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Mavronicola, Natasa

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# **Is the prohibition against torture and cruel, inhuman and degrading treatment absolute in international human rights law? A reply to Steven Greer**

## **ABSTRACT**

In a recent article, Steven Greer questions whether the prohibition of torture and cruel, inhuman and degrading treatment is really 'absolute' in international human rights law, and argues that it is not. In this piece, I consider Greer's arguments against the absolute character of the prohibition at law, and find them wanting. In doing so, I clarify what the legal prohibition's absolute character entails, and what it does not, addressing misconceptions, and revisit the distinction between negative and positive obligations in human rights law. In responding to Greer's arguments, conceptual clarifications are offered which carry significant implications in the context of counter-terrorism and human rights law more widely. At the same time, I underline that the absolute character of the prohibition of torture and cruel, inhuman and degrading treatment in human rights law does not close off critical engagement with the issue of individual (criminal) culpability vis-à-vis the prohibition at human rights law, or with the meaning of the terms torture and cruel, inhuman and degrading treatment.

**KEYWORDS:** torture, cruel, inhuman or degrading treatment, police, absolute rights, counter-terrorism, *Gäfgen v Germany*

## **1. INTRODUCTION**

Steven Greer has written extensively in a thoughtful and thought-provoking manner on the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR). In recent years, he has devoted some of his attention to the absolute character of the right not to be subjected to torture or inhuman or degrading treatment or punishment under Article 3 of the ECHR (the word 'cruel' is not included in this provision), and in its variations across other legal instruments for the protection of human rights. His critical reflections on this subject have in many ways been focused on and galvanised by the controversial judgment of the ECtHR in *Gäfgen v Germany*.<sup>1</sup> In this case, the ECtHR's Grand Chamber found a breach of Article 3 ECHR when German police-officers subjected Magnus Gäfgen, the kidnapper of 11-year-old Jakob von Metzler, to threats of torture with a view to locating Jakob. The kidnapper thereby confessed to having killed Jakob and disclosed the body's whereabouts. He was convicted after pleading guilty, following a decision to admit real evidence obtained through his tainted confession, which attracted a contentious finding on Article 6 ECHR (the right to a fair trial) by the

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<sup>1</sup> *Gäfgen v Germany*, Application No 22978/05, Merits and Just Satisfaction, 2010.

Grand Chamber,<sup>2</sup> on which I will not dwell. The Grand Chamber found the threats of torture to amount to inhuman treatment and demanded adequate redress. It considered that there was no room for justifying breaches of Article 3, given that it is an absolute right, which means that it is not displaceable on the basis of even the worthiest of extraneous ends, such as saving the life of an 11-year-old child.<sup>3</sup>

In his latest piece for the *Human Rights Law Review*, titled ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really “Absolute” in International Human Rights Law?’<sup>4</sup> which builds on an earlier case comment on *Gäfgen*,<sup>5</sup> Greer takes a stand against what he calls the ‘cardinal axiom of international human rights law...that the prohibition against torture, cruel, inhuman and degrading treatment is *absolute in the sense that no exception can be accepted, defended, justified, or tolerated in any circumstance whatever*’, as he sets out in the article’s abstract.<sup>6</sup> In this paper, I unpack and address his arguments vis-à-vis the prohibition at human rights law. In doing so, I clarify what the legal prohibition’s absolute character entails, and what it does not, addressing misconceptions, and revisit the distinction between negative and positive obligations in human rights law. These conceptual clarifications, I argue, carry significant implications in the context of counter-terrorism and human rights law more widely. I suggest that the absolute character of the prohibition of torture and cruel, inhuman and degrading treatment in human rights law does not close off critical engagement with the wider moral debate, including as it relates to the ticking bomb scenario, with the issue of individual (criminal) culpability vis-à-vis the prohibition at human rights law, or with the meaning of the terms torture and cruel, inhuman and degrading treatment.

## 2. PRELIMINARY CONCERNS

My preliminary remarks concern Greer’s portrayal of the absolute character of the prohibition at law. I consider that Greer’s understanding of the absolute character of the prohibition on torture and cruel, inhuman or degrading treatment and punishment (which I will shorten to CIDT, but without wishing to dismiss the significance of inhuman and degrading punishment<sup>7</sup>), as set out in the abstract, is premised on an ambiguity that could be seen as setting absoluteness up for failure, in the following ways. When Greer posits that the absolute character of the

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<sup>2</sup> Ibid. at paras 133-188. The Grand Chamber of the ECtHR suggested that real evidence obtained by torture can never be used against someone in criminal proceedings without violating Article 6 ECHR, whilst the use of real evidence obtained by other Article 3 ill-treatment *may* entail violation of Article 6 ECHR: see *Gäfgen*, *ibid.*, at para 167. In this case, the Grand Chamber found that the admission of such evidence did not vitiate the fairness of the trial under Article 6 ECHR.

<sup>3</sup> Ibid., at paras 87-132.

<sup>4</sup> Greer, ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really “Absolute” in International Human Rights Law?’ (2015) 15 *Human Rights Law Review* 101.

<sup>5</sup> Greer, ‘Should Police Threats to Torture Suspects Always be Severely Punished? Reflections on the *Gäfgen* Case’ (2011) 11 *Human Rights Law Review* 67.

<sup>6</sup> Emphasis added.

<sup>7</sup> On this topic, see Mavronicola, ‘Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context’ (2015) 15 *Human Rights Law Review* 721; Van Zyl Smit, Weatherby and Creighton, ‘Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?’ (2014) 14 *Human Rights Law Review* 59.

prohibition means that ‘no exception can be accepted, defended, justified, or tolerated in any circumstance whatever’, the modal verb ‘can’ could be read as connoting possibility as a matter of fact rather than lawfulness. Thus, reading Greer’s formulation, one may assume that absoluteness entails that it is impossible that torture or CIDT would ever be accepted, defended, justified or tolerated by anyone (or even committed by anyone) – rather than the more limited claim of legal absoluteness, which is that torture or CIDT is *not lawful*, in international human rights law, in any circumstances.<sup>8</sup> The potentially misleading account of what legal absoluteness entails is, to some extent, harnessed by Greer. For instance, he puts forward the non-absolute character of the prohibitions of torture and CIDT in certain constitutional rights instruments – which he considers to be an ‘inconvenient fact’<sup>9</sup> for those supporting the absolute character of the prohibition in international human rights law.

In other words, Greer’s ambiguous and sweeping description makes a straw man of legal absoluteness. There are and will be circumstances in which some might defend or even tolerate torture or CIDT. The absolute character of the prohibition of torture and CIDT in human rights law does not signify that no such circumstances can possibly arise, nor does it purport to reflect unanimous global consensus (I wonder what legal prohibition can?).

Moreover, Greer’s formulation of absoluteness has the capacity to conflate the absolute character of the prohibition of torture and CIDT as it applies to the State under international human rights law with the contours of the criminal culpability, excusability, and shades thereof, of individuals<sup>10</sup> who commit such acts, such as the police officers in *Gäfgen*. This is, to some extent, informed by the approach adopted by the Grand Chamber of the ECtHR in *Gäfgen* in relation to the criminal culpability of the police officers involved,<sup>11</sup> and of which Greer has been critical.<sup>12</sup> The absolute character of the prohibition of torture and CIDT as a matter of human rights law stands in a complex relationship with regards to individual criminal liability, which is not coterminous with illegality in international human rights law. I address this below.

