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Gäfgen v Germany, the use of threats and the punishment of those who ill-treat during police questioning: A reply to Steven Greer

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ABSTRACT
This article will look at the question whether it was correct that the police officers in Gäfgen v Germany were treated leniently by the German court for ill-treating the kidnapper and murderer of a boy, because the officers felt that they could have saved him. In doing so, it will evaluate two articles by Professor Steven Greer who has argued that in specific circumstances, such as those in Gäfgen, police officers may be treated leniently for threatening criminal suspects or using other forms of ill-treatment in breach of Article 3 of the European Convention on Human Rights. In his articles Professor Greer argues that the Grand Chamber of the European Court of Human Rights did not take into account the specific circumstances of Gäfgen and failed to explore how the rights of the applicant and the boy were in conflict. This article evaluates the issues which arise in the case through consideration of the conflict of the different rights. It will argue that while there is a case for allowing some mitigating circumstances to be taken into account when sentencing, the police officers should have received a proportionate sanction in accordance with the German Criminal Code.

KEYWORDS: torture, inhuman or degrading treatment, police, absolute rights, Gäfgen v Germany, Article 3, European Convention on Human Rights.

1. INTRODUCTION

In Gäfgen v Germany¹ the applicant was convicted of kidnapping and murdering a boy named Jakob. After killing him, he contacted the boy's parents stating that they would never see their son again unless he received a ransom of money and safe passage out of the country. The police arrested the applicant after observing him picking up the ransom money. Believing the boy was still alive and in danger, the Deputy Chief of the Frankfurt police, Mr Daschner,

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¹ Gäfgen v Germany Application No 22978/05, Merits and Just Satisfaction, 1 June 2010.
ordered another officer to threaten the applicant with physical pain and, if necessary, to subject him to pain so that he would reveal where the boy was being held. In doing so, Daschner acted against the advice of subordinate heads of department who disapproved of the order. His subordinates had supported an approach which entailed further questioning and confrontation of the applicant with third parties. The officer threatened the applicant with pain, hit him on the chest with his hand and shook him so that his head hit a wall. As a result, the applicant disclosed the location of the boy’s body.

Daschner and the other police officer were found guilty of coercion and incitement to coercion pursuant to section 240(3) of the German Criminal Code, but in their trial there was a departure from the prescribed sentencing range of six months to five years imprisonment. Instead they received lenient suspended fines. Daschner was later appointed as chief of a police authority, however, one which did not have direct involvement in criminal investigations. He was also promoted. In Gafgen the Chamber of the European Court of Human Rights held that the police threats to torture or ill-treat suspects should be punished but perpetrators could be sentenced leniently in certain specific circumstances, such as those presented by the case. The Grand Chamber overturned this decision holding that all perpetrators should be punished in accordance with the full letter of the law.

Gafgen raises a number of legal issues: whether threats to ill-treat individuals during police questioning amount to a breach of Article 3, whether confession and real evidence obtained following a breach of Article 3 can be used in court proceedings and how individuals should be punished for ill-treating individuals. That threats to individuals can amount to ill-treatment in breach of Article 3 was reaffirmed in Gafgen. This article will consider this matter as settled and will not discuss it, nor will it address the Article 6 complaint as it is outside the scope of this discussion. Instead, it will focus on how the police officers should have been punished. In doing so, it will respond to the article by Steven Greer ‘Should police threats to torture suspects always be severely punished? Reflections on the Gafgen case’, and on his follow up article ‘Is the prohibition against torture, cruel, inhuman and degrading treatment

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2 Gafgen v Germany Application No 22978/05, Merits and Just Satisfaction, 30 June 2008 at para 44.
3 Gafgen v Germany Application No 22978/05, Merits and Just Satisfaction, 1 June 2010 at paras 15-6.
5 Gafgen v Germany Application No 22978/05, Merits and Just Satisfaction, 1 June 2010 at para 123.
6 Ibid. at para 125.
7 Ibid. at para 111.
really ‘absolute’ in international human rights law?’ These articles argue that not only should the police officers have been sentenced leniently in the way they were by the German court, but threats and other ill-treatment in breach of Article 3 European Convention on Human Rights (ECHR) may be permitted under specific circumstances.

Professor Greer argues that the case of Gäfgen presents a conflict between absolute and non-absolute rights, including the right not to be ill-treated, the right not to be unlawfully detained and the right to life. When a conflict of rights arises, such as those posed by the case, he considers ‘...the only viable option is to exercise moral judgment. This involves... the systematic and careful weighing of the competing interests at stake in the widest senses’. He summarises his position as follows:

‘[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?’

Greer ultimately concludes the following:

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

Greer is correct to suggest that absolute rights conflict, although do so rarely. This article will assess Greer’s arguments through the prism of his methodologies – moral reasoning and

12 Greer, supra n 9 at 78-9.
13 Greer, supra n 9 at 86.
14 Greer, supra n 9 at 88.
15 Greer, supra n 10 at 6.
utilitarianism. It will argue that it is immoral to threaten individuals held for police questioning and will suggest that there are also clear policy reasons why threats and other forms of ill-treatment should not be given permission for use by agents of the State and those who ill-treat should be punished in accordance with the law.

