, Dmytro Lubinets, immediately repudiated as having been taken out of context, stressing that no “victory” could be declared (NV, 2024a). Only days later, however, Dmytro Lubinets acknowledged that instances of physical busification were declining because “this approach does not work,” even as the number of complaints concerning mobilisation-related violations that year exceeded four thousand (Pohorila, 2024; NV, 2024b). The most complete and consequential acknowledgment came on 1 July 2026, when Dmytro Lubinets publicly stated that mobilisation, in the course of which busification had become a systemic phenomenon, required a change of approach: abandonment of quantitative recruitment targets, a shift in the motivational basis of enlistment, conversion of TCC premises into service-oriented centres, and cessation of the practice of wearing balaclavas and checking documents without police involvement (Ukrainews, 2026). Criticism also came from within the military itself: some field commanders described busification as a *national humiliation*, distinguishing it sharply from lawful compulsory mobilisation – a legitimate procedure inherent to any state engaged in total war – precisely on the ground that busification, unlike lawful conscription, involved the indiscriminate seizure of individuals from the street without regard to qualification, motivation, or any systemic planning whatsoever (Hromadske Radio, 2024).

The trajectory from denial to acknowledgment supports the paper’s central methodological claim from an unexpected angle. Unlike the Russian Federation, Ukraine is a State Party to the Convention in substance as well as in form, and it has an active parliament and a media environment in which spokespersons, editorial boards, officials, and military commanders can contest the very naming of the phenomenon in public. This institutional culture ultimately allowed a coercive practice occurring at the margins of lawful authority to be named, investigated, and, however incompletely, curtailed. War did not suspend the formal prohibition on arbitrary detention and inhuman or degrading treatment in Ukrainian law; what it did was create the operational conditions – exigency, jurisdictional confusion, and a rhetoric of necessity – under which a practice bordering on ill-treatment could emerge and, for a period, be normalised through official silence and, subsequently, through the deliberate reframing of the very language used to describe it as an enemy construct. That this *normalisation* was ultimately reversed by the ombudsman’s explicit acknowledgment does not weaken the analogy to the aggressor state’s conduct; it sharpens it, by demonstrating that even within a rights-respecting institutional culture, the pressure of war pushes toward the erosion of protective norms, and that the difference between Ukraine and the Russian Federation in this respect lies not in the absence of such pressure but in the presence of institutions willing, eventually, to resist and correct it. The formal prohibition, in other words, is necessary but insufficient in both directions: it neither prevented the practice from emerging under wartime strain, nor was it, by itself, the mechanism through which the practice was ultimately curbed – that mechanism was, again, an institutional culture of scrutiny and correction, operating through parliamentary initiative, ombudsman oversight, and public discourse rather than through the text of the Convention alone.

The Absolute Prohibition of Torture and the Trap of the “Bargaining Philosophy”: From an Extraordinary Precedent to Routine Practice

The subject of the absolute prohibition of torture and other forms of ill-treatment under Article 3 of the Convention appears, at first glance, unshakeable, well-established, and unlikely ever to be challenged. This impression is built up in light of *Gäffen* and *Jalloh*, in which the ECtHR, it would seem, closed the debate on the absoluteness of this prohibition. Precisely because this closure exists – despite isolated attempts to call it into question and subject it to revision – it is itself the object of our interest: not in order to challenge the established conclusion, but in order to show how a narrow reading of that conclusion is precisely what generates the risks that these cases were, in fact, formulated to overcome.

Gäffen and *Jalloh* create a certain framework – a framework of cases in which torture or another form of ill-treatment is applied to a person for the sake of a specific, clearly articulated high social purpose.

These are examples that are fairly well established, radical, vivid, acute, and undoubtedly attractive for doctrinal analysis, but at the same time, from a real-life standpoint, extremely rare. The case of *Gäfgen* describes a situation that occurs extremely rarely – one involving the saving of a life during a kidnapping or a terrorist act being prepared. The case of *Jalloh* has a more mundane context, yet is likewise rare: the police visibly observed drug trafficking and attempted to retrieve the relevant portion of the narcotic substance directly from the detainee's body. Both scenarios share one thing in common – *extraordinariness*. This extraordinariness, once taken as the unit of measurement of absoluteness, creates a hidden danger: any narrow interpretation and reading of these precedents leaves outside the field of absoluteness a much broader – and much more routine – body of practices.

The issue of torture and other forms of ill-treatment acquires particular acuteness in a state that we define as a *deviant state*: in the era of human rights the risk grows that any other goal proclaimed by the state as socially significant turns out to be a temptation to remove the relevant practice from the scope of the absoluteness of Article 3 of the Convention. In other words, the less extraordinary and the more “everyday” a case is, the easier it becomes to imagine that absoluteness applies to it only conditionally (Yagunov, 2024).

