

Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really ‘Absolute’ in International Human Rights Law?

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ABSTRACT

A cardinal axiom of international human rights law is 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. Yet, for several reasons this is deeply problematic. For a start, since absoluteness is not an express, inherent, self-evident, or necessary feature of the provisions in question, this status is a matter of attribution rather than, as the orthodoxy holds, inherent legal necessity. Other non-absolute interpretations are not only possible, but expressly underpin similar prohibitions in some celebrated national human rights instruments. It does not follow either, because the term ‘cruel, inhuman or degrading treatment’ is typically included in the same clauses which prohibit torture, that each of these very different types of harmful conduct must necessarily share the same status. The much-repeated claim that the prohibition is absolute in principle but relative in application is also unconvincing. Finally, it is not merely morally or legally, but also logically impossible for each of two competing instances of any ‘absolute’ right to be equally ‘absolute’ in any meaningful sense. The prohibition against torture, cruel, inhuman and degrading treatment in international human rights law can, at best therefore, only be ‘virtually’, rather than strictly, absolute. It applies, in other words, in all but the rarest circumstances but not, as the received wisdom maintains, to the exclusion of every possible justification, exonerated, excuse, or mitigation.

KEYWORDS: torture, inhuman or degrading treatment, absolute prohibition of torture and inhuman or degrading treatment, competing ‘absolute’ human rights, *Gäfgen v Germany*, Article 3 European Convention on Human Rights

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1. INTRODUCTION

A core assumption of international human rights law, prompted by the Holocaust and other atrocities perpetrated during the Second World War, is that torture is wrong in all circumstances without exception and that the prohibition against it, and the right not to be tortured, are, therefore, 'absolute'. The events of 9/11 and their aftermath have, however, revived interest in possible moral and legal justifications for torturing terrorist suspects in 'ticking bomb scenarios' considered more fully later. This is not, however, the only reason why the 'absoluteness' of the prohibitions and rights under discussion has recently come under critical scrutiny. My own hitherto unwavering faith in the absolutist cause was shattered by the case of *Gäfgen v Germany*, judged by the European Court of Human Rights (ECtHR) first in 2008 and then again on a referral to the Grand Chamber in 2010.¹

On 27 September 2002, Jakob von Metzler, the 11-year-old son of a prominent Frankfurt banker, was abducted by Magnus Gäfgen, a 32-year-old law student and acquaintance of Jakob's sister, later seen by police at a designated tram station picking up the ransom demanded from the family. Some of the money and a plan of the crime were recovered from Gäfgen's flat. Under police questioning Gäfgen changed his story several times, including claiming to having been involved in the kidnapping but only as courier. Fearing that Jakob might be dying wherever Gäfgen had taken him, a senior police officer, Daschner, ordered a subordinate officer, Ennigkeit, to threaten Gäfgen with torture, and if necessary to inflict it, unless he revealed Jakob's whereabouts.² Ten minutes later, having capitulated to the threat, Gäfgen told the police where Jakob's body could be found and was taken to the site where tyre tracks matching the tyres on his car, and foot prints matching his shoes, were also discovered. On the way back to the police station Gäfgen confessed to having killed Jakob and then took the police to a series of locations where some of Jakob's clothing and other incriminating items were retrieved. Having confessed again several times, including in open court at his trial, Gäfgen was convicted of having abducted and murdered Jakob and sentenced to life imprisonment. In separate proceedings the police officers responsible for the threat of torture were also convicted but received substantial suspended fines instead of the maximum five year prison sentence.³

Gäfgen complained to the ECtHR. In 2008 a Chamber held by majority that, although his right under Article 3 of the European Convention on Human Rights (ECHR)⁴ not to be threatened with torture had been breached, the fact that the

1 *Gäfgen v Germany* Application No 22978/05, Merits and Just Satisfaction, 30 June 2008; and *Gäfgen v Germany* Application No 22978/05, Merits and Just Satisfaction, 1 June 2010.

2 Similar cases have been the subject of debate in other jurisdictions: see, for example, the US case of *Leon v Wainwright* 734 F.2d 770 (1984) cited in Kramer, *Torture and Moral Integrity: A Philosophical Enquiry* (2014) at 60–1; Allhoff, *Terrorism, Ticking Time-Bombs, and Torture: A Philosophical Analysis* (2012) at 171–172. Krauthammer also cites a case in which a kidnapped Israeli soldier was killed by his captors during an attempted rescue made possible by the extraction of information about his whereabouts as a result of the torture of the driver of a car used in the kidnapping, see 'The Truth about Torture' in Levinson (ed.), *Torture: A Collection* (revised edn, 2006) 307 at 314–5.

3 According to Conroy this is also the typical outcome of the rare prosecutions of officials charged with torture: see Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* (2000) at 34.

4 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5.

police officers had been punished, albeit leniently, constituted adequate redress.⁵ But in 2010 a majority of the Grand Chamber held that only severe punishment would have sufficed.⁶ A majority of judges on both panels held that Gäfgen's right to a fair trial had not been violated by the admission in the domestic proceedings of the real evidence discovered following the threat.⁷ All 23 judges in both hearings also affirmed that a threat of torture violates the right not to be inhumanly treated which is absolute and subject to no exception including the urgent need to rescue a kidnapped child.⁸ A majority of both Chamber and Grand Chamber regarded Jakob's putative plight as a mitigating circumstance, though the Grand Chamber did not consider this sufficient to warrant a lenient sentence.⁹ However, not a single judge on either bench considered the possibility that, in a case such as this, the Article 3 rights of the kidnap victim appear to conflict with those of the suspected kidnapper. In 2011 a Frankfurt court awarded Gäfgen over €3,000 against the Land of Hesse for 'serious rights violations' suffered in police custody.¹⁰

The reluctance of judges on the ECtHR to regard *Gäfgen v Germany* as a classic Dworkinian 'hard case', where fundamental legal principles are in sharp conflict, is shared by most jurists who have applauded the judgment of the majority of the Grand Chamber for its uncompromising affirmation of the absoluteness of a suspect's Article 3 rights while also ignoring the Article 3 rights of the kidnap victim.¹¹ Some have also expressed concern about the Court's refusal to find that Gäfgen's right to a fair trial under Article 6 of the ECHR had been violated by the failure of

5 *Gäfgen v Germany* (2008), supra n 1 at paras 67–70 and 77–82.

6 *Gäfgen v Germany* (2010), supra n 1 at paras 124–125.

7 *Gäfgen v Germany* (2008), supra n 1 at para 109; and *Gäfgen v Germany* (2010), supra n 1 at para 187.

8 *Gäfgen v Germany* (2008), supra n 1 at paras 66 and 69; and *Gäfgen v Germany* (2010), supra n 1 at paras 91 and 107.

9 *Gäfgen v Germany* (2008), supra n 1 at paras 69 and 78; and *Gäfgen v Germany* (2010), supra n 1 at para 124.

10 Connor, 'Child murderer wins damages over police torture threat', 4 August 2011, available at: dw.de/child-murderer-wins-damages-over-police-torture-threat/a-15295473-1 [last accessed 11 October 2014].

11 Luban, *Torture, Power and Law* (2014) at 76–8; Farrell, *The Prohibition of Torture in Exceptional Circumstances* (2013) at 62–68; Maffei and Sonenshein, 'The Cloak of the Law and Fruits Falling from the Poisonous Tree: A European Perspective on the Exclusionary Rule in the Gäfgen Case' (2012–13) 19 *Columbia Journal of European Law* 21; Mavronicola, 'What is an "absolute right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12 *Human Rights Law Review* 723 at 736–7; Sauer and Trilsch, 'GÄFGEN v. GERMANY. Application No. 22978/05. At <http://www.echr.coe.int>. European Court of Human Rights (Grand Chamber), June 1, 2010' (2011) 105 *American Journal of International Law* 313; Bjorge, 'Case Comment: Torture and "ticking bomb" scenarios' (2011) 127 *Law Quarterly Review* 196; Simonsen, "'Is torture ever justified?': The European Court of Human Rights decision in *Gäfgen v Germany*", 15 June 2010, available at: ejiltalk.org/%E2%80%98is-torture-ever-justified%E2%80%99-the-european-court-of-human-rights-decision-in-gafgen-v-germany/ [last accessed 11 October 2014]; Spurrier, 'Case Comment: *Gäfgen v Germany*: Fruit of the poisonous tree' (2010) 5 *European Human Rights Law Review* 513; Ginbar, *Why Not Torture Terrorists? Moral, Practical and Legal Aspects of the 'Ticking Bomb' Justification for Torture* (2008) at 320–1; Ast, 'The *Gäfgen Judgment* of the European Court of Human Rights: On the Consequences of the Threat of Torture for Criminal Proceedings' (2010) 11 *German Law Journal* 1393; Wierenga and Wirtz, 'Case of *Gäfgen versus Germany*: How Absolute is the Absolute Prohibition of Torture? The Outcome of an Ethical Dilemma' (2009) 16 *Maastricht Journal of European and Comparative Law* 365; and Anonymous, 'Detainee forced to make admission: threat as inhuman treatment – admission of evidence – fruit of the poisoned tree – loss of victim status' (2008) 6 *European Human Rights Law Review* 785.

the trial courts to exclude evidence obtained subsequent to the threat.¹² Maffei and Sonenshein even claim that the Grand Chamber's judgment on the fair trial complaint is 'one of the most perplexing and unconvincing holdings in the Strasbourg Court's recent history', that it stems from the Court's desire to bolster its own legitimacy by avoiding causing offence to national legislatures, that it 'casts serious doubt on the fundamental structure of the Convention system', and that it constitutes 'another step' towards its 'progressive erosion'.¹³ Sauer and Trilsch conclude that, if the Convention rights at issue had been properly applied, Gäfgen would not have been convicted at all, a result which they claim, though unpalatable, would have been the fault of the police and not the courts or the ECHR.¹⁴

Other commentators have, however, acknowledged that circumstances such as these create a conflict between the 'absolute' rights of each party.¹⁵ Three possible routes to a resolution can be distinguished which adequately accommodate the Article 3 rights of the kidnap victim. The simplest would be to opt for the lesser of the two evils or wrongs,¹⁶ and to regard risking further suffering to, and the death of, a kidnapped child *in these precise circumstances*, as a greater wrong than threatening the kidnapper with torture in order to end the child's suffering and to save his/her life. Another option would be to treat the threat to torture the suspected kidnapper as falling below the threshold of inhuman treatment on the grounds that it does not entail the infliction of severe pain and suffering which many commentators regard as essential.¹⁷ But this would still leave open the possibility that it constituted degrading

12 Maffei and Sonenshein, *ibid.*; Sauer and Trilsch, *ibid.*; Bjorge, *ibid.*; Simonsen, *ibid.*; Spurrier, *ibid.*; Wierenga and Wirtz, *ibid.*; Anonymous, *ibid.*; Anonymous, 'Admissibility of Evidence Deriving from the Interrogation of the Defendant by Methods Prohibited by Article 3: European Court of Human Rights' (2010) 14 *International Journal of Evidence and Proof* 365.

13 Maffei and Sonenshein, *supra* n 11 at 40, 43–4 and 48.

14 Sauer and Trilsch, *supra* n 11 at 319.

15 Smet, 'Conflicts between Absolute Rights: A Reply to Steven Greer' (2013) 13 *Human Rights Law Review* 469; Greer, 'Should Police Threats to Torture Suspects Always be Severely Punished? Reflections on the Gäfgen Case' (2011) 11 *Human Rights Law Review* 67; Steinhoff, 'Justifying Defensive Torture' in Clucas, Johnstone and Ward (eds), *Torture: Moral Absolutes and Ambiguities* (2009); Ambos, 'May a State Torture Suspects to Save the Life of Innocents?' (2008) 6 *Journal of International Criminal Justice* 261 at 277; Schroeder, 'A Child's Life or a "Little Bit of Torture"? State-Sanctioned Violence and Dignity' (2006) 15 *Cambridge Quarterly of Healthcare Ethics* 188; and Jessberger, 'Bad Torture – Good Torture? What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany' (2005) 3 *Journal of International Criminal Justice* 1059. Prior to the Gäfgen case Brugger and Posner each also admitted this possibility: Brugger, 'May Government Ever Use Torture? Two Responses from German Law' (2000) 48 *American Journal of Comparative Law* 661 at 669; and Posner, 'Torture, Terrorism, and Interrogation' in Levinson, *supra* n 2, 291 at 293. For a discussion of conflicts between moral duties of differing strengths, see Kramer (2014), *supra* n 2 at 2–19; and Kramer, 'Michael Moore on Torture, Morality, and Law' (2012) 25 *Ratio Juris* 472 at 475–88.

16 See Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (2004) at 136–44; Krauthammer, *supra* n 2 at 311; Ginbar, *supra* n 11 at 315–9; Parry, 'Escalation and Necessity: Defining Torture at Home and Abroad' in Levinson, *supra* n 2, 145 at 160; Posner, *ibid.* at 294. See also the debate over the 'lesser evil' argument between Lukes, 'Liberal Democratic Torture' (2006) 36 *British Journal of Political Science* 1; and Levey, 'Beyond Durkheim: A Comment on Steven Lukes's "Liberal Democratic Torture"' (2007) 37 *British Journal of Political Science* 567.

