Should Police Threats to Torture Suspects Always be Severely Punished? Reflections on the Gäfgen Case

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Abstract

In Gäfgen v Germany the majority of a Chamber of the European Court of Human Rights affirmed that police threats to torture suspects always violate Article 3 of the European Convention on Human Rights, but that in certain circumstances such as those presented by this case, charging and convicting but leniently punishing the officers concerned provides adequate redress. A majority of the Grand Chamber held that, on the contrary, such violations should always be severely punished even when motivated, as here, by the urgent imperative of rescuing a kidnapped child. This article argues that, on Article 3, the majority of the Chamber reached the right result but not entirely for the right reasons, while the judgment of the majority of the Grand Chamber is methodologically, substantively and morally flawed. Having explored the central underlying normative dilemma neglected by all judges on both panels—how should conflicts between two competing instances of the same ‘absolute’ human right be resolved?—it concludes that, in such circumstances, courts have no legitimate alternative but to make a moral rather than a legal choice taking fully into consideration what is at stake for both parties in the widest possible senses. The verdict of the majorities on both panels that there was no violation of the applicant’s right to a fair trial is also defended, and the issues raised by the Gäfgen case are contrasted with the much-debated ‘ticking bomb’ scenario with which it is easily but mistakenly confused.

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1. Introduction

It appears to be beyond dispute that, while most rights found in the European Convention on Human Rights¹ and in other international human rights treaties, are limited by each other and by competing public interests, a handful, including the rights not to be tortured or inhumanly or degradingly treated or punished, are not. These are said to be ‘absolute rights’ subject to no exceptions, limitations, restrictions or derogations in any circumstances whatever, including in times of war or public emergency threatening the life of the nation, and saving the lives of specific others. But this label is not found expressly in the text of the instruments in question. It has instead been attributed to such rights by judges and commentators. The term, ‘formally unqualified rights’, is arguably more accurate and begs fewer questions.² However, whatever label is used, the key issues are how these rights should be understood and applied. There has been some discussion in the literature about their nature and character but much less about how conflicts between them should be resolved.³ In particular, commentators have generally declined to address squarely the questions: isn’t reconciling two competing instances of the same ‘absolute’ right fundamentally a moral rather than a legal matter and won’t the right of one right-holder inevitably emerge ‘less absolute’ than the same right held by the other? In what follows it will be argued that this is indeed the case and that, in relation to Article 3, all judges on the European Court of Human Rights in Gaëgen v Germany should have addressed these issues much more thoroughly; had they done so it would have become apparent that the verdict of the Chamber rests on firmer normative foundations than that of the Grand Chamber which overturned it. The judgment of the majorities on both panels that the applicant’s right to a fair trial under Article 6 was not violated will also be defended and some contrasts will be drawn with the ‘ticking bomb’ scenario which resembles this case only on the surface.

2. The Facts

In all probability the facts of Gáfgen v Germany are unique. Therefore, whatever precedent it may be said to have set is unlikely ever to be applied in similar circumstances. Nevertheless, it is a classic 'hard case' raising some profound moral and legal dilemmas which have aroused intense public debate in Germany and between commentators further afield.4 Fully appreciating the depth of these difficulties hinges on the precise facts which are, therefore, reviewed here in some detail.

On 27 September 2002, Jakob von Metzler, the 11-year-old youngest son of a prominent Frankfurt banker, went missing on his way home. Later it transpired that Magnus Gáfgen, a 32-year-old law student and acquaintance of Jakob's sister, had abducted and murdered him before delivering a letter to the family claiming that Jakob had been kidnapped by a gang and that if they wanted to see him alive again they should deposit a ransom of €1 million at a specified tram station. Gáfgen then disposed of Jakob's body under a jetty in a pond at a private property near Birstein, an hour's drive from Frankfurt. In the early hours of the morning of 30 September, Gáfgen picked up the ransom. But unbeknown to him the tram station had been under police surveillance. Shortly afterwards he was arrested at Frankfurt airport. He was told by detective officer M that he was suspected of having kidnapped Jakob and was informed of his rights, including to remain silent and to consult a lawyer, the latter of which he later exercised. For reasons not fully explained, Gáfgen was examined by a doctor at the airport hospital for shock and skin lesions. Not long after his arrest, some of the ransom money was recovered from Gáfgen's bank account, and some from his flat where a note planning the crime was also discovered. But there was no sign of Jakob.

When the police confronted Gáfgen with the evidence against him, he changed his story several times. He named others as accomplices and claimed one was holding Jakob. Later he said Jakob had been hidden by two members of the gang in a hut by a lake. But he refused to say where. Schroeder also claims that Gáfgen's girlfriend was taken into custody; that in his first interviews with the police Gáfgen claimed he had found the ransom by chance, but

then admitted to having been involved in the kidnapping but only as courier; that the public were informed of Jakob’s disappearance and a search party of 1,000 volunteers combed a nearby wood but nothing was found; and that, on 30 September 2002, Jakob’s mother was brought to the police station to plead with Gäßgen who remained unmoved. The police realised that if Gäßgen had kidnapped Jakob without assistance, the fact that he was in custody meant that Jakob might be dying alone wherever he had been taken. So, early on the morning of 1 October 2002, the deputy chief of the Frankfurt am Main police, D, ordered detective officer E, to threaten Gäßgen with ‘intolerable pain’, which would leave no physical traces—to be administered by a specially trained police officer already on his way by helicopter—if he continued to refuse to disclose where Jakob was. Another source claims the specially trained police officer had in fact been summoned. D’s subordinate heads of department had opposed this plan when he had previously proposed it, preferring further questioning and confrontation between Gäßgen and third parties instead. In a note for the police file, dated 1 October 2002, D stated that he had issued the orders, not to further the criminal investigation, but because he believed that, if he was still alive at all, Jakob’s life was in grave danger given his lack of food and the low temperature outside. The note indicated that another police officer had been ordered to obtain and administer a ‘truth serum’, and that it was also intended that a particular doctor, who had already given his consent, would supervise the infliction of the mistreatment.