2. THE JUDGMENT OF THE FIFTH SECTION OF THE EUROPEAN COURT

The judgment in the Fifth Section of the European Court first accepted that there had been a violation of Article 3 which amounted to inhuman treatment. It also accepted that the defendant’s sole concern was to save Jakob’s life, noting that they ‘had been completely exhausted at the relevant time and had acted in a very tense and hectic situation’. In determining whether there had been an appropriate sentence given to the officers the Chamber stated that ‘the Court is not convinced that the – comparatively lenient – sentence imposed on the police officers calls into question the fact that substantive redress has been granted to the applicant as a result of the officers’ criminal conviction’. Furthermore, they held ‘the police officers suffered prejudice in their professional careers in that they were transferred to posts which no longer comprised a direct involvement in the investigation of criminal offences’. The Chamber therefore found the sentence given to the police officers to be acceptable. Greer argues that the Chamber reached the correct decision in Gäfgen on the issue of punishing the offenders, but not for the correct reasons. Rather he contends that the Chamber should have taken into consideration that there were conflicts of rights in this case and made their judgment based on moral reasoning arising from evaluation of the conflicts – this will be discussed further below.

3. THE JUDGMENT OF THE GRAND CHAMBER

The Grand Chamber reached the same judgment on the core issues in Gäfgen. On the issue of whether the applicants were appropriately sentenced, whilst again acknowledging the role of national courts in the choice of appropriate sanctions for ill-treatment by State agents, the Grand Chamber stated:

[I]mposing almost token fines of 60 and 90 daily payments of EUR 60 and EUR 120 respectively, and, furthermore, opting to suspend them, cannot be considered an adequate response to a breach of Article 3, even seen in the context of the sentencing

16 Gäfgen v Germany Application No 22978/05, Merits and Just Satisfaction, 30 June 2008, at para 46.
17 Ibid. at para 78.
18 Ibid.
practice in the respondent State. Such punishment, which is manifestly disproportionate to a breach of one of the core rights of the Convention, does not have the necessary deterrent effect in order to prevent further violations of the prohibition of ill-treatment in future difficult situations.  

The minority judgment, however, was critical of the statement of the Court concerning sentencing:

Sentencing is one of the most delicate and difficult tasks in the administration of criminal justice. It requires a range of factors to be taken into account, as well as knowledge of, and hence closeness to, the facts, situations and persons concerned. It is normally the role of the national courts and not the Court, which should involve itself in this process only with the utmost caution and in cases of absolute necessity…

[Where] criminal punishment serves the purpose of protecting rights and freedoms, at the risk of obscuring the fact that it is also a threat to rights and freedoms, we should not lose sight of the subsidiarity principle, which is a basic axiom of criminal law: use of the weapon of punishment is acceptable only if there are no other means of protecting the values or interests at stake.

The minority view is that sentencing should be a matter for States to decide upon under the principle of subsidiarity and that the Court should only involve itself in cases of ‘absolute necessity’. To them, Gäfgen is not such a case. The majority raise an important issue when they state that the Court ‘must retain its supervisory function and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed’. What the majority judgment means by ‘intervene’ is uncertain. It is probable that it does not consider that it should recommend or order specific punishments and more likely that it means it will continue to comment on the inappropriateness of sentences. The majority in the Grand Chamber have, in a sense, dictated what sentences should have been given to the perpetrators, much in the same way as they did in the case Nikolova and Velichkova v Bulgaria, by deploring the inadequacy of the punishment. However, it must be noted that, after the act, this means little because the German Code provides protection against double jeopardy. Greer

19 Ibid. at paras 123-4.
21 Nikolova and Velichkova v Bulgaria Application No 7888/03, Merits and Just Satisfaction, 20 March 2008.
22 See, Article 103 (3) GG which reads: ‘Nobody shall be punished multiple times for the same crime on the base of general criminal law’; please also see Article 7 of the ECHR which reads:
acknowledges this, stating that the judgment of the eight-judge majority is ‘purely academic’ because the police officers will not have their sentences altered.23

4. ABSOLUTENESS AND POWERLESSNESS

Article 3 has been described as an ‘absolute right’. The right is framed in absolute terms ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’,24 and it is often repeated that ‘[t]he Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment’.25 In Greer’s second article on Gäfgen he questions the absoluteness of the prohibition on torture and inhuman and degrading treatment (IDT) and in doing so evaluates whether it was permissible for the police to have threatened the applicant. Greer argues against the prevailing view that Article 3 enshrines an absolute right, outlining:

‘[J]udges, 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’.26

Steven Greer is correct when he states that there is unwillingness for the Court to imagine the possibility of any legitimate exception to the absoluteness rule – that is because proclaiming the absoluteness of Article 3 forestalls arguments that it can be infringed. However, it is also correct for Greer, as a scholar, to challenge the premises of the rule. Guido Calabresi, recalling a conversation he had with Professor Charles L. Black, assesses that Black did not agree that judges could balance values, such as the ethic that torture is absolute, because they are part of a system which constrains some expression of their free thought.27 On the other hand, Calabresi argues that while judges must take into account how his or her decisions fit into the legal system as a whole, a scholar instead operates in a vacuum, and since he creates no precedent, is completely free to express his personal ideas.28 We may see some constraining

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations.