### 3. GREER’S GÄFGEN THESES

Greer’s central theses, which he labels the ‘*Gäfgen* thesis in the narrow sense’ and the ‘*Gäfgen* thesis in the broad sense’,<sup>13</sup> rely chiefly on casting certain situations as conflicts of rights. I will address these in turn by examining the obligations

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<sup>8</sup> For an illuminating discussion of the interaction between law and morality in the context of legal provisions protecting human dignity, see McCrudden, ‘Introduction to Current Debates’ in McCrudden (ed), *Understanding Human Dignity* (OUP 2013) 1, at 47-54.

<sup>9</sup> Greer, ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really “Absolute”?’, *supra* n 4, at 113.

<sup>10</sup> On this, and the crime of torture, see – for instance – Ambos, ‘May a State Torture Suspects to Save the Life of Innocents?’ (2008) 6 *Journal of International Criminal Justice* 261.

<sup>11</sup> *Gäfgen*, *supra* n 1 at paras 120-125.

<sup>12</sup> See, for instance, Greer, ‘Should Police Threats to Torture Suspects Always be Severely Punished?’, *supra* n 5 at 83-84, 86-87.

<sup>13</sup> *Ibid.* at 106.

emanating from the legally enshrined human right not to be subjected to torture or inhuman or degrading treatment or punishment.

The narrow *Gäfgen* thesis relies on an ideal type ‘ticking bomb’ scenario set out by Greer, broadly reflecting the facts of *Gäfgen* and with any of the uncertainties that might normally arise in such a context<sup>14</sup> largely absent:

It is known beyond reasonable doubt that the suspect was involved in the kidnapping. There is no reason to believe that the kidnap victim is already dead, and every reason to believe that the kidnapping is causing torture and/or inhuman treatment, and is likely also to threaten imminent death. There is compelling evidence that the suspect knows where the victim is and adequate reason to believe this will be revealed under pressure. The coercion applied to the suspect is limited to the threat of torture and, therefore, causes less suffering than that which the victim is reasonably assumed to be experiencing as a consequence of the kidnapping. Every other reasonably viable option to rescue the kidnap victim has been tried and failed. Finally, those responsible for the threat are prosecuted and tried by an independent court where, if these conditions are fulfilled, their conduct should be excused by the imposition of a lenient sentence or possibly, where the threat leads to the kidnap victim being rescued, no punishment at all.<sup>15</sup>

Greer suggests that this scenario encapsulates a conflict of rights, where ‘the right of a kidnap victim to be spared the torture, cruel, inhuman or degrading treatment and the risk of death caused by the kidnapping, should constitute an exception to the suspected kidnapper’s right not to be threatened with torture in an attempt to facilitate rescue’.<sup>16</sup> I note that, in this scenario, Greer envisages the perpetrators ultimately being subject to the justice process and the pursuit of some form of (lenient) redress – or (with a dash of moral luck) if the child is saved, receiving no punishment at all, in Greer’s account.<sup>17</sup>

Some clarificatory remarks regarding human rights law and moral philosophy are warranted at this point. Human rights *law* is not necessarily coterminous with perspectives from moral philosophy on human rights – and, of course, the latter are many and varied.<sup>18</sup> In philosophical terms, people’s human rights may be viewed as being directly violated through the acts of State agents and

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<sup>14</sup> The uncertainties involved in the proverbial ‘ticking bomb’ scenario are raised by Luban – among others – in Luban, ‘Liberalism, Torture, and the Ticking Bomb’ (2005) 91(6) *Virginia Law Review* 1425, at 1444. Luban comments on the *Gäfgen* case itself in Luban, *Torture, Power, and Law* (CUP 2014) at 76-78.

<sup>15</sup> Greer, ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really “Absolute”?’, *supra* n 4, at 105-106 (citations omitted). I note that as Luban points out in *Torture, Power, and Law*, *ibid* at 77, in the actual *Gäfgen* case the threats were patently not used as a last resort.

<sup>16</sup> *Ibid.* at 105.

<sup>17</sup> *Ibid.* at 106, citing Kramer, *Torture and Moral Integrity: A Philosophical Enquiry* (OUP 2014), at 288-309.

<sup>18</sup> See, for example, the diverse philosophical accounts on the foundations of human rights discussed in Cruft, Liao, and Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015).

non-State agents alike – although there may still be a variation in the extent of obligations appropriately to be allocated to the State (and similarly powerful entities) as against the average individual. Thus, it makes sense in philosophical terms to describe the situation in the *Gäfgen* scenario as one where Jakob’s right not to be subjected to CIDT or be killed has been violated by Gäfgen. Even so, this does not necessarily disclose a *conflict of rights*: Jakob’s right is violated by Gäfgen, whereas what is proposed by Greer is that Gäfgen’s right not to be subjected to CIDT ought to be – justifiably, in Greer’s view – infringed by the State. The duty-bearers and thus rights-violators are distinct. Therefore, calling for Jakob’s right to be balanced against Gäfgen’s right is misplaced, as the two rights demand acts or forbearances from different actors – they are not, as such in conflict.

In the alternative, and bringing this more squarely into the realm of human rights law, which directly binds *States*, Greer is alluding to Jakob’s and Gäfgen’s rights *as against the State*. But in this case Greer must acknowledge that distinct types of duties are at play. On the one hand, there is the negative obligation of the State to refrain from subjecting individuals to torture or CIDT, which is the essence of Greer’s discussion, given that his title focuses on the *prohibition* of torture and CIDT in international human rights law; on the other, there is the positive obligation on the State to take all reasonable measures to protect individuals from being subjected to CIDT at the hands of third parties.<sup>19</sup> It is very hard to argue that the positive obligation on the State is boundless. Whilst I may acknowledge that my right not to be subjected to CIDT includes a right, in philosophical terms, not to be raped at the hands of anyone – State actor or non-State actor alike – the State’s positive obligation to protect me from such ill-treatment encompasses duties to secure my protection through reasonable and adequate laws, law enforcement mechanisms and appropriate redress mechanisms, but does not extend to providing me with personal 24-hour protection at all times, in part due to resource constraints and not least because this might involve significant invasions of privacy. In the *Gäfgen* scenario, the State’s positive obligation can be unpacked into a number of duties including the effective deployment of forces to locate the child, interrogating the kidnapper, searching his house, and ultimately (in the specific scenario) seeking adequate redress for his wrong-doing. Yet there is no duty to torture or inflict CIDT within such a positive obligation to take reasonable measures.<sup>20</sup> This is both the legal position and, in my view, an eminently tenable moral position.<sup>21</sup>

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<sup>19</sup> Shue classifies duties under basic rights as duties of restraint, duties to protect and duties to provide – see Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, 2nd edn (Princeton University Press 1996) at 35. See also Fredman, ‘Human Rights Transformed: Positive Duties and Positive Rights’ [2006] *Public Law* 498, at 500.

<sup>20</sup> See Mavronicola, ‘What is an “absolute right”? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights’ (2012) 12(4) *Human Rights Law Review* 723, at 732. In an alternative argument, Turner questions the *efficacy* of torture and other ill-treatment towards preventing harm: see Turner, ‘Human Rights and Antiterrorism: A Positive Legal Duty to Infringe Freedom From Torture?’ (2012) 35(11) *Studies in Conflict & Terrorism* 760, at 771-773.

<sup>21</sup> Although I do not wish to dwell on the wider merits of Greer’s *moral* stance in this piece, it is worth highlighting that a prevailing issue as regards Greer’s moral position is that he often makes what Shue identifies as the mistake of assuming ‘that the only consideration relevant to moral permissibility is the amount of *harm* done’: Shue, ‘Torture’ (1978) 7(2) *Philosophy & Public Affairs* 124, at 126 (emphasis added).