E issued the threat and, according to Gäßgen, hit him once on the chest with his hand causing bruising, and shook him so that his head once hit the wall. Gäßgen also claimed that E had threatened to lock him in a cell with two huge black men who would sexually abuse him. Each of these accusations was disputed and remains unproven. Ten minutes after the session of questioning on 1 October in which the threat was issued began, Gäßgen told the police that Jakob’s body could be found under the jetty at the pond near Birstein. Detective officer M, and a party of police which did not include E, took Gäßgen there immediately and discovered it was true. Gäßgen claimed the police ordered him to walk without shoes through the woods to the place where Jakob lay. But this was also disputed and never proven. The discovery of the corpse was video-recorded and an autopsy later that day showed that Jakob had died from suffocation. Tyre tracks matching those of Gäßgen’s car and shoe prints matching his shoes were also discovered at the scene. When questioned on the way back to the police station by officer M, Gäßgen confessed to

5 Schroeder, ibid. at 188.
7 Jessberger, supra n 4 at 1062. No judge on either panel of the European Court of Human Rights queried why certain officers in the German police, and possibly the police forces of other European states, are specially trained in torture techniques if these are never permitted to be used.
having lured Jakob to his flat claiming that his sister had left her jacket there, and to having killed him shortly afterwards. Acting on this information, the police took Gäßgen to a series of locations he himself identified, where some of Jakob’s clothes and other belongings, and the typewriter used to type the ransom demand, were recovered. On his return to the police station Gäßgen was permitted to consult a lawyer instructed by his mother who had tried in vain to contact him that morning.

Gäßgen subsequently repeated his confession, not only to the police, but also to a public prosecutor, and to a district judge. On the first day of his trial by the Frankfurt am Main Regional Court for extortionate abduction and murder on 9 April 2003, he applied for the proceedings to be discontinued on the grounds that his constitutional rights had been breached by the events of 1 October 2002 and their aftermath, or, failing this, that all evidence obtained subsequent to his first admission to the police following the threat should be ruled inadmissible. The court refused the first request but held that Gäßgen’s admissions, made both under threat in the police station and thereafter up to the start of the trial, should be excluded since he should have been warned that they were inadmissible because they had been improperly obtained. However, the court refused to rule inadmissible the items of real evidence—Jakob’s body, clothes and belongings, the tyre and shoe prints, and the type-writer used to type the ransom demand—found as a result of Gäßgen’s first admission to the police. On the second day of his trial, Gäßgen confessed to the Regional Court that he had killed Jakob, claiming this was not what he had set out to do. However, at the close of the trial he admitted that killing Jakob had been his intention all along and that he made his courtroom confession out of remorse and to apologise. He was found guilty and was sentenced to life imprisonment. A subsequent appeal was rejected by the German Federal Constitutional Court. E and D were also tried and convicted for, respectively, coercion and incitement to coercion. Nevertheless, although these offences carry a maximum sentence of five years’ imprisonment in Germany, the Court merely imposed suspended fines of €3,600 and €108,000, respectively. Each officer was also transferred to duties unconnected with criminal investigation and D was later promoted.

Gäßgen complained to the European Court of Human Rights that the police threats and the assault he alleged he had received on 1 October 2002 violated his rights under Article 3 of the European Convention on Human Rights not to be tortured or inhumanly or degradingly treated. He also claimed that his right to a fair trial under Article 6 had been breached because his rights to remain silent and to defend himself effectively had been violated by the use of evidence in his trial stemming from the violation of Article 3. Having lodged this petition, Gäßgen also then submitted a claim for compensation against the Land of Hesse, which at the time of writing remains unresolved, and in 2005 he published a book about his case. On 30 June 2008, a Chamber of the
Fifth Section of the European Court of Human Rights (‘Fifth Section’) held by a majority of six\textsuperscript{8} to one\textsuperscript{9} that there had been no violation of Article 6 and that, while Article 3 had been violated, by the time Gäfgen petitioned Strasbourg he was no longer a victim because the police officers concerned had been adequately punished. Third party comments had also been received from Jakob’s parents. A Grand Chamber of the Court, which also heard submissions from Jakob’s parents and from the Redress Trust—a London-based human rights non-governmental organisation which helps survivors of torture obtain justice and reparation—delivered its judgment on 1 June 2010. Disagreeing with the majority of the Fifth Section, a majority of 11\textsuperscript{10} to 6\textsuperscript{11} held that the applicant remained a victim of a violation of Article 3 when he petitioned Strasbourg. Eight of the judges on the majority\textsuperscript{12} based this conclusion on the leniency of the police officers’ sentence while the other three\textsuperscript{13} held it was because of the failure to exclude evidence obtained in breach of the Convention. A majority of 11\textsuperscript{14} to 6\textsuperscript{15} agreed with the majority of the Fifth Section that there had been no violation of Article 6. Since the applicant had not claimed damages for either pecuniary or non-pecuniary loss, the Grand Chamber did not make such an award. It also unanimously rejected his request for a retrial by the domestic courts.

3. The Judgments of the European Court of Human Rights

The judgments of the various majorities and minorities of the Fifth Section and the Grand Chamber of the European Court of Human Rights will be considered below in relation, respectively, to the applicant’s claim that his rights under Articles 3 and 6 had been violated.

A. The Article 3 Complaint

(i) The judgments of the Fifth Section

The judgment of the majority of the Fifth Section recites familiar Convention case law on Article 3.\textsuperscript{16} It held, first, that the prohibition against torture,

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\textsuperscript{8} Judges Lorenzen, Maruste, Butkevych, Jaeger, Berro-Lefevre and Trajkovska.

\textsuperscript{9} Judge Kalaydjieva.

\textsuperscript{10} Judges Costa, Rozakis, Bratza, Tulkens, Jebens, Šikuta, Ziemele, Nicolaou, Bianku, Power and Vučinić.

\textsuperscript{11} Judges Casdevall, Kovler, Mijović, Jaeger, Jočeně and López Guerra.

\textsuperscript{12} Judges Costa, Rozakis, Bratza, Jebens, Šikuta, Nicolaou, Power and Vučinić.

\textsuperscript{13} Judges Tulkens, Ziemele and Bianku.

\textsuperscript{14} Judges Costa, Bratza, Šikuta, Nicolaou, Vučinić, Casdevall, Kovler, Mijović, Jaeger, Jočeně and López Guerra.

\textsuperscript{15} Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power.

