Conflicts between Absolute Rights: A Reply to Steven Greer

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Abstract

Can absolute rights conflict? Is it permissible to torture a person to save others from torture? And what can judges learn from trolleys? In this article, presented as a reply to an article by Steven Greer, I investigate the above questions in the context of the case law of the European Court of Human Rights. Drawing on Gäfgen v Germany, I construct a hypothetical case of conflicting absolute rights, which cannot be resolved by the existing strands of legal reasoning in the case law of the Court. Instead, I argue, recourse must be had to moral reasoning. In discussing one of moral philosophy’s deepest conundrums—the Trolley Problem—I rely on the distinction between negative and positive obligations and between direct and indirect agency to unravel the dilemma. Translating the moral argument into legal reasoning, I conclude that in cases of conflicts between absolute rights, negative obligations principally trump positive obligations.

Keywords: absolute rights – conflict of rights – European Court of Human Rights – Gäfgen v Germany

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1. Introduction

In an article published in an earlier issue of this journal, Steven Greer provides an interesting analysis of \textit{Gafgen v Germany}, a case decided by the Grand Chamber of the European Court of Human Rights (ECtHR or ‘the Court’).\footnote{Greer, ‘Should Police Threats to Torture Suspects Always be Severely Punished? Reflections on the \textit{Gafgen Case}’ (2011) \textit{11 Human Rights Law Review} 67.} The applicant, Mr Gafgen, had been threatened with torture by police officers in order to force him to reveal the whereabouts of his kidnap victim, Jakob, an 11-year-old boy. In his article, Greer argues that \textit{Gafgen} involved, at least in part, a conflict between two absolute rights: between the freedom from torture of the suspect, Mr Gafgen, and the same right of his victim, Jakob. Greer presents a compelling analysis of the case, arguing that the ECtHR should have engaged in deep moral reasoning to resolve the conflict. Greer himself is convinced that such moral reasoning should have left no stone unturned: all possible factors, closely tracking the specific circumstances of the case, should have been taken into account.\footnote{Ibid. at 80–5.} This \textit{ad hoc} analysis leads Greer to conclude that the ECtHR should have not found a violation of Article 3 of the European Convention on Human Rights (ECHR or ‘the Convention’) in the particular circumstances of the \textit{Gafgen} case. The primary shortcoming of the ECtHR’s reasoning, Greer maintains, is that the Court failed to ask the relevant moral question:

\begin{quote}
[T]he central moral question, which none of the judges framed, is this: why should the right of a suspect—virtually certain to have been involved in the kidnapping of a child for ransom—to be spared the short-lived psychological suffering caused by the threat of torture to compel him to disclose the whereabouts of his victim, take precedence over the victim’s rights to avoid the much more severe, and much more prolonged, physical and mental suffering and imminent death, occasioned by the kidnapping itself?\footnote{Ibid. at 86–7.}
\end{quote}

According to Greer, this failure stems from what he considers to be the ‘fatal flaw’ in the ‘superficially watertight argument’ of the Court to the effect that the Article 3 rights of Mr Gafgen are absolute and admit of no exception whatsoever, also not to save a child’s life.\footnote{Ibid. at 87.} Greer takes issue with the Court’s characterisation of the case, arguing that the Court ignored the fact that the
prohibition of torture and inhuman and degrading treatment did not only play a role on the side of the applicant (Mr Gäfgen):

Jakob [the victim] also had rights under Article 3, which were not explored by the parties, the third-party interveners, or any of the judges on the European Court of Human Rights. By overlooking these, all the judgments of both panels are methodologically deficient.\textsuperscript{6}

Ultimately, Greer concludes the following:

\textquoteleft[T]here is no ideal solution to the dilemmas presented by Gäfgen v Germany since every alternative suffers from moral problems. But . . . the verdicts of the majority of the Fifth Section, the minority of the Grand Chamber, and the relevant German courts represent the least bad outcome. They mean, in effect, that the Article 3 prohibition against police threats to torture suspects is not quite as 'absolute' as it has hitherto seemed. It could, in other words, effectively be overridden by the competing Convention rights of a hostage—to life, to freedom and to escape from severe inhuman and degrading treatment—particularly perhaps when the hostage is a child.\textsuperscript{7}

In this article, I aim to present an alternative—more principled—account of conflicts between absolute rights, in reply to Greer's \textit{ad hoc} account. Like Greer, I will start off by considering the real life case of Gäfgen. Unlike Greer, however, I do not consider Gäfgen to entail a genuine conflict between absolute rights. In order to analyse the possibility of conflicts between absolute rights, I will therefore construct a hypothetical case that does involve such a conflict (Section 2). This hypothetical case will involve the police threatening to torture a suspect (negative right), in order to save another person from torture by the suspect's accomplice (positive right). It will thus pose a dilemma between conflicting instances—one negative, one positive—of the prohibition of torture in Article 3 of the ECHR. Similar to Greer, I will demonstrate that this hypothetical dilemma cannot be resolved by the existing strands of legal reasoning available in the case law of the ECtHR (Section 3). Instead, recourse must be had to moral reasoning.

However, where Greer searches for a solution in the particulars of the (Gäfgen) case, I will develop a more principled argument (Section 4). In doing so, I will draw on one of moral philosophy's most persistent conundrums involving the right to life: the Trolley Problem. In analysing the conundrum, I aim to demonstrate that—in principle and all other things being equal—negative duties trump positive duties under the Trolley Problem. However, I will also argue, still under the Trolley Problem, that negative rights can nevertheless,
under certain conditions, be outweighed by positive rights. But I will pose a limit to such balancing. Relying on the distinction between direct and indirect agency, I will submit that balancing cannot be allowed when interference with the negative right entails treating a person as a means to an end.

I will then translate the moral argument into legal reasoning, while crossing the bridge from the right to life to the prohibition of torture. This will lead me to argue that, under the ECHR, negative obligations should principally trump positive obligations when two instances of an absolute right conflict (the positive right will therefore necessarily emerge less absolute from the conflict). I will also argue that no balancing can be allowed in the hypothetical case constructed for the purpose of this article, given that the facts of that case necessarily entail treating a person as a means. In the conclusion (Section 5), I will provide some suggestions as to how my principled argument may be of relevance to Gäfgen and the Court’s wider case law, over and above its applicability to what is—for now—a hypothetical scenario.

2. Gäfgen v Germany and the Hypothetical Case of X

Steven Greer argues that Gäfgen involved, at least in part, a conflict between absolute rights. Before we consider that claim, a short reminder of the facts of the case is in order. Gäfgen revolved around the abduction of an 11-year-old boy, Jakob von Metzler, by Mr Gäfgen, a 32-year-old law student and acquaintance of the von Metzler family. Mr Gäfgen killed Jakob shortly after having lured him into his apartment under false pretences. He then hid the boy’s body near a pond, but still demanded a ransom from his parents, pretending their son was still alive. The parents informed the police of the location where they had been instructed to leave the ransom. After Mr Gäfgen picked it up, the police kept him under surveillance, eventually arresting him at the airport later that day. Mr Gäfgen was taken into custody where the police, acting under the assumption that Jakob was still alive, questioned him to discover the whereabouts of the child. However, Mr Gäfgen refused to speak. The following day, a police officer—under order of the Deputy Chief of police—threatened Mr Gäfgen with subjection to considerable physical pain at the hands of a person specially trained to administer such pain, if he would not disclose the child’s whereabouts. Upon hearing the threat of torture, which the ECtHR would characterise as inhuman treatment, Mr Gäfgen confessed that he had killed Jakob and revealed the location of the boy’s body.

In his article, Greer reproaches all actors involved in the Gäfgen case for having failed to acknowledge that the case entailed, at least in part, a conflict between two absolute rights: the Article 3 rights of Mr Gäfgen (in their

8 Gäfgen, supra n 2 at para 131.
negative dimension) and the Article 3 rights of Jakob (in their positive dimension). I do not agree with Greer's characterisation of the case, for the following reason: the primary concern of the police in Gän gen was to save Jakob’s life. There is no indication that they acted under the assumption that Jakob was the victim of ill-treatment. The relevant—at the very least, primary—conflict was therefore one between Mr. Gän gen’s negative right to be free from inhuman treatment (threat of torture) and Jakob’s positive right to life. However, and crucially, the right to life is not an absolute right under the Convention and the case law of its Court. The second paragraph of Article 2 of the ECHR already describes a number of situations in which the negative right to life can be overridden: ‘deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary’ to, for example, ‘defend a person from unlawful violence or to effect a lawful arrest’.10 In its positive dimension, the right to life is not absolute either, given that the State’s positive obligation to protect life only arises when certain requirements have been met:

[W]here there is an allegation that the authorities have violated their positive obligation to protect the right to life...it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual...and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.11

Indeed, the threat a person may pose to the life of another is necessarily speculative. The potential nature of the risk arguably explains why the State’s positive obligation to protect life is open to balancing against the Convention rights of the potential perpetrator, including her right to personal liberty (Article 5) and right to private life (Article 8).12 Such balancing relies on the assessment of the risk a person poses to the right to life of another. When the risk is sufficiently established as being real and immediate, the right to life of the second person outweighs the rights to personal liberty and private life of the first person. However, the Court will not allow the Convention rights of the first person to be outweighed by an insufficiently established risk.