Greer acknowledges this framing of the issue, premised on drawing a clear distinction between negative and positive obligations,<sup>22</sup> and cites authors who posit that the negative obligation straightforwardly demands abstaining from ill-treatment whilst the positive obligation demands reasonable and human rights-compliant measures.<sup>23</sup> But he does it little justice. He describes the argument on negative and positive obligations as suggesting that ‘Jakob’s right to be rescued from the effects of the kidnapping would only arise if Gäfgen was not subjected to torture, inhuman or degrading treatment’.<sup>24</sup> This recasting of the argument is both inaccurate and misleading. Jakob’s right both arises and attracts an *extensive* range of positive obligations imposed on the police with a view to saving him: in the context of the ECHR, the State is under duties, in light of Articles 2 and 3 ECHR, which protect the right to life and the right not to be subjected to torture or inhuman or degrading treatment or punishment respectively, to enact relevant laws to deter and provide redress or punishment for unlawful takings of life or the infliction of Article 3-proscribed ill-treatment, and offer adequate mechanisms for implementing these; to investigate instances of credible allegations of breaches of Articles 2 and 3 ECHR; and to take operational steps to safeguard individuals facing an immediate risk of being killed or being subjected to the proscribed ill-treatment at the hands of others.<sup>25</sup> These obligations would simply not include a duty to torture or inflict inhuman or degrading treatment on Gäfgen. That is, positive obligations to take all *reasonable* measures, including operational measures, to protect Jakob would not include a duty to act in a way which is absolutely prohibited.<sup>26</sup> This is certainly the legal position under the ECHR, and for many it would also be an appropriate moral position. Indeed, I am not sure that Greer himself is prepared to countenance the prospect of the next-of-kin of persons who are the victims of kidnapping or other violent crime claiming a breach of human rights in the police’s ‘failure’ to take the step of torturing a suspect of subjecting him to CIDT with a view to finding out a (potentially alive) victim’s whereabouts.

Thus, much of Greer’s conflict thesis glosses over the issue of *responsibility* for human rights violations at law, and insufficiently engages with the obligations correlating to the rights he alleges are in conflict – a closer focus on these indicates that the conflict crumbles. The conceptual clarification offered above, based on the distinction between negative and positive obligations, is not only crucial to responding to his *Gäfgen* theses, but also of considerable significance more broadly in relation to counter-terrorism. Notably, the idea that the State may have a positive duty to act in breach of inviolable obligations, such as the duty not to inflict torture

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<sup>22</sup> Greer, ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really “Absolute”?’, supra n 4 at 124-125.

<sup>23</sup> See Smet, ‘Conflicts between Absolute Rights: A Reply to Steven Greer’ (2013) 13(3) *Human Rights Law Review* 469, at 475-480 and 496-498; Mavronicola, ‘What is an “absolute right”?’, supra n 20 at 732-735.

<sup>24</sup> Greer, ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really “Absolute”?’, supra n 4 at 124.

<sup>25</sup> See Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) at 16-22, 45-46. See, as an example from case law, *Opuz v Turkey* Application No 33401/02, Merits and Just Satisfaction, 9 June 2009.

<sup>26</sup> See Mavronicola, supra n 20 at 732.

or CIDT, in order to save lives in the context of counter-terrorism (and beyond) must be roundly rejected. The State's positive duties to protect the lives of persons within its jurisdiction do not extend to duties to torture or inflict CIDT. Clarifying this is vital – and ensures that human rights do not, through the flawed notion of allegedly unbounded positive obligations, become a rhetorical vehicle for their own destruction.

Returning to Greer's *Gäfgen* theses: what of the hypothetical scenario, Greer interposes, where instead of *Gäfgen*, the kidnapper is a rogue police officer? Does this scenario not disclose the 'perfect' conflict between duties of the same duty-bearer: the State? The answer is not so straightforward. Certainly, in this scenario, and with the rogue police officer captured, we could be looking at two instances – one actual, and one proposed by Greer – of direct *violation* of the right not to be subjected to torture or inhuman or degrading treatment: one where the rogue police officer subjects Jakob to the proscribed ill-treatment; the other insofar as police searching for Jakob subject the captured rogue police officer to proscribed ill-treatment. The State might be held responsible for both.<sup>27</sup> Nonetheless, these two instances do not straightforwardly encapsulate a *conflict of rights*. Even if we were able to say that the *State* breaches the negative obligation not to inflict torture or CIDT in both instances, the rogue police officer's duty not to inflict torture or CIDT and the duty of the police officers interrogating him not to do the same are not in *conflict*, although the rogue officer's initial breach of the right has triggered contemplation of the second. The only duties that could be said to be in conflict are the State's positive duties to stop Jakob's ill-treatment and the State's negative duty not to inflict torture or CIDT on *anyone*, including the rogue kidnapper. But as indicated above, these positive duties, which are – appropriately – circumscribed by criteria of reasonableness and legality under human rights law, do not extend to conduct violating the absolute prohibition of torture and CIDT. Again, there is no conflict.

Greer's broad(er) *Gäfgen* thesis, which stems from extending his analysis of the 'ideal' type *Gäfgen* scenario to human rights more generally, is worth setting out in full:

'Absolute' rights can and do conflict, though rarely. When they do it is logically impossible for each to be 'equally absolute'; one must inevitably be an exception to the other. As with the *Gäfgen*-thesis in the narrow sense, such conflicts can only be convincingly resolved by choosing the lesser of the two evils and/or by exercising moral reasoning, intuition and judgment in the fullest and widest senses guided by the quest to arrive at the result which is most consistent with the underlying rationale for the rights at issue. Call this 'the *Gäfgen*-thesis in the broad sense'.<sup>28</sup>

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<sup>27</sup> The State's direct responsibility may not be entirely straightforward. See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002), especially at 81-109; and see, specifically, Article 2 and Article 7.

<sup>28</sup> Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute"?', *supra* n 4 at 106 (citations omitted).



Key to Greer's broad *Gäfgen* thesis is the idea that 'it takes only a single exception to an "absolute" rule or principle for it to lose its absolute status'.<sup>29</sup> For Greer, the *Gäfgen* case offers precisely this potential exception. Envisaging other scenarios of such *conflict* even between 'absolute'<sup>30</sup> rights, Greer considers that in such instances judges ought to engage in a balancing of evils and to opt for the lesser evil of violating the more blameworthy party's rights, or perhaps going for whatever causes the least harm, or harm to the smallest number of people, depending on the situation. The proverbial trolley only makes one – understated – appearance,<sup>31</sup> but the broad *Gäfgen* thesis ultimately advocates pursuing the greater good, or lesser evil.

Again, the broad thesis relies on sketching a conflict which is non-existent, eliding as it does the distinction at human rights law between negative and positive obligations and the significant and appropriate distinguishing features pertaining to each.<sup>32</sup> Greer asserts that, given the conflict, affirming and applying the absolute prohibition on the State inflicting torture and CIDT in a scenario such as that in *Gäfgen* effectively amounts to a 'substantive moral choice'<sup>33</sup> between conflicting duties: not to torture or inflict CIDT on the one hand; and to save an innocent person or persons on the other, for example. As such, it requires 'convincing reasons'.<sup>34</sup> I address his 'legal status as moral choice' thesis below.