\textsuperscript{16} \textit{Labita v Italy} 2000-IV; 46 EHRR 1228; \textit{Selmouni v France} 1999-V; 29 EHRR 403; \textit{Chabal v United Kingdom} 1996–V; 23 EHRR 413; \textit{V v United Kingdom} 1999-IX; 30 EHRR 121; \textit{Ramírez
inhuman or degrading treatment or punishment is absolute, incapable of being
derogated from even in a public emergency threatening the life of the nation
and subject to no exceptions whatever, including saving life and irrespective
of what anyone allegedly subjected to it may have done. But to fall within the
scope of Article 3, alleged ill treatment must attain a minimum level of severity,
which in turn depends on all relevant circumstances, including its duration,
its physical and mental effects and, in some cases, the sex, age and health of
the alleged victim. In assessing whether or not Article 3 has been violated,
the standard of proof is ‘beyond reasonable doubt’. Treatment may be regarded
as ‘degrading’ when it was such as to arouse in the victim feelings of fear, an-
guish and inferiority capable of humiliating and debasing them, and possibly
breaking their physical or moral resilience or driving them to act against
their will or conscience. Treatment would be ‘inhuman’ if, amongst other
things, it was premeditated, applied for hours at a stretch, and caused either
actual bodily injury or intense physical and/or mental suffering. Under the
Convention, ‘torture’ is deliberate ‘inhuman’ treatment causing very serious
and cruel suffering. Provided it was sufficiently real and immediate, the major-
ity held, the mere threat of conduct prohibited by Article 3 may amount to a
violation. Therefore, the threat of torture could constitute at least inhuman
treatment.

Although the respondent state, and all relevant German courts, accepted
that Article 3 had been violated, the majority of the Fifth Section nevertheless
considered how these principles applied to the events of the morning of 1
October 2002. It accepted that the police officers acted as they had in order to
save Jakob’s life, which they believed was at great risk, rather than to pursue
the criminal investigation. But they emphasised that even this objective was
not permitted by Article 3 and that the threatened mistreatment would have
amounted to torture had it been carried out. However, they also accepted, as
mitigating factors, that the interrogation session lasted only 10 minutes and
had taken place in an atmosphere of heightened tension and emotion due to
the exhaustion of the officers concerned and the pressure caused by the belief
that they had only a few hours in which to save Jakob’s life. The majority was
not, however, convinced that either the physical ill treatment the applicant
alleged, or the threat of sexual abuse had been proven beyond reasonable
doubt. Nor did they find that the threat of serious physical abuse had had any
serious long-term consequences. They, therefore, concluded that the applicant
had been subjected to inhuman treatment rather than torture. The possibility
that he might have been degradingly treated was not expressly considered.

Sanchez v France 2006-IX; 45 EHRR 1161; Ireland v United Kingdom A 25 (1978); 2 EHRR 25;
Jalloh v Germany 2006-IX; 44 EHRR 667; Keenan v United Kingdom 2001-III; 33 ECHR 913;
and Campbell and Cosans v United Kingdom A 48 (1982); 4 ECHR 293.
The majority, nevertheless, concluded that the applicant had been afforded sufficient redress by the German legal system and, therefore, by the time he petitioned Strasbourg, was no longer a victim of an Article 3 violation. It was noted that the domestic courts had unequivocally acknowledged that Gâfgen had been a victim—not only of a breach of Article 136a of the Code of Criminal Procedure but also of Article 3 of the Convention and that this could not be justified by the defence of necessity—and that none of the statements made by him in the entire investigation proceedings were used at his trial. The majority also stated that it ‘was not convinced that the—comparatively lenient—sentence imposed on the police officers calls into question the fact that substantive redress has been granted to the applicant as a result of the police officers’ criminal conviction’, especially since D and E ‘suffered prejudice in their professional careers’. The exclusion of all statements made by the applicant between his initial admission to the police and his trial provided ‘an effective method of redressing disadvantages’ and also served to discourage, in other cases, the extraction of statements by means prohibited by Article 3. As for the fact that the applicant’s claim for compensation remained unresolved by the German courts, the majority ruled that ‘in a case such as the present one, in which the breach of Art. 3 lies in a threat of ill-treatment . . . redress for this breach is essentially granted by the effective prosecution and conviction of the persons responsible . . .’

Judge Kalaydjieva dissented from the majority on the grounds that, although the punishment the police officers received, and any compensation the applicant might subsequently obtain, could be seen asremedying the direct effects of the breach of Article 3, the applicant nevertheless continued to be a victim of this breach when he petitioned Strasbourg because he remained the victim of forced self-incrimination which had adversely affected his right to a fair trial. She concluded that, in order to correct these defects, a retrial was required.

(ii) The Grand Chamber’s judgments

The eight-judge majority of the Grand Chamber followed the judgment of the majority of the Fifth Section on the core facts and offered a more detailed account of relevant Convention principles as informed by wider international standards. In particular it held that the redress which is appropriate and sufficient in order to remedy a breach of a Convention right at national level depends on all the circumstances of the case, having particular regard to the specific Convention violation at issue. Victims should at least have the opportunity to seek compensation, which should be awarded ‘where appropriate’.

17 Gâfgen v Germany 48 EHRR 253 at para 78.
18 Ibid. at para 79.
19 Ibid. at para 80.
20 Gâfgen v Germany Application No. 22978/05, Merits, 1 June 2010, at para 116.
and their continuing status as victims of a Convention violation may hinge upon the level of compensation awarded at the domestic level. However, cases of wilful ill-treatment could not be remedied by such awards alone. Other sanctions, including disciplinary proceedings, must be imposed which have a deterrent effect and which do not undermine the prohibition of ill-treatment. Accepting that determining the degree of individual guilt and the appropriate sentence are matters within the jurisdiction of national criminal courts, the eight-judge majority affirmed that the European Court of Human Rights must, nevertheless, ensure that the State’s obligation to protect the rights of those under its jurisdiction is adequately discharged, and that this may require the Court to ‘intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed.’