17 See, for example, Nowak, 'What's in a name? The prohibitions on torture and ill treatment today' in Gearty and Douzinas (eds), *The Cambridge Companion to Human Rights Law* (2012) 307 at 313–4.

treatment.¹⁸ Finally, an attempt could be made to identify the underlying values or interests which the rights and prohibitions under consideration are intended to protect and then, taking all relevant factors into account, to find an accommodation which infringes them to the least extent possible.¹⁹

As I have argued in a previous issue of this journal, for three main reasons, applying these tests to *Gäfgen*-type circumstances should, therefore, and contrary to the judgments of both chambers of the ECtHR and the opinion of most commentators, result in the Article 3 rights of the kidnap victim taking precedence over those of the suspected kidnapper.²⁰ First, the suffering inflicted upon the victim as a result of the kidnapping is likely to be significantly more severe than that caused to the suspected kidnapper by the threat of torture, especially where the anxiety this causes, as in the *Gäfgen* case, lasts only 10 minutes and appears to have no enduring effects.²¹ Second, the suspected kidnapper has, without any reasonable doubt and without a shred of justification, created or been involved in creating, the entire crisis from which the moral dilemma derives.²² Third, if a kidnapper takes their victim hostage without killing them, it is entirely consistent with international human rights law for the police to kill the kidnapper if this is the only way rescue can be effected.²³

As I have also argued, it follows, then, providing the following conditions are fulfilled, that 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.²⁴ 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,²⁵ 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

18 See Vorhaus, 'On Degradation. Part One: Article 3 of the European Convention on Human Rights' (2002) 31 *Common Law World Review* 374; and Vorhaus, 'On Degradation Part Two: Degrading Treatment and Punishment' (2003) 32 *Common Law World Review* 65.

19 Greer (2011), supra n 15. For one of the fullest discussions of this approach, see Alexy, *A Theory of Constitutional Rights* (2002) at 44–110 and 388–425; and Alexy, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 *Ratio Juris* 433. See also Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (2007); and Brugger, supra n 15 at 674.

20 Greer (2011), supra n 15.

21 *Gäfgen v Germany* (2010), supra n 1 at para 103.

22 See Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in Pavlakos, supra n 19, 131 at 161. This is why, as Kumm also convincingly observes, it is absurd to suggest—as Luban (2014) (supra n 11 at 93–4), Ginbar (supra n 11 at 69–73) and Waldron ('Torture and Positive Law: Jurisprudence for the White House' (2005) 105 *Columbia Law Review* 1681 at 1715) have—that permitting the suspected kidnapper to be threatened with torture would also logically entitle the police to torture an innocent member of their family.

23 *Andronicou and Constantinou v Cyprus* Application No 25052/94, Merits and Just Satisfaction, 9 October 1997.

24 Greer (2011), supra n 15. See also Kramer (2014), supra n 2 at 215–20; Brugger, supra n 15 at 667 and Twining and Twining, 'Bentham on Torture' (1973) 24 *Northern Ireland Legal Quarterly* 305 at 346–7.

25 Luban (2014), supra n 11 at 77, suggests that the police should have realized that the reason *Gäfgen* would not divulge Jakob's location was because he had already been killed. But this fails to consider that the prospects of Jakob still being alive when *Gäfgen* was questioned were enhanced by the fact that the kidnapping was for ransom.

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.²⁶ Every other reasonably viable option to rescue the kidnap victim has been tried and failed.²⁷ 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.²⁸ Call this the ‘Gäfgen-thesis in the narrow sense’. However, the following more general conclusions, applying beyond the kidnapping context, also emerge from the Gäfgen case. ‘Absolute’ rights can and do conflict, though rarely.²⁹ 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.³⁰ Call this ‘the Gäfgen-thesis in the broad sense’.

The purpose of this article is to revisit and to defend the Gäfgen-theses in the context of a thorough critical examination of the absolutist case. First, an attempt will be made to state the core features of the latter. A critique will then be offered followed by a response to the principal objections to the Gäfgen-theses raised both in print and in the numerous occasions they have been publicly presented by the author.³¹

26 Luban (2014), supra n 11 at 76–8, claims that because Daschner intended the threat to be carried out if necessary, there was no difference, in the Gäfgen case, between the threat and use of torture. Yet this distinction has been consistently drawn by the ECtHR, not least in the Gäfgen case itself: see *Gäfgen v Germany* (2010) at para 108.

27 Luban (2014), supra n 11 at 77, argues that there were other things the police could have done in the Gäfgen case before resorting to the threat of torture, for example, offering Gäfgen immunity from prosecution for murder or staging a confrontation between him and Jakob’s sister.

28 See Kramer (2014), supra n 25 at 288–309.

29 While there is a rich literature on how conflicts between fundamental rights are, and should be, resolved in legal processes, scholars typically do not consider conflicts between ‘absolute’ rights. For recent contributions, see Da Silva, ‘Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision’ (2011) 31 *Oxford Journal of Legal Studies* 273; Martínez Zorrilla, ‘Constitutional Dilemmas and Balancing’ (2011) 24 *Ratio Juris* 347; Martínez Zorrilla, ‘The Structure of Conflicts of Fundamental Legal Rights’ (2011) 30 *Law and Philosophy* 729; Novak, ‘Three Models of Balancing (in Constitutional Review)’ (2010) 23 *Ratio Juris* 101; and Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (2007).

30 Smet, supra n 15; and Greer (2011), supra n 15. For a debate about judges as moral reasoners, see Waldron, ‘Judges as Moral Reasoners’ (2009) 7 *International Journal of Constitutional Law* 2; and Cover, *Justice Accused: Antislavery and the Judicial Process*, 2nd edn (1984).

31 These include: ‘Is the prohibition against torture, cruel, inhuman and degrading treatment really “absolute” in international human rights law?’, meeting of the University of Bristol Law School Primary Unit in Governance, Regulation and Family Law, 1 October 2013; ‘The Case Against Absolutism’, ESRC Festival of Social Science-sponsored panel discussion on *Torture, Inhuman and Degrading Treatment: In No Circumstances?* University of Bristol, 9 November 2012; ‘Are the rights derived from Article 3 of the European Convention on Human Rights “absolute” and does it matter?’, *Shaping Rights: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Faculty of Law, University of Ghent, Belgium, 12–13 March 2012; ‘Should police threats to torture suspects always be severely punished? Reflections on the Gäfgen case’, International Law Association Seminar, School of Law, University

The various threads of the inquiry will then be drawn together in the conclusion. While the debate about the absoluteness of the prohibitions and rights under consideration is very familiar in a ‘consequentialist *versus* deontological’ or ‘utilitarian *versus* anti-utilitarian’ framework,³² this article seeks to demonstrate that the absolutist case fails on human rights grounds. The effect of consent upon the permissibility of the otherwise prohibited conduct, and the status of the prohibition against cruel, inhuman or degrading *punishment* are not, however, considered, nor is any attempt made to contribute to the wider discussion concerning whether there are in fact any absolute legal and/or moral rights.³³

2. THE CASE FOR ABSOLUTENESS

Torture has been inflicted the world over since the dawn of human history, particularly as punishment and following victory in war.³⁴ In Europe it has also been used frequently, though rarely routinely, as an interrogation tool, especially with respect to accusations of crimes of state, sexual offences, heresy, and witchcraft.³⁵ Although the merits of interrogational torture have been debated since antiquity,³⁶ it was not formally abolished in England until the 1640s and elsewhere in Europe until the eighteenth and nineteenth centuries,³⁷ only to be revived on a colossal scale by totalitarian regimes in the mid-twentieth century, and more selectively by some liberal democracies in the post-9/11 global ‘war on terror’.³⁸ Worldwide, torture has never

of Glasgow, 16 March 2011; and ‘Reconciling competing “absolute” human rights: Striking a moral balance?’ *Conference on proportionality and post-national constitutionalism*, Faculty of Law, University of Antwerp, and the Centre for Law and Cosmopolitan Values (UA), the Integrated Project Reconstituting Democracy in Europe (RECON), and the Collaborative Research Centre Transformations of the State, University of Bremen, 17–18 February 2011.

- 32 Not all utilitarian arguments are hostile to an absolute prohibition: see, for example, Matthews, ‘Indecent Medicine: In Defense of the Absolute Prohibition against Physician Participation in Torture’ (2006) 6 *American Journal of Bioethics* W34 at W40–W41; Sussman, ‘What’s Wrong with Torture?’ (2005) 33 *Philosophy and Public Affairs* 1; and Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (2002) at 144–5.
- 33 See *Laskey and Others v United Kingdom* Application Nos 21627/93, 21628/93 and 21974/93, Merits and Just Satisfaction, 17 February 1997. One of the leading exponents of absolute moral rights begins his attempt to establish that there are such things by observing that ‘[i]t is a widely held opinion that there are no absolute rights’: see Gewirth, ‘Are There Any Absolute Rights?’ (1981) 31 *Philosophical Quarterly* 1. See also Levinson, ‘Gewirth on Absolute Rights’ (1982) 32 *Philosophical Quarterly* 73; Gewirth, ‘There Are Absolute Rights’ (1982) 32 *Philosophical Quarterly* 348; and Shafer-Landau, ‘Specifying Absolute Rights’ (1995) 37 *Arizona Law Review* 209.
- 34 Donnelly and Diehl, *The Big Book of Pain: Torture & Punishment Through History*, 2nd edn (2011) at 4–5; and Luban, ‘Liberalism, Torture and the Ticking Bomb’ in Greenberg, *The Torture Debate in America* (2006) 35 at 43.
- 35 Maio, ‘The Historical Evolution of the Arguments against Torture and the History of Human Rights’ (2000) 46 *World Medical Journal* 75; Donnelly and Diehl, *ibid.*, at 18–22; Sullivan, ‘The Abolition of Torture’ in Levinson (ed.), *supra* n 2, 317 at 319–20; Greenberg, ‘Introduction: The Rule of Law Finds Its Golem: Judicial Torture Then and Now’ in Greenberg, *ibid.*, 1 at 4–6; and Langbein, *Torture and the Law of Proof* (2006).
- 36 Donnelly and Diehl, *supra* n 34 at 37; Maio, *ibid.* at 75–8; and Maio, ‘History of Medical Involvement in Torture – Then and Now’ (2001) 357 *Lancet* 1609.
- 37 Maio (2000), *supra* n 35 at 76–8; Donnelly and Diehl, *supra* n 34 at chapter 4; Bekerman, ‘Torture – the Absolute Prohibition of a Relative Term: Does Everyone Know What is in Room 101’ (2005) 53 *American Journal of Comparative Law* 743 at 745; and Greenberg, *supra* n 35 at 4–5.
- 38 See Sands, *Torture Team* (2008); Greenberg and Dratel, *The Torture Papers: The Road to Abu Ghraib* (2005); and Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (2004).

in fact disappeared. Indeed the methods have been greatly refined.³⁹ As Nowak, former United Nations (UN) Special Rapporteur on Torture, observes: ‘*torture is practised in more than 90 per cent of all countries and constitutes a widespread practice in more than 50 per cent of all countries*’.⁴⁰

However, the view that the prohibition against torture, cruel, inhuman and degrading treatment is absolute was not consistently affirmed by lawyers, judges, human rights activists and others until after the Second World War when, having already apparently acquired this status in international humanitarian law,⁴¹ a formally unqualified prohibition was included in several global⁴² and regional human rights instruments,⁴³ gaining in turn an increasingly uncontested status as a peremptory norm in customary international law.⁴⁴

There is little dispute that an absolute right is one which is subject to no exception in any circumstance whatever and that an absolute obligation is one which always and in all circumstances overrides all other obligations with which it may conflict.⁴⁵ The view that there can be no exception to the right not to be tortured is based on the moral assumption that torture is inherently, and self-evidently, the worst violation of human dignity and autonomy, the worst kind of subordination, objectification, and forced self-betrayal of or by the defenceless, and the worst kind of harm or suffering capable of being inflicted upon anyone including killing them.⁴⁶ It is also widely acknowledged that the reliability of the information adduced by torture is likely to be compromised by the way it has been obtained, that torture is fundamentally incompatible with any moral legal system, that it is ‘tyranny in

39 Maio (2000), supra n 35 at 78.

40 Nowak (2012), supra n 17 at 307 (emphasis in original).

41 Rodley, ‘The Prohibition of Torture: Absolute Means Absolute’ (2006) 34 *Denver Journal of International Law and Policy* 145 at 148–52 and Bekerman, supra n 37 at 744–9.

42 For example, Article 5 Universal Declaration of Human Rights 1948, GA Res 217A(III), 10 December 1948, A/810 at 71; Article 7 International Covenant on Civil and Political Rights 1966, 999 UNTS 171; Article 2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85; and Rodley, *ibid.* at 152–9.

43 For example, Article 3 ECHR; Article 5(2) American Convention on Human Rights 1969, 1144 UNTS 123; Article 5 African Charter on Human and Peoples’ Rights 1981, 1520 UNTS 217; and Article 8 Arab Charter on Human Rights 2004, 12 IHRR 893 (2005).

44 Nowak (2012), supra n 17 at 307; De Wet, ‘The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law’ (2004) 15 *European Journal of International Law* 97; and Evans and Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1998) at 62–4.

45 Kramer (2014), supra n 2 at 2–19; and (2012), supra n 2 at 478–80, distinguishes between ‘strong’ and ‘weak’ forms of absoluteness and offers a sophisticated account of conflicts between ostensibly absolute moral obligations. See also Alexy (2002) and (2003), supra n 19; Gewirth (1981), supra n 33 at 2; and Addo and Grief, ‘Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?’ (1998) 9 *European Journal of International Law* 510 at 514.