23 Greer, n 9 supra at 86.
24 ECHR, Article 3.
25 This was initially articulated in Ireland v United Kingdom (1978) 2 EHRR 25 at para 163.
26 Greer, n 9 supra at 34.
28 Ibid. at 2.
of free thought in the judgments of the European Court on Article 3 – judges are operating within a system and there are policy reasons why they do not assess arguments concerning the balancing of rights when Article 3 is invoked. This is because the European judges want to ensure that ill-treatment is eliminated in so far as it is possible to do so. As Addo and Grief suggest ‘one would expect an absolute right to be protected as rigorously as possible. Ideally, an absolute prohibition or an absolute right should leave no room for doubt about its scope’. On the other hand, it is imperative that we do not censor academic discussion by claiming ‘absoluteness’ and closing off any further debate on the matter. Scholars should be given the freedom to allow for both the development of narratives and counter-narratives.

Although Article 3 is framed in absolute terms, there is moral judgment required to be made to decide whether something is acceptable or not for that ‘absoluteness’ to be triggered. When absoluteness is triggered, such as in the police interviewing room, we consider that the Article cannot be infringed under any circumstances. However, there are situations where we consider ill-treatment to be acceptable and not fall within the ambit of Article 3. This may call into question the ‘absoluteness’ of the Article. For example, Greer discusses the case of *Wainwright v United Kingdom* where it was held that ‘sloppy’ intimate strip searches of the applicants conducted when visiting a relative in prison were not considered a breach of Article 3, even though it was submitted that the applicants experienced severe long term psychological damage as a result. Other situations where the infliction of physical or mental harm on a person is permitted include those raised by Manfred Nowak, for example, where a police officer deliberately shoots a person to affect a lawful arrest, or where physical force is used to quell a riot or prevent a person from escaping from police custody. The use of solitary confinement might also be considered acceptable under Article 3, but it can cause severe psychological damage.

Given that there are situations where we allow the infliction of physical or mental harm on an individual, is it logical that Article 3 is automatically considered absolute when a police

30 *Wainwright v United Kingdom* Application No 12350/04, Merits and Just Satisfaction, 26 December 2006.
31 This can be contrasted with the case of the case of *Yazgul Yilmaz v Turkey* Application No 36369/06, Merits and Just Satisfaction, 1 February 2011 where it was held that the gynaecological examination of an unaccompanied 16-year-old girl in police custody without her consent amounted to degrading treatment.
33 In the case of *Sanchez v France* Application No 59450/00, Merits and Just Satisfaction, 4 July 2006 it was held that there had been no violation of Article 3 when a prisoner, Carlos ‘the Jackal’, had been segregated in prison for over 8 years.
34 Hinkle and Wolff ‘Communist Interrogation and Indoctrination of Enemies of the State’ A.M.A. Archives of Neurological Psychiatry 76.
officer ill-treats someone during questioning? Is it correct to forestall any argument that we should not ill-treat individuals during police questioning, regardless of the particular circumstances? One of the policy reasons that the use of coercive practices in police interview rooms is prohibited is that evidence obtained as a result of these methods is generally considered to be unreliable. In addition, the powerlessness or defencelessness of the person being questioned is also cited. Nowak considers:

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.

He further states 'As soon as the person concerned is, however, under the direct control of the police officer by being, e.g., arrested and handcuffed or detained in a police cell, the use of physical or mental force is no longer permitted.' Greer criticises this, stating, 'it does not follow that the use of any force... is invariably unjustified since, for example, an attempt to escape might still be made...’ However, Nowak himself recognises that this may be one of those situations where the use of force can be permitted. When a person is trying to escape, he or she is not under the direct control of the police – they are not powerless. In order to attempt escape, a person must use physical force to do so. Powerlessness, for Nowak, is the criterion for distinguishing between situations where the use of force may be permitted and those where it is not. However, is it an adequate criterion?

Police officers can use physical force against detainees in custody, for example, if an individual refuses to move from their cell. This calls into question the ‘powerlessness’ criterion which Nowak uses to distinguish between acceptable and unacceptable use of physical force in places of detention. He or she is under the direct control of the police – they cannot escape, cannot do what they wish and are defenceless against physical assaults. Therefore they are powerless in the sense that Nowak describes. Yet the use of physical force to move someone

35 Cruel, inhuman and degrading treatment.
36 Nowak, ‘Challenges to the absolute nature of the prohibition of torture and ill-treatment’ (2005) 23 Netherlands Quarterly of Human Rights 674 at 678.
37 Ibid.
38 Greer, supra n 10 at 19.
from their cell who is refusing to co-operate seems intuitively to be acceptable. We might expect that some force can be used by police and prison officers when individuals refuse to co-operate in specific circumstances, so long as they make every effort to try other methods which do not involve physical force, and if they have to use force, that it is proportionate to their aims. We need to be able to ensure that police custody suites can operate effectively and this could mean having to forcefully remove detainees from cells. From this perspective, it seems that powerlessness may not be the sole criterion for distinguishing between what will breach Article 3 and what will not when individuals are in police custody. Although the powerlessness of a detainee held in police custody provides an extra impetus not to use force against them, it only necessitates the need for a cautious approach.