Like the majority of the Fifth Section, the eight-judge majority of the Grand Chamber also accepted that the threat of torture to which the applicant had been subjected amounted to inhuman treatment but not to torture itself. However, it differed from the majority of the Fifth Section on the key question of whether the applicant had been afforded ‘appropriate and sufficient reparation.’ Noting that there were mitigating factors which distinguished this case from those concerning ‘arbitrary and serious acts of brutality by State agents’, the eight-judge majority nevertheless considered that the suspended fines the police officers received:

cannot be considered an adequate response to a breach of Article 3, even seen in the context of the sentencing practice in the respondent State. Such punishment, which is manifestly disproportionate to a breach of one of the core rights of the Convention, does not have the necessary deterrent effect in order to prevent further violations of the prohibition of ill-treatment in future difficult situations.

The eight-judge majority also held that, during the criminal investigation into the conduct of police officers charged with the ill treatment of suspects, the officers concerned should be suspended from duty rather than transferred to other non-investigative police work as D and E had been in this case. D’s subsequent appointment as chief of a police authority was also deemed to have raised ‘serious doubts’ about whether the respondent state had taken the breach of Article 3 sufficiently seriously. In the opinion of the eight-judge majority, the fact that the applicant’s claim for compensation had still not been settled by June 2010, when the Grand Chamber’s judgment was delivered, also raised serious doubts about the effectiveness of the domestic liability

21 Ibid. at para 123.
22 Ibid. at para 121.
23 Ibid. at para 124.
24 Ibid. at para 125.
proceedings. Because, therefore, the respondent state had not afforded the applicant sufficient redress for his mistreatment in breach of Article 3, he remained a victim according to Article 34 of the Convention. As the eight-judge majority put it:

In the Court’s view, neither the protection of human life nor the securing of a criminal conviction may be obtained at the cost of compromising the protection of the absolute right not to be subjected to ill-treatment proscribed by Article 3, as this would sacrifice…(relevant)…values and discredit the administration of justice.25

The eight-judge majority also held that appropriate and sufficient redress may include the exclusion of evidence obtained by the violation of a suspect’s rights under Article 3 in criminal proceedings against them, an issue which, in this case, fell to be considered under Article 6.

As already indicated, three other judges concurred with the eight-judge majority that the applicant remained a victim of an Article 3 violation when he petitioned Strasbourg, not because of the sentence the police officers received, but because of the failure to exclude evidence obtained in breach of this provision.

The six judges who dissented from the conclusion of the 11-judge majority of the Grand Chamber on the applicant’s victim status vis à vis the breach of Article 3, endorsed the view of the majority of the Fifth Section that there had been adequate redress from the domestic legal system. They also wondered what degree of punishment the eight-judge majority of the Grand Chamber would have accepted as appropriate for the police officers concerned and thought it was ‘fairly significant’26 that the applicant had not claimed an award for non-pecuniary damage, that is, for the suffering caused by the events of 1 October 2002. They also queried what useful purpose was served by the operative provisions of the judgment of the eight-judge majority since it changed nothing of substance and merely confirmed the conclusion of all judges involved in the case that the threat of torture, to which the applicant was subjected, amounted to inhuman treatment prohibited by Article 3.

B. The Article 6 Complaint

(i) The judgments of the majorities of the Fifth Section and Grand Chamber

The six-judge majority of the Fifth Section and the 11-judge majority on the Grand Chamber affirmed that, in determining whether any criminal proceedings had been fair, regard must be had to whether the rights of the defence had been respected, especially concerning whether evidence had been

25 Ibid. at para 176.
26 Ibid. at Partly Dissenting Opinion of Judge Casadevall; Joined by Judges Kovler, Mijović, Jaeger, Jočienė and López Guerra, para 8.
obtained in ways which cast doubt on its reliability or accuracy and whether or not the applicant had been given the opportunity to challenge its authenticity and oppose its use. The right to silence and the privilege against self incrimination were particularly important safeguards in protecting an accused from improper compulsion. But the function of the Strasbourg Court was to consider whether the proceedings as a whole had been fair—including the ways in which evidence had been obtained—and not to determine, as a matter of principle, whether particular kinds of evidence should, or should not, be admitted. A confession obtained in breach of Article 3 always raised an issue about the fairness of subsequent proceedings. The admission of confessions and admissions induced by torture, as evidence to establish relevant facts in criminal proceedings, automatically rendered the proceedings as a whole unfair. Similarly, incriminating physical evidence obtained as a result of torture should never be relied on as proof of guilt irrespective of its probative value. The admission of incriminating real evidence obtained as a direct result of torture also rendered the proceedings as a whole unfair. But, in its Jalloh judgment, the Court had left open the question of whether the use of real evidence adduced by inhuman or degrading treatment falling short of torture necessarily rendered the proceedings unfair.

The majorities on both panels concluded that there had been no breach of Article 6 because the applicant had been convicted entirely on the confession made at trial which was not tainted by the treatment he received in the police station nor was it induced by a breach of his defence rights. The items of physical evidence discovered as a result of his initial admission to the police on 1 October 2002, plus other untainted evidence, merely confirmed his guilt. The majorities noted that the confession made by the applicant in the interrogation session on 1 October 2002—together with all other statements made by him to the investigating authorities—had been excluded from trial by the Regional Court on account of the violation of Article 3. They also pointed out that the applicant had claimed in his petition to Strasbourg that his courtroom confession had only been made because he believed the items of real evidence secured as a result of his first confession would be used against him. But he nevertheless consistently claimed in the proceedings before the domestic courts that his courtroom confession was made out of remorse and in order to apologise for the crime he had committed. His courtroom confession was not, therefore, induced by measures which infringed his defence rights but was simply a variation in his defence strategy. The majorities also acknowledged that the items of physical evidence discovered as a result of Gafgen’s initial admission to the police could be deemed to have been obtained as a result of police misconduct. They also accepted that, had they been relied upon to secure the applicant’s conviction, the proceedings in question would have

27 Supra n 16.
been rendered unfair. But it was concluded that their effect was, at most, merely to confirm Gafgen’s guilt as proven by evidence independent of his mistreatment by the police, namely his courtroom confession, supported by other untainted evidence including the ransom demand, police surveillance evidence showing that he collected the ransom, the plan of the crime found in his flat and testimony from Jakob’s sister. And even without Gafgen’s courtroom confession, there was sufficient evidence to convict him at least of kidnapping with extortion causing the death of the victim. In relation to Article 6, the majority of the Grand Chamber also indicated its awareness of ‘the different competing rights and interests at stake’, but added that this was not the case in relation to Article 3 because, unlike the former, the latter enshrines an absolute right.