In cases involving ill-treatment by private actors, conversely, the question is not one of potentiality, but of actuality. As soon as domestic authorities are aware (or ought to be aware) that a person is the victim of ill-treatment at the hands of private actors—and provided that such ill-treatment meets the threshold for application of Article 3—the State is arguably under an absolute

9 Greer, supra n 1 at 68 and 86–7.
10 Article 2(2) ECHR.
12 Ibid.
obligation to put an end to it.\textsuperscript{13} The authorities may under certain circumstances require some time to act, for instance in preparing a successful rescue operation, without thereby failing to fulfil their positive obligation.\textsuperscript{14} But there can be no question of balancing the Article 3 rights of the victim against the Convention rights of the perpetrator in determining the State’s obligation to intervene. This argument, sufficiently explicated for our current purposes, will be defended at length below, with further references to the Court’s case law.\textsuperscript{15}

For now, it is important to note that the difference in nature between the right to life and the prohibition of torture in the Court’s case law—the former being relative, the latter being absolute—explains why, in \textit{Gáfgen}, the Court dismissed the Government’s defence that the police officers were obliged under the Convention to protect Jakob’s right to life:\textsuperscript{16} ‘[w]hile the] Convention indeed requires that the right to life be safeguarded by the Contracting States . . . it does not oblige States to do so by conduct that violates the absolute prohibition of inhuman treatment under Article 3.’\textsuperscript{17} On the contrary, according to the Court ‘torture, inhuman or degrading treatment cannot be inflicted even in circumstances where the life of an individual is at risk.’\textsuperscript{18}

The above considerations render it difficult to characterise \textit{Gáfgen} as a case involving a genuine conflict between absolute rights. Surely, one may attempt to construct the case as such, as Greer does, but I submit that such characterisation stretches the facts of the case too far. Rather than attempting to mould \textit{Gáfgen} into a case of conflicting absolute rights, I will use it as the basis for the construction of a hypothetical case involving a genuine conflict between absolute rights. That will be the case of \textit{X}.

Let us imagine that, similar to Mr Gáfgen, \textit{X} has abducted a child, \textit{Z}, in a Council of Europe member State. \textit{X} is subsequently arrested by the police, while picking up the ransom he demanded in return for \textit{Z}’s release. However, contrary to \textit{Gáfgen}, let us imagine that the child, \textit{Z}, is still alive when \textit{X} is arrested. Let us also imagine that the police are aware of this fact, because they discovered a live video feed in \textit{X}’s apartment, in which the police can see that \textit{Z} is being tortured by \textit{Y}, who is known to be \textit{X}’s wife. Let us further imagine that the police submit \textit{X} to torture, because he refuses to disclose \textit{Z}’s location. Regardless of whether \textit{X} subsequently reveals \textit{Z}’s location or not, his case—if brought before the ECtHR—would appear to involve a genuine conflict between absolute rights. This conflict is able to arise because the domestic authorities in \textit{X} are at the same time under a (negative) obligation under Article 3 ECHR not to torture \textit{X} and under a (positive) obligation under the same article

\textsuperscript{13} See, for instance, \textit{M and Others v Italy and Bulgaria} Application No 40020/03, Merits, 31 July 2012, at paras 99 and 102–103.
\textsuperscript{14} Ibid. at para 102.
\textsuperscript{15} See Section 3.
\textsuperscript{16} \textit{Gáfgen}, supra n 2 at para 177.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid. at para 107.
to protect Z against torture by a private actor, Y. Once they resort to torturing X, the conflict materialises. However, does this hypothetical case really entail a conflict of **absolute** rights? And if so, how can it be resolved? These are the questions I will now turn to.

3. **The Absolute Character of Article 3 ECHR? Negative Interferences versus Positive Obligations**

The easiest way to escape the (apparent) dilemma posed by the hypothetical case of X is to deny that it involves two instances of absolute rights.\(^{19}\) Indeed, the dilemma only arises if the prohibition of ill-treatment in Article 3 of the ECHR is considered to be absolute in both its negative and its positive dimension. If closer examination of the Court’s case law were to reveal, for instance, that the Court does not consider Article 3 to be absolute in its positive dimension, the conflict could be reformulated as one between an absolute and a relative right. Resolution of the conflict—no longer a seemingly irresolvable dilemma—would then be straightforward: the absolute right should trump the relative right.\(^{20}\) The following preliminary question therefore requires answering: how absolute is the prohibition of torture and inhuman and degrading treatment in the case law of the Court?\(^{21}\)

**A. The Negative Dimension of Article 3: An Absolute Prohibition of Torture by State Agents**

The ECtHR has repeatedly and consistently held, in almost mantra-like fashion, that ‘Article 3 is absolute’,\(^{22}\) that it ‘enshrines one of the most fundamental

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\(^{21}\) Addo and Grief, supra n 20; see also Greer, *The European Convention on Human Rights – Achievements, Problems and Prospects* (Cambridge/New York: Cambridge University Press, 2006) 209 (to the effect that none of the ECHR rights are really absolute, arguing instead that they have been made subject to implied restrictions in the case law of the ECtHR).

\(^{22}\) Labsi v Slovakia Application No 33809/08, Merits, 15 May 2012, at para 118.
values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim’s conduct and that the philosophical basis underpinning the absolute nature of the right under Article 3 does not allow for any exceptions or justifying factors or balancing of interests. As a result, application of Article 3 in its negative dimension takes a relatively straightforward form: once conduct by domestic authorities, such as police officers or prison guards, falls within the scope of the article, it is prohibited in absolute terms. To determine whether the scope criterion is met, the Court applies a threshold requirement:

[I]n order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim... Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it... as well as its context, such as an atmosphere of heightened tension and emotions.

It is important to note that, although the threshold for application of Article 3 is variable, the provision does not allow for any proportionality assessment or balancing. Ill-treatment that falls within the scope of Article 3 can under no circumstances be justified as a proportionate response to protect public interests, such as national security or public order. It can also not be outweighed by the Convention rights of other individuals, including their right to life. Instead, the only relevant element for application of Article 3 is its threshold requirement.

The context-dependent nature of this threshold requirement explains why conduct that may be inexcusable under certain circumstances does not fall within the scope of Article 3 in others. For example, arbitrary use of force by the police against random persons in the streets would fall foul of Article 3, while use of the same amount of force to arrest a suspect who violently resists her arrest does not meet the threshold requirement (provided that the amount of force used does not go beyond what is strictly necessary to subdue the suspect). The example demonstrates that it is the context in which the domestic authorities act (resistance against arrest) that determines whether or not the threshold requirement is met. It is not the case that the public

23 MSS v Belgium and Greece ECHR 2011; 53 EHRR 2, at para 218.
24 Gäfgen, supra n 2 at para 107.
25 Ibid. at para 88.
26 Ibid. at para 87.
27 Ibid. at para 107.
28 See also Addo and Grief, supra n 21 at 515–6.
29 See, for example, Ribitsch v Austria A 336 (1995); 21 EHRR 573, at para 38.
interest reason for which the ill-treatment was inflicted (punishment of crime) acts as a justification. Indeed, arresting the suspect is what is necessary to achieve the aim of public interest, not the application of force. Only if the suspect resists can the police resort to the use of—necessary—force. If the suspect does not resist, application of the same amount of force will (or at least should) fall foul of Article 3.