Nonetheless, although powerlessness may not be the sole criterion for distinguishing between acceptable and unacceptable physical or mental coercion, it has a unique meaning within the police interviewing room. This makes the powerlessness of an individual a compelling reason not to ill-treat them. David Sussman, who writes about torture (although the same argument can be made about IDT) states:

[T]orture forces its victim into the position of colluding against himself through his own affects and emotions, so that he experiences himself as simultaneously powerless and yet actively complicit in his own violation.\(^{40}\)

Moral indignation arises because of the powerlessness of the individual, but also because he or she is compelled to reveal information they would not have otherwise revealed. Within the custody suite, an individual is physically powerless, but there is no clear reason for him or her not to cooperate with the police. If the individual co-operates and leaves his or her cell, they will be not be harmed. In the police interviewing room, the individual is powerless, but when threatened with ill-treatment, the only way to avoid it without coming to harm is to incriminate themselves (or to lie). The sense of powerlessness to the individual is therefore exacerbated by them being compelled to provide information which could cause them harm (e.g. a prison sentence). The interviewee is, in this sense, completely disempowered by the dynamic between him or her and their interviewer, and the wider setting of being contained within a police station. Although this broadly Kantian idea may not stand by itself in affirming that we should never threaten or ill-treat individuals in police questioning rooms, it nevertheless provides some of the justification, which in addition to the other arguments in this article, provide a compelling case.

It may be the case that there is no sole decisive theoretical underpinning to our understanding of why we can permit causing physical and mental harm to individuals in some situations, but in others we cannot, such as powerlessness. There are in fact a variety of moral and policy reasons why we allow harm to happen to individuals in specific circumstances. We allow force to be used against the escaping detainee because we need to keep individuals in detention; we keep individuals in solitary confinement, for punishment, for their safety or for the safety of others; we use force against detainees in police custody cells to ensure that police stations are operational. There are no clear policy reasons why we need to threaten individuals when ordinary police questioning is known to work. We also have to recognise that the powerlessness of the individual has a particular importance within the police interviewing room, where the only means to escape ill-treatment is to invite harm on oneself.

5. GREER'S 'ASYMMETRIES'

Steven Greer argues that there is a series of 'asymmetries' or incongruities between relevant Convention rights, the cumulative effect of which support a case for leniently punishing the police officers who ill-treated Gäfgen.\textsuperscript{41} He asserts that these asymmetries were not taken into account by the European Court in their reasoning, suggesting that they did not give consideration to the rights of Jakob, specifically under Articles 2, 3 and 5 ECHR.\textsuperscript{42} Greer argues that the European Court should have applied moral reasoning to these asymmetries. Applying moral reasoning himself, he arrives at the conclusion that the police officers should have been leniently punished, as the Chamber of the European Court held that they could be. However, while Greer starts from the premise in his first article that the police officers should be leniently punished, he moves on to consider that threats might be justifiable in certain circumstances.\textsuperscript{43} Furthermore, in his second article, he suggests that in order for threats to have force, torture might be justified, stating ‘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’.\textsuperscript{44} This section will evaluate these arguments, but will arrive at the conclusion that the Grand Chamber of the European Court,

\textsuperscript{41} Greer, supra n 9 at 79.
\textsuperscript{42} Greer, supra n 9 at 80.
\textsuperscript{43} Greer, supra n 9 at 88-9.
\textsuperscript{44} Greer, supra n 10 at 29.
which was critical of the lenient punishment of Daschner and his associate, came to the correct decision.

A. The ‘lesser of two evils’ argument when balancing non-absolute and absolute rights

Greer considers that, had Jakob have been alive, as the police considered that he was, more of his rights would have been engaged than Gäfgen. This is because Jakob’s life and his right to be free from unlawful detention were hypothetically both threatened at this time. Jakob also would have been experiencing a breach of Article 3 himself because he would have suffered a terrible ordeal for a number of days, compounded by the fact that he was an 11-year-old boy who was separated from his family. The only right breached when Gäfgen was threatened, was his right not to be ill-treated.\(^{45}\) Therefore, there is a clash of rights between the non-absolute of Article 2, the qualified right of Article 5 and the absolute right of Article 3.

\(\text{(i) The right to life versus the right not to be ill-treated}\)

Greer considers the situation where all the facts of Gäfgen remain as given, except that Jakob is bound to a ladder in a huge tank which is slowly filling with water. The police are able to see this scenario played out on a video on Gäfgen’s smartphone. He argues that it is difficult to see under these circumstances how severely punishing the police officers for threatening Gäfgen ‘would not be a disproportionate and morally indefensible outcome’.\(^{46}\) In this scenario, it would seem justifiable to give the police officers lenient sentences, or no sentences at all, for saving the life of the child. However the hypothetical example is fanciful and, it could be argued, does not provide the argument with any strength.

Hypothetical examples are used throughout law, to create it, to support arguments, or to assess how a particular rule or principle applies. This case is close to that of the ‘ticking bomb’ example, another hypothetical scenario which has been used to justify torture against individuals.\(^{47}\) It has been argued by Bagaric and Clarke that although the ‘ticking bomb’ scenario is hypothetical, the force of examples cannot be dismissed on that basis.\(^{48}\) They quote CL Ten, who argues that ‘fantastic examples’ that raise fundamental issues for

\(^{45}\) His right to a fair trial would not have been invoked at this stage.

\(^{46}\) Greer, supra n 9 at 84.