46 For recent typologies of torture and the moral objections see Kramer (2014), supra n 2 at chapters 2 and 3; and Luban (2014), supra n 11 at Part III. See also Chang, ‘The Absolute Prohibition on Torture: Extra-Legal Action and ex post Ratification’ (2007) *UCL Jurisprudence Review* 27 at 28–31, 35 and 45; Twiss, ‘Torture, Justification, and Human Rights: Toward an Absolute Proscription’ (2007) 29 *Human Rights Quarterly* 346 at 358–60 and 363–5; Shue, ‘Torture’ in Levinson, supra n 2, 47 at 51–6; Sullivan, supra n 35 at 318–9; Luban (2006), supra n 34 at 38–40; Sussman, supra n 32 at 16; and Maio (2000), supra n 35 at 75.

microcosm',⁴⁷ and that those who resort to it, and the societies and legal systems which permit it, are fundamentally corrupted and damaged as a result.⁴⁸ It is also widely claimed that even permitting a single exception will inevitably lead to, or at least create a serious risk of, institutionalization.⁴⁹ Torture, it is said, cannot, therefore, be justified in any circumstances whatever, and should be universally and absolutely legally banned. It follows that those subjected to it should also be provided with effective legal remedies and adequate reparation,⁵⁰ and those who inflict it should be severely punished in all cases without exception.⁵¹ This, it is said, is essentially what international human rights law does by expressing the prohibition, not only against torture, but also against cruel, inhuman, and degrading treatment, in formally unlimited or unqualified, and, therefore, 'absolute' terms.⁵² Yet the only reasons typically supplied for this conclusion are that no express exceptions are provided, that other rights in the documents in question are hedged by provision-specific restrictions, and that the rights deriving from the formally unqualified prohibitions are non-derogable.⁵³ Some commentators offer more pragmatic justifications arguing, for example, that, while an absolute ban on torture may be difficult to justify morally, it may, nevertheless, be legally necessary to avert the risk of creeping institutionalization even where exceptions might otherwise be warranted in rare circumstances.⁵⁴

The purpose of the prohibitions, and the core characteristics of each of the designated types of misconduct, have also been debated.⁵⁵ Some maintain, for example, that the underlying rationale is to protect human dignity, autonomy, and integrity rather than fundamentally to prevent the infliction of physical pain or mental suffering.⁵⁶ Others claim that a twin-runged hierarchy of deliberately inflicted suffering is

47 Luban (2006), supra n 34 at 43.

48 Ginbar, supra n 11 at 131–56; Twiss, supra n 46 at 363–4; Chang, supra n 46 at 31; Waldron (2005), supra n 22 at 1718–48; Matthews, supra n 32 at W41; and Krauthammer, supra n 2 at 312 and 314.

49 Ginbar, supra n 11 at 157–8; Sullivan, supra n 35 at 323; and Dorf, 'Renouncing Torture' in Greenberg, supra n 34, 247 at 250–1.

50 Paust, 'The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions' (2009) 43 *Valparaiso University Law Review* 1535 at 1546–51.

51 *Gäffen v Germany* (2010), supra n 1 at paras 123–124; and Addo and Grief, supra n 45 at 516.

52 As the ECtHR categorically declared in *Ireland v United Kingdom* Application No 5310/71, Merits and Just Satisfaction, 18 January 1978, at para 163: 'The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment'. See also Shue, 'Torture in Dreamland: Disposing of the Ticking Bomb' (2006) *Case Western Reserve Journal of International Law* 231 ('Torture in Dreamland') at 238.

53 Nowak (2012), supra n 17 at 316–7; Ni Aoláin, 'The European Convention on Human Rights and Its Prohibition on Torture' in Levinson, supra n 2, 213 at 214; and Evans and Morgan, supra n 44 at 72.

54 Shany, 'The Prohibition against Torture and Cruel, Inhuman, and Degrading Treatment and Punishment: Can the Absolute be Relativized under Existing International Law?' (2006–2007) 56 *Catholic University Law Review* 837 at 868. See also Waldron (2005), supra n 22 at 1717; Sumner, *The Moral Foundation of Rights* (1987) at 212–3; and Gross, 'The Prohibition on Torture and the Limits of the Law' in Levinson, supra n 2, 229 at 229–30 and 236.

55 See, for example, Nowak (2012), supra n 17 at 311–24; and Evans and Morgan, supra n 44 at 73–105.

56 Mavronicola and Messineo, 'Relatively Absolute? The Undermining of Article 3 ECHR in *Ahmad v UK*' (2013) 76 *Modern Law Review* 589 at 594; and Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-treatment' (2005) 23 *Netherlands Quarterly of Human Rights* 674 at 678.

involved, with degrading treatment at the bottom (where dignity and integrity are most relevant), and torture, cruel and inhuman treatment (where suffering is greatest) together at the top.⁵⁷ Yet others maintain the scale has three rungs, with degrading treatment at the bottom, torture at the top, and cruel and inhuman treatment somewhere in between.⁵⁸ Some also argue for a 'horizontal model' where torture and degrading treatment are each regarded as species of inhuman treatment, the former involving a purposive element.⁵⁹ Whether torture requires the involvement, or at least acquiescence, of a public official, a specific purpose on the part of the perpetrator, and the total powerlessness of the victim, have also been discussed.⁶⁰

3. THE CASE AGAINST ABSOLUTENESS

The case against the absoluteness of the prohibition against torture and other forms of ill-treatment in international human rights law begins by querying the moral assumptions at the root of the absolutist case. It notes that formally unqualified legal prohibitions do not necessarily generate absolute rights and that expressly non-absolute formulations of the rights under discussion can be found in some celebrated national human rights instruments. It also argues that a genuinely absolute right cannot credibly be absolute in principle but relative in application as typically claimed, that the prohibition against cruel, inhuman, and degrading treatment need not necessarily have the same status as the prohibition against torture, and that subtle distinctions between types and degrees of absoluteness have little or no relevance to the international legal debate.

A. Moral Assumptions

The fact that torture inflicts terrible suffering is beyond doubt. But this does not dispose of two core problems with the moral assumptions underpinning the absolutist case. First, depending upon duration and alternatives, torture is not necessarily the worst thing which can happen to anyone in every conceivable circumstance.⁶¹ For example, resistance fighters and others in Nazi-occupied Europe, who endured torture rather than implicate their comrades, selflessly chose personal suffering over what they regarded as the greater wrong—condemning others to a similar fate and betraying a noble cause. Second, even if torture is the worst type of suffering possible this would not be a sufficient reason for prohibiting it in all circumstances,⁶² especially where torturing one person would prevent the torture and/or death of many others.⁶³

57 Wouters, 'Editorial: How Absolute is the Prohibition on Torture?' (2006) 8 *European Journal of Migration and Law* 1 at 4.

58 Rodley, *supra* n 41 at 149–50 and 154. Since the *Greek* case in 1967, this has also been the opinion of the judicial institutions at Strasbourg: see Bekerman, *supra* n 37 at 753–8; and Ní Aoláin, *supra* n 53 at 214–8.

59 Evans, 'Getting to Grips with Torture' (2002) 51 *International and Comparative Law Quarterly* 365 at 382–3.

60 See, for example, Nowak (2012), *supra* n 17 at 314; Shue ('Torture'), *supra* n 46 at 51; Rodley, *supra* n 41 at 156; and Evans, *ibid.* at 375–6.

61 See, for example, Kramer (2014), *supra* n 2 at chapter 2.

62 Twiss, *supra* n 46 at 357.

63 Allhoff, *supra* n 2 at 76; and Moore, 'Torture and the Balance of Evils' (1989) 23 *Israel Law Review* 280 at 330.

B. Formally Unqualified, Non-derogable, but not Expressly Absolute Prohibitions

Arguably the root problem with the orthodox understanding of the prohibition against torture, cruel, inhuman and degrading treatment in international human rights law lies in the failure adequately to appreciate the following issues. To begin with, nearly all the canonical formulations are in the form of unqualified prohibitions and do not contain any express rights at all. Article 5 of the Universal Declaration of Human Rights (UDHR)⁶⁴ states, for example, that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’, while Article 7 of the International Covenant on Civil and Political Rights (ICCPR)⁶⁵ provides: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.’ Article 3 of the ECHR provides that ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’.⁶⁶ Two proposed amendments to Article 3, which would have clarified its scope in radically different ways, were rejected. One was to the effect that it should not apply where there was a need to protect ‘security of life and limb’, while the other would have included the words ‘that this prohibition must be absolute and that torture cannot be permitted for any purpose whatsoever, neither for extracting evidence, for saving life nor even for the safety of the State’ and ‘that it would be better even for society to perish than for it to permit this relic of barbarism to remain’.⁶⁷ It is true that Article 2(2) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁶⁸ provides that ‘no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture’. But since the ‘exceptional circumstances’ cited are of a public order kind it is not beyond dispute that this rules out those where the *Gäfgen* conditions apply. In any case, the provision in question is limited to ‘torture’ and does not expressly include ‘cruel’, ‘inhuman’, or ‘degrading’ treatment. And, even if it did, it is not at all clear how a conflict between two competing instances of the same right should be resolved.

Since all other relevant provisions do not include the terms ‘absolute’, ‘subject to no exception in any circumstance or for any reason whatever’, or any synonym or equivalent, they are clearly not expressly absolute.⁶⁹ This has several consequences for the current debate. First, any rights to which they give rise are implied rather than express. The scope of any implied right, including possible limits and

64 Universal Declaration of Human Rights 1948, supra n 42.

65 International Covenant on Civil and Political Rights 1966, supra n 42.

66 For recent discussions of the Strasbourg jurisprudence on Article 3 ECHR, see Mavronicola, supra n 11 and Smet, supra n 15 at 475–80.

67 Council of Europe, *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights, Vol II* (1975) at 36–40. For an account of the drafting history of Article 3 ECHR, see Evans and Morgan, supra n 44 at 69–73.

68 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, supra n 42.

69 For the same observation put slightly differently, see Battjes, ‘In Search of a Fair Balance: The Absolute Character of the Prohibition of *Refoulement* under Article 3 ECHR Reassessed’ (2009) 22 *Leiden Journal of International Law* 583 at 598 and 606.

restrictions, is a matter of interpretation, choice and attribution rather than necessity and inescapable prescription unproblematically mandated by the relevant provisions themselves.⁷⁰ The ECtHR has indeed, and without controversy, interpreted other formally unlimited rights implied by the ECHR—for example, the right of access to a court derived from the expressly unqualified right to a fair trial under Article 6—as non-absolute and, therefore, subject to implied exceptions provided these are legitimate and proportionate.⁷¹ Second, to be credible, whatever status is attributed to any implied right requires convincing reasons. Repeated assertion of unsupported assumptions by authorities, however venerable or respected, is no substitute. Third, the fact that the instruments providing the formally unqualified prohibitions against torture, cruel, inhuman and degrading treatment also contain other rights expressly limited on a provision-by-provision basis, is not conclusive of the absoluteness of the former. For example, even though the German Basic Law provides expressly limited rights, German courts have had no difficulty implying limitations to the formally unqualified right to freedom of religion found in Article 4 where a conflict with other constitutional rights arises.⁷² The lack of formal limitations to prohibitions in any fundamental rights document merely suggests that the rights in question should not be open to the kind of legitimate interferences to which the other expressly restricted rights are routinely exposed.⁷³ But, of itself, this does not necessarily make the former ‘absolute’. The questions, therefore, become: should any of the implied rights under consideration be limited by implicit exceptions; if so, why and by what; and if not, why not? Answers will be suggested later.

It is also a mistake to confuse absoluteness with universality and ‘non-derogability’, as many commentators regrettably do.⁷⁴ All human rights, including those limited by express exceptions, are universal because, in principle, they apply to everyone everywhere. But this clearly does not mean they prevail over every competing interest in every case. Since the relationship between a right and an exception must be settled on a principled and defensible basis, the right will prevail over the exception

70 Addo and Grief, *supra* n 45 at 513. As Möller argues, the proportionality principle should provide the ‘default’ position on account of the profile it has acquired in the adjudication of fundamental/constitutional rights: see Möller, ‘The Right to Life Between Absolute and Proportional Protection’ *LSE Law, Society and Economy Working Papers 13/2010* at 7, available at: lse.ac.uk/collections/law/wps/WPS2010-13_Moller.pdf [last accessed 11 October 2014].

71 See, for example, *Al-Adsani v United Kingdom* Application No 35763/97, Merits, 21 November 2001, at para 53.

72 BVerfGE 32, 98; 41, 29; 44, 59; and 52, 223. See also Kokott, ‘Article 4’ in Sachs (ed.), *Grundgesetz Kommentar* (1996) at paras 87–94; Callies, ‘Dimensions of Fundamental Rights – Duty to Respect versus Duty to Protect’ and Tschentscher, ‘Interpreting Fundamental Rights – Freedom versus Optimization’ in Pünder and Waldhoff (eds), *Debates in German Public Law* (2014) 27 and 43 respectively.

73 This is particularly true of Articles 8–11 ECHR: see, for example, Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Human Rights Files No 15 (1997).

74 See, for example, Mavronicola and Messineo, *supra* n 56 at 601; Twiss, *supra* n 46 at 357; Maffei and Sonenshein, *supra* n 11 at 48; Palmer, ‘A Wrong Turning: Article 3 ECHR and Proportionality’ (2006) 65 *Cambridge Law Journal* 438 at 448; and O’Donnell, ‘Genocide, the United Nations, and the Death of Absolute Rights’ (2002–03) 23 *Boston College Third World Law Journal* 399 at 403. Nowak regards the rights to personal integrity and human dignity as non-derogable but non-absolute and criticises international human rights lawyers for assuming that they are absolute: see Nowak (2012), *supra* n 17 at 312 and 317–8.

in some cases and vice versa in others. Derogation, on the other hand, is a formal process by which a state notifies the relevant treaty body that it intends to suspend a particular treaty right in the context of war or public emergency threatening the life of the nation to an extent no more than strictly required by the exigencies of the situation.⁷⁵ In most human rights treaties a handful of rights are formally non-derogable and therefore cannot be suspended even in such circumstances. But, for several reasons, 'non-derogability' and 'derogability' are not the same as 'absoluteness' and 'non-absoluteness', respectively. First, derogation is only possible in states of war or public emergencies threatening the life of the nation, while absoluteness and non-absoluteness ostensibly apply in all circumstances. Second, the right to life under Article 2 of the ECHR, though clearly non-absolute on account of being subject to several explicit and wide-ranging exceptions, is non-derogable under Article 15 except with respect to deaths resulting from lawful acts of war. Third, by contrast, the right to a fair trial under Article 6 of the ECHR is formally unqualified, and therefore putatively 'absolute', yet derogable. Fourth, the possibility that 'non-derogable' rights could conflict with each other cannot be excluded. And if they did, their 'non-derogable' status would not itself resolve the conflict any more effectively than conflicts between competing instances of the same 'absolute right' can be resolved simply by invoking their 'absolute' status.