Returning to the plausibility of the *Gäfgen* theses, Greer's strongest case, in my view, appears to be the hostage scenario,<sup>35</sup> and it is worth reflecting on this scenario to cast his *Gäfgen* theses in their best light as legal positions. The right to life, as enshrined in provisions such as Article 2 ECHR, allows for the use of lethal force against a hostage-taker insofar as absolutely necessary to defend the hostage(s) from unlawful violence.<sup>36</sup> Now we might contemplate the possibility that, instead of firing a shot that kills a hostage-taker, police shoot him in the gut, causing him enormous pain, though his life is ultimately saved by medics. Is this not an instance of the lawful infliction of inhuman or degrading treatment, given that it inflicts grave suffering – and perhaps aims to do so?<sup>37</sup> If a gratuitous infliction of such suffering would clearly be found to amount to a breach of Article 3 – and it would<sup>38</sup> – then

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<sup>29</sup> Ibid. at 128.

<sup>30</sup> The quotation marks are Greer's – ibid. at 104.

<sup>31</sup> For a thoughtful take on *Gäfgen* in light of the Trolley Problem, see Smet, *supra* n 23. On the Trolley Problem in philosophy, see generally Edmonds, *Would You Kill the Fat Man?: The Trolley Problem and What Your Answer Tells Us about Right and Wrong* (Princeton University Press 2015).

<sup>32</sup> On the distinction, see Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge 2013) at 57.

<sup>33</sup> See Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute"?', *supra* n 4 at 125.

<sup>34</sup> Ibid.

<sup>35</sup> Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute"?', *supra* n 4 at 105, 123, 135.

<sup>36</sup> See Article 2(2)(a) ECHR.

<sup>37</sup> In order for treatment to be found to be inhuman or degrading, it is not essential for the suffering caused to be intended by the perpetrator: see, for instance, *Jalloh v Germany* Application No 54810/00, Merits and Just Satisfaction, 11 July 2006, at para 82.

<sup>38</sup> See, for instance, *Güler and Öngel v Turkey* Application Nos 29612/05 and 30668/05, Merits and Just Satisfaction, 4 October 2011; and see also *Cestaro v Italy* Application No 6884/11, Merits and Just Satisfaction, 7 April 2015, where the Court made a finding of torture.

arguably to make a finding that the lawful shooting of the hostage-taker is *not* contrary to Article 3 amounts to carving an exception to Article 3. That is, this constitutes a situation where a conflict of rights is created, and where the infliction of ill-treatment proscribed by Article 3 is considered justified.

This is not the right way to frame the issue, although – frustratingly – it appears to have traction with certain academic commentators who see instances of justified use of force as amounting to exceptions to Article 3 ECHR.<sup>39</sup> As argued in a relevant case comment,<sup>40</sup> neither the use of force nor the infliction of suffering are ‘the be-all and end-all of concepts such as “inhuman treatment”’.<sup>41</sup> Persons withstand significant suffering whether consensually or not, inflicted by third parties or not, in multiple contexts, without such suffering necessarily amounting to torture or CIDT. Rather, it is a particular form of *wrongful* infliction of such suffering, in a way which attacks persons’ human dignity, which the notions of torture and CIDT capture. The use of proportionate – that is, non-excessive – physical force to repel an immediate attack on oneself or others does not amount to torture or CIDT in that it does not undermine the human dignity of the person subjected to such force, whose agency is respected.<sup>42</sup> Waldron makes a related point to this, alluding primarily to the criterion of purpose. His view is worth setting out in full:

ECtHR doctrine holds that shackling a prisoner is degrading unless the shackling is necessary to stop the prisoner from harming others. Someone might ask: what is the difference between *this* invocation of an attendant possibility of harm to others, to justify what would otherwise be degrading, and (say) the invocation of the danger of terrorist attack to justify what would otherwise be degrading treatment during interrogation?...

... In the shackling case, what is degrading is the use of chains without any valid justification. Once the justification is clear, the element of degradation evaporates. But in the interrogation case, we choose treatment that is inherently degrading, because it is precisely that *degradation* that will get the detainee to talk...<sup>43</sup>

Thus there is no affront to dignity or agency in shackling a potentially violent and dangerous individual for the purpose of preventing harm to himself or others, yet there is one in gratuitous force, or force used for the very purpose of inflicting

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<sup>39</sup> See, for instance, Harris et al, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights* (Oxford: OUP, 2014) 236. See also Smet, ‘Conflicts Between Absolute Rights’, *supra* n 23.

<sup>40</sup> See, on this, Mavronicola, ‘*Güler and Öngel v Turkey*: Article 3 of the European Convention on Human Rights and Strasbourg’s Discourse on the Justified Use of Force’ (2013) 76(2) *Modern Law Review* 370.

<sup>41</sup> *Ibid.*, at 379.

<sup>42</sup> *Ibid.*

<sup>43</sup> Waldron, *Torture, Terror and Trade-offs* (OUP 2012) at 297-298.

feelings of anguish and degradation.<sup>44</sup> Therefore, as a matter of human rights law, the hostage scenario amounts to something more nuanced than a simple conflict of rights and the resultant carving of an exception to the prohibition of torture and CIDT.

Another important clarification is warranted, which relates to the distinction between negative and positive duties as they relate to the *Gäfgen* theses. Given the emphasis on criminal liability in Greer's ideal type *Gäfgen*-based scenario, in which he assumes that 'those responsible for the threat are prosecuted and tried by an independent court',<sup>45</sup> I propose briefly to revisit what absoluteness does and does not entail.

As indicated above, whilst in philosophical terms people's human rights may be viewed as capable of being directly violated through the acts of State agents and non-State agents alike, this is generally not the case in international human rights law, whereby human rights are only *directly* violated by the State. I point this out without wishing to dismiss the significant indirect horizontal effect resulting from positive obligations on States to protect people's human rights. The absolute prohibition of torture and CIDT in human rights law entails that every instance of the infliction of such ill-treatment at the hands of the State is conclusively unlawful as a matter of human rights law,<sup>46</sup> in being a straightforward breach of the State's negative obligation not to torture or inflict CIDT. Nonetheless, the question of redress via the pursuit of individual civil or criminal liability pertains to the State's positive obligations: whether the ill-treatment occurs at the hands of State or non-State agents, the duty to provide adequate protection and redress through civil or criminal mechanisms falls within the positive obligations to respect,<sup>47</sup> protect and fulfil human rights, and is appropriately to be delimited by a reasonableness standard.<sup>48</sup> Some *reasonable and adequate* redress must be provided in relation to Article 3-incompatible ill-treatment under Article 3 ECHR – or unlawful killings under Article 2 ECHR, to take another example.

The findings of the ECtHR in relation to redress in *Gäfgen*, however, could be challenged as having gone too far, by the standards of reasonableness and adequacy, in demanding a particular degree of criminal punishment via human rights law; in particular, the Grand Chamber of the ECtHR found that the imposition of suspended fines 'cannot be considered an adequate response to a breach of Article 3', finding such punishment to be 'manifestly disproportionate to a breach of one of

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<sup>44</sup> See *Raninen v Finland* Application No 20972/92, Merits and Just Satisfaction, 16 December 1997; see also *Svinarenko and Slyadnev v Russia* Application Nos 32541/08 and 43441/08, Merits and Just Satisfaction, 17 July 2014.

<sup>45</sup> See *supra* text to n 15.

<sup>46</sup> Mavronicola, 'What is an "absolute right"?', *supra* n 20, at 737, 739.

<sup>47</sup> I note that generally the duty to respect is seen as the negative obligation to abstain from certain treatment. Nonetheless, I consider that the duty to respect, within the State apparatus, entails duties to take positive measures to avert breaches of the negative obligation by State agents.