\(^{47}\) In the ‘ticking bomb’ scenario a bomb is about to explode which could kill many people. The interrogator has a suspect in custody whom he believes has information which could stop the bomb going off. The dilemma posed to the interrogator is whether he should ill-treat the individual to obtain the information which could save lives.

consideration play an important role in the evaluation of moral principles.\textsuperscript{49} Nonetheless, one might consider that much will depend on the realism of the examples being utilised. Shue argues '[i]f the example is made sufficiently extraordinary, the conclusion that torture is permissible is secure… one cannot easily draw conclusions for ordinary cases from extraordinary ones'. Shue has also neatly summed up:

[T]here is a saying in jurisprudence that hard cases make bad law, and there might well be one in philosophy that artificial cases make bad ethics.\textsuperscript{50}

It is not the case that reasoning with hypothetical examples is a fruitless exercise. As Ashby explains, ‘hypothetical cases help decision-makers evaluate alternative hypotheses for deciding cases. They demonstrate the sensitivity of a hypothesis to apparently small factual differences… By anticipating new variations, the decision-maker seeks to formulate as general and robust a hypothesis as possible’.\textsuperscript{51} Even extreme hypothetical examples may be useful in specific situations. For instance, an often quoted observation on the British Constitution is that of Sir Leslie Stephen who wrote in \textit{The Science of Ethics} ‘If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it’.\textsuperscript{52} Although this is an extreme example, Stephen is not suggesting that all blue eyed babies are to be murdered - it is simply a way of remembering the underlying premise of his argument which is that Parliament is supreme, but its supremacy rests on the will of the people. However, some hypothetical examples are designed so the reader considers ‘this might happen, therefore we should adapt our law for this possibility’. If these examples are designed to test decision-making which could lead to human rights infringements then it is imperative it is foreseeable to a reasonable person that the facts can occur. It is not enough to say that ‘this has not happened before, but we cannot rule it out ever happening, therefore we should adapt the law’ when the scenario is not foreseeable. It may be argued that the more sinister the conduct we are attempting to justify, the more careful we should be in choosing our hypothetical examples. The ‘tank filling with water’ example should find no standing in justifying the ill-treatment of individuals because it is sufficiently ‘fantastic’ to move beyond the realms of possibility.

\textsuperscript{51} Ashby, ‘Interpretative reasoning with hypothetical cases’ (Conference Paper, University of Pittsburgh, 2007).
Greer also discusses what he describes to be a paradox with the situation where it is acceptable to kill someone to save the lives of others, referencing the French case of Schmitt.\(^5\) In this case Schmitt held a classroom of children to ransom, stating that bags around his waist were filled with explosives. Following a two day siege he was shot dead by police. A teacher and a military trained individual, who remained with the children in their classroom as this took place, were lauded as heroes. Greer considers that it is a paradox that ‘it is not a violation of the right to life under Article 2 for a child abductor to be killed in order to save the life of his victim(s) because the right to life is not absolute. But Article 3 apparently does not permit subjecting the abductor even to a brief period of inhuman or degrading treatment in order to achieve the same result because these are absolute rights subject to no exceptions under any circumstances whatever’.\(^5\)

Assuming that Schmitt was a direct danger to the children, it seems justifiable that he could be shot dead to save their lives, in the same way it would be acceptable to kill an individual holding a gun to another person’s head. The defence of necessity would be available for a person who commits this sort of action. However, the defence of necessity was not and should not have been available to Daschner and his accomplice. The defence, common to multiple jurisdictions, is articulated under Article 31(1)(d) of the Rome Statute of the International Criminal Court.\(^5\) It requires a threat of death or serious bodily harm is ‘imminent’ and that a person acts necessarily and reasonably to avoid the threat. In addition, the person should not intend to cause greater harm than what he or she sought to avoid. Whereas there is sympathy for the view that the police officers were trying to avoid harm which was greater than that they inflicted, it was not apparent that there was an imminent threat to the boy. They believed the boy to be in danger and there were good reasons to consider that he might be, but the threat could not be said with certainty to be imminent. For example, the police did not know whether the boy was alive or dead, if he had an accomplice who was ensuring the boy was safe, or whether the boy was left in some place where he had access to basic necessities. Greer admits it in the statement ‘Perhaps it lies in the fact that, in a siege, the police would be physically on site and would, therefore, be able to monitor closely the imminence of the risk to


\(^{54}\) Greer, supra n 9 at 83.

\(^{55}\) Rome Statute of the International Criminal Court (last amended Jan. 2002), 17 July 1998, A/CONF. 183/9, 2187 U.N.T.S. 90, 37 I.L.M. 1002. This reads: The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control.
the victim’s life and to act accordingly instantaneously’. Nor can we say that the police officers acted reasonably to avoid the threat, when they could have continued to question Gäfgen or used other legal methods (e.g. third parties) as suggested by Daschner’s subordinates. In addition to this, and although this did not play out, at the time of issuing the threat there was no reasonable certainty that Gäfgen would have given up the boy’s whereabouts, therefore the actions of the police officers could not be considered necessary.