Once the context-dependent threshold for the application of Article 3 is met, the provision thus prohibits ill-treatment by State agents in absolute terms, without allowing any considerations of proportionality or balancing to enter the Court’s reasoning.30 The negative dimension of Article 3 can therefore be considered absolute under the Court’s case law.31

B. The Positive Dimension of Article 3: An Absolute Obligation to Protect Individuals from Torture?

Article 3 not only prohibits, in absolute terms, torture and inhuman and degrading treatment by State agents. It also imposes a number of positive obligations on the State, including the obligation to protect individuals from such ill-treatment by agents of another State or by private actors. But is that obligation also an absolute one? If it is, the dilemma in our hypothetical case of X persists. However, if the positive dimension of Article 3 turns out not to be absolute, the dilemma in X disappears: the case can be resolved to the benefit of the absolute right (the negative right of X).

The Court has had ample occasion to evaluate the absolute character of Article 3 in the context of the State’s positive obligation to protect individuals from ill-treatment.

Expulsion cases offer the prime example. Such cases are arguably of a mixed character: they involve a negative obligation on the part of the State to not expel a person, but this negative obligation only exists because the State is under a positive obligation to protect persons from ill-treatment by third parties (including public officials in third States). In its leading expulsion case the Court insisted, in unmistakable terms, that Article 3 remains absolute in its positive dimension:

[T]he Court cannot accept the argument…that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory

31 For further elaboration of the argument that the negative dimension of Article 3 is absolute, with the necessary nuance on deficiencies in the Court’s case law with regard to certain types of cases, see Smet, ‘The “Absolute” Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?’, in Brems and Gerards (eds), Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights (Cambridge University Press: forthcoming 2014) (paper on file with author).
State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole... Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment (emphasis added).

The Court went on to hold that, since Article 3 is absolute in all its dimensions, there can be no question of balancing the positive obligation to protect against torture and inhuman or degrading treatment against the public interest:

[I]t is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State... Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return.

It should be noted that the Court has also held fast to the absolute character of Article 3 in expulsion cases when the risk of ill-treatment emanated from private actors, not public officials, in the receiving State.

Other cases in which the Court has held States to be under a positive obligation to protect individuals from ill-treatment by private actors involve sexual and other forms of abuse. Although it has never stated so explicitly, the Court appears to regard the positive dimension of Article 3 to be absolute in those cases as well, provided—of course—that the domestic authorities are aware

32 *Saadi v Italy* ECHR 2008; 49 EHRR 30, at para 138; see also *Chahal v United Kingdom* 1996-V; 23 EHRR 413, at paras 80–81.
33 *Saadi*, supra n 32 at paras 138–139.
34 *Hirsi Jamaa and Others v Italy* ECHR 2012; 55 EHRR 21, at paras 120 and 122; *Safi and Elmi v United Kingdom* 2011; 54 EHRR 9, at paras 213 and 246–248. Note, however, that cases in which the threat does not come from persons, but from the state of the health system in the receiving country continue to cast a shadow of doubt on the absolute nature of both the positive and the negative dimension of Article 3. See *N v United Kingdom* Application No 26565/05, Merits, 27 May 2008; *D v United Kingdom* 1997-III; 24 EHRR 423. One way to reconcile them with the absolute nature of Article 3 would be to maintain that the state of the health system in the receiving country (as well as the presence of any family members) affects the threshold under Article 3. These cases would on that account revolve around contextualisation, not proportionality. Another interpretation would read the reasoning in these cases as falling short of the Court’s own principle on the absolute nature of Article 3 and therefore in need of amendment.
(or ought to be aware) of the ill-treatment. As already established above, good reasons exist to disallow balancing between the positive rights of victims of abuse under Article 3 and the Article 8 rights of the perpetrators, even when the latter are family members of the former. There exists, however, room for confusion in the Court’s case law on the matter.

In cases of actual ill-treatment by private actors, the Court does not reference the Article 8 (or Article 5) rights of the perpetrator as a factor to be weighed against the Article 3 rights of the victim, like it does with the Convention rights of potential perpetrators in cases concerning the positive obligation to protect life. But it has acknowledged, in the domestic abuse case of Z and Others v United Kingdom, ‘the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life (emphasis added)’. The reference to the ‘countervailing principle of respecting and preserving family life’ may entice us to conclude that balancing is possible under Article 3 after all. However, upon closer reading of the judgment, such a conclusion becomes untenable. It seems to me that, rather than being read as allowing for balancing, the full quote falls to be understood as recognising that the search for a solution within the family may be worth striving for, but under the—not to be surrendered, because absolute—condition that the abuse is put to an end. This reading of the Court’s judgment in Z and Others is further strengthened by the fact that the quoted principle is immediately followed by firm confirmation, on the part of the Court, that ‘the present case . . . leaves no doubt as to the failure of the system to protect these applicant children from serious, long-term neglect and abuse’. The absolute nature of Article 3, also in its positive dimension, thus seems undeniable.

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36 See supra n 12–15 and accompanying text.

37 See, contra, Dordević v Croatia ECHR 2012, at paras 138–40, in which the Court—exceptionally and, it is submitted here, erroneously—holds, under the heading ‘general principles’, that the principles it developed in the Osman case also apply to cases of ill-treatment by private actors under Article 3. However, the Court does not apply any of those principles in its assessment of the particular circumstances of the case at hand. Instead, it finds that the authorities did not do enough to put a halt to the ill-treatment, without referencing any need to balance the applicant’s Article 3 rights against the Convention rights of the perpetrators. See ibid. at paras 146–150.

38 Z and Others, supra n 35 at para 74.

39 Ibid.

40 For further elaboration of the argument that the positive dimension of Article 3 is absolute, see Smet supra n 31. See, contra, Van Droogenbroeck, La Proportionnalité dans le Droit de la Convention Européenne des Droits de l’Homme (Brussels: Bruylant, 2001) at 142–43.
C. No Easy Escape from the Dilemma

There is no easy way out of the dilemma posed by our hypothetical case of X. Given that the domestic authorities were aware of the torture of Z by Y, they were under an absolute positive obligation under Article 3 of the ECHR to protect Z from further torture. At the same time, they were under an absolute negative obligation not to torture X. By choosing to nevertheless torture X to force him to reveal the whereabouts of Z, the domestic authorities created a situation of dilemma: a conflict between absolute rights.

It is not possible to escape the dilemma simply by negating the absolute nature of Article 3 in its positive dimension, given that such an argument would be out of line with the Court’s established case law, as outlined above. However, the State’s negative and positive obligations under Article 3 are crucially different in one important sense: complying with the former merely requires inaction, while obeying the latter demands action. An intuitively appealing conclusion to be drawn from this difference is that the State should not engage in torture of its own to protect individuals from torture by other individuals. Indeed, in the above cited cases concerning abuse by private actors, the Court was keen to emphasise that the State was under an obligation to take reasonable steps to prevent ill-treatment by private actors. In line with our intuitions, a workable hypothesis would thus entail that in cases of conflicting absolute Article 3 rights, torturing a person to protect another person from torture is not a reasonable step that can be taken by the State. The validity of that hypothesis will be demonstrated in the next section.

4. Turning to Moral Philosophy for Guidance

While some scholars, for example, Ronald Dworkin, argue that law and morality are necessarily intertwined, others insist that both fields are (or at least should be kept) separate. Here, I will not make any broad statements in favour of either of those positions. Instead, I rely on the more modest claim

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41 Z and Others, supra n 35 at para 73; M and Others, supra n 13 at para 99; see also Opuz, supra n 35 at para 162 (‘the Court must next determine whether the national authorities have taken all reasonable measures to prevent the recurrence of violent attacks against the applicant’s physical integrity’). Palmer, supra n 30 at 449–50 explains that the reference to ‘reasonable steps’ is a matter of determining the scope of the positive obligation, not of proportionality.

42 For Dworkin’s most recent statement to this effect, see Dworkin, Justice for Hedgehogs (Cambridge, Massachusetts/London: The Belknap Press of Harvard University Press, 2011) at 5 and 400–5.


that, in the field of human rights adjudication, recourse to moral arguments by judges is (at times) inevitable.\textsuperscript{45} This is certainly the case for human rights adjudication by the ECtHR.