<sup>48</sup> On the reasonableness standard in relation to positive obligations under the ECHR, see Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) at 223.

the core rights of the Convention'.<sup>49</sup> Indeed, there is good reason to suggest that the ECtHR must refrain from attempting to draw rigid contours of individual criminal liability via positive obligations under human rights law, given that it is neither a criminal tribunal nor a law-making body.<sup>50</sup> What it is important to take away from this clarification, for the purposes of this article, is that any duty to punish individuals is not an essential parameter of the absoluteness of the prohibition in international human rights law, a prohibition which directly holds *States* liable for human rights violations.

I conclude on the *Gäfgen* theses by highlighting that Greer's accusation that the majority of the Grand Chamber was willing 'to sacrifice the life of an innocent child in order to protect his kidnapper from 10 minutes of anxiety provoked by the threat of torture to facilitate rescue'<sup>51</sup> is inapposite and, ultimately, unfair. I consider that the analysis above, which elucidates the type and scope of the relevant duties, offers a more nuanced account of the issues at stake.

#### 4. BEYOND THE GÄFGEN THESES

There are other theses within Greer's contestation of the absolute prohibition of torture and CIDT in human rights law. A significant bulk of Greer's arguments is premised on discrediting the idea of the legal 'absoluteness' of the prohibition through challenges based on varied premises. This is done with a view to affirming the substantive moral choice – 'making intuitively and emotionally convincing, and rationally defensible, moral choices',<sup>52</sup> as he puts it – involved in situations which, he suggests, amount to conflicts of rights or, at least, moral dilemmas. I proceed to consider these arguments, which I will label the 'legal status as moral choice' thesis and the 'substantive content as moral choice' thesis.

One argument relies on the idea that the absoluteness of the prohibition of torture and CIDT under rights such as Article 3 ECHR is not 'necessary'. Greer suggests, in the article's abstract, that the absolute character of the prohibition of torture and CIDT in international human rights law is a matter of 'attribution' and not 'inherent legal necessity'. Greer does not explain what he considers 'inherent legal necessity' – a rather opaque expression – to be, but the point emerges in his suggestion that the prohibition of torture and CIDT is 'formally' unqualified and non-derogable, but not expressly absolute. It is difficult to understand this point, given that the absence of qualification and immunity from derogation are the central

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<sup>49</sup> See *Gäfgen*, supra n 1, at para 124. On this, see the seminal study on prosecuting serious human rights violations in Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (OUP 2009), especially at chapters 2-4, 6.

<sup>50</sup> See Seibert-Fohr, *ibid.*, chapter 4; note her point regarding the human rights position vis-à-vis the criminal law position at 147, footnote 232. See also Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?', in Zedner and Roberts (eds.), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012) 135; Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *Journal of International Criminal Justice* 577.

<sup>51</sup> *Ibid.*, at 128.

<sup>52</sup> Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute"?', supra n 4, at 136.

constitutive elements of the right's absoluteness at law – the ECtHR, for example, which has pronounced on the absolute character of Article 3 ECHR in hundreds of cases, has distilled the following elements as constitutive of Article 3's absoluteness:

- (a) that Article 3 makes no provision for exceptions – it cannot be lawfully interfered with insofar as 'necessary in a democratic society', as is the case with other, qualified rights such as the right to private and family life (Article 8) or freedom of expression (Article 10);
- (b) that Article 3 is non-derogable even in situations of war or other public emergency threatening the life of the nation, as affirmed in Article 15 ECHR; and
- (c) that the prohibition of torture and inhuman and degrading treatment and punishment applies irrespective of the victim's conduct, that is, 'whether the victim or potential victim is an innocent child or a cold-blooded murderer'.<sup>53</sup>

Thus, absoluteness represents this legal non-displaceability of a right such as Article 3 ECHR.

A hint of the broader point Greer is making nonetheless emerges in his comparison of rights such as those enshrined in Article 3 of the ECHR with those encapsulated in Article 6 of the ECHR. Greer suggests that the fact that absoluteness is a matter of attribution – and can be revoked by choice – is attested by the ECtHR's qualification of a 'formally unlimited' right of access to a court as non-absolute and therefore subject to legitimate and proportionate exceptions.<sup>54</sup> On this, Greer cites the case of *Al-Adsani v UK*,<sup>55</sup> where on a tight majority the Grand Chamber found that the bar, on the basis of State immunity, to a civil suit alleging torture against the government of Kuwait was compatible with the right to a fair trial enshrined in Article 6 of the ECHR, arguing that it was a justified restriction on the applicant's right to a court.<sup>56</sup> Greer is suggesting that the same approach can be taken with Article 3 of the ECHR, in that implicit exceptions can appropriately be read into it.

Two points can be made in relation to what I might label Greer's 'legal status as moral choice' thesis. The first relates to his use of the example of Article 6 ECHR. It is worth, first, highlighting that Article 6 is derogable under Article 15 ECHR, and thus does not constitute an absolute right, given that it is displaceable in circumstances of war or other public emergency threatening the life of the nation. As to Greer's suggestion that it has been implicitly qualified on the basis of – arguably – 'moral choice', I would say the following. Article 6(1) provides that '[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. Whilst derogable under Article 15 ECHR, unlike Article 3 of the ECHR which is non-displaceable in the sense of being both unqualified and non-derogable, Article 6 ECHR is otherwise not expressly qualified in such a way as, say, Article 8 of the ECHR, which allows under

<sup>53</sup> Mavronicola, 'What is an "absolute right"?', supra n 20, at 737.

<sup>54</sup> Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute"?', supra n 4, at 112.

<sup>55</sup> *Al-Adsani v UK* Application No 35763/97, Merits and Just Satisfaction, 21 November 2001. See the analysis in Voyiakis, 'Access to Court v State Immunity' (2003) 52(2) *International & Comparative Law Quarterly* 297.

<sup>56</sup> *Al-Adsani*, ibid., at paras 42-67.

Article 8(2) for interferences which are necessary in a democratic society in the pursuit of certain legitimate aims. Yet what a fair hearing amounts to is a matter of interpretation – or, as it has been put elsewhere, specification.<sup>57</sup>

In my view, the right to a fair hearing in the determination of one's civil rights and obligations is not properly to be interpreted as demanding unfettered access to a substantive hearing on the merits of a legal claim without any procedural barriers. Arguably, the right to a fair hearing admits of both the preliminary or procedural and substantive stages in adjudication of a claim or dispute. Insofar as access to the procedural hearing is not unfairly impeded, it is fair that access to a full-blown *substantive* hearing is, in some circumstances, denied at a preliminary stage, for instance on account of a limitation period or not discharging an evidentiary burden. As such, what the ECtHR is saying is that access to a substantive hearing is not always necessary to fulfil the demand of a fair hearing in the determination of someone's rights and obligations. The proper interpretation of what the Court is doing is not that the right to a fair hearing is not absolute, in the sense that it is *displaceable*; but rather that, in specifying the substantive contours of the right to a fair hearing, access to a substantive hearing may – fairly – be regulated and potentially restricted. The determination of whether the regulation of access to a substantive judicial hearing is Article 6-compatible centres on fairness, which is the interpretive focus of Article 6 ECHR<sup>58</sup> – much like torture, the 'inhuman' and the 'degrading' are the interpretive focal points of Article 3 ECHR. I reserve judgement on whether it is fair, however, to deny access to a substantive hearing on the basis of immunity, as in *Al-Adsani*<sup>59</sup> and the more recent judgment in *Jones v UK*,<sup>60</sup> but have considerable misgivings as regards the Court's findings.<sup>61</sup>

The second response to Greer's 'legal status as moral choice' is broader. In Greer's casting of the issues, the distinction between the widespread philosophical debate on something akin to the 'ticking bomb' scenario,<sup>62</sup> on the one hand, and the *legal* position on torture and CIDT in human rights law, on the other, is eschewed. This is the straw man, outlined in my preliminary objections above, kicking in, insofar as a lack of total moral consensus on what ought to happen in something akin to a ticking bomb scenario is utilised to suggest that the legal character of the

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<sup>57</sup> See Mavronicola, 'What is an "absolute right"?', *supra* n 20. See, on this, Gewirth, 'Are There Any Absolute Rights?' (1981) 31 *The Philosophical Quarterly* 1; and Richardson, 'Specifying Norms as a Way to Resolve Concrete Ethical Problems' (1990) 19(4) *Philosophy & Public Affairs* 279.