(ii) Positive and negative obligations to prevent ill-treatment

Steven Greer argues that in Gäfgen there is a clash between positive and negative obligations to prevent ill-treatment. This is because there is a negative obligation to refrain from ill-treating Gäfgen, but also a positive obligation not to allow Jakob to be ill-treated, as he has been kidnapped and separated from his parents. Both Articles 2 and 3 place positive obligations on States. Smet argues that where there are two sets of obligations, each regarded as absolute, one positive and the other negative, the negative one is the more compelling because it merely requires police officers to always abstain from harmful and unlawful conduct, while the other obligation requires reasonable and lawful attempts to prevent ill-treatment by private actors. Greer argues that to suggest that one obligation is absolute while the other relative does not get to the crux that the issue is ‘a substantive moral choice rather than…. the inescapable logic of an absolute moral imperative’. He contends that the argument essentially comes back to considering lesser evils, but in this case the fact that Jakob was a young boy is of additional significance because the obligation to prevent ill-treatment to children is typically stronger with respect to children than adults. Greer uses the case of Z and others v United Kingdom to highlight this view. The Court states in this case:

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

56 Greer, supra n 9 at 83.
57 For confirmation of this in relation to Article 2 see: Osman v United Kingdom Application No 87/1997/871/1083, Merits and Justification, 28 October 1998; for confirmation of this in relation to Article 3 see: A and others v United Kingdom Application No 3455/05, Merits and Just Satisfaction, 19 February 2009.
59 Greer, supra n 10 at 25.
60 Ibid. at 25.
persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.\textsuperscript{61}

It may be the case that the obligation to prevent ill-treatment to children is of particular importance to the European Court. However, there is no jurisprudence within human rights law which argues that individuals can be ill-treated for the purposes of ensuring that children are safeguarded. The European Court are unequivocal that those held for police questioning should also receive particular protection, and although this has not been articulated \textit{per se} it might be assumed that this is because they are vulnerable, due to their powerless position in custody, and the fact that worldwide there is a long history of interrogational ill-treatment. Therefore the argument that the ill-treatment of a child, because of their age, is a lesser of two evils than the ill-treatment of someone in police custody does not stand up to scrutiny, at least in the eyes of the European Court. Nonetheless, intuitively some might consider that the ill-treatment of a detainee is the lesser of two evils, in circumstances such as Gäfgen’s, where there is certainty of his role in the crime of kidnapping. However, there are a number of considerations that should be taken into account which would suggest otherwise. In order for the ill-treatment of the kidnapper to happen, the police officers have to act unlawfully – as custodians of the law – this is unacceptable. They also have to step outside the ethical framework of their profession. This in itself is wrong, and could undermine confidence in policing. It may also have an impact on the police officer’s personal integrity – engaging in ill-treatment of an individual is arguably morally corrosive to the individual officer. In addition to this, it has the potential of affecting the general tenet of integrity of the criminal justice system. In totality these infractions to law, ethics and integrity could equate to the greater of two evils if a decision is made to breach a negative obligation to ill-treat an individual, in favour of a positive obligation to prevent ill-treatment.

Greer also postulates on the transient nature of ill-treatment that Gäfgen will have experienced in comparison to that Jakob hypothetically would have. He states: ‘Gäfgen could easily escape from the suffering caused by the fear of torture induced by the police simply by revealing the whereabouts of Jakob’s body…. On the other hand, even if Jakob had still been alive, there was nothing he could have done to alleviate the suffering and gross mistreatment Gäfgen had inflicted upon him’.\textsuperscript{62} Although it may have been the case for Gäfgen that the fear of being ill-treated would cease following him revealing the whereabouts of the boy, this argument overlooks that medical studies have shown that threats to an individual’s physical

\textsuperscript{61} Z and others v United Kingdom Application No 29392/96, Merits and Just Satisfaction, 10 May 2001 at para 73.

\textsuperscript{62} Greer, supra n 9 at 84.
well-being can have a lasting psychological impact. Research demonstrates that threats are known to induce feelings of fear and loss of control which are strongly associated with PTSD and major depression. Wilson, Smith and Johnson state:

We believe that in addition to one’s life and safety, mere exposure to death, dying and destruction can cause PTSD. Immersion in death, destruction, and chaos is sufficient to create lasting psychic imprints. The greater the exposure to catastrophic, life threatening events, the more likely it is that the survivor will develop intrusive imagery, psychic numbing, isolation, survivor guilt, and changes to personality and values.63

In paragraph 103 of the judgment of the Grand Chamber it states ‘The applicant, however, did not submit medical certificates to establish any long-term adverse psychological consequences suffered or sustained as a result’.64 Although Gäfgen does not appear to experience any enduring effects, it is not completely established by this point – we can speculate on whether Gäfgen experienced ill-effects or not – a lack of a submission of medical certificates is not conclusive. In addition, it may be added that this argument can (and has) been used to support the use of torture against individuals. Torture by its very nature is transient, at least as a physical act, but some argue it could have beneficial effects, such as preventing terrorist attacks. Just because the ill-effects of torture are transient does not make the brutal ill-treatment of individuals acceptable, in the same way it can be said for less serious forms of ill-treatment.

This does not dismiss the proposition that Jakob would have hypothetically been suffering more at the time of the questioning of Gäfgen. A young boy, alone and frightened and away from his parents, would undoubtedly experience more suffering than someone threatened by the police with torture. However, Greer’s argument rests on the premise that the only option that the police officers had under the circumstances was to ill-treat Gäfgen – it assumes that there is an absolute certainty that the right not to be ill-treated had to be balanced against the right to life and the right to be free from unlawful detention. The police officers had other options - they could have continued to have questioned Gäfgen and achieved a result. This is speculative, but so is the argument that the police officers had no other option but to commit a breach of human rights.65