C. Some Human Rights Prohibitions against Torture, Cruel, Inhuman and Degrading Treatment are Expressly Non-absolute

An inconvenient fact for the absolutist case, and one which has been consistently ignored in the contemporary torture debate, is that some reputable national human rights instruments expressly do not accord absolute status to the rights and prohibitions under consideration. This is, for example, the position under the Canadian Charter of Rights and Freedoms found in Part I of the Constitution Act 1982, the New Zealand Bill of Rights Act 1990, and the South African Bill of Rights provided by Chapter 2 of the Constitution of the Republic of South Africa 1996.⁷⁶

Surprisingly, there is no express right not to be tortured in the Canadian Charter of Rights and Freedoms, although section 12 provides: 'Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.' However, 'it has been recognized' that these rights 'are not absolute'⁷⁷ because section 1 states: 'The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' Section 9 of the New Zealand Bill of Rights Act ('BORA') provides: 'Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.'

75 See Article 15 ECHR; Article 4 ICCPR; Article 27 American Convention on Human Rights; and Article 4 Arab Charter on Human Rights.

76 This is also the position under Article 52 Charter of Fundamental Rights of the European Union [2010] OJ C 83/389, which subjects all the rights in the Charter to a generic exception clause but complicates the matter further by requiring the meaning and scope of those Charter rights which are also found in the ECHR to be the same as those in the latter.

77 Sharpe, 'The Impact of a Bill of Rights on the Role of the Judiciary: A Canadian Perspective' in Alston (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) 431 at 436.

Section 23(5) also states that: 'Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.' But 'none of . . . [these] rights is absolute'⁷⁸ because section 5 provides that ' . . . the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

Amongst other things, section 12 of the South African Bill of Rights provides: 'Everyone has the right to freedom and security of the person, which includes the right . . . to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way.' Section 36 also provides:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The rights in the Bill of Rights are, therefore, 'not . . . stated in absolute terms, but rather require a commitment on the part of government to take all reasonable steps, within its available resources, to implement them'.⁷⁹

These provisions have the following implications for the current debate. First, two difficult questions for the absolutist case are raised by the fact that *none* of the rights in any of these documents, including those not to be tortured or subjected to other forms of ill-treatment, is 'absolute': which of these alternatives properly protects the interests at stake—a formally unqualified and putatively 'absolute' prohibition, or one subject to a generic limitation clause? And by what standards should the choice be made? Second, the formally unqualified formulations of the prohibition in Article 5 of the UDHR, Article 3 of the ECHR and Article 7 of the ICCPR antedate all these national bills of rights, were well-known when each of the latter was drafted, and could easily have been adopted and passed into law in these countries had this been deemed appropriate. Yet generic exemption clauses were chosen instead. Third, in any litigation in these jurisdictions relevant to the prohibitions and rights under discussion, the provisions of the national bills of rights rather than international human rights law would be applied. Fourth, even if domestic courts were to refer to the latter as an aid to interpreting their own national laws, this would not be a binding legal necessity. Fifth, in spite of the fact that the rights not to be tortured, cruelly, inhumanly or degradingly treated are

78 Joseph, 'The New Zealand Bill of Rights Experience' in Alston (ed.), *ibid.* 283 at 301. See also Taggart, 'Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990' [1998] *Public Law* 266 at 277.

79 Goldstone, 'The South African Bill of Rights' (1997) 32 *Texas International Law Journal* 451 at 457.

not absolute in these jurisdictions, there is no evidence that routine and systematic torture, cruel, inhuman or degrading treatment is a problem in any of them.⁸⁰

Finally, had the *Gäfgen* case arisen in Canada, New Zealand or South Africa, it is not at all clear that the courts there would have found that the threat of torture had violated *Gäfgen*'s fundamental rights. Two questions would have had to be answered: first, did it amount to 'cruel and unusual' treatment (Canada), 'cruel, degrading, or disproportionately severe' treatment (New Zealand), or 'cruel, inhuman or degrading' treatment (South Africa)? It would be a question of fact for Canadian, New Zealand and South African courts to decide whether 10 minute anxiety about the prospect of being tortured constituted the forbidden conduct. A tribunal in any of these jurisdictions, particularly in Canada and New Zealand, could quite plausibly have concluded that it did not cross the relevant threshold. In the New Zealand case of *Falwasser v Attorney General*, for example, the plaintiff was assaulted several times over a 20 minute period while in police custody by officers wielding batons and using Oleoresin Capsicum spray.⁸¹ The High Court of New Zealand held that, while this gave rise to damages in tort and constituted a breach of section 23(S) of BORA, section 9 had not been violated because it only applies to 'truly egregious cases'⁸² involving conduct which, according to the majority of the Supreme Court of New Zealand in *Taunoa v Attorney General*, 'is to be utterly condemned as outrageous and unacceptable in any circumstances' and which 'New Zealanders would . . . regard as so out of proportion to the particular circumstances as to cause shock and revulsion'.⁸³ According to Stephens J, the breach of section 23(S) in *Falwasser* 'lacked humanity' but 'fell short of being cruel', and while the conduct of the police 'did demean' the plaintiff, it did not do so 'to such an extent that it was degrading'.⁸⁴

But, even if a Canadian, New Zealand or South African court decided that *Gäfgen*'s treatment had interfered with his rights, the second question would arise: could it be justified in accordance with 'such reasonable limits prescribed by law' (including judge-made law) 'as can be demonstrably justified in a free and democratic society' (Canada and New Zealand) or in 'terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' taking the section 36 factors into account (South Africa)? The urgent imperative of rescuing Jakob and protecting *his* rights could easily be deemed precisely the kind of exception which the Canadian, New Zealand and South African provisions permit.

D. Absolute in Principle but Relative in Application?

The provision in international human rights law prohibiting torture, cruel, inhuman or degrading treatment which has received the most thorough judicial consideration

80 For example, of the three only South Africa features among the many countries featured on the Human Rights Watch 'Torture' webpage: see hrw.org/search/apachesolr_search/torture [last accessed 11 October 2014].

81 19 March 2010, CIV-2008-463-000701.

82 *Ibid.* at para 73.

83 *Falwasser v Attorney General*, 19 March 2010, CIV-2008-463-000701 at para 73; and *Taunoa v Attorney General* [2007] NZSC 70 at paras 170 and 172.

84 *Falwasser v Attorney General*, 19 March 2010, CIV-2008-463-000701 at para 76.

is Article 3 of the ECHR. Much of the relevant Strasbourg case law is concerned with how the various kinds of prohibited conduct should be understood and distinguished.⁸⁵ About half the reported Article 3 cases make no reference to the absoluteness of this provision.⁸⁶ Where they do it is common to find assertions in the judgments that the rights in question are ‘absolute’, followed in the next sentence or paragraph by claims that subjective and other factors might have to be considered in determining how they apply.⁸⁷

There can be no doubt that ‘ill-treatment must attain a minimum level of severity’ if it is to fall within Article 3, and that determining whether this threshold has been crossed or not, is ‘relative’ and will depend on ‘all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim’.⁸⁸ Some commentators argue that relativity in the application of Article 3 has no bearing on its absoluteness.⁸⁹ But most have observed that the variability of the relevant thresholds undermines this status or at least raises a query about what it really means.⁹⁰

Compare, for example, the *Gäfgen* case with that of *Wainwright v United Kingdom*.⁹¹ The applicants in the latter were a mother, Mrs Mary Wainwright, and her son, Alan, who suffered from cerebral palsy and arrested social and intellectual development. Mrs Wainwright’s other son, Patrick O’Neill (Alan’s half-brother) was detained on remand in Leeds prison on suspicion of murder. Mary and Alan complained that intimate body searches motivated by suspicion that Patrick was involved in drug-dealing, and conducted in breach of prison regulations on their first visit, violated their ECHR rights. In spite of the fact that both Mary and Alan sustained considerable long-term psychological damage as a result of the searches, a seven-judge Chamber of the ECtHR unanimously held that, while Articles 8 (the right to respect for private life) and 13 (the right to an effective remedy) of the ECHR had been violated, Article 3 had not. Restating the conclusions of earlier judgments, the Court confirmed that strip searching does not constitute inhuman or degrading treatment providing it is carried out in an appropriate manner, avoids any significant aggravation of its inherently humiliating character, and was instigated for a legitimate

85 See, for example, Vorhaus (2002) and (2003), supra n 18; and Evans and Morgan, supra n 44 at 79–105. For the Court, as Evans argues, this is less about finding ‘definitions’ than developing an ‘approach’: see Evans, supra n 59 at 368–9.

86 A study of Level 1 Article 3 cases reported on HUDOC, the European Court of Human Rights’ online database, conducted by Isobel Bottoms in July 2012 in connection with this article, found that 63 out of 114 made no reference to absoluteness.

87 See, for example, *Ireland v United Kingdom* Application No 5310/71, Merits and Just Satisfaction, 18 January 1978, at paras 162–163.

88 Ibid.

89 See, for example, Mavronicola and Messineo, supra n 56 at 592–4; and Palmer, supra n 74 at 439.

90 See, for example, Addo and Grief, supra n 45 at 514 and 517–8; Battjes, supra n 69 at 619–21; Harris et al., *Harris, O’Boyle and Warbrick: Law of the European Convention on Human Rights*, 3rd edn (2014) at 236; Fenwick, *Civil Liberties and Human Rights*, 4th edn (2007) at 46; Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn (2002) at 242; and Evans and Morgan, supra n 44 at 75–6. Regrettably, Mavronicola’s erudite and thoughtful recasting of this distinction in terms of ‘applicability’ and ‘specification’ does not solve this problem either: see Mavronicola, supra n 11 at 728–57. See also Gross (2006), supra n 54 at 232.

91 Application No 12350/04, Merits and Just Satisfaction, 26 September 2006.

purpose.⁹² The Court added that, since the authorities had reason to suspect that Patrick O'Neill was involved in the prison drugs trade, searching all his visitors 'may be considered as a legitimate preventive measure' provided the searches were 'conducted with rigorous adherence to procedures and all due respect to their human dignity'.⁹³ However, prison regulations were not observed and the searches 'demonstrated "sloppiness"'.⁹⁴ Nevertheless, the Court did not accept that 'the minimum level of severity prohibited by Article 3' had been reached.⁹⁵ Although the psychological effects of the applicants' experience were fully set out in the judgment,⁹⁶ the Court made no reference to them when it arrived at its conclusion. Nor did it apparently pay much attention to its own much-repeated dictum, referred to above and reaffirmed in this case that: 'Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3' and that the minimum level 'is relative' and 'depends on all the circumstances of the case, such as the duration of the treatment, its *physical and mental effects* and, in some cases, the sex, age and *health* of the victim' and whether 'the suffering and humiliation' went '*beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment*'.⁹⁷

The contrast between the judgments of the ECtHR in the *Gäfgen* and *Wainwright* cases is stark, difficult to justify, and calls into question the credibility of the 'absoluteness' of Article 3. Both cases involved ill-treatment in apparent breach of relevant rules in pursuit of a law enforcement objective. But in *Gäfgen* the majority of the Grand Chamber regarded a threat of torture which caused 10 minute anxiety to a suspected child kidnapper, as an unforgivable violation of the right not to be inhumanly treated, notwithstanding that it was motivated by the urgent need to rescue the child from any further violation of *his* rights under Articles 2 and 3 of the ECHR. Yet, in *Wainwright* strip searches of a mother and her disabled son, motivated by what turned out to be false suspicions that they were drug trafficking, conducted in breach of prison rules, causing psychological damage to both—which, in the case of the son, lasted for at least four years—were deemed not to be sufficiently serious even to amount to degrading treatment.

E. Disaggregation and Defences

This brings us to a further problem with the absolutist case. It does not follow, as widely assumed, that because the prohibitions in question typically forbid torture, cruel, inhuman, and degrading treatment in the same single provision, the prohibition against each of these very different types of mistreatment must necessarily have the same status.⁹⁸ It only takes a moment's reflection to appreciate that a wide spectrum of conduct and/or circumstances may be involved, from those which cause humiliation and embarrassment at one end, to the severe and typically long-lasting,

92 Ibid. at para 42.

93 Ibid. at para 44.

94 Ibid. at para 45.

95 Ibid. at para 46.

96 Ibid. at paras 17–20.

97 Ibid. at para 41 (emphasis added).

98 See, for example, *Ginbar*, supra n 11 at 278–81; and *Mavronicola*, supra n 11.

physical and/or psychological harm inflicted by torture, at the other. It is, therefore, possible, even if harm is not the only factor relevant to moral permissibility and impermissibility,⁹⁹ that the prohibition against torture may be stronger than that against cruel, inhuman or degrading treatment.