<sup>58</sup> See *supra* n 55.

<sup>59</sup> *Al Adsani v UK*, *supra* n 55.

<sup>60</sup> *Jones v UK*, Application Nos 34356/06 and 40528/06 Merits and Just Satisfaction, 14 January 2014.

<sup>61</sup> See Mavronicola, 'Mavronicola on State immunity and torture: the case of *Jones v UK*', *Human Rights in Ireland*, 16 January 2014, available at: <http://humanrights.ie/international-lawinternational-human-rights/mavronicola-on-state-immunity-and-torture-the-case-of-jones-v-uk/> (accessed 21 June 2016).

<sup>62</sup> For an eloquent discrediting of this scenario, see Farrell, *The Prohibition of Torture in Exceptional Circumstances* (CUP 2013). See also Shue, 'Torture in Dreamland: Disposing of the Ticking Bomb' (2005) 37 *Case Western Reserve Journal of International Law* 231; Luban, *Torture, Power, and Law* (CUP 2014) at chapter 4. For a firm stance on the post-9/11 'temptation' to torture, see The Special Rapporteur, Statement by the Special Rapporteur, delivered to the Third Committee of the General Assembly, U.N. Doc. E/CN.4./2002/76 (8 November 2001); and Rodley, 'The Prohibition of Torture: Absolute means Absolute' (2006) 34 *Denver Journal of International Law and Policy* 145.

prohibition should be reconceptualised as being a matter of moral choice. But even if the argument could be made of the moral permissibility of torture in such – hypothetical – exceptional circumstances, the fact that there is room for a moral debate does not automatically change the absolute character of the prohibition at human rights law.<sup>63</sup> Interestingly, Greer himself actually envisages the illegality of the police-officer’s actions in the ideal type *Gäfgen* scenario: a legal prohibition at human rights law and, indeed, criminal liability for inflicting torture and CIDT, remain part of his scenario’s factual matrix, though he advocates leniency in sentencing.<sup>64</sup> But Greer cannot have it both ways. On the one hand, he puts forward arguments towards the idea that the *legal* absoluteness of the prohibition of torture and CIDT hinges on moral consensus and crumbles in the face of dissensus in relation to a hard case such as an ideal type *Gäfgen* scenario; on the other hand, he assumes that the prohibition remains firmly in place for the purposes of strengthening his moral point in the scenario adopted to push the *Gäfgen* theses. Rather, we can take him to acknowledge that the legal prohibition remains absolute, whilst, in his view, the moral imperative not to torture or inflict CIDT is not.<sup>65</sup> I return to the broader implications of the suggestion that the law on torture and inhuman and degrading treatment ultimately boils down to ‘moral choice’ below.

Greer’s argument that the legal status of the prohibition of torture and CIDT should be recast, at law, as a matter of moral choice, is complemented by accusations levelled at those who support the absolute legal prohibition. He suggests that:

The *Gäfgen* case also illustrates how attempting to solve the challenges it raises through legal formalism and legal logic alone, risks degeneration into ‘legal fetishism’, the attribution of a transcendent, omnipotent, supra-human quality to what are no more than human-made standards, in order to avoid making intuitively and emotionally convincing, and rationally defensible, moral choices to resolve intractable normative dilemmas.<sup>66</sup>

It is not clear what is being described as possessing ‘a transcendent, omnipotent, supra-human quality’ – that is, whether it is (a) the law in general, (b) the particular legal provision (Article 3 ECHR) in particular, or (c) the absolute character of the prohibition enshrined in Article 3 ECHR, which the ECtHR has recognised – or attributed, as Greer prefers it – for decades across a rich body of case law. I take it, however, that Greer’s concern is to do with (c). I respond to this within the

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<sup>63</sup> In this vein, see Buchanan on ‘the mirroring view’ regarding human rights at law and morality: Buchanan, *The Heart of Human Rights* (OUP 2013) at 14-23 and chapter 2. I am grateful to Professors Shue and McCrudden for pushing this point.

<sup>64</sup> See the ideal type *Gäfgen* scenario, *supra* text to n 15.

<sup>65</sup> For a nuanced take on illegality, justifiability and excuse in the criminal context, see Davis, ‘The Moral Justifiability of Torture and other Cruel, Inhuman, or Degrading Treatment’ (2005) 19(2) *International Journal of Applied Philosophy* 161. On the distinction between crimes and rights, see also Farrell, ‘Just How Ill-treated Were You? An Investigation of Cross-fertilisation in the Interpretative Approaches to Torture at the European Court of Human Rights and in International Criminal Law’ (2015) 84(3) *Nordic Journal of International Law* 482.

<sup>66</sup> Greer, ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really “Absolute”?’ *supra* n 4 at 136.

framework of the ECHR, but consider that my response is applicable to other human rights instruments. As I explained above, the prohibition in Article 3 ECHR straightforwardly admits of no displacement – either through qualification as with rights such as Article 8 or 10 ECHR, or by means of derogation under Article 15 ECHR. Accordingly, Article 3 protects everyone within ECHR jurisdiction under any circumstances from being subjected to torture or CIDT; and if a Contracting State subjects anyone to torture or CIDT in any circumstances, the ill-treatment is conclusively unlawful. This is no mere legal formalism – the non-displaceable character of the prohibition enshrined in Article 3 ECHR reflects a deep commitment to safeguarding human dignity even against the seemingly or actually most pressing of extraneous concerns or aims, as has been repeatedly affirmed in cases such as *Chahal v UK*.<sup>67</sup>

More than that, the affirmation and application of the prohibition's non-displaceable character to the facts of *Gäfgen* accords with the principle of the rule of law, one of the core values on which the Council of Europe is founded.<sup>68</sup> Human rights provisions have been legally enshrined to safeguard these fundamentals rather than to leave them to individuals' and, crucially, State agents' intuitive judgement in whatever they might perceive as a troubling moral dilemma. In my view, it is hardly 'legal fetishism' to stand by that; Greer's position, on the other hand, attacks the foundational core of the legal protection of human rights as enshrined in the ECHR and other instruments. Human rights law is there to hold States to certain minimum standards, and the point of having standards is to impose requirements which are distinct from whatever State agents simply feel is the right thing to do in any perceived or actual dilemma.

In Greer's argument, not only is the legal status of rights such as those enshrined in Article 7 of the ICCPR or Article 3 of the ECHR a matter of moral choice – so, in Greer's view, is their *content*. Greer's position is that 'nearly all the canonical formulations are in the form of unqualified prohibitions and do not contain any express rights at all'.<sup>69</sup> Thus, according to Greer, the rights emanating from such provisions are 'implied' rather than express, and this entails that their limits and restrictions are matters of 'interpretation, choice and attribution rather than necessity and inescapable prescription'.<sup>70</sup> For Greer, this can accommodate carving certain rights out of the absolute prohibition or finding exceptions to these on the basis of 'moral choice'.<sup>71</sup>

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<sup>67</sup> *Chahal v UK*, Application No 22414/93, Merits and Just Satisfaction, 15 November 1996.