The principles the Court has developed in its case law reveal that it rejects a utilitarian theory of the Convention’s human rights.\textsuperscript{46} Instead, the Court has emphasised that one of the primary functions of Convention rights is to protect individuals/minorities against abuse of power by the State/the majority: ‘although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position’.\textsuperscript{47} States, or the ruling majority within those States, can thus not simply rely on utilitarian considerations to limit individual rights for the protection of the ‘common good’. They have to argue why interference with a Convention right was necessary in a democratic society to protect public and/or private interests in the particular circumstances of the individual case at hand. Within this search for a balance, abstract preference is given to the human rights enumerated in the Convention: ‘the Convention . . . implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter’.\textsuperscript{48}

The Court has therefore time and again insisted that limitations on Convention rights are to be interpreted restrictively.\textsuperscript{49}

In adjudicating individual cases, the ECtHR has at times explicitly engaged in moral reasoning.\textsuperscript{50} In \textit{Lustig-Prean and Beckett v United Kingdom}, for instance, the Court held that ‘[negative attitudes representing] a predisposed
bias on the part of a heterosexual majority against a homosexual minority cannot be considered to amount to sufficient justification for the interferences with the applicants’ rights. In most cases, however, such moral reasoning is left implicit, hidden from sight by its translation into the language of legal reasoning: the Court applies an explicit legal test that is underscored by an implicit moral argument. The Court’s proportionality test, with its priority-to-rights principle, is a classic example of such a legal test that is ultimately based on a moral argument (the understanding that Convention rights should carry a priori higher weight than the non-rights considerations invoked to justify their infringement). Another example from the ECtHR’s case law is the very weighty reasons test, which the Court applies in cases of, for instance, racial discrimination. The strictness of the legal test, drastically reducing the States’ margin of appreciation, is underscored by a moral argument to the effect that treating persons differently on the basis of their race is among the worst kinds of discrimination and can thus only be justified in the most exceptional of cases.

In our hypothetical case of conflicting absolute rights, however, no explicit legal test is, as of yet, available to resolve the dilemma. I will therefore turn to moral reasoning for guidance. In what follows, I will offer the contours of a moral argument capable of resolving the dilemma posed by the hypothetical case of X and compatible with the Court’s existing case law. I will go on to translate that moral argument into a legal test, which the Court can employ in its reasoning on conflicts between absolute rights. The core elements of the test will also prove relevant to the Court’s wider case law, including the Gäfgen case.

A. The Trolley Problem, Modified

The principled moral argument I have in mind starts off by considering one of the most tenacious dilemmas in moral philosophy: the Trolley Problem, introduced by Philippa Foot and modified by Judith Jarvis Thomson. In a first scenario of the Trolley Problem—Thomson’s Trolley (Switch)—a runaway trolley is hurtling down a track on which five workmen are standing. The only person able to save the lives of the five, let us call her Jane, is standing by a switch in the tracks. If Jane does nothing, the trolley will continue down the

51 Lustig-Prean and Beckett, supra n 50 at para 90.
52 On the priority-to-rights principle, see Greer, supra n 1 at 196 and 208–10; and Van Drooghenbroeck, ‘Conflits entre droits fondamentaux, pondération des intérêts : fausses pistes (?) et vrais problèmes’, in Renchon (ed.), Les droits de la personnalité (Brussels: Bruylant, 2009) 313.
53 This statement should be understood as referring to negative discrimination only.
track and kill the five. If she flips the switch, the trolley will be diverted onto another track, thereby saving the five. However, on that other track, one workman is standing. He will be killed if the trolley is diverted. The moral question in Trolley (Switch) is: is it permissible for Jane to throw the switch? In an alternative scenario—Thomson’s Trolley (Fat Man)—the same runaway trolley is hurtling down a track on which five workmen are standing. The trolley will kill the five unless it is somehow stopped. However, in this scenario there is no alternate track to which the trolley can be diverted. Instead, there is a footbridge over the track on which the trolley is driving. On the footbridge, there are two people, Jane and a fat man. Jane once again has the ability to save the five workmen, but she can only do so by pushing the fat man off the footbridge. If she does so, the fat man will land on the track and—through his mass—stop the trolley. However, he will die in the process. Again, the moral question is raised: is it permissible for Jane to shove the Fat Man off the footbridge and onto the track?

Both scenarios—Trolley (Switch) and Trolley (Fat Man)—involve a choice between saving five lives in exchange for one. Nevertheless, most moral philosophers consider it permissible to throw the switch in Trolley (Switch), but impermissible to push the fat man in Trolley (Fat Man). Studies into folk intuitions have demonstrated that this is also the moral opinion of the vast majority of people confronted with both scenarios. For reasons I will explain below, my personal reflective judgment on the Trolley Problem is that balancing the five lives against the one is permissible in Trolley (Switch), while it is never permissible to push the fat man in Trolley (Fat Man).

The reason why people support different courses of action in both scenarios of the Trolley Problem continues to be debated in both moral philosophy and psychology. The three most prominent explanations given relate to the opposition of (i) intended versus foreseen, but unintended, consequences; (ii) doing

55 However, an entirely different argument can be and has been raised to the effect that ‘numbers should not count’ in these cases. See, for instance, Kamm, *Morality, Mortality Volume I – Death and Whom to Save from It* (New York/Oxford: Oxford University Press, 1993) at 90–4; and Thomson, ‘Turning the Trolley’ (2008) 36 *Philosophy and Public Affairs* 359 (arguing that it is, after all, not permissible to kill one in order to save five in Trolley (Switch), although she did not object to the principle that it may, under circumstances, be permissible to kill one in order to save five in her earlier work).

56 Hauser, Cushman, Young, Kang-Xing, Jin and Mikhail, ‘A Dissociation Between Moral Judgments and Justifications’ (2007) 22 *Mind & Language* 6 (eight-five per cent of participants judged it morally permissible for a person to flip the switch in Trolley (Switch), while only twelve per cent thought it morally permissible to push a fat man in Trolley (Fat Man)). On a view as to what consequences could or should be drawn from folk intuitions for moral philosophical theories, see Huebner and Hauser, ‘Moral Judgments about Altruistic Self-sacrifice: When Philosophical and Folk Intuitions Clash’ (2011) 24 *Philosophical Psychology* 15 (arguing that ‘the presence of a dominant folk-moral intuition that conflicts with a philosophical moral theory always provides a defeasible reason for revising or abandoning that theory’, instead of ‘always [providing] a reason for revising or abandoning that theory’ (emphasis in original)).
versus allowing; and (iii) direct versus indirect agency. Before examining how these explanations tie in with the case law of the ECtHR, Trolley (Switch) and Trolley (Fat Man) will be slightly modified, in order to make them more analogous to our hypothetical case of X.

Both cases are already analogous to X in one sense: they present a moral dilemma to which no easy solution exists. However, they can be made even more analogous by slightly modifying the circumstances: instead of imagining Jane as being just any person who happens to be standing at the switch or behind the fat man, we can imagine her to be an agent of the State, a police officer for instance. In doing so, we render Trolley (Switch) and Trolley (Fat Man) into cases that could—hypothetically speaking—be decided by the ECtHR. They would involve a conflict of Convention rights, in that Jane the police officer would at the same time be under an obligation to save the lives of the five and under an obligation not to kill the one, without being able to comply with both obligations. With this modified version of Trolley (Switch) and Trolley (Fat Man) at hand, I will evaluate—with reference to the Court’s case law—the abovementioned explanations offered by moral philosophers and psychologists for the difference between people’s moral judgments in both cases. In the process, I will reject one of those explanations: the doctrine of double effect. Instead, I will argue that it is the distinction between positive and negative obligations, combined with an element of balancing as well as the distinction between direct and indirect agency that is key to understanding the Trolley Problem and, by extension, our hypothetical case of X.

B. The Doctrine of Double Effect and ‘Moral Nullifiers’: (In)compatible with the Case Law of the ECtHR?

One theory that is often invoked to explain the difference in moral judgment in Trolley (Switch) and Trolley (Fat Man)—permissible in the first scenario, impermissible in the second—is the doctrine of double effect. This doctrine,


It is true that they concern different rights—the freedom from torture in X and the right to life in the Trolley Problem. However, this does not reduce their comparability for our current purposes to such an extent that no relevant conclusions can be drawn from the one case for the other. Moreover, I will present an example further on that eradicates the difference (that is, a moral dilemma that is relevantly similar to the Trolley Problem, in that it compels us to choose between five persons and one, but concerns the freedom from torture, like in X).
which can be traced back to Thomas Aquinas, maintains that it is permissible to perform an action that causes a serious harm (for example, killing one’s attacker) as a side effect of promoting some good end (for example, saving one’s own life). Thus, it is likewise permissible to act in manner that results in the loss of a few lives in order to save more, provided that the loss of life is merely a foreseen, not intended, consequence of the action. Hence, throwing the switch in Trolley (Switch) is permitted, because the death of the one workman on the other track is a foreseen consequence of the action taken to save the five other workmen, but not intended (instead, the intention is to divert the trolley in order to save the five; the death of the one is not a prerequisite to saving the five: even if the track would be empty they would be saved). Pushing the fat man in Trolley (Fat Man), however, is not permissible since the death of the fat man is not merely a foreseen consequence of the action taken to save the five; it is intended (the death of the fat man is a prerequisite to being able to save the five: without his mass, the trolley cannot be stopped and the five will die).