Some commentators have, therefore, recently suggested that, in one of two ways, 'cruel, inhuman or degrading treatment' should no longer be regarded as absolutely prohibited in international human rights law: existing thresholds could be raised so that some forms of conduct currently forbidden are no longer;¹⁰⁰ or it could be acknowledged that some instances of such treatment can be justified if proportionate to a legitimate purpose with the result that, in such circumstances, perpetrators could invoke defences which might mitigate or exclude punishment.¹⁰¹ Shany, for example, argues that, although an absolute ban on torture can be defended on pragmatic grounds, it applies with less force to ill-treatment falling short of torture where a greater degree of flexibility, including the operation of the classic criminal law defences of duress, necessity, or the defence of self or others, could be allowed.¹⁰² As he points out, while the UN Convention Against Torture imposes a duty on state parties to prosecute those responsible for torture, there is no comparable duty to punish those guilty of other forms of ill-treatment.¹⁰³ Similarly, the Geneva Conventions do not require prosecutions for such crimes committed in non-international armed conflicts.¹⁰⁴ The Rome Statute of the International Criminal Court also suggests that a defence of necessity would be available to those accused of war crimes arising from such treatment in both international and non-international armed conflicts.¹⁰⁵ Battjes also shows that the *non-refoulement* case law of the ECtHR does not consistently maintain that the risk of inhuman or degrading treatment precludes repatriation as categorically as torture,¹⁰⁶ while Ginbar accepts that a successful plea of necessity cannot be ruled out in international criminal law even for a torturer in the ticking bomb scenario considered more fully below.¹⁰⁷ Some commentators also suggest that an absolute legal ban on torture, cruel, inhuman and degrading treatment is consistent with defences of necessity or 'lesser evil' capable of exonerating or

99 Shue ('Torture'), supra n 46 at 48–9.

100 As suggested, for example, by Addo and Grief, supra n 45 at 523; and Chang, supra n 46 at 40. See also Evans, supra n 59 at 383.

101 Vorhaus (2002), supra n 18 at 381; and Elshtain, 'Reflection on the Problem of "Dirty Hands"' in Levinson (ed.), supra n 2, 77 at 86–7.

102 Shany, supra n 54 at 840.

103 Ibid. at 857.

104 Ibid. at 868.

105 Ibid. While torture, cruel, inhuman and degrading treatment are 'absolutely' prohibited in Israeli law, the High Court of Justice has indicated that the defence of necessity provided by section 34(11) of the Penal Code might allow a perpetrator to escape criminal liability. Section 18 of the General Security Services Act 2002 also provides that employees of the General Security Service will not be held criminally or otherwise liable for acts within their responsibilities if carried out in a reasonable manner: see Bekerman, supra n 37 at 761–5; and Parry, supra n 16 at 158–60.

106 Battjes, supra n 69 at 595–8.

107 Ginbar, supra n 11 at 338. See also Chang, supra n 46; Luban (2006), supra n 34 at 65–7; and Horne, 'Torture – A Short History of its Prohibition and Re-emergence' (2009) 14 *Judicial Review* 155 at 165–6.

excusing those responsible for inflicting it.¹⁰⁸ But this is difficult to accept. Arguably the judgment of the German courts and the majority of the Chamber of the ECtHR in the *Gäfgen* case endorse a partial defence of necessity by affirming the absoluteness of the suspect's right not to be threatened with torture, while simultaneously accepting that the lenient punishment of the police officers constituted adequate redress for its violation. But, as the Grand Chamber rightly recognized, unless each and every breach of the prohibition including those motivated by necessity, is severely punished without exception, the ban cannot be genuinely absolute.¹⁰⁹

Nowak also maintains that, while 'the prohibition of torture constitutes an absolute right', the prohibition of cruel, inhuman or degrading treatment ('CIDT') 'constitutes only a relative right subject to legitimate limitations' according to the principle of proportionality.¹¹⁰ Directly mirroring the legitimate limitations upon the right to life provided by Article 2 of the ECHR, he proposes that CIDT should not include 'any use of force which is no more than absolutely necessary: (i) in defence of a person from unlawful violence; (ii) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (iii) in action lawfully taken for the purpose of quelling a riot or insurrection'.¹¹¹ But he adds that:

Outside a situation of detention and similar direct control, the prohibition of CIDT is subject to the proportionality principle. Only excessive use of police force constitutes CIDT. In a situation of detention or similar direct control, no proportionality test may be applied and the prohibition of torture and CIDT is absolute. Any use of physical or mental force against a detainee with the purpose of humiliation constitutes degrading treatment or punishment, any infliction of severe pain or suffering for a specific purpose as expressed in Article 1 CAT amounts to torture.¹¹²

However, this view suffers from several difficulties. First, Nowak states: 'As soon as the person is arrested, handcuffed and, therefore, powerless, i.e. under the direct control of the police officer, no further use of force is permitted.'¹¹³ The ECtHR has recently confirmed that, although there is a presumption that any injury received by those in police custody is a violation of Article 3 ECHR, the proportionate use of physical force does not constitute a violation where it is necessary to restrain a detainee prior to being handcuffed.¹¹⁴ But it does not follow that the use of *any* force thereafter is invariably unjustified since, for example, an attempt to escape might still be made in such circumstances, particularly where the detainee is under the influence of intoxicants and where physical restraints are inadequate. Second, Nowak claims

108 For example, Chang, *supra* n 46; Gross (2006), *supra* n 54 at 240–4; and Sullivan, *supra* n 35 at 322–3.

109 *Gäfgen v Germany* (2010), *supra* n 1 at paras 124 and 129. See also Levinson, 'Contemplating Torture' in Levinson (ed.), *supra* n 2, 23 at 36.

110 Nowak (2012), *supra* n 17 at 320; and Nowak (2005), *supra* n 56 at 677. See also 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 *Modern Law Review* 370.

111 Nowak (2012), *supra* n 17 at 318.

112 Nowak (2005), *supra* n 56 at 678–9.

113 Nowak (2012), *supra* n 17 at 319.

114 *Đekić v Serbia*, Application No 32277/07, Merits and Just Satisfaction, 29 April 2014.

that, where the exceptions he proposes apply, the treatment in question would amount to *something other* than cruel, inhuman or degrading treatment. However, another alternative would be to regard those forms of ill-treatment which fulfil Nowak's exceptions, as *legitimate* CIDT. The choice may appear to be only a matter of semantics. But, the latter should be preferred if the parallel with Article 2 is to be pursued since any deprivation of life justified under this provision remains a 'killing', albeit a legitimate one. This is also more consistent with the crucial distinction, which runs throughout the ECHR and human rights law generally, between an *interference* with a right, which does not amount to a violation if it can be justified, and a *violation* which cannot be justified by any exception.¹¹⁵ It is, therefore, arguably more intelligible, more consistent with the Article 2 parallel, more congruent with other ECHR provisions and with the position in Canada, New Zealand and South Africa considered above, to distinguish, on the one hand, between *interferences* with the rights not to be cruelly, inhumanly or degradingly treated which can be justified but which nevertheless remain cruel, inhuman or degrading, and, on the other, *violations* of these rights which cannot. Third, Nowak's proposal is sharply at variance with the current understanding of Article 3 by the ECtHR which has repeatedly emphasised, not least in the *Gäfgen* case itself, that even the *threat of torture* which involves no force whatever, violates the 'absolute right' not to be inhumanly treated. Finally, most significantly, and in spite of his protestations, Nowak's proposal embodies precisely the principle invoked by those who seek to justify the use of, not only cruel, inhuman or degrading treatment but also torture, in the ticking bomb context considered further below.

F. Types and Degrees of 'Absoluteness'

Another possible solution to the difficulties raised by the *Gäfgen* case would be to regard the rights of the two parties as absolute, but in different senses. Gewirth, for example, distinguishes three dimensions of absoluteness from the most to the least abstract ('principle', 'rule' and 'individual').¹¹⁶ Kramer both distinguishes strong and weak forms of permissibility and absoluteness¹¹⁷ and also argues that, although 'calamity averting interrogational torture' is absolutely prohibited, it might, nevertheless be 'morally optimal', that is to say the least wrong outcome all things considered.¹¹⁸ It could also be argued that the *principle* containing the prohibition is absolute but that this is not necessarily true for all the *rights* it implies. In other words, wherever the principle applies it prevails without exception over all other principles and also in circumstances where a conflict between two 'absolute' rights derived from it is resolved by subordinating one to the other.

There are, however, several problems with these approaches. First, they are much too subtle for the robust 'no nonsense' concept of 'absoluteness' found in

115 Battjes, *supra* n 69 at 618.

116 Gewirth (1981), *supra* n 33 at 1–6.

117 Kramer (2012), *supra* n 15 at 478–80; without invoking any 'comprehensive absolutist moral theory', Ginbar (*supra* n 11 at 30) advocates what he calls 'minimal absolutism' – the 'moral view that *certain acts must be prohibited absolutely*, namely that *they must never be performed, whatever the consequences*' (emphasis in original).

118 Kramer (2014), *supra* n 2 at 4–7, 215–20, 224–31, 240–1.

international human rights law where it is assumed that absoluteness means, plainly and simply, that none of the rights in question is subject to any exception in any circumstance whatever and that all violations should be severely punished. Kramer's conception of absoluteness is also robbed of all meaning, both by his distinction between weak and strong forms and by his acknowledgment that, in rare and extreme circumstances, public officials responsible for calamity-averting interrogational torture need not be punished at all.¹¹⁹ It is also more likely to cause confusion than enlightenment in legal proceedings where these issues arise. Second, the distinctions offered by Gewirth or Kramer do not of themselves indicate into which category of absoluteness the Article 3 rights of Jakob and Gäfgen should each fall. Third, although the principle underpinning the prohibition does indeed apply, even in *Gäfgen*-type circumstances, it is not its simple application per se which resolves the conflict. As already indicated, it is difficult to imagine any more convincing method for determining which of any competing 'absolute' rights should be the exception to the other, apart from identifying the 'lesser wrong or evil', and/or by applying the underlying rationale for the principle in a morally sensitive manner.

4. A REPLY TO CRITICS OF THE GÄFGEN-THESES

The following are amongst the most compelling criticisms to which the *Gäfgen*-theses have been exposed. They are less about the current scope, content and character of relevant norms of international human rights law, and more about what they ought to be. For several reasons the conflict between the ECHR rights of Jakob and Gäfgen is more apparent than real or, if a conflict arose at all, it should have been resolved in Gäfgen's favour. The significance of the *Gäfgen* case has also been disputed.

A. What the Law Is and What the Law Ought to Be

It has been argued that the absoluteness of the prohibition and rights under consideration is beyond dispute because this status has been categorically and consistently affirmed by every relevant legal authority, particularly the judicial institutions at Strasbourg. Any objection, therefore, does not concern what the relevant norms of international human rights law are, but amounts to a claim about a moral exception, or an argument about what they ought to be. There are three problems here. First, the mere fact that a legal proposition has been repeated, no matter how often or however eminent those in question, does not make it valid or true, particularly when it rests on a logical impossibility. Second, the distinction between 'what the law is' and 'what the law ought to be' is not nearly as clear-cut as it seems. As Dworkin, amongst others, has argued, where two fundamental legal principles collide their judicial resolution generally will, and should, be determined by how the foundational values of the legal and political system as a whole suggest they ought to be reconciled.¹²⁰ Third, the reason any human rights norm has legal status at all is because

119 Ibid. at 287–309.

120 Dworkin, *Law's Empire* (1996) at chapters 6 and 7; and Dworkin, *Taking Rights Seriously* (1977) at chapters 4 and 7.

it carries moral weight. It is difficult to see, therefore, how a putative human rights legal norm which lacks moral credibility can obtain, or retain, any genuine legal authority.

B. The Conflict between Absolute Rights in the *Gäfgen* Case Is More Apparent than Real or, if It Arose, Should Have Been Settled in *Gäfgen*'s Favour

Five versions of this claim can be distinguished. First, when *Gäfgen* was threatened with torture, Jakob no longer had any rights under Article 3 because he was already dead. Second, conflicts between the rights under Article 3 and the right to life under Article 2 of the ECHR must inescapably be resolved in favour of the former because the latter is non-absolute. Third, Article 3 rights are absolute against the state but not against private parties. In its least convincing form this argument can be asserted as a bald, unsupported general proposition or, fourth, with greater sophistication, as stemming in *Gäfgen*-type circumstances from a proper appreciation of the normative significance of the distinction between acts, omissions, positive and negative obligations. Finally, it is said that *Gäfgen*'s Article 3 rights should prevail over Jakob's on account of the Kantian principle not to use anyone as a means to an end and because, otherwise a consequentialist rather than a deontological meta-ethic would be invoked.

(i) Jakob no longer had any Article 3 rights when Gäfgen was threatened with torture
It is said that, since Jakob was already dead when *Gäfgen* was threatened by the police, he effectively no longer had any rights at all and, therefore, no conflict could arise between his and those of *Gäfgen*. However, at this point no one but *Gäfgen* knew Jakob's fate. And, since Jakob had been kidnapped for ransom rather than for abuse and murder (much more common in the abduction of children by strangers) the only responsible assumption, contrary to what Luban supposes,¹²¹ was that he might still have been alive. Another difficulty is that, whether Jakob was alive or dead is a contingent rather than a necessary feature of the normative dilemma at the heart of this case. It could easily have been otherwise and if it had been this objection would disappear.