<sup>68</sup> Founding Statute of the Council of Europe, 1949, Preamble.

<sup>69</sup> Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute"?', *supra* n 4, at 111.

<sup>70</sup> *Ibid.*, at 111-112. A similar argument, but particularly in relation to *non-refoulement* duties under Article 3 ECHR, is made in Battjes, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed' (2009) 22(3) *Leiden Journal of International Law* 583; and Greenman, 'A Castle Built on Sand? Article 3 ECHR and the Source of Risk in Non-Refoulement Obligations in International Law' (2015) 27(2) *International Journal of Refugee Law* 264; but cf Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009) 326-327; and Mavronicola and Messina, 'Relatively Absolute? The Undermining of Article 3 ECHR in *Ahmad v UK*' (2013) 76(3) *Modern Law Review* 589.

<sup>71</sup> Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute"?', *supra* n 4, at 125.



In response to what I might thus label Greer's 'substantive content as moral choice' thesis, I propose that there is a distinction between the delimitation of the prohibition of torture and CIDT through the interpretation of its terms and the application of exceptions, qualifications or derogations to the prohibition of torture and CIDT. The former does not contradict the absolute character of the prohibition, whereas the latter would. Certainly, human rights instruments are imbued with moral content. They embody deeply moral – and morally contested – concepts whose interpretation must be morally engaged. Nowhere is this perhaps more vivid than in Article 3, which proscribes torture, inhumanity, and degradation inflicted on human beings. These abstract concepts are rich in moral content, whose contours we can arrive at through relevant deliberation, not empty canvases which contain 'no express rights' and on which preferences or intuitions can, without further ado, simply be imposed. This does not mean, however, that their interpretation constitutes an all-encompassing moral *choice*, which Greer posits can boil down to a greater good / lesser evil balancing act. Their specification, rather, should proceed on a principled understanding of the sorts of wrongs they proscribe.<sup>72</sup> A purported interpretation which amounts to displacement through the back door is not committed to such a principled reading of the ill-treatment proscribed. Waldron makes a forceful point to clarify the distinction between proper interpretation of terms such as torture, inhumanity and degradation on the one hand and displacement through the back door (that is, the pretence of interpretation) on the other, suggesting that in interpreting these terms:

We are certainly not permitted to follow...a realist logic proceeding on the basis of *modus tollens*:

- (1) If X is inhuman then X is prohibited;
- (2) But because X is necessary, it is unthinkable that X should be prohibited;
- therefore, (3) X cannot be regarded as inhuman.<sup>73</sup>

At the very least, Greer has not made the case for the idea that something intuitively targeted to a greater good / lesser evil outcome is *not* torture or CIDT. Rather, he seems precisely to be following the logic criticised by Waldron.

Another aspect of Greer's account involves taking issue with the interpretation of torture and CIDT and their 'extension' to certain actions that do not seem, to put it crudely, quite so bad as to warrant unqualified condemnation. He is particularly concerned with the idea that ill-treatment falling short of torture, such as the threats issued to Gafgen – amounting to CIDT – is considered to be absolutely prohibited. Going beyond the conflict argument, his argument could either be: (a) that (cruel,) inhuman and degrading treatment are not *wrong enough* to warrant an absolute prohibition; or (b) that the interpretation of these terms is going beyond the proper understanding of (cruel,) inhuman and degrading treatment. I have, to some extent, addressed (a) in considering Greer's argument for carving certain rights out

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<sup>72</sup> See, on this, Waldron, *Torture, Terror and Trade-offs*, *supra* note 43, especially at chapter 9. See also Mavronicola, 'What is an "absolute right"?', *supra* n 20, at 746-747.

<sup>73</sup> Waldron, *ibid.* at 297.

of the absolute prohibition or finding exceptions to these on the basis of ‘moral choice’.<sup>74</sup> There is much more to be said on the subject, but space does not allow this to be exhaustively covered in this piece.<sup>75</sup> Nonetheless, at times Greer appears to be suggesting (b): for instance, alluding to Kant’s principle of treating persons as ends in themselves and not only as means to an end, and returning to the *Gäffen* case, he suggests that ‘the threat to torture is more of a threat to treat someone as an end [sic] rather than itself treating them as an end [sic]’.<sup>76</sup>

The debate about the proper understanding of torture and cruel, inhuman and degrading treatment – and punishment – is significant. Given that these forms of ill-treatment are absolutely proscribed in human rights law, their interpretation and application in a given case determine the line between conclusively unlawful and potentially lawful<sup>77</sup> conduct. The line has been hotly contested since at least the seminal inter-State case of *Ireland v UK*, where the European Commission of Human Rights found the five techniques of interrogation employed by the UK forces in Northern Ireland internment camps to constitute torture, the European Court of Human Rights found them to constitute the lesser, but also absolutely prohibited, wrongs of inhuman and degrading treatment;<sup>78</sup> Judge Fitzmaurice, on the other hand, considered that most of the ill-treatment at issue did not cross the Article 3 threshold at all, and advised the Court not to ‘water down and adulterate the terms of the Convention by enlarging them so as to include concepts and notions that lie outside their just and normal scope’.<sup>79</sup>

More recently, the majority of the Grand Chamber in *Bouyid v Belgium*<sup>80</sup> found that single slaps inflicted on persons in police custody amounted to degrading treatment; whilst a vocal minority of judges, in dissent, cautioned against what they branded the ‘trivialising’ of findings of Article 3 ill-treatment.<sup>81</sup> Those in dissent expressed concern that the majority’s judgment ‘may impose an unrealistic standard by rendering meaningless the requirement of a minimum level of severity for acts of violence by law-enforcement officers’ and argued that this unduly high standard did not show proper appreciation of the difficulties that police may face in real-life

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<sup>74</sup> Greer, ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really “Absolute”?’ , supra n 4, at 125.

<sup>75</sup> See, however, Mavronicola, *Torture, Inhumanity and Degradation under Article 3 ECHR: Absolute Rights and Absolute Wrongs* (Hart Publishing, 2016 – forthcoming), on file with author.

<sup>76</sup> I believe Greer meant ‘means’ rather than ‘end’ here. Greer, ‘Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really “Absolute”?’ , supra n 4, at 126.

<sup>77</sup> The qualifier of ‘potentially’ reflects the fact that the treatment at issue may still be found contrary to another human right.

<sup>78</sup> *Ireland v UK* Application No 5310/71, Merits and Just Satisfaction, 18 January 1978.

<sup>79</sup> *Ireland v UK*, *ibid.*, Separate Opinion of Judge Sir Gerald Fitzmaurice at para 36.

<sup>80</sup> *Bouyid v Belgium* Application No 23380/09, Merits and Just Satisfaction, 28 September 2015. See blog posts commenting on this: Smet, ‘*Bouyid v. Belgium*: Grand Chamber Decisively Overrules Unanimous Chamber’, *Strasbourg Observers*, 1 October 2015, available at: <http://strasbourgobservers.com/2015/10/01/bouyid-v-belgium-grand-chamber-decisively-overrules-unanimous-chamber/> (accessed 21 June 2016); Mavronicola, ‘*Bouyid* and dignity’s role in Article 3 ECHR’, *Strasbourg Observers*, 8 October 2015, available at: <http://strasbourgobservers.com/2015/10/08/bouyid-and-dignitys-role-in-article-3-echr/> (accessed 21 June 2016).