(ii) The judgments of the minorities of the Fifth Section and Grand Chamber

Judge Kalaydjieva, the only dissentent on the Fifth Section panel, and the six judges of the Grand Chamber who dissented from the majority view on Article 6, argued that, although in previous cases the Court had declined from declaring that the admission of evidence stemming from a breach of Article 3 necessarily renders a trial as a whole unfair, a golden opportunity had been missed in this case to make a much clearer ruling to this effect. The minority of the Grand Chamber maintained that evidence resulting from a breach of Article 3 ought to be excluded from trial as a strict rule, even if this results in the accused receiving a lighter sentence, because the admission of such evidence casts ‘serious doubt’ on the capacity of the applicant to defend himself effectively, compromises the integrity of the trial process and undermines core values in the administration of justice.

4. Critique

The argument I wish to advance here has seven core elements. First, ultimately there is no legal or Convention-based solution to the kind of conflict between competing Convention rights presented by this case; the only viable option is to exercise moral judgment. This involves, second, the systematic and careful weighing of the competing interests at stake in the widest senses. Third, the central problem with the judgments of all judges on the European Court of

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28 Supra n 20 at para 175.  
30 For a more formal discussion of this point, see Griffin, On Human Rights (Oxford: Oxford University Press, 2008) at Ch 3.
Human Rights on the Article 3 issues is that they signally failed even to embark upon this task. Fourth, had they done so they would have discovered a series of asymmetries or incongruities between relevant Convention rights. Fifth, they should then have come to the conclusion that, while none of these is decisive on its own—and some involve drawing particularly fine distinctions—their cumulative effect is to support the case for leniently punishing D and E. Therefore, sixth, while not wholly satisfactory methodologically, the judgment of the majority of the Fifth Section nevertheless reaches the right result, while that of the eight-judge majority of the Grand Chamber is deeply flawed methodologically, substantively and morally. Finally, a number of significant contrasts can and should be drawn between the Gafgen case and the much-debated ‘ticking bomb’ scenario with which it has been confused. However, before considering these issues further, a few words are required in support of the judgments of the majorities on both panels on the Article 6 complaint.

A. The Article 6 Complaint

While some commentators have expressed their unease about the view of the majorities of both Fifth Section and Grand Chamber that Article 6 was not violated, the judgments of the minorities on each panel are difficult to accept because of their overly prescriptive, rigid and formalistic nature. As the majorities recognise, whether physical evidence should be ruled inadmissible because a violation of a Convention right preceded its discovery, is not always clear-cut and can be a matter of degree depending on the precise circumstances. The use to which such evidence is put may well be a more important issue. The judgment of the minority of the Grand Chamber on Article 6 is also undermined by their greater readiness to accept the lenient sentencing of a child murderer than the lenient sentencing of police officers who threatened him with ill-treatment in an attempt to rescue the child, by their failure to address the fact that even if the impugned evidence had been excluded there was sufficient evidence to convict Gafgen without it, and also, for no stated and no obvious reason, their refusal to endorse Judge Kalaydjieva’s call for a retrial. Incidentally, the view of the eight-judge majority of the Grand Chamber that Article 6 permits a balancing of competing rights and interests because, unlike Article 3, it is not absolute, is also difficult to defend but makes no difference to the substantive outcome. The right to fair trial is absolute because any and every unfair trial constitutes a breach of Article 6. However, what amounts to unfairness is relative to the specifics of any particular trial. All relevant issues must, therefore, be evaluated and weighed before

31 Anonymous, supra n 4 at 788; and Wierenga and Wirtz, supra n 4 at 369.
any trial can be said to have been fair or not. But, although wider in scope, this is not a fundamentally different exercise from determining what constitutes ‘torture’, ‘inhuman’ or ‘degrading’ treatment or punishment for the purposes of deciding whether or not Article 3 has been violated.

B. The Article 3 Complaint

The core problem with the judgments of the majorities and minorities on both panels in relation to Article 3 is the complete absence of any recognition that this case engages the Convention rights, not just of Gafgen, but also of Jakob.32 Neither the German government, Jakob’s parents, nor the Redress Trust, appears to have drawn this to the Court’s attention either. While all judges recognised the intense pressure the police were under to rescue Jakob, even the majority of the Fifth Section regarded this as only one of a number of ‘mitigating factors’33 rather than itself raising a Convention rights issue. Sadly, Jakob was already dead even as Gafgen was being threatened by the police. But the judgments of the relevant courts should be capable of applying both to the facts as they were and as they were reasonably believed to be. The moral and legal dilemmas are thrown into even sharper relief if we assume all the real facts except that Jakob was still alive on the morning of 1 October 2002. If this had indeed been the case there would have been a complex, multi-dimensional relationship with all the relevant Convention rights on six main dimensions.

(i) Six asymmetries between relevant Convention rights

The first asymmetry concerns the fact that more of Jakob’s rights would have been engaged had he been alive when Gafgen was threatened by the police than would Gafgen’s. The only one of Gafgen’s rights at issue had this happened would have been his right, under both German law and Article 3 of the Convention, not to be subjected to inhuman treatment. By contrast, Jakob’s rights would have included not only this right, but also his rights, under German law and possibly also the Convention, to life and to be free from unlawful detention.

However, the second asymmetry lies in the complex relationship between relevant Convention rights. Since Gafgen’s Convention right not to be inhumanly treated was violated by the police it was, therefore, directly actionable under the Convention because law enforcement agencies are public authorities for which the state is liable. By contrast, since Gafgen is not a party to the

32 See also Jessberger, supra n 4; and Brugger, ‘May Government Ever Use Torture? Two Responses from German Law’ (2000) 48 American Journal of Comparative Law 661.
33 Supra n 17 at para 69.
Convention he cannot technically breach Jakob’s *Convention* rights although he was convicted of having violated Jakob’s legal rights to the same interests. Nor, *prima facie*, were Jakob’s Convention rights violated by any agency for which the German state is directly responsible. However, since states have positive obligations to protect Convention rights from violation by third parties, the key questions become: what positive obligations for the German authorities, including the police, arise from Jakob’s relevant Convention rights and how are they affected by Gäßgen’s? In *Osman v United Kingdom* the European Court of Human Rights held that national authorities may have a positive obligation under Article 2 of the Convention ‘to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual’. This arises where it is established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

However, two limitations were acknowledged: the obligation must be interpreted in a manner which does not impose ‘an impossible or disproportionate burden on the authorities’ and ‘due process and other guarantees which legitimately place restraints on the scope of… action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention’, must be respected. In the *Osman* case the applicant’s family had been targeted by a dangerous stalker who eventually broke into their home and killed the applicant’s father. But the Court held that, since the murder could not have been predicted with sufficient certainty, the positive obligation to protect life under Article 2 had not been breached.