The doctrine of double effect is said to enjoy considerable support among morally reflective people. However, it has also met devastating criticism. Herbert L.A. Hart has for instance stated, after referring to the origins of the doctrine of double effect in Catholic moral theology, that ‘[it] is used to draw distinctions between cases in a way which is certainly puzzling to me and to many other secular moralists’. He has also argued that ‘the contrasting examples usually cited [in support of the doctrine] seem to me . . . not to illustrate this doctrine but some other way of drawing a distinction between killing . . . and an act or omission having death for its consequence’. Frances Kamm has, through the use of several counter examples, likewise pointed towards the ‘insufficiency of the [doctrine of double effect] in accounting for constraints on conduct’. Psychological research, from its part, has offered indications that, in folk moral reasoning, the doctrine of double effect is the only of the three explanations for the difference in moral judgments in Trolley (Switch) and Trolley (Fat Man) cited above to which individuals do not have

60 McIntyre, supra n 59 at 219.
62 Hart, supra n 61 at 122.
63 Ibid. at 123.
64 Kamm, supra n 57 at 578.
conscious access. To the extent that the doctrine of double effect operates as an explanation for the difference, it thus does so at the level of intuitionist, rather than reflective, reasoning. Further on, I will defend a moral argument that provides an alternative—and better—explanation for the difference in moral judgment in Trolley (Switch) and Trolley (Fat Man) than the one offered by the doctrine of double effect. I will argue that, rather than being explained by the doctrine of double effect, the difference between both scenarios can only fully be understood by relying on the double distinctions between negative and positive obligations (killing versus letting die) and between direct and indirect agency. These distinctions will also prove of immediate relevance to the resolution of our hypothetical case of X, on a conflict between absolute rights.

For our current purpose, however, the normative validity of the doctrine of double effect is not yet our target. Instead, what is relevant is, first, an assessment of how the doctrine ties in with the case law of the ECtHR. As it turns out, the Court has offered mixed statements in this regard. It has in some cases appeared to support the ideas underlying the doctrine, while it has implicitly rejected its relevance in others. In apparent support of the doctrine, the Court has for instance held that, as a matter of principle, ‘Article 2 covers not only intentional killing but also the situations in which it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life.’ Yet, it is not immediately clear whether this principle applies with the same strength to situations in which innocent lives are lost. Rather, it appears to be primarily designed to assess situations in which legitimate force is used against a person whose actions made such use of force necessary (for example, someone violently resisting arrest) and in which the force was not intended to kill the person, but nevertheless led to that result.

But the Court has also reasoned in terms that resonate the ideas behind the doctrine of double effect more directly. In the tactical bombing case of Isayeva v Russia, the Court held that the responsibility of a State may ‘be engaged where [it fails] to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising, incidental loss of civilian life.’ Thus, if all feasible precautions have been taken, tactical bombing with the loss of civilian life—an action that is permissible under the doctrine of

65 Cushman et al., supra n 57.
66 Ibid. at 1086.
68 Isayeva v Russia 41 EHRR 38, at para 173. For the origin of the principle, see McCann v United Kingdom A 324 (1995); 21 EHRR 97, at para 148.
69 Isayeva, supra n 68 at para 176.
double effect—will not lead to a violation of those civilians’ right to life. But
the presence of this principle in the Court’s case law should not be interpreted
as unequivocal support of the doctrine of double effect. Just as the permissibil-
ity of tactical bombing can be explained by different theories, so can the earlier
cited principle from the Court’s case law. As already indicated, I will defend a
particularly promising alternative explanation further on in this article.

Here, it remains to be noted that the Court seems to have implicitly re-
jected—albeit by way of obiter—the relevance of the doctrine of double effect
in another judgment: Finogenov v Russia. The case concerned the Russian
authorities’ actions in the context of the hostage-taking in the Dubrovka the-
atre in Moscow in 2002. A group of forty terrorists had taken more than nine
hundred civilians hostage in the theatre and had booby trapped the building.
Nearly half of the terrorists were also wearing suicide-bombing vests and had
positioned themselves among the hostages. The Russian authorities were of
the opinion that the least dangerous manner to save the hostages (ie the
manner that would cost the fewest lives) would be to release a narcotic gas
into the theatre through the building’s ventilation system. When the terrorists
controlling the explosive devices and the suicide bombers lost consciousness
under the influence of the gas, a special squad stormed the building. One hun-
dred and twenty-nine hostages died in the process, but the vast majority was
saved.

Since the Russian government refused to release the formula of the gas, it
was unclear to which extent the gas had contributed to the one hundred and
twenty-nine deaths among the hostages. For our current concerns, what is
relevant is that the Court accepted that ‘the gas was probably not intended to
kill the terrorists or hostages’, but that it was nevertheless ‘safe to conclude
that the gas remained a primary cause of the death of a large number of the
victims’. The Court then referred to the judgment of the German
Constitutional Court in the Aviation Security Act case in which that court
struck down a law authorising the use of force to shoot down a hijacked air-

70 See also Ergi v Turkey 1998-IV: 32 EHR 18, particularly at para 79 (on the death of a civilian
who was hit by a bullet during a shoot out between the Turkish authorities and Kurdish
separatists).
71 Finogenov and Others v Russia ECHR 2011. I am grateful to the anonymous referee for the
Human Rights Law Review for pointing out that the decision in Finogenov can also be inter-
preted differently, as making the Court’s reasoning easier by lowering the moral stakes (in
assuming that the gas was in no way intended to kill), thus obviating the need to grapple
with the doctrine of double effect. I agree with the referee that the Court did not directly
grapple with the doctrine of double effect in Finogenov. However, it seems to me that it re-
ains the case that its reasoning—even if ‘only’ implicitly so—cannot be reconciled with
the doctrine of double effect, for the reasons explained in the text.
72 Ibid. at para 202. For the judgment of the German Constitutional Court, see BVerfG, 1 BvR
357/05, 15 February 2006.
to save more people by sacrificing the lives of a few). The German Constitutional Court declared the law unconstitutional, reasoning that the use of lethal force against the persons on board who were not participants in the crime (that is, the passengers) would be incompatible with their right to life and human dignity.

In Finogenov, the ECtHR held that the situation of the hostages in the theatre was different from the situation of the passengers of a hijacked plane, given that ‘the gas used by the Russian security forces, while dangerous, was not supposed to kill’ and that ‘the hostages... were [therefore] not in the same desperate situation as all the passengers of a hijacked airplane’. In reasoning in this manner, the Court seems to have implicitly rejected the relevance of the doctrine of double effect to the ECHR. Application of the doctrine would have led to the conclusion that, even if the gas had been known to be potentially lethal, its use would have been permissible, since it would have been used to subdue the hostage takers (intention), thereby killing some hostages (foreseen, but unintended consequence), while allowing the majority of the hostages to be rescued (saving more). Yet this is precisely the type of argument that the Court rejected—albeit a contrario and by way of obiter—in Finogenov.

Before moving on to my argument in support of an alternative explanation for the difference in moral judgment in Trolley (Switch) and Trolley (Fat Man), one more element deserves our attention here: the attempt by Jeff McMahan to save the doctrine of double effect by revising it. In his attempt, McMahan has introduced the relevance of what could be termed moral nullifiers, arguing that the ‘most obvious nullifier is moral non-innocence. Thus it is the non-innocence of the victim that explains the permissibility of intentionally harming a person in cases of deserved punishment, certain cases of self-defence, and so on.’ Steven Greer has relied on a similar idea in his evaluation of the Gäfgen case, referring to ‘the huge disparity in the moral worth of each party’ and insisting that ‘when two putatively “absolute” Convention rights are in conflict it is difficult to see why any morally relevant factor should not be invoked to help resolve the dilemma.’