63 Wilson, Smith and Johnson, ‘A comparative analysis of PTSD among survivor groups’ (1985) 1 Trauma and its Wake 142 at 152.
64 Gäfgen v Germany Application No 22978/05, Merits and Just Satisfaction, 1 June 2010 at para 103.
65 In Greer’s second article he discusses the situation whereby Gäfgen was a rogue police officer, and not a law student (p. 24). Greer considers that under this scenario the dilemma of Gäfgen would arise in a more acute form because Gäfgen would have an absolute right not to be ill-treated by police
(iii) More rights would have been engaged

Greer argues that more of Jakob’s rights would have been engaged than Gäfgen’s in this case because he was subjected to ill-treatment in being kidnapped, in addition to being unlawfully detained in breach of Article 5 ECHR. Gäfgen, in comparison, was only subjected to inhuman treatment in the form of a threat. Greer does not spend too much time justifying his reasons for this argument, and it is probable that he does not consider that it could stand up on its own as justifying the use of ill-treatment. It is a flawed argument - it would oversimplify the meaning of human rights law to hold that when more than two rights come into conflict we count how many violations have occurred to determine an outcome. It is not the way in which any human rights courts operate because it could lead to morally indefensible judgments. In addition, it may not determine the lesser of two evils in particular cases. For example, we would not permit the state to turn a blind eye in allowing a private person to ill-treat another private person to secure the release of a third party. Nor would we allow a gang-leader to be murdered if we knew it would prevent the forced disappearances of members of the public. The counting of rights exercise is therefore weak as a theoretical means of ascertaining the lesser of two evils.

(iv) The moral worth of each party

In another argument Greer assesses the ‘huge disparity in the moral worth of each party’ - the boy was innocent in this case, but Gäfgen was seen picking up a ransom for a kidnapping. His contention is that when ‘putatively ‘absolute’ Convention rights are in conflict it is difficult to see why any morally relevant factor should not be invoked to help resolve the dilemma raised by how they should be applied’. The problem with this argument is that everyone should not have their human rights infringed, regardless of their actions. If we allowed this reasoning to stand it could justify the ill-treatment of a variety of bad characters. For example, should we allow the police to threaten suspected terrorists routinely? If a serial killer admits to killing one person and another is missing, should we be able to ill-treat him or her? The moral worth of the different parties would be in stark contract in situations such as these. Although Greer might point to the fact that this argument would only be used when trying to resolve a case like Gäfgen, the purpose of human rights is to provide protection to everyone and to officers, while the state would be under an obligation to prevent the ill-treatment of Jakob by one of its agents. To this author’s mind, this does not present itself as any different from the original situation posed, because the fact that the officer is not acting in an official capacity is likely to mean that he should be treated the same as a private person.

66 This would invoke Article 2 and 5 of the ECHR.
67 Greer, supra n8 at 84.
68 Ibid. at 85.
ensure that those who are powerless have protection. We should hold steadfast to this rule. For this reason, this argument is flawed.

6. THE SLIPPERY SLOPE ARGUMENT

It is clear that the pain and anguish caused to a child who has been kidnapped will amount to a breach of Article 3. However, we should strongly affirm that the kidnapper should not be ill-treated to reveal the child’s whereabouts because it can lead to a slippery slope, making ill-treatment considered more acceptable to use in police custody. Bagaric and Clarke are critical of the argument of the slippery slope, referring to it as the ‘slippery slope illusion’. They state that ‘proposals cannot be rebutted merely by stating that unacceptable practices might lead to bad outcomes’. This is difficult to rebut in respect of permitting threats, because there is no evidence to suggest that when threats are permitted only, that this will lead to further abuse. This is because coercive methods of interrogation tend to be authorised as a package. Threats, to this author’s knowledge, have never been permitted for use as one single method without other coercive methods being authorised.

Where a number of coercive methods of interrogation are permitted, there is evidence to suggest that this leads to further abuse. This was observed in Israel following the Landau Commission, and in Guantanamo Bay and Abu Ghraib, following the authorisation of various methods of interrogation through the Torture Memos. The ‘slippery slope’ argument does not seem an illusion. These precedents suggest that if we ‘justify’ ill-treatment in some situations certain officials may wish to explore the outer bounds of the rules and ill-treat detainees in others. Authorising coercive methods of interrogation has the potential to normalise ill-treatment, making individuals more ready to consider using unacceptable practices in other situations. For example, if we are to allow a kidnapper to be threatened, it may seem acceptable to allow threats to a detainee who knows the whereabouts of a lethal batch of drugs. Likewise, if an individual is suspected of knowing the whereabouts of a criminal gang which is involved in committing vicious attacks, we might consider that we could threaten a member of the gang, fulfilling the State’s positive obligation to prevent further ill-treatment to

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69 Bagaric and Clarke, Torture: When the Unthinkable Becomes Morally Permissible (2007) at 41.
70 Ibid.
members of the public. To prevent these types of occurrences we need to erect a clear defensive line which prohibits all ill-treatment against detainees.

7. LENIENT PUNISHMENT

Limiting the discussion to torture, Jessberger argues that while criminal responsibility for torture under international criminal law cannot be excluded by the fact that the torturer acts to save a life, his or her altruistic motivation may be taken into account when determining sentences. Paola Gaeta also argues for mitigating circumstances in the ticking bomb paradigm, which has similarities to the moral conundrum presented in Gäfgen. She states:

[T]he extreme circumstances envisaged by the ticking-bomb paradigm may be taken into account as mitigating circumstances... I submit that this course of action should be favoured, because it makes it clear that human beings are not objects that can be used, under the law, to obtain information... [T]here may be cases in which the circumstances are such as to prompt a judge to treat the torturer leniently. These circumstances, such as those of an imminent deadly terrorist attack, must, of course, be appraised on a case-by-case basis, in the light of all the factual elements available to a judge....