(ii) Article 3 rights are absolute and take precedence over the non-absolute right to life in Article 2

A second version lies in framing the dilemma in *Gäfgen*-type circumstances as a conflict, not between the Article 3 rights of each party, but between the suspect's absolute right not to be threatened with torture and the victim's non-absolute right to life under Article 2, as the Grand Chamber itself did.¹²² There are three problems here. First, contrary to Smet's claim, it is irrelevant to the relationship between the rights in question that the police were primarily motivated by the need to save Jakob's life rather than to end any torture or inhuman treatment he may have been suffering as a result of the kidnapping. Second, it is not difficult to imagine a permutation of

121 Luban (2014), *supra* n 11 at 77.

122 *Gäfgen v Germany* (2010), *supra* n 1 at para 175; Smet, *supra* n 15 at 471 and 473–4; and Nowak (2005), *supra* n 56 at 675.

the actual facts of the *Gäfgen* case where, instead of having killed Jakob, Gäfgen bound and gagged him, locked him in the boot of a car, and then locked the car in a garage on an industrial estate. It would be difficult to deny that such treatment would amount to unspeakable torture and not merely to inhuman or degrading treatment.

Third, no reasons have been offered to explain why the right to life always and invariably has a lower moral and legal status than the right not to be threatened with torture. No adherent to the absolutist cause has, for example, convincingly explained why it can never be permissible for a suspected kidnapper to be *threatened* with torture in order to rescue the victim when, provided no more force than absolutely necessary is used, it is permissible under international human rights law to kill a hostage taker to achieve the same purpose. Instead the debate has tended to contrast the permissibility of killing in certain circumstances with the impermissibility of *torture* in all circumstances.¹²³ It has been said, for example, that unlike the hostage-taker in a siege stand-off, the suspect in official custody is defenceless and at the mercy of law enforcers.¹²⁴ However, this difference can only be morally significant if the hostage taker deserves a fighting chance to defend himself, to kill the hostage and those seeking his arrest, to avoid being killed himself and to make his escape. Alternatively, the difference may be thought to lie in the fact that, unlike police interviews, there is much greater urgency, certainty and proximity in time and space between the hostage taker and law enforcers in a siege shoot-out. But, while this may be generally true, it is not invariably. Imagine, for example, that the police could see Jakob dying on a webcam as they questioned Gäfgen about his whereabouts.¹²⁵ It is also said that, unlike killing a hostage taker, torturing a suspect, and by implication threatening to do so, involves their humiliation and degradation, which in its turn debases those who make and carry out the threat and also the society which endorses or tolerates it.¹²⁶ While this may also be true as a general rule it is not clear why a hostage taker is not degraded and humiliated as a result of, for example, having been permanently disabled but not killed by the shooting, nor why humiliation and degradation should be considered in all circumstances more morally repugnant than killing. Finally, it is said that the right to life is not absolute in international human rights law whereas the rights not to be tortured, cruelly, inhumanly or degradingly treated are. But, as already noted, this assumes precisely what is at issue, namely that the ‘absolute’ prohibition against the latter, and the non-absolute prohibition of killing, each have this differential status for sound normative reasons.¹²⁷

(iii) *Absolute against the state but not against private parties*

Some critics of the *Gäfgen*-theses have argued that the right not to be tortured, cruelly, inhumanly or degradingly treated is ‘absolute’, but only against agents of the

123 See, for example, Nowak (2012), supra n 17 at 317. See also Harris et al., supra n 90 at 236; Fenwick, supra n 90 at 46; and Brugger, supra n 15 at 670.

124 See, for example, Nowak (2012), supra n 17 at 319; and Luban (2006), supra n 34 at 51.

125 Greer (2011), supra n 15 at 83–4.

126 See, for example, Nowak (2005), supra n 56 at 676; and Kramer (2012), supra n 15 at 490.

127 Smet, supra n 15 at 473–5.

state. Therefore, while Jakob's Article 3 rights were non-absolute against Gäfgen, Gäfgen's were absolute against the German police. Needless to say there are several fatal problems here also. First, this is clearly not mandated by the relevant provisions themselves. Second, if it were true, it would mean that the prohibition and the rights under consideration are not genuinely 'absolute' after all because violations by private parties would be 'less absolute' than those by the state in all circumstances no matter what the reasons or the relative disparities in suffering. Third, it is not difficult to imagine a conflict between two instances of the same 'absolute' right even against the state. Consider, for example, that all the facts in the *Gäfgen* case obtained, except that Gäfgen was a rogue police officer who, while on duty, kidnapped, but did not kill Jakob. Gäfgen would then have an absolute right not to be threatened with torture by other police officers seeking to rescue Jakob, while Jakob would also have an absolute right against the state not to suffer torture and other forms of ill-treatment as a result of having been kidnapped by Gäfgen, one of its agents. Clearly, both rights cannot be equally absolute and the dilemma posed by the *Gäfgen* case itself would, therefore, arise in an even more acute form.

(iv) *Acts, omissions, positive and negative obligations*

A fourth permutation of the 'no conflict' claim which seeks to provide better reasons than the previous one, also constitutes what is, perhaps, the most powerful objection to the *Gäfgen*-theses. Hinging on the distinction between acts and omissions (or direct and indirect agency), on the one hand, and positive and negative obligations, on the other, it goes something like this. The police had both negative legal and moral obligations to refrain from threatening Gäfgen with torture, and also competing positive legal and moral obligations to attempt to rescue Jakob from the torture, inhuman and degrading treatment, and risk of death, they reasonably believed the kidnapping was causing. But, it is said, that of these two sets of obligations, each of which Smet regards as 'absolute',¹²⁸ the negative one is the more compelling because it merely requires police officers always and in all circumstances to abstain from harmful and unlawful conduct towards those in their custody, while the obligation to rescue kidnap victims requires only reasonable, lawful and human rights-compliant rescue attempts.¹²⁹ Therefore, if Jakob's Article 3 rights could only be protected by threatening Gäfgen with torture, there was no conflict of rights at all because 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.

However, these arguments suffer from two critical weaknesses. First, far from providing a solution to the dilemma at the heart of the *Gäfgen* case they merely replace a conflict between competing instances of the same absolute right with a conflict between competing negative and positive obligations, and between acts and omissions, where the negative (the omission) is assumed to be absolute and subject to no exception in any circumstance whatever, and the positive (the act) is deemed conditional and relative. Second, since the substance of any given positive obligation is a

128 Ibid. at 473–5 and 478–9.

129 Ibid. at 469, 475–80 and 496–8; and Mavronicola, supra n 11 at 732–5.

'matter of specification',¹³⁰ favouring such priorities, even in *Gäfgen*-type circumstances, depends upon a substantive moral choice rather than upon the inescapable logic of an absolute procedural imperative. To be credible, substantive moral choices require convincing reasons. And if a circular argument is to be avoided, the reasons must be independent of the negative and positive character of the competing obligations themselves.

Therefore, the underlying conflict presented by the *Gäfgen* case remains essentially the same whether it is framed in terms of colliding 'absolute' rights of equal strength, strong or weak 'absolute' rights, competing negative and positive obligations, or in terms of the differential moral significance of acts and omissions. And, no matter how it is framed, the underlying question also remains exactly the same: what is it about the various prohibitions, rights, acts, and omissions which requires one set to prevail over the other in any given circumstances? Here again we are driven back to the conclusion that the only credible routes to an answer lie in considering lesser evils and/or underlying rationales. The point of the prohibition against torture, cruel, inhuman and degrading treatment is to outlaw harm and suffering to body, mind and dignity, especially when deliberately inflicted. The fact that Jakob was a child is of additional significance because the official obligation to prevent torture and other forms of ill-treatment is, typically, stronger with respect to children than adults. For example, the ECtHR held in *Z and Others v United Kingdom* that

Article 3 . . . requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.¹³¹

Article 37 of the UN Convention on the Rights of the Child imposes an even more onerous positive obligation on state parties to 'ensure that . . . no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment'.¹³² Unlike the *Z v United Kingdom* test, this is not subject to a reasonableness requirement and, *prima facie*, is at least as 'absolute' as the prohibition against torture, cruel, inhuman or degrading treatment found in other provisions of international human rights law.

There are clearly good reasons why the moral and legal obligation on the police to refrain from violating suspects' rights should *normally* be stronger than their obligation to rescue victims of crime. But, for the reasons already given, in *Gäfgen*-type

130 Mavronicola, *supra* n 11 at 738.

131 Application No 29392/95, *Merits and Just Satisfaction*, 10 May 2001, at para 73. The ECtHR has also affirmed that 'acquiescence and connivance' in extraordinary rendition by third parties will result in a breach of Article 3 by the Convention states concerned: see *Husayn (Abu Zubaydah) v Poland* Application No 7511/13, 24 July 2014, at paras 512–514 and *Al Nashiri v Poland* Application No 28761/11, *Merits and Just Satisfaction*, 24 July 2014, at paras 517–519.

132 Convention on the Rights of the Child 1989, 1577 UNTS 3.

circumstances the standard order of priorities is only one, albeit a powerful one, of several normatively relevant factors the significance of which has to be weighed with the others. And when properly weighed it proves not to be so decisive after all. While there is, in other words, a clear and compelling legal and moral presumption that the state should not harm suspects, it is difficult to accept that it is absolute without reasons, rather than mere assumptions, which demonstrate conclusively that there can never be any circumstances in which it can be rebutted.

(v) *Deontology, utilitarianism, ends, means, inherent and consequential wrongs*

Finally, it has been argued that seeking to resolve conflicts between ‘absolute’ rights by reference to disparities between the harms or suffering inflicted implicitly invokes a utilitarian political morality antithetical to rights-based normative theories which assume ‘deontological ethics’, that is meta-ethical theories based on absolute duties to refrain from those acts and omissions which are wrong in themselves regardless of consequences.¹³³ One of the most prominent contenders is the Kantian injunction to: ‘Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.’¹³⁴

Smet, for example, claims that although the negative obligation to refrain from killing in principle ‘trumps’ or ‘weighs heavier’ than the positive obligation to save life, this is not always the case.¹³⁵ Determining whether the positive obligation outweighs the negative or vice versa involves, he maintains, both an exercise in balancing (avoiding disproportionate consequences) and paying proper attention, as already indicated, to the distinction between direct and indirect agency (between acts and omissions).¹³⁶ But, he maintains that negative rights are open to balancing against positive rights ‘only if interference with the negative right does not involve treating a person as a means’.¹³⁷ Smet maintains that where, as in the *Gäfgen* case, the positive obligation to save someone from harm and the negative obligation not to cause harm cannot both be fulfilled simultaneously, the conflict should be resolved by the Kantian injunction in favour of the latter.¹³⁸ Therefore, in *Gäfgen*-type circumstances, the kidnapper should not be threatened with torture and the kidnap victim should be left to die.

There are several problems here. First, the threat to torture is more of a *threat to treat someone as an end* rather than itself *treating* them as an end. Second, by elevating the Kantian injunction to an absolute status this ‘solution’ again merely reframes, rather than resolves, the dilemma at the heart of *Gäfgen*-type cases. Third, in such circumstances, the conflict can also be conceived in terms of two competing instances

133 For a brief summary, see Horne, *supra* n 107 at 160–3.

134 Kant, *The Moral Law: Groundwork of the Metaphysic of Morals* (translated by Paton, 2005) at 106–7. For a subtle account of the differences, and overlaps, between consequentialist and deontological theories of moral obligation, see Kramer (2014), *supra* n 15 at 20–8; Kramer (2012), *supra* n 2 at 480–8; and Ginbar, *supra* n 11 at 15–29.

135 Smet, *supra* n 15 at 471–2, 490 and 496.

136 *Ibid.* at 491–4.

137 *Ibid.* at 496.

138 *Ibid.* at 472, 493 and 496.

of the Kantian injunction, that is between, on the one hand, the kidnapper treating his victim as a means to a ransom and, on the other, the police using the suspected kidnapper by threatening torture, as a means to end the violation of the Kantian injunction by the kidnapper himself.¹³⁹ The contribution of deontological ethical theories to this debate, therefore, at best amounts to yet another exercise in replacing the language of ‘absolute prohibitions and rights’ with other putative normative absolutes without the provision of any convincing consequence-free method by which conflicts between these alternatives can, and should, be resolved. Finally, as Kramer and others point out, ‘not all deontologists are absolutists’.¹⁴⁰

It is also a huge mistake to conclude that, because rights-based normative theories are anti-utilitarian, they are entirely indifferent to consequences. The reason for having rights in the first place, and the scope attributed to them is, after all, inescapably linked to the consequences of having or not having them. Deontological theories also provide a problematic meta-ethic for human rights because they assume the primacy of obligations over rights while for the human rights ideal it is the other way around.¹⁴¹

C. The Significance of the *Gäfgen*-theses

A final absolutist response to the *Gäfgen*-theses is to accept that they are true, but to deny their significance on the following grounds. They derive from a trivial aberration, are largely speculative, and have no serious implications for the real world. They risk a slide down the slippery slope into more routinized ill-treatment of suspects and should, therefore, be denied by telling the ‘noble lie’ that the prohibition and rights in question are absolute even though we know they are not. To be credible, there must be a commitment to inflict torture if the threat fails, and this can never be permitted. Threatening or using torture is pointless for the purposes of rescue since each is likely to produce unreliable information. They have disturbing and unacceptable implications for the ‘ticking bomb scenario’. And, finally, they rest on an inappropriate appeal to sentiment and emotion when the application of cold, dispassionate reason and legal logic are required instead.