States also have a positive obligation under Article 3 ‘to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals, Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity’ and this is stronger where the authorities know, or ought to have known, that a specific individual is at a particular risk from such conduct. This obligation

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36 Ibid.
38 *Z and others v United Kingdom* 2001-V: 34 EHRR 97 at para 73. See also *MC v Bulgaria* 2003-XII: 40 EHRR 459; and *Costello-Roberts v United Kingdom* A 247 (1993); 19 EHRR 112.
was, for example, held to have been breached in *Kaya (Mahmut) v Turkey*,\(^3^9\) where the risk stemmed from anti-terrorist elements in the security forces hostile to the applicant because of suspicions that he provided medical assistance to guerrillas, and in *97 Members of the Gldani Congregation of Jehovah's Witnesses v Georgia*,\(^4^0\) where the police failed to act when Jehovah's Witnesses attending a religious meeting were physically attacked by members of the Orthodox Church. While the jurisprudence on the positive obligation to prevent violations of Article 3 by third parties does not appear expressly to include the proviso that other Convention rights should be respected, it is difficult to avoid the analogy with Article 2. However, this does not resolve the issue at stake here because the risk in *Osman* was much less imminent than in *Gäfgen*, and the other asymmetries between the relevant Convention rights have yet to be considered.

The third of these concerns the relationship between the Convention right to life and the rights not to be tortured or inhumanly or degradingly treated or punished. Imagine if, instead of having murdered Jakob, Gäfgen holds him hostage at a lake-side hut which the police surround and begin to negotiate for Jakob's release. Imagine also that the negotiations stall, that an increasingly agitated Gäfgen threatens to murder Jakob unless the police withdraw, and, acting on the advice of psychologists trained in hostage-taking, a police assault team storms the hut, Gäfgen is shot dead, and Jakob is found, bound and gagged but alive. Assume also that, in the light of all the circumstances, there can be no doubt that the police action was fully justified under Article 2(2) of the Convention which permits killing in order to save life, provided this involves using no more force than absolutely necessary in defending another from 'unlawful violence'.\(^4^1\)

Indeed, it is not even necessary to imagine this scenario because very similar events have in fact occurred. On 13 May 1993, 41-year-old Eric Schmitt, wearing a helmet and gloves and brandishing a pistol, held hostage a nursery class of 21 children aged three and four at the Commandant-Charcot school in the affluent Paris suburb of Neuilly-sur-Seine.\(^4^2\) Having told the headmistress to call the police, Schmitt, a divorcee and former computer entrepreneur, drew the blinds, barricaded the classroom doors with cupboards, and settled in for what he probably hoped would be a short siege. A letter he pushed

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39 2000-III.
40 46 EHRR 30.
41 See also Møller, supra n 3; and Wicks, *The Right to Life and Conflicting Interests* (Oxford: Oxford University Press, 2010).
under the door demanded the equivalent of $18.5 million and explained that the bags around his waist were filled with explosives which he would not hesitate to detonate if his demands were not met. The police duly arrived and negotiations, assisted by a psychiatrist, began. The teacher, Laurence Dreyfus joined by militarily trained Dr Evelyn Lambert, remained with her class, liaising with anxious parents gathered outside. Children were released in phases and various sums of money were delivered, including the equivalent of $2 million by the Mayor of Neuilly, Nicolas Sarkozy, who later became President of France. At Schmitt’s request a video camera was provided to reassure parents that their children were still safe. But, after two days and nights, negotiations had reached an impasse and Schmitt was becoming irritable and increasingly unstable. Training the video camera on the exhausted hostage-taker as he dosed off, Lambert was able to alert the police to the opportunity they had been waiting for. Seizing the moment two assault teams stormed the classroom. Schmitt was shot dead while the six remaining hostages played a game under blankets at the other end of the classroom unaware of how their ordeal had ended. Dreyfus and Lambert were awarded the Legion of Honour and the police, far from being prosecuted or even criticised, were also lauded as heroes.

There is, therefore, a strange moral paradox between Convention norms applicable to the facts as they appeared to the police in the Gfägen case, and to the imagined siege scenario and the Schmitt case. Provided it is absolutely necessary, it is not a violation of the right to life under Article 2 for a child abductor to be killed in order to save the life of his victim(s) because the right to life is not absolute. But Article 3 apparently does not permit subjecting the abductor even to a brief period of inhuman or degrading treatment in order to achieve the same result because these are absolute rights subject to no exceptions under any circumstances whatever. But what is the moral justification for this difference? Perhaps it lies in the fact that, in a siege, the police would be physically on site and would, therefore, be able to monitor closely the imminence of the risk to the victim’s life and to act accordingly instantaneously. By contrast, as they questioned Gfägen, the police had no way of knowing if Jakob was dead or alive. However, consider a further thought experiment. Imagine all the actual facts in the Gfägen case, except that Jakob was still alive when Gfägen was questioned by the police but was gagged and bound to a ladder in a huge tank which was slowly filling with water. Imagine also that Gfägen positioned a webcam clearly showing Jakob’s predicament, which the police are able to access either via Gfägen’s iPhone or having been referred to it by Gfägen in a bid to bargain about his own position, but without the physical location of the tank being revealed. Under these circumstances the police could monitor the imminence of the threat to Jakob’s life even more reliably than in the imaginary siege. Yet, in the siege scenario, Article 2 of the Convention would clearly permit them to shoot Gfägen dead to save Jakob’s
life. But, under the interpretation of the Convention favoured by the eight-judge majority of the Grand Chamber, if Gáfgen was merely degradingly treated in order to rescue Jakob from drowning in the water tank—and he was in fact rescued as a result—the police officers concerned should, nevertheless, be severely punished for having violated Gáfgen’s absolute Article 3 rights. It is difficult to see why this would not be a disproportionate and morally indefensible outcome.