While moral non-innocence of a victim (contrasted to the moral guilt of an attacker) may indeed explain cases of self-defence on McMahan’s account, it cannot be used to offer an explanation for the alleged permissibility of torturing a suspect in order to save his victim. Such use of a moral nullifier is out of line with established case law of the ECtHR, which has held, in

73 Finogenov, supra n 71 at para 231.
74 Ibid.
75 Ibid. at para 232.
76 McMahan, supra n 57 at 211.
77 Greer, supra n 1 at 84–5.
unmistakable terms, that the conduct of the victim (that is, in this context the person who is being tortured by State agents) is irrelevant to the responsibility of the State. As a result, ‘the nature of the offence allegedly committed by the applicant [is] . . . irrelevant for the purposes of Article 3.’ Moral nullifiers will thus get us nowhere in attempting to find a way out of the dilemma posed by our hypothetical case of X. Instead, I will move on to consider the relevance of the distinctions between positive and negative obligations and between direct and indirect agency.

C. Negative versus Positive Obligations and Direct versus Indirect Agency: The Best Available Moral Theory

Several philosophers have relied on the distinction between negative and positive obligations in their attempts to offer an explanation for the dilemma posed by the Trolley Problem. In this section, I aim to demonstrate that this distinction indeed forms the basis for the best available explanation for our moral intuitions in the different scenarios of the Trolley Problem. However, I consider it necessary to add an element of balancing and to complement the distinction between positive and negative obligations with one between direct and indirect agency, in order to fully account for the difference in moral judgment between Trolley (Switch) and Trolley (Fat Man).

In their efforts to explain our moral judgment in the different scenarios of the Trolley Problem, philosophers and psychologists alike have formulated ever more complex versions of the problem, involving loops and even double loops. Curiously, though, it appears as if no one has attempted to resort to simplified scenarios. In that respect, a particularly interesting scenario is a modified version of Trolley (Switch), in which there is only one workman standing on the track on which the trolley is driving, instead of five. In that scenario, let us refer to it as Trolley (Switch*), Jane—one person standing at the switch—has a choice between letting the trolley continue down the track, where it will kill one person, or throwing the switch, thereby saving the one person by sending the trolley down another track, where it will kill one other person. In Trolley (Switch*) Jane is thus faced with a choice between one life and one other life, not between five lives and one.

79 Labita v Italy 2000-IV, at para 119; and V v United Kingdom 1999-IX; 30 EHRR 121, at para 69; see further Chahal, supra n 32 at para 79.
80 Labita, supra n 79 at para 119.
81 Foot, supra n 54 at 27–29; and Thomson, supra n 55 at 372.
82 See also Hart, supra n 61 at 123.
83 See, for instance, Otsuka, ‘Double Effect, Triple Effect and the Trolley Problem: Squaring the Circle in Looping Cases’ (2008) 20 Utilitas 92; and Thomson, supra n 55.
I submit that most people, when confronted with Trolley (Switch*), would most likely regard it impermissible for Jane to switch the tracks. Whatever reason they may cite for this moral judgement, eg 'since there is only one person standing on each track, it would be wrong to intervene by redirecting a threat that is already moving towards one of them towards the other', I submit that it is the distinction between the type of obligation Jane has towards each person that is determinative. Jane is under a positive obligation to save the life of the workman towards whom the trolley is moving. If she does nothing, the workman will be killed and she will have omitted to save him. Towards the person on the other track, however, Jane is under a negative obligation not to kill. If she does nothing to intervene, that workman will live. If she acts, sending the trolley his way, he will die. Even if her intention will not be to kill him, she will have nevertheless violated her negative obligation towards that workman.

My moral judgment, one with which I expect most people will agree, is that Jane should not throw the switch in Trolley (Switch*). The best available explanation for that moral judgment appears to be that, all other things being equal, the negative obligation not to kill one person trumps the positive obligation to save the life of another person. Therefore, in principle the negative obligation weighs heavier than the positive obligation to save life.

The stated principle does, of course, not apply when all other things are not equal, for instance when lethal force is used in self-defence or in order to save someone else’s life from a violent attacker. In those situations, also recognised as justified infringements of the right to life under Article 2(2) of the ECHR, 

84 Royzman and Baron, 'The Preference for Indirect Harm' (2002) 15 Social Justice Research 175 (demonstrating, through empirical research, that—when confronted with scenarios in which the harm is equal—people prefer the following order of options: omission—indirect harm—direct harm). Applied to Trolley (Switch*) this means that most people would prefer not to intervene. If we also add the option of pushing a fat man onto the tracks in Trolley (Switch*), most people would prefer to, in the following order, not intervene—divert the trolley—shove the fat man.

85 See also Thomson, supra n 54 at 1398. On the relevance of intention, drawing on Bentham’s distinction between oblique and direct intentions, see Hart, supra n 61 at 119–22. On the distinction between acting with the intention to bring about a certain result and acting intentionally, see Knobe, 'Intentional Action and Side-Effects in Ordinary Language' (2003) 63 Analysis 190; and Knobe, 'Intention, Intentional Action and Moral Considerations' (2004) 64 Analysis 181.


87 See also Foot, supra n 54 at 29; Quinn (a), supra n 57 at 289 and 306–8; and Kamm, supra n 57 at 100 (making the same claim but in the context of the Organ Transplant Case, involving killing one person in order to harvest his organs to save five others). In the context of the ECHR, Judges Martens and Matscher have argued in similar terms that ‘once it is recognised that Article 11 . . . encompasses a negative as well as a positive freedom of association, the negative freedom should in principle prevail in a conflict between them’, adding that ‘[t]he words “in principle” should be stressed.’ See dissenting opinion of Judges Martens and Matscher to Gustafsson v Sweden 1996-11; 22 ECHR 409, at para 8.

88 Why that is the case, I, along with Thomson, do not know, but I do consider it irrefutable: see Thomson, supra n 55 at 372.
something along the lines of McMahan’s moral nullifiers seems to be in play: the unlawful use of violence by the attacker renders, in certain circumstances, infringement of his own right to life justified. All other things were also not equal in the Conjoined Twins case in the United Kingdom: Mary, the weaker of two twins (Mary and Jodie) who had been born in a conjoined state, had no chance to survive in any case.89 If they were not separated, both Mary and Jodie would die. If they were separated, Mary would die, but Jodie would live. As a result, the ruling judge correctly held that Mary’s negative right to life did not weigh as heavily in the balance as it would have if she would have had a chance to survive.

The proposition that the negative obligation not to kill principally trumps the positive obligation to save life should also not be misread as condemning abortions performed to save the mother’s life. The primary moral question to be answered in those cases is precisely whether or not the foetus has equal status as a human being to the mother (as well as scientific questions as to its viability before birth). It thus remains possible to argue that the foetus does not have equal status as a human being to the mother and that therefore abortion remains permissible when necessary to save the mother’s life.90

Having established that the distinction between negative and positive obligations is relevant to unravelling the Trolley Problem, the question that presents itself next is: why do people then offer different moral judgments in Trolley (Switch) and Trolley (Fat Man)? In order to fully explain that difference, it is necessary to (i) add an element of balancing to the distinction between negative and positive obligations and (ii) incorporate the distinction between direct and indirect agency.91

By adding an element of balancing, the difference in moral judgment between Trolley (Switch*) and Trolley (Switch) can be explained.92 While I have argued that it is not permissible for Jane to throw the switch when there is one workman standing on each track, it seems permissible for her to throw the switch when there are five workmen on the track on which the trolley is driving. When there are one hundred workmen on the original track, it

89 Re A (Children) [2000] 4 All ER 961.

90 See also Dworkin, supra n 42 at 376–77. I do not explicitly address abortions for other reasons (that is, when a woman decides she does not want to have a child), because they concern two different rights/interests: the right to decisional privacy of the woman and the interest in (some would argue the right to) life of the foetus. However, similar considerations to the ones mentioned in the text would apply also in that context.

91 Möller, supra n 78 at 11 (arguing that, while the distinction between actions and omissions might be relevant, it cannot do all the moral explanation itself). See, contra, Waldmann and Dieterich, supra n 61 (arguing, on the basis of empirical evidence, that our moral judgments in the Trolley Problem and the Organ Transplant Case can best be explained by looking at the point of intervention, ie whether the action intervenes at the level of the agent responsible for the threat (the trolley) or at the level of the victim (the involuntary organ donor)).

92 See, contra, Quinn (a), supra n 57 at 304–5 (arguing that letting the trolley continue on the track is a form of what he terms positive agency and that this is why the bystander – confronted with a choice between two instances of positive agency – may flip the switch).
becomes impossible to maintain that it is categorically impermissible for her to throw the switch. What distinguishes these scenarios is the number of persons whose lives are at risk. With the increase in the number of lives at risk, Jane’s positive obligation to save those lives starts to weigh heavier in the balance, until it outweighs her negative obligation not to kill the one person standing on the other track.