This risk is illustrated by at least four types of situations that, at first glance, appear to have nothing in common with the “ticking-time bomb” scenario, yet are subject to the same bargaining logic.

First, this is the array of cases in which a migration service decides on the extradition or expulsion of a person to a third country solely for a high and socially oriented purpose – to protect the state and its population from a person considered a terrorist or the leader of an extremist group. The nobility of the purpose – to save the country from terrorism – is beyond doubt here. However, the price of this purpose is the safety of the person themselves, who, after expulsion, falls into conditions that are highly likely to create a threat to their life or physical integrity through the application of the death penalty or torture in the third state. This example is significantly more mundane and significantly more widespread than the hostage-rescue scenario.

Second, this is a situation in which, for the purpose of protecting the patients of a psychiatric institution – and, at the same time, the staff – excessive means of restraint, whether physical or chemical, are applied to a particular patient. External calm within the psychiatric institution here appears as a benchmark of greater weight than the inner world and psychological integrity of the particular person whom the State is thereby attempting, *de facto*, to remove from the institutional environment. The concept of the absoluteness of the prohibition of torture must be applied in this sphere just as it is in the sphere of criminal justice.

Third, these are cases in which the national authorities, guided by concern for public safety – a concern that not infrequently is imaginary in nature and rests on unverified scientific research – apply a preventive measure in the form of chemical castration, once again through the lens of future social security. Whatever may be said about the grounds for such measures, they bear a distinctly Lombrosian character and are aimed at securing society at the cost of the bodily and psychological integrity of the particular individual.

Fourth, this is a decision by the management of a prison or of the national prison administration as a whole – amid a surge in crime – to accept a greater number of prisoners than the available space allows, rather than putting the law-enforcement system in a situation where people have to be literally released (illustrative in this context is the recent British penitentiary crisis, when the system had to be unloaded in waves of early releases). The logic here is the same: for the sake of “our streets” and “our cities,” suspects and convicts can “put up with” a few square meters less, so that the courts and law-enforcement agencies get a breathing space to overcome the crisis.

If someone were to object that the life of a hostage of a terrorist is incomparable to a reduction of one square meter in cell space, the answer lies in two propositions. First, any and all forms and types of ill-treatment and torture are absolutely unacceptable and prohibited regardless of the scale of comparison. Second, the conditional “torture code” of any modern deviant state expands over time – through the raising of standards for holding people in places of deprivation of liberty – and the state must take responsibility for this expansion just as consistently as for extraordinary cases.

The conclusion to which this problem invariably returns is that absoluteness tolerates no bargaining or negotiation. If the temptation arises to bargain over life- and health-endangering forms of influence on a terrorism suspect, that same bargaining philosophy extends to other forms of treatment in which the state and its agents become a source of responsibility under Article 3 of the Convention. The cases of *Gäfgen*, *Jalloh* and other related cases, which make up the foundational body of the case-law of the ECtHR on the absolute prohibition of torture, have not lost their relevance in any way – on the contrary, they acquire

new significance precisely when the state attempts to expand the circle of exceptions by invoking the ordinariness of the circumstances.

The Ukrainian example is, in this context, highly illustrative – amid a war of a kind to which Europe, fortunately, had grown unaccustomed. Against the backdrop of the declared absoluteness of the prohibition of torture, the political elites *de facto* tolerate nationwide practices of busification, while at the same time insisting that this practice has nothing in common with the derogation from Article 3 of the Convention that is, in fact, taking place. This discrepancy between formal absoluteness and its actual bargaining away constitutes the principal subject of further research.

Conclusions

The analysis of *Gäfgen* and other case law provides an exhaustive answer to the question posed in this paper. *Instrumental rationality*, applied to the prohibition of torture, is refuted not on a theoretical, abstract plane but on factual material most favourable to that thesis: a threat to the life of an innocent child, the good-faith intentions of officials, the absence of any pre-planned intent to torture as such, and the brief duration of the threat itself (approximately ten minutes). If, even under such circumstances, the ECtHR permitted no departure whatsoever from the prohibition enshrined in Article 3, this confirms that the absolute character of this norm is not declaratory or situational but constitutes a structural element of the Convention system for the protection of human rights.

At the same time, the *Gäfgen* case demonstrates another, no less important, dimension of the failure of instrumental logic – the empirical one. Even the State that attempted to apply the ‘rescue’ justification within its own legal system proved unable to keep it within narrow, controlled limits: the leniency of the punishment turned into a practical absence of deterrent effect, the acknowledgment of guilt was combined with the career advancement of the guilty official, and the right to an effective remedy was devalued by years of delay in examining the compensation claim. These three elements, combined by the ECtHR into a single *cumulative victim-status test*, are empirical proof that instrumental justification, even legitimised through the category of a mitigating circumstance at the sentencing stage, turns into a systemic channel for the erosion of state accountability.