The fourth asymmetry concerns the huge disparity between what each party suffered as a result of their rights having been violated. There can be no question that Gáfgen violated Jakob’s rights much more severely than the police violated Gáfgen’s. Had he not been murdered almost from the beginning of his abduction, Jakob would have endured a terrible ordeal lasting days, greatly compounded by the fact that he was an 11-year-old child separated from his family. Gáfgen’s suffering, on the other hand, involved a mere ten minutes of what the Grand Chamber described as ‘considerable fear, anguish and mental suffering’.43 If the rationale for Article 3 is to prevent human suffering inflicted by someone for whom the state can be held responsible, it can be argued that the positive obligation on the police should effectively include subjecting Gáfgen to a much less serious violation of his Article 3 rights, if this was the only viable means of rescuing Jakob—a result achieved by prosecuting the officers concerned afterwards, but punishing them leniently.

The fifth, related asymmetry is that Gáfgen could easily escape from the suffering caused by the fear of torture induced by the police simply by revealing the whereabouts of Jakob’s body, something which he was already under an overwhelming legal and moral obligation to do in any case. On the other hand, even if Jakob had still been alive, there was nothing he could have done to alleviate the suffering and gross mistreatment Gáfgen had inflicted upon him.

The sixth asymmetry, and probably the most controversial, concerns the huge disparity in the moral worth of each party.44 Jakob was an innocent child, abducted and brutally murdered without a shred of justification. Gáfgen, on the other hand, is a ruthless child abductor who expected the ransom he anticipated receiving would enable him to live the life of the rich lawyer to which he aspired, without the inconvenience of having to become one. His moral depravity was further compounded by the fact that he murdered Jakob even before the ransom was demanded from the unsuspecting family. Yet, according to human rights orthodoxy the moral unworthiness of a suspected criminal is wholly irrelevant to their rights. Indeed, both the Fifth Section and the Grand Chamber affirmed that, no matter how heinous the crime allegedly committed by the accused, the prohibition against the violation

43 Supra n 20 at para 103.
44 See also Brugger, supra n 32 at 669.
of their Article 3 rights remains absolute. But when two putatively ‘absolute’ Convention rights are in conflict it is difficult to see why any morally relevant factor should not be invoked to help resolve the dilemma raised by how they should be applied.\(^45\) The well-known Kantian principle of not using anyone as a means to another’s end also arguably supports the mistreatment Gäßgen received at the hands of the police because this involved using him for a more worthy end (rescuing Jakob) than the end to which he mistreated Jakob (to become rich).

(ii) Differences between the Gäßgen case and the ‘ticking bomb’ scenario

Finally, for at least six reasons, this case can also be distinguished from the much-debated ‘ticking bomb’ scenario with which it has been confused by at least one commentator.\(^46\) According to the classic features of the latter, the police arrest a terrorist suspect who claims to have hidden and primed a ‘dirty’ bomb in a city which will kill thousands within a matter of hours if not found and defused. Under intense police questioning the suspect resolutely and calmly refuses to disclose where the bomb is and, with time running out, the question arises—should he be tortured to make him talk and thus save numerous lives? The main differences between the ticking bomb scenario and the Gäßgen case are, first, that the former remains an unlikely hypothetical, particularly in an age of suicide bombers, while the Gäßgen case presents concrete legal and moral dilemmas. Second, if the whereabouts of the ticking bomb are unknown, it can also not be known for certain that there is a bomb at all. By contrast, it was absolutely certain that Jakob had gone missing and virtually certain that Gäßgen had been involved in kidnapping him. Third, the rights of potential victims of the ticking bomb are not violated until it explodes, whereas Jakob’s rights were violated from the moment he was kidnapped. Therefore, had he not been murdered almost from the outset, this violation would have been ongoing throughout Gäßgen’s detention by the police. Fourth, it also follows that, until the bomb goes off, it will not be clear whose rights have been violated, whereas there can be no doubt whose rights have been violated by Gäßgen. Fifth, the core moral dilemma in the ticking bomb scenario concerns the legitimacy of the intense suffering the suspect will undergo by being tortured, whereas the issue in the Gäßgen case concerns the legitimacy of his ten minutes of anxiety about being tortured if he did not disclose where Jakob was. Sixth, unlike the hypothetical terrorist—a fanatical activist likely to be able to endure torture without talking and possibly even welcoming it in the quest for martyrdom—Gäßgen’s will to resist police pressure crumbled within 10 minutes of the mere threat having been issued.

\(^{45}\) Ibid. at 674.

\(^{46}\) Anonymous, supra n 4 at 788. For a particularly thoughtful discussion of the ticking time bomb issue in the context of German law, see Brugger, supra n 32.
5. Conclusion

The moral and legal dilemmas in this case are most vividly revealed by how sharply it divided judicial opinion. The judgments of the majorities and minorities on both panels of the European Court of Human Rights occupy different, but not diametrically opposed, positions in the middle ground on a spectrum ranging from, at one extreme, refraining from punishing the police officers at all (and possibly even rewarding them), to, on the other, quashing Gäfgen’s conviction and awarding him substantial compensation. The majority of the Fifth Section, the minority of the Grand Chamber, and the relevant German courts all agreed that the lenient punishment of D and E effectively addressed the violation of Gäfgen’s right not to be threatened with torture for failing to disclose Jakob’s whereabouts. Only the eight-judge majority of the Grand Chamber thought that more severe punishment was required but declined to say what this should have been. Judicial opinion was also divided on whether or not Gäfgen had been fairly tried. But only a minority of six judges on the Grand Chamber, and one on the Fifth Section, thought he had not been.