<sup>81</sup> *Bouyid*, *ibid.*, Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney, at para 7.

situations and which may 'cause them to lose their temper'.<sup>82</sup> Given that the situation complained of, according to the dissenting judges, presented a treatment that was 'far less serious' than ill-treatment in other cases the Court has unfortunately had to deal with, this entailed that the Court's findings and conclusions risked 'being completely at odds with reality'.<sup>83</sup>

My brief response to the concerns expressed by the judges in *Bouyid* is as follows. As indicated by reference to Waldron's point previously,<sup>84</sup> torture is torture, and inhuman treatment is inhuman treatment, and degrading treatment is degrading treatment, irrespective of how frequently they might occur in the workings of any State machinery. Moreover, the dissenters' view of the minimum level of severity is unduly focused on harm: as I argue elsewhere, it was the wrong committed against the applicants which reached the minimum level of severity, rather than the harm endured by them.<sup>85</sup> I suspect that Greer might disagree,<sup>86</sup> and it would be interesting to debate and reassess, for instance, whether threats such as those issued to Gäfgen are properly to be seen as inhuman or degrading treatment contrary to the prohibition enshrined in Article 3 ECHR.

Although I addressed this matter above, I wish to reiterate that, beyond the conflict-of-rights idea in the *Gäfgen* theses, a dimension to Greer's critique of the Grand Chamber judgment in *Gäfgen* which remains under-explored in academic commentary on human rights, is the extent to which ill-treatment proscribed at *human rights law* under provisions such as Article 3 ECHR ought to attract individual criminal liability and, indeed, particular penalties.<sup>87</sup> As I illustrate above, this is a distinct issue to the question of the unlawfulness of certain State action under human rights law.<sup>88</sup> It is therefore misconceived to see it as an essential parameter of the absolute character of the prohibition at human rights law, as Greer tends to do. Nonetheless, the issue pertains to the delimitation of positive obligations under fundamental rights such as the right to life and the right not to be subjected to torture or CIDT, and warrants further critical discussion.

Lastly, I wish to address what Greer portrays as a clarificatory point, in the form of a grievance against proponents of the absoluteness of the prohibition of torture and CIDT, to the effect that they confuse absoluteness with universality and non-derogability. Greer's grievance demands critical consideration because, in my view, it misrepresents the points made and therefore does the opposite of

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<sup>82</sup> Ibid.

<sup>83</sup> Ibid., at para 8.

<sup>84</sup> See *supra* text to n 73.

<sup>85</sup> See Mavronicola, 'Bouyid v Belgium: The "minimum level of severity" and human dignity's role in Article 3 ECHR' at [https://www.academia.edu/18858510/Bouyid\\_v\\_Belgium\\_The\\_minimum\\_level\\_of\\_severity\\_and\\_human\\_dignity's\\_role\\_in\\_Article\\_3\\_ECHR](https://www.academia.edu/18858510/Bouyid_v_Belgium_The_minimum_level_of_severity_and_human_dignity's_role_in_Article_3_ECHR) (accessed 14 February 2016). See also the point made by Shue, *supra* n 21.

<sup>86</sup> He makes some allusions to what he considers to be the (comparatively) low severity of the ill-treatment at issue in Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute"?', *supra* n 4, at 115, 133; see also Greer, 'Should Police Threats to Torture Suspects Always be Severely Punished?', *supra* n 5, at 73, 86.

<sup>87</sup> See, on this, Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *Journal of International Criminal Justice* 577; and the monograph by Seibert-Fohr, *supra* n 49.

<sup>88</sup> See *supra* text to n 49.

elucidating the issues at hand. It appears that, on the universality point, Greer is taking issue with commentators who have suggested that the absolute character of Article 3 ECHR demands an autonomous reading of torture and inhuman and degrading treatment by the ECtHR in the context of the proposed expulsion of individuals to States which are not subject to the ECHR,<sup>89</sup> rather than a relativist reading which finds that the very same treatment which is inhuman in Europe may not be so outside Europe.<sup>90</sup>

The prohibition on expelling individuals to a State where they face a real risk of torture or inhuman or degrading treatment or punishment is a long-standing element of ECtHR case law,<sup>91</sup> stemming from the principle that States must not put individuals in a situation which involves an amplified risk of such torture or inhuman or degrading treatment, whether that situation is to be found in a prison cell or in a different jurisdiction.<sup>92</sup> The ECtHR has repeatedly affirmed that the prohibition remains 'equally absolute' in expulsion cases.<sup>93</sup> This is what Francesco Messineo and I were highlighting in our criticism of a relativist dictum in the case of *Ahmad v UK*,<sup>94</sup> where the Court suggested that 'treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case'.<sup>95</sup> The particular comment highlights that the relativism involved in paragraph 177 of *Ahmad* amounted to an inappropriate specification of Article 3 of the ECHR, and was in fact displacement through the back door.<sup>96</sup> As concerns the suggestion that some confuse absoluteness with non-derogability, I only note that non-derogability is an aspect of absoluteness: that is, of the non-displaceability of the prohibition of torture and CIDT. It is therefore a necessary, but not sufficient,<sup>97</sup> as Greer rightly observes, aspect of the absolute character of the prohibition at human rights law.

## 5. CONCLUSION

The above is a brief attempt to elucidate and address Greer's anti-absoluteness arguments in relation to the prohibition of torture and CIDT in international human rights law. The three main arguments – the conflict of rights thesis (elaborated through the narrow and broad *Gäffgen* theses), the legal status as moral choice thesis,

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<sup>89</sup> Greer cites Mavronicola and Messineo, 'Relatively Absolute?', *supra* n 70.

<sup>90</sup> *Ibid.*, at 592-603.

<sup>91</sup> Wouters, *supra* n 70, at 326-327. See, for example, *Chahal*, *supra* n 67; *MSS v Belgium and Greece*, Application No 30696/09, Merits and Just Satisfaction, 21 January 2011; *Hirsi Jamaa and others v Italy*, Application No 27765/09, Merits and Just Satisfaction, 23 February 2012.

<sup>92</sup> For the prison context, see *Keenan v UK* Application No 27229/95 Merits and Just Satisfaction, 3 April 2001. On generally prevailing conditions triggering a real risk, see *Sufi and Elmi v UK*, Application Nos 8319/07 and 11449/07, Merits and Just Satisfaction, 28 June 2011, at para 217.

<sup>93</sup> *Chahal*, *supra* n 67, at para 80.

<sup>94</sup> *Babar Ahmad and others v UK* Application Nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Merits and Just Satisfaction, 10 April 2012.

<sup>95</sup> *Ibid.*, at para 177.

<sup>96</sup> Mavronicola and Messineo, *supra* n 70, at 601.

<sup>97</sup> Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute"?', *supra* n 4, at 112-113.

and the substantive content as moral choice thesis – are unpacked, confronted and dismissed. Refuting Greer's arguments *inter alia* serves to dismantle arguments that there may ever exist a positive duty, in human rights law, to torture or inflict CIDT, in order to save lives, including in the context of fighting terrorism. The article forcefully rejects the flawed notion of allegedly unbounded positive obligations creating conflicts of rights which might compel the State to violate absolute prohibitions.

Ultimately, Greer's position can be seen as a contribution to the moral debate on the ticking bomb scenario. Whilst he attempts to project his views on the moral imperatives involved in particular situations of the *Gäfigen* variety onto the character of the legal prohibition – and its relationship with the State's positive obligations to protect individuals' right to life and right to be free from torture and CIDT – the law, and the judges applying it, are likely to remain unmoved; and, in my view, rightly so. Without any significant change in the international legal position envisaged at this stage or necessitated by virtue of any conflict of rights, his arguments leave the absolute character of the legal prohibition of torture and CIDT in international human rights law intact.