When such outweighing will take place is a matter of appreciation. As long as there is only one person standing on the side track, lay people and philosophers alike may very well consider it permissible for Jane to throw the switch even if there are less than five workmen (but more than one) at risk. However, this does not mean that the balancing exercise can be reduced to a simple game of counting; as soon as there are fewer people on the track to which the trolley can be diverted, it is permissible to throw the switch. That this assumption does not hold can be demonstrated by increasing the number of people on both tracks to large amounts. In a scenario in which the trolley is, for instance, hurtling towards one hundred workman standing on one track, but can be diverted to one on which ninety-nine workmen are standing, my moral judgment is that the weight of the negative right not to be killed of each of the ninety-nine still outweighs the positive right to be saved of each of the hundred. And this may also be the case when there are ninety-five or even ninety workmen standing on the side track. Research from social psychology also indicates that, when confronted with such a scenario (one hundred versus ninety-nine), most people would regard it impermissible to divert the trolley, thereby favouring adherence to the negative obligation. In fact, probably only act utilitarians would consider it permissible to throw the switch in such a scenario. What is ultimately at play in the various alternatives of Trolley (Switch) is thus a situation in which the principled preference for adherence to the negative obligation towards the one workman on the sidetrack is open to balancing against the positive obligations towards the multiple workmen on the main track. I have no intention to provide the solution to the balancing exercise. All I have set out to demonstrate is that, under certain

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93 My personal intuitive judgment leans towards permissible in the case of five workmen versus one on the side track, but not without hesitation. However, in the case of one hundred workmen versus one, my intuition does not hesitate: it tells me it is permissible for Jane to throw the switch.

94 See, for instance, Kamm, ‘Conflict of Rights: Typology, Methodology, and Nonconsequentialism’ (2001) 7 Legal Theory 248 (considering it permissible to turn a trolley headed towards two people onto a track where one person will be killed).

95 See also Quinn (a), supra n 57 at 306–7.

96 See also Royzman and Baron, supra n 84 at 166 (stating—in discussing a dilemma involving the development of a vaccine that would cure a deadly disease, but that unfortunately causes deaths of its own—that, to prevent one hundred deaths from the disease, a utilitarian would consider ninety-nine deaths from the vaccine acceptable, while many people answer considerably less, some even giving ‘0’ as an answer).

97 Ibid.
circumstances—that is, as will be explained immediately below, as long as only indirect agency is involved—it is permissible to engage in such a balancing exercise.

But how can we then explain the difference in moral judgment between Trolley (Switch) and Trolley (Fat Man)? In agreement with several scholars in moral philosophy, human rights law and psychology alike, I consider it necessary to rely on the distinction between direct and indirect agency.98 This distinction is best captured by connecting it to the Kantian principle that every person should be treated as an end in herself and never as a means to an end.99 Using a person as a means to an end (direct agency) is thus morally worse than acting in a manner that respects the status of a person as an end in herself, but which nevertheless results in her death (indirect agency).100 The former is precisely what happens in Trolley (Fat Man). By shoving the fat man in front of the trolley, Jane uses him as a means (to perform the function of obstacle) to an end (saving the five workmen). In Trolley (Switch), on the other hand, the one workman standing on the track to which the trolley is diverted is not used as a means to an end. He is respected as being an end in himself, but his negative right not to be killed is nevertheless considered to be outweighed by the positive right to be saved of the five other workmen.101

I submit that the presence of direct agency—using people as means—should function as a nullifying factor, cancelling the relevance of any balancing exercise between the negative obligation towards the few and the positive obligation towards the many.102 This position has also been defended, in the

98 Quinn (b), supra n 57 at 343–4 (Quinn intended to formulate a revised version of the doctrine of double effect, but several scholars have pointed out that the revision he has proposed is so substantial as to, in effect, provide an entirely new doctrine. See Mapel, supra n 58 at 269–70; Kamm, supra n 57 at 572); and Royzman and Baron, supra n 84 at 165–84. See further, Foot, supra n 54 at 29 (arguing that the distinction between direct and oblique intentions plays a subsidiary role to the distinction between avoiding injury and bringing aid); Greene et al., supra n 57 at 4 and 6–7 (arguing that, in cases of direct agency, the use of what they term 'personal force' interacts with intention, leading people to judge harmful actions even less morally acceptable when the agent applies personal force to the victim; and demonstrating that personal force does not play a role in cases of indirect agency); and Wicks, supra n 86 at 155.

99 See also Thomson, supra n 54 at 1401; and Wicks, supra n 86 at 155. For a similar idea, expressed in terms of the inviolability of the (right to life of a) person, see Kamm, supra n 94 at 245; and Möller, supra n 78.

100 See also Wicks, supra n 86 at 155; Hart, supra n 61 at 127; and Royzman and Baron, supra n 84 (demonstrating, on the basis of empirical research, that people favour indirect harm (and thus indirect agency) over direct harm (and thus direct agency)). See contra Thomson, supra n 55 at 374 (arguing that we rely too heavily on how the scenario plays out in evaluating the various statements of the trolley problem—the more drastic the means chosen by the agent, the more strikingly abhorrent his actions—and concluding that we may simply be overly impressed by the fact that, if the agent proceeds in Trolley (Switch), all he does in order to save five people is merely turning a trolley).

101 See also Kamm, supra n 94 at 254.

context of deprivation of liberty of asylum seekers, by a number of dissenting Judges in Saadi v United Kingdom: ‘in no circumstances can the end justify the means; no person, no human being may be used as a means towards an end’. If fulfills the positive obligation towards the many involves treating the few as means to an end, rather than as ends in themselves, there can thus be no question of balancing: it is not permissible to act. Allowing balancing under those circumstances would entail a complete abdication of the inviolability of the human being, stripping her of all the qualities that make her human and rendering her into a tool. However, if the positive obligation can be fulfilled without treating people as means only, then the balancing exercise can be conducted, allowing for the positive obligation towards the many to— at some point—outweigh the negative obligation towards the few.

D. Turning the Trolley towards X: From Moral Argumentation to Legal Reasoning

Thus far I have argued that, in cases of conflicting instances of the right to life and all other things being equal, negative obligations weight heavier than positive obligations. I have also argued that those negative obligations can be outweighed in a balancing exercise, but only in cases of indirect agency. As soon as acting involves direct agency—thereby treating people as means—there can be no question of balancing: the act is prohibited. However, I have argued all of this in the context of the Trolley Problem, which deals exclusively with the (relative) right to life. Our hypothetical case of X, however, concerns the absolute prohibition of torture. The gap between the Trolley Problem and X thus needs to be bridged before any definitive argument can be offered on the (im)permissibility to act in the latter case.

In order to bring what I have argued above closer to X, I will offer a scenario that is relevantly similar to the Trolley Problem, but which, like X, concerns the freedom from torture. Imagine, to that end, a situation—Acid—in which a criminal (Joe) threatens to throw a glass filled with acid in the faces of five innocent hostages, tied to chairs and sitting in front of him, unless he is paid a ransom by the State authorities. Imagine also that Joe is forcing another

103 Dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä in Saadi v United Kingdom ECHR 2008; 47 EHRR 17.

104 See, contra, Borowski, ‘Limiting Clauses: On the Continental European Tradition of Special Limiting Clauses and the General Limiting Clause of Art 52 (1) Charter of Fundamental Rights of the European Union’ (2007) 1 Legisprudence 230 (arguing that the ‘absoluteness’ of rights does not mean that proportionality does not apply to them, only that the requirements for their being overridden are so demanding that, as a result of applying proportionality, a de facto absoluteness is yielded).

105 See also Kamm, supra n 55 at 116 (but arguing that it is the structure of the case, for example, the fact that a threat is redirected, not the presence of rights per se, that determines whether or not balancing is permitted).
hostage, Jeff, to videotape the scene. Jeff is standing next to the row of chairs. Imagine further that a police officer, Jane, enters the room just when Joe is about to throw the acid on the hostages. All Jane can do under the circumstances—given that there is no time to draw her gun and due to spatial constraints in the room—is to knock the glass out of Joe’s hands, thereby sending it towards Jeff, causing him intense pain and disfiguring his face. This scenario is analogous to Trolley (Switch). I therefore believe most people would consider it permissible for Jane to hit the glass. This moral judgment can be explained as follows: given that Jane’s actions do not entail treating Jeff as a means to an end, her positive obligation towards the five hostages can be regarded as outweighing her negative obligation towards Jeff.