Although it constitutes the final authoritative legal verdict on the matter, the judgment of the eight-judge majority of the Grand Chamber on the appropriateness of the police officers’ punishment is ‘purely academic’ in two senses. First, it makes no difference to the substantive outcome since D and E will not in fact have their sentences altered. Second, it is unlikely to affect any subsequent similar cases since, fortunately, the chances of the same facts happening again are so remote they can be virtually discounted. Child abduction by strangers is very rare and abductions for ransom rarer still. Apprehending the kidnapper so soon after the abduction, as Gäfgen was, appears to be entirely unprecedented. These factors also distinguish this case from the wider debate about the rights of suspects, accused and victims of crime which tend to be concerned, not with possible rescue, but with the role of victims and their families in the trial and sentencing processes.47

Ultimately the solution to this case cannot be found in legal logic but requires the exercise of moral choice. The central moral question, which none of the judges framed, is this: why should the right of a suspect—virtually certain to have been involved in the kidnapping of a child for ransom—to be spared the short-lived psychological suffering caused by the threat of torture to compel him to disclose the whereabouts of his victim, take precedence over the victim’s rights to avoid the much more severe, and much more prolonged, physical and mental suffering and imminent death, occasioned by the

kidnapping itself? By condemning the lenient punishment the officers received, the eight-judge majority expressly intended to deter other police officers in similar situations in any Council of Europe state from acting in a similar fashion. In other words, were events similar to the Gafgen case ever to recur—except the child victim remained alive while the abductor was questioned by the police—the eight-judge majority would prefer the child to die rather than the abductor be exposed to ten minutes of anxiety about being tortured, or, by necessary implication, merely by being subjected to moderately degrading treatment. The reason given is that the right of suspects under Article 3 of the Convention is absolute and admits of no exceptions whatever. Yet the fatal flaw in this superficially watertight argument is that Article 3 is not expressly limited to suspects at all. Jakob also had rights under Article 3, which were not explored by the parties, the third-party interveners, or any of the judges on the European Court of Human Rights. By overlooking these, all the judgments of both panels are methodologically deficient, a problem regrettably not unique to this case.

To be fully legitimate the judgments of courts on human rights issues should be both morally and legally defensible because all legal human rights are effectively moral rights upgraded to formal legal status because of their particularly compelling moral character and intimate connection with the most fundamental aspects of human well-being. In this case, the normative frameworks the majorities of both panels constructed are of a familiar ‘cut-and-paste’ character, with familiar extracts quoted verbatim from previous judgments. While it is, of course, important that fidelity to earlier verdicts is maintained, this approach, regrettably, militates against the kind of principled lateral thinking which may be required. The Grand Chamber has a particular responsibility to eschew the kind of ‘head in the sand’ formalism the eight-judge majority resorted to in the Gafgen case, in favour of reasoning which has greater moral and constitutional authority.

The resolution of ‘pure’ conflicts between Convention rights, that is, those which do not directly involve competing public interests, is notoriously difficult. No formula is available simply waiting to be applied. But any convincing solution must involve a much more systematic attempt than that made by any of the judges in the case of Gafgen v Germany to identify and assess the morally relevant factors which might tip the balance one way or the other. The judgment of the eight-judge majority on Article 3 was partly motivated by the perceived need


49 For a review of the debate about the Court’s ‘constitutional’ status, see Greer, supra n 2 at 169–85.

50 Ibid. at 266–74.
to protect the Convention from being undermined by the dilution of its standards which, it feared, might have been caused by the judgment of the majority of the Fifth Section. But public confidence in human rights can also be undermined when the judgments of human rights courts lack moral authority. According to the judgment of the majority of the Fifth Section, in Germany, where respect for human rights is generally high, there was ‘wide public approval of the treatment to which the applicant was subjected.’ This presents yet another dilemma. While the point of human rights is, amongst other things, to protect vulnerable individuals and minorities from the tyranny of the majority, public scepticism about human rights also derives in no small measure from the misconception that human rights benefit mostly criminals, and members of other unmeritorious minorities, rather than the law-abiding, morally worthy majority. For example, an article in the Sunday Telegraph of 14 May 2006 branded the UK’s Human Rights Act 1998 ‘the refuge of terrorists and scoundrels’ and reproduced the title page of the Act with the word ‘Human’ scored out and replaced with ‘The Criminals.’ Judgments, such as those of the eight-judge majority of the Grand Chamber in the Gäfgen case, make myths such as these more, rather than less, difficult to dispel.

There is no ideal solution to the dilemmas presented by Gäfgen v Germany since every alternative suffers from moral problems. But, for the reasons already given, the verdicts of the majority of the Fifth Section, the minority of the Grand Chamber, and the relevant German courts represent the least bad outcome. They mean, in effect, that the Article 3 prohibition against police threats to torture suspects is not quite as ‘absolute’ as it has hitherto seemed. It could, in other words, effectively be overridden by the competing Convention rights of a hostage—to life, to freedom and to escape from severe inhuman and degrading treatment—particularly perhaps when the hostage is a child. But, because several rare conditions would have to be fulfilled, admitting this exception would not risk sliding down the slippery slope to increasing judicial toleration of the routine abuse of suspects in police custody. First, there would have to be virtual certainty provided by overwhelming evidence that the suspect was involved in the abduction. Second, compelling reasons would have to exist to support the belief that the hostage was likely to be suffering severe inhuman and degrading treatment, and faced an imminent risk of death, unless rescued immediately. Third, compelling evidence would be required indicating that the suspect had information which could facilitate a rescue. Fourth, coercion applied to the suspect by law enforcement officials

51 See, for example, Keller and Stone Sweet (eds), A Europe of Rights: The Impact of the European Convention on Human Rights on National Legal Systems (Oxford: Oxford University Press, 2008) at 693; and Greer, supra n 2 at 76–83.
52 Supra n 17 at para 80.
should be limited to the threat of torture, or other ill-treatment, and should not involve physical ill-treatment itself, a distinction which not all commentators on the Gáfgen case fully appreciate. Fifth, the threat should be issued only when every other option has been tried and failed. And, finally, those who were responsible should be formally, though leniently, punished afterwards. While this last condition may seem morally inconsistent—punishing what is effectively permitted—it is, at least, arguably more acceptable than the increased risk of the abuse of suspects in police custody which might be incurred without it.

54 For example, the titles of the articles by Simonsen, supra n 4; Schroeder, supra n 4; Jessberger, supra n 4; and Wierenga and Wirtz, supra n 4, all of which include the word ‘torture’, are misleading on this point.