(i) *A trivial aberration with only hypothetical significance*

According to this view, the *Gäfgen* case is nothing more than a trivial aberration because, although there may be grounds in such circumstances for privileging the rights of a kidnap victim over those of the suspected kidnapper, such cases are extremely rare and the *Gäfgen* case was probably unique. It is also said that the *Gäfgen* case itself did not in fact fulfil all the necessary requirements of the *Gäfgen*-thesis in the narrow sense because Jakob was killed not long after having been kidnapped and because the police failed to exhaust every possible option before issuing the threat.¹⁴²

139 Jessberger, supra n 15 at 1064.

140 Kramer (2014), supra n 2 at 23; Waldron (2005), supra n 22 at 1713; and Ginbar, supra n 11 at 24–9.

141 The human rights ideal is one of the many consequences of the seismic shift in the normative foundations of western states and societies from the feudal hierarchy of obligations to ‘natural’, then ‘constitutional’, and finally to ‘human’ rights. See, for example, Donnelly, *Universal Human Rights in Theory and Practice*, 3rd edn (2013) at chapter 5; and Kamenka, ‘The Anatomy of an Idea’ in Kamenka and Tay (eds), *Human Rights* (1978) 1.

142 Luban (2014), supra n 11 at 77.

The *Gäfgen*-theses, therefore, at most make only a tiny theoretical, but no practical, difference to the prohibition and rights under consideration which remain ‘absolute’ for all real purposes.

There are several problems with these claims. First, it takes only a single exception to an ‘absolute’ rule or principle for it to lose its absolute status.¹⁴³ Even if all other possible objections to the absolutist case could be satisfactorily addressed, the *Gäfgen*-theses would still reduce the status of the prohibition and rights under discussion from ‘strictly absolute’ to ‘virtually absolute’ and, for the following reasons, this is not insignificant. To begin with, the broad version of the *Gäfgen*-thesis suggests that other currently unforeseen circumstances might arise in which it could also apply. As already noted, before the *Gäfgen* case occurred, the international human rights community did not consider a conflict between two instances of the same ‘absolute’ right to be even a theoretical possibility. But, post-*Gäfgen*, this is no longer possible.

The *Gäfgen*-theses are far from trivial for several other reasons. They demonstrate how a well-intentioned legal interpretation of a human rights norm can acquire a canonical status in spite of dormant, yet fundamental, conceptual problems stemming from a lack of critical reflection on the part of those responsible for its authoritative articulation at, and since, its inception. They also show that, no matter how patently flawed the received wisdom may be, if repeated often enough by those in authority, any criticism is more likely to be denied and avoided than convincingly addressed.¹⁴⁴ The *Gäfgen*-theses also have significant implications for judicial reasoning in human rights litigation not least because they show that, where conflicts between ‘absolute’ rights occur, a narrow formalistic approach, as exemplified by the judgment of the majority of the Grand Chamber, fails to provide a convincing basis for resolution. Finally, the issues raised by the *Gäfgen* case involve matters of much greater importance than mere conceptual clarification. Flawed concepts can lead to injustice. There can be no more vivid illustration than the willingness of the majority of the Grand Chamber 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.

(ii) *The slippery slope and the noble lie*

A frequently repeated objection to the *Gäfgen*-theses, and/or to any equivocation about the absoluteness of the prohibitions under discussion, is that they risk a slide down the slippery slope to the more routine official use and toleration of torture, cruel, inhuman and degrading treatment.¹⁴⁵ In order to resist this, it is said, we should tell ourselves and others a ‘noble lie’—that the prohibition and the rights it implies, are absolute even though the *Gäfgen*-theses show this is not logically possible. But the noble lie is not necessary. For one thing, as already noted, the ‘absolute’

143 Gross (2006), supra n 54 at 234.

144 See citations infra n 11. Nowak makes no reference to the *Gäfgen* case or to the extensive literature on it (Nowak (2012), supra n 17), while Kramer, despite acknowledging that it has been ‘much discussed’, barely mentions it and does not even refer to it by name: see Kramer (2014), supra n 2 at 61, 87–8.

145 See, for example, Waldron (2005), supra n 22 at 1716–7 and 1748–9; Twiss, supra n 46 at 360–4; Ginbar, supra n 11 at 111–56; and Chang, supra n 46 at 34. See also Shue’s response (‘Torture’, supra n 46 at 57–9), a position he has since changed: see Shue (‘Torture in Dreamland’), supra n 52 at 236–8.

ban has been less than a resounding success in eliminating these practices globally whereas, by sharp contrast, Canada, New Zealand and South Africa have not slid down the slippery slope as a result of framing the prohibition in formally non-absolute terms. For another it is not clear why legally permissible official killings do not create the risk of a slide down a different slippery slope.

(iii) *The threat of, and willingness to use, torture*

The *Gäfgen*-theses have also been criticized for drawing an untenable distinction between the threat and the use of torture because, it is said, the credibility of the threat depends upon a willingness to use torture if the threat fails.¹⁴⁶ Although *Gäfgen* was misled into thinking that a ‘torture expert’ was already on his way,¹⁴⁷ the problem of whether or not to follow up the threat with the infliction of torture did not arise because, in common with most suspects in this position,¹⁴⁸ he cooperated without the threat having to be implemented. However, the question of what should be done if the threat fails must be addressed in a manner consistent with the method and principles already discussed.

To begin with it should be recognized that the *use* of torture in *Gäfgen*-type circumstances would greatly intensify the moral dilemma because it would create much greater ‘parity in suffering’ between the kidnap victim and kidnapper, particularly where there may be doubts about whether or not the former is still alive. However, it does not necessarily follow that torturing the suspected kidnapper must be excluded in all circumstances. To put it bluntly, the *Gäfgen*-thesis in the narrow sense is capable of justifying torture itself if the conflict between the rights of the suspected kidnapper and the kidnap victim can credibly be framed as a conflict between two competing instances of the right not to be tortured. But, as before, there must be reasonable grounds for believing: that the kidnap victim is alive, that the victim is undergoing severe suffering as a result of the kidnapping, that the suspect was involved in the kidnapping, that the suspected kidnapper knows where the victim is, that torture is likely to produce sufficiently reliable information about the victim’s whereabouts in time to facilitate rescue, and that there is no other reasonably viable alternative. Those responsible for the infliction of torture should also be prosecuted and tried afterwards. Needless to say it is difficult to imagine how these conditions could be met in all but the rarest circumstances.

(iv) *The unreliability of information extracted by the threat and use of torture*

It has also been claimed that, even where the *Gäfgen* conditions apply, torture should never be threatened or inflicted because the information elicited will be inherently unreliable. There is certainly a risk, as already indicated, that the veracity of information adduced by the threat or use of torture will be compromised by the way in which it has been obtained. But there is no obvious reason why the potential

146 See, for example, Luban (2014), supra n 11 at 76–8.

147 *Gäfgen v Germany* (2010), supra n 1 at para 15. According to Luban (2014), supra n 11 at 76, the trial documents indicate that the police officer summoned by helicopter was not a specially trained torture expert but merely an officer whom other officers believed might be prepared to behave as required.

148 Donnelly and Diehl, supra n 34 at 9.

unreliability of information obtained in *Gäfgen*-type circumstances is less amenable to morally responsible risk-management than that posed by any other type of information the veracity of which also cannot be guaranteed. And, as the *Gäfgen* case itself indicates, information secured by the threat of torture may, nevertheless, be true. Doubts about its reliability merely add another imponderable to the others in such cases, complicating the rational and moral management of the aggregate risk. But they do not establish, either for this reason alone or for this reason combined with others, that torture or the threat of torture should be excluded in all circumstances without exception.

(v) *The ticking bomb scenario*

Concern has also been expressed about the implications of the *Gäfgen*-theses for the use of torture in the much-debated ‘ticking bomb scenario’ where a terrorist suspect in police custody admits having planted and primed a time-bomb capable of causing mass casualties, but refuses to say where it is. The dilemmas raised by this scenario have spawned a huge literature with formidable arguments on both sides which there is neither the space nor the need to review thoroughly here.¹⁴⁹ But it is certainly not an ‘intellectual fraud’ or unreal fantasy, as Luban and others claim.¹⁵⁰ Though largely hypothetical, the dilemma is said already to have been encountered more than once in the real world.¹⁵¹ And if there is a bomb, conflicts will inevitably arise both between the suspect’s right not to be tortured and the right to life of potential victims, and also between the suspect’s right not to be tortured and the right of those injured when the bomb detonates, to be spared the torture, cruel, inhuman and degrading treatment caused by the blast.

There are, however, several crucial differences between the *Gäfgen* case and the ticking bomb scenario.¹⁵² First, the latter remains unlikely, particularly in an age of suicide bombers, while the former presented concrete legal and moral dilemmas. Second, if the whereabouts of the ticking bomb are unknown, it cannot be known for certain if there is a bomb at all. By contrast, it was absolutely certain that Jakob had gone missing and virtually certain that *Gäfgen* had something to do with it. 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 Jakob not been murdered from the outset, this violation would have been ongoing throughout *Gäfgen*’s detention by the police until the former’s whereabouts were ascertained. Fourth, while there can be no doubt whose rights were violated by *Gäfgen*, it will not be clear whose rights have been violated by the bomb until it explodes. 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 *Gäfgen* case concerns the legitimacy of *Gäfgen*’s

149 See, for example, Luban (2014), supra n 11 at Part II; Allhoff, supra n 2; Ginbar, supra n 11; Levinson, supra n 2; and Greenberg, supra n 34. Other contributions include Mayerfeld, ‘In Defense of the Absolute Prohibition of Torture’ (2008) 22 *Public Affairs Quarterly* 109.

150 Luban (2014), supra n 11 at Part II; Luban (2006), supra n 34 at 51; and Shue (‘Torture in Dreamland’), supra n 52. See also Mayerfeld, *ibid.* at 111; and Farrell, supra n 11 at 128–33.

151 See, for example, Levinson, supra n 109 at 34; and Ginbar, supra n 11 at 379–86.

152 Greer (2011), supra n 15 at 85.

10 minute anxiety about the prospect of 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, Gäfgen's will to resist police pressure crumbled within 10 minutes of the threat having been issued.

Krauthammer argues that: 'In the case of the ticking time bomb, the rules would be relatively simple: Nothing rationally related to getting accurate information would be ruled out.'¹⁵³ But this is much too broad to comply with any credible interpretation of international human rights law. Nevertheless, by analogy with the Gäfgen case, it is difficult to see why the suspected bomber should never be *threatened* with torture in the ticking bomb scenario. However, to justify the *use* of torture itself in such circumstances would require the fulfilment of several exacting conditions similar to those specified above. It is known beyond reasonable doubt that there is a bomb, that if it explodes it will kill and maim many people, that the suspect was involved in planting it and therefore knows where it is, there are adequate reasons to believe that torture would produce sufficient information about the bomb's location sufficiently quickly to enable it to be defused, and there is no other reasonably viable way of preventing the catastrophe. Finally, whether there was a bomb or not, or whether it is defused or not, those involved in the threat or infliction of torture are publically held to account, ideally through prosecution and trial, afterwards.¹⁵⁴

Many who have contributed to the case against the use of torture in such circumstances have argued that it is not only extremely unlikely that these tests could ever be fulfilled in practice, but it is difficult even to imagine how they ever could be.¹⁵⁵ But consider the following unlikely, though not impossible, scenario. Late in the evening, acting on information supplied by a vigilant member of the public, the police arrest two men in the basement of a city skyscraper planting a bomb which is immediately defused. Had it gone off hundreds, if not thousands, would have been killed and many others severely injured. Separated in police cells, the bombers—'loners' unknown to the authorities with no ideology apart from a deep antipathy towards 'the system'—each independently claim that, earlier that day, they planted three other devices at three separate locations timed to detonate at noon the following day. As proof, they each independently refer the police to the cell phone one of them had been carrying where several video recordings have been stored which, they claim, were intended to be uploaded to the internet in celebration of the attacks. These show one of the suspects hiding each of three objects, very similar in appearance to the device which has been defused, in what appear to be three different locations. On each occasion the suspect planting the device turns to the camera, smiles, and displays a copy of the front page of one of that morning's national newspapers.

153 Krauthammer, supra n 2 at 313.

154 See, for example, Kramer (2014), supra n 2 at 287–316; and Kramer (2012), supra n 15 at 492; Shue ('Torture'), supra n 46 at 58–9; Bassiouni, 'Great Nations and Torture' in Greenberg, supra n 34, 256 at 259; and Horne, supra n 107 at 169.

155 See, for example, Luban (2014), supra n 11 at Part II; Luban (2006), supra n 34 at 44–7; and Holmes, 'Is Defiance of Law a Proof of Success? Magical Thinking in the War on Terror' in Greenberg, supra n 34, 118 at 127–9.

Four possible ways in which this scenario could end can be distinguished. First, there is no legal or moral problem if the suspects are neither threatened with torture nor tortured, and it turns out there were no other bombs. However, if the suspects were not threatened with torture or tortured and there were in fact other bombs, their locations were not identified, they went off, and hundreds were killed and maimed, there will be a huge moral and political, though, according to the prevailing orthodoxy, no obvious legal problem. But, if the suspects were tortured and it turns out that the only bomb was the one they were caught planting *in flagrante*, there will be a legal problem and a different kind of political and moral problem. However, if the suspects were tortured, there were other bombs, which were found and defused, it is likely to be politically difficult to punish those responsible for the torture whatever the legal and moral imperatives. They are, in fact, more likely to be celebrated as heroes.

In all these circumstances the moral and legal risk will be borne primarily by the police unless the courts or the executive are involved in 'torture warrant' proceedings similar to that for searches and arrests.¹⁵⁶ While it would also be possible, according to the circumstances, for the courts to refrain from punishing, or to punish leniently, or for the executive or legislature to pardon those the courts have sentenced, this might not foreclose the possibility of civil proceedings by the torture victim(s).¹⁵⁷ But, whatever the pros and cons of these alternatives, the case for a genuinely absolute prohibition on the use of torture in every conceivable version of the ticking bomb scenario is difficult to justify in *human rights terms* because doing so rests on a denial of the obvious: it might involve a conflict between the suspects' 'absolute' human right not to be tortured and the same 'absolute' human right held by their potential victims. Rather than claiming that the prohibition against torture is 'absolute', a wiser and more credible policy would be simply to affirm that no ticking bomb scenario can *realistically* be envisaged in which the use of torture could ever be justified. This means that the prohibition, though not strictly 'absolute', remains 'virtually', or 'all but',¹⁵⁸ absolute for all conceivable practical purposes.