Thus, the instrumentalisation of torture remains a *rhetorical*, not a legal, construct: no legitimate aim, including the saving of a human life, is capable of transforming prohibited treatment into permitted treatment. This is precisely the practical significance of *Gäfgen v. Germany* for refuting the myth in question – the judgment demonstrates that the absoluteness of Article 3 was tested by the ECtHR not on an abstract hypothesis but on the most emotionally and morally charged factual material available in its practice and withstood that test without a single exception. It is this combination of doctrinal severity and factual extremity that gives the judgment its *unique probative value*: had the ECtHR been willing to bend the absolute prohibition anywhere, it would have bent it here, where the stakes were framed in the most sympathetic terms imaginable for the instrumentalist position. That it did not do so removes, once and for all, the possibility of treating the absolute character of Article 3 as a rule that yields under sufficiently dramatic pressure.

The broader analysis conducted in this paper provides grounds for supplementing this central conclusion with several further points.

First, the didactic “ticking time bomb” model, despite its persistent presence in educational and training discourse on human rights, is a methodologically untenable construct, built on cinematic rather than empirical premises, and incapable of reflecting the real nature of terrorism as a phenomenon whose participants’ knowledge is distributed, fragmented, and situational in character. The model presupposes a single, omniscient detainee who possesses complete and immediately actionable information about an imminent, precisely located, and precisely timed threat, together with an interrogator who can be certain, in real time, that torture will produce accurate rather than false or misleading information. None of these premises withstands scrutiny once measured against the actual organisational structure of terrorist networks, the well-documented unreliability of statements extracted under duress, or the practical impossibility of verifying, at the moment of decision, that the underlying factual predicate for the scenario is even true. The persistence of the model in pedagogical settings is therefore not a reflection of its explanatory power but of its rhetorical convenience: it offers a vivid, emotionally compelling shortcut that allows instrumental reasoning to bypass the harder, more realistic question of whether torture reliably works at all.

Second, *Gäfgen v. Germany*, despite its widespread oversimplification in both popular and, at times, academic commentary, confirms rather than undermines the absolute character of Article 3. All *oral* evidence obtained as a result of the threat of ill-treatment was excluded from the criminal proceedings, while the Grand

Chamber's finding that the trial remained fair rested primarily on the applicant's fresh and voluntary confession before the trial court, not on any residual reliance on the tainted material. Commentators who cite *Gäfgen* as evidence that coercively obtained information can, in some diluted form, still be used against a defendant, misread the judgment's actual structure of reasoning: what saved the trial's fairness was precisely the causal and evidentiary independence of the later confession from the earlier threat, not any relaxation of the exclusionary consequences that attach to a breach of Article 3.

Third, the experience of the terrorist act in Monaco and the systemic practice of the Russian Federation in the context of the Russian-Ukrainian war demonstrate, from seemingly opposite positions on the spectrum of political violence, the very same underlying thesis: the actual practice of terrorism and the actual practice of state-organised violence have nothing in common with the archetype of the "ticking time bomb." In both cases, what is observed empirically is not a single, isolated, time-critical dilemma faced by an individual official acting in good faith but either a diffuse, decentralised threat structure resistant to the kind of clean informational capture the model requires, or a systemic, institutionalised policy of violence pursued for reasons of coercion, deterrence, and domination rather than the urgent extraction of life-saving information. The instrumentalisation of torture, where it in fact occurs in either of these contexts, is accordingly a manifestation not of rational necessity but of systemic dehumanisation – a bureaucratic and ideological normalisation of ill-treatment that has detached itself from the narrow rescue scenario that instrumentalist theory purports to defend.

Fourth, *Sklyarenko v. Ukraine* demonstrates that even in a State formally recognising the absolute character of the prohibition of torture, a practice persists at the domestic level that contradicts the very essence of this prohibition – the *instrumentalisation of the victim's conduct* as a means of avoiding institutional responsibility. This is instrumentalisation of a subtler and, in some respects, more insidious kind than the classic '*rescue*' justification: it does not openly claim a legitimate aim capable of outweighing the prohibition but instead attempts to shift the analytical focus from the conduct of state agents to the conduct or credibility of the person who suffered ill-treatment, thereby diluting institutional accountability through procedural and evidentiary means rather than through overt doctrinal exception. The persistence of this pattern within a Convention state that has never disputed the abstract absoluteness of Article 3 illustrates that formal acceptance of the norm at the level of constitutional or international commitment does not, by itself, guarantee its substantive observance in the daily practice of investigation and adjudication.