For Gaeta, therefore, mitigating circumstances can be taken into account where individuals act to save many lives. Gaeta’s view is that one must strike a balance between saving many lives and ill-treating one individual. It is sensible that mitigating circumstances are taken into account in cases like Gäfgen. However, sentences should also have a deterrent effect. Deterrence theory traditionally has held that increasing the certainty of punishment, in the form of a higher probability of arrest and conviction, or increasing the severity of punishment, in the form of longer prison sentences, will raise the ‘costs’ of committing crimes so individuals will be deterred from committing them. If criminals go unpunished, the costs of committing crimes go down and criminals accordingly commit them.

More recent literature has shown, however, that the severity of punishment may not be as relevant to deterrence as once thought. Mendes and McDonald note:

Most studies find evidence in support of a deterrent effect of an increase in the certainty of punishment. However, less than half of the studies have found the same to be true of the severity of punishment. As a consequence, the more recent literature has tended to favour the certainty of punishment over the severity of punishment as a deterrent measure for reducing crime.\footnote{Ibid. at 590.}

The deterrent effect of punishments is also criticised in the minority judgment in Gäfgen:

\[W\]e wonder whether the Court, in making the assumption that more severe criminal penalties have a deterrent effect, is not at risk of creating or maintaining an illusion. The (general or individual) preventive effect of sentences has long been the subject of extensive studies and research, particularly of an empirical nature. Such studies have concluded that this effect is relative, if not limited.\footnote{Ibid. Joint Partly Concurring Opinion of Judges Tulkens, Ziemele and Bianku.}

If we are to believe ‘most studies’, the minority judges in Gäfgen are correct about the imposition of harsher sentences. However, this does not appear to be the issue in Gäfgen. Rather, the issue is that the punishment the police officers received was so paltry it could hardly be viewed as punishment at all. The imposition of harsher sentences may not ultimately lead to greater deterrence, but it is the certain ordering of some punishment which matters. The police officers in Gäfgen should have been criminally punished and sentenced as criminals in a way which acted as a deterrent and clearly affirmed that the right not to be ill-treated by agents of the State during police questioning is inviolable.

In the trial of the police officers there was a departure from the sentencing range, from six months to five years of imprisonment, for coercion under aggravated circumstances pursuant to section 240(3) of the Criminal Code.\footnote{Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I p. 3214, section 240 (3).} Rather than this, the police officers should have been immediately dismissed from duty and should have received a custodial sentence under this Code. This would have had the desired deterrent effect to prevent ill-treatment in the future. However, in recognition of the fact that the police officers were operating in a highly charged emotional situation and were acting seemingly out of altruism, a lighter sentence could have been imposed in mitigation. Although this may appear as inequitable, it should be stressed that Daschner and his associate had the option of further questioning or the use of third parties, which was the favoured option of Daschner’s subordinates, and they had ethical and legal
duties to abstain from committing human rights breaches in accordance with their positions as police officers.

8. CONCLUSION

We may be very familiar with facts such as those of Gāfgen from works of fiction, but they are rare to actual experience. Although Steven Greer goes to some lengths to differentiate Gāfgen from the classic ‘ticking bomb’ scenario, it is reasonable to be sympathetic to the view that there are some similarities. While the police in the ticking bomb scenario feel that they are pressured for time to act before harm befalls many people, in the Gāfgen case the police felt pressured to act to ensure harm did not come to the young boy. The Gāfgen case is a real-life example of the moral conundrum in practice – do we ill-treat to save the life of another or to stop them suffering harm? Steven Greer argues in his two articles that if the European Court were to apply moral reasoning to the case that they might arrive at the view that the police officers should have been leniently punished, because they were acting out of altruism in trying to save a young boy’s life, but also because Jakob had rights which were not considered – those not to be ill-treated or unlawfully detained. Greer argued that to forestall the argument that Gāfgen should not have been threatened because his rights are absolute, is morally wrong.

This article accepted that it is worthwhile to consider that there were different rights at play within the Gāfgen case and as scholars we should consider these. Article 3 is absolute, but only when applied to certain situations. We permit the physical and mental harm of individuals to a level which would not otherwise be acceptable under the prohibition in certain situations, such as in relation to solitary confinement. This article did not seek to undermine the arguments of Greer on a theoretical or procedural basis. Rather his arguments were evaluated through his own lens of moral reasoning, as well as policy decision making. The police officers in this case had other options. This is not recognised by Greer – his whole argument is based around the premise that the ill-treatment of Gāfgen was unavoidable. The police also have a duty to uphold the law, not contravene it. Any dereliction of this duty affects the integrity of the justice system and undermines confidence in policing and the criminal law. In addition, human rights law is designed to protect minorities, regardless of their actions – this includes the applicant. Finally, the acceptance that ill-treatment is permitted in limited circumstances can have the effect of allowing it to be used in other situations.

The police officers in Gāfgen could have been treated leniently, but in a way which deterred further misconduct. Mitigating circumstances may have been taken into account, as they would in any criminal trial, but the officers were effectively allowed to ill-treat an individual
with impunity in this case. For this reason, the decision of the Grand Chamber in deploring the sentences was correct.

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