Now consider an alternative scenario—Acid*—in which Joe is again threatening to throw a glass filled with acid on five hostages. However, this time Jeff is his accomplice. Jeff is also not present in the room this time. Instead, he is being detained by the police, who know of his relationship to Joe. The police also know—through a live video feed—that Joe is getting impatient and will throw the acid on the five hostages anytime now (Joe has already inflicted some injuries on the hostages and is getting ever more desperate to force the State to pay the ransom). However, the police do not know where Joe is and the only way to find out is from Jeff, who refuses to speak. A police officer, Jane, contemplates torturing Jeff to force him to reveal the location of Joe and the hostages. This scenario is analogous to Trolley (Fat Man): it involves using a person as a means to save five persons. On the moral argument I have set out above, it is therefore impermissible for Jane to torture Jeff, given that there can be no question of balancing Jeff’s negative right against the positive rights of the five hostages.

Crucially, Acid* is analogous to our hypothetical case of X: it involves treating a person as a means to an end, by torturing him in order to be able to save (five or one) person(s) from torture by another private actor. A similar conclusion to Acid* therefore applies to X: it is not permissible for the police officers to torture X in order to save Z from torture by Y. Because acting would involve direct agency, thereby treating X as a means, his negative right under Article 3 of the ECHR cannot be balanced against Z’s positive right under the

106 This scenario is the most realistic one I could envision. However, it remains possible to argue that—and this argument is probably correct—Jeff is not really a victim of torture in this scenario, given that any torture-specific purpose for the act (for example, to extract a confession) as well as any context of complete submission to the power of a state agent (for example, in the case of a suspect detained at the police station) is missing. See Gäfgen, supra n 1 at para 90 (with reference to the definition of torture in Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). Nevertheless, even if the treatment to which Jeff is submitted would fall short of the threshold of torture, it would most likely be accepted as inhuman treatment for the purposes of Article 3 ECHR. And, like torture, inhuman treatment is prohibited in absolute terms by Article 3: see, among many authorities, Stanev v Bulgaria ECHR 2012; 55 EHRR 22, at para 201.
same article.\textsuperscript{107} In his analysis of Gäfgen, Greer also relies on this Kantian principle, but he applies it differently. He argues that ‘the well-known Kantian principle of not using anyone as a means to another’s end also arguably supports the mistreatment of Gäfgen received at the hands of the police because this involved using him for a more worthy end (rescuing Jakob) than the end to which he mistreated Jakob (to become rich).\textsuperscript{108} However, the relevant consideration for application of the Kantian principle is—on my understanding thereof—not the one used by Greer. Instead, it is the following: the police treat Gäfgen as a means to an end by threatening him with torture, thereby breaching the Kantian principle, while they would not fail to treat Jakob as an end in himself by not threatening to torture Gäfgen.

Accepting balancing in circumstances where a person is used as a means only would entail sacrificing the very core of what she is: her inviolability as a human being.\textsuperscript{109} An unwillingness to surrender that inviolability, also in the most extreme cases and with regard to the most vile persons, explains why the nullifier of moral guilt should not be relevant in cases of active ill-treatment of a suspect.\textsuperscript{110} Such ill-treatment is the quintessential case of treating a person as a means only, robbing her of her humanity.

5. Conclusion

In this article, I first constructed a hypothetical case to demonstrate that conflicts between absolute rights are a conceptual possibility under the ECHR. Drawing on moral reasoning, I suggested a two-step legal principle to resolve the conflict. It is, however, important to note that the principles developed in this article should only be applied as a measure of last resort, to resolve the kinds of moral dilemmas—like our hypothetical case of X—that cannot be resolved through any other means of (conventional) legal reasoning.

The first step of the legal principle relies on the distinction between positive and negative obligations: principally, negative rights trump positive rights when two instances of the same (absolute) right conflict. The second step of the principle relies on the distinction between direct and indirect agency: in cases of conflicting absolute rights, where the Court is forced to provide a solution, 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. As soon as that last criterion is not met, there can be no question of balancing.

\textsuperscript{107} See, similarly, Quinn (b), supra n 57 at 350 (arguing that the doctrine he constructed—based on the distinction between direct and indirect agency—must help explain ‘why some of the most perverse forms of opportunistic agency, like torture, can seem absolutely unjustifiable’).

\textsuperscript{108} Greer, supra n 1 at 85.

\textsuperscript{109} See also Möller, supra n 78 at 17.

\textsuperscript{110} See, contra, Kumm, supra n 102 at 160-2.
Applied to the hypothetical case of X, the two-step legal principle led to the conclusion that it is not permissible to torture the suspect, because doing so would entail treating him as a means only. As a result, the conflict between the suspect’s (negative) right to be free from torture and his victim’s (positive) right to be free from torture is resolved to the benefit of the former. This logically means that the positive right emerges less absolute from the conflict.

But the principles proposed in this article are not limited to the hypothetical case presented therein. If accepted, they would have wider ramifications, both for the Court’s existing case law and for situations it may be confronted with in the future. Regarding the latter, the multiple variations on the ticking time-bomb scenario come to mind. Although these scenarios generally concern different rights—the freedom from torture of a terrorist and the right to life of his potential victims—the second principle (direct versus indirect agency) provides a principled solution to the conflict (over and above any arguments based on uncertainty and/or the idea of the ‘slippery slope’): even in the most extreme scenarios and no matter his moral depravity or guilt, the inviolability of the person as a human being precludes that the authorities ever use him merely as a means to an end (even if that person himself intends to use other people as a means to an end).

Both principles hold similar relevance to any—for now equally hypothetical—scenario that would require a Council of Europe State to make a tragic choice between shooting down a hijacked passenger plane—thereby killing the hijackers and the passengers—and saving any potential victims on the ground. In such a scenario, the passengers would not be used as means to an end, should the authorities decide to shoot down the plane. Therefore, balancing between the negative right to life of the passengers and the positive right to life of the potential victims on the ground becomes permissible under my argument. However, permissible does not equal obligatory. Given the uncertainties involved (will other measures suffice? Will the hijackers succeed? Will there necessarily be victims on the ground? How many will there be? etc.), it remains possible to argue that the positive rights of any potential victims on the ground do not outweigh the negative rights of the actual victims on board of the plane.

112 On these other arguments, see ibid. at 118–54.
113 See Ireland v United Kingdom 15 Yearbook 76 (1972), as found in Ginbar, supra n 1 at 325–26 (‘it is not difficult to take a hypothetical situation, to imagine the extreme strain on a police officer who questions a prisoner about the location of a bomb which has been timed to explode in a public area within a very short while. In the Commission’s view, any such strain on members of the security forces cannot justify the application on a prisoner of treatment amounting to a breach of Art. 3.”).
114 Contrary to what the German Constitutional Court held in the Aviation Security Act Case; see also Möller, supra n 78 at 14; and Kumm, supra n 102 at 156.
The principles are, lastly, not restricted to hypothetical cases, but are also directly relevant to a number of dilemmas on which the ECtHR has already adjudicated. They are thus, for instance, able to add justificatory force to the judgments the Court delivered in cases involving tactical bombing (Isayeva) and difficult rescue operations (Finogenov). Given that neither of those situations entails treating persons as a means to an end, balancing between the negative and the positive rights to life at stake is permissible. As already explained, it does not automatically follow that the positive rights of the larger number of persons necessarily outweigh the negative rights of the fewer. All I have argued is that it is morally permissible to conduct the balancing exercise. If tragic choices have to be made, the negative rights of the few may under certain circumstances be balanced against the positive rights of the many.

However, there is a clear limit to the above: balancing should never come at the price of treating a person as a means only, no matter how morally guilty she may be. This leads us to come full circle, returning to the case we started off considering: Gäfgen. The principle on direct agency explains, beyond mere rhetoric restatement of the absolute nature of Article 3 on the part of the Court, why it was necessary to also defend that absoluteness in one the most difficult cases the Court has faced thus far. Because ill-treatment (not only torture, but also the threat thereof) entails treating a person as a means to an end, thereby eradicating—even if temporarily—his inviolability as a human being, it should remain absolutely prohibited. If nothing else, this article has provided reasons for the Court to explicitly rely on such moral arguments in its defence of the absolute nature of Article 3, rather than leaving them implicit.