Fifth, the historical genealogy of the paradigm itself must be kept firmly in view when assessing its resilience going forward. The paradigm of the absolute prohibition of torture, and the accompanying culture of zero tolerance that the Council of Europe system, the ECtHR, and the CPT have worked for decades to build, was formed and consolidated in a post-war Europe – and, more precisely, in a Europe of sustained peacetime. That formative environment allowed the paradigm to develop into a settled orthodoxy without ever having to withstand the particular pressures generated by an active, large-scale, existential armed conflict fought on the territory of a Convention state. The war launched by the Russian Federation against Ukraine therefore constitutes not merely one more set of factual episodes to be catalogued under Article 3, but the first genuinely sustained test of whether a paradigm built under and for peacetime conditions can retain its practical, as opposed to merely declaratory, force once a Convention state is fighting for its survival. This is a structural vulnerability that pre-dates the war and is not the fault of Ukraine or of the Ukrainian population; it lies in the fact that the paradigm's institutional memory and operational reflexes were never calibrated against wartime stress of this magnitude.

Sixth, the phenomenon that this paper has described under the heading of Ukrainian '*busification*' illustrates how quickly practices developed over decades can be eroded once such wartime stress is combined with a permissive institutional posture at the level of national elites. It would be both analytically mistaken and unjust to attribute this erosion to Ukrainian society as such, or to treat it as evidence of some inherent weakness in Ukraine's commitment to human rights. The responsibility for this state of affairs, and for what amounts to a *de facto* diversion against the paradigm of the absolute prohibition of torture, rests with segments of the Ukrainian political and administrative elite who have, in effect, asserted a legitimate entitlement to the broad use of coercive and, at times, degrading practices in the name of saving the state – while the underlying interests being served are frequently narrower, corporate, and political, and the population is the party actually being sacrificed in the process. Recognising this distinction between elite responsibility and societal culpability is essential both as a matter of accuracy and as a matter of strategy for any future preventive or accountability mechanism addressing the phenomenon.

Seventh, this paper's analysis points to a further and more troubling implication that extends beyond the duration of active hostilities. It is foreseeable that, once the war eventually ends, substantial numbers of former military personnel – including former staff of the territorial recruitment centres directly implicated in coercive mobilisation practices – will move into the ranks of the prison system, the police, and other law-enforcement bodies. Insofar as personnel selection and organisational culture in that transitional period come to privilege a simulacrum of masculinity constructed around frontline combat experience, this creates a structural risk that the culture of zero tolerance toward ill-treatment, painstakingly built up within these institutions, will be weakened from within by a generation of personnel whose formative professional experience is one of wartime coercion rather than peacetime institutional restraint. On the formal, declaratory level, the absolute character of the prohibition of torture will almost certainly continue to be affirmed without qualification; the more serious risk lies at the level of practice, where a gap between declared norm and lived institutional culture is precisely the space in which instrumentalist reasoning has historically found its footing.

Finally, the paper's main overarching conclusion is that the current stage in the development of the European legal order in the field of countering torture is characterised by a necessary shift – already underway but by no means complete – from the paradigm of a normative prohibition requiring continuous instrumental justification of its expediency, to the *paradigm of a culture of absolute intolerance towards torture*. Such a culture must be transmitted from generation to generation among law-enforcement, prison, and security personnel, and is inseparable from an analogous culture in society at large; a closed institution cannot sustain a standard of zero tolerance that the surrounding society does not itself recognise and reinforce. In maintaining, strengthening, and reproducing this culture – not merely in the formal observance of the norm of Article 3 – lies the principal task of the modern human-rights policy of the parties to the Convention, as well as the activity of such preventive mechanisms as the European Committee for the Prevention of Torture. This is why instrumental rationality, in whatever form – rhetorical, didactic, or procedural – it may appear, remains precisely a myth, and not a legal or even ethical construct suitable for application within a rule-of-law state that recognises the absolute character of the prohibition of torture.

The problem identified here is not one that this paper claims to resolve in full. It is evident that the war will, sooner or later, come to an end, and that the resulting demobilisation will bring into Ukraine's prisons, police forces, and other law-enforcement bodies a substantial cohort shaped by wartime rather than peacetime institutional experience. The interaction between that demographic and organisational shift, on the one hand, and the paradigm of the absolute prohibition of torture as it has developed within a Convention system whose reflexes were forged in peacetime, on the other, has not previously been tested at this scale within Council of Europe practice. This gap constitutes precisely the perspective and the point of departure for further scholarly research and empirical observation proposed in this paper: a sustained, evidence-based study of how the culture of zero tolerance toward torture and ill-treatment either withstands or is eroded by the post-war reintegration of combat-experienced personnel into Ukraine's law-enforcement and penitentiary institutions, and of what preventive and institutional safeguards – whether developed domestically or through the continuing engagement of the ECtHR and the CPT – can most effectively secure the absolute character of the prohibition against this specific, and as yet largely unexamined, category of risk.

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