(vi) *Intuition and emotion in reflective equilibrium with reason*

Finally, it has also been claimed that the *Gäfgen*-theses subtly, and inappropriately, rely on an emotional over-identification with the plight of a kidnapped child while equally inappropriately fail fully to acknowledge the rights of the morally unattractive suspected kidnapper whose status as a heartless and wicked child abductor was assumed in the *Gäfgen* case long before it was settled beyond reasonable doubt in a fair trial. By contrast the case for the absoluteness of *Gäfgen's* right not to be threatened with torture is said to rest on much more appropriate cold, dispassionate, legal logic. Typically, absolutists recognize how 'difficult . . . challenging . . . highly charged'

156 See, for example, Kramer (2014), supra n 11 at 243–85; Krauthammer, supra n 2 at 313; Dershowitz, supra n 32; Dershowitz, 'Tortured Reasoning' in Levinson, supra n 2 at 257; Gross, 'Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience' (2003–2004) 88 *Minnesota Law Review* 1481; and Ginbar, supra n 11 at 183–99.

157 Chang, supra n 46 at 41–42; Gross (2006), supra n 54 at 241–8; Shue ('Torture'), supra n 46 at 58–9; and Shue ('Torture in Dreamland'), supra n 52 at 236.

158 Horne, supra n 107 at 169.

and tragic the *Gäfen* case is,¹⁵⁹ but shrug their shoulders effectively saying—‘It’s a pity. But there’s nothing that can be done about it. The right of suspects not to be threatened with torture is absolute even in these circumstances. End of story.’

However, preferring that the suspected kidnapper is spared the threat of torture in *Gäfen*-type circumstances, even if this results in the kidnapped child dying, also relies upon the moral intuition that this is the price that has to be paid for the complete exclusion of all threats of torture against all suspects in all circumstances. The fundamental questions here, therefore, turn out to be very familiar: which of these competing intuitions is more convincing and why? It should also be added that arriving at the least unpalatable outcome is not just a matter of blindly following normative logic wherever it leads. Mature, nuanced, and well-grounded normative judgments involve the application of universal emotional qualities such as empathy, balanced with reason. The *Gäfen* case provoked a sharp public controversy in Germany at the time.¹⁶⁰ Studies also consistently show that ‘the vast majority’ accept that, under certain conditions, even killing an innocent person to save the lives of several others is acceptable in circumstances when someone will die whatever happens.¹⁶¹ As already suggested, such a moral intuition is difficult to reconcile with an absolute prohibition against threatening a suspected child kidnapper with torture even in circumstances where there is no other viable way of rescuing the child.

5. CONCLUSION

No credible contributor to the contemporary debate argues that officials should torture or cruelly, inhumanly or degradingly treat those under their control as a matter of routine fully sanctioned by law. The only area of real controversy is whether any exceptions can be identified in which such conduct could ever be justified or excused, if so what legal status it should have, and what should be done with those who resort to it in such circumstances. In spite of a mountain of literature no consensus about what the answers should be has yet been established, arguably because, ultimately, an intuitive moral choice between two incommensurate sets of values seems to be involved. According to one view, even the suffering of the many killed or injured when a ticking bomb explodes matters less than guaranteeing that, even in these circumstances, the perpetrator is protected from any suffering which, had it been inflicted, might have averted the calamity. The other view is that, since the prohibition against torture derives from the moral impulse to eliminate all forms of deliberately inflicted unjustified harm, it is difficult to see why the perpetrator’s right to be spared even the threat of suffering must always and invariably outweigh the death and injury caused by the explosion. This moral dilemma cannot be avoided in international

159 Maffei and Sonenshein, *supra* n 11 at 25. See also Sauer and Trilsch, *supra* n 11 at 319.

160 Schroeder, *supra* n 15 at 189.

161 However, while most think it would be morally right to throw a switch to divert a runaway trolley from a track where it is certain to kill several people to another track where it is certain to kill only one, the majority would not countenance pushing a ‘fat man’ under the trolley to achieve the same result: see Smet, *supra* n 15 at 483. For further discussion of moral intuition and moral reasoning, see Sinnott-Armstrong, Young and Cushman, ‘Moral Intuitions’ and Harman, Mason and Sinnott-Armstrong, ‘Moral Reasoning’ in Doris (ed.), *The Moral Psychology Handbook* (2010) 246 and 206 respectively; and Nadelhoffer, Nahmias and Nichols (eds), *Moral Psychology: Historical and Contemporary Readings* (2010), Part V: Moral Intuitions at 307.

human rights law either. On closer examination it turns out that the absolute status of the prohibition against torture, cruel, inhuman and degrading treatment is based on a problematic moral choice masquerading as an objective and inescapable legal imperative, supported and defended by bald assertion, blind faith, intellectual tunnel vision, and by appeals to authority rather than to reason.

This is particularly true of the universal failure on the part of those who subscribe to the absolutist case, to acknowledge that when two instances of the same absolute right come into conflict, as the *Gäfgen* case clearly indicates they can and do, each cannot be equally absolute. In such circumstances the rights of one party must logically and inevitably take precedence over those of the other, with the former providing an exception to, or a limitation upon, the latter. The key questions then become: whose rights should prevail and why? When such a dilemma arises no morally perfect or watertight solution can be found. But only two routes to the least objectionable solution appear to be available: either the 'lesser of the two evils' should prevail, and/or an accommodation between the competing prohibitions and rights is found which best expresses their underlying rationale. Where the conditions specified by the *Gäfgen*-thesis in the narrow sense apply, the rights of the kidnap victim to avoid the torture, cruel, inhuman and degrading treatment and the risk of death stemming from the kidnapping, should, therefore, take precedence over the right of the suspected kidnapper to avoid the threat of torture issued to rescue the victim.

But the problems with the absolutist case do not end there. It is not clear, for example, that torture, terrible though it is, invariably constitutes the worst way in which anyone could be treated including being killed or permanently disabled. Circumstances can easily be contemplated where it could well be preferred, either to one's own death or to the death or suffering of others. Nor is the fact that torture causes severe and lasting suffering sufficient, of itself, to render the prohibition against it absolute without exception. Absoluteness is not, moreover, an express, inherent, self-evident, or necessary feature of the international prohibition and rights under discussion. And merely because the provisions in question are formally unqualified is not a good enough reason to regard them, or the rights they generate, as absolute, since other formally unqualified human rights obligations are uncontroversially regarded as the source of implied rights limited by implicit exceptions. Many subtle and sophisticated arguments have been advanced by philosophers for and against the concept of absolute rights and also about which rights deserve this status. However, by contrast, rather than invoking any of these, judges, lawyers and jurists have simply assumed the provisions in question are absolute on account of their lack of express limitations combined with a failure or unwillingness to imagine the possibility of any legitimate exception. Non-absolute interpretations of the prohibition of torture and other forms of ill-treatment are not only possible, but in fact formally and expressly underpin similar provisions in some celebrated national human rights instruments including the Canadian Charter of Rights and Freedoms 1982, the New Zealand Bill of Rights Act 1990 and the South African Bill of Rights 1996. This raises the following questions: which legal human rights formulation—absolute or non-absolute—is more appropriate and why?

The claim that the prohibitions and rights under consideration are 'absolute in principle' but 'relative in application' is also unconvincing since it facilitates the

rebranding of a legitimate exception as a mere failure to satisfy threshold criteria, thereby misleadingly appearing to leave the absoluteness of the prohibition intact. The contrast between the *Gäfgen* and *Wainwright* cases provides a stark example. Nor does it follow, because the term ‘cruel, inhuman or degrading’ treatment is typically included in the same provision of any international human rights instrument which prohibits torture, that each of these very different forms of harmful conduct must necessarily share the same absolute status. Subtle distinctions between types of ‘absoluteness’ have no obvious relevance to the robust conception held to apply in international human rights law either, and there is no merit in the proposition that the principle in question is absolute even though this is not necessarily true of all the rights which derive from it.

There is no substance in any of the objections so far raised against the *Gäfgen*-theses. It is difficult to sustain the view that the rights and prohibitions in question are legally absolute, even though the *Gäfgen* case may constitute a rare moral exception, or that it raises only an argument about what the law ought to be rather than what it is. Since human rights norms gain their legal authority on account of their moral weight, without minimal moral credibility it is difficult to see what legal authority they can possibly have. The claims that there was no genuine conflict between the Article 3 rights of *Gäfgen* and *Jakob*, and that any conflict must be settled in *Gäfgen*’s favour, are also unconvincing. The fact that *Jakob* was already dead when *Gäfgen* was threatened with torture, and that the police may not have exhausted all other options short of the threat, are contingent but not necessary features of the moral and legal dilemma the case presents. It could easily have been otherwise and, at the material time, only *Gäfgen* knew *Jakob*’s real fate. Nor is it appropriate to frame the conflict exclusively in terms of the kidnap victim’s right to life and the suspected kidnapper’s right not to be threatened with torture since there is also undeniably a conflict between each party’s right not to be inhumanly treated. No one has yet satisfactorily explained either why police officers who kill hostage-takers in order to rescue hostages can do so without violating human rights, provided no more force than absolutely necessary is used, while those who, for the same purpose, merely cause limited anxiety to suspected kidnappers by threatening them with torture, must be severely punished in all circumstances without exception. The claim that the prohibition in question is absolute against agents of the state but not against private parties is also unsustainable since this would constitute an acknowledgement that it is, in fact, subject to implicit exceptions. If true it would also fail to provide a solution to the hypothetical problem that if *Gäfgen* had been a rogue police officer, there would have been a conflict between two competing sets of Article 3 rights (his and *Jakob*’s) each against the state. In *Gäfgen*-type circumstances, privileging the negative obligation held by the police to refrain from mistreating suspects over their positive obligation to rescue victims of crime, or framing the dilemma in terms of ‘inherent wrongs’ rather than absolute prohibitions and rights, also merely recasts rather than resolves the dilemma. Convincing reasons, independent of the positive and negative character of these obligations, or their allegedly inherent rightness or wrongness, need to be found to justify this order of priorities in all circumstances without exception. None has yet been provided. It does not follow either that, because the *Gäfgen*-theses are consequence-sensitive, they necessarily invoke a utilitarian political

morality since, by nature, human rights prioritise the pursuit of certain consequences over others.

The significance of the *Gäfgen*-theses is also difficult to deny. While the *Gäfgen* case may itself be a unique aberration, it nevertheless reveals important principles with wider application. It shows, for example, how a conceptually flawed interpretation of a fundamental norm in international human rights law can lead to substantive injustice in hitherto unforeseen contingencies. There are no credible grounds either for concluding that the *Gäfgen*-theses presage a slide down the slippery slope towards the more routine official use of torture. For one thing neither the slippery slope nor the noble lie have been encountered in Canada, New Zealand or South Africa where the prohibition and rights in question are expressly non-absolute. Nor is it clear why the legitimate official use of lethal force does not also create the risk of a slide down a different slippery slope. The categorical exclusion of, not just the threat, but also the infliction of torture in international human rights law, including in every conceivable version of the ticking bomb dilemma without exception, also lacks conviction because here too conflicts between fundamental human rights cannot always be excluded. Nor has it been explained why the potential unreliability of information obtained in *Gäfgen*-type circumstances is less amenable to morally responsible risk-management than that posed by any other type of information the veracity of which cannot be guaranteed. 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.¹⁶²

It is more important, therefore, and entirely consistent with the *Gäfgen*-theses, that those with control over others should understand that credible allegations of torture, cruel, inhuman or degrading treatment will result in prosecution and, if proven, are likely to lead to punishment.¹⁶³ There is no need to invoke the concept of absoluteness at all to make this message clear. It would have been wiser and more credible, therefore, if, prior to the *Gäfgen* case, the eminent legal authorities who have so repeatedly, stubbornly, myopically, and unreflectively affirmed the absoluteness of the prohibition and the rights under consideration, had avoided the term ‘absolute’ altogether and had instead simply stated that it is difficult to imagine any circumstances in which torture, cruel, inhuman or degrading treatment would be justified. This would have sent, and would continue to send, an appropriate message to state officials and others entirely consistent with the *Gäfgen*-theses: any resort to torture, cruel, inhuman, or degrading treatment will expose those responsible to the prospect of potentially severe punishment. It is open to further debate, where the *Gäfgen*-conditions apply, whether a defence of necessity could ever absolve those responsible from either criminal liability and/or moral culpability rather than merely mitigating punishment. But, if the threat in the *Gäfgen* case had resulted in Jakob’s life being

162 See, for example, Elshstain, *supra* n 101 at 86–8.

163 See, for example, Shue (‘Torture’), *supra* n 46 at 58–9; and Shue (‘Torture in Dreamland’), *supra* n 52 at 236.

saved, it would be difficult to see why any punishment would be justified at all. Rather than repeating the empty mantra of ‘absoluteness’, the challenge is to specify conditions which limit any exception to the prohibition to the rarest and most unlikely circumstances. Hiding behind the myth of absoluteness is merely an evasion of the responsibility inherent in a full commitment to human rights to decide for sound reasons, where suffering cannot be avoided in given circumstances, whose matters most—suspects, victims, and potential victims included.

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